The class action as a mechanism for repairing mass damages. A comparative law analysis

Summary

1. Key words

Progress, illicit deed, mass damage, civil liability, substantive law, procedural law, class action, class representative, settlement, notification.

2. Table of contents

2. ,,Mass" or ,,collective". The reason for choosing ,,mass"

Chapter 2. Setting the fundamental characteristics of mass damages

a. The existence of a large number of victims. The quantitative component

1. The pertinence of establishing a fixed number of victims
2. Identifying other criteria
   i. Substantial criteria that can be considered when it comes to the quantitative component
   ii. Material criteria that can be considered when it comes to the quantitative component

b. The existence of common elements. The qualitative criteria

1. The illicit deed as an element of cohesion among the victims
2. Other common elements

c. The existence of a public interest distinct and parallel to the interest of the victims. The public component

d. The trans-substantive nature of mass damages. The substantial component

e. Conclusion on the fundamental characteristics and the definition of mass damages

Chapter 3. Classifying mass damages

a. Classifying mass damages according to the type of the right violated

1. General considerations on the emergence of new type of civil rights in the context of mass society
2. Classifying mass damages according to the type of the right violated in collective, diffuse and individual homogeneous
   i. Diffuse damages
   ii. Collective damages
   iii. Individual Homogeneous damages

b. Classifying mass damages according to their source

1. Mass damages that result from mass accidents
2. Mass damages caused by products
3. Mass damages caused by mass services
4. Mass damages caused by intentional torts
5. Mass damages caused by illicit governmental acts

c. Classifying mass damages according to their way of manifestation

1. Elastic mass damages v. inelastic mass damages
2. Mature mass damages v. immature mass damages
3. Homogeneous mass damages v. heterogeneous mass damages
4. Major mass damages v. small claims

Title 2. The impact of mass damages

Section I. The impact of mass damages from the perspective of substantial law

Chapter 1. The impact of mass damages on the mechanisms of civil liability

a. The damage, as a condition of civil liability, in the context of mass damages

1. Mass damages and the personal nature of damage
2. Mass damages and the certainty of damage
3. Mass damages and the principle of full compensation
    i. The principle of full compensation and determining the damage as a lump sum
    ii. The principle of full compensation in the context when the defendant is insolvent
4. The emergence of new forms of reparable harm
    i. The post traumatic shock disorder resulted from a catastrophic event
    ii. The specific damage of anxiety
    iii. The specific damage of contamination
5. The emergence of civil liability without damage. The principle of precaution

b. The causality, as a condition of civil liability, in the context of mass damages

Chapter 2. The emergence of special forms of civil liability and funds of compensation in the context of mass damages

a. The emergence of new forms of civil liability in the context of mass damages

1. The civil liability for nuclear damages
2. The civil liability for faulty products
3. The civil liability for environmental damages
4. The civil liability for breaching the rules of competition

b. The emergence of compensation funds used for repairing mass damages

1. The fund for compensating the victim of crimes
2. The compensation funds in France

c. Conclusion. Substantial law and mass damages

Section II. The impact of mass damages on the judicial system and the proposed solutions

a. The increase in the number of trials: the direct and immediate effect of mass damages

b. The impact of mass damages in solving the trials

1. The mass damages and the duration of trials
2. The judicial costs and mass damages
3. The collusive agreements and mass damages
4. The divergent jurisprudence and mass damages

c. Conclusion on the impact of mass damages on the judicial system

Chapter 2. The mechanisms proposed for dealing with mass trials

a. Setting the objectives that should by taken into account when adopting a mechanisms for dealing with mass trials

1. The objectives of special mechanisms adopted in comparative law for dealing with mass damages
   i. The United States of America
   ii. Canada
2. Our objectives
   i. Substantial objectives: the optimal elimination of negative effects of illicit deed and optimal prevention
   i.1. The elimination of negative effects of illicit deed
   i.2. Preventing future illicit deeds
   i.3. The relation between the compensatory and the preventive-educational function
   ii. Procedural objectives: access to court, better assurance of fair trial and solving the claims in a reasonable time
   ii.1. Access to court
   ii.2. Providing a fair trial
   ii.3. Solving the claims in a predictable and reasonable time
   iii. Efficacy objectives: reducing the number of trials and the costs
   iv. Conclusion on the objectives

b. The analysis of possible ways of dealing with mass damages

1. Solving the mass damages through individual trials
   i. Advantages
   ii. Disadvantages
2. Adopting special mechanisms of civil liability
   i. Advantages
   ii. Disadvantages
3. Adopting an administrative procedure for compensating the victims
   i. Advantages
   ii. Disadvantages
4. Partial consolidation. Multidistrict Litigation (M.D.L.)
   i. Advantages
   ii. Disadvantages
5. Group Litigation Orders (G.L.O)
   i. Advantages
   ii. Disadvantages

6. Model claims. The German System
    i. Advantages
    ii. Disadvantages
7. The class action

PART II. The class action and mass damages

Title. Identifying the concept and the concept of reference

Chapter 1. The class action and its temporal and geographic evolution

a. The notion of „class action”

1. Defining the notion
    i. The notion in comparative in comparative law
    ii. Our definition
2. The characteristic features of class action
3. The judicial nature of class action
    i. The procedural or substantial nature of class action
    ii. The judicial nature of class action from a procedural perspective
    ii.1 The class action as a form of joinder
    ii.2. The class action as a trial through representative
    ii.3. The class as a distinct entity
    ii.4. The class action as a sui generis institution

b. The evolution of class action

1. The historical evolution of class action. From the rector of Barkway to Wal-Mart and between
    i. The origin of class action in English law
    ii. The class action in U.S.A.: the beginnings
    iii. The modern American class action: starting to the reform from 1966 to present
2. The expansion of class action outside U.S.A. The geographic evolution
    i. General considerations
    ii. The expansion of class action in Europe

c. Conclusion

Chapter 2. The forms of class action

a. The forms of class action depending on the way of determining class membership

1. The opt in or voluntary class action
2. The opt out class action
3. The mandatory class action
4. Adopting a model of class action from this perspective

b. The forms of class action depending on the substantial law

c. Plaintiff class v. defendant class action

d. The forms of class action depending on object

e. Full class action v. issue class action

f. Class action v. settlement only class action

g. Private class action v. organizational class action v. public class action

Section II. Choosing the model of reference: from Federal Rule of Civil Procedure 23 to Commission's Recommendation and in between

Chapter 1. Possible models of reference

a. The American model of class action

b. The Canadian model of class action

c. The Brazilian model of class action

d. The Dutch model of class action

e. The European's Commission model of class action

f. Conclusion on the models

Chapter 2. The situation in Romania and the chosen model

a. The situation in Romania regarding the class actions

1. The general legal framework regarding the class actions
2. Actions that can be seen as class actions

i. The representation in case of joinder

ii. The actions of the syndicate

iii. The actions actions brought by consumer protection associations

iv. The actions actions brought by the associations for the Defense of Human Rights

v. The action provided by Articles 12 and 13 of Law no. 193/2000

vi. Conclusion

b. Choosing the model of reference. Arguments

1. Identifying the model of reference
2. Arguments against the American model: the americanization and American exceptionalism
3. Arguments in favour of American model

TITLE 2. Elements of specificity in class action procedure

Section I. The class action procedure

Chapter 1. Starting the procedure

a. Court notification

b. The court. Competence and responsibilities

1. The court competence

i. Ratione loci and ratione materiae competence

ii. International competence

2. The judge's special role in class action

c. The class members and the defendant in the class action

1. The role of the class members in a class action
2. The defendant in a class action

d. Conclusion

Chapter 2. The conditions for certification

a. Certification stage. Reasons and particularities

1. Judicial systems that do not provide for a certification stage
2. The role and the functions of certification stage in U.S.A.

i. The certification motion

ii. The importance of certification

iii. The certification standard

iv. The object and the limits of certification

v. The moment for certification

vi. The case of more pending actions

vii. The effects of certification

viii. The appeal against the certification decision

b. The conditions for certification

1. Common conditions for certification

i. The existence of a definable class. An implicit common condition

ii. Numerosity

ii.1. The substantial approach of numerosity

ii. 2. The formal approach of numerosity

iii. Commonality

iv. Typicality

v. Adequacy of representation

1. The class representative
2. The class counsel

v.2.1. Mandatory counsel assistance or representation

v.2.2. The role of the counsel in class action. The importance of a close court supervision

v.2.3. Choosing the counsel

2. Special conditions for certification

i. The action provided by Rule 23 (b) (1)(A)

ii. The action provided by Rule 23 (b) (1)(B)

iii. The action provided by Rule 23 (b) (2)

iv. The action provided by Rule 23 (b) (3)

iv.1. Predominance

iv.2. Superiority

3. The action is not manifestly ill-funded
4. Conclusion

Section II. Other elements of specificity

Chapter 1. Procedural disposition acts. A special view on the settlement

a. General considerations on the acts of procedural disposition in our judicial system.

b. The acts of procedural disposition in the context of class action. General aspects

c. The settlement in a class action

1. General considerations
2. The moment of negotiations and conclusion
3. The role of the parties, class counsel and the court in settling a claim

i. The attributions of the class representative and class counsel

ii. The attributions of the court

iii. The objectors

4. Analyzing the settlement

Chapter 2. Notification

a. The role and the nature of the notification

b. The object of notification and its content

c. Who pays for notification?

d. Ways of notification

Chapter 3. Financing the class action and the judicial costs

a. Financing the class action

1. Class counsel financing
2. Third party financing
3. Public fund financing

b. Counsel fee in class action: the American option

c. The judicial costs and class members

Section III. Solving the class action and the binding effect of the decision

Chapter 1. Solving the class action

a. Elements of specificity on the field of evidence

b. The merits analysis

c. The sums distribution

Chapter 2. The binding effect of the court decision

a. The effects of the decision on the certification motion

b. The effect of the decision on the merits

TITLE 3. The class action and the mass damages. An analysis from the perspective of our objectives. The proposed model

Section I. The disadvantages and advantages of class action

Chapter 1. The disadvantages of class action as a mechanism for repairing mass damages

a. Substantial disadvantages

1. The class action and over deterrence
2. The class actions are sometimes benefiting only to the class counsel
3. The loss of individuality

b. Procedural disadvantages

1. The class action violates the right of the victims to individually address the court and to personally present their claim before the court
2. The class action leads to „legalized blackmail”
3. The class action creates a framework in which the interest of the victims can be defrauded

c. Systemic disadvantages

1. The class action encourages trials
2. The class actions increases the complexity of the trials

Chapter 2. The advantages of class action

a. Substantial advantages

1. Facilitates the compensation of the new reparable damages
2. Leads to better deterrence
3. Increases the chance of the victims to be compensated

b. Procedural advantages

1. Facilitates the access to court
2. Leads to an equilibrium of arms between the victims and wrongdoer
3. Reduces costs
4. Eliminates the risk of divergent jurisprudence

c. Systemic advantages

1. Decreases the pressure on courts dockets
2. Reduces the costs for the judicial system
3. Increases the trust into the judicial system

Conclusion in the Title

Section II. The proposed model of class action

Conclusion

Bibliography

Articles and studies

Treatise, monographs and PhD Thesis

National and international jurisprudence

Laws

Others

Web sites

3. The synthesis of the main parts

Most of the civil law institutions, including contractual and tort responsibility, had been conceptualized at a time when the legal relationships were profoundly individualized. A product was conceived and sold to a limited number of persons, a service was addressed to a small community, an unlawful act damaged the legitimate rights and interests belonging usually to a single individual and the contract was the result of consistent wills of the parties.

The progress in science, technology and information from the last half of century has radically changed this *status quo*. As so, millions of products are being made by the same producer and distributed globally. Services are provided for hundreds of thousands or millions of beneficiaries. Negotiated contracts were replaced with contracts of adhesion, which are being repeatedly used by sellers or suppliers. The on-line environment had developed, which facilitates the international commerce. Medical and pharmaceutical discoveries led to the development of increasingly complex devices and drugs. Genetic manipulation became an increasingly common practice. New production technologies have the ability to harm thousands or even millions of people in case of accidents etc.

Under the new social and economic dynamics the importance of the individual has gradually diluted in favor of the masses, as the sellers and suppliers no longer address to individuals but target groups that share a number of common features[1].

Gradually, a *„mass society*"[2] had developed, that characterize both the production and

[1] See R. A. Nagareda, R. G. Bone, E. C. Burch, C. Silver, P. Woolley, *The Law of Class Actions and Other Aggregate Litigation. Second Edition,* Foundation Press, 2013, p. 1

[2] According to some authors, the massification is an increasingly real and inevitable phenomenon. See G. C. Hazard Jr., J. L. Gedid, S. Sowle, *An Historical Analysis of the Binding Effect of Class Suit,* in *University of Pennsylvania Law Review,* vol. 146/1998, p. 1858.

consumption and the social relations and conflicts[3]. In this society, to become effective and accessible, individual rights must often be doubled by „*social rights*"[4].

As a result of the mass society and the development of complex industrial process and complicated production and consumption patterns, new technologies, information environment and urban centers, the risks[5] to which individuals are being exposed on a daily basis had exponentially increased, leading to a so called „*society of risks*"[6] in which the science, experts, states, traders and the international system of action and decision have become increasingly aware of the fact that they are unable to calculate and prevent certain harmful situations[7].

The risk correlates with the mass society in two ways. Firstly, today's society, characterized by the emergence of large scale usage of products and technologies whose mode of manifestation in the long term is uncertain[8] facilitates the emergence of new sources and forms of risks that were previously unknown. From this perspective, the society of risk appears to be a side effect of modern life[9]. Thus, if until a century ago natural hazards and epidemics, seen as manifestations of the divine will[10], were, along with wars, regarded as the main events capable of causing a significant number of casualties, contemporary society witnessed a anthropization of risks, by moving causality towards human actions[11]. Secondly, the same elements acted as a powerful catalyst for risks that also existed in the past, but became more serious in the current context.

All these changes were not without impact on the sources of legal relations and the effects of illicit deeds. Regarding the sources, the law-makers tried to prevent the proliferation of risks by adopting new rules in some fields of law. As most of these norms provide new subjective rights or

---

[3] See M. Cappelletti, *Vindicating the Public Interest Through the Courts: A Comparativist's Contribution,* in *Buffalo Law Review*, nr. 25/1975, p. 646.

[4] Idem.

[5] The risk is defined by Article 3 p. 19 of the Law no. 59/2016 regarding the control of danger of major accidents implying hazardous substances as being „*the probability that a certain effect will produce in a given period of time or certain circumstances*".

[6] The term has been used by the sociologist Ultrich Beck in the paper *World Risk Society* published in 1999 by Cambridge Polity Press. The central idea of this paper is that instead of decreasing the level of risks, the industrialism, science and technology had led to an increase of it. For other uses of the term see J. J. Salomon, *Une civilisation à hauts risques*, Éditions Charles Léopold Mayer, 2006; P. Lagadec, *La civilisation du risque. Catastrophes technologiques et responsabilité sociale*, 1981, apud D. Melloni, *Qu'est-ce qu'un risque collectif?* in *Riséo,* no. 1/2010, par. 1also available at http://www.riseo.fr/-Revue-1-#page17.

[7] See U. Beck, *Living in the world risk society,* in *Economy and Society,* no. 3/2006, p. 338.

[8] Examples in this matter are the nanotechnologies and genetically modified products regarding which even though insufficient data exists on their effects on human body, they are still used in medical and food industry.

[9] See C. Le Gallou*, La notion d'indemnité en droit privé,* L.G.D.J., 2007, pp. 360-361; U. Beck, *Living in the world risk...*, p. 330; C. Menkel-Meadow, *Ethics and the settlement of Mass Torts: When the Rules Meet the Road,* in *Cornell Law Review,* vol. 80/1995, p. 1175; F. Bella, *Les Choses Dangereuses Dans le Contacts Privés*, PhD. Thesis, 2015, p. 154, available at http://www.theses.fr/2015VERS007S.pdf; A. Guégan-Lécuyer, *Dommages de masse et responsabilité civile*, L.G.D.J, 2006, p. 62.

[10] See J. Calais-Auloy, *Les délits à grande échelle en droit civil français,* in *R.I.D.C.*, no. 2/1994, p. 379, also available at http://www.persee.fr/web/revues/home/prescript/article/ridc_0035-3337_1994_num_46_2_4879; J. J. Salomon, *Une civilisation...*,p. 64; E. Poddighe, *I „MASS TORTS" NEL SISTEMA DELLA RESPONSABILITÀ CIVILE,* GIUFFRÈ EDITORE, 2008 p. 1.

[11] See J. J. Salomon, *Une civilisation...*, pp. 59-62.

create standards of conduct, they led to an increasing number of trials[12]. Moreover, the new technologies have facilitated new ways of committing classical illegal acts, such as theft, and the emergence of new forms of damage, that would not have existed without the technological development[13] such as irradiation caused by nuclear accidents, exposure to artificial electro-magnetic fields, development of various diseases due to defective medical devices or drugs with unexpected side effects or deaths and injuries caused by aircraft crashes.

Still, the most important transformation is on the realm of the effects of the illegal deeds. The mass production, distribution, provision of services and consumption, the new technologies, the development of industries and new ways of transportation and the new type of services, all facilitated the perpetration of illegal deeds that result in damaging a large number of persons[14]. Whether it is a faulty product, an illegal bank commission, an unfair term in a contract, a technological accident etc., in most cases the result will be the violation to the rights and interests belonging to a large number of owners[15]. In fact, almost any illicit deed of a corporation, whether it is a tort, the breach of competition norms or those relating to the securities market, consumer's protection or discrimination, will no longer resume in damaging just one person[16].

This massification in the effects of illicit deeds can be found in many area of law such as consumer's protection, contracts, torts, competition, securities, labor etc. In all these cases, only one illicit deed can sometimes cause hundreds, thousands or even millions of victims. Eloquent examples in this sense are the damages caused by asbestos[17], medical devices, such as Dalkon Shield[18], technological accidents such as the explosion of AZF plant from Toulouse[19], manipulation

---

[12] Regarding the connection between the number ol legal norms and the increase in the number of trials see S. C. Yeazell, *The Past and Future of defendant and settlement classes in collective litigation,* in *Arizona Law Review,* vol. 39/1997, p. 698.

[13] See E. Poddighe, *I „MASS TORTS"…,* p. 13.

[14] See , G. C. Hazard Jr., J. L. Gedid, S. Sowle, *An Historical Analysis….,* p. 1858.

[15] See C. Hodges, *Current discussions on consumer redress: collective redress and ADR,* p. 1, papre presented at the *Annual Conference on European Consumer Law2011,* organised by ERA on 13 October 2011 in Trier, Germany; L. J. Hine, *The dangerous Allure of the Issue Class Action,* in *Indiana Law Journal,* vol. 79/2004, pp. 569-570; D. R. Hensler, *The Globalization of Class Actions: An Overview,* in *The Globalization of Class Actions,* The Annals of the American Academy of Political and Social Science, SAGE 2009, D. R. Hensler, C. Hodges şi M. Tulibacka (coord), pp. 7-8.

[16] See R. A. Nagareda, R. G. Bone, E. C. Burch, C. Silver, P. Woolley, *The Law of Class Actios...,* p. 1; D. Rosenberg, *Avoiding Duplicative Litigation of Similar Claims: The Superiority of Class Action vs. Collateral Estopel vs, Standard Claim Market, Discussion Paper no. 394/2002,* Harvard Law School, p. 1, available at http://www.law.harvard.edu/programs/olin_center/.

[17] See B. G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as a Network,* in *Utah Law Review,* vol. 3/2005, pp. 870-871.

[18] See S. E. Gibson, *Case Studies of Mass Tort Limited Fund Class Action Settlements & Bankruptcy Reorganization,* Federal Judicial Center, 2000, p. 187.

[19] Regarding the effects of this technological accident see the *La prise en charge des victimes d'accidents et de catastrophes collectifs: cas de l'explosion de l'uzine AZF à Toulouse,* written by C. Lienhard, R. Cario, L. Daligand, M. F., Steinle Feuerbach, R. Clement, A. Garnier, E. Marsaudon, S. Ruiz, C. Gensollen și C. Lacroix, and available at http://www.gip-recherche-justice.fr/wp-content/uploads/2014/07/02-48-RF.pdf.

of securities market as in the case Shell Petroleum[20], systemic discrimination as in the Wal-Mart case[21] or the one caused by inserting an unfair contract term in contract model used by a seller or supplier.

Due to the fact that the situations in which the same illicit deed causes a large number of victims had become increasingly common, especially during the second half of the XXst century, they increasingly caught the attention of doctrine, which tried to differentiate them by the classical hypothesis, on which only one victim or a small number of victims is/are being caused.

The most important paper published in French law in this area uses the term ,,dommage the masse" (mass harm) to illustrate the cases in which one illicit deed causes a large number of victims[22]. According to the author, mass harms apart from the classical ones both quantitative and qualitative. Quantitatively, the particularity lies in the large number victims caused [23] and qualitatively mass harms are characterized by a unique injurious act that, in certain cases, such as those relating to damages caused by defective products, must be understood as the common origin of damages. If the quantitative criterion serves to underline the dimension of mass harms, the qualitative one reflects the connection that exists among the damages, as it is the element of cohesion that unites and structures all individual damages[24].

According to this theory, a mass harm exist each time the illicit deed causes a damage that is pecuniary reparable, no matter if the responsibility is regulated by special or common norms. On the other hand, when the remedy is not pecuniary, such as ordering the defendant to restrain from an illicit act, to do or not to do something or to nullify the consequences of the illegal act in other way then by paying an amount of money, we are not in the presence of mass damage. Furthermore, the theory does not seem to apply when the illicit deed does not damage individuals but a group of people, such as the inhabitants of a city, and it breaches subjective rights and interest belonging to a community and not to determined individuals. On the other hand, the mass harms may also result from natural hazards and not just human actions[25].

The French doctrine also uses the term ,,collective damage" when referring to situations in which a collective interest is being harmed[26]. This type of damages result when the interest of a group, such as the members of a profession or community, the users of the same product or service,

---

[20] For more details on this case see R. Gaudet, *Turning a blind eye: The Commission's rejection of opt out class action overlooks Swedish, Norwegian, Danish and Dutch experience*, in *European Competition Law Review,* Vol. 3/2009, p. 115.
[21] For more details on this case see M. K. Kane, *The Supreme Court's Recent Class Action Jurisprudence. Gazing into a Crystal Ball*, in *Lewis & Clark Law Review,* vol. 16/2012, p. 1022.
[22] See the entire paper A. Guégan-Lécuyer, *Dommages de masse ...*

[23] Ibidem, p. 53.
[24] Ibidem, p. 91.
[25] Ibidem, p. 88 and p. 96.
[26] Ibidem, p. 120.

the practitioners of a sport or, more generally, the consumers, producers and the environment in general, are being harmed[27].

Know in the United States of America under the term „mass torts" the illicit deeds that result in great number of victims had sparked wide doctrinal and jurisprudential debate, especially in the last half of century[28]. The notion of mass torts was first used in the field of procedural law, and not substantial law, as an attempt to better understand and especially to find solutions for this new type of damaging events[29]. Their history is inextricably linked to class actions to which share a common past under multiple aspects, but, nevertheless, most of the scholars underline that between the two a distinction must be made[30], mass torts being a form of civil torts which are characterized by the large number of victims and the class action a possible way of dealing with them. In any way, mass torts are being seen as a side effect of the mass modern society and the development of new technologies[31].

Synthetically, in accordance with the American theory, we are in the presence of a mass tort each time an illicit deed had caused a large number of victims, such as in the case of mass accidents (like an air crash, the collapse of a building, a fire in a restaurant) or the exposure to a faulty product or a drug with unknown side effects[32].

Accordingly, we can state that under the American view mass torts apart from regular torts both quantitative and qualitative.

Quantitatively a tort becomes a mass one when the number of victims caused by the same illicit deed, or a series of illicit deeds having a common origin, require a special judicial management[33].

The qualitative component can be seen both from a substantial and procedural perspective.

---

[27] Ibidem, p. 118. See also, X. Pradel, *Le préjudice dans le droit civil de la responsabilité,* L.G.D.J., 2004, p. 281.

[28] The debate on mass torts emerged in U.S.A in 1960's as a result of a series of legislative reforms, especially the ones related to objective responsibility for the damages caused by products-see P. H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, in *Cornell Law Review,* vol. 80/1995, p. 947. Other authors place the emergence of mass torts at the beginning of 1970's – see M. G. Bianchini, *The Tobacco Agreement That Went up in Smoke: Defining the Limits of Congressional Intervention into Ongoing Mass Tort Litigation*, in *California Law Review*, vol. 87/1999, pp. 715-176; S. McG Bundy, *The Policy in Favor of Settlement in an Adversary System*, in *Hastings Law Journal*, vol. 44/1992, pp. 26-27.

[29] See, for example, J. O. Siciliano, *Mass Torts and the Rhetoric of Crisis*, in *Cornell Law Review,* vol. 80/1995, p. 990. The author states that when it comes to mass torts, lawyers, judges and scholars focus almost exclusively on how the judicial system should face them. For a series of lege ferenda proposals on how the mass torts should be dealt with see American Bar Association Commission on Mass Torts, *Report to the house of delegates 5*, 1989.

[30] See , C. J. Okrent, *Torts and personal injury law. Fourth edition,* Delmar Cengage Learning, 2010, p. 272; M. J. White, *Mass Tort Litigation: Asbestos,* in *Encyclopedia of Law and Economics*, Springer Science + Business Media, 2014, p. 1, also available at http://econweb.ucsd.edu/~miwhite/asbestos_springer.pdf. Nevertheless a part of the doctrine sees mass torts as indissoluble linked to class actions – see, for example, E. Poddighe, *I „MASS TORTS"…,* p. 7.

[31] See L. A. Hines, *The Dangerous Allure...*, pp. 569-570; J. C. Alexander, *An Introduction to Class Action Procedure in The United States,* p. 1, available at https://www.law.duke.edu/grouplit/papers/classactionalexander.pdf.

[32] See L. A. Hines, *The Dangerous Allure* ... p. 596; L. E. Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second – Class Settlements,* in *Louisiana Law Review,* vol. 65/2004, p. 164.

[33] See L. E. Chamblee, *Unsettling Efficiency:...*, p. 165.

Substantially, the mass torts are the result of a unique act or did or of a series of act or deeds having a common origin[34]. As a procedural matter, the cases emerging from a mass torts present fundamental common elements of fact or law[35].

In the American law, it had been noticed that this type of torts led to major behavior changes of the main actors from civil trial and the way in which civil cases are being solved, especially in terms of diluting the importance of the particular features of the victims.

It must be underlined that according with the American concept, mass tort are restricted to tort law, in other words, to those situations in which the illicit deed causes a body or material damage[36].

The situations in which one illicit act results in a great number of victims had also caught the attention of the European Commission. As so, pct. 3 (b) from the Recommendation no. 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law states that we are in the presence of a collective damage each time two or more natural or legal persons claim to have suffered harm causing damage resulting from the same illegal activity of one or more natural or legal persons[37].

For the cases in which the same illicit deed leads to a large number of victims we proposed the use of term ,,mass damage", as we appreciate that it better reflects the phenomenon.

From our point of view, mass damages apart to regular ones under four aspects. Firstly, quantitatively, in contrast to classical damages, mass damages involve a large number of victims. Even though setting a certain numeric limit above which a damage becomes a mass damages is neither possible nor desirable, for differentiating the two, some criteria may still be useful. From this point of view, the following substantial criteria can be relevant: the fact the number of victims is large enough to reflect an abnormal exposure of the society to a certain risk, a systemic dysfunctionality, a major illicit attitude of the author or the indivisible nature of the remedy. From a procedural stand point it may be considered the impact that individual trials may have on the judicial system as a whole or on a certain court.

Secondly, qualitatively, mass damages result from the same illicit deed or from a series of illicit deeds having a common origin and the claims of the victims share a series of common elements such as the same author of the illicit act, the same way in which the damage was caused,

[34] See S. J. Campos, *Mass Torts and Due Process,* in *Vanderbilt Law Review,* vol. 65/2012, pp. 1068-1069.
[35] See F. E. McGovern, *An Analysis of Mass Torts for Judges,* in *Texas Law Review,* vol. 73/1995, p. 1824.

[36] Furthermore, some scholars have even proposed to resume mass torts to body damages. See L. S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm,* in Valparasio University Law Review, vol. 33/1999, pp. 425-426; J. C. Alexander, *An Introduction ...,* p. 3.
[37] Further on ,,Commission's Recommendation''. Recommendation is available at http://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32013H0396&from=EN

the same type of civil responsibility and even the same type of damage.

Thirdly, the mass damages imply, besides the existence of a private interest, regarding the repairing of damages suffered by each individual, a public interest in the form of repairing the damage caused to the community or the necessity to prevent or reduce future risk of committing such acts that affect large swathes of society, creates a sense of vulnerability among the population and leads to significant costs and difficulties for the judiciary.

Finally, mass damages can result from any form of human illicit deed and can take any shape, from bodily injuries, to material or financial damages or any other damage acknowledged by law.

Mass damages can classify in multiple ways. Considering the nature of right that has been violated, mass damages can be classified in diffuse, collective and individual homogeneous. A diffuse damage results when a diffuse right is violated, which a trans-individual and indivisible right that belongs to a community. Mass damages are collective when a collective right has been infringed. Collective rights are also trans-individual and indivisible, but unlike diffuse rights imply a closer connection among the members of the group[38] as a result of a preexisting judicial relation among themselves or among each member of the group and the wrongdoer[39]. Finally, individual homogeneous mass damages result from the violation of classical subjective rights, but what makes them different is the fact that the same illicit deed or a series of illicit deeds gives rise to multiple damages, sometimes millions.

Considering their source, mass damages classify in mass damages resulting from mass accidents, mass damages caused by products, mass damages caused by services, mass damages caused by intentional torts and mass damages caused by governmental illicit acts.

Regarding their way of manifestation, mass damages classify in elastic and inelastic, mature and immature, homogeneous and heterogeneous, major and small claims. A mass damage is elastic when the number of victims that may mile claims is indeterminable and extremely high, and the damages occur during multiple years[40]. On the other hand, a mass damage is inelastic when the number of victims is determinable and the damages occur in the same time framework[41]. A mass damage is mature when, by considering the previous cases, a clear image on the facts, the illicit nature of the deed, the type and extent of damages and causality exists[42]. A mass damage is

[38] See I. I. Neamț, *Class action la porțile cetății!(?),* in *Liber amicorum Liviu Pop,* Universul Juridic, 2015, p. 572.
[39] See Article 81 from Código de defesa do consumidor, Article. 11 (2) from Ley de Enjuiciamiento Civil, Article 1.1.1. from The Class Action Code:A Model for Civil Law Countries and Article 581 par. 2 from Código Federal de Procedimientos Civiles.
[40]See F. E. McGovern, *Settlement of Mass Torts in a Federal System,* in *Wake Forest Law Review,* vol. 36/2001, pp. 874-875.
[41]See F. E. McGovern, *Settlement of Mass Torts...*, pp. 875; F. E. McGovern, *The Defensive use of Federal Class Actions in Mass Torts,* in *Arizona Law Review,* vol. 39/1997, p. 605.
[42]See F. E. McGovern, *Resolving Mature Mass Tort Litigation,* in *Boston University Law Review,* vol. 69/1989, p. 659;

immature when trials resulting from the illicit are still at beginning, and, as a result, possible new evidence may still be uncovered and a clear jurisprudence on matters such as the existence of that act, the illicit nature of it, the type and the extent of damages and the causality is not yet formed[43]. Mass damages are considered to be homogeneous when they don't imply a high degree of individualism, a particular inquiry into each victim's case[44]. On the other hand, a mass damages is heterogeneous when for repairing them an individual analysis into each victim's claims is necessary, especially for determining the extent of the damage, a good example being some hypothesis of physical[45].

The ever growing number of mass damages has resulted in a series of specific problems in the field of substantive and procedural law.

Regarding the substantive law, mass damages imply particular characteristics at multiple levels of analysis. In the matter of civil responsibility the most profound impact is on the condition of damage. The aggregation of all claims arising from the same illicit deed into one trial, an increasingly common solution, leads to new challenges in terms of the personal nature of the injury as, usually, a person is allowed to claim, without any legal or conventional mandate, a compensation for the damages suffered by all or a major part of the victims, and the extent of the compensation is determined globally or averaged.

Moreover, in the case of elastic mass damages, the impossibility of determining the number of victims and the extent of the injury suffered by the future victims makes the global damages uncertain and so impedes a global resolution of the case and the possibility to determine once and for all the extent of defendant's responsibility.

Mass damages also give rise to certain problems in regard of the principle of full compensation, especially when the compensation for each victim is determined as a lump sum or the global injury exceeds the value of the defendant's assets.

If from the above mentioned aspects it seems that the conditions of civil responsibility are put to test when it comes to mass damages, from other points of view these conditions are affirmed with a new vigor. For example, in the context of mass damages the doctrine and jurisprudence have identified new types of psychical harm that can be compensated, and which are fundamentally

---

S. B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context. A Preliminary View,* in *University of Pennsylvania Law Review,* vol. 156/2008, p. 1497; S.C. Yeazell, *The Past and Future...,* p. 699. The last author states that the damages caused by asbestos and tobacco are mature because ,,*a large number of individual lawsuits have developed the factual information and legal theories*".

[43] See R. H. Klonoff, *Class Actions and Other Muli-Party Litigation in a nuthsell, 4th Edition*, West, 2012, p. 340. Other authors state that the mass damage is immature until ,,plaintiffs' lawyers can establish a "credible threat" that their clients can prevail on each element of their claims"- D. Marcus, *Some Realism about Mass Torts,* in *The University of Chicago Law Review,* vol. 75/2008, p. 1952.

[44] See J. W. Stempel, *Class Actions and Limited Vision: Opportunities for Improvements Through a More Functional Approach to Class Treatment of Disputes,* in *Washington University Law Quarterly,* vol. 83/2005, pp. 1160-1161.

[45] Ibidem, p.1162.

linked to the collective nature of the negative effects of the illicit deed. As so, it has been upheld that the collective nature of the damage enface to each individual damage a special gravity, which makes the overall damage to be greater than the sum of its parts.

Another particularity of mass damages, in the field of the conditions of civil responsibility, refers to causality. Often, as a result of the complex factual context in which mass damages occur, the identification of the exact act that caused the injuries or the author of that act is, if not impossible, at least extremely difficult. The situation becomes even more complicated when even though it is known that a certain illicit act caused certain injuries it cannot be established which of the victims resulted from that illicit deed. In this case, the analysis would become easier if causality could be determined in relation to the global injury and not the individual one, suffered by each victim.

Trying to overpass some of the difficulties raised by the mass damages, at national and international level multiple special forms of civil responsibility were adopted, which aimed to increase the level of protection afforded to the victims and to ensure them a better chance to be compensated for their injuries. As so, special norms were adopted in domains such as faulty product, nuclear damages, environmental damages and competition. Despite of the commendable endeavor, most of these reforms are still deficient in multiple ways, the biggest problem being the lack of an adequate procedural framework which would allow the victims an optimal implementation of these new mechanisms of accountability.

Another measure taken by the national legislators was to create special administrative funds for compensating the victims of mass torts. Even though such funds considerably ease to possibility of the victims to obtain compensation for their injuries, the existence of such mechanisms, having a sectorial application, exclusively depend on the will of the legislator and, being financed most often from public resources, raises major problems in terms of budgeting and social equity.

Globally, it would seem that the main issue of mass damages is the lack of a uniform approach, allowing victims to have a predictable and effective remedy in terms of both the substantive law and procedure. The existence of multiple parallel systems, some private and other public, may lead to confusion for victims that will transform into to further difficulties on their way to compensation. Moreover, the lack of an adequate procedural framework, which would be required for an effective implementation of existing substantive mechanisms, makes the later without much practical relevance.

As in the case of substantive law, mass damages imply characteristics at multiple levels of analysis in the field of procedure and practice as well. The first and most obvious effect, a direct consequence of the quantitative nature of mass damages, is the increase pressure on courts dockets as a result of the massive infusion of claims determined by the multitude of injured victims. If an

aggregation mechanism does not exist, in many cases the courts will effectively be flooded by claims through which the victims ask for the compensation of their injuries. This effect is sharpened by the fact that the victims of mass torts seem to be more willing to address the courts as a result of the cognitive-behavioral changes that occur when other victims of the same illicit act obtain a positive solution in a trial and their belonging to a „common destiny". The fundamental characteristic of these trials is their profound repetitive nature as in most of the cases the victim will file the same kind of claim, she will bring the same legal and factual arguments, the same evidence will be administrated before the court and the judge will have to consider the same elements of fact and law. This characteristic makes the individual resolution of mass damages a waste of resources and judicial time.

From another stand point, as a result of the pressure on the courts dockets in many situations the mass damages will lead to important prolongations on the time necessary to solve a claim, both the regular ones and the ones related to the mass damage. Furthermore, the judge will have to reduce the time dedicated to each case and so the quality of justice will be affected and risk of judicial errors and the probability that the solutions passed in this context may differ from the ones passed in regular circumstances increase.

Another important aspect is the one related to procedural costs. Individual resolution of the claims resulted from a mass damages leads to unnecessary costs both for the judicial system and the parties. Regarding the victims, they will be often required to advance, beside the sums for judicial taxes and lawyer's fee, important sums for the complex and costly judicial expertise and the administration of other evidences. Facing such a situation and the risk of having to pay also for the costs of the adverse party, in many cases the victims will choose not to address the courts, especially when the injury they have suffered is not a major one. Regarding the defendants, they will have to advance in every new trial sums of money for lawyer's fee and administration of evidence and, when they lose the case, they will have to pay along with the compensation afforded to the victim the costs she has made during the trial. Even when the defendant would want to solve each claim outside the court, before the victims file claims, this would be impossible as in most of the cases the defendant won't be able to do so because the identity of the victims is unknown until they step up and address to the courts. If the defendant settles after the claim has been filled, as in many cases he will be by law in default, he will still have to pay the victim, besides compensation, the costs with judicial taxes and lawyer's fee. Also, the courts, under the pressure of increasing number of files, will make extra costs with additional human, logistic and material resources required in order to be able to solve the cases.

The high number of victims in conjunction with sometimes their heteroclite nature and a low number of law firms that practice in certain type of mass torts may encourage the emergence of

conflicts of interests among the involved actors and gave rise to ethical problems that cannon be found in the case of classical damages.

Finally, the individual resolution on injuries that resulted in the context of a mass damage will lead, in many cases, to divergent jurisprudence, which will appear as profoundly inequitable for the victims who had been injured by the same illicit act or a series of illicit acts having a common origin. This will also lead to social frustration and mistrust in the judicial system's capacity to respond in an adequate manner to this new type of situations.

With all this challenges in mind, the necessity of adequate mechanism to deal with mass damages comes to the surface. From our point of view the construction of such a mechanism should start with the establishment of a series of clear objective. As so, from a substantial perspective, the mechanism should lead to optimal deterrence and compensation. Procedurally, the mechanism should facilitate access to court, provide the guaranties of a fair trial and allow the resolution of cases in a reasonable time. Finally, regarding the judicial system, the mechanism should lead to decrease of pressure on court dockets and a reduction of costs.

As a result of multiple substantial, procedural and judicial challenges raised by the mass damages, some states tried to adapt by adopting substantial or procedural reforms, while others have completely ignored so far the phenomenon.

In the later case, remaining in the classical paradigm, in many situations, the only available alternative for the victims is the individual claim address to a court and the use of common norms. The great advantage of this approach is that fact that it conserves a way of repairing injuries that exists for centuries, in which the victim and the wrongdoer are individually analyzed in a one to one judicial duel. On the other hand, the approach has many disadvantages, from the risk of over-deterrence or under – deterrence and difficulties in proving the fulfillment of legal conditions of civil responsibility to difficult access to court, the conservation of a disequilibrium of arms between the victim and the wrongdoer, divergence in jurisprudence, over-crowded court dockets and major costs for solving the claims.

Among the states that chose to react, some had adopted special forms of civil responsibility, adapted to the particularities of mass damages. The biggest advantage of this approach is that it allows an adapted reaction and so the difficulties that the victims are facing when having to prove the conditions of civil responsibility or the identification of the one responsible for their injury, can be efficiently removed or diminished to make their task easier. Still, countless disadvantages exist. The adoption of sector-specific systems of accountability leads to an eclectic, dense and hard to understand legal framework, which creates problems both to the litigants, to whom it becomes increasingly harder to know and understand the legal norms and the standard of conduct that this norms impose, and the practitioners, who frequently have to apply rules that are not correlated and

structured[46]. Furthermore, the existence of special rules, themselves extremely different, in the same time with a common system of responsibility, creates an inequality among victims, which are often in identical situation, and among the ones responsible, and so creates problems on the field of legislative ethics and equality before the law[47]. Finally, if this special mechanisms of civil responsibility are not doubled by reforms in procedure, even though some of the problems regarding the access to courts may be reduced, by facilitating the prove of civil responsibility conditions, it will still not offer any extra facilities when it comes to the equality of arms, the resolution of cases in a reasonable time and it will not lead to the decrease of pressure on the court dockets or the costs associated with solving the claims of the victims.

Other states have completely canceled the need for the victims to address a court in order to get compensated by implementing some administrative proceedings, usually in the form of compensation funds, financed from the state budget or through insurance[48] to which the victims can address for compensation. Once notified, the compensation funds, through an administrative procedure, establish, usually in legally establish short terms, the compensation to which the victim is entitled by using a set of criteria similar to the ones used by courts[49]. The main advantage of this special funds is that they allow the victims to be compensated in a fast and efficient manner and so the victims manage to get their damage repaired faster than if they were to address the court and by fallowing a simpler procedure, in which they don't have to prove the conditions of civil responsibility or they are held to a lower standard of proof[50]. Nevertheless, this approach implies countless disadvantages as well, like the ones referring the pressure this funds put on the public budget, the different treatment of the victims of mass damages[51], the abolishment or dilution of deterrence, lack of the guaranties associated with fair trial and, in some situations, insufficient prevention of court file-pressure and reduction of costs.

There are states that also tried to address mass damages from a procedural point of view. As so, some legal systems, as the American one, allow a partial consolidation of all cases that arise from the same illicit act in order to solve in a uniform matter all some common aspects (M.D.L.).

---

[46]See S. Mauclair, S. Mauclair, *Recherche sur l'articulation entre le droit commun et le droit spécial en droit de la responsabilité civile extracontractuelle*, Thesis, 2011, p. 4.

[47] By considering this problems, some scholars consider that in order to better face the mass damages a specially designed system of civil responsibility should be adopted which would provide a presumption of causality, a common procedure for technical expertise, no matter the type of injury, a prioritization among victims and a privilege for the victims of mass damages in relation to the other creditor of wrongdoer. Also a solidarity found should exist for the situations when the assets of the wrongdoer are inferior to the value of the global damage. See, A. Guégan-Lécuyer, *Dommage de masse...*, pp. 349-364.

[48]See C. Le Gallou, *La notion d'indemninité...*, p. 369; G. Viney, *Traité de droit civil. Introduction à la responsabilité. 3e édition.* L.G.D.J., 2008, p. 49.

[49]See C. Le Gallou, *La notion d'indemnité ...*, pp, 372-375.

[50]See A. Guégan-Lécuyer, *Dommage de masse...*, p. 225; G. Viney, *Traité de droit civil. Introduction ...*, p. 65.

[51]This may lead to debates on their equity. See A. Guégan-Lécuyer, *Dommage de masse...*, p. 225; G. Viney, *Traité de droit civil. Introduction ...*, p. 65.

The partial consolidation leads to countless advantages from procedure and efficiency stand point. Still, by not implying the complete resolution of claims, but only pretrial aspects, they have little benefits when it comes to optimal deterrence and compensation. Also, other states, such as England, allow consolidation under all points of view of claims arising from the same illicit act, but under very restrictive conditions. This mechanism has a series of advantages, especially in the field of procedure and judicial efficiency, but as it is only available after the claims were filed by the victims, it has little substantial benefits. Another approach, which can be found in states such as USA, England, Germany or Switzerland, is the use, in some strict conditions, of model claims, which allow the extrapolation of a given case result to all the other cases arising from the same illicit act. This mechanism prevents divergent jurisprudence, strengthens judicial security and the trust in the judicial system, reduces costs for the judiciary and parties and promotes equilibrium of arms among victims and wrongdoer. Nevertheless, the extremely strict conditions in which this mechanism can be used and its incidence only in regard to the pending claims reduces it efficiency.

The most complex, debated and used mechanism for solving the claims arising from mass damages is the class action. With an almost millenary history and with an upsurge without precedent in the last half of century, the class action, a mechanism in the same time worshiped and blasphemed, sparked wide debate in many countries, dividing doctrine, practice and nations.

The class action is a mechanism by which one or more persons file a claim or defenses in the name of a class of persons, who will not stand as parties in the trial and who share common problems of fact of law, as a result of being injured by the same illicit act a series of illicit acts having a common origin, without a legal or conventional mandate, and the judicial decision will have res judicata effect both in relation to the parties and class members.

From this description the *sine qua non* elements of a class action can be identified. The first characteristic of it is that one or more persons act on behalf of a class without a legal or convention mandate. Second, the class members are united by the fact that they were injured by the same illicit act or a series of illicit acts having a common origin and as a result they share multiple common problems of fact or law. Furthermore, the members of the class are not parties in the trial. Finally, even though the member of the class are not parties the judicial decision will have res judicata effect in relation to them also and not only to the parties.

Some judicial systems see the class action as a purely procedural mechanism, while others give it a strong substantial character. From our point of view the class action has a sui generis nature, an instrument build as a judicial mechanism with strong impact on substantial ground[52]. This approach of class action allows a correlation of both substantial and procedural objectives

[52]For a similar oppinion see J. Leubsdorf, *Class Action in the Cloverleaf*, in *Arizona Law Review*, vol. 39/1997, pp. 454-455.

under a complex and coherent mechanism and bypasses a tunneling vision that would undermine one of the two plans.

Historically, the class action had a very sinuous evolution. Initially constructed as an instrument used by the powerful to collect taxes, especially the church, it gradually evolved, in Medieval England, due to social and economic transformations, to an ambivalent nature, in which the class could act both as a plaintiff and as a defendant. After a steady evolution over the centuries, the class actions started to decline in England during the XVIIIth century and almost extinct in the XIXth century.

The institution has nevertheless survived, as it was adopted in the American law where it also had an extremely sinuous evolution. After a quite frail journey during the XIXth century and the beginning of XXst century, a 1966 reform leads to a major evolutionary leap. During this reform the class action was completely restructured and its domain was extended from equity to any type of claims. The result was immediate. Right from the late 1960s, as a result of a flexible interpretation of the conditions for certification, the courts delivered a series of decisions with a major social impact.

The success of the first years have led to a strong adverse reaction, coming especially from the large corporations which now seen themselves exposed to the risk of an accountability at a level without precedent. A huge lobby immediately started, aiming to reduce or even eliminate the use of class actions. This endeavor materialized both in countless attempts to legally restrain the class action and a jurisprudence back-drop coming from the Supreme Court, which started to underline more and more stringent the need of an restrictive interpretation of conditions for certifying a class action. In spite of this efforts and even though the applicability of class action was severely diminished, it still remained an extremely valuable and powerful instrument in the American judicial system.

While in the USA the revolt against the class action was caching more and more ground and even though it was initially seen by other judicial systems with reluctance, things started to change abroad at the late 1970s, when the class action was reconsidered by the other countries and seen as a viable and efficient instrument to deal with mass damages. Gradually, an increasing number of systems of law, from all continents, started to implement, with small or major adaptations, class actions inspired by the American model.

In Europe the negative image of the American judicial system also reflected intensely in relation to the class action. As so, at the beginning, the class action was highly criticized and marked as being incompatible with the European legal system. Still, the lack of viable alternatives in the confrontation with mass damages led to a reconsideration of the initial position and the gradual implementation of some forms of class action. Initially, this judicial mechanism was

limited to the protection of consumers and remedies in the form of injunctions. Later, the trend was to liberalize the institution and apply it to any type of injury or remedy.

As a result of the multiple transformation and adaptations during the implementation into the legal systems, the class action has become an extremely heteroclite and complex instrument. Class membership can be determined in an opt in manner (in which the victims become members of the class only if they expressly manifest their will), opt out (when all the victims are presumed to belong to the class and if they don't want to be a part of and want to escape *res judicata* effect of the judgment they have to express themselves in a specific time-frame) and imperative, in which all victims are absolutely presumed to be part of the class and they have no way of escaping *res judicata* effect of the judgment.

Among the states that do have a class action mechanism, some allow it to be used no matter the nature of the infringed right, as long as the conditions for certification are met, while others only allow the use of class action in certain areas of law, such as consumer protection or competition law.

Moreover, while in some states, such as U.S.A., the class can act both as plaintiff as defendant, in other states, such as Holland, the class can act only as plaintiff.

Furthermore, in some systems of law, especially the ones that already have a history in this matter, such as U.S.A., Canada and Australia, the class action can be used no matter the type of remedy, while in others the class action can only be used to ask for an injunction.

Referring to its effects, in some countries, such as U.S.A., Canada, Australia, Holland or U.K., all the conditions of civil responsibility can be analyzed in a class action, while in others, such as Brazil, only an issue class action exists, in which the use of the mechanism is limited to some aspects or issues, the others having to determine in individual actions.

Some considerable differences also exist in the way in which the class action is decided. Countries such as Holland provide only for a settlement only class action, in other words a mechanism that can be used by the class representative and plaintiff to conclude a settlement which is to have collective effects. Most of the other countries allow the claims to be solved by the court or by the parties through a settlement, in the latter case special norms being provided.

Finally, important differences also exist among the states regarding the person who can act as class representative. While some systems, such as U.S.A. or Canada, usually allow only a class member to act as a class representative, in other the class representative has to be a public authority or an N.G.O.. There are also mixed systems, that allow all the subjects previously mentioned, or a part of them, to act as class representatives as it is for example Brazil[53], Mexico[54], Israel[55],

[53]See Article 82 from Código de defesa do consumidor.
[54]See Article 585 from Código Federal de Procedimientos Civiles.

Portugal[56], Poland[57] , Norway[58] or Denmark[59]. Even the European Commission has embraced this option[60].

From our point of view also, for the maximum potential to be achieved and in order to prevent as much as possible any abuses, the ability to act as a class representative in a class action should be provided both for the victims and public authorities and N.G.O.'s that have competences in the domain in which the illicit deed was committed.

We can now conclude from the above that between the class action models adopted by different systems of law there major differences. As so, a system of reference is necessary to be established. Among the most advance models of class actions that may be considered are the ones from U.S.A, Canada, Brazil, Holland and the one proposed by the European Commission through its Recommendation no. 2013/396/UE. In Romania there are only primary forms of class action in domains such as consumer's protection, the action brought by human's rights protection associations and unfair contract terms. In all this cases, a class action can be brought only when a collective or diffuse right has be breached and no damages can be claimed.

Out of the five possible systems of reference, the European's Commission Recommendation would seem, at a first glance, as the main favorite. Still, as it only provides a set of principles that may be considered by the member states, the Recommendation is insufficiently developed and coagulated to be taken as a model. Furthermore, the Recommendation is almost unanimously criticized for its lack of a clear and unified vision, the contradictory and confusing provisions and for the fact that it lets uncovered a series of extremely important aspects. Considering all this, from our point of view, even though the European's Commission Recommendation should not be ignored, it cannot be taken as a model of reference.

The next models that may be considered as the most appropriate are the Dutch and Brazilian ones, considering that the two countries are part of the same family of law as Romania. Regarding Holland, the fact that the model is a settlement only class action disqualifies it as a viable reference as, on on side, it reduces a lot the efficiency of class actions, especially when it comes to small claims and, on the other side, the settlement only class action is among the most contested models of class actions, the main criticism being that it leads countless abuses on the class members.

---

[55] See par. 4 (a) from Sefer Hachukim 5766-2006.

[56]See Article 2 from Lei n.º 83/95, de 31 de Agosto, DIREITO DE PARTICIPAÇÃO PROCEDIMENTAL E DE ACÇÃO POPULAR.

[57] See M. Tulibacka, *Collective redress. Poland,* available http://www.collectiveredress.org/collective-redress/reports/poland/generalcollectiveredressmechanisms.*;* G. L. Fowler, M. Shelley, S. Kim, *Emerging Trends in International Litigation: Class Action, Litigation Funding and Punitive Damages,*in *Dispute Resolution International,* vol. 3/2009, p. 111.

[58] See section 35-1 (3) from LOV-2005-06-17-90: Lov om mekling og rettergang i sivile tvister (tvisteloven).

[59]See section 254 from Bekendtgørelse af Lov om rettens pleje.

[60]See par. 3 (a) and (d) from Commission's Recommendation.

On other occasions we praised the Brazilian model[61] and, in accordance with other scholars[62], we stated that it should not be ignored by the countries belonging to the civil law family when they plan to adopt a class action. We still believe that the Brazilian class action is an excellent example on haw this instrument may be adapted to correspond to the particularities and necessities of certain legal systems as to be considered an expression of that system and not a foreign body. Furthermore, even though it had not reached the performances from Canada and U.S.A., the Brazilian class action has proven to be quite successful in practice, numerous class actions being filled, especially by the General Attorney. Nevertheless, under multiple aspects, such as the ones related to notification of the class members, their status in the proceedings and the acts of procedural disposal, the models is extremely faulty. Moreover, as Brazil only provides for a model of issue class action, when an individual homogeneous right was breached, it can prove to be quite inefficient, especially in the case of small claims.

For all the above arguments, even though the virtues of the two models are undeniable, we think that they are not suitable to be taken as a reference.

As a result, the Canadian and American models are next to be considered. The Canadian legislation is American inspired, and the last still exerts a major influence on doctrine and jurisprudence. Furthermore, even though, especially in the last decade, a consistent jurisprudence and doctrine has taken shape in Canada, they have still not reached by far the level of complexity and profoundness of the ones from U.S.A.. That is why, from our point of view, the American and not the Canadian model is the preferable model.

Some may say that the American model of class action is an unsuitable reference, as U.S.A. belongs to a different legal family, the civil trial is adversarial and dominated by the lawyer, the contingency fee is allowed, the claims are decided by juries, consistent punitive damages are afforded and American rule applies when it comes to costs.

Even so, the class action provided by Federal Rule of Civil Procedure 23 has been the model of reference for the high majority of the other legal systems[63]. Both admired and contested, the American class action became the source of majority, if not all, class actions[64]. That is why, if we were to choose any other model, in reality it will be only and adapted form of the American class

[61]See I. I. Neamț, *Class action* ..., pp. 569-576.

[62]A se vedea, în acest sens, A. Gidi, *Class actions in Brazil: A model for Civil Law Countries*, în *American Journal of Comparative Law* nr. 51/2003, pp. 311-406.

[63] See C. Hodges, *What are People Trying to Do in Resolving Mass Issues, How is Going, and Where are we Headed?* in *The Globalization....,* p. 331; D. Marcus, *The History of Modern Class Action, Part I: Sturn Und Drang, 1953-1980,* in *Washington University Law Review,* vol. 90/2013, p. 592; N. M. Pace, *Class Actions in the United States of America: An Overview on the Process and the Empirical Literature,* p. 6 available at http://globalclassactions.stanford.edu/sites/default/files/documents/USA__National_Report.pdf; G. L. Fowler, M. Shelley, S. Kim, *Emerging Trends* ..., p. 102.

[64]See E. F. Sherman, *Group Litigation under Foreign Legal Systems: Variations and Alternative to American Actions,* in *DePaul Law Review,* vol. 52/2002, p. 401.

action. Another argument in favor of the American class action is that fact that it is the most developed and complex existing form[65]. More than half of century of extremely vast jurisprudence and consistent doctrine have transformed the class action into a multifaceted judicial instrument with a level of efficiency which is hard to surpass. Finally, the consistent jurisprudence and doctrine have revealed over decades both the positive aspects, which should be conserved by any system, and the negative ones, that must be taken into account in order to prevent the problems that emerged across the ocean.

Even so, the way in which the class action has been adapted by other countries must also be considered, as those adaptations may equally constitute the recipe for a reasonable and successful transplant. That is why, in the fallowing pages, we will constantly take into account not only Rule 23 but also the other four models and also the models of class action from U.K., France, Austria, Belgium, Spain, Italy, Portugal, Poland, Denmark, Finland, Norway, Sweden, Argentina, Mexico, Chile, Australia, Israel and Indonesia.

The way in which class action works differs under many aspects by comparison to regular actions.

Firstly, even though Rule 23 does not provide any norm regarding the complaint in most of the other countries the complaint filed in a class action must contain a series of specific elements related to the conditions for certification and the number of class members and their personal data, in order to allow the court to analyze the certification criteria and the defendant to build the defense.

Secondly, in many states, such as Holland, U.K., Finland or Sweden, the material and territorial jurisdiction belong only to a certain court or courts. From our point of view, in Romania also, in order to avoid the problems related to material or territorial jurisdiction and the risk of setting different standards, the law-maker should invest only one court with the power to judge class actions. Because of the complexity of the procedure and the impact that the judgment may have, this court should be one found at the top of the court system.

Thirdly, the class action transforms the judge into a fiduciary of the class member as she has the duty to constantly supervise that their rights and interest are respected by the parties and to take the necessary measures in order to protect them.

Fourthly, another fundamental particularity of class action is that even though the judgment delivered by the court will have res judicata effect in relation to the class members, they are not parties in the proceedings in the regular sense of the term. In the class action, the class members have only limited procedural rights, such as the right to intervene and the right to object to the

[65]See D. Geradin, *Collective Redress for Antitrust Damages in the European Union: Is this a Reality Now,* in *George Mason Law Review,* vol. 22/2015, p. 1087.

settlement. They cannot file claims or demands, ask for evidence or invoke exceptions. In some situations, the class members cannot even file an appeal against the judgment, this right being acknowledged only for the parties, that is the representative and the defendant.

Fifthly, regarding the defendant, even though the class action can be filed against any person, natural or legal, of public law or private law, in most of the cases it will be filed against public authorities or major corporations, especially due to the size of the global damage or the nature of the remedy asked for. Furthermore, the majority of countries do not allow the defendant to file a counterclaim in a class action or the counterclaim can be filed only in restrictive circumstances, such as the need to also fulfill the conditions of a class action.

Sixthly, most of the class action models provide for an intermediate stage, that of authorization or certification, in which the judge must check if the conditions are met for the proceedings to continue as a class action. In American law, the certification stage is unanimously seen as a fundamental and essential by both the jurisprudence and doctrine[66]. In the case of small claims, the rejection of certification will, in most of the cases, close any access to a court as the filling of individual claims is not economically viable[67]. Furthermore, the certification of a class action influences both the willingness of the defendant to enter into a settlement and the chance that the negotiations in the name of the class members will be carried out at a length arm[68]. On the other hand, the refuse to certify a class action will put an end to any chance of a settlement, especially in the case of small claims in which there is almost no risk for the defendant that the class members will files individual claims[69].

The certification procedure is also seen as a guarantee of due process for the class members, in this stage being analyzed elements such as the existence of common questions of law or fact and, most importantly, the adequate representation, aspects that are seen as having the role of protecting the class members from frauds and from losing their right of access to a court as a result of a procedure in which their rights were not protected in a proper manner[70]. As so, the main role of the

---

[66] See S. C. Yeazell, *Civil Procedure. Seventh Edition*, Walter Kluwer, 2008, p. 811, 814; R. H. Klonoff, *Class action...*, p. 145; Federal Judicial Center, *Manual for Complex Litigation. Fourth*, Thompson West, 2004, p. 246; T. E. Eble, *Federal Class Action Practice Manual*, 1999, par. 33, available at http://www.classactionlitigation.com/fcapmanual/; M. E. Solimine, C. O. Hine, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23 (f)* in *William and Mary Law Review*, vol. 41/2000, p. 1546; D. Geradin, *Collective Redress for Antitrust Damages...*, p. 1089.

[67] See S. C. Yeazell, *Civil Procedure...*, p. 814; M. E. Solimine, C. O. Hine, *Deciding to Decide:...*, p. 1546; D. Geradin, *Collective Redress for Antitrust Damages...*, p. 1089; R. H. Klonoff, *Class action...*, p. 145.

[68] See S. C. Yeazell, *Civil Procedure...*, p. 814; M. E. Solimine, C. O. Hine, *Deciding to Decide:...*, p. 1546; D. Geradin, *Collective Redress for Antitrust Damages...*, p. 1089; R. H. Klonoff, *Class action...*, p. 145. About the pressure that the decision to certify a class action may put on the defendant to settle see *In re* Rhone Poluenc Rorer Inc., 51 F. 3D 1293, 1296-1298 (7th Circ., 1995).

[69] See T. D. Rowe, jr. *Beyond the Class Action Rule: An Inventory of Statutory Possibilities to Improve the Federal Class Action*, in *New York University Law Review*, vol. 71/1996, p. 198.

[70] For this, see the cases Amchem Prods Inc. v. Windsor, 521 US 591, 620 S. Ct. 2231, 138 L. Ed. 2 d (1997); Barboza v. Ford Consumer Fin. Co., no. Civ. A. 94-12352-GAO, W.L. 148832 (1998) și Ortiz vs. Fireboard Corp 357 U.S. 815,

certification is to ensure that the extension of res judicata effect beyond the parties and to the class members is appropriate and justified[71]. Furthermore, the existence of a certification provides a better protection of the defendant's image, by precociously ending those trials that are manifestly ill-funded or do not fulfill the conditions for a collective proceeding.

Regarding the conditions for certification, in today's form, Federal Rule of Civil Procedure 23 states that one or more members of a class may sue or be sued as representative parties on behalf of all members if the conditions of „numerosity", „typicality", „commonality" and „adequate representation" are met[72]. Then, depending on the type of remedy claimed, Rule 23 regulates four special forms of class action[73]. The first type of class action can be used when prosecuting separate actions by or against individual class members would create a risk of inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class[74]. The second type of class action is available when prosecuting separate actions by or against individual class members would create a risk of adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests[75]. The third form of class action is admissible when the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[76]. Finally, the forth type of class action can be certified when the court finds that the questions of law or fact common to class members predominate (predominance condition) over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy (the superiority condition)[77].

The American way of regulating class action, by structuring it in different forms, depending on the remedy, each with its one special condition alongside with the general conditions, is unique in comparative law and it has caused countless problems related to the difficulties in differentiating among the different types of class actions and the standards that need to be applied by the courts at

---

849 S.Ct. 2295, 144 L. Ed. 2 d 715 (1999). This is exactly the reason why most of the countries provide a certification stage for class action. See D. Hensler, *The Globalization ...*, p. 17.

[71]See D. Marcus, D. Marcus, *Flawed but Nobble: Desegregation Litigation and its Implications for the Modern Class Actions*, in *Florida Law Review*, vol. 63/2011, p. 714.

[72]See Federal Rule of Civil Procedure 23 (a).

[73]The four types of class actions are structured considering the type of remedy requested through the claim, even though a certain type of class action is not absolutely limited to a certain remedy. For more details see R. C. Williams, *Due Process...*, pp. 646-649; J. G. Ginsberg, *Class Action Notice:...*, p. 744; M. Taruffo, *Some Remarks ...*, p. 410.

[74]See Federal Rule of Civil Procedure 23 (b) (1) (A).

[75]See Federal Rule of Civil Procedure 23 (b) (1) (B).

[76]See Federal Rule of Civil Procedure 23 (b) (2).

[77]See Federal Rule of Civil Procedure 23 (b) (3).

the certification stage and during the trial. That is why, in accordance with the other models of class action, we plead for a unitary construction of the conditions for certification in which the aspects that led to the four types of class actions in the U.S.A. are to be considered in relation to the legal regime applicable after certification, more exactly the way of determining class membership and notification.

As so, also seeing the other models of class action, in our opinion the conditions that should be emplaced for certification are numerosity, commonality, adequate representation, predominance, superiority and the fact that the action does not seem to be manifestly ill-funded.

Obviously, we cannot talk about a collective proceeding without a class of victims that claim to have been damaged by the same illicit deed and that is why numerosity is a condition that lies in the center of class action. A group begins with two persons but it's hard to justify a collective proceeding for two victims. Even a higher threshold formally determined can be hard to calibrate in order to reflect maybe the most revealing conditions of class action. That is why, the American approach of numerosity, adopted also by other countries, which does not rely on a formal determination but on a substantial one, stating that the condition is met when the class is so numerous that joinder of all members is impracticable, appears to be more appropriate.

If numerosity gives the class action its dimension, the commonality is meant to give substance to that dimension. The existence of common questions of fact or law is the element that unites the class members into a unitary and cohesive group and sets them apart from other members of the community and even from other victims. In other words, the common questions are the ones that give identity and consistency to the group. The class action stops where the common questions end and in the lack of common questions no class action exists as this mechanism is based on the element that binds class members: the existence of some common questions of fact or law.

Unique in the landscape of class actions, the typicality requirement, seen as the existence of a strong resemblance between the claims of the representative and the ones of the class members, appears to be quite untenable even in U.S.A., mainly because of the fact that its finality may be reached by the other conditions, especially commonality and adequate representation. Moreover, typicality may be justified only in private class actions, as in public or organizational class actions, in which class representative is not a member of the class, is impossible to talk about an identity between the claims of the class representative and class members. As most of the class action models are mixed, in which all three forms of class action are permitted (private, public and organizational) or a combination of two, setting different conditions for certification, depending who stands as class representative, would create confusions, particularly in the case of hybrid class actions, filed by two different type of class representatives. That is why we think that this condition

should not be upheld, all the more as its removal would not have major negative consequences in practice.

Even though numerosity gives the specific dimension to the class action and commonality gives it substance, it still lacks an extremely important element: legitimacy. This void is filled by adequate representation, the most important and complex condition. Usually, the victim is the only one who can decide what happens after she was damaged and if it is necessary or not to use the most powerful instrument of all: filling a claim. In exceptional situations, when certain imperative conditions provided by the law are met, the victim may be completely or partially deprived of her right to decide if or not to act, this decision being made by a third with whom the victim is in no direct judicial relationship. Such a deprivation, as well as the extension of res judicata effect to the victims that only play a minor role in the proceedings, may not be allowed unless a certainty exists that the one acting in the name of the class members is at least as qualified and acts at least with the same level of due diligence as the victims would. In other words, the class action must place the victim, in terms of the management and development of the proceedings, at least in the same situation in which she would have been if an individual claim had been used.

No matter how strict and complex are the norms meant to regulate adequate representation, from our point of view, this condition can never be analyzed *in abstracto* but only *in concreto,* by the court *invested* with the claim. Furthermore, putting aside any considerations without practical relevance, the court should analyze to what extent the putative representative is capable to adequately and correctly act in the name of the class, no matter if she is a member of the class, an organization or a public authority. The only fact that the plaintiff entity is a public authority or an organization does not mean that she is capable to adequately act on behalf of a determined class of persons or that she is outside any conflicts of interest. Furthermore, even though the class counsel always plays and undeniably major role in the class action, a rule, as the one in U.S.A., according to which the class counsel in appointed by the court after an analysis of her capacity to act adequately in the name of the class, even though is not by itself incompatible with our system of law, would nevertheless be excessive, especially as we pleaded for an increase of the role of the class representative and a dilution of the role of class counsel and in our system the elements considered when this condition was set forth in U.S.A., related to the major role and attributes of the lawyer in the civil trial, do not subsist. Even so, the counsel's qualification and experience in class actions should be considered when the court analyzes the capacity of the putative class representative to fairly and adequately act in the name of the class. In other words, the counsel and her particularities should be one criteria to look at when the condition of adequate representation in being analyzed in relation to a certain putative representative.

The three conditions, numerosity, commonality and adequate representation, set the general

outline of class action but do not completely define it. The complete, or partial, deprivation of class members of their procedural autonomy and the use of a mechanism as complex as class action, cannot be justified unless such an endeavor is both efficient and desirable by comparison to all the other possible options. A class action loses its justification when in case of a positive decision the victims would still need to file individual claims in which to prove, for example, most of the conditions of civil accountability. As so, if the only common element is the same material deed and the members of the class would have to prove, in individual trials, its illicit nature, causality and the damage, it is hard to identify any reason to file a class action. Moreover, as the U.S.A. Supreme Court has states in the cases Wal-Mart and Amchem, the lack of a strong nucleus of common elements makes the class cohesion debatable, and, implicit, the substance of a class action, and this may lead to negative effects for class members and conflicts of interests. That is why, in accordance with most of the models of class action, we think that the common questions should predominate over the individual ones, in the sense that solving them should at least advance considerably the final resolution of the claims.

Furthermore, considering the profoundly intrusive nature of class action into the freedom and procedural autonomy of an individual, it can only be justified when it appears to be superior to any other procedural means available for the victims. As so, when the members of the class may use other equally efficient instruments the class action cannot be justified, due to it exceptional and subsidiary nature. That is why, alongside with predominance, superiority or preferability should be a condition for certification no matter the nature of the right infringed or the remedy claimed. Of course, when the damage result as a breach of a diffuse or collective right, the conditions of predominance and superiority will be invariably fulfilled, as in this cases all the questions are common to the members of the group and the class action is the only truly adapted instrument for such situations, due to the fact that individual trials cannot work for purely collective damages.

Finally, even though is not provided by Rule 23, some other systems expressly state that in order to be certified the action should not appear to be manifestly ill-funded. This condition would eliminate most of the abuses that are pretended to exist in US.A. when it comes to class action and, implicitly, the criticisms brought to it. Without requiring the same standard of probation as the one for solving the claim, when analyzing this condition the judge should get to the conclusion that, at a first glance, the action does not seem to be manifestly ill-funded, in order to avoid damaging defendant's reputation by certifying a class action that obviously lacks any grounds or to make him settle a groundless claim in order to escape the risk of a less favorable judgment.

If all the conditions for certification are met, the class action also continues with some particularities by comparison to common trials. One of these differences refers to the settlement, as most of the legal systems provide a special set of norms for a settlement conducted in a class

action. Usually, the settlement is negotiated by the class representative with the defendant, in the name of the class members, and needs to be verified and approved by the court. The negotiations happen in most of the cases after the class action was certified and the court can, in certain circumstance, name an independent expert to participate at the negotiations in order to ensure that the interest of the class members are adequately represented. Furthermore, the class members, even though they are not parties and have not previously intervene in the trial, can make written or oral objections to the settlement and, in some situations, they can opt out if they do not agree with the settlement. The court has the most important role, as the judge has to make sure that the settlement is fair and reasonable and that it is not meant to damage the interest of the class members. For this, the court can administrate any evidence it considers necessary.

Another particularity of class action refers to the notification of class members. The notification is the bridge between the court and the class members, the instrument through which the class members find out about the existence of the class action, their rights and through which the court can see what is the opinion of the class members regarding the action, the way in which the class representatives do their jobs and the adequacy or inadequacy of the settlement[78]. Trough notification the class members are informed on the fact that a class action was certified, that they have the possibility to opt in or opt out of the proceedings, that a settlement has been concluded, that the class action has be decided or about other aspect that the court considers appropriate. In most of the cases the class representative is the one responsible for the notification and the costs that it implies, under the direct surveillance of the court. The notification can be individual, through on-line means, advertisements, posters, through public authorities and trough mass media.

An essential aspect for a workable class action is financing. Three solutions can be found in comparative law in this regard. The first one, used mainly in U.S.A., implies the financing of the class action by the lawyer trough contingency fee. Another, which was first used in Australia, is the financing of the class action by third party who, in exchange, will get a part of the money afforded to the class members, if the class action is decided in their favor. Finally, a solution, found in Canada, is the financing of class action by a public fund specially constructed. Remaining on the domain of costs, we underline that an increasing number of countries admit the use of contingency fee in the class action contexts and that with only a few exceptions, the members of the class do not have to pay any trial costs if the class action is rejected.

Regarding the decision on the merits in a class action, some particularities exist in the field of evidence, the merits analysis and the distribution of money damages. Concerning the evidence,

[78]About the importance of notification in the context of class action see Federal Judicial Center, *Manual...*, p. 285. On the idea that in spite of the major importance of notification in today's class action this aspect has no historical roots see S.C. Yeazell, *The Past and Future...*, p. 698.

the element of particularity is that the claims of the class members must be decide on a common set of evidences. The court can administrate any evidence for determining the damage, including statistics or individual determination in respect to some class members fallowed to extrapolation to the rest of the class, as long as the result is rigorously enough and the precise determination would be difficult or unpractical. We underline that when the damage is not precisely determined, in some systems, the victims must be afforded a new chance to opt out after the damage has been determined[79].

In which the merits are concerned, when the remedy does not consist in money damages, the situation is relatively simple, the judges having only to state in the judgment as precisely as possible the class to which the decision will be binding when the class action is mandatory or opt out and the name of the class members when the class is opt in, to state on the remedy afforded and, in some situations, on how this remedy is to be put into practice[80]. If the damage resulted from the breach of an individual homogeneous right, any class member may ask for the enforcement of the decision.

Major particularities exist when money damages are afforded. In this hypothesis, in many systems, including the Canadian and Australian ones, a global determination of the damage is preferable to individual determination, when this can be reasonably done. If the damage is globally determined the court will also establish how the money will be distributed to the class members, who will do this and what will happen with the remaining amounts.

Referring to the distribution of money, when the identity of class members is known and also the amount that must be afforded to each victim, the courts can decide that the money will be distributed without any other procedures. On the other hand, when this data are not know but can be determined based on criteria that may be set by the court, the judge will establish the moment until the members of the class can fill claims for damages, the criteria that will be used for determining the amount afforded to every class members and, eventually, the evidences that will have to be provided by the victims. The court will also decide the entity which will distribute the money to the class members. Furthermore, when the amounts that should be afforded to every class member is very small, some systems provide the possibility of the court to decide that the entire amount will be afforded to a third party, usually an N.G.O., from the activity of which the class

[79]See, for example, par. 334.28 (3) from Federal Court Rules (Canada); par. 30-31 from Class Proceedings Act (British Columbia); part. 32 from Class Proceedings Act (New Brunswick); par. 30 from Class Actions Act (Newfoundland and Labrador); par. 24 from Class Proceedings Act (Ontario). The same conclusion can be reached from Article L. 423 -1 from LOI no 2014-344 du 17 mars 2014 relative à la consummation (France). For a pleading in favor of statistical evidence see entirely M. J. Saksm P. D. Blank, *Justice Improved: The unrecognized Benefits of Agregation...* . For situations in which in France the damage is statically established see A. Guégan-Lécuyer, *Dommage de masse...*, p. 160, 353, 357. Regarding the standardization of damages in class actions in Norway see C. Bernt, *Norway...*, p. 58.

[80]See, for example, par. 334.24 from Federal Court Rules (Canada); Article L. 423 -1 from LOI no 2014-344 du 17 mars 2014 relative à la consommation (France).

members will benefit indirectly.

One of the most important features of the class action is the fact that the judgment delivered by the court binds the class members even though they are not parties in the procedure. As so, no matter if the solution is favorable or not, the class members will no longer be able to file an individual or collective claim. Two arguments were brought to justify this effect. Firstly, is has been stated that in the case of opt in or opt out class actions the class members tacitly accept this effect when they decide to adhere to the proceedings or to remain in the class. Still this silent agreement does not explain why the imperative class actions have the same effect and nor why most of the systems do not admit the possibility of the class members to contest the binding effect of the judgment when they prove that they weren't regularly notified during the proceedings. The second and most important argument was that at the basis of the binding effect of the judgment lies the adequate representation of the class members. It is accepted that as long as the interest of the class members are represented and effectively protected during the proceedings they can be bound by the class action without breaching their due process.

Regarding the use of class action as a mean to repair the mass damages both disadvantages and advantages can be identified.

Referring to the disadvantages we must underline right from the beginning that most of them were invoked by some vehement critics of the class action and that many of them are the result of generalizations from exceptional situations or lack empirical data to confirm their reality.

On the substantial disadvantages it have been stated that the class action leads to over-deterrence as it makes the defendants to pay huge amounts of money even though only minor damages were caused to the class members. Also, it forces the defendants to settle on the fear that they might be obliged to pay ruinous amounts if the trial goes on the merits, even though the claims are based on debatable scientific evidence. Furthermore, the objectors claim that the class action involves astronomical costs by comparison to the benefits it brings to class members. It has been also affirmed that class action brings no real benefit to the class members, whose rights are brought to court, but only to the lawyers. Finally, it has been stated that the class action cancels the individual nature of the civil responsibility in general and of the damage in particular, as of result of the fact that the legal relationship between the victim and wrongdoer is no longer individually analyzed but globally and the damage is sometimes is set as a lump sum.

From a procedural stand point it has been stated that the class action deprives the victims of her right to individually file a claim, to decide on her right, to personally sustain her claim before the court and to dispose of her procedural rights. It has also been stated that the class action leads to a ,,legalized blackmail" as, once certified, the defendant feels an immense pressure to settle due to the perspective of an negative outcome on the merits, even though the claims might be groundless.

Also, it was affirmed that the class action creates a framework in which the interest of the class members can be defrauded, by facilitating the collusive agreements between class counsel and defendant.

Systemically, it was said that the class action encourages trials by allowing small claims to get to the courts that otherwise would never form the object of a trial. Furthermore, by aggregating multiple claims into one trial, the class action increases the complexity of the cases.

Regarding the advantages, from a substantial stand point, the class action facilitates the identification of the special damages that result from the collective nature of the negative effects of the illicit deed. Furthermore, and maybe the most important, the class action leads to better deterrence as it allows more claims to be brought to the court and a higher internalization of the negative effect of the illicit deed by the wrongdoer. The class action also increase the chance of the victims to compensation especially when the global damage exceeds the value of the assets of the wrongdoer as the victims can be proportionally compensated and reduces the procedural costs that need to be paid by the defendant due to the fact that all the claims are decided in one trial.

Procedurally, the class action facilitates the access to court by reducing the costs that the victims need to pay or even eliminating them completely sometimes, by reducing the risks to which the victims are exposed and by removing some of the psychological barriers that usually determine the victims not to act. Moreover, by consolidating the victims into a single trial, the class action eliminates a part of the unbalances that may exist between the plaintiff and defendant such as the ones related to the financial capabilities, access to information, the quality of judicial assistance and the power of negotiation. Furthermore, as all the claims are decided in one trial and based in one set of evidence, the class action significantly reduces the costs for the parties. Finally, another major advantage of the class action is the fact that it eliminates the risk of divergent jurisprudence as a result of the fact that all or most of the claims are decided in one trial.

Systemically, the class action substantially reduces the pressure on court dockets by aggregating all the claims arising from the same illicit deed in one trial. The same aspect leads to a significant cut of the costs for the judicial system. Finally, by facilitating the access to court, equalizing the arms between the plaintiff and the defendant and eliminating the divergence in jurisprudence the class action consolidates the trust into the judicial system.