

LITIGATION IN THE CONSUMER INTEREST

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I. THE DEVELOPMENT OF CONSUMER RIGHTS

The identification of the consumer as a discrete party, entitled to specific legal rights, is a product of the latter half of the twentieth century. Looking back on the last four decades, one can now clearly detect a trend for special legislation protecting the interests of consumers. These resonate with the values expounded by President Kennedy, who famously in his 15 March 1962 declaration to the United States Congress said: "*Consumers by definition, include us all ... They are the largest economic group, affecting and affected by almost every public and private economic decision. Yet they are the only important group ... whose views are often not heard.*" He declared four basic consumer rights: the right to safety, the right to be informed, the right to choose, and the right to be heard. Significantly for our present theme, the right to redress was not mentioned, but as we shall see this has become an important aspect of consumer law and policy and is one of four additional rights developed by Consumers International.¹ States in developed economies were relatively quick to start granting rights based on Kennedy's declaration to their consumers, and most now have fairly comprehensive consumer laws. Developing countries continue to catch up under the influence of the United Nations Guidelines on Consumer Protection.²

However, in recent times the legislatures of the First World have become more reluctant to regulate consumer issues. In part, this may be a form of paralysis, because the consumer problems of today are no longer of the manageable order that yesterday's politicians were able to gain plaudits for addressing in a way that produced obvious improvements. Also, whether it was the impact of consumer laws, competitive forces, developments in technology, or other factors, one can certainly say that the quality of cars, white goods, and to some extent the practices of creditors, have improved over the last few decades. A more daunting set of tasks face today's politicians if they wish to claim to be able to use law to control the types of risks³ facing the modern consumer - witness the issues concerning BSE, GM foods, and the threat to state regulation posed by trading on the internet.

1. The others are the rights to satisfaction of basic needs, to education, and to a healthy environment.

2. G.A. Res. 39, U.N. GAOR, 39th Sess., 106th mtg., U.N. Doc. (1985); *See Guidelines for Consumer Protection*, Department of International Economic Affairs, U.N., N.Y. (1986).

3. *See generally* ULRICH BECK, *RISK SOCIETY: TOWARDS A NEW MODERNITY*, (1992).

Even in the traditional arena for consumer law, i.e. the sale of consumer durables, governments are less keen to regulate. This is partly because, on the whole most developed countries have fairly strong consumer laws, and there is a preference for self-regulatory solutions to new problems. This reflects the feeling that there is little sense in adopting laws if they do not actually lead to traders changing their behavior and wronged consumers being able to have access to justice. There is certainly an appreciation that rather than piling up consumer laws, it is important to make those we already have work better.

Of course one way of enforcing consumer laws is through public enforcement. This is especially appropriate with respect to safety issues, where the supervision of the marketplace cannot safely be left to individual initiative. Equally, financial services are so vital for individuals and often involve sums so large that the state clearly has a role in supervising the market. At the other end of the spectrum, state involvement might be desirable to deal with small economic losses which might not justify individual litigation, and also for matters of taste where the state might feel it should be involved and individuals may again not be sufficiently motivated to act themselves. The function of the state as protector of the consumer is, however, another inquiry, for we are concerned in this essay with how consumers as individuals can invoke the law to voice their concerns, obtain redress, and help ensure the development of higher trading standards. Our discussion of public authorities will therefore be limited to their role in assisting consumers to utilize the law. This essay is concerned with assessing the comparative efficacy of different modes of consumer redress within disparate regulatory cultures.

II. WAVES OF ACCESS TO JUSTICE

A good starting point for the legal analysis of consumer access to justice issues must still be the seminal work of Prof. Mauro Capelletti.⁴ This influential work has proven to be fertile ground for many subsequent commentators, but we believe there is still merit in reconsidering his theories in the present political and regulatory climate. This is not least because we shall go on to show that, in addition to the three waves in the access to justice movement which Capelletti discerned, two subsequent regulatory and globalization waves can be detected, and we will argue for an extension of his analysis in the form of a further integrative wave. Capelletti's first wave concerned economic matters (i.e. providing citizens with the legal means to seek justice, i.e. legal aid). The second wave was organizational (i.e. extending standing to bodies that could act

4. See generally MAURO CAPELLETTI & B. GARTH, *ACCESS TO JUSTICE* (1976); MAURO CAPELLETTI, *ACCESS TO JUSTICE AND THE WELFARE STATE*, (1981); See also Mauro Capelletti, *Alternative Dispute Resolution Processes within the Framework of the Worldwide Access to Justice Movement*, 56 *MOD. L. REV.* 282 (1993).

on behalf of diffuse interests and developing class actions). The third wave was procedural (i.e. developing ADR). It is interesting to reflect on these three waves with the benefit of hindsight.

Reading the literature of the late seventies and early eighties on how to make legal services available to the public,⁵ one is struck by the optimistic tone struck by legal radicals. At that time the UK, for instance, had a relatively large legal aid budget and a flourishing Law Centre movement. With hindsight this optimism was misplaced. Today in the UK, it would be unrealistic to suggest that the public purse should finance increased lawyers to fight for the vulnerable. Although there is the possibility of some legal provision being given to consumers through the Community Legal Service⁶ and grants to bodies like the Citizen's Advice Bureaux do continue, nevertheless the move is to restrict legal aid and to privatize the delivery of legal services through the use of contingent fees. A similar pattern is replicated in other countries.

However, the second and third waves remain strong. The organizational changes have indeed strengthened the role of bodies such as consumer organizations and public authorities in representing the consumer collective interest. This can be rationalized as reflecting the law's recognition that litigation has increased in significance as a means of protecting consumers as compared to direct regulation. A very practical manifestation of this is the EC's Consumer Injunctions Directive.⁷ Moreover, class action procedures have spread throughout the common law world and are being discussed in many civil law countries, and even introduced in a few.⁸ In some rare instances in common law countries, public bodies are even allowed to support individual litigation.⁹ In civil law countries with the *partie civile* procedure, the prosecutors assist consumers to compensation by bringing criminal actions which can lead to compensation.

The procedural wave favoring ADR has of course continued apace. There has always been a certain ambiguity as to the motives for adopting ADR. Some view it as a sensible and affordable way of dealing with relatively minor consumer problems. Others champion it as a means to provide a higher form of justice than that which is served up by the adversarial court process.¹⁰ For

5. See e.g., M. Zander, *The First Wave*, in ACCESS TO JUSTICE AND THE WELFARE STATE (1981).

6. Access to Justice Act, 1999, c. 22 (Eng.); See at <http://www.justask.org.uk> (last visited Aug. 29, 2002).

7. Council Directive 98/27, art. 2, 1998 O.J. (L 166) 51.

8. Such as Quebec, and to some extent, France.

9. For instance, this is possible for product liability actions in Australia, see the Australian Consumer and Competition Commission - role and functions, at <http://www.accc.gov.au/pubs/Publications/Corporate/ACCCRoleFuncti.pdf> (last visited October 12, 2002).

10. CAPELLETTI, *supra* note 4, (referring to it as "co-existential justice").

others it is seen as merely providing second class justice for the poor.¹¹ Some recent moves, such as the introduction of compulsory arbitration for small claims in Germany, are clearly primarily motivated by a desire for cost reduction.¹² Indeed one can detect a certain managerial edge to the administration of many ADR schemes, yet instances can still be discovered where ADR is advocated as a better form of justice more suited to the needs of consumers.

Thus some of the same issues continue to be the same as when Capelletti defined his three waves, albeit that the contours of debate have evolved over time. If one were seeking to identify new waves, one might select the regulatory function of redress actions and cross-border or globalization dimension.

Litigation has always had a regulatory function. The nineteenth century German scholar Rudolf von Ihering found it unsatisfactory that individuals should decide whether to institute litigation on the basis of a personal cost-benefit analysis, because they had a duty to take into account the public interest in demonstrating the effectiveness of the law and deterring potential law breakers.¹³ The changes in organizational structure have helped emphasize the role litigation plays in developing standards. The motivation behind injunctions brought by state agencies and/or consumer organizations is primarily to promote better trading practices. Class actions often have, as one dimension, the desire to ensure that wrongs are exposed and that remedial action is taken. This learning process¹⁴ function of litigation has also become evident in some ADR schemes. For instance, an important function of private sector Ombudsmen schemes is to provide guidance to industry through published decisions or annual reports. Even arbitration schemes are aware that they have to provide some means of commenting on the poor practices they come across. It is perhaps only in the small claims courts, where the cases are too minor to be reported and there is no supervisory structure, that the need to learn the lessons of disputes is not being appreciated.

The globalization of consumer disputes is becoming more than a mere theoretical problem. This is a factor of increased international travel and trade.¹⁵ It is most prominent in the EC, which as the world's most integrated free trade zone, has encouraged consumers to shop across borders and has taken

11. RICHARD ABEL, *THE POLITICS OF INFORMAL JUSTICE*, (1992).

12. See § 15a EGZPO (Gesetz betreffend die Einführung der Zivilprozessordnung).

13. Dr. Rudolf von Ihering, *Der Kampf Um's Recht*, (1889) quoted in H. Kötz, PUBLIC INTEREST LITIGATION: A COMPARATIVE SURVEY in Capelletti (1981) op cit.

14. K.N. Llewellyn, *The Normative, The Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 YALE L.J. 1355 (1940).

15. The events of September 11th may lead to some reduction in travel in the short term at least, but trade will remain increasingly international.

responsibility for making it easier for consumers to obtain redress, should things go wrong.¹⁶ However, this is now a global phenomenon, given the increasing pervasiveness of Internet trading. This causes problems for regulatory authorities¹⁷ and also individuals who want to seek redress from overseas. The Internet challenges conventional rules on how law should control businesses. Even if one wanted to hold on to the belief that the traditional court based forms of redress were adequate to deal with consumer problems, this cannot be a realistic response to the Internet. Formal court procedures cannot be the right way to resolve disputes for small amounts between parties on the opposite side of the globe. The only practical solution is some sort of virtual ADR court. This forces one to confront the economics of litigation, but in fact it only confirms and reinforces the existing trend.

We shall conclude with a request for a sixth integrative wave to be generated in the future, which involves bringing the ordinary courts and the ADR schemes into sync. We see a strange phenomenon occurring. The collective dimension is being recognized in the court system (collective injunctions and class actions), yet the focus of consumer litigation is being shifted to ADR mechanisms in which these collective instruments rarely exist. Equally, some ADR mechanisms are taking their function of raising trade standards extremely seriously and are adopting innovative techniques, yet the traditional courts continue to rely upon publicity of decisions, which is not really meaningful for small consumer claims. Thus, we want there to be a sixth wave of integration of innovations between the courts and ADR institutions.

III. ACCESS TO JUSTICE AS A COMPARATIVE VENTURE

There are many examples of good practice in the consumer redress field. However, we will caution that, whilst one should accept that consumer redress mechanisms will be - and indeed we will argue ought to be - different from ordinary court procedures, one should not accept that these differences ought to be an excuse for simply providing a poorer version of what already exists. Consumer problems need unique solutions. Our intention is not to map out a common model for consumer redress institutions which each country should follow. The exact mix (for inevitably there will be a mix) of redress systems will vary from country to country, depending upon national traditions and legal cultures, and will inevitably build upon what already exists. However, we believe a comparative survey will provide some interesting models and reveal some important lessons. We also hope that we can provide some guiding principles of universal value against which national systems can be judged. The

16. See *infra* pp. 51-53.

17. Allan Fels, *The Global Enforcement Challenge: Enforcement of Consumer Protection Laws in a Global Marketplace*, (Aug. 1997) (discussion paper).

most fundamental being that one should welcome the uniqueness of redress schemes set up to address consumer problems, and not simply judge them by how closely they replicate the ordinary courts. In fact, we suggest that the potential of new alternatives may not be fully delivered, and problems can result, if they are simply modeled and judged against existing court based redress schemes.

It is with regard to redress schemes dealing with relatively small individual disputes that most work has been undertaken to develop criteria against which they should be judged. We shall review this, but we also seek to paint a broader canvas of consumers' use of litigation. It is harder to put forward universal principles to cover all types of consumer litigation. For instance, different criteria will apply depending on whether the claim is a one-off individual dispute or raises broader collective consumer concerns; equally the ability of the consumer to obtain legal representation will be relevant in some but not all types of dispute.

IV. CHARACTERISTICS OF CONSUMER DISPUTES

At a fundamental level, it is possible to suggest certain special characteristics of consumer litigation which explain why we think it calls for an entirely different and novel approach, rather than simply a slimmed down version of traditional models of justice. Consumers often have small claims, although the total harm caused by a particular problem to the consumer collective can be great. Even small claims can have a significant impact on consumer welfare. This is especially so for the disadvantaged, who ironically are less likely to seek redress. Moreover, consumer problems are likely to be a greater irritant to consumer lives than their mere economic consequences might suggest, because of the distress and wasted time the problems generate. What to lawyers looks like an economic problem, often translates to the consumer as a social problem.

Consumers come in all shapes and sizes and few will have the resources to employ lawyers to deal with their consumer problems, and many will be intimidated by approaching traders or third party dispute resolution procedures. One only has to look at the low levels of literacy even in developed western societies to see how the prospect of writing a formal complaint, yet alone being enmeshed in legal proceedings, might be a forbidding prospect for many. Others will simply not find it worthwhile to expend energy on relatively small claims.

Thus, consumer claims often represent individual losses, but need collective procedures often involving third parties representing them, to find a remedy. Advocating such procedures can be quite a tricky argument to win. The need for such mechanisms is obvious in contexts like the environment,

where there can be no obvious human victim. In contrast, in the consumer context, the jibe can be made that if the victim does not think the claim merits action, then there is no real 'mischief' to be remedied. However, it is hoped that the reader can see that whilst it may be a sensible decision for individuals not to take such cases, this may mask real consumer detriment. It has been suggested that many individuals who bring cases have to possess "super-spite"¹⁸ to do so. Nevertheless, society would benefit from wrongs being rectified and trading standards being improved and this requires some mechanisms for consumer grievances to be voiced.

Consumer disputes can be categorized into four categories. Variables might include whether the claim is specific to an individual or if it affects the consumer collective, and whether it is for a large or small amount.¹⁹ Where claims involve large individual claims, the consumer aspect of the claim is perhaps less significant. Such claims raise the same familiar issues, such as funding and the courts' ability to influence behavior, that are pervasive throughout the law.²⁰ For this reason we will not spend more time on the problems facing consumers with large claims where they are of an individual nature. We will dwell longer on the issues surrounding large claims, which represent a collective problem. This is both because they raise specific concerns of organization and funding and also because we wish to reflect on the ability of such actions to promote the collective interest. The law in this area is making some hesitant steps at improvement. This allows us to contrast the position with how poorly the law facilitates collective claims where the amounts at stake are small for individuals, even if collectively they are large. However, our focus will first be on the main practical problem which consumers pose for the legal system. Namely, how to manage the numerous small individual disputes consumers have.

V. INDIVIDUAL SMALL CLAIMS

Two main approaches have been adopted to manage disparate consumer disputes often involving small amounts. Under one approach, the dispute is characterized according to the type of consumer product or service involved, and a separate dispute mechanism provided which appropriately matches the dispute characteristics in some sense. This approach has been followed in a number of the countries which we studied, where particular grievance remedial processes are provided for disputes in connection with specific and discrete

18. Arthur Allen Leff, *Injury, Ignorance and Spite- The Dynamics of Coercive Collection*, 80 YALE L.J. 1, 21 (1970).

19. Leaving to one side the debate is about what is a small claim.

20. It should be noted however, that some of the Ombudsmen schemes for instance, can award quite considerable sums, although most operate a ceiling on the awards that are binding on firms.

products. So we see for example, an arbitration scheme set up to deal with complaints about vehicles,²¹ a complaints board to deal with insurance disputes,²² and ombudsmen to deal with specific sector disputes.²³ Commonly, this is a privatized form of justice. This approach carries the advantage that most such schemes abide by standards of fairness,²⁴ and provide a decision maker who has expertise and specialist knowledge. However, since in many instances the imperative for the setting up of such mechanisms (and indeed the finance) has come from the product or service providers, there may be a trade-off between this managerialist approach and the kind of guarantees of independence and impartiality which are taken for granted in the traditional adjudicative setting.

The other approach is to provide a special state-funded mechanism, and to invest it with the particular characteristics, which are regarded as suitable for 'small' consumer disputes of any nature. Most commonly, this mechanism will be a variant or adaptation of the normal court hearing (although the state-funded Scandinavian Consumer Complaints Boards are an exception providing an informal mode of resolution). Here, the advantages of specialism may not pertain (although there are some exceptions, notably the Consumer Credit Tribunals in some Australian jurisdictions and the specialist boards that work within the Scandinavia Consumer Complaints Board structure) and while the independence of the adjudicator is unlikely to be put in question, other concerns may arise as to the suitability of the forum given many of their origins in court-based formal proceedings.

The advantages of court based schemes are that they have the authority of law, are independent, and can hand down binding decisions. These are also the roots of some of the disadvantages of using courts as a means of consumer protection. Judicial processes have to maintain a degree of formalism that can be off-putting to consumers. The judges may have limited knowledge of consumer law and even less appreciation that consumer problems may call for solutions which stretch traditional legal concepts. Also, each court decision is

21. G. Howells & R. James, *Litigation in the Consumer Interest*, Report for the Nuffield Foundation and paper presentation to the Annual Conference of the Society of Public Teachers of Law, (Sept. 1999) (discussing the Canadian Motor Vehicle Arbitration Plan (CAMVAP)).

22. *Id.* (discussing Norwegian Bureau for Insurance Disputes Forsikringsklagekontoret Arsberetning).

23. *Id.* (discussing the example of the banking ombudsmen in Australia, Canada, the UK, and New Zealand); See RHODA JAMES, *PRIVATE OMBUDSMEN AND PUBLIC LAW*, (1997) (for a discussion on the banking ombudsmen in Australia, Canada, the UK, and New Zealand, and for other private ombudsmen in the UK); R. James & P. Morris, *The New Financial Ombudsmen Service in the UK- Has the Second Generation Got it Right?*, Paper presented to the 8th International Consumer Law Conference in New Zealand (Apr. 9-11, 2001).

24. In most instances, they also provide for awards which are binding, or binding de facto, on the business.

seen as unique, and there is normally no attempt to obtain an overview of consumer issues in order to tackle systemic problems. Of course some legal systems have done their best to eliminate these problems. New Zealand, is one such example, where the disputes tribunals are quite distinct from traditional courts.²⁵

One point requires emphasis, since it must colour any conclusions about how well individual redress mechanisms work. Whatever form they take, small claims court or ADR system, consumer redress mechanisms are still unlikely to serve the interests of the most disadvantaged. As one commentator in the United Kingdom has said after studying the small claims courts there “for the most part, small claims hearings involve well-to-do people suing other well-to-do people.”²⁶ This mirrors research findings from the US and Canada.²⁷ ADR procedures have a similar record.²⁸ However accessible and effective they may, they are still operating in a context where the balance is skewed against those who can least bear the loss caused by a faulty product or service, and who may be least able to negotiate successfully with a company.

In setting out to examine mechanisms for individual consumer redress it is immediately clear that here is an area where Capelletti’s third procedural wave is particularly evident, in form at least. But the whole range of consumer redress problems are not usually covered by such procedures, and one should note a broad distinction between disputes concerning the financial services sector, where ADR schemes are quite numerous, and general consumer disputes about goods and services where there continues to be a need to rely on court based solutions, albeit that court procedures have often been modified to accommodate small claims.

Different forms of ADR have been taken up in different countries. In some, notably Australia, Canada, New Zealand, and the UK, the private ombudsman has proved to be a popular consumer remedy with business, government, and broadly with consumer interests. There is evidence of its success in providing an easy-to-use and free process for the individual

25. See discussion in Geraint Howells, Rhoda James & Peter Spiller, *Making the Alternative Appropriate: ADR for Consumer*, 7 N.Z. BUS. L. Q. 204 (2001).

26. J. BALDWIN, *SMALL CLAIMS IN THE COUNTY COURTS IN ENGLAND AND WALES: THE BARGAIN BASEMENT OF CIVIL JUSTICE*, (1997).

27. JOHN CONLEY & WILLIAM M. O’BARR, *RULES VERSUS RELATIONSHIPS: THE ETNOGRAPHY OF LEGAL DISCLOSURE*, (1990); Seana C. McGuire & Roderick A. MacDonald, *Small Claims Court Cant*, 34 OSGOODE HALL L.J. 3, 509 (1996).

28. John Birds & Cosmo Graham, *Complaints Against Insurance Companies*, 1 CONSUMER L.J. 92 (1993) (explaining that private ombudsmen have been found to be accessed largely by male, middle class professionals); Rhoda James & Mary Seneviratne, *Offering Views in Both Directions: A Survey of Member Agencies and Complainants on Their Views of the Ombudsman for Corporate Estate Agents Schemes*, Sheffield Law Faculty (1996).

consumer.²⁹ (Typically, they are able to decide disputes taking into account the relevant law, industry codes of practice, and considerations of what is fair and reasonable and make awards of up to a financial limit, which in the UK is £100,000, which are binding on the companies in the scheme.)

Despite its popularity as a consumer grievance mechanism in many countries, the spread of this type of private ombudsman has not been universal. In the US, which is notable for the rapid proliferation of ombudspersons, the office has been largely confined to the governmental or public agency sphere, with some limited individual corporate instances.³⁰ The idea of an ombudsman to cover a particular industry or corporate sector has not taken hold as it has in other countries. Whether this results from a different regulatory climate or the availability of other, preferred consumer remedies is unclear, but it provides emphasis for the point that it would be impractical to prescribe universal solutions.

Where the idea *has* taken hold, it has to be said that private ombudsmen are largely concentrated in financial services. The structural features of industries in those sectors have meant that the early provision of an external complaints mechanism was a feasible voluntary response to threats of statutory intervention. The absence of ombudsmen in the retail sector is striking and may, incidentally, go some way to explaining research findings in the UK that ombudsmen played a minimal role in consumer disputes.³¹

In most countries there are some consumer sectors, outside financial services, which operate codes of practice including the provision of a low cost arbitration schemes. One problem with these schemes is their often low visibility to the public eye, and also their perceived lack of independence. Consumers are concerned not so much about the independence of the arbitrator, but rather about attempts to force them to mediate claims. Moves are afoot to improve these schemes,³² but as a general rule, it is true to say that globally outside the financial service sector, there are few examples of effective industry ADR schemes.

29. The spread continues. See, *Government to Appoint Banking Ombudsman*, DAWN(London), June 19, 2001, at 1 (discussing Pakistan's Finance Minister's announcement of his intention to appoint a banking ombudsman).

30. See Donald C. Rowat, *The Parliamentary Ombudsman: Should the Scandinavian Scheme Be Transplanted?*, 28 INT'L REV. ADMIN. SCI. 399 (1962); WALTER GELLHORN, *WHEN AMERICANS COMPLAIN: GOVERNMENTAL GRIEVANCE PROCEDURES*, (1966); Larry B. Hill, *Institutionalization, the Ombudsman, and Bureaucracy*, 68 AM. POL. SCI. REV. 1075, 1077 (1974); Shirley A. Wiegand, *A Just and Lasting Peace: Supplanting Mediation with the Ombuds Model*, 12 OHIO ST. J. ON DISP. RESOL. 1, 95 (1996); See also Standards for the Establishment and Operation of Ombudsman Offices, 2000, A.B.A. Section of Administrative Law and Regulatory Practice.

31. HAZEL GENN, *PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW*, (1999).

32. See Statement of Principles of the National Consumer Disputes Advisory Committee of the American Arbitration Association: Consumer Due Process Protocol, (May 1998).

The kind of criteria against which to judge mechanisms for individual consumer redress are well known, and there is a general consensus in the literature³³ about the kind of points which need to be met, certainly for a non-court based resolution scheme. The benchmarks recently adopted by the Australian Government³⁴ are broadly representative of this consensus identifying considerations of accessibility, independence, fairness, accountability, efficiency and effectiveness. The European Commission, too, has been looking at consumer redress and has produced a Recommendation on the principles applicable to bodies responsible for out-of-court settlement of consumer disputes.³⁵ These are the principles of independence, transparency, the adversarial principle, and principles of effectiveness, legality, liberty, and representation. Both the benchmarks and principles bear detailed examination. Although they cover much the same ground, there are some interesting differences that serve to illustrate some of the difficulties faced in trying to devise an all-purpose model for consumer redress. They also highlight areas of deficiency. Since, for us, they seem to encompass the kind of considerations which must be integral to an effective consumer redress mechanism, in this article we shall use them to test *all* the consumer redress schemes we have examined in our comparative survey, whether or not those schemes are court-based or ADR institutions, and regardless of whether the criteria would be formally applicable in their national setting.

The Australian benchmarks seem well suited to an ombudsman type of remedy. The EC principles have inevitably been fashioned to cover the multiplicity of forms of redress which currently exist within the EU, and one can detect in places the influence of the court-based, formal approach favored in civil law countries. Clearly some formal protection is required. The question is as to where the balance should be struck between, on the one hand, imposing the kind of formal protections for the consumer which have their origins in a judicialized forum, and on the other, accepting that for out-of-court procedures to function as a cheap and accessible remedy then some formal procedural requirements must be relaxed.

VI. INDEPENDENCE

Independence is probably the most crucial characteristic. It is also one which is easier to demonstrate the closer the mechanism is to a judicial model.

33. See, e.g., John Birds & Cosmo Graham, *Complaints Mechanisms in the Financial Services Industry*, 1 CIV. JUST. Q 313 (1988).

34. J. Chris Ellison, Minister for Customs and Consumer Affairs, *Benchmarks for Industry-Based Customer Dispute Resolution* (1997).

35. Commission Recommendation 98/257 on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes, 1998 O.J. (L 115) 31.

Both the benchmark and the EC principles require that institutional arrangements should be in place to guarantee the independence of the decision-making body and thus the impartiality of the decisions. The benchmark requires that the members of the scheme (i.e. the companies), should have no role in the decision making process and the administration of the scheme. Both require that the arrangements made as to the appointment of the decision maker should be such as to ensure independence from the companies, and the principle requires that where a decision is taken by an individual, this independence is to be guaranteed by a range of measures including the requirement that the appointment of that individual should be for a period of time sufficient to ensure independence, and that the individual should not be liable to be relieved of his duties without just cause

The principle also requires that the person appointed should not have worked for the professional association or one of its members within three years of the appointment, if that professional association is concerned in the appointment or remuneration of the decision maker; *but* it does not impose any limits on where a post holder might go *after* holding such an appointment. This might, however, be at least as significant an issue.

These are all criteria which are met by small claims courts. As to arbitration, there is usually no serious question about lack of formal independence of arbitrators, but concerns arise where they are habitually appointed by an industry and may give the appearance of, at the least, familiarity with the company representatives. This is the familiar problem of the advantages of repeat players.

Lack of independence from the industry which funds the private ombudsman has been one long standing criticism. However, the criticism usually relates to the institutional arrangements rather than any suggestion of lack of impartiality on the part of the individuals who hold the office. That said, there has been some evidence of individual ombudsmen having to withstand covert industry pressure.³⁶ The private ombudsman has its origins in the United Kingdom, and the solution devised there to keep the companies at arms length from the ombudsman and his decision making was a tri-partite structure which placed an ombudsman council (chaired by an independent person of high repute and with a majority of independent members) between the ombudsman and the company which funded the scheme. This was the model adopted first by the insurance industry in the United Kingdom when they introduced the first such ombudsman in 1981, and it is a format that has been largely exported to Australia, NZ, and Canada. Concerns have still been voiced however about the

36. See Howells & James, *supra* note 21, for an example of a former Australian Banking Ombudsman and a former UK Insurance Ombudsman; P.E. Morris & J.A. Hamilton, *The Insurance Ombudsman and the PIA Ombudsman: A Critical Comparison*, 47 N. Ir. LEGAL Q. 119 (1996).

influence of the industry,³⁷ and there have also been concerns where the ombudsman company had the final power of approval and reappointment with the result that some schemes have moved to fixed term appointments.³⁸ In the United Kingdom, many of these concerns will only be of historic interest, since the new Financial Ombudsman Service is about to take over the work of eight existing ombudsman schemes in the financial services sector. As a statutory scheme, this now represents a reverse in the privatization trend, looking, as it does, rather like a nationalization of a previously self-regulatory mechanism.³⁹ Similar plans have been put forward in Canada to introduce one ombudsman in the financial services sector.⁴⁰

The EC principle of independence further requires that any individual who is the decision maker must possess the abilities, experience and competence, 'particularly in the field of law', required to carry out this function. Most arbitrators, ombudsmen and judges in small claims courts are lawyers, although there are notable exceptions, especially for example, in the New Zealand Disputes Tribunals where only ten percent are lawyers.⁴¹ Some ombudsmen, the current Canadian Banking Ombudsman, for example, and some in the United Kingdom⁴² are drawn from other professional backgrounds. In our view this does not seem to detract from their effectiveness. Indeed, since these ombudsmen are generally required to make rulings in the light of what is fair and reasonable there may well be advantages in a non-lawyer examining established practices with a fresh eye, free from any preconceptions. But as it is, most of the existing ombudsmen are lawyers further confirming the view that

37. See Howells & James, *supra* note 21, at 31, for an example of where Democracy watch have argued that subsequent appointments to independent directorships of the Canadian Banking Ombudsman Inc. are inevitably tainted because the original appointees (who made subsequent appointments) were selected by the industry.

38. *Id.*

39. James & Morris, *supra* note 23.

40. See Report of the Task Force on the Future of the Canadian Financial Services Sector, Change Challenge Opportunity, (1998) (explaining that the relevant legislation finally received the royal assent in June 2001. More recently, it was announced in December 2001, that the five major financial services industries in Canada- banks, life and health insurers, property and casualty insurers, investment dealers, and the mutual fund industry- have agreed to the creation, on a self-regulatory basis, of a National Financial Services OmbudService (NFSO), which will provide a central contact point for consumers where they can be referred to the relevant industry redress mechanisms, some of which are yet to be put in place. It is understood that the new redress mechanisms are likely to be modeled on the existing Canadian Banking Ombudsman organization, which will itself form part of NFSO. The NFSO is to come into operation in July 2002, CANADA NEWS WIRE, Dec. 20, 2001, and an interview by the authors with Mike Lauber, (Jan. 8, 2002).

41. PETER SPILLER, THE DISPUTES TRIBUNALS OF NEW ZEALAND, (1997).

42. See for example, the current and previous Estates Agents Ombudsman, and the Legal Services Ombudsman. In the case of the latter, the relevant legislation prescribes that the post-holder who oversees complaints against lawyers may *not* be a lawyer.

the alternative dispute resolution “industry” has been colonized by the legal profession.⁴³

VII. ACCESSIBILITY

Accessibility, especially in terms of cheapness and ease of use are crucial elements and most ADR systems would claim these as strengths. The accessibility benchmark also requires that the redress scheme be well publicized, that there should be appropriate assistance for disadvantaged complainants and that a complainant should be able to make contact with the scheme orally, even though the complaint must ultimately be reduced to writing. For the benchmark, industry-based schemes should be free of charge and legal representation should be avoided except in exceptional circumstances. It also suggests that conciliation, mediation and negotiation should be used to attempt to settle complaints and that a legalistic and adversarial approach be discouraged. It is here that there is evidence, perhaps of a cultural difference between the Australian benchmarks and the EC principles, the latter favoring a more adjudicative model. On the one hand, the EC’s principle of effectiveness requires that the consumer should have access without being obliged to use a legal representative, that the procedure should either be free or of moderate cost, that only a short period should elapse between the referral of a matter and the decision, and that the competent body should have an active role. On the other, the principle of representation requires that the redress procedure should not deprive the parties of the right to be represented or assisted by a third party at any stage of the procedure. The adversarial principle requires that the procedure followed should allow all the parties concerned to present their viewpoint before the competent body and to hear the arguments and facts put forward by the other party, and any experts’ statements. But this tilt towards formality is mitigated to some extent by the preamble to the Recommendation, which states that while the interests of the parties can only be safeguarded if the procedure allows them to express their viewpoint before the decision maker and to know the facts and arguments presented by the other side, this does not necessarily necessitate *oral* hearings of the parties.

Nevertheless, there seems to be an underlying tension between the perception that procedural rights must always be available and the need to provide an out-of-court remedy which is informal and easy for the consumer to use. For instance, the benchmark emphasis on conciliation may not lead to substantive justice for the consumer given the inequalities that exist and which can be exploited in negotiations.

43. MICHAEL PALMER & SIMON ROBERTS, DISPUTE PROCESSES: ADR AND THE PRIMARY FORMS OF DECISION MAKING, (1998).

Most ADR systems score well on accessibility. The state-funded Scandinavian Complaints Boards, for example, are easy to use, comparatively cheap to invoke, and the large numbers of new complaints received each year are testimony to their popularity. However, most are slow, taking on average a year to reach a final decision. This seems to be largely a function of lack of resources.⁴⁴ One of the strengths of private ombudsman schemes, too, has been their comparative accessibility. Individuals can make a complaint without the help of a lawyer or other third party and without a charge or fee. That is not to say that they have achieved as wide a coverage as they might, and those few studies⁴⁵ which have gathered socio-economic data on complainants tend to suggest that complainants are more usually drawn from the middle-classes.

The paper-only procedure adopted by most ombudsmen seems to make it easy and cheap for certain sections of the population to use. The challenge is to find an approach which allows a wider constituency to use the ombudsman procedure to resolve consumer disputes, and this is something which most ombudsmen try to address with help lines and staff specifically allocated to the giving of advice and assistance. Some are happy to try to resolve complaints over the phone, to obviate the necessity for form filling, and some of the smaller schemes are able to organize visits to complainants.⁴⁶

An issue which goes to accessibility and which has not yet been satisfactorily addressed is the relationship between ombudsmen and the internal complaints procedures within companies. Ombudsmen are designed to form the top rung of an informal complaints ladder, with 'exhaustion' of the internal procedure a prerequisite for access to the ombudsman, and the integrity of the bottom rungs is of considerable importance to the consumer. Publicity for the remedy is essential. Certainly in the United Kingdom there was evidence that companies were not always wholehearted in their commitment to publicizing either their own internal complaints process or the ombudsman.⁴⁷ We suspect that deficiencies may often result from a disparity of knowledge and commitment between those in management and those at the counter. We also suspect that it is not a problem specific to the United Kingdom. Certainly there is anecdotal evidence to support this. In our survey work, one of the authors made a spot check on an ATM and Investor Advice Centre close to the head

44. Klaus Viitanen, *The Scandinavian Public Complaints Boards: The Aims, Present Situation and the Future*, 1 CONSUMER L.J. 118 (1996).

45. James & Seneviratne, *supra* note 28.

46. See Howells & James, *supra* note 21, for a discussion on the Canadian Banking Ombudsman.

47. C. Graham, M. Seneviratne & R. James, *Publicising the Bank and Building Societies Ombudsman Schemes*, 3 CONSUMER POL'Y REV. 85 (1993); R. James, C. Graham & M. Seneviratne, *Building Societies, Customer Complaints, and the Ombudsman*, 23 ANGLO-AM. L. REV. 214 (1994) (explaining that it is something which will be largely remedied under the new FOS regime where the new industry regulator, the Financial Services Authority, has responsibility for monitoring compliance with publicity rules).

office of one particular Canadian bank immediately after having met the internal 'bank ombudsman'. This spot check revealed that there were no leaflets on how to complain on view, *or available on request*, despite confident assertions made earlier by the bank ombudsman that they were on display at *every* outlet, however small.⁴⁸

One reason for the importance of effective internal complaints procedures is that they may form a barrier for the consumer to surmount rather than providing the opportunity to have their complaint resolved at the earliest opportunity. The desire to address the issue quickly lies behind much of the argument for conciliation, and there is a trend for ombudsmen and many other ADR systems to lay stress on initial conciliation. The President of the state-funded Consumer Complaints Board in Norway, for example, believes that consumers would benefit if the conciliation function of the Consumer Council were strengthened, not least because of the time it takes the Board to deal with cases. Two of the private complaints boards in Norway, for example, those for banking and finance and for insurance also operate a form of conciliation. Ombudsmen, too, are increasingly placing an emphasis on conciliation rather than formal resolution of complaints and the head of the new Financial Ombudsman Service in the United Kingdom has said he would like to see his scheme operate a system where only a small minority of cases actually reach the more formal stages of investigation and decision.⁴⁹ Whether this emphasis is really to the consumer's benefit or whether it is driven by managerial considerations is not clear although we harbor a suspicion. It is a moot point if consumers benefit most from resolution at an early stage when they may be encouraged to compromise, or from having their claim examined and determined by an independent adjudicator.

Conciliation is not the sole preserve of the ADR sector. Small claims systems commonly provide for a variety of outcomes, including both agreed settlements and decisions. In France, pre-trial conciliation allows one party to bring the other before the court for an attempt at conciliation where a settlement is believed to be possible.⁵⁰ In British Columbia, the new small claims court programme of 1991 introduced mandatory settlement conferences for disputed claims.⁵¹ In New Zealand, referees are required to assess whether the matter is appropriate for a settlement, and if so, to facilitate that process, but failing that to give a decision in the same forum.⁵² There is perhaps a distinction to be drawn between systems which introduce such a mechanism to improve dispute

48. Howells & James, *supra* note 21.

49. W. Merricks, Presentation to the Biennial Conference of the British and Irish Ombudsman Association, (May, 2001).

50. Howells & James, *supra* note 21.

51. *Id.* at 28.

52. Disputes Tribunals Act, 1988 (N.Z.)

resolution outcomes and those which see mediation as a short cut to reducing costs on the legal system. The German law permitting states to demand arbitration in small claims cases perhaps falls into the latter category.

Arbitration, although possibly more accessible than the courts, where for instance the fees are kept down by subsidies from trade associations, still involves a degree of formality which may be off-putting to the consumer and usually continues to involve costs for the consumer. In some instances the costs may be prohibitively high in comparison with the amount at stake.⁵³

The hope was that small claims courts and tribunals would be accessible and thus bring justice closer to the ordinary person but there is disquieting evidence, in jurisdictions such as Canada, New Zealand and the UK, that a large proportion of consumer disputes are initiated by traders rather than consumers - what Ramsay has described as "the deformation of small claims courts into collection agencies."⁵⁴ There is also evidence that the applicants tend to be disproportionately male professionals or self employed and well educated.⁵⁵

In the US, consumers may choose to take their claim to the small claims courts which have a highly simplified procedure. There is no need for representation and indeed in some states there is a prohibition on the use of lawyers in these courts. The procedure is informal albeit it was originally based on an adjudicative model, although some courts are now adopting modes of ADR. Consumer cases would also commonly go to the Municipal Courts (sometimes known as Magistrates Courts) which have a limited jurisdiction and are staffed by a full-time judge - appointed or elected, depending on the particular circumstances in the State. Formal court procedure is adopted, but these courts also offer *non-binding* arbitration which can be voluntary or mandatory, before getting to court, depending on the way the court operates. It is this procedure which normally applies to consumer cases, normally up to a limit of \$15,000-\$20,000, and the individual pays a filing fee of \$100. Interestingly, this type of consumer arbitration is non-binding, because when the courts adopted the procedure they could not, under the Constitution, deny trial rights. The arbitration procedure has the advantage of speed, as the hearing would normally be held within a few months and the procedure would be streamlined and less formal than an ordinary court. Lawyers can be hired for a small fee and the consumer is not at risk of having to pay the other side's fees.

53. Richard M. Alderman, *Mandatory Arbitration in the United States: The Destruction of Consumer Rights*, Presentation at the Eighth International Consumer Law Conference (Apr. 2001).

54. I. Ramsay, *Consumer Access to Justice*, Plenary Address at the Eighth International Consumer Law Conference (Apr. 2001).

55. Howells & James, *supra* note 21; Seana C. McGuire & Roderick A. Macdonald, *Judicial Scripts in the Dramaturgy of the Small Claims Court*, 11 CAN. J.L. & SOC'Y 63 (1996); Spiller, *supra* note 41; Review, *Rethinking Civil Justice: Research Studies for the Civil Justice Review*, 1 Ont. L. Reform Commission, (1996).

In these court processes, however, there is still the perception that the business 'repeat player' will be at an advantage in comparison with the unrepresented individual consumer. The point probably is that a way needs to be found to provide low-cost legal advice and representation rather than to ban it. Early neutral evaluation is used in other courts, for instance in some District Courts, but while there might be potential for its use in consumer redress it seems at present not to be used much in that setting.

It is recognized that most parties who attend a small claims process expect and prefer it simply to hand down a decision, and that this reality needs to be respected by the presiding officer.⁵⁶ It is also recognized that there are practical constraints on the extent to which there can be true mediation in the small claims forum, bearing in mind time constraints, the fact that the respondent/defendant attends involuntarily, and the role of the presiding officer as an authority figure.⁵⁷ Indeed it is unlikely that in small claims the ideal will be achieved of the mediator and the decision-maker being different people. Nevertheless, it is suggested that it is important for small claims process to allow the flexibility to allow disputes to be settled where this is appropriate. Although it should be recognized that many consumers may feel pressurized into agreeing a settlement which deprives them of the full value of their claim, nevertheless the parties' underlying needs may best be met through settlements which they have fashioned and are committed to implementing. There is also the hope that the experience of the consumer and the trader in resolving their dispute will have a remedial and educative effect, not least in heightening the sensitivity of the trader to the consumer's needs.

Cost is an issue with small claims courts and this varies amongst jurisdictions. France, for example, has the admirable principle that the legal system is a free service provided by the state (although since 1991 a tax has been imposed on legal acts).⁵⁸ New Zealand for many years operated on the basis of low filing fees, but in 1998 an increased scale of fees from \$30 to \$200 has proved a deterrent to certain claimants,⁵⁹ and in the UK where the Civil Procedure Rules do allow for a small claims track, there is discretion for the judge as to whether this may be invoked and the court fees and allocation fee (payable if a defense is entered) may prove a barrier to the consumer. These fees remain fairly high even for small claims because of the political decision that court fees must cover the cost of running the judicial infrastructure. This

56. E. Clark, A STUDY, THE TASMANIAN SMALL CLAIMS COURT: AN EMPIRICAL STUDY, (1992); Spiller, *supra* note 41, at 98.

57. *Id.* at 90, 91.

58. Howells & James, *supra* note 21, at 7.

59. Disputes Tribunals Rule 5.

is in contrast to the position in Ireland where the issuing fee is in the region of £6.

The scale of cost is also determined by the involvement allowed for lawyers. In jurisdictions such as Quebec and New Zealand, lawyers are excluded from representing clients on either side, and in recognition of this there is only limited scope in New Zealand for the award of costs in relation to the proceedings.⁶⁰ Even in jurisdictions where lawyers are allowed there are usually bars on recovery of lawyers' costs unless one party has behaved unreasonably.

Again on accessibility, a concern arises as to the nature of the proceedings and the degree of formality imposed by the judge. The involvement of lawyers as representatives would seem on the face of it to engender an unhelpful legalistic approach which is inimical to the aims of informality which may be reinforced by the physical setting and the court building. However, the issue may not be clear cut since there is some interesting evidence in Canada (other than in Quebec) where some poverty groups have argued that the small claims courts were intimidating for their clients and that reforms such as the introduction of full time inquisitorial judges and duty counsel would make the system more effective for the poor. The nature of the procedure has been addressed in a number of jurisdictions, but with varying success. In France, where consumer disputes are heard in the court system, albeit with simplified procedures, research indicates that these courts are not particularly friendly to individual consumers with small claims. Other jurisdictions provide for small claims courts as distinct parts of the court system. In Quebec, small claims court judges are regular, full-time judges of the Civil Division of the Court who hear cases in the small claims court one day every other week.⁶¹ In New Zealand, the Disputes Tribunals function as a division of the District Court and claims are heard on court premises.⁶² Yet other jurisdictions, such as New South Wales, have adopted specialist consumer claims tribunals.⁶³ Indeed some Australian states have separate tribunals to deal with credit disputes. There is some evidence that small claims judges find the handling of disputes an unpleasant aspect of their work. Clark noted that part-time small claims judges had difficulty switching to this role from their normal duties and that in Tasmania satisfaction was greater where one judge specialized in this type of work.⁶⁴ In Canada, it was found that work in the small claims court was not popular with the judiciary and was seen as a demotion. Judges in these courts

60. Disputes Tribunals Act, 38, 43, 1988 (N.Z.)

61. Disputes Tribunals Act, 27, 1988 (N.Z.)

62. Disputes Tribunals Act, 4, 1988 (N.Z.); Spiller, *supra* note 41, at 10.

63. Howells & James, *supra* note 21, at 44.

64. CLARK, *supra* note 56.

were found not to be particularly good at recognizing the issues being presented by individuals, and there was a mismatch between the perception of the problem on the part of the individual and the way in which the legal system, even at small claims court level, characterized it.⁶⁵

A recurrent feature of forums designed for small claims is that there is a large measure of flexibility in the procedures used, to respond to the needs of the parties and their situation. In Quebec, small claims judges are authorized to use the procedure which seems most appropriate.⁶⁶ In New Zealand, referees who preside in the Disputes Tribunals may adopt such procedure as is best suited to the ends of justice and may receive any relevant evidence even if not legally admissible in a court of law.⁶⁷ This informality enhances the important role played by the personality of the adjudicator. The situation in New Zealand is striking, as the vast majority of referees are not legally trained. Baldwin noted in the UK that the atmosphere of small claims courts varied markedly even within the same building depending on the character of the judge.⁶⁸ Could these individual idiosyncrasies be altered by better training?

Plaintiffs who make it as far as a small claims hearing have had to overcome a number of obstacles and the strong temptation must often have been to drop the claim somewhere along the line. Those who get to the small claims court represent the tip of the iceberg. Baldwin, in his research in the United Kingdom, found that in talking to small claims litigants many had found it an uphill struggle to pursue the action as far as the county court. He believes it is not enough to provide improved facilities or to expand the scope of informal procedures or to encourage judges to become pro-active: the greater problem is to persuade people confronting serious legal difficulties to make use of the courts and other legal processes. Public awareness of small claims procedures and alternative methods of resolving disputes is very low, and public attitudes to the courts in general remain resistant. For large sections of the population, the courts are seen as uninviting, even forbidding institutions to be visited only in extreme circumstances. They are places to which they are 'taken'; not somewhere they use to settle disputes, or have their grievances resolved.

In Canada, McGuire and Macdonald's conclusion has been that:

the use of the court is often correlated with those socio-demographic variables associated with social power and that structural modifications to processes of civil litigation designed to enhance access to justice do not significantly alter the character of any court's plaintiff pool. Whatever may be the benefits of creating systems of small claims courts, the empirical evidence

65. Ramsay, *supra* note 54.

66. *Id.* at 227.

67. Disputes Tribunals Act, 40, 44, 1988 (N.Z.)

68. BALDWIN, *supra* note 26.

suggests that greater accessibility of official institutions of dispute resolution is not one of them.⁶⁹

That point, so powerfully made, should give one pause for thought.

VIII. FAIRNESS

The next benchmark, fairness, entails that the scheme produces decisions which are fair and *seen* to be fair by observing the principles of procedural fairness, by making decisions on the information before it, and by having specific criteria upon which its decisions are based. Decisions should be based on what is fair and reasonable, taking into account good industry practice, relevant industry codes and the law. Procedurally, due process or natural justice requirements should be observed. An obligation to provide information should be placed on scheme members, subject to certain limitations. These requirements seem to have been written with the private ombudsman in mind. One issue, however, is the extent to which consumers are satisfied by the normal paper-only ombudsman procedure. It is a moot point whether having a paper-based scheme is to the consumer's advantage. Whilst it certainly removes the intimidation of the 'day in court', it may be that some consumers are less able to articulate their views on paper than orally. There is also some evidence that consumers place a high value on 'being heard' whether in person or on the telephone and that an important element in their satisfaction with the system is the feeling that their complaint has been understood and been recognized in some sense by an independent person.⁷⁰ Adoption of a more personal approach as a general rule would result in massively increased costs, which might result in a charge having to be made to the consumer, and it would also have implications for the speed and informality of procedures, which are currently part of the ombudsman hallmark.

As to the courts, in New Zealand, there is an important emphasis on the procedures of natural justice in that there are grounds for appeal where proceedings have been conducted unfairly and this unfairness has prejudicially affected the outcome.⁷¹ Furthermore, there is review to the High Court on the basis of breach of natural justice.⁷² While the number of appeals is low and the number of successful appeals lower still, and judicial review is rare, the presence of these safeguards acts as an important incentive to referees to pursue fair procedures.⁷³

69. McGuire & MacDonald, *supra* note 27.

70. See Birds & Graham, *supra* note 28, for research into the views of complainants who had used the estate agent's scheme in the UK; See also James & Seneviratne, *supra* note 28.

71. Disputes Tribunals Act, 50, 1988 (N.Z.)

72. Spiller, *supra* note 41, at 137.

73. *Id.* at 136-137.

Clark is, however, troubled as to whether the right balance has been struck in Australia concerning informality of proceedings and deviations from the rules of evidence, limitation on rights of appeal etc. He notes Pound's view that there is a "continual movement in legal history back and forth between wide discretion and strict detailed rule, between justice without law, as it were, and justice according to law"⁷⁴ and clearly sees small claims and ADR procedures as being at the very end of the discretionary spectrum. He points out that many of the legal rules which are being pushed aside in the name of seeking justice were in fact introduced to ensure justice was delivered. His motivation for raising this concern about informality is his finding that people cared most about being given a fair opportunity to present their case and that too much emphasis should not therefore be placed on fast and cheap justice. However, one can agree with Clark that it is important that participants see the process as fair and permitting them the chance to present their cases fully, without resorting to technical legal institutions to achieve these goals. Again, much will depend upon enhancing the training for judges and court staff and developing better information to users. If small claims procedures become too complex there is a danger of killing the goose that lays the golden egg.

In New Zealand referees are directed to decide in terms of the substantial merits and justice. They are not bound by strict legal technicalities and forms, and may disregard contractual terms which appear harsh or unconscionable.⁷⁵ Indeed in *Hertz NZ Ltd. v. Disputes Tribunal*,⁷⁶ a decision was upheld even though the court admitted the appellant was not and could not be liable at law. There is, then, a strong emphasis on common-sense justice rather than legalistic outcomes. However, referees are required to have regard to the law, and it is a ground of appeal that a referee did not have regard to the provision of an enactment brought to the attention of the referee at the hearing.⁷⁷

Similar rules are found in Australian small claims courts. In Queensland and New South Wales, for instance there is provision that the final order must be "fair and equitable", thus giving the judge leeway to deviate from the strict letter of the law.⁷⁸ Nevertheless, their impact has not been as great as in New Zealand, because the decisions have continued to be made by lawyers.⁷⁹ Indeed it would be an impossible burden to require lay referees to make decisions according to the law.

One of the interesting issues is whether New Zealand adopts this approach on the pragmatic basis that within the time and cost limitations of the New

74. Clark, *supra* note 56.

75. Disputes Tribunals Act, 18-19, 1988 (N.Z.)

76. 8 P.R.N.Z. 145 (1994).

77. Disputes Tribunals Act, 18, 50, 1988 (N.Z.)

78. Howells & James, *supra* note 21, at 46.

79. Spiller, *supra* note 41.

Zealand system it is not possible to deliver perfect justice.⁸⁰ Alternatively was the system recognizing that laws could be imperfect and that the tribunals would be able to deliver better justice if they looked at the substantial merits of the case? There are some hints of the latter approach, for example when a time limit is ignored which would operate against a meritorious party. On the whole, however, the impression gained is that justice according to the law is an ideal which has to be departed from on cost grounds. Indeed one of the fears of some commentators⁸¹ is the suspicion that this power could be used against consumers. There is a difference between the use of a flexible power of this sort to deliver substantive justice when wielded by an ombudsman within a structure which requires him to justify his use of the power, and the placing of a similar power in the hands of a referee. In the final analysis, however, the result of the New Zealand approach may be simply to make explicit what happens in most small claims courts, for Baldwin's research indicates that many District Judges in the United Kingdom are happy to depart from the law to achieve a just result despite being formally bound by the law. Nevertheless one might be cautious about the extent to which one is willing to accept adjudication according to substantive justice rather than law. Given the background and training of the modern referees one can expect them to make a good effort to reach fair decisions, which do not treat consumers unfairly. To the extent that there are injustices, one can be reasonably sanguine if the alternative is simply a legal system which prevents small disputes being heard at all. However of course this position is less defensible the higher the monetary amount involved.

The EC principle of legality goes further than the benchmark and is concerned to reinforce the need to preserve strict legal protection which may look strange to those in countries with well developed ADR systems. It stipulates that the consumer must not be deprived of the protection of the mandatory provisions of the law of the state in whose territory the dispute resolution body is established nor should the consumer be deprived of the protection afforded by the mandatory provisions applying under the law of the Member State in which he is normally resident. The first point is covered in most ombudsman systems where the consumer is free to reject the decision and go to court instead. Arbitration is usually binding on both parties, however. The second point, seems to present practical problems. Is it realistic to expect national ADR systems to have specialist knowledge of legal systems within other Member States or, perhaps, globally? And indeed, if the consumer is given the choice to use an informal out of court procedure with its attendant benefits,

80. Kate Tokeley, *Disputes Tribunals: Should the Monetary Limits Have Been Increased?*, 5 N.Z. BUS. L.Q. 13 (1999).

81. *Id.*

is it not a reasonable trade-off that any legal rights available in their own country are relinquished?

IX. ACCOUNTABILITY

The benchmark on accountability requires that the redress scheme should publicly account for its operations by publishing its determinations and information about complaints and highlighting any systemic industry problems. This includes the provision of anonymous written reports of determinations to scheme members and interested bodies both to provide guidance and to demonstrate consistency and fairness in decision-making. There should also be an annual report providing, *inter alia*, a statistical breakdown of complaints, representative case studies, and highlighting systemic problems. Much of this is mirrored in the EC principle of transparency.

Ombudsmen and complaints boards broadly meet these requirements, although arbitration procedures usually do not. A drawback of many ADR systems stems from the private nature of the process which enables companies to settle disputes without public acknowledgement of their failings. While the state funded Scandinavian Complaints Boards do make full details publicly available, in private schemes case reports are normally on an anonymised basis, and this includes those private complaints boards in Scandinavia as well as the private ombudsmen.⁸² There is an exception. In the Canadian Banking Ombudsman scheme there are quite stringent reporting requirements where the ombudsman is required to report quarterly on the number of cases where he has made a recommendation, and cases where the bank has followed his recommendation. These figures identify the banks concerned and are made public. This goes a long way further than reporting requirements in other jurisdictions where ombudsmen commonly simply report anonymised case reports. (In one private scheme in the UK, the Building Societies Ombudsman, the naming of a building society and details of an ombudsman award against it was available as an option to any society that was disinclined to abide by the ombudsman's decision. In the event, only two societies took the option during the scheme's existence). Ombudsmen have generally been assiduous to identify common problems in their Annual Reports that have gone some way towards raising public awareness (if only amongst consumer groups and academics) of the systemic problems which affect consumers.

82. See for example, the Norwegian Bureau for Insurance Disputes and the Complaints Board for Consumers in Banking and Finance Matters in Norway.

X. EFFICIENCY

The efficiency benchmark,⁸³ which requires that schemes should keep track of complaints, ensure they are dealt with by the appropriate process or forum and should regularly review their own performance is now broadly met by ombudsman schemes which have become increasingly aware of the need to ensure a speedy and stream-lined process and one which they can defend under scrutiny from outside observers. There should also be a system for tracking complaints, notifying the parties of progress, and provision for regular monitoring. How well arbitration and small claims courts match these requirements is unclear although case management is assuming greater importance if only on financial grounds.

XI. EFFECTIVENESS

Finally, the effectiveness benchmark's measure is that the scheme should have appropriate and comprehensive terms of reference and periodic independent reviews of its performance. This is closely linked to the efficiency benchmark but with the former focusing on the operation of the scheme the effectiveness benchmark measures the capacity of the scheme to deliver justice. Schemes should therefore be broad enough to cover the majority of customer complaints, up to monetary limits which are consistent with customer transactions in that industry.

Determinations must be binding on members and members must be encouraged to abide by the rules of the scheme. As regards most of the Scandinavian Complaints Boards where the awards were not enforceable, there was a poor rate of compliance with recommendations, in some cases only 50%, in others only 30-40 %. Bad publicity or the encouragement of consumers to take legal action in the court if a recommendation has not been complied with have not proved particularly successful sanctions.⁸⁴ The Norwegian Consumer Complaints Board whose decisions are enforceable if the parties do not request that the matter goes to court within four weeks is able to give assistance to the consumer to obtain enforcement if this proves necessary. While only a minority of cases go on to court there had been in 1999 a rash of cases going to court involving disputes about professional services.⁸⁵

83. There is no direct equivalent EC principle on these matters although the principle of transparency covers similar points.

84. Viitanen, *supra* note 44.

85. This Board received comparatively few complaints. In 1999 it received 256 in total; as to the category of complaints, those about cars constituted the largest total in number (45), of complaints about services those relating to building work topped the list at 18 with electrical work next at 12.

Private ombudsman schemes have a good record on compliance, in most instances the company settles on the ombudsman's recommendation without a formal award having to be made and awards have been invariably followed. This is true in both voluntary and statutory schemes. For the new Financial Ombudsman Service, statute provides for enforcement of the awards in the county court at the instance of the consumer.⁸⁶

It is interesting that the EC principle of liberty goes further on the issue of binding awards and requires that the decision taken by the body concerned may be binding on the parties only if they were informed of its binding nature in advance and specifically accepted that. Further, the consumer's recourse to the out-of-court procedure must not be the result of a commitment prior to the materialization of the dispute, where such commitment has the effect of depriving the consumer of her right to bring an action before the courts for the settlement of the dispute. The importance of this provision is sharpened when one considers the situation in the US where the courts have largely upheld mandatory arbitration clauses in contracts of adhesion even in circumstances where the consumer was given wholly inadequate notice.⁸⁷ Indeed, it has been argued that pre-dispute mandatory arbitration, as employed in the US, is designed to preclude effective redress by consumers and substantially reduce or eliminate the beneficial effects of favorable judicial precedent and legislation.⁸⁸ For the consumer in the US, arbitration has significant defects: it is often not as prompt or inexpensive as the small claims courts, the informal rules often favor the company as the repeat player and mandatory arbitration precludes the consumer's freedom to choose to litigate as a class action.⁸⁹

In countries where the ombudsman remedy pertains, the consumer is free to go to court at any time up until acceptance of the ombudsman's determination. Nevertheless, the point has been well made elsewhere that, given the practical realities, recourse to the courts may only be a theoretical alternative.⁹⁰

86. Financial Services and Markets Act, 2000, 3, c. 8, s. 229, sched. 17.

87. Richard M. Alderman, *Mandatory Arbitration in the United States: The Destruction of Consumer Rights*, Presentation at the Eighth International Consumer Law Conference, (Apr. 2001).

88. Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1 (1997); Alderman, *supra* note 86; Mary Dee Pridgen, *Gateway to Justice: Arbitration Imposed on U.S. consumers by Adhesion Contracts*, Presentation at the Eighth International Consumer Law Conference, (Apr. 2001); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33 (1997).

89. Alderman, *supra* note 86; Jean R. Sternlight, *As Mandatory Binding Arbitration Meets The Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000).

90. Philip Rawlings & Chris Willet, *Ombudsman Schemes in the United Kingdom's Financial*

It is usually implicit in an arbitration process that both parties agree to be bound by the arbitrator's decision and this certainly pertains in the UK, Netherlands, Spain and Portugal for example. Although agreements in EC countries are subject to provisions arising from the EC Directive on Unfair Terms in Consumer Contracts.⁹¹

As to small claims courts and tribunals, it would seem to be essential that the outcome of the small claims process be binding and effective, subject to the earlier discussion above about conciliation. There is little point in either consumer or trader initiating and pursuing a process which has inevitable financial and emotional cost and which ends with an outcome that makes no difference. Unfortunately, even obtaining a judgment is not the end of the matter. The reality is that many judgments debtors do not voluntarily comply with court orders, and law enforcement officers are unable to exact fulfillment of the order (because of the party's lack of means, disappearance or bankruptcy). The experience of many litigants in obtaining remedies which are not complied with, and which sometimes can never be enforced, has caused some observers to question the value of the small claims system.⁹²

Small claims systems commonly provide for enforcement of outcomes of the process, either because the small claims system is part of the court process or because there is provision for registration of the outcome for purposes of enforcement. In New Zealand, orders for the payment of money or the delivery of property automatically become orders of the District Court and are enforceable through the court process.⁹³ In Victoria, there is a "funds in trust" model, whereby if a consumer disputes payment of an account the money must be paid by the consumer into a trust account until the order is decided.⁹⁴

It is recognized that the enforceability of court orders is an issue not only for the small claims process: throughout the court process, there is the experience of successful litigants being unable to translate their orders into tangible benefit. Nevertheless, it is submitted that it is essential that the orders of small claims forums be given the maximum support possible by the state if citizens are to have faith in their justice system.

Under the effectiveness benchmark, schemes should also be designed to pick up systemic problems, and here it may be important, ironically, that the dispute 'goes the distance' so that a record is kept of the type of issues involved. Most complaints boards and ombudsmen claim some success in influencing good practice, particularly those which are industry specific. In some settings,

Sector: The Insurance Ombudsman, the Banking Ombudsman, and the Building Societies Ombudsman, 17 J. CONSUMER POL'Y 307 (1994).

91. Council Directive 93/13, 1993 O.J. (L95) 29.

92. Howells & James, *supra* note 21, at 47, 56.

93. Disputes Tribunals Act, 45, 1988 (N.Z.)

94. Howells & James, *supra* note 21, at 47.

the Norwegian complaints boards for example, decisions of these ADR bodies are taken into account by the courts in comparable cases so that there is the potential, at least, for benefit to the collective consumer interest by the influencing of judicial precedent. Ombudsmen have had some influence in identifying systemic problems within an industry although their effectiveness here has been tempered by the willingness or otherwise of an industry to accept the strictures of the ombudsman. In many instances, changes in practice have seemed rather slow moving to the onlooker, and changes to policy infrequent. Some ombudsmen have regularly been consulted about industry codes of practice; it may well be time to give them increased powers in this area.

XII. SUMMARY

Forms of redress for the individual consumer dispute have the potential at least to provide an adequate mode of resolution, but they have yet to meet their promise. Small claims courts or tribunals have yet to become truly accessible to the more vulnerable consumer, and there is a debate as to whether or not access to (free) legal assistance is a benefit or not. Certainly Capelletti's first wave of economic assistance is not very apparent for consumers litigating small claims (this applies a fortiori in the ADR sector). Moreover, while decisions may be authoritative, in some jurisdictions at least the consumer can be left high and dry if enforcement of judgment is problematic. Again, the role and commitment of the adjudicator is crucial; where the judge is a reluctant one then the consumer is unlikely to get the "best" justice.

Arbitration, while less formal than the courts, seems to us to have considerable disadvantages for the consumer. The consumer is likely to incur considerable costs through the arbitration fee, and costs for any expert witnesses etc. While arbitrators are drawn from independent panels, there will be an advantage to the company as repeat player both structurally and informally and the consumer usually has to agree to be bound by the arbitrator's decision. Here, developments in the US towards mandatory binding arbitration are of particular concern.

Consumer Complaints Boards and Ombudsmen are assuming considerable importance in terms of the number of consumer complaints with which they deal, and the implicit acceptance in many jurisdictions that they are not alternative forms of resolution for particular disputes, but the only form of dispute resolution for all but the most unusual consumer who has the time, money, and willingness to take the long road through the ordinary court system. They provide a helpful remedy which is free, accessible, informal, and, in the case of ombudsmen, they are able to make considerable financial awards where appropriate (where awards are not formally binding, recommendations have usually become *de facto* binding). The consumer can reject the award and go

to the courts. But there have been doubts about the perceived independence of the ombudsman in some of the industry sponsored schemes and the remedy is not always as speedy as the informality of the processes would promise. Most are able to depart from the law and codes of practice to take decisions based on what is fair and reasonable; this allows them to do justice in the individual case unencumbered by strict precedent but with the consequence of potential unpredictability for future consumers and companies in dispute.

Capelletti's third procedural wave is therefore evidenced in some strength in particular areas of consumer redress but even so, and even where the forms of ADR are apparently strong, close examination reveals inadequacies which have yet to redress the structural imbalance between the parties. More needs to be done to subject the modes of dispute resolution to scrutiny and to effect change.

There is too, another concern. The issue of individualized justice, as against such rule of law considerations as certainty and consistency, has a further dimension. The general consumer interest is better served if conclusions can be drawn from individual decisions. It is desirable that decisions form more than mere guidance to the industry concerned and have in some measure the value of precedent. Can this be achieved in a system which rightly values speed, accessibility, and probably the desire to resolve disputes at the earliest level? ADR is commonly a private form of justice; while it may be successful for the individual consumer, its essential characteristics seem by their very nature to rule out the wider role of creating beneficial precedent for future consumers. Some forms of ADR, notably ombudsmen, are making brave attempts to draw attention to system weaknesses and to bring about change. However, there are factors preventing the regulatory wave taking hold with ease in ADR and small claims jurisdictions.

The increased use of mediation, or conciliation, to try to reach a conclusion may be of benefit to the individual consumer but there is insufficient evidence at present to make a judgment about it and it takes consumer redress even further from the public gaze. Justice behind closed doors can only have a minimal effect on corporate policy and behavior.

The crucial next step is to take action against systemic problems and to find a way of addressing the collective consumer interest. This is where our call for a sixth integrative wave to allow a cross-fertilization between the courts and ADR institutions has importance. The court's power to make decisions public, and the impetus which comes from the ability of some ADR systems to draw attention to corporate practices and policies which are detrimental to consumers could, if brought together, make a significant impact for all consumers, including those who do not even get as far as seeking redress. One way of achieving this might be to open small claims courts and ADR procedures up to the type of collective procedures seen in main stream litigation i.e. class actions,

injunction procedures etc. These collective procedures will be considered next before the cross-border dimension is focused on. However, it should also be noted that small claims and ADR schemes will also increasingly have to consider how they can handle cross-border disputes or be honest in admitting that they are not suitable for them and encouraging appropriate alternatives to be developed.

XIII. COLLECTIVE CLAIMS

The use of collective actions is a good example of Cappelletti's second wave of organizational changes. There is a trend both towards making it easier to bring civil actions through procedures analogous to class action procedures and the development of public law style controls permitting government bodies and consumer organizations to seek injunctions. To some extent collective actions also link to the economic trend Cappelletti noted as they can be a mechanism for making access to justice more affordable. It also fits into the regulatory wave we noted for this type of litigation often has a broader political concern to protect the public interest (even where cases are framed as the protection of private rights). They can also be a mechanism for making cross-border litigation viable and thus feeds into the globalization wave. Such mechanisms need to be adapted to the new consumer litigation climate by incorporating them into the new ADR procedures, for otherwise one could have the situation where the legal system had developed the means to represent the consumer collective interest at the very time these sorts of claims were being litigated outside the court system.

This section covers both the collective litigation of individual claims for damages and the use of actions to settle points of dispute in a prospective manner. One of the problems in this area is to categorise the many different types of collective action available. It is possible, for instance, to distinguish between regimes where the litigation in theory remains under the control of private parties (which we label private interest collective litigation) and where some third party takes control such as a public body or NGO like a consumer organization (public interest collective litigation). At the heart of many of the debates in this area is the question of whether there is a collective consumer interest over and above the sum of the individual claims. We think there certainly is, at least to the extent of ensuring the law can regulate market failures where individuals may not have adequate incentives to act against wrongdoing.

It is possible to see the large-scale personal injury problem as falling into the private interest collective action model and other consumer claims falling into the public interest category. The private interest collective action procedure could then be seen as having less of a political dimension. Instead, it could be viewed as a means of permitting access to the courts to those whose interest

would not otherwise be represented and as a means of increasing efficiency by reducing costs and helping the courts manage a workload which otherwise might threaten to overwhelm the court system. However, the position is not so black and white. Some large-scale personal injury cases certainly have a political agenda. The tobacco litigation in the US is one such example. The Agent Orange case is another good example where the litigation involved more than the sum of its individual parts, for in addition to compensation many of the claimants sought to shame the Government for the way they had treated Vietnam veterans.⁹⁵ On the other hand, there are some examples of public bodies and consumer groups being able to assist individuals recover damages.⁹⁶

Nevertheless, private action collective actions for large amounts, such as large-scale personal injury (and to some extent financial service) claims, often raise quite different issues from the public interest collective action which is the focus of our concern. The debate concerning private interest collective actions often concerns the question of whether claimants grouping together to press claims for large amounts of money is an unfair threat to defendants. The debates tend to center around whether individual assessments of causation and damages dominate the common issues to such an extent that it is pointless to bring a collective action. Defendants have argued that the system is wrong to force them to expend a lot of resources defending generic issues without testing the underlying strength of the particular cases at hand.⁹⁷

However, if, what is being considered in a collective action is a point of principle removed for the issue of compensation, then one might overcome these objections. We shall see that there is a modern trend to grant standing (especially within the EC) to consumer groups and public bodies charged with protecting consumers to seek injunctions in cases involving matters such as unfair terms, advertising and trade practices. Indeed, this use of the class action as a form of legislative adjudication is more in keeping with the historical origins of the representative action in common law as a way of defining the rules that governed feudal relations.⁹⁸ For some, the modern notion of the class action for damages sits uneasily in a legal system which requires that individuals satisfy all elements of their claim.⁹⁹ Although such objections seem to be aimed at the personal injury class action, similar sentiments seem to underpin those who argue that the line should be drawn at collective injunctions to protect the consumer interest and that damages should not be available in such cases. However, we believe a case can be made out for damages to be

95. PETER H. SCHUCK, *AGENT ORANGE ON TRIAL* (1987).

96. See The Australian Consumer and Competition Commission, *supra* note 9.

97. See CRISTOPHER HODGES, *MULTI-PARTY ACTIONS*, (2001).

98. Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 6 (1977).

99. H.P. Glenn, *The Dilemma of Class Action Reform*, 6 OXFORD J. LEGAL STUD. 262 (1986).

recovered in collective actions involving small scale but widely disseminated consumer detriment in order to ensure there is no unjust enrichment (although the manner of distributing the compensation may involve innovative techniques rather than simply paying sums over to individuals). Thus a role remains for private interest collective action procedures in protecting the consumer interest. The problem is not so evident where large amounts are at stake, as in these cases consumers can often obtain legal assistance under contingency or conditional fee arrangements. The challenge is to find ways where consumers who have suffered small amounts of detriment individually, can group together to make litigation a viable option. Indeed this underlines our central argument that consumer litigation needs more than modification of existing principles, it needs new principles structured to respond to the needs of consumers.

XIV. PRIVATE INTEREST COLLECTIVE ACTION PROCEDURES

Defining a private interest collective action procedure is a difficult task. There are at least three models for how the courts can handle claims brought by large numbers of consumers - the test case approach, the representative action and a dedicated class or group action procedure.

XV. TEST CASES

The traditional way would be for lawyers to bring test cases and for claims to be settled in the wake of the test cases. The problem with such an approach for claimants is that it does not permit them to benefit fully from the advantages that should be available if many consumers have similar claims. These include economies of scale; sharing of legal and expert costs and potential liability for the other sides' costs (at least in a system where the loser pays rule applies); demonstrating the full impact of the defendant's conduct and novel opportunities for fashioning appropriate remedies. From the defendant's perspective it does not produce the desired finality to such claims as new claims can be lodged so long as they fall within limitation periods. The courts also do not have the necessary control over such actions so as to reduce the impact of such mass claims on the machinery of justice.

XVI. REPRESENTATIVE ACTION

Where claims are similar a representative action has traditionally been possible in some common law systems. In England such actions had initially been thwarted by the rule that they were not available for damage claims as each case was considered to be unique. In England, this particular restriction has now been overcome and indeed even before the development of a group litigation order there was a greater willingness to adapt procedures to group

litigation.¹⁰⁰ The strictures of the procedure meant it never really functioned well, however, in some common law countries like Canada. In Australia the representative action has also proven to be less malleable, despite some good intentions. For instance, the New South Wales Court of Appeal in *Carnie v. Esanda Finance Corp.*, a case involving a challenge to interest charged, had first rejected attempts to use a representative action as each credit transaction was viewed as discrete and not a series of transactions.¹⁰¹ The High Court of Australia took a more liberal approach admitting the approach in principle,¹⁰² but when the matter was remitted back to Mr. Justice Young, his order requiring the parties to give notice to all other parties made the action impracticable.¹⁰³ Such a course of action may have been necessary for the defendants had adopted the divisive tactic of only seeking interest against those who were a party to the proceedings, but this only underlines the need for a more sophisticated procedure than the representative action.

The approach in Victoria was to introduce a new representative action on a statutory basis.¹⁰⁴ However, the judiciary remained resistant. In *Marino v. Esanda Ltd.*,¹⁰⁵ they interpreted the rules restrictively in the face of the clear legislative intent and held a representative action was not appropriate as the borrowers had separate contracts.

In 1986 a new representative action was introduced by ss 34-35 of the Supreme Court Act. This was essentially an opt-in scheme available where three or more persons have the right to the same or essentially the same relief and some common question of law or fact would arise irrespective of whether the claims arose out of the same transaction or series of transactions. Again the judges were not sympathetic. In *Bellotti v. Zentahope Pty Ltd.*, they criticized the brevity of the rule describing it as “an attempt to break a butterfly upon a wheel: the gear is ill-fitted to the task, raising more problems than it can conveniently bear, yet offering greater torment than the subject deserves”¹⁰⁶ and suggested there were so many ambiguities that virtually no case could be brought under it and that joinder provisions were a better way forward. The analogy with joinder provisions is perhaps appropriate to some extent under an opt-in procedure and the opt-out nature of most class action procedures serves

100. *Horrocks v. Ford Motor Co.*, TIMES (London), Feb. 15, 1990; See generally Howells & James, *supra* note 21; H. Koch & A. Willingmann, GROSSSCHADEN: RECHTLICHE UND ALTERNATIVE REGULIERUNGSSTRATEGIEN IM IN-UND AUSLAND-COMPLEX DAMAGES, (1998).

101. 29 N.S.W.L.R. 382 (1992).

102. *Carnie v. Esanda Finance Corp.*, 127 A.L.R.76 (1995).

103. (1996) ASC 56-336.

104. S. 62(1C).

105. 1986 V.R. 735.

106. 1992 BC9203164 3474 at 19.

to distinguish them from representative actions. Although there is no clear borderline between the two types of private interest collective action procedures.

The criticism of the brevity of the rules touches on a sensitive issue. Detailed rules undoubtedly promote certainty, which is an element which is highly sought after in most legal systems. On the other hand, it also reduces flexibility. We shall see in the next section the contrast between the United States class action and the United Kingdom group litigation order. The United States class action has strict criteria, but relatively established pathways once the gateway is opened. By contrast the United Kingdom system has laxer entry criteria, but then leaves the judge with a great deal of discretion as to how far and for what aspects of the litigation he departs from the model adopted for individual redress.

XVII. CLASS ACTIONS

The class action is a prime example of Cappelletti's second organizational wave, where the legal system adapted to the changes needs by developing new organizational structures. The United States class action procedure found in rule 23 of the Federal Rules of Civil Procedure, and mirrored in each United States state, is the most famous example. However, similar models have also been developed in Canada in Ontario, British Columbia¹⁰⁷ and even the civil law jurisdiction of Quebec.¹⁰⁸ Australia also has an effective class action procedure at the federal level as well as a less well functioning scheme in South Australia with reform being discussed in other states. The United Kingdom now has the Group Litigation Order (GLO) procedure.¹⁰⁹ Civil law countries have generally been more conservative in their procedural reform, but we have seen that Quebec has a class action procedure and France has some mechanisms which seek the same results, but in a French way through using consumer associations as the bodies responsible for developing group actions.

Traditionally, following the United States model, class actions have required certification. This can be a very important stage in litigation for the viability of the claim may depend upon whether the court accepts to hear them as class actions. There are, however, some recent trends to make certification less crucial. The Australian Federal procedure for instance has no certification stage and the making of a GLO in the United Kingdom is less like an all or nothing step. Nevertheless most systems have some requirements before such a process is permitted.

107. J. Prestage & G. McKee, 'Class Actions in the Common Law Provinces of Canada' in *Multi-Party Actions*, C. Hodges (ed.).

108. *See* an Act Respecting the Class Action, Chapter R-2.1.

109. R. CIV. P. 19(11), 48; *See generally* M. MILDRED, *GROUP ACTIONS IN THE LAW OF PRODUCT LIABILITY*, (2000).

Some systems specify a minimum number of parties. The United States requires the class be so numerous as to make joinder impracticable, whilst the Australian Federal procedure requires seven. In Ontario and British Columbia, two suffice to form a class. The United Kingdom's GLO is silent on this issue. In practice this is not as crucial as the test for determining whether a class action is desirable.

The United States has three criteria for class actions to cover different situations. Where damages are being claimed, the issue is usually framed as whether "the questions of law or fact common to the class as a whole predominate over any questions affecting only individual members and that the class action is superior to other available methods for the fair and efficient adjudication of the controversy."¹¹⁰ In other jurisdictions the test is less strict. In Ontario and British Columbia for instance, the claims must raise common (but not necessarily identical issues) and be the preferable procedure for resolving the common issues, not necessarily all the issues. In the Australian Federal procedure, the claim must simply arise out of the same, similar or related circumstances and there must be a common question of law or fact arising with respect to all the claims. The United Kingdom's GLO is the most flexible as it is simply a form of case management and can apply to claims which give rise to common or related issues of fact or law.

In the United States, there have been some high profile cases where rule 23 (b)(3) has been used for mass tort cases, such as the recent tobacco case of Engle,¹¹¹ where a state wide class action against tobacco companies resulted in a \$144 billion award of punitive damages. Indeed, in an asbestos case, certification was upheld as it was seen to be the best way to conclude litigation, for the court said "there may be cases in which class resolution of one issue or a small group of them will so advance the litigation that they may be fairly said to predominate."¹¹² But the majority view is that "The ill-advised deployment of the class action technique imposes a relatively cumbersome format on largely personal disputes, while achieving very little, if any, gain in efficiency and economy."¹¹³ Also, the flexible remedy regime which is a hallmark of the United States system is more suited to smaller consumer claims where aggregate damages make more sense than in litigation involving significant individual damages.

The United States use of class actions to remedy mass small scale consumer abuses is worth dwelling on for one characteristic of the collective

110. FED. R. CIV. P. 23(b)(3).

111. This award was made in Dade County on July 14, 2000.

112. *In re School Asbestos Litigation*, 789 F.2d 996 (3rd Cir. 1986).

113. *Pasternak v. The Upjohn Co.*, 92 CV 5987, 1994 U.S. Dist. LEXIS 21078 (E.D.N.Y. 1994); *see also Amchem Prod. Inc. v. Windsor*, 117 S. Ct. 2231 (1997).

action elsewhere is that in its private interest version it has predominantly been used for personal injury litigation, rather than this type of mass small scale consumer problem. One sentiment driving the Americans is undoubtedly the notion of access to justice. This was eloquently expressed by Judge Weinstein who thought: "this matter touches on the credibility of our judicial system. Either we are committed to make reasonable efforts to provide a forum for the adjudication of disputes involving our citizens - including...consumers who overpay for products because of anti-trust violations.. -or we are not."¹¹⁴ Part of the explanation for the importance of this form of legal action in the United States is revealed in the next quote which well illustrates the role of the class action in the United States as not merely a means to provide individual justice but also as a method of controlling business behavior in the absence of public forms of control:

to consumerists, the consumer class action is an inviting procedural device to cope with frauds causing small damages to large groups. The slight loss to the individual, when aggregates in the coffers of the wrongdoer, results in gains which are both handsome and tempting. The alternatives to the class action - private suits or government actions - have so often been found wanting in controlling consumer frauds that not even the ardent critics of class actions seriously contend that they are truly effective. The consumer class action, when brought by those who have no other avenue of legal redress, provides restitution to the injured, and deterrence of the wrongdoer.¹¹⁵

In other systems a similar function may be played by public law enforcement or action by consumer organizations. The distinguishing characteristic of the United States approach is that it can deliver damages to individuals and fully recover from businesses the profits they made. There is a marked reluctance in other systems to provide compensation based on such mass small-scale widely disbursed damage claims. There is also less incentive for lawyers to become involved, for unlike in the United States, there is rarely the functional equivalents of contingent fees and special statutory provisions concerning recovery of attorney fees in consumer protection statutes. However, a criticism of these consumer class actions in the United States is that very few consumers actually recover meaningful compensation. The criticism is that in return for say a discount voucher as compensation, lawyers often settle the cases

114. Excerpt from a Symposium before the Judicial Conference of the Fifth Circuit, quoted in a National Consumer Law Centre Publication (1973) *FED. R. CIV. P.* 58, 299, 305.

115. Jonathan Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 *S. CAL. L. REV.* 3 (1974).

on terms where the amount of lawyer's fees recovered from the defendant is the prime bargaining issue.

The United States National Consumer Law Center has advised lawyers to consider bringing class actions under Rule 23(b)(2), as this usually removes the need for notice until the central liability issues have been settled. This authorizes a class action where "The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." However, as this again involves no damages flowing to the injured parties the outcome for most consumers may not be too different under the United States procedure than under other systems depending more upon public enforcement.

A significant differentiating feature is whether class action procedures are of the opt-in or opt-out variety. Closely connected to this is the issue of notice, which is clearly most crucial in an opt-out system which has the capacity to bind individuals, although they may never have taken part in the proceedings. Equally the steps required to give notice are crucial for if they are too onerous they may make the case impractical to run. Most class action procedures are differentiated from representative actions by being opt-out in nature. The United Kingdom GLO is different in this respect for it only covers claims that have been entered on to the group register i.e. it is an opt-in scheme.

Under most schemes the judge is given wide discretion as to the appropriate form of notice. Ontario has the innovative feature that notification costs can be funded through the Class Proceedings Fund (see below). For a personal injury claim, the preference for a representative action style opt-in procedure or a class action opt-out procedure is finely balanced. Given the amounts at stake it may be thought unfair to place the conduct of someone's claim in the hands of a third party without their express permission. By contrast, where small claims are involved individuals are likely to suffer little by having the action taken on their behalf and indeed the only likely alternative is that the case does not get litigated at all. As the point of principle is decided by an independent arbiter, the consumer can only win by the proper development of the law and any possible compensation going either to him directly or cy-pressed to activities that benefit him indirectly as a consumer.

Funding for class actions in the United States is uncomplicated. Lawyers work on contingent fees and there is usually no liability for the other party's costs, even if the case is lost. That is not to say that the level of such fees should not be a proper topic for debate, taking as they do usually one third of the damages. We have already noted the criticism that in many consumer class actions only the lawyers gain much financially. In most countries funding is more problematic. Indeed, funding is the most problematic aspect of collective

litigation.¹¹⁶ Although class actions are normally more cost effective than individual actions, they can still be expensive to run. There is a general drift towards contingent fees, although a reluctance to replicate completely the United States' system. In the United Kingdom for instance, successful lawyers can obtain an uplift of up to 100 percent of their normal fee and in Ontario there is a non-percentage contingent fee based on the lawyer's hourly rate, number of hours worked and a multiplier.

The more serious problem however is to deal with the liability to the other party for their costs if the case is unsuccessful in full or in part. In the Australian Federal and Ontario procedure the representative is personally liable (although he may have an agreement with those he represents regarding cost sharing), whereas the United Kingdom approach is for the costs to be borne by all parties represented. This rule was problematic when confirmed by the courts.¹¹⁷ It disturbed the practice of selecting legally aided plaintiffs against whom costs were not awarded as representatives in test cases.

The idea of waiving the loser pays rule fees is appropriate in class actions. This is especially so as far as low value consumer claims are concerned, for one can readily understand why few individuals would find it beneficial to risk costs liability for small individual personal gain.

Ontario has adopted a novel approach to address this issue. Not only is the representative not to be liable in test cases where a novel point of law is raised or where a matter of public interest was involved; but also where a plaintiff has received assistance from the Class Proceedings Fund then the Fund will be liable rather than the representative. For this reason, funding from the Fund can be crucial despite the fact that it only covers disbursements and not lawyer's fees.¹¹⁸ In Quebec, a government agency (the Fonds) provides assistance for both disbursements and lawyer's fees, and the problem of the other sides' costs is now covered by a rule that the claim is treated as one for a modest amount for which only moderate costs are recoverable.

In Hong Kong, a loan from the state lottery was used to establish a scheme which meets the legal expenses of litigants in return for a percentage of damages. It seems clear that if class actions are to work, at least outside the realm of personal injury litigation, then novel forms of funding and liability for costs need to be addressed. This is another example of how consumer litigation challenges the legal system to find novel solutions.

116. Klaus Viitanen, *The Crisis of the Welfare State, Privatisation and Consumers' Access to Justice*, in FROM DISSONANCE TO SENSE: WELFARE STATE EXPECTATIONS, PRIVATIZATION AND PRIVATE LAW (1999).

117. *Allocating Liabilities in Open action, Davies v. Eli Lilly and Co.*, TIMES (London), May 11, 1987.

118. Ontario Law Commission: *Report on Class Actions* (1982) (explaining that the commission had proposed that the loser pays rule not apply in class actions)

Where class actions are simply used as an efficient means for processing individual claims then individual assessment of damages may be appropriate. However, even in personal injury cases there are examples of class actions giving rise to novel solutions which better reflect the collective dimension of the problem. The provision in the Agent Orange settlement providing for part of the damages to be used to improve Veteran healthcare is one example. In small-scale consumer claims, it may sometimes be possible to award individualized compensation. For instance, if a utility charges an unlawful amount it could be ordered to reimburse that amount to all its customers. It may be more difficult to see how a taxi company that overcharged its customers could trace them to effect repayment. However, this novel problem was overcome in the New York class action case of *Daar v. Yellow Cab Co.*,¹¹⁹ where the cab drivers were ordered to undercharge for a period so that the unlawful profits were returned to the customers. Of course this was rough and ready in the sense that not all customers would be compensated to the same degree, depending on their cab hiring habits during the two periods, but unjust enrichment was avoided and some form of compensation received by those who used New York cabs regularly. Any more exact distribution of damages would have been impractical. Most class action procedures make provision for the award of aggregate damages so long as some sound basis for that assessment can be discerned. The United Kingdom is out of line in this respect, but even here settlements can have cy-pres characteristics. For instance, Rover paid £1M for car research to the Consumers' Association to compensate for breach of competition laws.¹²⁰ Once again consumer disputes require reconsideration of existing principles.

The payment of damages to consumer associations in appropriate cases might be a way forward for overcoming the problem of providing incentives for them to bring small consumer claims. As Olsen well demonstrates, there is every reason why individuals will not follow Ihering's call to invoke the law in the general interest.¹²¹ The United States' solution is to provide this incentive to private lawyers through the lure of attractive fees. In China, the peasant Wang Hai is using the laws on exemplary damage for counterfeiting as the basis for a nice income generation scheme based on uncovering counterfeit goods.¹²² However, in many cultures there seem something distasteful about leaving recovery to such private enterprise initiatives. This is not to say that the role of individual litigation in developing good standards should be underestimated.

119. See 63 Cal. Rptr. 724 (Cal. 1967).

120. David Nicholson-Lord, *Rover 'Pays' 1m Pounds Compensation*, THE INDEPENDENT (London), Nov. 17, 1993, at 2.

121. M. OLSEN, THE LOGIC OF COLLECTIVE ACTION, (1965).

122. M. Ip, "An Update on the 'Wang Hai' Phenomenon" (2000) 8 Consumer Law Journal 71.

Indeed, one sometimes wonders whether the energies put into obtaining standing and lobbying for new procedures by consumer organizations might not be more effectively spent in litigating test cases. However, such a strategy requires resources, often from the public purse, which are increasingly scarce.

XVIII. LEGAL AID

Public funding of lawyers is on the retreat. The one time fairly extensive United Kingdom legal aid system is now in decline with lawyers being looked to take cases on a conditional fee basis under which they can claim a success fee of up to 100 percent if they win depending upon the risk involved. To some extent, we do not regret some aspects of the decline of Cappelli's first economic wave for in many respects lawyers rather than litigants or society seemed to be the main beneficiaries of legal aid. One of the main stimulants for reform in the United Kingdom was the benzodiazepine cases where £33 M of public money was spent on a product liability action that never got to court. However, there is a tendency to throw the baby out with the bath water, and public funding needs to be more available than it is for high-risk cases that are unsuitable for conditional fees. Also, there is a need for a more developed system of legal advice to consumers than exists in most countries.

One interesting model is the New South Wales Legal Aid Commission, which although with a far smaller budget than their counterparts in the United Kingdom, seems to have achieved some notable successes by retaining in house lawyers to work on cases in areas prioritized by the Commission.¹²³ This shows that Capelletti's economic wave still has some life left in it although the funding of consumer litigation from the public purse may need to be rethought.

Indeed it is noticeable that in Australia there is a lot of case law (at least in contrast to the United Kingdom) on consumer credit. This seems to be due to the activity of specialist law centers for financial service funded out of cy-pres type settlements where creditors have failed to comply with disclosure requirements and, as a result, agreed to pay money into a financial counseling trust fund. This is interesting and could be the possible basis for a holy cycle, whereby such cy-pres arrangements provide an incentive for consumer organizations to bring actions to protect the consumer interest and then use the profits to bring further actions and thereby effectively police the market at the expense of the market.

XIX. PUBLIC AUTHORITIES

One alternative to private initiative class actions is the use of public authorities. The faith in public authorities to regulate the market place varies

123. Ben Slade, *Not Enough Lawyers*, 36 LAW & SOC'Y J. 58 (1998).

from culture to culture. It is probably at its highest in Scandinavia where the Consumer Ombudsmen play an important role, and at its lowest in the United States where citizens distrust the power of Government to control powerful business interests,¹²⁴ and in developing countries where resources are too scarce to permit effective enforcement. However, public authorities are likely to place less emphasis on providing individuals with compensation than with efforts to protect the general public interest. It is true that in some countries criminal prosecutions can be an important means of providing consumers with the means to compensation. For instance, in France the action civile allows the criminal courts to award compensation to those injured by the breach of the law. Similar rules allowed the victims of the Colza cooking oil affair in Spain to recover. In other countries, especially in S. America, the Attorney Generals help consumers recover damages as well as police the criminal laws. The United Kingdom courts do have powers to award compensation in such situations under s. 35 of the Power of Criminal Courts Act 1973, but these powers are rarely utilized to their full extent and more generally public authorities do not see it as their function to expend resources in providing compensation.

The Australian Consumer and Competition Commission has a novel power to intervene in assisting product liability victims. This has been little used as private practice lawyers are quick to take up the most likely cases and there is no provision for similar powers where they are most needed, in claims of modest value.

XX. PUBLIC INTEREST COLLECTIVE LITIGATION

As public bodies become involved in the litigation of claims on behalf of individuals, we see that the line between public and private interest litigation is not distinct. We will however now turn our attention to ways in which such bodies act with the predominant purpose of improving consumer welfare generally, rather than recovering damages for consumers.

XXI. CONSUMER ORGANIZATIONS

Particularly in France and Germany, consumer organizations have a tradition of using litigation to promote the consumer interest. However, especially in Germany consumer organizations (Verbraucher Zentrale¹²⁵ in each Land and a central Verbraucher Schutz Verein) should not be viewed in the same light as the organic grassroots organizations that exist in most of the common law world. They are part of the corporatist state structure being funded

124. Even there, there is some good work being done by bodies such as the Federal Trade Commission, the Consumer Product Safety Commission, and the State Attorney Generals.

125. Not all are equally active in using their powers.

by the state and perform an important structural role in market surveillance. In Germany the consumer organizations main powers have traditionally been to challenge unfair trade practices under the Law Against Unfair Competition 1965, and in more recent times unfair contract terms under the Law on Standard Contract Terms 1976, as amended. The consumer organizations typically negotiate with traders and obtain their agreement to desist in the practice or failing that seek injunctions. If these are breached, fines are payable but these go to the court. It has from time to time been proposed that consumer groups be allowed to recover damages, but this has not come to fruition.¹²⁶

In France, the consumer organizations have also had this market surveillance role, but whilst some powers merely provide for injunctive relief (for example in 1988 they were given the power to challenge unfair terms)¹²⁷ the majority also permit consumer organizations to become involved in claims for damages. French consumer organizations were first given the right to bring actions in the collective interest by art. 46 of the Royer Law of 27 December 1973.¹²⁸ A decision of the Court de Cassation in 1985 made it clear that this only applied where there was an action civile in the strict sense i.e. there must have been a breach of the criminal law. The offence must have harmed, directly or indirectly, the collective interest of consumers. This is an interesting principle for the consumer organizations are seen as representing the collective consumer interest. This has been described by Calais-Auloy and Steinmetz as being half-way between the individual interest of consumers and the general interest of citizens.¹²⁹ The former can be protected by the individuals themselves, the latter by the *ministère public*. By contrast consumer groups are best placed to protect the collective consumer interest. Consumer groups can seek injunctions, damages or publicity for the judgment at the defendant's expense.

XXII. DAMAGES FOR COLLECTIVE HARM

The nature of damages for harm to the collective interest are difficult to discern with certainty. Calais-Auloy and Steinmetz suggests it is to compensate the consumer organizations for their efforts. However, they also comment that they might be viewed as private fines and this fits best with the belief they form part of a deterrence strategy.¹³⁰ They note that often the judges fail to confront the issue and only award a symbolic franc. However the consumer

126. R. Tur, *Litigation and the Consumer Interest: The Class Action and Beyond*, 2 LEGAL STUD. 135, 165-166 (1982).

127. See C. CON. art. 421-6 (Fr.)

128. *Id.* (now the Consumer Code).

129. J. CALAIS-AULOY & F. STEINMETZ, *DROIT DE LA CONSOMMATION*, (1996).

130. S. CARVAL, *LA RESPONSABILITE CIVILE DANS SA FONCTION DE PEINE PRIVEE*, (1995).

organization, Que Choisir in their booklet, *20 ans d'action civile*, cite a decision of the Court of Appeal of Paris of 11 December 1995 which states that there should be full compensation and not merely a symbolic amount. How should this be calculated? One approach might be for it to cover damages that cannot be compensated to individuals for practical/logistical reasons. A more satisfying theoretical justification might be one based on the harm to consumer confidence in the market caused by misleading advertising or the sale of dangerous products. Thus, whilst France has introduced the interesting concept of damage to the collective consumer interest as something distinct from the accumulation of individual claims, the implications of this new principle have yet to be worked out. This goes beyond our view of the collective interest being to recover damages that otherwise would not have been recovered by individual proceedings. It is an interesting concept which can perhaps be invoked when the amount of individual damages is difficult to assess. It might be possible to argue that poor business practices actually cause more than the sum of individual losses because of the impact on market confidence in general. Thus, harm for the collective interest is closely linked to a fine. Payment to a consumer organization, in addition to individual losses, may provide the incentive for consumer organizations to bring such cases, but we suspect there will be strong resistance to such an approach where full compensation is also awarded. It is more likely that awards to consumer organizations will be more easily accepted if they are viewed as part of the compensatory package.

XXIII. CONSUMER GROUPS AND INDIVIDUAL LITIGATION

Consumer groups in France can also become a party to individual litigation,¹³¹ but this power is severely limited and adds little to the consumer's groups power simply to assist consumers. As actual harm is required, it cannot be used as a mechanism to prevent harm occurring in the first place. Such instances show how blurred the distinction between public and private interest collective litigation can be.

The French Consumer Law Reform Commission had proposed a class action procedure based on the N. American model, but having the French characteristic that the action would have been brought by a consumer organization.¹³² The organization would have been able to bring an action on the question of liability in principle without even informing the consumers they claimed to represent. Once the decision was handed down publicity would be given to it, and consumers could decide whether to benefit from the decision or take their own action. In fact, the French legislator adopted a half-way house

131. C. CON. art. 421-7 (Fr.)

132. COMMISSION DE REFONTE: PROPOSITION POUR UN CODE DE LA CONSOMMATION, (1990)

in its Neietz law of 18 January 1992, which was supplemented by a decree of 11 December 1992.¹³³ The right of action arises where several identified individual consumers suffer harm from the same cause as the result of the act of the same trader. Thus, it provides a mechanism for them to represent the sum of individual interests, rather than simply the collective interest which is protected by the action civile. It is broader than the action civile in that it can concern both an action civile or a civil law claim. This procedure is unlikely to have a great impact. In part this is because of the need to identify victims and have them mandate the organization to represent them. This is hampered by the restriction that only the written press may be used, for fear that using audio-visual media might unfairly tarnish a company's image before it has been found to have done wrong. More fundamentally, one might question why a consumer organization would wish to involve itself in such a procedure. It can in any event assist consumers to bring actions and this new procedure does not entitle it to claim damages in its own right. Under this procedure consumer organizations simply expose themselves to liabilities in terms of claims by consumers if they do not exercise their mandate properly and by producers if they damage their reputations unfairly. They may also be held liable for the producers' costs if the action fails.

XXIV. INJUNCTIONS

The notion of collective injunction actions has clearly taken root in Europe driven by EC law. Starting with the misleading advertisement directive,¹³⁴ successive consumer protection directives included provision for injunction procedures. Drawing upon the diverse traditions within the Community these provided standing to either public bodies whose task it was to protect consumers or consumer organizations having the same function. Sometimes these were clearly alternatives,¹³⁵ at other times it was arguable that the wording of the directives required member states to give standing to consumer groups as well as public authorities. This development culminated in a Consumer Injunctions Directive,¹³⁶ to which we shall return when considering cross-border regulation. Here it is clear member states have the choice of whether standing be granted to public authorities or consumer organizations or both.¹³⁷ Granting it to both is becoming the standard preference of legislators, although actual practice remains linked to national traditions. The Directive's policy is aimed at the

133. See C. CON. art. 422 (Fr.)

134. Council Directive 84/450, 1984 O.J. (L 250) 17-20.

135. As in misleading advertising directive.

136. Council Directive 98/27, art. 3, 1998 O.J. (L 166) 51, 52.

137. *Id.*

protection of the collective interests of consumers.¹³⁸ Its policy is not complete as it does not cover all areas of consumer law - safety laws are one notable omission - and of course it only provides for injunctive relief not damages.

The impact of this new European policy on the United Kingdom is interesting. The United Kingdom has little history of consumer organizations having standing to enforce consumer laws and indeed the Control of Misleading Advertisement Regulations (implementing the EC Directive) only gave such power to the Director General of Fair Trading.¹³⁹ The first implementation of the Unfair Terms in Consumer Contracts Regulations similarly restricted standing to the Director General. However the Consumers Association challenged this in the European courts and the incoming Labour Government agreed to settle the case by granting standing to the Consumers' Association and a host of other bodies.¹⁴⁰ A similar approach has been adopted when implementing of the Consumer Injunctions Directive.¹⁴¹ It is not yet clear whether this represents a change of culture. One suspects that so long as the public authorities make a good fist of market surveillance, the private consumer organizations will be happy not to invest their resources in court battles.

Indeed, the notion of representative action was taken to heart by the Labour Government who set up a committee to look into how such a procedure should work not only in the consumer context, but also in any setting where a collective interest was at stake. Whilst the notion of representative actions for injunctions and declaratory relief were accepted in principle,¹⁴² there is more hesitation over including damage claims, although interesting this possibility was not excluded in the final report.¹⁴³ However, if consumer organizations are to participate in market surveillance, they need some encouragement, possibly in the form of allowing the cy-presing at least part of the damages or allowing the recovery of legal fees. Under the current situation all they have is the threat of costs liability against them.

XXV. SOCIAL ACTION LITIGATION

Before concluding this survey of collective redress mechanism, it is worth mentioning the Indian experience of Social Action Litigation.¹⁴⁴ This provides

138. *Id.* at art. 1.

139. The Control of Misleading Advertisements Regulations, No. 915 (1988) (Eng.).

140. *See now*, the Unfair Terms in Consumer Contracts Regulations, No. 2083 (1999) (Eng.).

141. DTI Consultation paper, Injunctions Directive Implementation of Directive 98/27 EC on Injunctions for the Protection of Consumers' interests, 19 (2000).

142. Although there remain some problems about bringing such actions before a private law right of action has accrued if damage is an element of the cause of action.

143. *See* LORD CHANCELLOR'S DEPT., REPRESENTATIVE CLAIMS: PROPOSED NEW PROCEDURES (2001).

144. D. Harland, *Collective Access to Justice-Some Perspectives from Asia and the Pacific*, 90

that where a person or class of person is unable to approach the Supreme Court by virtue of poverty, disability or their socially or economically disadvantaged position then any member of the public or a social action group acting bona fide can apply seeking judicial redress for the legal wrong or injury caused. The Court has been willing to act on a simple letter directed to the court and in some cases has taken over the proceedings, for example establishing a socio-legal commission to investigate the complaint. Although primarily aimed at instances of state repression and exploitation of disadvantaged groups, it has been used to further consumer concerns. Doubtless this model is the product of the particular socio-economic conditions prevailing in India, but it nevertheless serves to remind us of the need to give voice to the collective concerns of groups which might be ordinarily excluded from the legal process, including consumers.

XXVI. SUMMARY

Leaving to one side the special experience of India, we have a bleak picture of how consumers are protected as a collective so far as compensation procedures are concerned. Only in France and to some extent at the EC level by virtue of the Injunctions Directive, is the notion of collective interest recognized as a distinct legal category, but it is only in France and even there hesitantly that there is seen as a need to compensate for harm caused to the collective. It might be argued that the consumer class actions in the United States represent an attempt to provide compensation for small but widely dispersed losses that affect the consumer collective. The problem there is that the incentives to lawyers tend not to require them to extract the best compensation for consumers. Elsewhere the position with regard to public bodies and consumer organizations seeking injunctive and declaratory relief seems better, but the United States class action model where copied has almost exclusively been used for high ticket value cases and not for the mass, small, widely disbursed consumer claims. Indeed some systems seem to turn their face against such a use of the class action procedure: the Australian federal procedure contains a power to stop proceedings where the cost of distributing money would be excessive as the class is too large and individual amounts claimed are small.¹⁴⁵

One argument might be that there is not the same need for the regulatory role performed by private lawyers in United States class action cases in other Western countries, as in Europe and other common law countries, this function is performed by regulators and consumer groups. However, evidently there is a unmet need in these countries to deliver justice to consumers who have

CHULALNMGKORN L. REV. 126, 134-36 (1990).

145. S. 33M. Federal Court Of Australia Act 1976.

suffered small losses and to prevent traders being unjustly enriched. If this cannot be achieved directly by compensating consumers then attempts can be made to achieve this indirectly by cy-pres orders giving damages to bodies promoting the consumer interest.

However, it is undeniable that collective actions to protect the consumer interest is a dynamic area of law which one can expect to see develop in the future both as regards injunctive and declaratory relief and representative and class actions. However, we have already commented that a lot of consumer litigation takes place in the lowest level courts and in alternative dispute resolution forums. It is arguable that many class actions for small individual amounts are in reality large claims and do not belong in the small claims courts. However, such claims may have to be litigated there and indeed one could imagine localized problems affecting the residents of a particular area being best sorted out by the local small claims court. Yet some class action schemes, such as Ontario's, exclude small claims courts. This may be because there is a feeling that small claims courts cannot handle the complexity of a class action. By contrast, many ADR schemes are sophisticated enough to handle collective disputes, and some indeed actually do accept some collective disputes. Some individual complaints become, in effect, test cases where a decision in one case is enforced at least on behalf of all others who bring a complaint on the same terms, although not necessarily with respect to those consumers who have suffered but have not contacted the ADR institution.¹⁴⁶ These examples should be followed and publicized so that the waves for organizational and procedural reform Cappelli detected, converge rather than flow in separate directions. This is the sixth wave of integration that we want to see developed.

XXVII. GLOBALIZATION

Our fifth wave in consumer litigation: the globalization of consumer disputes, is perhaps the most talked about new wave in consumer access to justice. One might suspect sometimes that it is a phenomenon that is more talked about than real. For instance, a Eurobarometer survey found that only 2% of European consumers had a complaint about goods purchased overseas.¹⁴⁷ Given the internal market in Europe, one might expect this figure to be even less elsewhere in the globe. Of this 2%, 43% complained in person or by telephone to the seller, 36% did not react and only 6% consulted a lawyer. Interestingly,

146. Guy Dennis, *Borrowers In Line for Mortgage Payout*, SUNDAY TIMES (London), Aug. 26, 2001. (showing a recent example in the UK concerning a decision by the Banking Ombudsman against lenders who gave new customers a better deal on mortgage rates than existing customers, and that complaints have been upheld against several banks and building societies who adopted this practice, and the implication is that significant compensation will have to be paid to a large number of borrowers).

147. Les Européens et l'accès à la justice- Resultats significatifs de l'Eurobarometre 52.1.

the most popular choice for European consumers as a means of resolving disputes purchased abroad was a public consumer body. As we shall see this option is not on the Community's agenda.

Although still small in numbers, it is reasonable to predict that cross border consumer complaints will grow in significance. There are several factors giving rise to the globalization of consumer disputes. As the inexorable rise (at least before 11 September) in air traffic indicates the world's population is simply becoming more mobile. It is to be expected that consumers will not leave their passion for shopping at home and indeed will take advantage of local bargains and differential pricing. This phenomenon is being encouraged by regional free trade zones which not only remove taxation barriers, but (at least in the case of the EC) positively encourage the consumer to act as an active competitive dynamic within the internal market though the adoption of minimum consumer protection rules throughout the Community.

Obviously the development of e-commerce is going to be a major factor in the globalization of consumer disputes. Another dimension of the internet is that it has the ability to take the consumer away from even its regional bloc and allow him to contract anywhere in the globe and frequently in N. America!

The globalization of disputes also keys into many of the other waves we have identified. Most obvious is the link with procedural changes, for the distance between consumer and trader in global disputes makes the traditional courts even more impracticable as a forum and inevitably gives succor to the procedural wave and the trend towards ADR. However, it also gives impetus to the organizational wave, for as individuals become less able to resolve disputes across borders, so there is more need for collective solutions. Equally one might argue that new economic solutions need to be adopted as individuals who can afford to litigate at home, or can use self-help solutions within their own jurisdictions, are more vulnerable when faced with the additional cost and complexity of suing across borders. However, one sees little sign of there being a lot of money to assist consumers resolve cross border disputes. We will also suggest that if global mechanisms can be set up to assist consumers then this might indeed help enhance the regulatory role of consumer litigation, which we argue should be seen as an important element in modern redress regimes. Amongst the consequences of this will be the ability of global regulators to identify more easily bad practices in particular states and bring trading standards up to international norms.

XXVIII. PRIVATE INTERNATIONAL LAW

There have certainly been some attempts to make the traditional court based remedies responsive to consumer needs. This is evidenced by the rules of private international law. Within Europe, the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial

Matters¹⁴⁸ contained special consumer protection rules ensuring that in certain circumstances consumers could sue in their domestic courts and also only be sued there.¹⁴⁹ Similarly, the Rome Convention on the Law Applicable to Contractual Obligations 1980 provides for circumstances in which consumers cannot be deprived of the mandatory rules of their state.¹⁵⁰ These rules are currently being updated with the intention of making them part of EC law rather than merely Conventions that member states sign up to. This process has already been completed for jurisdictional issues and negotiations on choice of law matters are in progress.

The EC Regulation 44/2001 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters¹⁵¹ was adopted with an eye on the development of Internet shopping. Its provisions give consumers access to their domestic courts where:

the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

There is a certain ambiguity as to whether the provision covers sales made on both passive and interactive web-sites, but the general view is that this is a consumer friendly provision, as it seems to give consumers purchasing over the net the right to sue in their home jurisdiction. However, the reality is that few consumers will make use of it, because there are numerous practical obstacles which militate against consumers suing parties across borders.¹⁵² Also, it has been calculated that the average cost of suing across borders in the EU for a 2000 Ecu claim is 2500 Ecu, and the proceedings will take between 12 and 64 months depending on the country.¹⁵³ Allowing the consumer to sue in his own

148. See generally 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Jan. 1, 1998, 27 I.L.M. 1.

149. 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Jan. 1, 1998, art. 13-15, 27 I.L.M. 1.

150. Convention on the Law Applicable to Contractual Obligations, *opened for signature* June 19, 1980, 266 Europ. T.S. No. 1.

151. Council Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2000 O.J. (L 12) 1.

152. See generally Report by the European Consumer Law Group, *Jurisdiction and Applicable Law in Cross-Border Consumer Complaints- Socio-legal Remarks on an Ongoing Dilemma Concerning Effective Legal Protection for Consumer-Citizens in the European Union*, E.C.L.G. 157/98 (1998), available at: http://www.europa.eu.int/comm/consumers/policy/eclg/rep01_en.html (last visited October 12, 2002).

153. See Commission Communication to the Parliament, Council, Economic and Social Committee and Committee of the Regions Concerning the Action Plan on Consumer Access to Justice and the Settlement

courts alleviates the problem, but there remain significant practical problems for consumers when suing a party in another state.

There is another problem that the European rules on jurisdiction face as regards regulating the Internet and that is that they do not extend beyond Europe. In particular, they do not cover companies based in the United States. There are attempts to renegotiate the Hague Convention to deal with this issue, but these negotiations look like being prolonged and when agreement is finally reached it will be necessary for states to ratify the Convention. Indeed action to deal with the consumer problems associated with globalization is most evident within Europe, because the EC has both the need for such rules to promote its internal market and the political mechanisms to address the issue. One might hope that a body such as the OECD would take the lead in expanding these rules beyond the member states of the EC. However, despite some efforts at promoting guidelines for consumer protection and e-commerce, which raises issues of dispute resolution and redress, this has not taken concrete form to-date. Indeed in the field of product safety one sees the opposite phenomenon. The OECD's notification system on consumer safety matters has suffered from the development of binding notification procedures at the EC level.

XXIX. EUROPEAN INITIATIVES TO IMPROVE CROSS-BORDER CONSUMER REDRESS

Although access to justice issues have long been mentioned in consumer policy debates at the EC level the main impetus has been since the 1993 Green Paper on Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market.¹⁵⁴ We have already noted that it adopted a Resolution on the principles applicable to the bodies responsible for out-of court settlements of consumer disputes.¹⁵⁵ It has recently followed this up with a Recommendation on the principles for out of court bodies involved in the consensual resolution of consumer disputes.¹⁵⁶ Whilst the former covers third parties who propose or impose solutions, the latter deals with third parties who seek to find an agreement by common consent. Neither therefore covers company internal procedures. The intention is to give consumers confidence that these bodies are truly impartial, transparent, effective and fair. The guidelines by and large reflect good practice. Our main concern, as regards the

of Consumer Disputes in the Internal Market, COM(96)13 at 9.

154. Green Paper- Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market, COM(93)576 final.

155. Commission Recommendation on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes, 1998 O.J. (L 115) 31.

156. Commission Recommendation on the Principles for Out-of-Court Bodies Involved in the Consensual Resolution of Consumer Disputes, 2001 O.J. (L 109) 56.

impact of globalization is whether the obligation to comply with the Rome Convention requirement that in some circumstances the mandatory rules of the consumer's state should apply might not be too onerous for many ADR schemes that lack adequate legal resources.

At the same time as the 1998 Recommendation was issued, a consumer complaints form was produced. Interestingly, this had originally been intended as a means of making it easier for EC consumers to use the courts of other member states. This had to be abandoned as "[e]valuation [has shown] that use of the form as a legal instrument for simplifying seizure of the national courts is incompatible with the heterogeneity and rigidity of the procedural rules of the individual legal orders."¹⁵⁷ This is evidence that globalization of disputes will lead to increased use of ADR because of the inability of the traditional courts to adapt. Although interestingly Ireland has mooted the possibility of its small claims court system being available on-line,¹⁵⁸ there has generally been little movement in traditional courts to respond to the globalized nature of consumer disputes, despite the United Kingdom devoting a conference to this topic when it held the presidency of the EC in June 1998.

The complaints form guides the consumer to explain the nature of her problem and the remedy sought through a series of multiple choice and free text boxes. As the form is available in all the official languages, the use of multiple choice clearly circumvents some of the language problems, but does not remove them entirely as there is still some textual content required. The form is intended in the first instance for use in negotiations between consumer and trader, and if that fails, for facilitating the use of ADR procedures. Consumers may turn to consumer organizations to assist them, but such bodies are aware of their lack of expertise and the European Advisors Forum has sought to develop a protocol on how cross border disputes should be handled.¹⁵⁹ To assist consumers with disputes the Commission has set up thirteen European Consumer Advice Centres. These have expertise in advising consumers about cross-border consumer problems. However, these resources are obviously thinly spread and another example of the wane of the first wave of providing economic assistance to ensure consumers have legal redress. Mitchell has made envious comparisons with the Action for Single Market schemes which are located within ministries and therefore receive government backing. They investigate queries and complaints from business and can take up the matter

157. Towards Greater Efficiency in Obtaining and Enforcing Judgments in the EU, COM(97)609 at 14.

158. Comm. on Consumer Policy Report, Government and Private Sector Initiatives to Promote and Implement the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce, DST/CP (2000) 7 final at 9.

159. Samantha Mitchell, *Cross Border Disputes: To Sue or Not to Sue*, 9 CONSUMER POL'Y REV. 97, 101-102 (1999).

with the Commission or member states concerned, whereas the consumer centers merely offer advice.¹⁶⁰

The Commission has created a European Extra-Judicial Network (EEJ-NET), comprised of notified bodies which comply with its guidelines for ADR bodies and national clearing houses.¹⁶¹ A similar scheme (FIN-NET) is already up and running for financial services. Under EEJ-NET, the national clearing houses will be both a national contact point providing domestic consumers with information on ADR bodies in their jurisdiction, and also enabling European consumers to access ADR schemes in other countries by contacts with the clearing house in the supplier's state. It will also provide the consumer with assistance in formatting and filing his complaint, although it is unclear to what extent this covers assistance with translation costs.

In addition to its role as an information source and facilitator, it is also foreseen that the clearing houses will provide support for policy makers through its strategic role in monitoring and storing information about the level and nature of complaints. This is a good example of how the regulatory function of consumer litigation is being recognized.

The Commission has appreciated the need to enhance consumer access to justice, but the barriers to this are immense. Frequently, for instance, it comments upon the impossibility of interfering with national judicial procedures. Yet it is bravely trying to promote the cause of consumer access to justice. In its recent discussion document, *Ideas for a Consumer Policy Strategy*,¹⁶² it talks about the need to ensure access to justice for consumers "both individual (agreement on applicable law for contractual and non-contractual disputes, building on the approach for jurisdiction and enforcement of judgments, alternative dispute resolutions and small claims courts) and collectively (examining the potential of a mechanism for collective redress of consumers at EU level)."¹⁶³

XXX. INTERNET

Similar hopes concerning regulatory objectives are also being expressed for the global online dispute resolution (ODR rather than ADR!) bodies in the field of e-commerce. For instance, the American Bar Association's Task Force on E-Commerce and Dispute Resolution has suggested that as part of adhering to an ODR Trustmark scheme there should be an obligation on the online

160. *Id.* at 102.

161. Commission Working Document on the Creation of a European Extra-Judicial Network (EEJNET)

162. See *Ideas for a Consumer Policy Strategy*, http://europa.eu.int/comm/consumers/policy/intro02_en.pdf (last visited October 12, 2002).

163. *Id.*

dispute resolution provider and/or trustmark entity to notify the public authorities that have jurisdiction over the business activities of the particular merchant.¹⁶⁴ A lot could be said about the moves to create online dispute resolution schemes. It is clearly based on self-regulatory structures and a recognition that traditional court structures cannot deal with low value cross border disputes. However, equally there is also a recognition that consumers need to have confidence in these schemes and a range of private and public accreditation scheme are developing. The problem is to develop principles which offer a globally recognized standard for a global medium. There are some national standards, such as Trust UK, but these need to be part of an international framework. Unfortunately, as the issue becomes globalized so it becomes more difficult to agree standards and to ensure consumers have confidence in those standards. Much more could be said on this topic, but for present purposes it suffices to say that it is a clear example of the globalizing trend in consumer litigation and also clear evidence that this will lead to increased use of ADR.

XXXI. MAKING TRADERS ACCOUNTABLE ACROSS BORDERS

Of course as companies trade more and more across borders, there is a problem of how to hold them accountable for compliance with consumer protection laws. Indeed, the variety of consumer laws can be a headache even for a firm seeking to trade ethically. Failing harmonization, one way around this is for country of origin controls and systems of mutual recognition. These are indeed hallmarks of EC internal market law. However, regulators still find it harder to enforce laws in the global environment. There are some initiatives such as the 24/7 initiative by the Attorney Generals in the United States to ensure there is always someone available in every state to respond to urgent internet problems. There are also examples of consumer agencies around the world setting particular days aside to collaborate on seeking out Internet scams. However, such efforts appear to involve running to stand still against the welter of problems thrown up by the increased globalization of trade.

Once again the EC has developed a novel solution. It was apparent that there was a need to develop strategies to prevent companies from taking advantage of the fact that the internal market had not been matched by the development of an internal legal order. This was obvious when French companies targeted German consumers with misleading advertising. The German consumer organizations had no standing before the French courts and

164. *Draft Preliminary Report & Concept Paper*, 2001 A.B.A. ASS'N TASK FORCE ON E-COMMERCE & ALTERNATIVE DISP. RESOL.

the French authorities had no interest (in some countries the problem would be a lack of authority) to protect German consumers.¹⁶⁵

As previously described the Community had developed the notion of collective injunctions in several consumer law directives. This policy culminated in Directive 98/27/EC on injunctions for the protection of consumers' interests,¹⁶⁶ which gave it an internal market dimension. This Directive requires member states to notify bodies who can bring injunction actions to prevent the infringement of the laws implementing a list of directives found in its annex where this would harm the collective interest of consumers.¹⁶⁷ Although the Directive clearly offers the choice of these bodies being either independent public bodies or consumer organizations, or both,¹⁶⁸ in practice both sorts of body are given standing. Not only do these bodies have standing in domestic matters,¹⁶⁹ but they can also seek injunctions in other member states where the interests they protect are affected. Thus, a German consumer organization can seek an injunction before the French courts for misleading advertising aimed at German consumers, but emanating from France. Member states can introduce a requirement that the entity first consult with the defendant and/or a qualified entity within the state where the injunction is sought. This is again an instance of a regional rather than a global solution. It is of limited assistance when one of the parties is outside that region: Again, one approach may be to try to develop international agreements or bilateral agreements to take these principles further, but one may doubt how fast developments of this nature can take place. Nevertheless, this example serves to show how organizational changes in consumer litigation (in the form of collective injunctions) are made even more necessary because of the trend to globalization.

XXXII. CONCLUSIONS

Globalization enhances several of the trends that were becoming apparent in consumer litigation and concerns to address this phenomenon will underpin our thinking in the future. At the same time there is a need to remember most consumer disputes are still for small amounts and concern products and services purchased locally. Currently, there are few realistic avenues for redress for such claims. The only practical way of improving redress is through development of the organizational and procedural reform waves identified by Capelletti. These

165. Hans-W. Micklitz, *Cross-Border Consumer Conflicts- A French-German Experience*, 16 J. CONSUMER POL'Y 411 (1993).

166. Council Directive 98/27, art. 2-3, 1998 O.J. (L 166) 51.

167. Guidance has been provided on what amounts to collective interest, but this term remains undefined in the legislation.

168. Council Directive 98/27, art. 3, 1998 O.J. (L 166) 51.

169. Council Directive 98/27, art. 2, 1998 O.J. (L 166) 51.

will assist the local as well as the global consumer. Indeed, many local problems are likely to be found replicated in other parts of the globe and so the distinction should not be too strongly defined between the two types of consumer problem. The economic reform wave has certainly faltered. However, what is needed is new thinking on how limited public funds for consumer advice can best be used. How can consumer advice centers best be organized, how can litigation strategies be developed to best increase welfare? Part of this may be to appreciate the regulatory impact of litigation in both the court and ADR sectors. Above all, the legal system in the broadest sense must be viewed as a whole. Innovative solutions developed in the traditional legal system may have to be transplanted into the ADR sector if their benefits are to be realized to the full. We have seen decades of experimentation and innovation. This has also resulted in fragmentation in the procedures and avenues for consumer redress. Our final call is for the cross-fertilization of ideas and the integration of solutions. This has been an essay in comparative law, but our call is for the lessons of comparisons not to stop at national borders, but also for the various consumer redress mechanisms within national legal systems to learn from the experiences of one another.