International Association of Procedural Law

Moscow Conference – 2012

Cultural Dimensions of Group Litigation

ITALY

Elisabetta Silvestri [*]

Introduction

Before addressing the questions prepared by the General Reporter, it appears necessary to make some preliminary statements that will provide the background to the Italian Report, and hopefully will help in understanding the reasons why some issues concerning group litigation in Italy cannot be expanded upon.

Even though the scholarly debate on collective redress in Italy dates back to the 1970s, the first attempts at enacting a form of class action for damages were made only toward the end of 2007 under the pressure of a few financial failures involving Italian corporations (such as Parmalat, Cirio and Giacometti) and affecting thousands of investors. In the previous years, the lack of any forms of group actions available to those who had suffered damages arising from the same tortious actions had caused the Italian courts to be literally flooded with individual civil suits and bankruptcy proceedings; the wave of Italian financial scandals even hit other countries, such as the United States, where some class actions were filed and maintained successfully.

The rule adopted in 2007 and inserted into the Consumer Code as a new article (Article 140 *bis*) never went into effect since its entry into force was postponed several times. Eventually, in 2009, the rule was amended and virtually rewritten: it went into effect on 1 January 2010, but – due to some legislative mechanisms too complex to be explained here – the new 'class action' (*Azione di classe*) was made available only to claim damages sustained as a result of acts (or failures to act) perpetrated by the defendant after 15 August 2009. This date is very important because it prevents the use of class action in the very cases that motivated Italian lawmakers to turn their attention to collective redress: in other words, the investors crushed by the financial scandals mentioned above, as well as those individuals who were enticed by many Italian banks into buying the infamous Tango (that is, Argentinean) bonds, will never be able to aggregate their claims into a single class action, since the events took place long before the fateful date of 15 August 2009.

As of June 2011, only six class actions had been brought nationwide. Out of these six actions, only one has been declared admissible (that is, in the language of American-style class actions, certified to proceed as a class action). The hearing at which the court was supposed to decide how to manage the case was scheduled for mid-June, but this Reporter was not able to collect information as to what happened at the hearing: maybe it was adjourned, or the court reserved its decision on the motions presented by the parties. In any event, it is foreseeable that quite a long time will go by before the case comes to an end, whether by virtue of a collective settlement or a court judgment.

[*] University of Pavia.

In light of the above and the obvious lack of 'black letter law' on the many issues raised by the rule governing Italian class actions, essentially this Report sets forth some theoretical observations on group actions in Italy. Most observations are not original ideas of the Reporter, but are borrowed from a rich harvest of academic writings on the subject matter. Actually, the interests scholars have shown in dissecting Article 140 *bis* of the Consumer Code has been – at least so far – in reverse relation to its application in practice: that must be taken into account, since it contributes to shaping the cultural dimensions of Italian class actions.

Something else can cast light upon such cultural dimensions: the Italian legal system provides for not only class actions for damages, but also for a variety of collective actions, and – since 2009 – for a brand new 'public' class action.

Collective actions were initially devised in the field of consumer law according to the model laid down by several EU Directives (from Directive 98/27/CE to the more recent Directive 2009/22/CE) Italy had the duty to implement; later these actions became available in other fields such as environmental protection, securities regulation and anti-discrimination protection. In spite of the disparate areas of law these collective actions affect, they all share at least two common features: first, they can be brought only by 'qualified' bodies or entities (for instance, consumer associations accredited by the Government); and second, the remedy sought can only be an injunction issued against the defendant.

The so-called 'public' class action is a special action that both individuals and groups can bring to the administrative courts with the goal of attacking the inertia of the public administration when it has failed to act in spite of a specific obligation to do so (e.g. the administration did not comply with the rule setting a deadline for the enactment of certain provisions). Courts cannot award any damages, but only issue orders mandating the administration (as defendant) to fulfil its obligations. Those who want to claim damages will have to turn to the civil courts and bring either individual suits or, if the appropriate requirements are met, a 'private' class action (the one governed by Article 140 *bis* of the Consumer Code).

The diverse landscape described above could foster the idea that Italy has a legal system highly committed to the protection of group rights and to the cause of collective redress: unfortunately, though, the assortment of legal instruments available 'on paper' is met by a disheartening lack of efficiency of these very legal instruments. This depends on a variety of reasons that cannot be analysed in this Report: suffice it to say that the shortcomings of collective redress are just symptoms (and probably not even the most serious ones) of the 'disease' impairing the Italian system of justice at large. And that does have a bearing on the cultural dimensions of the level of judicial protection granted to the rights of citizens, whether these rights are strictly individual or belong to a group.

1. Objectives

The main purpose attached to class actions for damages provided for by Article 140 *bis* of the Consumer Code is to enhance access to justice. According to the Italian Constitution, 'Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law' (Article 24, sec. 1): the right of judicial protection before the courts

is predicated on the principle of equality, which is one of the fundamental tenets of the Italian Constitution, whose Article 3 provides that 'All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions'.

For a long time, scholars argued that the implementation of these constitutional guarantees was incomplete since group rights had no avenues to claim judicial protection. The legal system seemed to care only about individual rights, as did the Code of Civil Procedure, which made perfect sense, considering that it dates back to 1942, a time when the awareness of collective, 'diffuse' and transindividual rights was unheard of. But in contemporary society it cannot be ignored that the frequency of multiple claimants suffering an identical loss as a consequence of the same tortious conduct is growing fast and, therefore, the meaning of the guarantee of access to justice had to be updated so as to include mechanisms of collective redress, too.

The advent of class actions has apparently filled the gap; just apparently, though, because class actions are available only to 'consumers and users', and even though one may argue that, one way or another, we all are both consumers and users, it would have been better if lawmakers had framed the action in broader terms, so as to make it a general tool, accessible to any group of individuals, provided that some requirements are met. For instance, the numerosity of the prospective plaintiffs and the commonality of factual or legal issues – that is, some of the prerequisites of American class actions set forth by Fed. R. Civ. P. 23 (a) – could have been adopted by Italian lawmakers as requirements if they had really pursued in good faith the goal of conceiving an effective legal means by which mass claims (affecting groups of individuals other than consumers or users) could be aggregated.

As to the other objectives conventionally assigned to class actions, that is, behavioural modification and deterrence, since in Italy no class actions have been settled or decided yet, any forecasts are premature. Recalling how the enactment of the rule on class actions was opposed by the Italian business community, one may assume that both behavioural modification and deterrence are highly feared. It is reasonable to say, though, that both by-products of class actions should not be overestimated in a legal system that – like most continental European legal systems – does not allow courts to impose punitive damages.

2. Representation

In the Italian class action for damages the role of plaintiff can be played by each member of a class, either personally or through a consumer association of his or her choice. It is important to underscore that even if Article 140 *bis* grants standing to sue to 'each component of the class', at the initial stage of the proceeding there is only a putative class: at its inception, the action is conceived as a strictly individual one. It is only in the development of the procedure that the 'class' (that is, a group of individuals who claim to be the bearers of 'homogenous rights' and, more precisely, of rights that are 'identical' to the one for which the leading plaintiff is seeking financial redress) takes shape through the mechanics of an opt-in procedure. If the action is declared admissible, an order is issued by the court as to the 'appropriate notice' to the class members; with the same order the court sets the deadline for opting-in. The class members who opt-in are bound by the outcome of

the action, even though they are not considered parties to the suit, which – from a strictly procedural point of view – goes on between the leading plaintiff and the defendant.

Notoriously, opt-in procedures are not very user-friendly, and that is even more so for Italian class actions, since the opt-in period can be relatively short and, in any event, cannot exceed one hundred and twenty days. On the other side, opt-in can be made more attractive by the rule according to which, once the opt-in period has expired, no other class actions can be brought against the same defendant on the same set of issues.

Lawmakers did not pay any particular attention to the issue concerning how fairly the plaintiff is able to represent the interests of the class. It is true that the court can refuse to declare the action admissible 'if the plaintiff seems unable to afford adequate protection to the interests of the class', but this is the only reference to the problem of adequacy of representation, and no case law elucidates the issue. Since Italy adopts an opt-in mechanism, the problem could be seen as less serious than it is in those legal systems where opt-out is the rule and the rights of absent members can be jeopardised by a careless leading plaintiff. At the same time, opt-in procedures are, to a certain extent, a leap in the dark, most of all if – as in Italy – those who opt-in do not become parties to the case and, therefore, not only lack any powers of initiative as to the conduct of the suit, but also cannot control whether the plaintiff acts in their best interests.

3. Funding and financing

It is claimed that the little success met by class actions in Italy is due to the lack of financial incentives. As a matter of fact, among the many questionable aspects of Italian class actions there is the lack of any special provisions concerning their funding and financing. Class actions are subject to the same rules that apply in any civil and commercial case. Among these rules, two are worth mentioning, meaning, first, the rule according to which each party is responsible for the expenses the party is expected to advance as the initial funding of the action the party brings, and, second, the so-called 'loser-pays' rule, a rule the court may disregard by ordering each party to bear his or her own costs and expenses only when certain conditions occur.

The handful of class actions Italian courts have entertained so far were all commenced by consumer associations, as representatives of individual claimants: probably, the activism of consumer associations had more to do with aspiring to gain a higher level of visibility than with the hope of receiving any financial benefits from a victory in court.

The image of aggressive 'Kings of Torts', meaning entrepreneurial attorneys acting as the driving force of class actions, does not suit the Italian Bar. American lawyers can provide the funding of class actions because they can rely on contingency fee agreements. In Italy, these agreements are forbidden; what Italian attorneys can do is to reach an agreement with their clients according to which they are entitled to receive not a percentage of the damages awarded to their client, but only a success fee on top of their regular fees (calculated according to a mandatory rate, approved by the Government) if they win the case. Probably, that is not enough to make class actions a profitable business. But even if contingency fee agreements were legal, the appeal of class actions for attorneys would not increase: the damages Italian courts can award are strictly compensatory, since

– as mentioned earlier – punitive damages are not allowed. And speaking of the damages class members can recover, one cannot help underscoring that even for class members the recovery of the damages awarded by the court could be a stressful high-hurdles race: not only do they have to opt-in, but they also face the possibility that the court, when it finds for the plaintiff, will restrict itself to setting the criteria according to which the damages suffered by each class member must be calculated. Too bad that, in this event, each class member will have to start his or her own individual civil action in order to have a court apply those criteria and finally be awarded the damages he or she is entitled to recover.

To wrap up the issue of financing class actions, one more point is worth mentioning. Third-party funding is possible, since it is not openly forbidden by any legal rules. In spite of that, the lack of statutory regulations and, even more, of any case law on the matter, puts third-party funding of litigation in a sort of 'twilight zone' nobody seems willing to explore.

4. Available relief

The issue has been addressed in the introductory part of this Report.

5. Court Involvement

The involvement of the court at the initial stage of an Italian class action has been described already: the action can proceed only if the court declares it admissible (that is, certifies it as a class action), having found that the requirements laid down by Article 140 *bis* of the Consumer Code have been met. Among the elements the court is supposed to evaluate, one, in particular, enables the court to 'filter' prospective class actions according to a prognostic evaluation of their merits: as a matter of fact, certification can be denied if the action appears to be 'clearly groundless'.

As far as the control of the court over the settlement is concerned, the situation is not satisfactory at all. Italy has no rule equivalent to Fed. R. Civ. P. 23 (e): the problem of empowering the court so that it can act as the advocate of the fairness, reasonableness and adequacy of settlements in class actions has not been addressed by Italian lawmakers. The law governing class actions for damages intersects – to a certain extent – the law governing mediation in civil and commercial cases: scholars have tried to make sense of rules that are sometimes conflicting, sometimes overlapping, but their efforts have been to no avail. One must be patient and wait to see whether courts will be inclined to find a way out of the legislative conundrum so as to play a decisive role in preventing abuse in settlements.

6. Compatibility with US-style Class Actions

The Italian 'class action' is anything but an American-style class action. Certainly, the opt-in mechanism is the major departure from the American model, but other aspects, too, of both Italian collective actions and the 'class action' for damages do not have much in common with the way collective redress is dealt with in the United States. Besides problems such as the lack of specific regulations addressing the issues of funding and financing of group actions, as well as the fairness of collective settlements and even more technical issues concerning procedural aspects of both collective and class actions, what marks the distance from the American experience is most of all a different 'culture of litigation': that – in its

turn – shows how the so-called private enforcement (by way of group actions) is still underdeveloped even as regards matters in which either individual actions would take the plaintiff nowhere (for instance, because the costs of litigation would exceed the value of his or her claim) or public enforcement has proven to be weak and ineffective. In the case of Italy, also, the issue of collective redress cannot be isolated from a wider context, that is, the general situation of civil justice. It is well known (even at the international level) that Italy is not a 'beacon of civilisation' as far as its administration of justice is concerned: one should acclaim the miracle if group actions were working as perfectly as a Swiss clock in a country in which even a minuscule 'small claim' brought to court can last years to be defined by a judgment.

Looking at things in a less pessimistic way, it must be conceded that Italy is not the only country of continental Europe that has found it hard to devise efficient and workable forms of collective redress. In a working document issued last February with the view to opening a public consultation on the topic 'Toward a Coherent European Approach to Collective Redress'[1], the EU Commission noted that in the field of existing models of collective redress in the European Union, 'every national system of compensatory redress is unique and there are no two national systems that are alike in this area'. The obvious problems brought about by such a variety of national systems could be reduced if a European framework of collective redress, based on common principles, were set forth. As it did on several other occasions, the Commission made clear that 'any European approach to collective redress (injunctive and/or compensatory) would have to avoid from the outset the risk of abusive litigation', since 'many stakeholders have expressed concern that they wish to avoid certain abuses that have occurred in the US with its "class actions" system'. Therefore, according to the Commission, the evil American-style class actions are to be kept away from European shores: unfortunately, the Commission did not show the same resolve in advancing a model of group actions alternative to class actions. Maybe in the future the Commission will make up its mind and design an original pan-European form of collective redress, laying down some common principles to be enforced by national legislatures: hopefully, that will help the Italian legal system—or, more likely, will force it—to change its attitude toward group actions.

[1] The document is available at http://ec.europa.eu/justice/news/consulting_public/0054/ConsultationpaperCollectiveredress4February2011.pdf.

Basic Bibliography

The Italian literature on collective actions and class actions is very rich. Since this Report is intended for an international congress, the Reporter has decided to provide the readers only with a few bibliographical references concerning the Italian experience, but written in the new '*lingua franca*' of the scientific community, that is, English.

CALCAGNO, N., '«Italian Class Action»: The Beginning' (March 15, 2011), available at SSRN: http://ssrn.com/abstract=1875424.

COMOLLI, R., DE SANTIS, M. and LO PASSO, F., 'Italian Class Actions Eight Months In: The Driving Forces' (16 September 2010), available at http://globalclassactions.stanford.edu/.

HODGES, C., 'Collective Redress in Europe: The New Model', 29 *Civil Justice Q.*, 2010, 370.

NASHI, R., 'NOTE: Italy's Class Action Experiment', 43 *Cornell Int'l L.J.*, 2010, 147.

SILVESTRI, E., 'Italy', in D. H. HENSLER, C. HODGES AND M. TULIBACKA (spec. eds.), *The Globalization of Class Actions*, *The ANNALS of the American Academy of Political and Social Science*, vol. 622 (1), 2009, 138.

SILVESTRI, E., 'The Difficult Art of Legal Transplants: The Case of Class Actions', 35 *Revista de Processo*, 2010, 99.

VALGUARNERA, F., 'Legal Tradition as an Obstacle: Europe's Difficult Journey to Class Action', *Global Jurist*: Vol. 10: Iss. 2 (Advances), Article 10 (2010), available at http://www.bepress.com/gj/vol10/iss2/art10.