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CMS Dispute Resolution Newsletter

Class Actions in Europe?

Consumer protection has long been an important objective of the European Commission. Whilst it initially focussed on improving the rights of the consumer throughout Europe, the focus would now appear to be shifting towards ways of enforcing such rights. The European Commission is currently looking at the introduction of class actions in Europe in the sectors of competition and consumer protection, even though it denies any plans to introduce such actions based on the US-model. The Commission goes to great lengths to avoid the term “class actions”, referring only to the somewhat mystifying term “collective redress”. Whilst no-one seriously expects to see jury trials and punitive damages in Europe, collective redress as currently envisaged by the European Commission would nonetheless incorporate a number of important elements from the US system of class actions that are currently unknown in many European countries. These include discovery methods for establishing evidence, the question of who can benefit from such action (opt-in or opt-out mechanisms), the introduction of contingency fees (“no win no fee”), and whether the losing party has to bear the cost of the proceedings and the opponent’s costs.

The developments of the last two years suggest that European companies can expect to see class action procedures in Europe within a few years. In March 2007 the European Commission published a Consumer Policy Strategy containing a policy statement on furthering consumer collective redress. In May 2008 the European Parliament passed a resolution calling on the Commission to present a *“coherent solution at European level, providing all consumers with access to collective redress mechanisms for the settlement of cross-border complaints”*. Under the aegis of the Directorate-General for Health and Consumers, the European Commission is therefore currently exploring consumer-protection mechanisms and experience in the Member States through a process of consultation and studies. The criteria which it is investigating are a clear indication that fundamental principles of the legal systems in Europe such as the “loser pays” principle are being called into question. The Commission intends to publish a communication on the subject of consumer redress in December 2008.

The deliberations of the Competition Directorate-General on collective redress for the victims of cartels already have significantly more substance. In April 2008 the European Commission published a White Paper containing detailed measures that are well developed. It is likely that the various deliberations on effective consumer protection will receive even more support in the context of the forthcoming European Parliament elections in 2009.

It is therefore high time that both European companies along with their in-house counsel and European defence counsel become involved in the debate at EU level and ensure that their views are heard. It is not a case of preventing the introduction of class actions in Europe. Rather, the prime objective should be to prevent the more notorious features of US-type class actions being imported to Europe and secondly to ensure that consumer protection is dovetailed into the procedural systems of Europe which have so far prevented the excesses of the US system. If the Commission intends to introduce US mechanisms of consumer protection it is essential that it balances this at least by the type of protective mechanisms which are inherent in the US system. It is a matter of great concern that the White Paper proposal grants courts the power to order parties or third parties to disclose relevant evidence (discovery US-style) without even mentioning that – unlike their counterparts in many European countries – in-house counsel in the US enjoy legal privilege. In Europe the extent of legal privilege which should be accorded in-house counsel continues to be an extremely contentious issue. The debate also needs to address the widespread European principle that the loser pays and the issue of contingency fees, which are forbidden in many European countries. Last, but by no means least, it is essential to consider the issue of electronic discovery, which can potentially cause the companies concerned immense costs.

It is therefore necessary to ensure that thorough research is carried out into collective redress mechanisms drawing on experience around the world in order to avoid the excesses and drawbacks of US-style class actions when developing such mechanisms for Europe.

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Recovery of costs and attorney's fees in Belgium

The principle according to which costs and attorney's fees could be recovered from a losing party was expressed, for the first time in Belgium, in a decision of the highest court of justice (the "Cour de Cassation") on 2 September 2004.

However, although this and subsequent decisions made it possible to define some aspects of this principle, a lot of questions and controversies still existed, notably in relation to the kind of procedures in which it was permitted to claim recovery of fees and costs, the amount which could be obtained, the evidence to be submitted and the different treatment which could arise between persons in different situations.

Accordingly, at the beginning of last year, the Belgian legislature finally intervened and adopted the Law of 21 April 2007 on the recovery of costs and attorney's fees. This Law was published in the Belgian Official Journal on 31 May 2007 and entered into force on 1 January 2008.

This new Law solves the question of recovery by increasing the amounts ("indemnité de procédure") that had previously been granted to cover (in theory) the legal costs incurred by the prevailing party in a legal procedure. Before the adoption of the new Law, these amounts were indeed very low (from EUR 30 to maximum EUR 500 depending on the kind of proceeding) and did not cover the actual costs and attorney's fees paid by a party in a proceeding. This is why the Cour de Cassation had previously ruled that the prevailing party could obtain the recovery of its costs and attorney's fees as an element of its prejudice, in addition to the very low amounts granted by the indemnity for legal costs referred to above.

The new amounts that can be granted by the judge as an indemnity for legal costs were determined by Royal Decree on 26 October 2007. These amounts are linked with the amount involved in the dispute (from EUR 75 for disputes involving an amount up to EUR 250 to EUR 30,000 for disputes involving an amount beyond EUR 1,000,000.01).

Article 1022 of the Belgian judicial code was also modified by this new Law and now states that the indemnity for legal costs is an all-encompassing provision for the payment by the losing party of the costs and attorney's fees of the prevailing party. This means that the newly increased indemnities for legal costs are the only amounts which can be granted to cover all the legal costs of the prevailing party, including its costs and attorney's fees.

This intervention by the legislature is to be welcomed, as it clarifies the situation on the recovery of legal costs and provides certainty for judges, practitioners and clients alike.

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The Growth of Third Party Funding

Third party funding of litigation and arbitration has been a regular feature in the English legal press in 2007 and 2008. For example, an accountancy firm was facing a GBP 90 million negligence claim brought with the help of outside funders in one of the largest claims yet to be funded by an independent third party, before the claim was struck out by the Court of Appeal for reasons unconnected to the funding structure. The funder involved in the accountancy litigation, like others, will now fund not just insolvency cases, as historically was the case, but also general commercial litigation and arbitration claims with sufficient prospects for success. Insurance giant Allianz launched a litigation fund in the UK after carrying out a number of successful pilot studies over the last few years. Hedge funds also appear to be taking an interest in funding litigation with Harbor Litigation Funding being set up at the end of 2007, reportedly backed by USD 100 million from Jersey based hedge fund MKM Longboat. Allianz and certain other major funders indicate that they expect that the bulk of their funding will be directed at arbitrations as arbitral awards are seen as easier to enforce and there is usually less scope for an arbitral award to be appealed. Other funders will remain focussed on funding litigation.

Although judicial opinion now appears to be changing, third party funding arrangements had previously been vulnerable to claims that they were champertous and therefore unenforceable. The Court of Appeal expressly preserved the doctrine of champerty in the 2005 case of *Arkin*. A champertous agreement is an unenforceable agreement by which a person who otherwise has no interest in a claim agrees to fund the litigation in return for a share of the subject matter of the claim. To avoid a court finding that an agreement is champertous, the third party funding must (1) facilitate access to justice and (2) allow the fundee to control the proceedings and retain the primary interest in the litigation. In the cases allowing third party funding, the public policy of providing access to justice has triumphed over the public policy against champerty.

Professional funders, however, are not excused from liability for costs in the event of an unsuccessful outcome. The courts have the power to order a third party to pay costs where appropriate. In *Arkin* the Court of Appeal limited the liability for costs of the professional funder to the extent of the funding provided, thus recognising that the public benefit of access to justice must be balanced against the general rule that a successful

party to litigation should recover its costs. Any third party that attempts to exercise control over the conduct of litigation risks finding that its funding agreement with the funded party is champertous and therefore unenforceable. It could also find itself having to pay the entirety of the defendant's costs in the event of an unsuccessful claim.

In June 2007, the Civil Justice Council ("CJC"), an advisory public body that was set up to oversee and coordinate the modernisation of the civil justice system, concluded that third party litigation funding has a major role to play in facilitating access to justice. It formally recommended to the Lord Chancellor that *"properly regulated third party funding should be recognised as an acceptable option for mainstream litigation."* The CJC also recommended that the activities of commercial third party funders be regulated and has met a number of times throughout the year to discuss what form this regulation should take.

Any further encouragement of third party funding has, however, to be carefully balanced against the problems such arrangements may cause. For example, one cause for concern would be funders backing substantial but weak claims and running them hard in the knowledge that they will probably extract some, perhaps substantial, offer of settlement.

Given the high cost of litigation, reduced public funding, the attitude of the courts and the stance taken by the CJC, in our view it is likely that third party funding of litigation will become noticeably more prevalent over the next few years. The growth of third party funding is, however, likely to be limited by the type of case that will attract funding. At present, funders tend to be looking for high value claims with a high chance of success (over 70% being the most often quoted figure), which preferably are being arbitrated. By definition only a minority of commercial claims will meet these criteria.

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Mediation in the Netherlands (and in Europe) in commercial cases: Be Prepared!

Recently all civil and administrative courts in the Netherlands have opened a mediation service. If a judge, after summary assessment of the case, doubts whether his judgement will solve the real problem, he may ask parties and their counsel during the oral hearing if they wish to use this mediation service.

It is therefore of great importance that counsel, when considering commercial litigation in the Netherlands, assesses with his client whether mediation would be a suitable means of dispute resolution. If counsel explains to the judge that he has discussed the possibility with his client before litigation and it was decided that this case is not fit for mediation, the judge will refrain from further pursuing the matter and litigation continues. Should it appear during the hearing that the client does not have a clue as to what mediation means, counsel will, to say the least, cut a poor figure in court. It can be maintained that it is a breach of professional duty not to inform the client beforehand of the pros and cons of all means of dispute resolution available, among which mediation now has its proper place in the Netherlands. This means that counsel must explore with the client what his interests are and by which means they are served best. Should this be mediation, counsel should be capable to assist the client as ably as in litigation or arbitration – which requires a totally different mindset.

With court-annexed mediation on the rise, more and more international contracts containing mediation clauses, countries providing legal frameworks for mediation and the European Union recently adopting a Mediation Directive*, this means of dispute resolution has become a fact of life for all attorneys and clients, whether they like it or not. Better be well-prepared for it!

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* Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ 24/05/2008 no L136/3

Germany recognises Chinese judgements

The *Kammergericht* of Berlin recently had to decide upon a request for recognition of a judgement of a Chinese state court. According to the German Civil Procedure Code, a foreign judgment is to be recognised if it is to be expected that the other state will recognise German judgements in return (principle of reciprocity).

The *Kammergericht* found that there was no evidence either way as to whether Chinese courts will enforce German judgements. However, since the principle of reciprocity also exists in Chinese civil procedure law, the *Kammergericht* considered that Chinese courts cannot be expected to first recognise German judgements. The *Kammergericht* therefore held that Chinese judgements are to be recognised in Germany as long as they do not contradict German public policy and as long as there is no evidence that Chinese courts will refuse recognition of German judgements. (See *Kammergericht*, 18 May 2006, 20 Sch 13/04)

How to exclude the CISG under German law

German courts impose high requirements on the exclusion of the Convention on Contracts for the International Sale of Goods (“CISG”). If the parties agree that German law shall govern their contractual relations the CISG will apply if the dispute falls within the scope of the CISG and if the CISG is not expressly excluded.

The Higher Regional Court of Stuttgart recently had to decide on whether the CISG was applicable to a purchase contract between a Latvian and a German company on the sale of cars. The German company argued that the parties implicitly excluded the CISG because the parties agreed on German law and on the jurisdiction of German courts. In view of the German company the CISG was thereby implicitly excluded. The Higher Regional Court of Stuttgart rejected this argument and held that the CISG can only be excluded if the parties expressly do so, i.e. by stating that the “*contract shall be governed by the sales law of the German Civil Code*”. (See OLG Stuttgart, 31 March 2008, 6 U 220/07)

European Court of Justice: Annexes to a Statement of Claim should be translated if the Claim is to be served within the EU

The European Court of Justice recently decided, on a Reference from the *Bundesgerichtshof*, the question of whether a defendant has the right to refuse acceptance of the service of a document instituting court proceedings if the annexes to the documents are not translated into the language of the Member State in which the document is served.

The ECJ held that under Article 8 of the Council Regulation No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters the annexes must be translated, unless the annexes have a purely evidential function and are not necessary for understanding the subject matter of the claim and the cause of action. The ECJ further held that it is for the national court to determine whether the content of the document instituting the proceedings is sufficient to enable the defendant to assert his rights or whether it is necessary for the party instituting the proceedings to remedy the fact that a necessary annex has not been translated. (See European Court of Justice, 8 May 2008, C-14/07)

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The risks of performance bonds

Performance bonds in Scotland have recently been considered by the Court of Session in the case of *Spiersbridge Property Developments Ltd v Muir Construction Ltd*. Normally, if a performance bond is called, this will be followed by an accounting under which the party receiving payment would only be entitled to the amount of their proved losses. The question before the court was whether the party receiving payment had to account for any excess to the other party to the contract, or to the bank providing the bond. The outcome of the decision was that the obligation is owed to the other party and not to the bank. The bank, for their part, would have recourse to their counter-indemnity. The court highlighted in this case that the bank faced a risk that the party for which it had provided the bond might become insolvent after they had already paid out under the terms of the bond.

Third parties and the exclusion of liability in Scotland

The recent case of *Farstad Supply AS v Enviroco Ltd* has provided guidance in relation to third parties to an action who have previously been indemnified by the claimant/pursuer. The owners of an oil rig supply vessel sued a service company in relation to a fire on board, and the defenders attempted to bring in the vessel's charterer as a third party to the action. Prior to the incident, however, the pursuer had agreed to indemnify and hold harmless the charterer against damages arising from wrongful or negligent acts. The court decided that the agreement between the owners and charterers, having been concluded in good faith, prevented the defender from bringing the charterer in as a third party.

Arbitration and the choice of law in Scotland

The English courts were recently asked to consider the governing law in an arbitration where the contract stated that the arbitration be subject to English law, but that the seat of arbitration be in Scotland. The Queen's Bench Division decided in *Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd* that where the parties had clearly agreed that the arbitration would be subject to the laws of one country, the place of arbitration would not affect that choice.

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