

Class Actions, Group Litigation & Other Forms of Collective Litigation

- Germany -

Dietmar Baetge

I. Main features of the German civil litigation system

Civil litigation is a generic term referring to the adjudication of conflicts between private parties by courts of law. In class actions and other collective procedures, there are often interests of the general public involved. These procedures are, nonetheless, part of the civil litigation process as long as a private conflict serves as the starting point.¹

Traditionally, comparative legal research distinguishes two groups of civil procedure rules, those belonging to the common law family and those belonging to the civil law family. The latter group includes all countries with a civil litigation system of Romano-canonical origin, while the former group designates all systems that have, originally, been informed by English civil procedure.² Germany is one of the prime examples for a civil law country.³ Domestic and foreign commentators comparing civil procedure in German law with common civil procedure law, namely U.S. law, regularly point to the “markedly

¹ For a discussion of the term “civil procedure” from a comparative law perspective, see C.H. (Remco) van Rhee & Remme Verkerk, *Civil Procedure*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 120-1 (Jan M. Smits, ed., 2006).

² For a brief description of the two families of civil procedure, see Rhee & Verkerk, *supra* note 1, at 122-4.

³ The leading English-language treatise on German civil procedure is Peter L. Murray & Rolf Stürner, *GERMAN CIVIL JUSTICE* (2004). Shorter descriptions include Astrid Stadler & Wolfgang Hau, *The Law of Civil Procedure*, in *INTRODUCTION TO GERMAN LAW* (Mathias Reimann & Joachim Zekoll, eds., 2nd ed. 2005) 365-86; Harald Koch & Frank Diedrich, *CIVIL PROCEDURE IN GERMANY* (1998); Alexander Layton & Hugh Mercer (eds.), *EUROPEAN CIVIL PRACTICE II* (2nd ed. 2004) 178-211 (Ch. 52 on Germany written in collaboration with Thomas Försterling); Nigel G. Foster & Satish Sule, *GERMAN LEGAL SYSTEM AND LAWS* (3rd ed. 2002) 110-36; for an older treatment still of great value, see Benjamin Kaplan, Arthur T. von Mehren & Rudolf Schaefer, *Phases of German Civil Procedure* (pts. 1-2), 71 *HARV. L. REV.* 1193, 1443 (1958).

different” practices in both systems.⁴ Features that distinguish U.S. from German civil litigation include pre-trial discovery, trial by jury, American rule on costs, and, last but not least, class actions.⁵ Unlike England, the United States, and other countries with a common law tradition, German courts have no authority to adopt general rules on civil procedure. On constitutional grounds this task is reserved to the legislator. The German law of civil procedure has a variety of statutory sources. Its main source, however, is the Code of Civil Procedure (*Zivilprozessordnung* or *ZPO*), one of the famous so-called *Reichsjustizgesetze* dating back to 1877.⁶ Since its enactment the Civil Procedure Code has been amended several times,⁷ but its basic structure and characteristic features have endured.

There are number of guiding principles that inform civil trials in Germany. Some of them are firmly rooted in the German constitution.⁸ The most important principles are the principle of party control, the principle of party control of facts and the means of proof, and the right to be heard. According to the principle of party control (*Dispositionsmaxime*), all relevant aspects of the proceedings (beginning, subject-matter, termination, etc.) are determined by the parties.⁹ The principle of party control of facts and the means of proof

⁴ Kaplan, von Mehren & Schaefer, *supra* note 3, at 1193; in the same vein Burkard Hess, *Aktuelle Brennpunkte des transatlantischen Justizkonflikts*, 50 DIE AKTIENGESELLSCHAFT [DIE AG] 897 (2005); see also Jan von Hein, *Recent German Jurisprudence on Cooperation with the U.S. in Civil and Commercial Matters: A Defense of Sovereignty or Judicial Protectionism?*, in CONFLICT OF LAWS IN A GLOBALIZED WORLD (Eckart Gottschalk et al., eds., forthcoming 2007) (speaking of “deeply embedded differences between German and American Civil Procedure”).

⁵ See Hess, *supra* note 4, at 897; von Hein, *supra* note 4, at I B-G. Another feature also often mentioned in this context are contingency fees. However, in a recent judgment, the German Federal Constitutional Court held that the *per se* legal ban on contingency fee arrangements in Germany was unconstitutional in so far as it did not provide for “special circumstances” on part of the attorney’s client that, otherwise, may prevent him from pursuing his legal rights. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Dec. 12, 2006, 60 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 979 (2007).

⁶ Code of Civil Procedure (*Zivilprozessordnung* [ZPO]) of Jan. 30, 1877 in the version promulgated on Sept. 12, 1950, Bundesgesetzblatt I (BGBl. I) [Federal Gazette, Part I], p. 533, as amended. For additional sources of German civil procedure, see Koch & Diedrich, *supra* note 3, at 24.

⁷ The most recent comprehensive reform was undertaken in 2001 coming into force on January 1, 2002. For a description of the reforms, see Astrid Stadler, *The Multiple Roles of Judges and Attorneys in Modern Civil Litigation*, 27 HASTINGS INT’L & COMP. L. REV. 55, 59-76 (2003).

⁸ For an overview see Koch & Diedrich, *supra* note 3, at 26-39; Murray & Stürner, *supra* note 3, at 151-90; Foster & Sule, *supra* note 3, at 123-6.

⁹ The principle of party control is based on Article 2 of the German Constitution (*Grundgesetz* or *GG* of May, 23, 1949, BGBl. I, p. 1, as amended), which guarantees citizens the maximum scope

(*Verhandlungsgrundsatz* or *Beibringungsgrundsatz*) means that parties are responsible for presenting the facts and relevant evidence to the court. In consequence of the *Verhandlungsgrundsatz*, the German civil trial is adversarial and not inquisitorial, as has been alleged by some commentators.¹⁰ Nonetheless, in comparison to the common law, judges play a more active role.¹¹ The constitutional right to be heard (*Recht auf rechtliches Gehör*) is considered to be the most important principle of German law of civil procedure.¹² It is not only guaranteed by the German constitution¹³ but also by the European Convention on Human Rights (Article 6 (1)). The right to be heard is the constitutional right most frequently alleged in constitutional appeals to the German Constitutional Court. It guarantees a litigant, as well as every other person directly affected by the result of a law suit, “an opportunity to address the court in support of its own claims and proof and in opposition to the assertions and proof of the opponent.”¹⁴ Conversely, the judge is under an obligation to take into account the allegations and arguments presented by the parties.¹⁵

II. Formal rules that have been adopted for collective litigation

of personal freedom consistent with an ordered society (general right of self-determination). See Murray & Stürner, *supra* note 3, at 154; Stadler & Hau, *supra* note 3, at 365.

¹⁰ See, e.g., Hein Kötz, *Civil Justice Systems in Europe and the United States*, 13 DUKE J. COMP. & INT’L L. 61, 69 (2003); for the opposing view see Alexander Layton & Hugh Mercer, *supra* note 3, at 192 (adversarial only “in theory”).

¹¹ For instance, they are under a duty to assist the parties through providing hints and feedback (ZPO § 139). For a classical study on the role of the judge in German civil procedure see John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823 (1985).

¹² Koch & Diedrich, *supra* note 3, at 35. Another important fundamental right, sometimes in contradiction to the right to be heard, is the “claim to justice” (*Justizgewährungsanspruch*). It guarantees the parties to a civil trial the right to effective legal remedies, which, on part of the court, includes the duty to not unduly delay proceedings. The “claim to justice” had been considered by the German Constitutional Court in its judgment in the *Deutsche Telekom* case that later led to the introduction of a test case procedure for securities cases. See *infra* note 43-44 and accompanying text.

¹³ See Article 103 (1) GG (“In court everybody is entitled to a hearing in accordance with the law.”).

¹⁴ Murray & Stürner, *supra* note 3, at 188.

¹⁵ Stadler & Hau, *supra* note 3, at 366.

Like most continental European systems, German law does not know a class action like in the United States. There are, nevertheless, other instruments of collective litigation, most notably complaints by interest groups or associations (*Verbandsklagen*) which have a long history in Germany. In recent years, new forms of collective litigation have become more widespread in Germany, including model proceedings in capital market disputes.

1. Although there are now, and have always been, a variety of collective litigation instruments, the most common form is still the association or interest group complaint (*Verbandsklage*). In sociological terms, associations are intermediaries between the individual person (citizen, consumer, businessman), the general public, and the state. The *Verbandsklage* has been introduced first in 1896 into German law in the Act against Unfair Competition for associations whose purpose is to promote commercial interests (*Verbände zur Förderung gewerblicher Interessen*).¹⁶ These associations may bring a claim for injunction in case of deceptive advertising.¹⁷ In 1965, the right to seek injunctive relief under the Unfair Competition Act was extended to certain consumer associations (*Verbraucherverbände*). At the same time, the class action in its present form was introduced into US law.¹⁸ In both cases, a better protection of consumer interests played a major role. In 1977, the Law Regulating the Use of Standard Contract Terms accorded the same right to consumer associations to assist them in their fight against unfair business terms.¹⁹ Before and during the reforms, an intense debate of a US style class action took place in Germany, especially concerning the feasibility of introducing a claim for compensation for damages.²⁰

¹⁶ The historical development of association complaints in Germany is described in Ellen Schaumburg, *DIE VERBANDSKLAGE IM VERBRAUCHERSCHUTZ- UND WETTBEWERBSRECHT* (2006) 24-33.

¹⁷ See UWG § 3.

¹⁸ Rule 23 of the Federal Rules of Civil Procedure (F.R. Civ. P., 28 U.S.C.A.) in its present form dates back to the reform of 1966. For an overview of the reform from a German perspective see Stephanie Eichholtz, *DIE US-AMERIKANISCHE CLASS ACTION UND IHRE DEUTSCHEN FUNKTIONSÄQUIVALENTE* (2002) 35-7.

¹⁹ See § 13 of the Law Regulating the Use of Standard Contract Terms (*Gesetz zur Regelung der Allgemeinen Geschäftsbedingungen* or *AGB-Gesetz*) of Dec. 9, 1976, BGBl. I, p. 3317.

²⁰ See Eichholtz, *supra* note 18, at 226 with further references.

In recent years, the association complaint has been expanded to encompass a broader range of subject matters. The most important development has been the adoption of the Act on Injunctive Relief (*Unterlassungsklagengesetz* or *UKlaG*) which came into force in 2002.²¹ In § 1, the UKlaG reiterates the right for qualified consumer associations and commercial interest groups, formerly included in the *AGB-Gesetz*,²² to seek injunctive relief against the use of unfair standard contract terms. UKlaG § 2 extends this right to violations of all provisions protecting consumer interests. This provision implements the European Directive on injunctions for the protection of consumers' interests²³ but goes further than what is demanded by the Directive. Whereas the Directive provides for the right for legal action by, so-called, "qualified entities" only with reference to those legal instruments explicitly mentioned in its Annex, the Act on Injunctions extends to all consumer protective rules. The term "consumer protection laws" ("*Verbraucherschutzgesetze*") in UKlaG § 2 has to be understood in a broad sense,²⁴ including not only provisions on consumer credits or timesharing but also other subject-matters, which are not traditionally consumer oriented, like, for instance, investor protection laws or the laws governing the production and distribution of medical products.

In addition to the Act on Injunctions there are a number of other laws that provide for complaints by certain qualified associations or interest groups. The Unfair Competition Act (*UWG*) has already been mentioned above as the earliest legal instrument containing a *Verbandsklage*.²⁵ The right for consumer associations to bring legal action under the *UWG* has recently been extended to cover all acts of competition contrary to honest practices,²⁶

²¹ Law Authorizing Suits for Injunctive Relief in Consumer Protection and other Matters (*Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen*) of Nov. 26, 2001 in the version promulgated on Aug. 27, 2002, BGBl. I, p. 3422, as amended.

²² See *AGB-Gesetz* § 13 in the version promulgated on June 29, 2000, BGBl. I, p. 946 (repealed on January 1, 2002).

²³ Directive 98/27/EC of the European Parliament and of the Council of May 19, 1998, Official Journal L 166, p. 51. For an overview, with an emphasis on the repercussions for German law, see Dietmar Baetge, *Das Recht der Verbandsklage auf neuen Wegen – Zu den Auswirkungen der EG-Richtlinie über Unterlassungsklagen zum Schutz der Verbraucherinteressen auf die Verbandsklage in Deutschland*, 112 *Zeitschrift für Zivilprozeß [ZZP]* 329 (1999).

²⁴ See, e.g., Axel Halfmeier, *POPULARKLAGEN IM PRIVATRECHT* 174-6 (2006).

²⁵ See *supra* note 16 and accompanying text.

²⁶ See § 8 of the Law against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb* or *UWG*) of July 3, 2004, BGBl. I, p. 1414, as amended.

whereas, according to an earlier version of the Act, these associations might assert a claim only if "essential interests of the consumer" were affected.

The German Competition Act (*GWB*) also authorizes some interest groups to bring a complaint in case of a violation of the *GWB* or of Articles 81 or 82 of the EC Treaty.²⁷ Unlike the Law on Injunctive Relief and the Act against Unfair Competition, the authority for a *Verbandsklage* is limited to organizations for the promotion of commercial or independent professional interests. It does not extend to consumer associations. In course of the most recent amendment of the Competition Law, the German government sought to include consumer associations in the list of interest groups competent to bring complaints in the courts. This attempt did, however, fail, due to pressure of the *Bundesrat* or Second Chamber of the German parliament.²⁸ Consumer associations may, nonetheless, bring legal action insofar as a violation of the Competition Law constitutes, at the same time, a violation of the Unfair Competition Act. Moreover, consumer associations may claim a right under the general clause in UKlaG § 2, since the ultimate aim of antitrust laws is to protect the interests of consumers.²⁹

Some other rather specific provisions also provide for association suits. Commercial interest groups and consumer associations who are entitled under the Unfair Competition Act may also bring an action for cancellation under the Trademark Law in such cases where the cancellation request has been filed because of an indication of geographical origin having seniority.³⁰ The Telecommunications Law (*TKG*) permits associations and interest groups entitled under the Act on Injunctions to seek injunctive relief against businesses who have violated a consumer protective provision of the *TKG*.³¹ The Law on Equal Treatment of Disabled Persons authorizes associations for the protection of the disabled, which have been officially recognized by the Federal Ministry of Labor and

²⁷ See § 33 (2) of the Law against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* or *GWB*) of Aug. 26, 1998, BGBl. I, p. 2521, as amended.

²⁸ See Halfmeier, *supra* note 24, at 136-7.

²⁹ See also Halfmeier, *supra* note 24, at 137.

³⁰ See § 55 (2) of the Law on the Protection of Trademarks and Other Signs (*Gesetz über den Schutz von Marken und sonstigen Kennzeichen*) of Oct. 25, 1994, BGBl. I, p. 3082, as amended.

³¹ See § 44 (2) of the Telecommunications Law (*Telekommunikationsgesetz* or *TKG*) of June 22, 2004, BGBl. I, p. 1190, as amended.

Social Affairs, to institute legal proceedings before the administrative or social security courts to enforce certain provisions and regulations that are designed to benefit this category of people.³² The Law on the Remuneration of Hospitals permits the private health insurance association to bring a complaint in the civil courts if a reduction of the remuneration for certain optional treatments is not granted by the owner of the hospital.³³

In the area of environmental protection, a number of laws provide for interest groups to bring an action before the administrative courts. Since 2002, the Federal Environmental Protection Law confers the right upon qualified environmental interest groups to enforce environmental standards and rules in the courts without having to assert an injury to their own proprietary interests.³⁴ The Environmental Protection Laws of most German states (*Länder*) contain similar provisions.³⁵ The Law on Judicial Remedies in Environmental Matters (*Umwelt-Rechtsbehelfsgesetz*), that implements the EU Directive on public participation,³⁶ expands the scope of association complaints for domestic and foreign environmental interest groups that are recognized by the Federal Environmental Agency to other areas of environmental concern, like environmental impact assessments.³⁷

2. Beside the *Verbandsklage*, other instruments of collective litigation are gaining more ground in Germany. The most important development, so far, has been the recent enactment of the Capital Markets Model Case Act (*Kapitalanleger-*

³² See § 13 of the Law on Equal Treatment of Disabled Persons (*Gesetz zur Gleichstellung behinderter Menschen* or *BGG*) of Apr. 27, 2002, BGBl. I, p. 1467, as amended.

³³ See § 17 (1)(5) of the Law on the Renumeration of Hospitals for Full or Partial In-Patient Treatment (*Gesetz über Entgelte für voll- und teilstationäre Krankenhausleistungen* or *KHEntgG*) of Apr. 23, 2002, BGBl. I, p. 1412, as amended.

³⁴ See § 61 of the Law on the Protection of the Environment and Landscape (*Gesetz über Naturschutz und Landschaftspflege* or *BNatSchG*) of Mar. 25, 2002, BGBl. I, p. 1193, as amended.

³⁵ For an exhaustive list of the statutes, as of Feb. 2007, see Hans-Joachim Koch, *Die Verbandsklage im Umweltrecht*, 26 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVwZ] 369, 372 (2007).

³⁶ Directive 2003/35/EC of the European Parliament and of the Council of May 26, 2003, providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment, Official Journal L 156, p. 17.

³⁷ See Law on Supplementary Provisions concerning Judicial Remedies in Environmental Matters According to the EC Directive 2003/35/EC (*Gesetz über ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG* or *Umwelt-Rechtsbehelfsgesetz* or *UmwRG*) of Dec. 7, 2006, BGBl. I, p. 2816.

Musterverfahrensgesetz or *KapMuG*).³⁸ The KapMuG is designed to strengthen the position of investors under securities law.³⁹ The KapMuG is supposed to be an "experimental law", introducing, for the first time, a model case procedure into German civil procedural law. After a trial period of 5 years, the law will automatically expire on November 1, 2010.⁴⁰ If it is found to work satisfactorily, the legislator may decide to have it prolonged or to have its rules even incorporated into the Code of Civil Procedure. In the latter event, which, for the time being, is quite likely, model case proceedings would become generally available in civil litigation.

The KapMuG's origins can be traced back to the *Deutsche Telekom* case, the biggest investor suit in German history so far.⁴¹ Deutsche Telekom (DT) is Germany's most widely held share with some 3 million individual shareholders. Between 2001 and 2003 thousands of investors, represented by more 754 different attorneys, filed suit against DT, alleging that the formerly state-owned company issued wrong information in two offering prospectuses in 1999 and 2000.⁴² The claimants contended that DT had overstated the value of its real property by € 2 billion. Exclusive jurisdiction over the claims, which represented a total value of some €150 million, was exercised by the 7th Commercial Panel of the Frankfurt District Court (*Landgericht*), with one single presiding judge (Meinrad

³⁸ Law on Model Proceedings in Capital Market Disputes (*Gesetz über Musterverfahren in kapitalmarktrechtlichen Streitigkeiten*) of Aug. 16, 2005, BGBl. I, p. 2437. For an article-by-article commentary see Volkert Vorwerk & Christian Wolf (eds.), *KAPITALANLEGER-MUSTERVERFAHRENSGESETZ (KAPMUG)* (2007).

³⁹ For an overview of the KapMuG's aims cf. Thomas M.J. Möllers & Tilman Weichert, *Das Kapitalanleger-Musterverfahrensgesetz*, 58 NJW 2737 (2005); Brigitte Zypries, *Ein neuer Weg zur Bewältigung von Massenprozessen - Entwurf eines Kapitalanleger-Musterverfahrensgesetzes*, 37 ZEITSCHRIFT FÜR RECHTSPOLITIK [ZRP] 177 (2004).

⁴⁰ See the "sunset clause" in Art. 9 (2) of the Act Introducing Model Proceedings in Securities Litigation (*Gesetz zur Einführung von Kapitalanleger-Musterverfahren*) of Aug. 16, 2005, BGBl. I, p. 2437.

⁴¹ For details cf. Burkhard Hess, *Musterverfahren im Kapitalmarktrecht*, 26 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 1713 (2005); Moritz Bälz & Felix Blobel, *Collective Litigation German Style - The Act on Model Proceedings in Capital Market Disputes*, in *CONFLICT OF LAWS IN A GLOBALIZED WORLD* 126, 132 (Eckart Gottschalk et al., eds., forthcoming 2007); Michael Stürner, *Model Case Proceedings in the Capital Markets - Tentative Steps Towards Group Litigation in Germany*, 26 CIV. JUST. Q. 250, 253 (2007); see also Richard Milne, *Judge Slams D Telekom Methods*, FIN. TIMES, Nov. 24, 2004, at 18.

⁴² A class action filed against Deutsche Telekom in the U.S. has already been settled in January 2005 for US \$120 million. See *In re Deutsche Telekom AG Securities Litigation*, 229 F. Supp. 2d 277 (S.D.N.Y. 2002).

Wösthoff) being inundated with the flood of claims. After almost 3 years without oral hearings, a number of plaintiffs lodged a constitutional appeal with the Federal Constitutional Court (*Bundesverfassungsgericht*) alleging a denial of justice. Although the Constitutional Court rejected the appeal, it committed the *Landgericht* to speedy up the proceedings.⁴³ In this context, the Court explicitly referred to the possibility of "other procedures as model cases".⁴⁴

The German legislator reacted by enacting the KapMuG.⁴⁵ The drafting of the Act was accompanied by an extensive academic debate.⁴⁶ Apart from and prior to the KapMuG, there had been already various calls for improving the possibilities for collective litigation in securities cases under German law.⁴⁷ Therefore, the KapMuG's enactment appears only a logical development.

In contrast to a U.S. style class action, model proceedings under the KapMuG are designed as mere interlocutory proceedings and not as separate action.⁴⁸ In this respect, they resemble § 93a of the Code of Administrative Procedure, which provides for a similar

⁴³ See BVerfG, July 27, 2004, 57 NJW 3320 (2004).

⁴⁴ BVerfG, *supra* note 43, at 3321.

⁴⁵ Due to its genesis, the KapMuG is also sometimes referred to as the "*Lex Telekom*". See Bälz & Blobel, *supra* note 41, at 134.

⁴⁶ See, e.g., Franz Braun & Klaus Rotter, *Der Diskussionsentwurf zum KapMuG - Verbesserter Anlegerschutz?* 4 ZEITSCHRIFT FÜR BANK- UND KAPITALMARKTRECHT [BKR] 296 (2004); Burkhard Hess & Chrisoula Michailidou, *Die kollektive Durchsetzung von Schadensersatzansprüchen im Kapitalmarktrecht*, 57 WERTPAPIERMITTEILUNGEN [WM] 2318 (2003); Fabian Reuschle, *Möglichkeiten und Grenzen kollektiver Rechtsverfolgung*, 58 WM 966 (2004).

⁴⁷ See, e.g., the report by the German Expert Commission on Corporate Governance, Bericht der Regierungskommission "Corporate Governance", BTDrucks 14/7515 of Aug. 14, 2001, 88-90 (calling for the introduction of a representative action, based on an opt-in model, whereas, at the same time rejecting a U.S. style class action); see also the recommendations of the 64th Conference of German Jurists (Deutscher Juristentag), 2002, Section of Economic Law [E], Recommendation 1.15, reprinted in 5 NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT [NZG] 1006 (2002) (proposing a group action only for securities litigation); in the same vein Klaus J. Hopt & Hans-Christoph Voigt, *Grundsatz und Rechtsprobleme der Prospekt- und Kapitalmarktinformationshaftung*, in PROSPEKT- UND KAPITALMARKTINFORMATIONSHAFTUNG 9, 104 (Klaus J. Hopt & Hans-Christoph Voigt, eds., 2005). For a criticism of these and other proposals, see Reuschle, *supra* note 46, at 973-5.

⁴⁸ Bälz & Blobel, *supra* note 41, at 135; Stürner, *supra* note 41, at 264.

procedure in administrative cases.⁴⁹ This provision, which was enacted in 1991, is based on the experiences gained in the proceedings concerning the construction of the Munich II airport.⁵⁰ It has been applied, successfully, for the first time only in 2006 by the Federal Supreme Administrative Court (*Bundesverwaltungsgericht*) in two separate cases.⁵¹

Model proceedings are not totally new to German civil litigation, either. Even before the enactment of the KapMuG, it had been possible to initiate test cases, although the ZPO does not provide for such a procedure.⁵² To make test case proceedings binding for all parties, a contractual arrangement is required (so-called *Musterprozessvereinbarung*).⁵³ It is, however, very difficult and in many cases even impossible, to get all potential plaintiffs and, at the same time, the defendant to enter into such an agreement.⁵⁴ The actual scope of the contractual model case procedure is, therefore, limited to special situations.⁵⁵

3. In addition to model proceedings and association suits, an alternative way of litigating mass claims may, possibly, involve the assignment of the claimants' rights to a third party that then pursues the claims on its own.

⁴⁹ Code of Administrative Procedure (*Verwaltungsgerichtsordnung* or *VwGO*) of Jan. 1, 1960 in the version promulgated on Mar. 19, 1991, BGBl. I, p. 686, as amended. For a brief description of the test case procedure envisaged by *VwGO* § 93a and its possible transfer into the Code of Civil Procedure, see Klaus J. Hopt & Dietmar Baetge, *Rechtsvergleichung und Reform des deutschen Rechts - Verbandsklage und Gruppenklage*, in *DIE BÜNDELUNG GLEICHGERICHTETER INTERESSEN IM PROZESS 57-9* (Jürgen Basedow et al., eds., 1999).

⁵⁰ In these proceedings, the administrative court (*Verwaltungsgericht*) had selected some 30 test cases, out of a total of more than 5700 cases, and had suspended the other procedures while conducting the test cases. The Federal Constitutional Court did not raise any objections against this line of procedure. See BVerfG, Mar. 27, 1980, 54 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 39. For a description of the genesis of *VwGO* § 93a see Richard Rudisile, in *KOMMENTAR ZUR VERWALTUNGSGERICHTSORDNUNG*, § 93a mn. 1-2 (Friedrich Schoch et al., eds., 2006).

⁵¹ Both involved the expansion of regional airports (Berlin-Schönefeld and Leipzig/Halle respectively). Cf. Stefan Paetow, *Erstinstanzliche Großverfahren vor dem BVerwG*, 26 NVWZ 36, 38-40 (2007).

⁵² See Hopt & Baetge, *supra* note 49, at 56-7.

⁵³ For details cf. Florian Jacoby, *DER MUSTERPROZESSVERTRAG* (2000).

⁵⁴ See also Detlef Haß, *DIE GRUPPENKLAGE 95-6* (1996).

⁵⁵ For the various difficulties encountered by the parties to a *Musterprozessvereinbarung*, see Bundesgerichtshof [BGH] [Federal Supreme Court of Justice], April 23, 1998, 51 NJW 2274 (1998).

This line of action is currently being tested in the *CDC* case.⁵⁶ In this case, a Belgian corporation (CDC), which specializes in the private enforcement of damage claims against antitrust violators for commercial purposes, is pursuing the claims of 29 commercial clients that have sustained heavy losses in the hands of the Cement cartel, operating in Germany between 1989 and 2002. The clients have assigned their claims against the cartel's participants to CDC which now claims approximately € 114 million from the cement producers. The LG Düsseldorf, in an interlocutory judgment (*Zwischenurteil*), confirmed the admissibility of the suit.⁵⁷ The case is still pending, however, and it may take years until the Federal Supreme Court of Justice will render its final opinion on the matter. Until then, it remains at least doubtful, if the commercial model pursued by CDC is consistent with German law.⁵⁸ The provision of the Legal Advice Act,⁵⁹ according to which only specially qualified persons or institutions are allowed to offer legal services,⁶⁰ may well prove to be a stumbling-block, as it has been in the past with regard to suits by interest groups, founded *ad hoc* by the victims of mass torts in order to pursue their legal rights on a not-for-profit basis.⁶¹

4. All forms of collective litigation described so far are either regulated in special legislative instruments or have been developed outside of the realm of the Code of Civil Procedure. Within the *Zivilprozessordnung*, there is only the joinder of parties

⁵⁶ On the following, see Landgericht [LG] [State District Court] Düsseldorf, Feb. 21, 2007, 62 *BETRIEBS-BERATER* [BB] 847 (2007).

⁵⁷ *Id.*

⁵⁸ See also Georg Weidenbach, *BB-Kommentar*, 62 BB 849 (2007) (indicating some doubts in this respect).

⁵⁹ Law on Legal Advice (*Rechtsberatungsgesetz* or *RBerG*) of December 13, 1935, Reichsgesetzblatt I (RGBl. I) (Imperial Gazette, Part I), p. 1478, as amended.

⁶⁰ See Article 1 para. 1 (1) *RBerG*. For an exception to this rule see *infra* note **Error! Bookmark not defined.**-137 and accompanying text.

⁶¹ For an overview of the case law, cf. Eichholtz, *supra* note 18, at 243-5; see also Haß, *supra* note 54, at 106-19. For the same reason (violation of the Legal Advice Act) another proposal to pool the claims of various individuals, advanced by some authors, may, in practice, prove unworkable. According to this proposal, potential claimants form a civil law partnership (*Gesellschaft bürgerlichen Rechts*) whose purpose consists solely in pursuing the claims of its members. See Harald Koch, *Sammelklagen durch eine BGB-Gesellschaft*, 59 *NJW* 1469 (2006). For a criticism, cf. Karl-Georg Loritz & Klaus-R. Wagner, *Sammelklagen geschädigter Kapitalanleger mittels BGB-Gesellschaften – Kollision mit dem Rechtsberatungsgesetz?* 61 *WM* 477 (2007).

(*Streitgenossenschaft*) which allows for a multitude of claimants or defendants.⁶² According to ZPO § 59, several persons may jointly sue as joined parties or be sued in the event that they have a common legal relationship with respect to the object of litigation or in the event that their rights or obligations arise from the same factual and legal ground. Several persons may also jointly sue or be sued in the event that the subject matters of the claims are similar in terms of facts and law (ZPO § 60). On the same ground, the court may order the joinder of different actions that were brought separately when they are legally connected or could have been asserted in a single complaint (*Verfahrensverbindung*).⁶³ As an efficient means of mass procedure, the joinder of parties suffers from the fact that the parties still are treated individually. Each party's claim has to be examined on its own merits in terms of venue, subject matter jurisdiction or party's legal capacity.⁶⁴ Also, there is no binding effect for the other parties as to factual allegations made by one party. The joinder of actions, which also leads to a multitude of parties, lacks in efficiency because, unlike consolidation under U.S. law, there is no possibility of consolidating law suits pending before different courts. For these reasons, the ZPO's mechanisms of joinder of parties and of actions are of very little use for collective litigation purposes.⁶⁵

In answering the following questions, I will mostly concentrate on the model case procedure under the KapMuG and on association complaints according to the UKlaG and the UWG.

III. Description of the process for each litigation mechanism contemplated by the formal rules

1. Model proceedings under the Capital Markets Model Case Act, which are also applicable in the already pending *Deutsche Telekom* case,⁶⁶ apply in first instance

⁶² For an excellent overview *cf.* Murray & Stürner, *supra* note 3, at 200-3; for a more thorough discussion *cf.* Wolfgang Lüke, DIE BETEILIGUNG DRITTER IM ZIVILPROZESS 12-27 (1993).

⁶³ *See* ZPO § 147.

⁶⁴ *See* Lüke, *supra* note 62, at 12.

⁶⁵ *See also* Hopt & Baetge, *supra* note 49, at 54-5.

⁶⁶ *See* Stürner, *supra* note 41, at 256.

procedures to claims in which compensation of damages due to false, misleading, or omitted public capital markets information contained in a prospectus, financial statements, etc. is asserted. Exclusive jurisdiction in these cases is granted to the court at the seat of the issuer, the offeror of other financial instruments, or the target company.⁶⁷ According to official statements by the Federal Ministry of Justice,⁶⁸ the KapMuG is supposed to help the individual investor in effectively pursuing his or her damage claims while, at the same time, reducing the risk of bearing the entire litigation costs. Moreover, proceedings involving a great number of plaintiffs are expedited since complex questions of fact and law have to be resolved only once with binding effect for all other injured investors.

To achieve these purposes, the KapMuG introduces a procedure that operates in three steps or phases.⁶⁹ In a first step or opening phase, a model case is established by the trial court (District Court) and submitted to the court of appeals (*Oberlandesgericht*). The trial court decision establishing a model case cannot be appealed by the parties.⁷⁰ It may be appealed, though, if the trial court dismissed the application for a model case procedure. In a second step, the appeals court conducts the actual model case proceedings that end with the rendering of a judgment on the model question(s). Because of their “fundamental significance”, model judgments may always be appealed before the Federal Supreme Court of Justice.⁷¹ Finally, in the third phase, the trial court will decide the individual cases with regard to the model case ruling.

2. Unless specific legal rules provide otherwise, actions brought by consumer associations and commercial interest organizations follow the same principles and rules of the Code of Civil Procedure that apply to ordinary civil litigation.⁷² Consequently, the principles of party control (*Dispositionsmaxime*) and of party control of facts and the means of proof

⁶⁷ ZPO § 32b (1). For an extensive discussion of this provision and its international repercussions see Bälz & Blobel, *supra* note 41, at 140-47.

⁶⁸ Federal Ministry of Justice, *Bundesrat ebnet den Weg für Musterverfahren geschädigter Anleger*, press release of July 8, 2005, and *Kapital-Musterverfahrensgesetz (KapMuG) im Bundesgesetzblatt verkündet*, press release of Aug. 19, 2005, both available at <http://www.bmj.bund.de>.

⁶⁹ See Bälz & Blobel, *supra* note 41, at 135-8; Stürner, *supra* note 41, at 256-64.

⁷⁰ KapMuG § 4 (1)(2).

⁷¹ See KapMuG § 15 (1)(2).

⁷² See UKlaG § 5.

(*Verhandlungsgrundsatz*) apply also to the association or organization that has brought the claim.⁷³

Unlike in regular civil trials, an association suit is commonly preceded by a warning notice (*Abmahnung*) that informs the other party about the wrongful act he allegedly has committed.⁷⁴ In addition, the warning notice usually includes a prefabricated declaration of discontinuance to be signed by the other party. In case of denial, the other party is threatened with legal action.⁷⁵

In regular civil proceedings, only the parties to the controversy are bound by a final judgment (*res adjudicata* or *materielle Rechtskraft*).⁷⁶ In general, this is also the case if the suit has been filed by an association.⁷⁷ There is, however, one exception that concerns association complaints alleging the use of unfair standard contract terms. According to the Act on Injunctions, consumers are entitled to invoke a court injunction against the use of unfair standard contract terms obtained by an association.⁷⁸ Therefore, if consumers bring individual actions against a business that is using the standard contract terms despite of the injunction, the contract terms are deemed invalid.⁷⁹

IV/V. Who may come forward to represent groups of claimants or initiate group litigation?

⁷³ See Leo Rosenberg, Karl Heinz Schwab & Peter Gottwald, *ZIVILPROZESSRECHT* 284 (16th ed. 2004); Schaumburg, *supra* note 16, at 202-3; for the opposing view see Halfmeier, *supra* note 24, at 166-70.

⁷⁴ UWG § 12 (1); UKlaG § 5; see also Baetge, *supra* note 23, at 346-9.

⁷⁵ For a more detailed description of the contents and the legal significance of a warning notice see Joachim Bornkamm in *WETTBEWERBSRECHT* 1047-88 (Helmut Köhler & Joachim Bornkamm, eds., 25th ed. 2007).

⁷⁶ ZPO § 325 (1). See also Murray & Stürner, *supra* note 3, at 359-60.

⁷⁷ For association suits under the UWG see Halfmeier, *supra* note 24, at 100-3.

⁷⁸ UKlaG § 11. For a criticism of this provision see Horst-Diether Hensen in *AGB-RECHT* 1856 mn. 13-4 (Peter Ulmer et al., eds., 10th ed. 2006).

⁷⁹ Astrid Stadler, *Collective Action as an Efficient Means for the Enforcement of European Competition Law*, in *PRIVATE ENFORCEMENT OF EC COMPETITION LAW* 195, 202-3 (Jürgen Basedow, ed. 2007).

1. Model Proceedings under the Capital Markets Model Case Act start with the application to the State District Court, where the case is pending, for the establishment of a model case procedure.⁸⁰ Any claimant or defendant may file an application. Model case proceedings can only be initiated by the parties and not by the court on its own motion.⁸¹ Applicants have to show to the court that the decision for the start of a model case procedure "may have significance for other similar cases beyond the individual dispute concerned."⁸² Admissible applications⁸³ are publicly announced by the District Court in a special complaint registry⁸⁴ that can be accessed electronically and free of charge via the Internet.⁸⁵ The publicity is supposed to induce other investors to join the model trial.⁸⁶

If at least ten similar applications, *i.e.*, applications relating to the same subject matter,⁸⁷ have been filed, the trial court refers the model case to the court of appeals. The appeals court then appoints a model claimant, whose name and legal representative are, again, made public.⁸⁸ The court chooses the model claimant from among the applicants at its discretion. Criteria for selecting a model claimant include the amount of a plaintiff's claim as well as an agreement among several plaintiffs designating a single model claimant.⁸⁹ To avoid the infamous "race to the courtroom" encountered in U.S. class action proceedings, it is not important which plaintiff has filed his model case application first.⁹⁰ In the above

⁸⁰ See KapMuG § 1 (1).

⁸¹ Stürner, *supra* note 41, at 257.

⁸² KapMuG § 1 (2)(3).

⁸³ An application is inadmissible, for example, if it is made for the sole purpose of delaying proceedings (*see* KapMuG § 1 (3)).

⁸⁴ See KapMuG § 2; for details *see* the Ministerial Ordinance on the Complaint Registry (*Klageregisterverordnung* or *KlagRegV*) of Oct. 26, 2005, BGBl. I, p. 3092, as amended.

⁸⁵ At <http://www.ebundesanzeiger.de>.

⁸⁶ See Hess, *supra* note 41, at 1715.

⁸⁷ See KapMuG § 2 (1)(5).

⁸⁸ KapMuG § 6.

⁸⁹ KapMuG § 8 (2).

⁹⁰ See Begründung zum Regierungsentwurf (official explanatory report accompanying the Federal Government's Draft), BTDrucks 15/5091, at 25.

mentioned *Deutsche Telekom* case, for example, the State Appeals Court of Frankfurt selected a model claimant with regard to the substantial amount of his claim and because his suit covered most of the aspects relevant to the controversy.⁹¹

2. Association complaints may be initiated by organizations whose purpose is to promote commercial or independent professional interests.⁹² Besides having legal capacity (*Rechtsfähigkeit*) and a “considerable number” of members from among the business community, organizations must also possess enough personnel, organizational, and financial resources to actively promote commercial interests.⁹³ In addition, association suits may be brought by so-called “qualified entities” within the meaning of the EC Directive on injunctions for the protection of consumers’ interests.⁹⁴ “Qualified entities” are consumer associations, either registered with the Federal Office for Justice (*Bundesamt für Justiz*) in Bonn or, in case of an organization from another EU member state, with the European Commission.⁹⁵ In order to be registered in Germany, qualified entities must fulfill certain requirements,⁹⁶ including legal capacity and the capability to promote the interests of consumers through information and advice. As far as membership is concerned, the association must either have other consumer associations among its members or, if all its members are natural persons, at least 75 members. Consumer centers (*Verbraucherzentralen*) and other consumer organizations that receive state funds are irrefutably presumed to qualify as qualified entities.⁹⁷ According to the most recent list published by the Federal Office of Justice, about 70 associations are currently registered as qualified entities.⁹⁸

⁹¹ Bälz & Blobel, *supra* note 41, at 137.

⁹² UKlaG § 3 (1)(2); UWG § 8 (3)(2).

⁹³ For a detailed analyses of these requirements *see* Schaumburg, *supra* note 16, at 132-43.

⁹⁴ *See supra* note 23 and accompanying text.

⁹⁵ UKlaG § 3 (1)(1); UWG § 8 (3)(3).

⁹⁶ *See* UKlaG § 4 (2)(1).

⁹⁷ UKlaG § 4 (2)(2).

⁹⁸ *See* the list of qualified entities as of Oct. 23, 2006, available at <http://www.bundesjustizamt.de>.

In practice, there are just a few organizations that are actively involved in collective litigation.⁹⁹ The most prominent examples are the Center for the Fight against Unfair Competition (*Zentrale zur Bekämpfung unlauteren Wettbewerbs* or *Wettbewerbszentrale*), located in Bad Homburg, near Frankfurt, and the Consumer Center National Association (*Verbraucherzentrale Bundesverband*) located in Berlin. The *Wettbewerbszentrale* is the most important association for the representation of commercial interests. It was founded in 1912 and has more than 1600 members, including all Chambers of Industry and Commerce located in Germany, the Chambers of Handicrafts, and about 400 commercial associations.¹⁰⁰ The *Verbraucherzentrale Bundesverband* (vzbv), itself a member of the European Consumers' Organization (BEUC), is a nationwide umbrella organization of the 16 regional consumer centers as well as of 22 other consumer oriented associations. It is funded by the Federal Ministry of Food, Agriculture and Consumer Protection.¹⁰¹

VI. Number of lawsuits in each litigation form over the past 5 years

1. In Germany, association suits form an important component of the civil litigation fabric, especially in the areas of unfair competition and of unfair standard contract terms. In 2006, the *Wettbewerbszentrale*, as the biggest and most influential association for the promotion of commercial interests,¹⁰² has brought 600 actions. In the years 2005 and 2004 it brought 688 and 454 actions, respectively.¹⁰³ The *Wettbewerbszentrale* succeeded fully or, at least, partially in about 85% of the litigation. The number of suits brought by consumer associations is similar. Between 2000 and 2005, together the *Verbraucherzentrale Bundesverband* and the regional consumer advice centers brought, on average, 450 actions.¹⁰⁴ The vast majority of the suits were initiated by the *Verbraucherzentrale*

⁹⁹ See Helmut Köhler in *WETTBEWERBSRECHT* 40-2 mn. 2.28-2.33 (Helmut Köhler & Joachim Bornkamm, eds., 25th ed. 2007).

¹⁰⁰ Köhler, *supra* note 99, at 40-1 mn. 2.29.

¹⁰¹ Köhler, *supra* note 99, at 42 mn. 2.32.

¹⁰² See *supra* note 100 and accompanying text.

¹⁰³ See *Wettbewerbszentrale, Annual Report 2006*, at 115, and *Annual Report 2004*, at 9.

¹⁰⁴ See *Verbraucherzentrale Bundesverband, Rechtliche Verfahren des Verbraucherzentrale Bundesverbands – Schwerpunkte und Fallbeispiele* (2006), at 3, and *Verbraucherschutzbilanz 2006: Gerichtserfolge serienweise – aber Verbraucher gehen leer aus*; both available at <http://www.vzbv.de>.

Bundesverband, which had an overall success rate of about 80%. Of all proceedings, 75% concerned unfair competition law, almost 25% contract law (including unfair standard contract terms).

2. In model proceedings, the Capital Markets Model Case Act had been preceded by the test case provision of § 93a in the Code of Administrative Procedure, which served as a kind of model for the KapMuG.¹⁰⁵ As was mentioned earlier, the provision had been applied, for the first time, in 2006 in two instances.¹⁰⁶

The KapMuG has come into force just two years ago so there are not enough data for a sufficient long period of time available.¹⁰⁷ As of September 1, 2007, one model case decision has been handed down (with a negative result for the plaintiffs).¹⁰⁸ In addition, in two other cases model proceedings are currently pending before the court of appeals.¹⁰⁹ In one instance, the court has refused to open model case proceedings because not enough applications had been filed.¹¹⁰

VII/VIII. Information of group members/parties about the initiation of the litigation and possibilities of opting in or out

1. In model proceedings according to the Capital Markets Model Case Act, there are two groups of plaintiffs, the model plaintiff and all other plaintiffs whose cases are pending before the trial court. Once the model plaintiff has been selected by the court of appeals,

¹⁰⁵ See Reuschle, *supra* note 46, at 975.

¹⁰⁶ See *supra* note 51 and accompanying text. Before these cases were tried by the Federal Supreme Administrative Court, § 93a had already been considered a failure by some commentators. See, e.g., Hess & Michailidou, *supra* note 46, at 2320; for the opposing view see Rudisile, *supra* note 50, at mn. 35.

¹⁰⁷ For all relevant data see the complaint registry, *supra* note 85.

¹⁰⁸ Oberlandesgericht [OLG] [State Appeals Court] Stuttgart, Feb. 15, 2007 (DaimlerChrysler), 62 BB 565 (2007).

¹⁰⁹ The cases are *Deutsche Telekom* (pending before the State Appeals Court of Frankfurt) and *IBV* (pending before the State Appeals Court [Kammergericht] of Berlin).

¹¹⁰ OLG München, Feb. 9, 2007 (Infomatec), 28 ZIP 649 (2007).

the model case will be publicly announced in the complaint registry on the Internet.¹¹¹ The trial court then suspends all other pending cases on its own motion (*ex officio*).¹¹² The suspension orders are being served on the various plaintiffs who are, by virtue of the suspension order, deemed summoned to the model proceedings as interested parties (*Beigeladene*).¹¹³ As interested parties summoned, they enjoy a status similar to that of an auxiliary intervenor (*Nebenintervenient*)¹¹⁴ who, although not a party to the proceedings in his own right, can support the position of a party by making assertions of fact and law and using all procedural means, like nominating witnesses (ZPO § 67).¹¹⁵ Interested parties summoned have the same rights as long as their procedural conduct does not contradict the position taken by the model plaintiff.¹¹⁶

For reasons of procedural economy, interested parties summoned are not automatically informed about all the relevant facts. To obtain the written pleadings of the model claimant, interested parties summoned have to make a special request to the court and they are barred from obtaining written pleadings of other interested parties summoned.¹¹⁷

Since the plaintiffs in a model case are not members of a "class", they may, technically speaking, not opt in or out of the proceedings. Any potential plaintiff may, however, file a claim later to join in the model trial. In accordance with general rules of German civil procedure, a plaintiff may also voluntarily withdraw his claim.¹¹⁸ In the event that, at time of the withdrawal, model proceedings have already commenced, the plaintiff is, nonetheless, bound by the model case ruling.¹¹⁹

¹¹¹ For details of the announcement *see* KapMuG § 6.

¹¹² KapMuG § 7.

¹¹³ *See* KapMuG § 8 (1) and (3).

¹¹⁴ *See* Möllers & Weichert, *supra* note 39, at 2740.

¹¹⁵ *See* Murray & Stürner, *supra* note 3, at 206-7.

¹¹⁶ KapMuG § 12. In addition, within the framework of the establishment objective, they may also ask for an expansion of the model case's subject matter (*see* KapMuG § 13).

¹¹⁷ KapMuG § 10 (3) and (4).

¹¹⁸ If the oral hearing has already been opened, a consent of the defendant is required (ZPO § 269).

¹¹⁹ KapMuG § 16 (1)(4).

Once the model case ruling is handed down by the appeals court, it is binding not only on the model plaintiff and the defendant but also on the interested parties summoned.¹²⁰ However, the latter are bound only insofar as they were able to influence the model proceedings.¹²¹ This implies that investors who have joined model proceedings at a later stage or have not brought a suit at all are not bound by the model decision. The model case judgment may be appealed by all parties to the proceedings, including the interested parties summoned.¹²² Because of the binding effect of the model case decision on all plaintiffs, the procedure comes very close to a group action.¹²³

The German legislator took great pains in guaranteeing plaintiff investors their constitutional rights, especially their right to be heard (*Recht auf rechtliches Gehör*).¹²⁴ The whole concept of interested parties summoned, which, at first glance, looks rather unwieldy, must be seen in this context. As interested parties summoned, investors, who have filed a claim, are allowed to play a more active role in model proceedings than ordinary class members in a U.S. class action suit.¹²⁵ It is because of the right to be heard that not only the model claimant but all plaintiffs are entitled to present their opinion on the model questions to the court. For the same constitutional reason,¹²⁶ the model judgment binds only those parties that were in a position to influence the outcome of the model proceedings.

¹²⁰ KapMuG § 16.

¹²¹ See KapMuG § 16 (2).

¹²² KapMuG § 15 (1)(3).

¹²³ See also Christian Wolf & Sonja Lange in *KAPITALANLEGER-MUSTERVERFAHRENSGESETZ (KAPMUG)* 23-4 mn. 26 (Volkert Vorwerk & Christian Wolf, eds., 2007) (speaking of a „limited group action“).

¹²⁴ For the significance of the fundamental right to be heard in German civil litigation see *supra* note 12-15 and accompanying text.

¹²⁵ See Zypries, *supra* note 39, at 178-9. American style class action are considered, by many, as unconstitutional under German law because they violate the right of class members to be heard. See Rupert Scholz, *Individualer oder kollektiver Rechtsschutz? – Zum Verfassungsproblem der Zulassung von Sammel-, Gruppen- und Verbandsklagen*, 18 *ZEITSCHRIFT FÜR GESETZGEBUNG [ZG]* 248, 254-5 (2003).

¹²⁶ See Hess, *supra* note 41, at 1716; Bälz & Blobel, *supra* note 41, at 138.

2. With regard to association complaints, there are no special rights of information. Individual consumers and other prospective plaintiffs do not have to be informed because they are entitled to take individual action despite a pending association suit. There are no possibilities of an opt-in or opt-out.

IX. Special case management procedures

1. There are no special case management procedures applicable to actions brought by associations.

2. As to model proceedings under the Capital Markets Model Case Act, their purpose is to clarify, with binding effect, certain questions of fact or law, common to a great number of similar complaints. In the interest of investors, the Act aims at a quick and efficient disposal of their cases. Therefore, the whole KapMuG model proceedings may qualify as a special case management procedure. As has been pointed out, however, model proceedings can only be initiated by the parties and not by the courts *ex officio*.¹²⁷ Nonetheless, the court of appeals deciding on the model questions may exercise considerable influence on how model proceedings are conducted because it selects the model claimant at its discretion.¹²⁸

X. Proportion of cases resolved either through settlement or through court decision

1. There are no specific provisions on the settlement of association suits. Thus, the general principles of the Civil Procedure Code apply.¹²⁹ As a general feature, German law of civil procedure encourages the settlement of legal disputes, with the judge being expected to play an active role in facilitating a case settlement.¹³⁰ As far as the number of settlements of association complaints is concerned, there are no data available.

¹²⁷ See *supra* note 81 and accompanying text.

¹²⁸ See *supra* note 89 and accompanying text.

¹²⁹ For a discussion of these principles, see Murray & Stürner, *supra* note 3, at 486-97.

¹³⁰ Murray & Stürner, *supra* note 3, at 487.

2. The Capital Markets Model Case Act includes a special rule for the settlement of model proceedings.¹³¹ According to this provision, the model claimant alone does not have the power to settle a model case, but for a settlement to be admissible, all of the other plaintiffs have to give their consent. It seems unlikely that such a consensus could be reached. In practical terms, settlements of model cases are, therefore, unrealistic.¹³² The only plausible outcome is a court decision.

3. Beside association suits and model proceedings, in some mass tort cases, out of court settlements were reached between interest groups, representing the victims, and the tortfeasor. As a result of such a settlement in the late 1960s in the famous *Contergan* case, a public trust was erected to administer and disburse the money to the, approximately, half a million victims.¹³³

XI. Remedies available in collective litigation

1. In general, suits by consumer associations and qualified interest groups allow only for injunctive relief and not for monetary compensation. This is also expressed in the title of the most important law on association suits, the Act on Injunctions (*Unterlassungsklagengesetz*) of 2002.¹³⁴ The lack of monetary relief under German law has been criticized in academic writing because it adversely affects the efficiency of association complaints.¹³⁵ So far, the legislator has made only some small adjustments.

In 2002, a provision was introduced into the Law on Legal Advice, according to which individual consumers may assign their claims, including claims for monetary relief, to a

¹³¹ KapMuG § 14 (3)(2).

¹³² Bälz & Blobel, *supra* note 41, at 137; Stürmer, *supra* note 41, at 261.

¹³³ For details of the *Contergan* case, cf. Haß, *supra* note 54, at 28-9.

¹³⁴ In the same vein § 8 (1) UWG.

¹³⁵ See, e.g., Baetge, *supra* note 23, at 345-6.

consumer association.¹³⁶ The association may then file suit on their behalf “if this is necessary in the interest of consumer protection.”¹³⁷ The provision is an exception to the rule that only specially qualified persons or institutions have the right to offer legal services.¹³⁸ If a large enough number of consumers have assigned their claims, the proceedings may assume the character of a mass procedure.

In 2004, the German legislator added a new remedy to association suits under the Unfair Competition Act, the skimming-off action (*Gewinnabschöpfungsklage*).¹³⁹ In course of the most recent overhaul of the German Competition Act, skimming-off actions have also been introduced into German antitrust law.¹⁴⁰ The aim of this unique remedy, which seems to exist only in Germany,¹⁴¹ is to deprive anyone who unfairly distorted competition of his illegal gains. Skimming-off actions, which have been heavily criticized by some,¹⁴² were designed with a view to strengthening consumer protection.¹⁴³ The requirements for its application are, nonetheless, rather strict. Unlike injunctive relief, illegal profits may be skimmed-off only in case of a deliberate infringement (*vorsätzliche Zuwiderhandlung*).¹⁴⁴ Moreover, the illegal profits had to be made to “the detriment of a large number of

¹³⁶ Article 1 (3) No. 8 RBerG. For an extensive discussion of the provision *see* Markus Burckhardt, AUF DEM WEG ZU EINER CLASS ACTION IN DEUTSCHLAND? – EINE UNTERSUCHUNG DES ART. 1 § 3 NR. 8 RBERG IM SYSTEM ZWISCHEN VERBANDSKLAGE UND GRUPPENKLAGE (2005); *see also* Astrid Stadler, *Musterverbandsklagen nach künftigen deutschen Recht*, in FESTSCHRIFT FÜR EKKEHARD SCHUMANN ZUM 70. GEBURTSTAG 465 (Peter Gottwald & Herbert Roth, eds., 2001).

¹³⁷ In a recent judgment the Federal Supreme Court of Justice found that bringing such an action may already to be considered necessary (“*erforderlich*”) if this is in the “collective interest of consumers” and more efficient than suits filed by individual consumers. *See* BGH, Nov. 14, 2006, 60 NJW 593 (2007).

¹³⁸ *See supra* note 59-60 and accompanying text.

¹³⁹ *See* UWG § 10.

¹⁴⁰ *See* GWB § 34a, for which UWG § 10 served as a model. For a brief treatment of skimming-off actions in antitrust law *cf.* Stadler, *supra* note 79, at 207-9.

¹⁴¹ *See* Schaumburg, *supra* note 16, at 111.

¹⁴² *See, e.g.*, Rolf Sack, *Der Gewinnabschöpfungsanspruch von Verbänden in der geplanten UWG-Novelle*, 49 WETTBEWERB IN RECHT UND PRAXIS [WRP] 549 (2003) (calling the remedy unnecessary as well as unconstitutional); for an extensive discussion of the remedy's merits, *cf.* Hans-W. Micklitz & Astrid Stadler, UNRECHTSGEWINNABSCHÖPFUNG (2003).

¹⁴³ Frauke Henning-Bodewig, *A New Act Against Unfair Competition in Germany*, 36 INT'L REV. INDUSTR. PROPERTY & COPYRIGHT L. [IIC] 421, 431-2 (2005).

¹⁴⁴ The same requirement does also apply to antitrust skimming-off actions; *see* GWB § 34a (1).

purchasers". In case of a successful skimming-off action, the money is not disbursed to the association which brought the suit, but rather directed to the Federal budget. This was out of fear that, otherwise, the skimming-off remedy would provide too great an incentive for filing an action.¹⁴⁵ In what little case law is available, the requirement of a wrongful intent (*Vorsatz*) has, so far, proven a considerable obstacle for the claim to succeed,¹⁴⁶ although a recent judgment by the State Appeals Court of Stuttgart seems to suggest a more favorable attitude towards associations.¹⁴⁷

2. Unlike association suits, model proceedings under the Capital Markets Model Case Act apply to claims for compensation of damages.¹⁴⁸ The proceedings are, however, of a mere interlocutory nature,¹⁴⁹ designed to answer the model question(s) and not to render a final judgment with respect to individual claims. The latter task remains with the trial court. It is, therefore, up to the trial court to award monetary compensation to each individual plaintiff, based on the outcome of the model proceedings.

XII. Funding of collective litigation

1. In Germany, unlike in other jurisdictions, funding, in general, is not perceived to constitute a major barrier for prospective plaintiffs.¹⁵⁰ The reasons are a well developed legal aid system and the ready availability of legal cost insurance.¹⁵¹ Moreover, lawyers' fees in Germany are, overall, moderate. In case the plaintiff is not eligible for legal aid and

¹⁴⁵ Henning-Bodewig, *supra* note 143, at 432.

¹⁴⁶ For an overview of the case law, *cf.* Anne van Raay, *Gewinnabschöpfung nach § 10 UWG: Erste Schritte*, 22 VERBRAUCHER UND RECHT [VUR] 47 (2007).

¹⁴⁷ OLG Stuttgart, Nov. 2, 2006, 22 VUR 70 (2007).

¹⁴⁸ *See supra* note 66 and accompanying text.

¹⁴⁹ *See supra* note 48 and accompanying text.

¹⁵⁰ *See* Murray & Stürner, *supra* note 3, at 116 ("Germany is a world leader in affording its citizens, regardless of economic circumstances, reasonable access to its civil justice system.").

¹⁵¹ For both aspects, *see* Murray & Stürner, *supra* note 3, at 116-25. For an older comparative treatment of the German legal aid system *see* Rudolf B. Schlesinger, *The German Alternative: Legal Aid System of Equal Access to the Private Attorney*, 10 CORNELL INT'L L.J. 213 (1977).

he does not have legal cost insurance, funding may, nonetheless, prove to be an obstacle, especially if costs are exceptionally high.¹⁵²

For instance, in the *Deutsche Telekom* litigation that has led to the enactment of the KapMuG¹⁵³ the issue of costs plays an important role because plaintiffs have to prove that DT's valuation of its more than 30,000 properties was wrong. The costs for the necessary expert testimony are estimated at €17 million.¹⁵⁴ Under ordinary German cost rules, the plaintiffs would have been obliged to pay this sum in advance.¹⁵⁵

To help plaintiffs in securities litigation to overcome those difficulties, the legislator inserted a provision into the KapMuG according to which, in case of a legal defeat, the model plaintiff does not have to bear all the costs. Rather, costs are shared among him and all other plaintiffs on a *pro rata* basis.¹⁵⁶ This rule is supposed to help especially small investors.¹⁵⁷ In addition, as a reaction to the problems encountered in the DT case, the parties (plaintiffs and defendant) are not required to pay in advance for hearing expert testimony.¹⁵⁸ Instead, the costs are advanced by the court.

2. A lack of adequate funding must be considered as an obstacle as far as association suits by consumer associations are concerned. As was mentioned earlier, the vast majority of

¹⁵² According to a recent empirical study, conducted under the auspices of the Soldan Institute for Lawyers' Management (Soldan Institut für Anwaltsmanagement), between 2002 and 2006, more than 40% of the population contacted a lawyer, which, for international standards, is a rather high percentage. 35% of all persons who hired an attorney had legal cost insurance, whereas 8% received legal aid. 47% of the persons interviewed paid for their lawyers with their own money. In the remaining 10% of the cases, lawyers were paid for by a third person or worked free of charge. See Christoph Hommerich & Matthias Kilian, MANDANTEN UND IHRE ANWÄLTE – ERGEBNISSE EINER BEVÖLKERUNGSUMFRAGE ZUR INANSPRUCHNAHME UND BEWERTUNG VON RECHTSDIENSTLEISTUNGEN (2007); for a summary of the study see <http://www.soldaninstitut.de>. (One may assume that among those individuals who actually go to court, the percentage of persons who have legal cost insurance or receive legal aid is even higher).

¹⁵³ See *supra* notes 41-44 and accompanying text.

¹⁵⁴ See Braun & Rotter, *supra* note 46, at 296; Milne, *supra* note 41, at 18.

¹⁵⁵ For a description of these rules, see Murray & Stürner, *supra* note 3, at 344-6.

¹⁵⁶ KapMuG § 17 (3).

¹⁵⁷ See Zypries, *supra* note 39, at 179.

¹⁵⁸ See § 17 (4)(1) of the Court Costs Law (*Gerichtskostengesetz* or *GKG*) of May 5, 2004, BGBl. I, p. 718, as amended.

actions in the consumer field are brought either by the *Verbraucherzentrale Bundesverband* or, to a lesser extent, by regional consumer centers (*Verbraucherzentralen*).¹⁵⁹ The annual budget of the *Verbraucherzentrale Bundesverband* is almost entirely financed by the Federal government,¹⁶⁰ whereas regional consumer centers are financed by the sixteen state governments.¹⁶¹ In other words, litigation activity in the field of consumer association suits depends almost entirely on funds provided for by the state. Considering the financial restraints the Federal as well as state budgets are subjected to, it is doubtful whether the *Verbraucherzentralen* are in a position to perform their litigation tasks properly.¹⁶²

As funding is tight, the *Verbraucherzentrale Bundesverband* can risk losing only a few cases annually.¹⁶³ As a result, the *Verbraucherzentrale Bundesverband* selects the cases it brings to court on the basis of the risks they pose in terms of litigations costs.¹⁶⁴ Likewise, because of tight budgets, regional consumer centers may avoid legal actions they would have brought under more favorable financial conditions, thus depriving consumers of the necessary protection. For instance, skimming-off actions, which are allowed under the Unfair Competition Act,¹⁶⁵ may be not brought, even if the chances to win are good, because the financial risks for individual consumer associations are too high.¹⁶⁶

¹⁵⁹ See *supra* note 102-104 and accompanying text.

¹⁶⁰ See *Verbraucherzentrale Bundesverband*, Annual Report 2006/07, at 108.

¹⁶¹ See Hans-W. Micklitz & Astrid Stadler, *DAS VERBANDSKLAGERECHT IN DER INFORMATIONEN- UND DIENSTLEISTUNGSGESELLSCHAFT 1270-1* (2005).

¹⁶² See also Micklitz & Stadler, *supra* note 161, at 1270 (describing the case of a regional consumer center that went bankrupt due to a lack of state funding).

¹⁶³ According to the “loser pays” rule prevalent in German civil litigation, the party that has lost a court controversy has usually to bear not only his own costs of litigation but also his opponent’s litigation costs (see ZPO § 91).

¹⁶⁴ See Ludwig von Moltke, *KOLLEKTIVER RECHTSSCHUTZ DER VERBRAUCHERINTERESSEN 75* (2003).

¹⁶⁵ See *supra* note 139-147 and accompanying text.

¹⁶⁶ Cf. Stadler, *supra* note 79, at 207-8; see also the statement by the president of the *Verbraucherzentrale Bundesverband*, Edda Müller, *Verbraucherschutzbilanz 2006: Regelmäßiger Erfolg vor höchsten Gerichten – aber Verbraucher gehen leer aus*, at 4-5, available at <http://www.vzbv.de> (saying that the costs risk associated with litigating skimming-off actions may endanger “the very existence” of her organization and of regional consumer centers).

The O₂ case is an example in point. The phone company O₂ used the currency conversion from the German Mark to the Euro to charge its more than 400,000 clients higher prices without telling them so explicitly. This practice resulted in estimated illegal gains of about € 50 million. Although the European Court of Justice found against O₂, the consumer center of Hamburg did not bring a skimming-off action because, in case of a legal defeat, it would have had to bear the entire litigation costs, including the costs incurred by O₂. Considering the high amount in question, this might have endangered the very existence of the Hamburg consumer center.¹⁶⁷ As a result, O₂ was allowed to keep its illegal gains.¹⁶⁸

XIII. Attorneys' fees

One political goal of the Capital Markets Model Case Act has been that plaintiffs do not incur any additional costs.¹⁶⁹ Consequently, the KapMuG does not provide for additional attorneys' fees in model proceedings. As in ordinary civil litigation, the lawyer representing the model plaintiff gets only paid by his client, notwithstanding the fact that the workload and the risks associated with trying the model case are considerably higher than those of the attorneys acting on behalf of the other plaintiffs.¹⁷⁰ It is, therefore, understandable that the KapMuG's cost rules have been met with criticism by the legal profession.¹⁷¹ It seems not unlikely that the absence of any financial incentive will deter trial lawyers from pursuing KapMuG model proceedings. It remains to be seen whether the publicity that counsels of model claimants may gain will prove sufficient to render the representation of such plaintiffs an attractive task for trial lawyers.¹⁷²

¹⁶⁷ See Müller, *supra* note 166, at 5.

¹⁶⁸ Theoretically, individual consumers could file a suit against O₂, but, considering that the damages sustained in each case were relatively low, lack the necessary incentive to do so.

¹⁶⁹ See the statement of Federal Minister of Justice, Brigitte Zypries, *supra* note 39, at 179.

¹⁷⁰ Hess, *supra* note 41, at 1719; for the opposing view, see Zypries, *supra* note 39, at 179, who, incorrectly, assumes that model proceedings do not pose any additional burden on the legal counsel.

¹⁷¹ See, e.g., Braun & Rotter, *supra* note 46, at 300-1.

¹⁷² The idea is advanced in Bälz & Blobel, *supra* note 41, at 137.

XIV. Burden that collective litigation mechanisms place on courts

Actions brought by associations follow the same rules as regular civil trials. Therefore, they do not place any additional burden on courts. KapMuG model proceedings are intended to reduce the burden put on trial courts by too many plaintiffs.

XV. Current debates over the application of collective litigation rules and their consequences

The current debate in Germany over the application and the need for reform of collective litigation is intense. A lot of commentators see a need for expanding the instruments of collective litigation.

1. A proposal for reform has been put forward by the Max Planck Institute for Comparative and International Private Law in 1999.¹⁷³ In answering an official inquiry by the Federal Ministry of Justice and based on an extensive comparative study, the reform proposal called, inter alia, for an expansion of association complaints beyond the scope of consumer protection laws to encompass all areas of law in which the interests of various other persons could have been affected in a similar way by the defendant's conduct. The proposal also called on the German legislator to expand other forms of collective litigation, especially model proceedings. In addition, the Institute proposed to permit associations and interest groups to seek not only injunctive relief but also monetary compensation in cases of association complaints. Finally, it recommended introducing a class action like mechanism into German law, based on an opt-out model, for specifically designated law areas (securities law, product liability).

Other distinguished academics have put forward reform proposals that also call for more extensive collective litigation procedures in Germany. In her 1998 opinion for the German *Juristentag*, Professor Astrid Stadler recommended to insert a "voluntary" group action procedure, based on an opt-in model, into the German Code of Civil Procedure,

¹⁷³ See Basedow et al. (eds.), *DIE BÜNDELUNG GLEICHGERICHTETER INTERESSEN IM PROZESS* 3-7 (1999).

specifically designed for mass litigation.¹⁷⁴ In an extensive study published in 2005 and prepared on the request of the Federal Ministry of Food, Agriculture and Consumer Protection, Professors Hans-W. Micklitz and Astrid Stadler proposed to enact a new "Association Complaints Act" ("*Verbandsklagegesetz*").¹⁷⁵ The proposed law is supposed to include detailed rules for legal actions by associations as well as new rules for test cases and group action proceedings.¹⁷⁶

2. So far, the calls for reform have only been partially heeded by the German legislator. Association suits have been gradually expanded in recent years to include not only claims against unfair competition and the use of unfair standard contract terms but all consumer protection laws. Moreover, in 2004 a skimming-off action has been introduced, albeit under very restrictive conditions. The KapMuG represents a very important legal development insofar as it introduced a new model case procedure into German law that bears resemblance to a group action. In enacting this law, the legislator built on some of the proposals mentioned above that had called for the expansion of existing mass litigation instruments.¹⁷⁷

XVI. Evaluation of collective litigation mechanisms' overall success

In Germany, it is generally assumed that civil litigation is dominated by two opponents (plaintiff and defendant) fighting for their individual rights in court.¹⁷⁸ Rudolf von Jhering's famous statement about the civil trial as a "duel between two mature and equally skilled citizens" is still considered valid by most commentators, legal practitioners and

¹⁷⁴ Astrid Stadler, *Empfehlen sich gesetzgeberische Maßnahmen zur Bewältigung von Massenschäden?* in II VERHANDLUNGEN DES 62. DEUTSCHEN JURISTENTAGES, BREMEN 1998, 35, 61-3 (1998).

¹⁷⁵ See Micklitz & Stadler, *supra* note 161, at 1471-88 (English translation) ("Act governing legal actions taken by associations, test cases and group proceedings").

¹⁷⁶ For other reform proposals, *see, e.g.*, Halfmeier, *supra* note 24, at 357-96 (arguing for a comprehensive public interest law suit [*actio popularis*]); von Moltke, *supra* note 164, at 195-220 (arguing for a consumer centered association claim directed at monetary compensation).

¹⁷⁷ See also Reuschle, *supra* note 46, 973-5, at the time of his writing a staff member with the Federal Ministry of Justice (discussing various reform proposals advanced in legal writing).

¹⁷⁸ Rudolf von Jhering, *DER KAMPF UM'S RECHT* (10th ed. 1889) 49-50.

academics alike.¹⁷⁹ There is no doubt about the main purpose of the country's civil justice system being the "determination and enforcement of private legal rights and obligations".¹⁸⁰ In reality, however, the model of two individuals fighting for their rights does not work, if a prospective plaintiff lacks the resources or, more importantly, the necessary incentive to file suit. In these situations, collective litigation mechanisms are needed. The same is true in the opposite situation in which the number of plaintiffs is too great, as has been the case in the Deutsche Telekom litigation that led to the introduction of a new law on model proceedings. Against this background, the overall success of collective litigation mechanisms in Germany is mixed.

Suits brought by consumer associations and organizations representing the interests of commerce and industry are the earliest and, still, the most important instruments of collective litigation in Germany. Traditionally, the influence of association suits is most strongly felt in unfair competition law and in the law of standard contract terms. In these two areas, association complaints have been of considerable importance. It is noteworthy that, as a result of association suits, mostly by consumer organizations, in the area of standard contract terms alone, more than 3,500 judgments were delivered between the late 1970es and 2001.¹⁸¹ Among these rulings are many leading judgments of the Federal Supreme Court of Justice. In comparison to individual plaintiffs, consumer and other associations are usually more capable and willing to make use of all successive stages of appeal, thereby ensuring that the litigation has the most far-reaching effect. Because monetary relief is not available and skimming-off actions are limited to cases of deliberate infringements, association complaints, sometimes, lack the necessary teeth. It does not help, in terms of prevention, if the wrong-doer is allowed to keep his illegal gains. Therefore, to increase association suits' overall efficiency, a claim for monetary compensation is needed.

Model case proceedings, insofar as civil litigation is concerned,¹⁸² have only recently been introduced into German law.¹⁸³ For the time being, their scope is limited to securities

¹⁷⁹ See Baetge, *supra* note 23, at 345-6.

¹⁸⁰ Murray & Stürner, *supra* note 3, at 4.

¹⁸¹ Peter Ulmer in AGB-RECHT 92 mn. 84 (Peter Ulmer et al., eds., 10th ed. 2006).

¹⁸² In administrative procedure, model trials are considerably older; see *supra* note 49-51 and accompanying text.

litigation, but one can assume that after the five year trial period will have expired at the end of 2010, the mechanism will be expanded to other areas. At this early stage, it is not possible to pass final judgment on the efficiency or inefficiency of this new instrument, but it is not too early to express some doubts. As far as one can tell, the KapMuG's model proceedings have three flaws. First, the procedure as a whole seems to be too cumbersome. Especially the first phase in which the model case is established by a State District Court and the model questions are submitted to the court of appeal, may last too long.¹⁸⁴ Second, the incentives the KapMuG provides for prospective plaintiffs (sharing of costs, no advance payment of expert fees) may prove too small.¹⁸⁵ In the same vein, the pressure exerted on the parties for settling the case, seems negligible.¹⁸⁶ Under these conditions, it is unlikely that the procedure will ever gain the same importance as securities class actions have in the United States. Notwithstanding these points of skepticism, the KapMuG provides a very interesting example for a piece of legislation that attempts to reconcile the necessities of a mass procedure with the conflicting goal of paying due regard to the specifics of the individual case.¹⁸⁷

¹⁸³ For the already existing possibility of test cases, based on a contractual arrangement, *see supra* note 52-55 and accompanying text.

¹⁸⁴ This is, at least, the impression one can get from the first controversies tried under the new KapMuG; *cf.* Dorothee Erttmann & Thomas Keul, *Das Vorlageverfahren nach dem KapMuG - zugleich eine Bestandsaufnahme zur Effektivität des Kapitalanlegermusterverfahrens* 61 WM 482 (2007) 482, 485.

¹⁸⁵ Bälz & Blobel, *supra* note 41, at 147.

¹⁸⁶ *See* Stadler, *supra* note 79, at 203.

¹⁸⁷ In the same vein Wolf & Lange, *supra* note 123, at 24 mn. 26.