

# Class Actions

*Contributing editors*

Joel S Feldman and Joshua E Anderson



2016

GETTING THE  
DEAL THROUGH 

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DEAL THROUGH 

# Class Actions 2016

*Contributing editors*

Joel S Feldman and Joshua E Anderson  
Sidley Austin LLP

Publisher  
Gideon Robertson  
gideon.roberton@lbresearch.com

Subscriptions  
Sophie Pallier  
subscriptions@gettingthedealthrough.com

Business development managers  
Alan Lee  
alan.lee@gettingthedealthrough.com

Adam Sargent  
adam.sargent@gettingthedealthrough.com

Dan White  
dan.white@gettingthedealthrough.com



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## CONTENTS

|   |           |   |           |
|---|-----------|---|-----------|
| <b>Argentina</b>  | <b>5</b>  | <b>Finland</b>  | <b>37</b> |
| Gastón Dell’Oca and Federico Sánchez Cortina<br>Forino – Sprovieri – Dell’oca – Aiello Abogados |           | Tanja Jussila and Mats Forsius<br>Waselius & Wist   |           |
| <b>Australia</b>  | <b>8</b>  | <b>France</b>   | <b>41</b> |
| Colin Loveday and Andrew Morrison<br>Clayton Utz  |           | Céline Lustin-Le Core<br>EBA Endrös-Baum Associés   |           |
| <b>Austria</b>  | <b>12</b> | <b>Italy</b>  | <b>47</b> |
| Alexander Klauser<br>Brauneis Klauser Prändl Rechtsanwälte GmbH                                 |           | Michela Turra and Alessandra Chimienti<br>Gianni, Origoni, Grippo, Cappelli & Partners  |           |
| <b>Belgium</b>  | <b>15</b> | <b>Japan</b>  | <b>50</b> |
| Joost Verlinden and Pieter Van Mulders<br>Linklaters LLP  |           | Tomoo Nishikawa, Takahiro Nonaka and Jun Kashio<br>Sidley Austin Nishikawa Foreign Law Joint Enterprise                               |           |
| <b>Brazil</b>   | <b>19</b> | <b>Mexico</b>   | <b>55</b> |
| Felipe Evaristo dos Santos Galea and Rebeca García<br>BMA – Barbosa Müssnich Aragão             |           | Luis Felipe Aguilar Rico, Patricia Arratibel Siles,<br>Hugo Oliverio Hidalgo Arroyo and Daniela Romero Garduño<br>Aguilar & Loera, SC |           |
| <b>Canada</b>   | <b>23</b> | <b>Portugal</b>   | <b>59</b> |
| Glenn Zakaib and Emily Larose<br>Cassels Brock & Blackwell LLP                                  |           | Nuno Libano Monteiro and António Pedro Pinto Monteiro<br>PLMJ Law Firm  |           |
| Jean Saint-Onge and Myriam Bixi<br>Lavery, de Billy   |           | <b>Russia</b>   | <b>62</b> |
| <b>Denmark</b>  | <b>29</b> | Sergei Volfson and Mikhail Ivannikov<br>Jones Day   |           |
| Martin Christian Kruhl and Henrik Puggaard<br>Lett Law Firm                                     |           | <b>United States</b>  | <b>65</b> |
| <b>England &amp; Wales</b>  | <b>32</b> | Joel S Feldman and Joshua E Anderson<br>Sidley Austin LLP   |           |
| Simon Fawell, Steven Pitt, Frances Macduff<br>and James Russell Stoneham<br>Sidley Austin LLP   |           |   |           |

# Preface

## Class Actions 2016

First edition

**Getting the Deal Through** is delighted to publish the first edition of *Class Actions*, which is available in print, as an e-book and online.

**Getting the Deal Through** provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

**Getting the Deal Through** titles are published annually in print and online. Please ensure you are referring to the latest edition or to the online version at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

**Getting the Deal Through** gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Joel S Feldman and Joshua E Anderson of Sidley Austin LLP, for their assistance in devising and editing this volume

GETTING THE  
DEAL THROUGH 

London  
November 2015

# England & Wales

Simon Fawell, Steven Pitt, Frances Macduff and James Russell Stoneham

Sidley Austin LLP

## 1 Outline the organisation of your court system as it relates to collective actions. In which courts may class actions be brought?

The Civil Procedure Rules (CPR) provide the framework for civil litigation in England and Wales, including the management of collective actions. The CPR are supplemented by Practice Directions that provide further practical detail on their operation and by judicial case law in which they have been interpreted.

Part 19 of the CPR provides two main procedures for collective actions. Group litigation orders (GLOs) allow the court to manage multiple claims together, on an opt-in rather than an opt-out basis, where there are common or related issues of fact or law. Representative claims allow a representative to bring or defend an action on behalf of others who have the same interest in the claim. In addition, the CPR allow multi-party litigation to be brought by issuing a claim naming more than one claimant or defendant. Additional claimants or defendants can be added to a claim that has already been issued.

The civil court system is broadly split into the county court, which generally handles lower value claims, and the High Court, which generally handles higher value and more complex claims.

GLOs and representative claims may be made in claims before either the county court or the High Court.

There are also a number of specialist tribunals. One that is worthy of particular mention is the Competition Appeals Tribunal (CAT). The Competition Act 1998 (the Act) provides specifically for collective actions to be brought in the CAT for breaches of competition law. The CAT is governed by its own Rules of Procedure (SI 2003/1372). Practical guidance on the CAT's procedures is provided in its Guide to Proceedings.

The Act was amended, effective 1 October 2015, by section 81 and Schedule 8 to the Consumer Rights Act 2015 to allow for collective actions to be brought in the CAT on an opt-out basis. Previously only opt-in proceedings were permitted. Importantly, those domiciled outside the UK will only be included in opt-out proceedings if they have expressly opted in to the proceedings. The CAT's Rules of Procedure and Guide to Proceedings were updated on 1 October 2015 to take account of the possibility for opt-out proceedings and to make certain changes (applicable also to opt-in proceedings), which appear to be aimed at encouraging those who have suffered as a result of breaches of competition law to bring private litigation.

## 2 How common are class actions in your jurisdiction? What has been the recent attitude of lawmakers and the judiciary to class actions?

The relatively recent (2000) introduction of GLOs shows some willingness to try to overcome some of the shortcomings of multi-party litigation. Notably, however, there are no mechanisms for large-scale opt-out class actions in general civil litigation claims.

Since their introduction, GLOs have been used relatively infrequently, with only 95 GLOs made, of which 36 were prior to 2003.

Although there is no formal record of how many representative claims have been made, case law suggests only a very small number since 2000.

The very recent introduction of opt-out collective action proceedings for breach of Competition Act claims before the CAT also shows a willingness for collective actions to be embraced in certain sectors.

## 3 What is the legal basis for class actions? Is it derived from statute or case law?

### GLOs and representative claims

The basis for representative claims and GLOs is Part 19 of the CPR and its related Practice Direction, as supplemented by case law.

### Competition Act 1998

Collective actions can be brought under section 47(B) of the Act. The Consumer Rights Act 2015 amended the Act to permit opt-out collective proceedings before the CAT, having previously permitted only opt-in collective proceedings.

## 4 What types of claims may be filed as class actions?

### GLOs and representative claims

There are no limitations on the types of claim. Of the 95 GLOs that have been made by the courts of England and Wales, many relate to claims concerning product liability, medical negligence, environmental issues or abuse and mistreatment in schools and children's homes.

### Competition Act 1998

The Act permits collective actions to be brought in respect of both follow-on damages claims (where the infringement and liability of the defendant has already been established by a decision of the relevant regulator or European Commission) and stand-alone damages claims (where the infringement has yet to be proven).

## 5 What relief may be sought in class proceedings (money damages, injunctive relief, restitution, etc)?

### GLOs and representative claims

There is, in principle, no limit to the types of relief available save for those under the general law. Although punitive or exemplary damages are, in principle, allowed, they are exceptionally rare under English law.

### Competition Act 1998

Section 47A(3) of the Act allows for both money damages and injunctive relief. Notably, an injunction granted by the CAT now takes effect and is enforceable as if it were granted by the High Court (section 47D(1) of the Act). Exemplary damages are not permitted (section 47C(1) of the Act).

## 6 Is there a process for consolidating multiple class action filings?

### GLOs

A list of all GLOs is maintained and published by the English Court (<https://www.justice.gov.uk/courts/rcj-rolls-building/queens-bench/group-litigation-orders>).

Individual GLOs may also specifically include provision for how they are to be publicised.

The Practice Direction to CPR 19 also encourages lawyers acting for a party that is considering applying for a GLO to consult the Law Society's Multi-Party Action Information Service before doing so.

Once a GLO has been made, a group register is established on which details are recorded of the cases that are to be subject to the GLO. The court may also make an order that, from a specified date, all claims raising one or more of the GLO issues must be started in that court. However, the

Practice Direction makes clear that failure to commence such a claim in the correct court will not invalidate it. Instead the claim should subsequently be transferred to the correct court.

The courts also have general powers under CPR 3.1 to consolidate proceedings or to try multiple claims together.

## 7 How is a class action initiated?

### GLOs

GLOs can be made either on the court's initiative or on application by a claimant or defendant. The Practice Direction to CPR 19 states that certain preliminary steps should be taken, including consulting the Law Society's Multi-Party Action Information Service to obtain information about other cases giving rise to issues to be covered by the proposed GLO.

Before making an application for a GLO, prospective claimants will often have their solicitors form a solicitors' group, from which one solicitor is chosen to take the lead in making the application. While the application can be made by one solicitor, each claimant seeking to have its claim included in the GLO will need to issue its own claim using its own claim form.

The application may be made at any time before or after any relevant claims have been issued, and should be made using the general procedure under CPR 23. The application should include (among other things) the number and nature of claims already issued, the number of parties likely to be involved and the common issues of fact or law that are likely to arise in the litigation.

The GLO will specify the common or related issues of fact or law it covers so as to identify the existing and (potentially) future claims to be managed as a group under the order. The individual claims will be listed on a register for that GLO. Depending on the court's directions, new claims issued after the GLO is made which raise one or more of the issues under the GLO, will usually be added to its register of claims. There is no cap on the number of claimants that can be added to the register.

The GLO effectively means that all claims currently or subsequently listed on the register for that GLO will be managed collectively by the court. It is usual for a lead solicitor to bring the action on behalf of all of those on the register through the duration of the case. Often, the court will order that one or more of the claims on the register proceed as test claims. Generally, any case management directions or judgments given in relation to a GLO issue will be binding on all other parties on the register for that GLO.

### Representative claims

Where a party wishes to act as a representative for other people who have the same interest in a claim, it can indicate this in its claim form.

It is not necessary for those represented to be named as parties to the proceedings, nor is it necessary for the person purporting to act as a representative to have the authority of those it represents, provided the 'same interest' test is met (*Independiente Ltd and Others v Music Trading* [2003] EWHC 470).

Subject to certain exceptions, below, the permission of the court is not required for a claim to be pursued by a representative party (CPR 19.6). However, the court can intervene, either on its own initiative or following application by another party to the claim, and direct that a person cannot act as a representative. A court can also order that existing claims continue under a representative party.

The court's permission is required to act as a representative where the claim concerns the estate of a deceased person, property subject to trust, or the meaning of a document, and the people whom the representative is to represent have not been born, cannot be found or cannot easily be ascertained (CPR 19.7).

The minimum number of persons required to have the 'same interest', and therefore for the claim to continue as a representative action, is two. There is, in principle, no maximum number of parties that can potentially be represented. However, it is clear that the class of parties to be represented must be sufficiently ascertainable, although it may fluctuate.

Where a claim is continuing under a representative party, the day-to-day management and decisions on the running of the case will be taken by the representative. Unlike a GLO, it is possible for persons who are represented to take no active part in the litigation where they are not named parties to the claim. A represented person who is not a party to the claim and plays no active role is unlikely to be subject to disclosure obligations or costs risks.

## Competition Act 1998

Collective proceedings are commenced by sending a collective proceedings claim form to the CAT-appointed registrar. The claim form should include, among other things, a description of the proposed class, an estimate of the number of class members and a concise statement of the relevant facts and law relied upon and the relief sought (CAT Rules of Procedure, rule 75).

The CAT will then hold a case management conference to give directions for the conduct of the application for a collective proceedings order (CPO) and ultimately determine the application having heard the parties (CAT Rules of Procedure, rules 76 and 77).

## 8 What are the standing requirements for a class action?

### GLOs and representative claims

As with any legal action, where a claim is subject to a GLO or is being brought by a representative party, the claimant must show that it has a cause of action. To be added to the register of claims for a specific GLO an issued claim must give rise to the 'common or related issues of fact and law' specific to that GLO.

The test for a claim to proceed by a representative party is that those represented must have the 'same interest in a claim'.

## Competition Act 1998

The CAT may make a CPO if it considers the proposed class representative is capable of acting in that capacity, and the claims raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings (section 47B(5) of the Act and rule 77 of the CAT Rules of Procedure). A collective proceeding order must include authorisations for the person bringing the proceedings to act as a representative, a description of the class of persons, and whether the proceedings will be opt-in or opt-out (section 47B(7) of the Act).

A representative may be a claimant (an individual or a business) who has suffered loss or a representative body, for example, a trade association. However, the CAT must consider it 'just and reasonable for that person to act as a representative' (section 47B(8)(b) of the Act).

Rule 78 of the CAT Rules of Procedure provides a list of the relevant factors for authorising a class representative. Those factors include whether the representative would 'fairly and adequately act in the interests of the class members', whether the representative has a 'material interest that is in conflict with the interests of the class members', whether the representative would be able 'to pay the defendant's recoverable costs if ordered to do so' and if the proposed representative is not a class member, whether it is a pre-existing body. Paragraph 6.30 of the Guide to Proceedings provides further practical guidance and suggests that the CAT will consider whether the proposed class representative is competent to manage what is likely to be a large and complex piece of litigation.

## 9 Do members of a class have to opt in or opt out of the action? Are class members notified that an action has been commenced on their behalf and, if so, how?

### GLOs

For a claimant to have its claim managed under a potential or existing GLO, it needs first to issue a claim form for its individual claim. In that sense, GLOs provide an opt-in regime as each individual claimant must consciously take steps to bring a claim to court. There is no mechanism to bind individuals who may be unaware that they have a claim or who may not want to bring a claim.

While the court can, on its own initiative, direct particular claims to be managed under a GLO, a party can make an application for its claim to be removed.

### Representative claims

It is not necessary for those represented to be named as parties to the proceedings, nor is it necessary for the representative party to have the authority of those it represents to act as their representative (*Independiente Ltd and Others v Music Trading* [2003] EWHC 470).

## Competition Act 1998

The CAT will state whether any collective proceedings will be opt-in or opt-out (section 47B(7)(c) of the Act). The class representative must give notice of the CPO to class members in a form and manner approved by the CAT (CAT Rules of Procedure, rule 81). The notice must set out in



straightforward terms how class members opt in or opt out of proceedings. (Guide to Proceedings, paragraph 6.59).

The CPO will specify a time by which class members must opt in or opt out of the collective proceedings. After that date, the permission of the CAT will be required (CAT Rules of Procedure, rule 82). The class representative must maintain a register of class members who have opted in or out of the proceedings. That register will be available on request to the CAT, any defendant and such other person as the CAT may direct (CAT Rules of Procedure, rule 83).

## 10 What are the requirements for a case to be filed as a class action?

### GLOs

There is no minimum number of claims required for a GLO to be made.

Each individual claimant under the GLO must issue its own claim form. The court may give directions about the form of pleadings for claims covered by the GLO. In particular, the court may direct that the claimants serve group particulars of claim, setting out the claims of all of the claimants on the register for that GLO. Group particulars of claim will usually contain general allegations relating to all of the claims and a schedule specifying which of the general allegations are relied on by, and any specific facts relevant to, each claimant.

Often, the specific facts relating to each claimant on the group register will be obtained using a questionnaire which has been approved by the court managing the GLO.

### Representative claims

For a claim to proceed by representative party, the persons to be represented must have the same interest in the claim.

### Competition Act 1998

Collective proceedings may be brought by combining two or more claims (section 47B of the Act). Collective proceedings may be commenced by a person who proposes to be a representative, but may only be continued if the CAT makes a CPO (section 47B (4) of the Act).

There is no requirement that all of the claims should be against all of the defendants in collective proceedings (section 47B (3)(b) of the Act).

## 11 How does a court determine whether the case qualifies for a collective or class action?

### GLOs

The court will usually deal with any application for a GLO at an oral hearing. The court has a discretion as to whether to order a GLO or to add a particular claim to an existing GLO and, frequently, exercises that discretion against making a GLO.

A GLO can be made only with the consent of the relevant head of the particular court division in which it would be made. To obtain the consent, the judge considering a GLO must, either before or after hearing the application, provide the relevant documentation, together with a written statement as to why a GLO is desirable.

Where the court makes a GLO on its own initiative, it is still required to obtain this consent.

### Representative claims

Unless the claim falls within the category for which the court's permission is expressly required, a party can commence a representative claim without the permission of the court by indicating on the claim form that it is acting as a representative. However, the court can intervene once a claim has been issued and direct that a person cannot act as a representative. The test to be satisfied for a claim to proceed by a representative party is that the parties to be represented must have the same interest in the claim. In general terms the test is strict and is considered more difficult to satisfy than that for a GLO. For example, in *Emerald Supplies Ltd and another v British Airways plc* [2010] EWCA Civ 1284 the court held that the persons represented needed to have the same interest at every stage of the proceedings, not just at the end point of the judgment.

### Competition Act 1998

The CAT may make a CPO if it considers the proposed class representative is capable of acting in that capacity, and the claims raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings (section 47B(5) of the Act and rule 77 of the CAT Rules of

Procedure). A person may be authorised to act as a representative whether or not that person is a class member, but only if the CAT considers it 'just and reasonable'.

The CAT will assess, among other things, the 'strength of the claims' when determining whether the collective proceedings should be opt-in or opt-out (CAT Rules of Procedure, rule 79(3)(a)). However, this does not amount to a full 'merits assessment' (Guide to Proceedings, Paragraph 6.39).

The decision on whether to make a CPO will ordinarily be made after an oral hearing.

## 12 How does discovery work in class actions?

### GLOs and representative claims

The courts have significant flexibility in how disclosure (ie, discovery) is to be managed. However, amendments to the CPR in April 2013 made clear that 'standard disclosure' (pursuant to which each party must conduct a reasonable search for documents on which it relies, documents that harm its own case and documents that assist the other party's case) would no longer be considered the default position. Instead, the courts have been encouraged to make orders for disclosure that are more closely tailored to the needs of the particular case.

This flexibility is particularly suited to multi-party litigation given the practical difficulties associated with disclosure from multiple parties.

In litigation under a GLO, unless the court orders otherwise, disclosure of any document relating to the issues covered by the GLO by a party to a claim on the register of a GLO is considered to be disclosure of that document to all parties to current and future claims on that GLO register.

In litigation brought or defended by a representative party, only those who are named parties to the claim (as opposed to those who are represented but are not named parties) will be treated as parties for the purposes of providing disclosure.

### Competition Act 1998

When giving directions for the conduct of an application for a CPO, the CAT will include provision for any evidence it considers necessary for the determination of that application.

The possible scope of disclosure in respect of the main claim is not specifically a relevant factor to be considered by the CAT when making a CPO.

The CAT has powers to order, on any terms it thinks fit, that disclosure be given by any party to the collective proceedings to any other party, by the class representative to any or all represented persons and by any represented person to any other represented person, the class representative or the defendant (CAT Rules of Procedure, rule 89).

## 13 Describe the process and requirements for approval of a class-action settlement.

### GLOs and representative claims

Subject to certain specific exceptions, parties do not require the court's approval of any settlement that may be reached, although steps must be taken to inform the court and end the litigation.

The exceptions include claims conducted by a representative party under CPR 19.7 where not all of the represented parties can be ascertained and the claim concerns the estate of a deceased person, property subject to trust or the meaning of a document. In such cases, the court's approval is required for the claim to be settled.

Where a claim to be settled is a test claim under a GLO, the court's approval is still not required and another claim on the register for that GLO will generally be substituted to proceed as the test claim.

### Competition Act 1998

CAT approval must be obtained for 'collective settlements' where a CPO has been made and the CAT has specified that the proceedings are opt-out (section 49A of the Act). An application for approval of a proposed settlement must be made to the CAT by the representative. The representative and the defendant must provide agreed details of the claims to be settled and the proposed terms of the settlement.

The CAT will approve the collective settlement only if it is satisfied that the terms are 'just and reasonable' (section 49A(5) of the Act). If the period for opt-out (or, for those domiciled outside the jurisdiction, opt-in) has expired, the approved collective settlement will be binding on all those who are domiciled in the United Kingdom at the time specified by the CAT; fall within the class described in the collective proceedings; and have not

opted out of the proceedings. The approved collective settlement will also be binding on those domiciled outside the jurisdiction who have opted in.

A collective settlement is not binding upon a person who opts out by the time specified by the CAT, or a person who is not domiciled in the United Kingdom at the time specified by the CAT and does not expressly opt in to the proceedings or settlement.

Where a CPO has not been made, the CAT may still make a collective settlement if the settlement is proposed by a person who is capable of acting as the settlement representative (section 49B of the Act). This may be relevant if the parties are at an early stage of the litigation.

Rule 94 of CAT Rules of Procedure and paragraphs 6.102 to 6.105 of the Guide to Proceedings provide additional guidance.

#### 14 May class members object to a settlement? How?

##### GLOs

Because the settlement of one particular claim under a GLO will not be binding in respect of any other claim, there is no basis for any other party to object.

##### Representative claims

Where a represented party is the subject of a settlement agreement, there is no mechanism to object. However, for representations under CPR 19.7, protection is provided by the need for court approval of the settlement.

##### Competition Act 1998

In cases with a CPO there appears no way of challenging a settlement order once made but parties may opt out of any settlement, provided they do so by a date specified by the CAT. For parties domiciled outside the UK, the settlement will, in any event, not be binding unless they specifically opt in.

Where a collective settlement order is made prior to a CPO, the CAT may vary or revoke the collective settlement order on its own initiative or on the application of a class member or party (CAT Rules of Procedure, rule 96(17)).

#### 15 What is the preclusive effect of a final judgment in a class action?

##### GLOs

Unless the court orders otherwise, a judgment in a claim on the group register that relates to an issue under the GLO will be binding on the parties to all other claims that are on the register for that GLO at the time the judgment is given. The court may give directions on the extent to which the judgment is binding on parties to any claim which is subsequently entered on the register for the GLO.

##### Representative claims

A judgment given in a representative action under CPR 19.6 is binding on all persons represented in the claim, unless the court orders otherwise. Importantly, the court's permission is required for the judgment to be enforced by or against a person who is not a party to the claim.

##### Competition Act 1998

Where a CPO has been made by the CAT, the judgment will bind all represented persons unless specified otherwise (rules 81(2)(d) and 91(1) of the CAT Rules of Procedure). It should be remembered that a judgment in opt-out proceedings will be binding on potential class members domiciled outside the UK only where they have specifically opted in.

#### 16 What type of appellate review is available with respect to class action decisions?

##### GLOs and representative claims

Generally parties do not have an absolute right to appeal judgments of the courts and must seek permission to do so. Permission may be sought from the judge that gave the judgment being appealed or directly from the Court of Appeal.

For GLOs, where a party was entered on the register for the GLO after the judgment or order was made, it cannot apply for it to be set aside, varied or stayed and cannot appeal. It can, however, apply to the court for an order that the judgment or order is not binding.

##### Competition Act 1998

Pursuant to section 49 of the Act the representative (but not an individual class member) or defendant may appeal the decision of the CAT to award damages or to grant an injunction, to the Court of Appeal. An appeal requires either the permission of the CAT or the Court of Appeal.

Paragraph 6.92 of the Guide to Proceedings makes clear that there is no statutory provision for appeals against the CAT's decision on an application for a CPO (this would have to be done by way of judicial review).

#### 17 What role do regulators play in connection with class actions?

##### Competition Act 1998

Regulators have not previously brought collective actions in the CAT. Under the old section 47B of the Act, only a 'specified body' had the right to bring collective proceedings in the CAT. The Consumer Association, Which?, was the only organisation to obtain the status enabling it to bring opt-in proceedings under the Specified Body (Consumer Claims) Order 2005 (SI 2005/2365).

The Act now permits anyone (rather than just a specified body) to bring collective proceedings, provided that person is a suitable class representative. It remains to be seen if under the new opt-out system regulators choose to become involved in collective actions.

#### 18 What role does arbitration play in class actions? Can arbitration clauses lawfully contain class-action waivers?

##### GLOs and representative claims

The opt-in nature of collective actions in England and Wales means that if a party participates in a court collective action in breach of an arbitration clause, the arbitration clause will almost certainly be enforced.

Arbitration tribunals have no power to consolidate proceedings in the absence of the consent of the parties. Therefore, to the extent collective actions are permitted within arbitration at all, it is on an opt-in basis.

##### Competition Act 1998

It is difficult to see how a claim could be brought under the Act that would breach an arbitration clause. A class action waiver would have little purpose in this context.

#### 19 What are the rules regarding contingency fee agreements for plaintiffs' lawyers in a class action?

##### GLOs and representative claims

CPR 19 does not contain any specific rules or restrictions in relation to contingency fee agreements in collective actions.

The general position is that claimants' lawyers are permitted to work on a contingency fee basis but subject to relatively strict limitations.

English law also allows (subject to certain limitations) the use of 'conditional fee arrangements' where a lawyer will receive a specified uplift on fees depending on the outcome of the case.

##### Competition Act 1998

A claimant's lawyers cannot operate on a contingency fee basis for opt-out collective proceedings. However, contingency fee arrangements can be used for opt-in collective proceedings (section 47C(8) of the Act).

Conditional fee arrangements (allowing a set percentage uplift on fees depending on the outcome) appear to be allowed for both opt-in and opt-out collective proceedings.

#### 20 What are the rules regarding a losing party's obligation to pay the prevailing party's attorneys' fees and litigation costs in a class action?

##### GLOs and representative claims

The courts have a discretion to order that one party pay some or all of another party's costs of the litigation. The general rule is that it will be the losing party that has to pay the costs of the successful party.

There are specific rules for cases under GLOs which distinguish between 'individual costs' (those incurred in relation to an individual claim) and 'common costs' (those incurred on the GLO issues including, for example, the costs incurred proceeding a test claim). In general, an order for costs against group litigants imposes several liability for an equal proportion of common costs. In addition to any liability to pay the receiving party, a group litigant who is the paying party will be liable for the individual costs of its claim, and an equal proportion of the common costs.



**Competition Act 1998**

The 'loser pays' principle applies to collective proceedings under the Act.

Rule 98 of the CAT Rules of Procedure provides that in opt-out collective proceedings costs may be awarded to, or against, the class representative, but may not be awarded to or against those represented except in certain circumstances. In particular, costs associated with an individual class member issue may be awarded to or against the particular individual represented.

**21 Is third-party funding of class actions permitted?****GLOs and representative claims**

Third-party litigation funding is permitted.

**Competition Act 1998**

Third-party litigation funding is permitted for collective proceedings (both opt-in and opt-out) before the CAT. There appears to be no restriction on the return for such funding being based on the level of damages awarded.

**22 Can plaintiffs sell their claim to another party?****GLOs and representative claims**

CPR 19 does not contain any specific prohibitions. Claims may be assigned in accordance with the provisions of English law relevant to assignments of rights of action.

**Competition Act 1998**

Neither the amended Competition Act nor the CAT Rules of Procedure restrict the sale of claims.

**23 If distribution of compensation to class members is problematic, what happens to the award?****GLOs and representative claims**

Since GLOs are opt-in (and not opt-out), all of the claimants are identifiable and have knowledge of the collective proceedings. Similarly, representative claims require the class of represented parties to be clearly ascertainable and defined. Accordingly, there is unlikely to be a scenario where there are undistributed damages since the award will be reflective of the harm done to the number of individuals who opted in to the proceedings. However, should there ever be unclaimed damages these will be paid to the Access to Justice Foundation.

**Competition Act 1998**

Where the CAT makes an award in opt-out collective proceedings, any damages not claimed by the represented persons within the specified period must be paid to charity (section 47C(5) of the Act). The CAT may also order that unclaimed damages may instead be paid to the representative in respect of costs or expenses incurred in connection with the proceedings (section 47C(6) of the Act). However, it should be noted that in collective settlements, it is possible for any undistributed settlement sums to revert back to the defendant (footnote to paragraph 6.88 of the Guide to Proceedings).

Separately, where an aggregate award of damages suffered by the class as a whole has been made, the CAT will give directions for assessing the amount of damages that may be claimed by each class member. This may include a method or formula for quantification or the appointment of an independent third party to determine the quantification of damages (CAT Rules of Procedure, rule 92).

# Sidley Austin LLP

Simon Fawell  
Steven Pitt  
Frances Macduff  
James Russell Stoneham

[sfawell@sidley.com](mailto:sfawell@sidley.com)  
[spitt@sidley.com](mailto:spitt@sidley.com)  
[fmacduff@sidley.com](mailto:fmacduff@sidley.com)  
[jrussellstoneham@sidley.com](mailto:jrussellstoneham@sidley.com)

Woolgate Exchange  
25 Basinghall Street  
London, EC2V 5HA  
United Kingdom

Tel: +44 20 7360 3600  
Fax: +44 20 7626 7937  
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