Comparative Analysis of Civil Procedures and Class Actions in Common and Civil Law Jurisdictions

Introduction

Class action procedures are an increasingly popular tool for plaintiffs seeking justice for harm caused by large corporations or organizations. These procedures allow a group of individuals with similar claims to band together and pursue legal action collectively, often resulting in a more efficient and effective process. However, the availability and effectiveness of class actions can vary greatly depending on the jurisdiction in which they are pursued.

This paper will take the position of the plaintiffs and examine the Netherlands, the UK, and Nigeria as potential plaintiff-friendly jurisdictions for class action procedures. Specifically, we will assess the procedural challenges that these jurisdictions impose on class actions, focusing on four key topics: certification, standing, financing, and settlement approval. By analyzing and comparing these topics, we will gain a better understanding of the strengths and weaknesses of class action procedures in each jurisdiction, as well as identify potential areas for improvement. Ultimately, this paper aims to provide a comprehensive comparative analysis of civil procedures and class actions in common and civil law jurisdictions, with a focus on the plaintiff's perspective.

Collective Action Mechanisms in the Three Jurisdictions

Starting with the Netherlands, the country has three types of collective redress procedures. The older provision, Article 305a of the Dutch Civil Code, applies to collective actions commenced before January 1st, 2020, unless the action relates to wrongdoings that took place before November 15th, 2016. The revised WAMCA procedure applies to litigations initiated after January 1st, 2020, unless the related wrongdoing took place after November 15th, 2016. The main difference between the two is that the latter allows for the pursuit of monetary compensation as a remedy. The Netherlands also has a collective settlement regime abbreviated as WCAM, which allows for a settlement that binds an entire class on an opt-out basis[1].

In the UK, there are currently four formal forms of collective redress. The first is the Group Litigation Order (GLO), which is a type of group proceeding that consolidates claims that

[1] Ianika Tzankova, ‘Everything You Wanted to Know About Dutch Foundations But Never Dared to Ask: A Checklist for Investors’ (2016) 4 TLSLSRPS 1

"give rise to common or related issues of fact or law"[2]. Typically, the cases are consolidated for the pre-trial stage, but individual adjudication takes place for the final judgment[3]. Secondly, a representative action can be initiated for individuals with the "same interest" in a claim[4]. The third option is collective action on an opt-out basis before the Competition Appeal Tribunal (CAT), but this is limited to claims related to competition law[5]. Finally, a representative action for breach of competition law can be initiated by the Secretary of State, who submits the complaint to the Competition and Markets Authority (CMA), a competition regulator that is not a judicial body[6]. However, monetary compensation does not seem to be available as a remedy for this type of action.

Nigeria, on the other hand, has only one type of collective redress at the federal level, which is class action[7]. However, its scope is limited to trademarks, copyright, patents, and designs[8].

Due to length limitations, this paper will analyze a select set of collective actions, namely the Dutch WAMCA procedure, the English representative action, and the Nigerian class action

Certification

Collective actions differ significantly from typical civil litigations. One of the primary distinctions is that an individual can be considered part of a represented class without their knowledge, yet still be bound by the judgment. As a result, certain jurisdictions have implemented a certification test to determine if collective action is the appropriate approach for a claim, as well as which individuals should be included as part of the class.

In general, this certification test places a heavier burden on the plaintiffs, as it reduces the number of claimants by imposing specific criteria that must apply to the claimants. Therefore, as a general rule, the more requirements there are for the certification test, the more demanding it is for the plaintiffs.

Similar Facts and Interests

A crucial aspect of collective actions is the requirement for a sufficient degree of factual similarity between the cases and shared interests among the plaintiffs.

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[2] Civil Procedure Rule (CPR), s 19.10.
[3] Deborah R. Hensler, 'From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally' (2017) 65 U Kan L Rev 965, 980
[4] CPR, S 19.6.
[5] Competition Act 1998, s 47B (amended by Consumer Rights Act 2015, Schedule 8(5)).
[6] Enterprise Act 2002, s 11.
[7] Federal High Court Civil Procedure 2009 (FHCCP), Order 9, Rule 4.
[8] Ibid. Rule 4(1)(a)-(c).

In the Netherlands, representatives must demonstrate a substantial commonality of factual and legal questions, as well as similar interests within the class[9].

Meanwhile, in the UK, the provision stipulates that plaintiffs must have the 'same interest' in the claim. However, the Supreme Court has clarified that this does not require identical interests, making the requirement less stringent than before[10].

In contrast, the Nigerian provision does not mandate such a requirement explicitly. Nonetheless, the Nigerian Supreme Court has ruled that for a class action to proceed, the plaintiffs must share a common interest and grievance, and the relief sought must benefit all members of the class[11].

Opt-in or Opt-out Mechanism

The mechanism employed in a jurisdiction for collective actions can significantly affect the outcome. Generally, opt-out mechanisms are considered more plaintiff-friendly, while opt-in procedures favour defendants[12].

In the Netherlands, after the appointment of the exclusive representative, class members domiciled in the Netherlands can opt out, while foreigners have the option to opt-in[13]. If the negotiation phase concludes successfully, class members have a second chance to opt out, enabling them to file individual claims for a more favourable remedy[14].

The UK's representative action also incorporates an opt-out mechanism, but unlike the Netherlands, it appears to have only one phase[15].

On the other hand, Nigeria's procedure employs a strict opt-in mechanism[16].

Overall, the Netherlands appears to be the most plaintiff-friendly jurisdiction for collective actions, despite requiring a sufficient connection of a claim to the jurisdiction. While the 'same interest test' has been strictly applied in English case law until recently, Nigerian case law is largely silent on this criterion, leading to unpredictable outcomes. Furthermore, the Netherlands is the only country of the three to use a two-phase opt-out procedure.

Standing

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[9] Dutch Code of Civil Procedure (DCCP), art 1018(c)(5)(c).
[10] Lloyd v Google LLC [2021] UKSC 50
[11] Idise v. Williams International Limited [1995] 1 NWLR (Pt. 370) 142
[12] Hensler (n 3) 972
[13] DCCP, art 1018(f)(1)&(5).
[14] Ibid. art 1018(h).
[15] 'Global Guide: Collective Rredress - UK' (*Linklaters*, 18 November 2022) <https://www.linklaters.com/en/insights/publications/collective-redress/global-guide-collective-redress/uk> accessed 8 November 2022
[16] FHCCP, Order 9, Rule 4(3)&(4).

After the certification stage, courts usually apply the standing test to assess whether the legal representative of the certified class is appropriate. Different jurisdictions have different requirements. In the Netherlands, the standing test is co-dependent on the certification stage, making it distinct from other countries.

The purpose of the standing test is to eliminate agency problems by adding requirements for the representative person or body. While private lawyers have been attributed with the majority of principal-agent conflicts, scholars have demonstrated that public officials and non-profit organizations are also susceptible to similar conflicts, albeit to a lesser extent[17].

In the Netherlands, a foundation or association with full legal capacity can represent and initiate a representative action[18]. However, the association must demonstrate that its purpose is to safeguard similar interests as those of the class, which can be assessed by analyzing its articles of association[19]. To protect the class and minimize agency problems, the provision adds more requirements for the association, such as a supervisory board, an effective participation mechanism for the class, sufficient resources and control over decision-making, a publically accessible internet page, and sufficient expertise[20]. Directors of the association cannot be motivated by potential profits from the claim, and the legal entity must prove a sufficiently close connection with the Dutch legal system[21]. During the negotiation phase, the legal entity must make sufficient efforts to achieve the claim's objective. When there are several associations that initiate a claim for the same class, the court will choose as an exclusive representative the legal entity that complies most comprehensively with the aforementioned requirements, while the other associations can still be considered as plaintiffs[22].

In contrast, the representative action of the UK does not seem to apply strict criteria for the standing test, as any person or entity can apply to become a representative[23]. Nevertheless, if a legal person becomes a representative, the court has discretion, and every party to the claim may apply for the court's assessment over the standing of the representative(s)[24].

The Nigerian provision governing class action claims does not stipulate specific standing requirements. However, it states that when a "person, the class, or some members of the class interested" cannot be ascertained or found, then a judge may appoint a representative for the expediency of the case[25].

Therefore, the Netherlands is arguably the most plaintiff-friendly jurisdiction when it comes to the standing phase. The WAMCA procedure provides double protection from

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[17] Hensler (n 3) 973-974
[18] DCC, art 3:305a(1).
[19] Ibid.
[20] Ibid. art 3:305a(2)(a)-(e).
[21] Ibid. art 3:305a(3)(a)-(c).
[22] DCCP, art 1018(e).
[23] CPR, s 19.6(1)(b).
[24] Ibid. s 19.6(2)&(3).
[25] FHCCP, Order 9, Rule 4(1)(i)-(iii).

principal-agent conflicts by not allowing private lawyers to represent plaintiffs and adding requirements for non-profit organizations to reduce agency problems further. In contrast, the UK does not apply such extensive requirements, and Nigeria's body of law and precedents are insufficient to conclude how a court would test the standing of a representative.

Financing

The regulation of financing in collective actions can significantly impact the outcome of the litigation. However, the lack of regulation, especially regarding third-party litigation financing (TPLF), has received criticism due to potential conflicts of interest[26]. The financial gain motive of TPLF providers may conflict with the interests of the class they are financing, which can cause them to reject settlements that the plaintiffs would otherwise accept. Despite these concerns, TPLF can also play a crucial role in enabling collective actions that would otherwise be too costly to pursue[27]. As such, rather than prohibiting TPLF outright, it may be more beneficial to regulate it in plaintiff-friendly jurisdictions.

Lawyer fees also play a crucial role in the success of collective actions. Unregulated fees can also result in principal-agent conflicts, but over-regulated fees can deter lawyers from working for plaintiffs[28]. Jurisdictions that prohibit contingency fees may be perceived as more plaintiff-friendly, as these fees reduce the amount of damages that have to be shared with lawyers.

Lastly, the rule of fee-shifting (adverse costs) can also impact the willingness of complainants to initiate proceedings. While some scholars argue that it deters frivolous claims, it is generally not considered a plaintiff-friendly rule[29]. Therefore, regulating financing and fee arrangements in collective actions can help ensure fairness and improve access to justice for plaintiffs.

Third-party Litigation Financing

In the Netherlands, third-party financing is not prohibited but is subject to regulation. To manage principal-agency conflicts, the representative entity must have ultimate control over decision-making[30]. In the *Fortis* case, judges determined that courts have the ability to review third-party funding arrangements to ensure the interests of those represented are adequately

[26] Hensler (n 3) 978
[27] Ibid. 976
[28] Ibid. 977
[29] Jonathan T. Molot , 'Fee Shifting and the Free Market' (2013) 66 VAND .L. REV 1807
[30] DCC, art 3:305a(2)(c).

protected. This is consistent with the Claim Code 2019, which is a code of conduct for foundations and associations in the Netherlands.

In the UK, third-party financing is permissible but is governed by common law rules that prohibit "maintenance" and "champerty". Maintenance refers to the funding of litigation by an unrelated third party, while champerty is doing so for profit. Funding agreements that violate these rules are considered unenforceable[31].

In Nigeria, TPLF is governed by the same common law principles of champerty and maintenance as in the US due to its colonial history. However, there is limited legal and academic literature on the topic[32].

Fee Rules

In the Netherlands, contingency fees are generally prohibited by the Dutch bar, and hourly-based fees are the most common fee type[33]. However, in the *Converium* case, the judges concluded that contingency fees may be compatible with the Dutch legal system, creating some uncertainty in fee regulation.

In the UK, alongside hourly rates, two types of contingency fee arrangements are legislated: conditional fee arrangements (CFAs)[34] and damages-based agreements (DBAs)[35].

In Nigeria, hourly rates are common, and a legislated contingency fee exists, which is highly regulated and protective of the plaintiff's interests[36].

Fee-shifting

The Netherlands, like many jurisdictions, allows for fee-shifting, whereby the losing party may be ordered to pay the legal costs of the prevailing party. However, the court retains the discretion to limit the number of costs awarded to the prevailing party in order to ensure that the costs are reasonable and proportionate[37].

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[31] *Re Trepca Mines Ltd* (No 2) [1963] Ch 199
[32] Folajomi Fawehinmi, 'Litigation and enforcement in Nigeria: Overview' (*Prctical Law*) <https://uk.practicallaw.thomsonreuters.com/w-017-3556?contextData=(sc.Default)&transitionType=Default&firstPage=true#co_anchor_a948835> accessed 8 November 2022
[33] Tzankova (n 1) 573-574
[34] Courts and Legal Services Act 1990, s 58(2)(a).
[35] Legal Aid, Sentencing, and Punishment of Offenders Act 2012, s 44 & 45.
[36] Nigerian Rules of Professional Conduct for Legal Practitioners, Rule 50
[37] Deborah Hensler, Class Action Dilemmas Pursuing Public Goals for Private Gain (*Rand* 2021) 18.

In contrast, fee-shifting is a well-established principle in common law jurisdictions like the UK and Nigeria, where the losing party is typically ordered to pay the full legal costs of the prevailing party[38].

Therefore, the regulation of TPLF appears to be equally stringent in all three jurisdictions, which can be advantageous to plaintiffs. However, the Netherlands may be considered the most plaintiff-friendly jurisdiction for two reasons. Firstly, contingency fees, which are generally not advantageous to plaintiffs, are more commonly used in the UK and Nigeria, while their use in the Netherlands remains uncertain. Secondly, fee-shifting, which can be a deterrent factor for plaintiffs, is more prevalent in common law countries (with the exception of the US), and is, therefore, less of an issue in the Netherlands.

Settlement Approval

Collective actions are often resolved through settlements, making the regulation (or lack thereof) of settlements crucial in collective action procedures. Settlements can save time and resources for both parties, making a mandatory settlement phase a potentially beneficial rule for plaintiffs. However, conflicts between representatives, lawyers, and third-party funders can arise, leading to a rejection of a settlement proposal that the class approves of (and vice versa). Therefore, regulating such conflicts can be a plaintiff-friendly measure.

The Netherlands has implemented a mandatory settlement phase that must be approved by the court[39]. Before settlement approval, certified plaintiffs may opt out and pursue a different claim or initiate an individual one[40]. In contrast, the UK and Nigeria have no special rules for mandatory settlement phases or settlement approval.

Overall, the Netherlands appears to be the most plaintiff-friendly jurisdiction in this regard due to its mandatory settlement phase. Additionally, due to agency problems and a large number of potential claimants, the settlement is subject to court approval, and plaintiffs have the option to pursue alternative claims or individual claims.

Conclusion

To conclude, while the Netherlands, and specifically the WAMCA, may pose some procedural obstacles that could potentially hinder plaintiffs from initiating or winning a

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[38] '*Class/collective actions in the UK (England and Wales): Overview*' (*Practical Law*) <https://uk.practicallaw.thomsonreuters.com/6-618-0351?contextData=%28sc.Default%29> accessed 8 November 2022

[39] DCCP, art 1018(g)&(h)

[40] Ibid.

representative action, such as the requirement of sufficient connection to the jurisdiction for the certification stage or the ambiguity surrounding contingency fees, it is still considered to have the most comprehensive rules compared to the other two jurisdictions. Furthermore, the rules in the Netherlands are designed to favour plaintiffs by taking into account potential issues, such as principal-agency conflicts, and regulating them. At the same time, the rules aim to maintain the positive aspects of these issues, as seen in the case of TPLFs.