Class actions in Italy

*Where the rubber meets the road*

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CLASS ACTIONS IN ITALY

WHERE THE RUBBER MEETS THE ROAD

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1. Introduction: civil law and common law systems

The aim of this brief article is to shed some light on class action as one of the most important procedural devices in the law of damages and in particular, securities law. We would demonstrate how necessary this device would be in the Italian system but, at the same time, how many hurdles and issues may arise from the introduction of this device through the current Italian bills.

The US Supreme Court has described the class action device as a “non-traditional form of litigation”, and Arthur Levitt added “besides serving as the primary vehicle for compensating defrauded investors, private actions also provide a «necessary supplement» to the Commission’s own enforcement activities by serving to deter securities law violations”. The former SEC Chairman Richard Breeden testified before

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Congress that “the SEC is able to prosecute only a fraction of the cases in which investors have suffered losses”\(^5\).

The controversial\(^6\) popularity of class actions stems from its ability to combine multiple claims against the same defendant into one large lawsuit.\(^7\)

The objectives of class action lawsuits are efficiency and deterrence.

Case-management of small claims allows an individual not to be charged all the needed costs.\(^8\)

Moreover class action suits may well deter any potential misconduct and avoid ill-gotten gains\(^9\).


\(^6\) See HENSLER D. R ET AL., Class actions dilemmas: pursuing public goals for private gain, p. 4, (2000). She explains that many scholars (but also many corporate representatives) argue that the class action lawsuit is a form of “legalized blackmail”, which benefits class action attorneys more than claimants and coerces multimillion dollar settlements from defendants through the threat of costly, large-scale litigation. See also MILLER A., Of Frankenstein monsters and shining knights: myth, reality, and the “class action problem”, in Harvard Law Review, p. 92, (1979) where there is a debate for and against the class action device.


\(^8\) See Amchem Prods. Inc. v. Windsor, 521 U.S. 591 (1997): “The very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor”.

\(^9\) See Deposit Guaranty Nat’l Bank v. Roper, 455 U.S. 326, 338-39 (1980): “The aggregation of individual claims in the context of a class wide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class action device”.

The controversial question is whether class action device may be compatible or not in civil law countries.\textsuperscript{10} What is at stake, naturally, is the reaction to the \textit{transplant} of this foreign tool into civil law systems.

We may divide the opinions of scholars into some different positions: some of them excluded the possibility of introducing class actions into civil law countries because of an institutional and constitutional rejection\textsuperscript{11}. Some others thought that class actions are the best way to \textit{“disgorge significant profits arising from unlawful or tortuous conduct”}\textsuperscript{12}. Finally, some scholars believed that experience has proved that class actions are compatible with civil law systems\textsuperscript{13}. This is possible through substantial adaptation and, in particular, by means of a dialectical and reconciling approach of the two different systems (civil law and common law).

The possible introduction of the class action lawsuits into Italy, a civil law country, might be \textit{where the rubber meets the road} regarding the evolution of the Italian financial system.

This process of modernization commenced in Italy with the Law of January 2, 1991, no. 1, up until to the Legislative decree of February 24, 1998, no. 58 (hereinafter, “TUF”) and all the Regulations implemented by the Consob\textsuperscript{14}. These duties and improvements, such as the drafting of an

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\textsuperscript{13} GIDI A. \textit{Class action in Brazil, a Model for Civil Law Countries}, 51, Am. J. Comp. L., September 2003, p. 311 and ff.

\textsuperscript{14} Particularly Consob Regulation of July 1\textsuperscript{st}, 1998, No. 11522; Consob Regulation of December 23\textsuperscript{rd}, 1998, No. 11768; Consob Regulation of May 14\textsuperscript{th}, 1999, No. 11971. “From this perspective, the regulation of markets was a response to dissatisfaction with litigation as a
Informative prospectus, best execution, suitability rule, management of conflict of interests, and many other disclaimers for investors, put transparency and information to the forefront, but a number of doubts concerning the effective protection of investors and, most of all, their trust in financial markets remained.\(^{15}\)

Today, after the internet bubble, the financial cracks of Enron, Cirio and Parmalat, demonstrate the miserable failure of the many transparency and informative rules the intermediaries had to comply with, the corporate and authorities’ supervision and control systems.

As some scholars observed this was only the part of {\it ex ante} regulation which would be insufficient without a complementary mechanism of {\it ex post} control such as private enforcement and in particular class actions.\(^{16}\)

In this respect, apparently a more effective device that will protect investors collectively from any kind of fraud, deter intermediaries from “hit and run” behaviour and increase trust in financial markets seems inevitable.

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2. Class Actions In the USA

The Anglo-American class action mechanism has its historic origins in the courts of equity.\(^{17}\) In order to prevent and avoid abuses of this device there

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\(^{16}\) See DI NOLA S., PORRINI D. E RAMELLO G., Class action, mercati finanziari e tutela dei risparmiatori, in “X Rapporto sul sistema finanziario italiano”, Fondazione Rosselli, 2005, pp. 459.

were several reforms, following the main reform, i.e. the “Private Securities
Litigation Reform Act” of 1995 (hereinafter “PSLRA”).

In 1998 the Securities Litigation Uniform Standard Act determined the
original/exclusive jurisdiction of the Federal District Courts.

In 2005 the Class Action Fairness Act only partially addressed securities
litigation, determining wider power for the courts in approving the proposed
settlement.

In the USA, the class action device is a practical method for combining
small claims and possibly the only economically viable way to provide legal
representation for this kind of case.

In the Escott v. BarChris Construction Corp. the Second Circuit explained
the importance of the class action procedure for small stockholders dispersed
throughout the country: “…the representative action is a device for vindicating claims
which, taken individually, are too small to justify legal action but which are of significant size
if taken as a group”.

In this respect we should not forget that in the USA the plaintiff’s costs
do not depend on the outcome of the lawsuit, therefore in order to promote
the small claims lawsuits, normally counsels are used to paying in advance any
expenses or costs relating to the action. In Italy as a general rule, if a plaintiff
loses a lawsuit he/she should normally refund his/her counterpart the
proceeding costs as stated in sect. 91 of the Italian Civil Procedure Code
(hereinafter “c.p.c.”). Therefore, on the one hand the risk to lose a lawsuit
and consequently be charged of legal expenses of counterpart and, on the other hand, the certainty to pay in advance a fund for initial counsel’s fees and

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18 See inter alia PERINO M. A., Did The Private Securities Litigation Reform Act Work?, in
University of Illinois Law Review, p. 913 and ff. and STERN W.R. AND Mccallum S.E., The
Private Securities Litigation Reform Act: ten years after, in The Review of Securities & Commodities
Regulation, April 6, 2005, p. 85 and ff.

19 See Frata L., Il Class Action Fairness Act of 2005: problemi e prospettive, in Danno
e resp., No. 1, 2006, pp. 13-17 and Poncibò C., La controriforma delle class actions, in Danno e

20 See S.T. Rossman & D. A. Endelman, A practical litigation guide § 1.1.1, p. 3 (5th ed.
2002).


22 This rule is named “regola della soccombenza”.
costs are two important hurdles which put the brakes on whom are victims of small claims.

At present, Rule 23 requires the court to certify, or approve of, the class before a case can proceed as a class action. The rule contains various provisions that instruct the court on which factors to consider in its determination.

Before a class can be certified, the plaintiff seeking to serve as a representative party on behalf of a class must satisfy some conditions of Sect. 27(a) of the Security Act of 1933 (hereinafter “SA”) and, furthermore, the plaintiff has to prove that he/she has fulfilled all of the prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure and one requirement of 23(b).

The court must decide whether or not to certify the class in consideration of the fulfilment of the prerequisites prescribed by law.23

Rule 23(a) sets forth four requirements that must be fulfilled to certify a class action:

1. **Numerosity:** the class must be so numerous that joinder of all members is impracticable;

2. **Commonality:** there must be a question of law or fact common to the class.

3. **Typicality:** the claims or defenses of the representative parties must be typical of the claims or defenses of the class.

4. **Adequacy of Representation:** the representative parties must fairly and adequately protect the interest of the class.24

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24 See *Amplus* see the critical description of the four/six requirements (numerosity, commonality, typicality, adequacy, superiority and predominance) in BRONSTEIN, JOHN AND FISS, OWEN M., “The Class Action Rule” in Notre Dame Law Review, Vol. 78, No. 5, pp. 1419-1454, 2003 (Available at SSRN: [http://ssrn.com/abstract=895093](http://ssrn.com/abstract=895093)) where the Authors reconstruct the consensual tie between the named plaintiff and the members of the class by introducing the idea of interest representation which is tolerated by the legal system (although there is no exercise of will by the individual class members to be represented by a self-appointed representative) by virtue of the social importance of the class action and the smallness of the potential loss for each member.
In addition to establishing all of the requirements of Rule 23(a) a plaintiff must establish that the action fits at least one of the categories described in Rule 23(b). In securities class actions and particularly for sect. 11 of SA, subparagraph (3) is frequently invoked.

Rule 23(b)(3) requires that the court finds that “questions of law or fact common to the members of the class predominate over any question affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy”.

Many courts are used to consider these aspects in order to grant the certification.

Sect. 27 of SA sets forth a procedure for the selection of the lead plaintiff, who is subject to the approval of the court.

The plaintiff seeking to serve as representative party on behalf of the class must provide a sworn certification, filed with the complaint and (inter alia) that states that: the plaintiff has reviewed the complaint and authorized its filing; the plaintiff did not purchase the security that is the subject of the complaint at the direction of plaintiff’s counsel or in order to participate in any private action arising under sect. 27 of SA; the plaintiff is willing to serve as a representative party on behalf of a class, including providing testimony at deposition and trial, if necessary; the plaintiff will not accept any payment for serving as representative party on behalf of a class beyond the plaintiff’s pro rata share of any recovery, except as ordered or approved by the court.

Within 20 days of the complaint being filed, the plaintiff has to publish in a widely circulated national business-oriented publication or wire service a notice advising members of the purported plaintiff class of the existence of

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26 See Sect. 27 (a)(2) of SA.

27 The notice should be sent individually to all reasonably identifiable class members, but when class counsel cannot identify certain class members through reasonable effort, constructive, rather than actual, notice is acceptable. Since the exact contours of constructive notice are not outlined in Rule 23, most courts have held that an advertisement in a widely circulated newspaper or magazine, which notifies readers of the pending action and their possible involvement in it, constitutes adequate notice. See e.g. Krangel v. Golden Rule Res.,
the action, the claim asserted therein and the purported class period; and that within 60 days of notice being published, any member of the purported class may move the court to serve as lead plaintiff of the purported class.

No later than 90 days after the date on which a notice is published the court must appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members.

In its decision the court must consider any motion made by a purported class member in response to the notice and the rebuttable presumption for which the class member who may be the most capable of adequately representing the interest of class members is the one who has the largest financial interest in the relief sought by the class.

Obviously, this presumption may be rebutted upon proof by a member of the purported plaintiff class that the presumptively most adequate plaintiff will not fairly and adequately protect the interest of the class or is subject to unique defenses that render such plaintiff incapable of adequately representing the class.28

Sect. 27, as amended, is aimed at promoting the role of institutional investors as lead plaintiff, but at the same time, it places limits on “professional plaintiffs”: a person may be a lead plaintiff or an officer, director, or fiduciary of a lead plaintiff in no more than 5 securities class actions brought as plaintiff class actions pursuant to the Federal Rules of Civil Procedure during any three-year period, unless the court may otherwise permit.29

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The lead plaintiff selects the lead counsel, but the court may disqualify the attorney from representing the plaintiff class whether there is a conflict of interests.30

2.1. Opt-Out And Opt-In Class Actions

Opt-out rights play a central role in class action lawsuits. They are a central component of the argument for why class action lawsuits under Rule 23(b)(3) satisfy procedural due process requirements, even though absent class members are represented by attorneys they did not select and may never have met. Opt-out rights are also deeply intertwined with the set of due process concerns associated with the fact that absent class members (i.e., members of the class who have not personally appeared in the action) will be bound by any final judgement or approved settlement of the litigation. In fact, when opt-out rights are conferred, the courts will bind class members to the judgement if they fail to exercise their privilege to exclude themselves from the class. If opt-out rights are not provided in a suit, a substantial element of which is a claim for money damages, the court may conclude that the proposed litigation would violate class members’ due process rights.31

In any class action certified under Rule 23(b)(3) each class member has a right to exclude himself/herself from the action. The right to participate or opt out is an individual one and should not be made by the class representative or the class counsel.32

To exclude oneself from a class action, a claimant must generally notify the court or an authorized agent of the court in writing that the class member desires to be excluded from the action. After receiving adequate notice, if a class member does not affirmatively opt out of the action in a timely manner, the class member will be bound by the final judgement or approved settlement of the litigation. In this case he/she may be permitted to opt out after the

30 See Sect. 27 (a)(8) of SA.
deadline upon a showing of excusable neglect for his/her failure to comply with a fixed deadline.  

The opt-out procedure is aimed at creating a procedural fairness for both potential litigants and defendants. Indeed, as already mentioned, the opt-out provision gives the potential litigants the opportunity to opt out of a lawsuit before being bound by the final settlement or judgement, but at the same time, ensuring that all claimants who do not opt out by a certain date may not later relitigate the same issues only because the class settlement or judgement is not satisfactory.  

Notwithstanding the Rule 23(b)(3) expressly states the opt-out procedure, some scholars argue that even though Rule 23 privileges the opt-out procedure, it permits judges to certify classes under an opt-in procedure in special circumstances.  

Nevertheless, opt-in classes have serious drawbacks. Indeed, opt-in proceedings can be rather inefficient because of the number of the forms; it might deter a potential settlement which can be highly desirable in the context of complex class litigation; it may weaken the ability of class action lawsuits to deter the corporate wrongdoer’s conduct because of the lower number of the potential plaintiffs in the class.  

As some scholars have observed, an “opt-in class may be desirable only in special circumstances but it is not appropriate as a default state”.

2.2. The New Pleading Standard

The PSLRA also sets out a new pleading standard applying to all private actions arising under Securities Exchange Act of 1934 (hereinafter, 

33 See Sect. 6(b)(2) of Federal Rule of Civil Procedure.

34 The opt-out, like recognition of intervention in Rule 23, is confined only to (b) (3) class actions which are the typical structure of securities class actions.


“SEA”) in which plaintiff alleges that defendant made material misstatements or omissions.\footnote{38} The new pleading standard consists of three components. First, the Act has introduced a specificity requirement with respect to the allegations that a statement or omission is false or misleading. The complaint is required to specify which statements are misleading and the reasons why the statements are misleading. Second, if a complaint is pleaded on information and belief, it must state “\textit{with particularity all facts on which that belief is formed}”. Third, plaintiffs must “\textit{state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind}”.\footnote{39}

\textbf{PLSRA} simply codified the existing Second Circuit pleading standard which required allegations of recklessness or motive and opportunity, as some practitioners explained.\footnote{40}


\footnote{38} This is one of the most important limits to abusive lawsuits. The plaintiff has been charged partial burden to prove their claims and allegations. “The investor's attorney, if she is experienced, will be acutely aware that a complaint alleging simply that the issuer "\textit{must have known}" the bad news at the time it made the "earlier, cheerier" statements will be dismissed on the ground that it impermissibly pleads no more than "\textit{fraud by hindsight}". But if the investor's attorney is skilled as well as experienced, she can draw with relative ease on the information in the bad news release and other publicly available information to draft a complaint alleging that, at the time the issuer made the "earlier, cheerier" statements, either the issuer and its senior managers had learned from internal reports the negative information later disclosed in the "bad news" release or that "red flags" had placed the issuer and its senior managers on notice that those negative developments were highly likely to occur. Finally, the investor's attorney will know that if the court can be persuaded to treat those allegations as true, they also will support a strong inference that the issuer and its senior managers made the "earlier, cheerier" statements either with actual knowledge that they were false or in reckless disregard of that possibility.” (\textit{underline added}) See WEISS, ELLIOTT J., \textit{Pleading Securities Fraud} (October 6, 2000). Available at SSRN: http://ssrn.com/abstract=245769.


2.3. **Safe Harbour For Forward-Looking Statements And Discovery Stay**

In order to prevent non-meritorious lawsuits, the PSLRA has laid down a number of further rules.

In this respect the PLSRA has protected specified written and oral forward-looking statements\(^{41}\) from liability.\(^{42}\)

Under safe-harbour provisions, even if the private action is “based on an untrue statement of a material fact or omission of a material fact necessary to make the statement not misleading”, forward-looking statements are not actionable if they are identified as a forward-looking statements and are “accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement”. Furthermore, even if the statements are not properly identified or are not accompanied by the appropriate cautionary words, they still fall within the safe-harbour if they are immaterial or “the plaintiff fails to prove” that the defendant had “actual knowledge … that the forward-looking statements were false or misleading”.\(^{43}\)

Moreover PLSRA makes compulsory a discovery stay in private securities action while a motion to dismiss is pending in order to “prevent unnecessary imposition of discovery costs on defendants”\(^{44}\). The stay of discovery, in fact, was intended to protect defendants from actions in which the plaintiff sued first and then used discovery to raise a factual issue sufficient to overcome a motion to dismiss.

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\(^{41}\) Sect. 27A(i) of SEA defines forward-looking statements as those including financial projections, future economic performance or concerning managements’ plans or objectives or statements of assumptions underlying the foregoing.


\(^{43}\) See 27A(c) of SEA. Nevertheless, after the introduction of the safe harbour provisions, bar association (Committee on Securities Regulation, *Forward-Looking Statements and Cautionary Language After the 1995 PLSRA: A Study of Current Practices*, 53 RECORD ASSOC. BAR CITY OF N.Y. 723, 736 (1998) - finding “no meaningful change in the nature or extent of written forward-looking statements made by reporting companies as a result of the adoption of the Act”) and SEC (SEC OFFICE OF GEN. COUNSEL, Report to the President and the Congress on the first year of practice under the PLSRA of 1995, at 25 (1997) - finding that issuers were reluctant to provide more forward-looking information than they had pre-PSLRA) studies concluded that the safe harbour has had little apparent effect on pre-PSLRA disclosure practice. See also BELLINI E., *Class actions e mercato finanziario: l'esperienza nordamericana*, in Danno e resp., Nn. 8-9, 2005, p. 823.

The stay of discovery is lifted by courts when a “particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party”\textsuperscript{45}.

3. Class Actions In Italy

After several major financial scandals including Cirio, Parmalat and the Argentinean Bonds cases\textsuperscript{46}, some scholars and Italian Parliament debated whether it was opportune to introduce the class action device in our procedural system.

The first Italian debate took place in the 1970s when a group of Italian scholars began studying American class actions and publishing articles and books on this subject.\textsuperscript{47} In the last few years Italian Parliament also proposed some bills concerning the introduction of class actions in Italy.\textsuperscript{48}

3.1 Current Regulation of Collective Actions in Italy

Currently, the Italian procedural system already contains some different kinds of collective procedures which are very far from US ones. These include

\begin{itemize}
  \item \textsuperscript{45}See Sect. 27(b) of SA.
  \item \textsuperscript{46}See amplius \textsc{Zatiello L.}, \textit{La giurisprudenza sul cosiddetto risparmio tradito}, ITA Edizioni, 2005. New edition will be released within December 2006.
  \item \textsuperscript{47}For a historical reconstruction see recently \textsc{De Santis A. D.}, I disegni di leggi italiani sulla tutela degli interessi collettivi e il «Class Action Fair Act of 2005», in Riv. Trim. di diritto proc. e civ., No. 2, 2006, p. 601 and ff. See also \textsc{Gidi A.}, \textit{Class action in Brazil, a Model for Civil Law Countries}, 51, Am. J. Comp. L., September 2003, p. 324. \textsc{Taruffo M.} seems to have been the first civil law scholar to write about class action “I Limiti Soggettivi del Giudicato e le Class Actions” 24 Rivista di Diritto Processuale 618 (1969), followed by \textsc{CapPELLETTI M.}, “Formazioni Sociali e Interessi di Gruppo Davanti alla Giustizia Civile” 30 Rivista di Diritto Processuale 361 (1975); \textsc{Le Azioni a Tutela Degli Interessi Collettivi} (\textsc{Denti V.} ed., 1976); \textsc{La Tutela degli Interessi Diffusi nel Diritto Comparato} (\textsc{Gambaro A.} ed., 1976); \textsc{Vigoriti V.}, \textit{Interessi Collettivi e Processo - la Legittimazione ad Agire} (1979); \textsc{The Florence Access-to-Justice Project} (\textsc{CapPELLETTI M.} et al. eds., 1978-9).
  \item \textsuperscript{48}See \textsc{Carratta A.}, \textit{Dall’azione collettiva inibitoria a tutela di consumatori e utenti all’azione collettiva risarcitoria: i nodi irrisolti delle proposte di legge in discussione}, in Giurisprudenza Italiana, 2005, fasc. 3, pp. 662-670.
\end{itemize}
sections 139-140 of the Consumer Code\(^\text{49}\) which restrains or prevents unlawful behaviour against the generality of consumers and implements the “necessary measures in order to correct or eliminate the damaging effects of the violation”\(^\text{50}\), sect. 2601\(^\text{51}\) c.c. which defends a professional group’s rights against acts of unfair competition, and in general the procedure in case of bankruptcy\(^\text{52}\), which serves to acknowledge the hierarchy of creditors’ rights towards a particular debtor in the event of insolvency\(^\text{53}\).

### 3.2 Obstacles to the Introduction of Class Action in Italy

Some distinguished scholars have discussed the constitutional obstacles and other issues that may arise from the introduction of the class action device into a civil law system.

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\(^{50}\) See sect. 140 of Consumer Code.

\(^{51}\) Sect. 2601 of (Italian) civil code states: “Azione delle associazioni professionali. Quando gli atti di concorrenza sleale pregiudicano gli interessi di una categoria professionale, l’azione per la repressione della concorrenza sleale può essere promossa anche dalle associazioni professionali (ora Consigli degli Ordini) e dagli enti che rappresentano la categoria.”

\(^{52}\) See r.d. (royal decree) of March 16, 1942, No. 267.

First of all, some scholars observed that the nature of the class action device is inconsistent with the subjective limits of “res judicata”. According to sect. 2909 c.c., res judicata binds only the parties and their heirs to the proceeding and it neither benefits nor prejudices third parties.\(^{54}\) In contrast, res indicata has a much broader scope in common law than in the civil law system.\(^{55}\)

As a consequence of this well-established principle of procedure in civil-law jurisdiction there is the principle of so-called “contraddittorio” (literally “cross examination”) whereby nobody may be bound by any ruling if he/she has not had the chance to defend himself/herself in a trial where he/she has regularly received the notification.\(^{56}\)

Certification of court, the notice system and the right of opt-out or opt-in, as already mentioned, may make the class action device consistent with these two principles.\(^{57}\)

Some countries have tried the “one way” preclusion, i.e. the final judgement binds absent members only if the group wins the litigation.\(^{58}\)

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\(^{54}\) This is derived from “res inter alios acta vel indicata alis non nocet nec prodest”, that substantially means “matters adjudged in a case do not prejudice or benefit those who were not parties to it”, see Black’s Law Dictionary (1990). See sect. 2909 c.c. states: “Cosa giudicata. — 1. L’accertamento contenuto nella sentenza passata in giudicato fa stato a ogni effetto tra le parti, i loro eredi o aventi causa”.

\(^{55}\) See GIDIA. Class action in Brazil, a Model for Civil Law Countries, 51, Am. J. Comp. L., September 2003, p. 385 “The common law doctrine of res indicata includes both issue preclusion, also known as “collateral estoppel” and claim preclusion. Issue preclusion bars relitigation of all issues that are “necessary steps” to the first decision on the merits, provided that those issues have actually been litigated and decided in the first action. Civil law doctrine has claim preclusion alone.” See also Allen v. McCurry, 449 U.S. 90, 94 (1980) (holding that “[u]nder res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action”).

\(^{56}\) See section 101 c.p.c. that states: “Principio del contraddittorio. Il giudice, salvo che la legge disponga altrimenti, non può statuire sopra alcuna domanda, se la parte contro la quale è proposta non è stata regolarmente citata e non è comparsa.” See also RESCIGNO P., Sulla compatibilità tra il modello processuale delle «class action» ed i principi fondamentali dell’ordinamento giuridico italiano, in Giur. It., 2000, p. 2226.

\(^{57}\) FAVA P., Class action all’italiana: “Paese che vai usanza che trovi”, in Corriere Giur., no. 3, 2004, p. 413.

\(^{58}\) This possible solution is named also “secundum eventum litis”. See sect. 1306 c.c.. See also CARRATTA A., Dall’azione collettiva inibitoria a tutela di consumatori e utenti all’azione collettiva risarcitorie: i nodi irrisolti delle proposte di legge in discussione, in Giurisprudenza Italiana, 2005, fasc. 3, p. 667; see also FAVA P., L’importabilità delle class action in Italia, in Contratto e Impresa, 2004, v. 1, p. 173.
Although this solution was a proposal taken into consideration before the bill of June 26, 2006, No. 679 (hereinafter, the “Bill”)\(^5\), in our opinion it would be seriously inconsistent with the constitutional principle of equality.\(^6\)

Other crucial obstacles to the introduction of class actions are the rules stated in sect. 24 and 25 of Italian Constitution\(^6\). 

According to sect. 24 the right of defence and the right to bring an action to court may not be renounced when the derogation of these rights would be an unavoidable effect of the final judgement or settlement in the class action lawsuits.\(^6\)

Furthermore, in compliance with sect. 2a subject may normally protect a right only if this right belongs to this subject.\(^6\)

The operative abstraction of “personal right”\(^6\) is a central pillar of the Italian and civil law system in general. As a consequence of this abstraction, if the plaintiff does not have a “personal right” recognized by legal system, he/she may not be successful in court.\(^6\) In this respect since all rights must belong to

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\(^6\) Sect. 24 of Italian Constitution states: “Tutti possono agire in giudizio per la tutela dei propri diritti e interessi legittimi. La difesa è diritto inviolabile in ogni stato e grado del procedimento. …” and Sect. 25 of Italian Constitution states: “Nessuno può essere distolto dal giudice naturale precostituito per legge. …”.


\(^6\) Another relevant abstraction in some civil-law countries that follow a system of administrative jurisdiction, such as Italy, is the concept of “legitimate interest” (interesse legittimo). On the rather complex difference between subjective rights and legitimate interests, see generally CÄPPLETTI M. & PERILLO J., Civil Procedure in Italy, 1965, p. 112; CÄPPLETTI M., MERRYMAN J.H. and PERILLO J., The Italian Legal System: An Introduction 81-82 and 115-16 (1967) (“a right (diritto soggettivo) is defined as an interest directly guaranteed by law to an individual, whereas a legitimate interest (interesse legittimo) is defined as an individual interest closely connected with a public interest and protected by law only through the legal protection of the latter.”) (citation omitted). See also PARKER, “Standing to Litigate ‘Abstract Social Interests’ in the United States and Italy: Reexamining
an individual or legal entity, group rights need to be represented in some way in court.\textsuperscript{66}

According to sect. 25 the right of “natural judge” is strictly linked to the principle of fair trial. For this rule the judge of a lawsuit is predetermined by law and for example, in the event of lawsuits involving consumers, he/she must be the judge of the domicile of the consumer.

In this respect it is reasonable that different jurisdictions or venues would be very frequent\textsuperscript{67} in the event of a lawsuit where a group of consumers bought a nationwide bond, and therefore it is not clear which judge should have jurisdiction.

Some scholars found some other kind of “legal-cultural” obstacles such as contingent and incentive fees for lawyers (i.e. \textit{pactum pro quota lite}) which were not allowed in Italy\textsuperscript{68}, notification rules in case of a large number of subjects, punitive damages, discretionary power of judges, burden of proof and statistical method.\textsuperscript{69}

\begin{flushright}
\textit{Injury in Fact},” 33 Colum. J. Transnat'l L. 259, 278-82 (1995) (noting that, in Italy, in order to have authority to act in a legal proceeding, “the plaintiff must allege in the initial pleadings that the defendant violated either a “subjective right” (“diritto soggettivo”) if the case is brought in the “ordinary” courts or a “legitimate interest” (“interesse legittimo”) if the case is brought in the administrative courts.” Moreover, “[i]n determining whether a plaintiff is alleging the existence of a protected diritto soggettivo or interesse legittimo and the necessary possession (titolarit` a) to such a right or interest, the Italian courts have generally looked for claims rooted in traditional notions of property and individual ownership.”) (emphasis added). Note entirely taken from GIDI A. Class action in Brazil, a Model for Civil Law Countries, 51, Am. J. Comp. L., September 2003, p. 345.
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\textsuperscript{67} See RESCIGNO P., Sulla compatibilità tra il modello processuale delle «class action» ed i principi fondamentali dell’ordinamento giuridico italiano, in Giur. It., 2000, p. 2227.

\textsuperscript{68} See sect. 2233 c.c. as amended by Law August 4, 2006, no. 248. See also BRUNO S., La class action non parla italiano, in Ilsole24ore of March 21, 2004, Diritto e Impresa, p. 19.

4. Probable Future Regulation

Recently many legislative bills were initiated by the former Italian Parliament, supported by both left-wing and right-wing parties.\textsuperscript{70}

The main initiatives were redrafted together in the bill No. 3058 and then adjusted in the Bill No. 679\textsuperscript{71}. This Bill is the most likely to became law, as some scholars have observed.\textsuperscript{72}

\textsuperscript{70} For a comparative analysis of the main initiatives see \textit{Carratta A.}, \textit{Dall’azione collettiva inibitoria a tutela di consumatori e utenti all’azione collettiva risarcitorie: i nodi irrisolti delle proposte di legge in discussione}, in Giurisprudenza Italiana, 2005, fasc. 3, pp. 662-670.

\textsuperscript{71} Disegno Di Legge d’iniziativa del senatore Benvenuto comunicato alla Presidenza il 26 giugno 2006. \textit{Disposizioni per l’introduzione della class action}, Art. 1. Dopo l’articolo 141 del codice del consumo di cui al decreto legislativo 6 settembre 2005, n. 206, è inserito il seguente:

«Art. 141-bis. (\textit{Class action}) – 1. I soggetti di cui all’articolo 139 sono altresì legittimati a richiedere al tribunale del luogo ove ha la residenza o la sede il convenuto la condanna al risarcimento dei danni e la restituzione di somme dovute direttamente ai singoli consumatori e utenti interessati, in conseguenza di atti illeciti plurioffensivi commessi nell’ambito di rapporti giuridici relativi a contratti conclusi secondo le modalità previste dall’articolo 1342 del codice civile, inclusi in ogni caso quelli in materia di credito al consumo, rapporti bancari e assicurativi, strumenti finanziari, servizi di investimento e gestione collettiva del risparmio, sempre che ledano i diritti di una pluralità di consumatori o di utenti. A pena di improcedibilità le relative domande giudiziali sono sottoposte a tentativo preventivo obbligatorio di conciliazione innanzi ad uno degli organismi di conciliazione di cui all’articolo 38 del decreto legislativo 17 gennaio 2003, n. 5, e successive modificazioni, iscritti nel registro di cui al decreto del Ministro della giustizia 23 luglio 2004, n. 222; si applicano gli articoli 39 e 40 del citato decreto legislativo n. 5 del 2003, e successive modificazioni; il relativo verbale di conciliazione, opportunamente pubblicizzato a spese della parte convenuta in giudizio, rende improcedibile l’azione dei singoli consumatori o utenti per il periodo di tempo stabilito nel verbale per l’esecuzione della prestazione dovuta.

2. Gli atti di cui al comma 1 producono gli effetti interruttori della prescrizione ai sensi dell’articolo 2945 del codice civile, anche con riferimento ai diritti di tutti i singoli consumatori o utenti conseguenti al medesimo fatto o violazione.

3. Con la sentenza di condanna il giudice determina, quando le risultanze del processo lo consentono, i criteri in base ai quali deve essere fissata la misura dell’importo da liquidare in favore dei singoli consumatori o utenti e i modi e i termini di erogazione dell’importo stesso.

4. In relazione alle controversie di cui al comma 1, davanti al giudice può altresì essere sottoscritto dalle parti un accordo transattivo nella forma della conciliazione giudiziale, nel quale siano altresì indicati i criteri di cui al comma 3.

5. A seguito della sentenza di condanna di cui al comma 3, nell’ipotesi in cui il giudice non determini i criteri in base ai quali definire i modi, i termini e l’ammontare per soddisfare i singoli consumatori o utenti nella loro pretesa, le parti sono tenute ad esprire in proposito, nel termine di sessanta giorni, un procedimento di conciliazione presso gli organismi di conciliazione e secondo le procedure e con gli effetti di cui al secondo periodo del comma 1.
4.1 Bill No. 679 of June 26, 2006

This Bill intends to amend the group action device set forth in the Consumer Code, including sect. 141-bis.\textsuperscript{73}

The new aspect of the proposal drafted within the Italian Parliament was the possibility first to acknowledge and then obtain the redress for damages which are consequences of unlawful multi-offensive behaviours.\textsuperscript{74}

The Italian Legislator seems to have preferred a kind of class action device based on individual rights of the same nature (that is closer to the American experience) by granting the right to sue to the associations of consumers and investors (that is in complete contrast with American system).

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6. In caso di inutile esperimento della conciliazione di cui al comma 5 o di obiezione all'accordo risultante dalla conciliazione, nel termine di novanta giorni dalla pubblicizzazione del relativo verbale con mezzi idonei, il singolo consumatore o utente può agire giudizialmente, in contraddittorio, al fine di chiedere l'accertamento, in capo a se stesso, dei requisiti individuati dalla sentenza di condanna di cui al comma 3 e la determinazione dell'ammontare del risarcimento dei danni o dell'indennità, riconosciuti ai sensi della medesima sentenza. La pronuncia costituisce titolo esecutivo nei confronti del comune contraddittore. I soggetti di cui al comma 1 non sono legittimati ad intervenire nei giudizi previsti dal presente comma. Il singolo consumatore o utente o uno dei soggetti di cui all'articolo 139, in caso di obiezione all'accordo risultante dal verbale di cui al comma 1, possono agire in giudizio singolarmente o collettivamente per l'ottenimento della sentenza di condanna di cui al comma 3, nel termine di centottanta giorni dalla sottoscrizione dell'accordo.

7. La pronuncia del giudice o l'accordo risultante dalla conciliazione della lite non hanno efficacia nei confronti dei consumatori o utenti che non sono intervenuti nel giudizio o alla conciliazione. La sentenza di condanna di cui al comma 3 costituisce, ai sensi dell'articolo 634 del codice di procedura civile, prova scritta, per quanto in essa contenuto, per la pronuncia da parte del giudice competente di ingiunzione di pagamento, ai sensi degli articoli 633 e seguenti del codice di procedura civile, richiesta dal singolo consumatore o utente. This is the would-be sect. 141-bis of Consumer Code.

\textsuperscript{73} \textsc{Marinucci E.}, \textit{Azioni collettive e azioni inibitorie da parte delle associazioni dei consumatori}, in Riv. Dir. Proc., gennaio-marzo 2005, p.142.

\textsuperscript{74} The reference is recently adjusted in this Bill toward Consumer Code (see note no. 49). In the foregoing Bill No. 3058 of July 21, 2004 the reference was toward sect. 3 of Law July 30, 1998, no. 281 which was just substituted, amended by and included in Consumer Code.

4.2 Current and Future Issues

It is clear that the intention of the Bill is not to protect and redress the damages deriving from violations of social and collective interests but only personal rights.\(^ {75}\)

The Bill lays down two steps before any individual client may obtain a real redress for damages.\(^ {76}\)

Firstly, the association must obtain a ruling on "an debeatur" (i.e. the judge may or may not acknowledge the existence of the right of the class) and then, in a second and different proceeding the individual client must obtain a decision on "quantum debeatur" (i.e. another judge or a "conciliation bureau" will decide the amount of redress the individual client should be paid).\(^ {77}\)

One of the most crucial points of the Italian bill no. 679 is the so-called "legittimazione ad agire in giudizio", i.e. determining who has standing to sue.\(^ {78}\) The possibilities were substantially two: an association or a class member.

The Bill gives this opportunity only to some associations which meet some requirements set forth by law.\(^ {79}\)

This decision applies the same principle taken into consideration in the event of environmental damages, where green associations have standing to sue.\(^ {80}\)

\(^ {75}\) See CARRATTA A., Dall’azione collettiva inibitoria a tutela di consumatori e utenti all’azione collettiva risarcitorie: i nodi irrisolti delle proposte di legge in discussione, in Giurisprudenza Italiana, 2005, fasc. 3, p. 664.

\(^ {76}\) See contro this two-step proceeding, CONSOLO C., Fra nuovi riti civili e riscoperta delle class actions, alla ricerca di una “giusta” efficienza, in Corr. Giur., No. 5, 2004, p. 568; see also PONCIBO C., La controriforma delle class actions, in Danno e responsabilità, no. 2, 2006, p. 129 and ff.


\(^ {78}\) See MENCHINI S., Per i “mass torts” e le azioni collettive la necessità di adattare i modelli stranieri, in Guida al diritto, no. 24, June 19, 2004, p. 11-12.

\(^ {79}\) See sect. 139 of Consumer Code.

\(^ {80}\) See sect. 18 of Law July 8, 1986, No. 349. See contro these privileged-plaintiff, ZOPPINI A., I 4 paletti per la class action all’italiana, in Ilsole24ore del 20 marzo 2004; ZOPPINI A. and GIUSSANI A., Una ricetta italiana per la Class Action, in Giuda al diritto del 10 luglio 2004, No. 27, p. 11-12.
If the Bill becomes law, this aspect would be different from the US model of class action and would go against the evolution there has been in the USA. In the USA, as mentioned before, there is the rebuttal presumption that the most adequate lead plaintiff should be whoever has the largest financial interest in the relief sought by the class. In this way, the US reform has determined the change of role of the Institutional Investors, who are, instead, completely ignored by the Italian Bill.

As far as the right of the association to bring an action on behalf of consumers is concerned, there are a number of issues which are not perfectly clear.

First of all, it is not perfectly clear which consumers may take advantage of (or be bound by) the potential success (or defeat) in court of the association: i.e. in the event of a collapse of a company which has issued some bonds bought by consumers, it is not clear whether every consumer who bought these bonds and exercise the right of opt-in may profit from a successful judgement or just the consumers who are part of that specific association and exercise the right of opt-in, or yet again those who are part of an association and do not exercise the right of opt-out, if any.

Moreover, regarding this last point, the plaintiff-association is not bound to publish a notice in order to make all the involved consumers aware of the action. This is a controversial point if we consider the necessity, required by the Bill, for consumers to exercise the right of opt-in in order to take advantage of the ruling or the settlement.

Furthermore it is not clear what happens in the case, for example, of *lis pendens* between two identical class actions brought from two different

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83 See paragraph no. 7 of the would-be 141-bis of Consumer Code.
associations or between a class action litigation and a corresponding individual action. 84

Lastly it is not clear whether the individual consumer may act to change the representative association because of her inappropriateness or appeal against the first judgement, whether an institutional investor might intervene in a class action proceeding, or in case of an association reached a settlement immediately before any litigation may happen, what the individual consumer may do to act against this arrangement collectively, 85 since the associations may not be involved in this proceeding, presumptively. Moreover the potential two-step structure will not solve the problem of small claims which are not cost free for individual consumers. 86

The Bill excludes from the application of this reform extra-contractual damages because of its reference only to sect. 1342 c.c. which is relative to the adhesion contract realized by means of standard forms and standard schemes. 87

In the event of a contract which is declared null and without effect because of the lack of the compulsory writing form according to sect. 23 of TUF, the association might not be able to bring a class action and the consumers might not take advantage of this long-awaited reform in such a case. 88

The expression that defines the route between the first step and the probable second one is very ambiguous: “the judge decides the criteria on the

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85 See paragraphs no. 1 and no. 6 of the would-be 141-bis of Consumer Code.

86 See note no. 7. See also PONCIBÒ C., La controriforma delle class actions, in Danno e responsabilità, no. 2, 2006, p. 130.

87 See paragraph no. 1 of the would-be 141-bis of Consumer Code.

basis of which he/she may determine the measure of individual consumers’ relief, where the results of the proceeding allow”.

Perhaps the Legislator should have defined the results for which the judge must (and not may) determine the measure of individual consumers’ relief.

Another important issue is the possibility for individual consumers to request their individual relief through a “conciliation bureau” created pursuant to sect. 38 of legislative decree January 17, 2003, no. 5, where they may ask for their individual redress. In such a case it is not necessary for the ruling to be a final judgement (or res judicata) and this choice might be in conflict with the principle of certainty of law.

5. Class actions and financial markets

Some doubts may arise concerning possible inconsistency between the class action device, as it is projected by the Bill, and the financial markets or, in particular, the performance of investment services.

Most of the financial defaults are a source of financial losses for consumers because of their asymmetric informative position.

In a typical class action, as a matter of fact, consumers did not know about the financial situation of a company (as in the Parmalat and Cirio cases). In this event, (i) if the defendant is the issuer, its managers or the underwriter of the bonds bought by the consumers, then it makes sense to use a class

89 See paragraph no. 3 of the would-be 141-bis of Consumer Code. “… il giudice determina, quando le risultanze del processo lo consentono, i criteri in base ai quali deve essere fissata la misura dell’importo da liquidare in favore dei singoli consumatori o utenti e i modi e i termini di erogazione dell’importo stesso” (underline added).


91 As to proceeding rules see amplius PETRILLO C., La tutela degli interessi collettivi e dei diritti individuali omogenei nel processo societario, in Riv. Dir. Proc., No. 1, 2006, p. 169.

action device for two reasons: the common and indifferent situation of each member of the class and the common basis of the defendant’s misbehaviour which would be the false information inside the prospectus. (ii) If the defendant is the intermediary through whom the client bought the bonds, then every client may have different and personal circumstances whereby he/she has decided (or has been advised) to buy these bonds. In such a case, it does not make sense to use a class action mechanism just in consideration of the absence of typicality and commonality prerequisites.

5.1 Class Actions and Investment Services

In the case of a class action concerning performance of investment services, first of all, the nature of the class action device is inconsistent with the principle of “know your customer”, whereby the intermediaries must know the characteristics of their clients, in particular their experience in financial investments, their financial situation, their propensity to risk, their investment objectives, in order to perform and customize efficiently their services.

93 In this respect see comparatively GOLD L.P., SPINOGLATI R.L., No “Seller” Liability for Security holder with Firm Underwriter Commitment, in New York Law Journal of April 10, 2002, pp. 3-4, where the authors applied the Pinter tests to determine the purported liability of the defendant. “As defined in Pinter, a proper §12 [of SA] defendant must have either (1) passed title or other interest in the security to the buyer for value or (2) successfully solicited the purchase of the security, motivated at least in part by a desire to serve his own financial interests or those of the security owner, such as a broker or agent”. See also BRODSKY E., Underwriter’s Liability under Section 12(2), In New York Law Journal of October 2, 1985, pp. 1-2, where the Author explained the limitation of privity requirement to determine the liability of the seller and how the courts have broadened the its scope by holding that any person who substantially participate in, is the proximate cause of, or is an aider and abetter in the sale may be liable under §12(2) [of SA], thus ignoring privity requirement.

94 See supra paragraph no. 2. Of course these prerequisites are from US law, but they constitute the basis of the identical causa petendi in the Italian procedure.

95 Sect. 28 of Consob Regulation No. 11522/1998 states “Informazioni tra gli intermediari e gli investitori. 1. Prima della stipulazione del contratto di gestione e di consulenza in materia di investimenti e dell’inizio della prestazione dei servizi di investimento e dei servizi accessori a questi collegati, gli intermediari autorizzati devono: a) chiedere all’investitore notizie circa la sua esperienza in materia di investimenti in strumenti finanziari, la sua situazione finanziaria, i suoi obiettivi di investimento, nonché circa la sua propensione al rischio. L’eventuale rifiuto di fornire le notizie richieste deve risultare dal contratto di cui al successivo articolo 30, ovvero da apposita dichiarazione sottoscritta dall’investitore; b) consegnare agli investitori il documento sui rischi generali degli investimenti in strumenti finanziari di cui all’Allegato n. 3. 2.Gli intermediari autorizzati non possono effettuare o
Moreover, in this respect, some intermediaries, may have not given some important information concerning the financial instruments, or “have forgotten” voluntarily to mention the main risks or the possible losses.

Nevertheless some other intermediaries may have given all the information and the client might still have decided to buy these risky bonds.

In the former case, the intermediary would be responsible for the client’s losses because of violation of disclosure obligations, but in the latter case the intermediary would not be responsible.

In addition, there may exist a conflict of interests between intermediary and a client either because the intermediary is the financier of the issuer or because it was the underwriter of the security bought by the client.66 In case of class actions with more than one defendant, an intermediary should be deemed liable according to these dissimilar circumstances.

As far as the clients are concerned, they may have different propensity to risk, so it would be impossible in a class action proceeding to consider every individual’s approach to a financial investment. Therefore, the suitability rule would not be applicable and the clients would be treated as they had similar characteristics, which is obviously not true.67

66 Sect. 27 of Consob Regulation No. 11522/1998 states: “Confitti di interessi. 1. Gli intermediari autorizzati vigilano per l’individuazione dei conflitti di interessi. 2. Gli intermediari autorizzati non possono effettuare operazioni con o per conto della propria clientela se hanno direttamente o indirettamente un interesse in conflitto, anche derivante da rapporti di gruppo, dalla prestazione congiunta di più servizi o da altri rapporti di affari propri o di società del gruppo, a meno che non abbiano preventivamente informato per iscritto l’investitore sulla natura e l’estensione del loro interesse nell’operazione e l’investitore non abbia acconsentito espressamente per iscritto all’effettuazione dell’operazione. Ove l’operazione sia conclusa telefonicamente, l’assolvimento dei citati obblighi informativi e il rilascio della relativa autorizzazione da parte dell’investitore devono risultare da registrazione su nastro magnetico o su altro supporto equivalente. 3. Ove gli intermediari autorizzati, al fine dell’assolvimento degli obblighi di cui al precedente comma 2, utilizzino moduli o formulari prestampati, questi devono recare l’indicazione, graficamente evidenziata, che l’operazione è in conflitto di interessi.

67 Sect. 29 of Consob Regulation No. 11522/1998 states: “Operazioni non adeguate. 1. Gli intermediari autorizzati si astengono dall’effettuare con o per conto degli investitori operazioni non adeguate per tipologia, oggetto, frequenza o dimensione. 2. Ai fini di cui al comma 1, gli intermediari autorizzati tengono conto delle informazioni di cui all’articolo 28 e di
Finally, the conduct of a client may influence the determination of the *quantum* of the redress that he/she may receive: indeed, the relief may be reduced or the claim may be completely rejected in consideration of his/her negligence or misconduct.\(^98\)

### 5.2 Conclusions

In conclusion, as one distinguished scholar observed, only if the *law reformers* are willing to engage in a comprehensive analysis of their own systems the substantial obstacles can be overcome so that the existing civil law structure can be tailored to effectively receive the doctrine of class action.” At the same time “there must be a comprehensive effort to adapt the class action device to fit into the civil law system”.\(^99\)

This dialectical and reconciling approach (i.e. taking into consideration the “body” of civil law system and the class action “organ” which is from the common law system) is the key to a responsible legal “transplant” with minimal risk of constitutional or institutional “rejection”.

And this approach is necessary because if the individuals had no means of redress for their small claims, they would likely lose faith in the marketplace as well. Confidence in the marketplace takes on added significance in the context of securities. The existence of securities class actions promotes investors’ confidence because investors know that in the event of fraud they will be able to recoup some or all of their losses.\(^100\)

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\(^{100}\) See BERSHAD D.J. et al., *A Dissenting Introduction*, in Securities Class Actions, Yodowitz E.J. et al. eds., 1994, p. 6, stating that the existence of securities class actions “is a major reason why investors confidence in the financial markets in the United States has been maintained despite all the wrongdoing”).
Investors’ confidence is a crucial factor in ensuring continued investment in companies. Continued investment, in turn, is vital to keeping the economy afloat.