



EDITED BY

STEFAN WRBKA

STEVEN VAN UYTSEL

MATHIAS SIEMS

COLLECTIVE ACTIONS

Enhancing Access to Justice and
Reconciling Multilayer Interests?

CAMBRIDGE

COLLECTIVE ACTIONS

Enhancing access to justice and reconciling
multilayer interests?

Edited by

STEFAN WRBKA

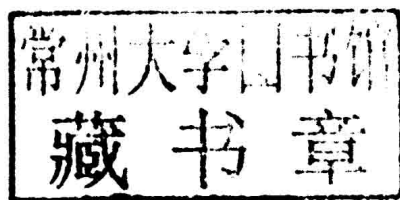
Kyushu University, Japan

STEVEN VAN UYTSEL

Kyushu University, Japan

MATHIAS SIEMS

Durham University, UK



CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781107536258

© Cambridge University Press 2012

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2012

Reprinted 2012

First paperback edition 2015

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication data

Wrbka, Stefan, 1976–

Collective actions : enhancing access to justice and reconciling multilayer interests? /

Stefan Wrbka, Kyushu University, Japan, Steven Van Uytsel, Kyushu University, Japan, Mathias Siems, University of Durham.

p. cm.

Includes index.

ISBN 978-1-107-02154-9 (hardback)

1. Class actions (Civil procedure) 2. Public interest law 3. Due process of law.

4. Justice, Administration of. I. Van Uytsel, Steven, 1974–

II. Siems, Mathias M., 1974– III. Title.

K2243.W73 2012

347'.053-dc23 2011052118

ISBN 978-1-107-02154-9 Hardback

ISBN 978-1-107-53625-8 Paperback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication, and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

COLLECTIVE ACTIONS

Enhancing access to justice and reconciling multilayer interests?

This volume of essays draws together research on different types of collective actions: group actions, representative actions, test case procedures, derivative actions, and class actions. The main focus is on how these actions can enhance access to justice and how to balance the interests of private actors in protecting their rights with the interests of society as a whole. Rather than focusing on collective actions only as a procedural device, the contributors to this book also examine how these mechanisms relate to their broader social context. Bringing together a wide range of scholarship from the areas of competition, consumer, environmental, company, and securities law, the book includes contributions from Asian, European, and North American scholars and therefore expands the scope of the traditional European and/or American debate.

STEFAN WRBKA is an associate professor of Consumer Law at the Graduate School of Law and International Education Center, Kyushu University.

STEVEN VAN UYTSEL is an associate professor of Competition Law and Natural Resources Law at the Faculty of Law, Kyushu University.

MATHIAS SIEMS is a professor of Commercial Law at Durham University.

CONTRIBUTORS

BENOÎT ALLEMEERSCH, Professor at the Institute for Civil Procedure, Katholieke Universiteit Leuven, Belgium, and Counsel at Clifford Chance LLP, Brussels; LL.M. (Yale Law School), Mag. iur. (Katholieke Universiteit Leuven and Duke University School of Law), Dr. iur. (Katholieke Universiteit Leuven).

MONIKA HINTEREGGER, Professor in the Department of Civil Law, Foreign and International Law, and President of the Senate, Karl-Franzens-Universität Graz, Austria; Dr. iur. (Karl-Franzens-Universität Graz).

SEAN MCGINTY, LL.D. candidate, Kyushu University's Graduate School of Law, Fukuoka, Japan; B.A. (Carleton University), LL.B. (University of Victoria), LL.M. (Kyushu University).

RACHAEL MULHERON, Professor in the Department of Law, Queen Mary, University of London, UK; B.Com, LL.B. (Hons), LL.M. (Adv) (University of Queensland), D.Phil (Oxon).

KUNIHIRO NAKATA, Professor at the Law School of Ryukoku University, Kyoto, Japan; LL.M. (Ritsumeikan University).

WILLIAM H. PAGE, Marshall M. Criser Eminent Scholar and Senior Associate Dean for Academic Affairs at the University of Florida Levin College of Law, USA; J.D. summa cum laude (University of New Mexico), LL.M. (University of Chicago).

ANNINA H. PERSSON, Professor of Private and Commercial Law, Banking Law, International Trade and Insolvency Law at the School of Law, Psychology and Social Work, Örebro University, Örebro, Sweden; Ph.D. (University of Stockholm).

ARTHUR R. PINTO, Professor of Law and co-director of the Dennis J. Block Center for the Study of International Business Law, Brooklyn Law School, New York, USA; B.A. (Colgate University) and J.D. (New York University).

QUYNH THUY QUACH, Lecturer at the Judicial Academy, Ministry of Justice, Vietnam; LL.B. and LL.M. (Hanoi Law University), LL.D. (Kyushu University).

MATHIAS M. SIEMS, Professor of Commercial Law, Durham Law School, Durham University, and Research Associate, Centre of Business Research, University of Cambridge, UK; LL.M. (Edinburgh), Dr. iur. (Munich).

AKINORI UESUGI, senior consultant working at Freshfields Bruckhaus Deringer, Tokyo, Japan, and visiting professor, Graduate School of International Corporate Strategy, Hitotsubashi University, Tokyo, Japan; LL.M. (Tokyo University), LL.M. (University of Pennsylvania).

STEVEN VAN UYTSEL, Associate Professor of International Economic Law at the Faculty of Law, Kyushu University, Japan; LL.B. and LL.M. (Antwerp University), LL.M. and LL.D. (Kyushu University).

SIMON VANDE WALLE, Post-doctoral Fellow at Tokyo University, Japan; LL.B. and LL.M. (Katholieke Universiteit Leuven), LL.M. and LL.D. (Kyushu University), LL.M. (Georgetown University Law Center).

STEFAN WRBKA, Associate Professor at the Graduate School of Law and International Education Center, Kyushu University, Japan; LL.M. (Kyushu University), Mag. iur. and Dr. iur. (University of Vienna).

PREFACE

Cases involving a large number of potential claimants have long presented difficulties to legal systems designed to accommodate disputes primarily among a small number of parties. Deterred by factors such as the costs of potential court proceedings and the imbalance of power between parties, private actors often abstain from pursuing their rights. Potential defendants who have caused significant but dispersed harm may thus escape from sanctions or liability. As a result, multiple layers of interests, or 'multilayer interests', ranging from the interests of private actors in protecting their rights on the one hand to the interests of society as a whole in deterring socially detrimental behaviour on the other, may be left unsatisfied.

To remedy this problem, various forms of collective actions have been developed. They range from group actions, in which individual actions are assembled into one procedure; to representative actions, in which an association sues on behalf of a multitude of claimants; to test case procedures, in which claimants sue in order to set a precedent for others. These various forms of collective actions aim to facilitate 'access to justice' for private actors, that is, the ability to enforce and protect one's rights through a legal process. In addition to bundling a larger number of fragmented individual interests, they are seen as a mechanism to safeguard the common interests of specific groups of claimants and of society as a whole. Moreover, collective actions are not just a procedural tool but raise a number of political, social and economic issues, for instance, balancing of interests between weaker private actors and bigger players, coordination of collective actions with enforcement efforts by public agencies, cost issues and a possible subordination of the individual for the sake of larger or collective interests.

There is intense debate among legal scholars and practitioners about whether collective actions can adequately safeguard and reconcile access

to justice with multilayer interests. This book examines the issues of collective actions in their broader historical, social, economic and political contexts, cutting across several legal fields in a variety of countries in Europe, Asia and North America, and thus going beyond approaches previously taken.

ACKNOWLEDGMENTS

The editors of and the contributors to this book wish to thank all those who have made it possible. First of all, thanks to Toshiyuki Kono, the program director of the international degree programs in law at Kyushu University, who initiated the Kyushu University International Law Conference series six years ago and who gave us the chance to meet and present the contributions to this book in early 2011. We are very indebted to all those who so efficiently organized the 2011 Kyushu University International Law Conference during which the contributors to this book had lively cross-cultural and interdisciplinary discussions on the interlinking themes of collective actions, multilayer interests and access to justice. We would like to especially mention the Kyushu University law secretariat under the lead of Ai Nagao as well as Quynh Thuy Quach, Sean McGinty and Simon Vande Walle, members of the organizing committee and doctoral students of law at Kyushu University at the time of the conference.

Many thanks also go to Cambridge University Press, especially to Kim Hughes, who has supported and accompanied this book project from day one.

During the intense process of writing this book, we were supported by many persons who helped to bring this project to fruition. We especially would like to thank Adrienne Lipoma, Jeffrey Kurashige and Ren Yatsunami for their help with linguistic matters.

We hope that this book will contribute to further discussions and developments of access to justice.

Stefan Wrbka, Fukuoka, 2012

Steven Van Uytsel, Fukuoka, 2012

Mathias M. Siems, Durham, 2012

ABBREVIATIONS

AC	Appeal Cases (Law Reports)
ADR	Alternative Dispute Resolution
aff'd	affirmed
AG	Aktiengesellschaft (joint stock company)
AktG-E	Aktiengesetz-Entwurf (German Stock Corporation Act Draft)
Ala. Cir. Ct.	Alabama Circuit Court
AMA	Japanese Antimonopoly Act
AMC	Antitrust Modernization Commission
ARC	American Radiolabeled Chemicals
ARN	Allmänna reklamationsnämnden (Swedish National Board for Consumer Complaints)
Art.	Article
Arts.	Articles
Assn	Association
BA	British Airways
BCSC	Supreme Court of British Columbia
BERR	Department for Business, Enterprise and Regulatory Reform
BGBI	Bundesgesetzblatt (German Federal Law Gazette)
BOD	Board of Directors
BOM	Board of Management
BOS	Board of Shareholders
BP	British Petroleum
c.	clause
C.D. Cal.	Central District of California
CAFA	Class Action Fairness Act
CanLII	Canadian Legal Information Institute
CAT	Competition Appeal Tribunal of the United Kingdom
CBR	Centre for Business Research
CEP	Committee on Environmental Policy (Economic Commission for Europe)

CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
cf.	confer
CFR	Code of Federal Regulations
ch.	chapter
CIF	Cost Insurance Freight
Cir.	Circuit
Civ	Civil Division
CJC	Civil Justice Council of England and Wales
cl.	clause
CMLR	Common Market Law Review
Co.	Company
Corp.	Corporation
CP Rep	Civil Procedure Reports
CPR	Civil Procedure Rules
CWA	Clean Water Act
D&O insurance	Directors and Officers liability insurance
D. Del.	District Court of Delaware
D. Md.	District Court of Maryland
D. Me.	District Court of Maine
D.C. Super. Ct.	Superior Court of the District of Columbia
D.D.C.	District Court of Columbia
D.N.J.	District Court of New Jersey
DC	District of Columbia
DC Cir.	Court of Appeals for the District of Columbia Circuit
Del.	Delaware
DG COMP	Directorate-General for Competition (European Commission)
DG SANCO	Directorate-General for Health and Consumer Protection (European Commission)
Dnr Ju	Justitiedepartementet Diarienummer (Registration Number of the Swedish Department of Justice)
DOI	Department of the Interior
DOJ	Department of Justice
Dr	Doctor
Ds	Departementspromemoria (memorandum from the Swedish government)
E.D.N.Y.	Eastern District of New York
E.D. Pa.	Eastern District of Pennsylvania
e.g.	exempli gratia (for example)
EC	European Community
ECC-Net	European Consumer Centre's Network

ECE	Economic Commission for Europe
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECR	European Court reports
ed.	editor; edition
Eds.	editors
EEA	European Economic Area
EEC	European Economic Community
EIA	Environmental Impact Assessment
ELD	Environmental Liability Directive
et al.	et alii; et aliae (and others)
<i>et seq.</i>	et sequens; et sequential
etc.	et cetera
EU	European Union
EUR	Euro
Eur.Ct.H.R.	European Court of Human Rights
EWCA	England and Wales Court of Appeal
EWCA Civ	England and Wales Court of Appeal Civil Division
EWHC	High Court of England and Wales
F. Supp.	Federal Supplement
F.R.D.	Federal Rules Decisions
Fed. Appx.	Federal Appendix
Fed. R. Civ. P.	Federal Rules of Civil Procedure
Fla. App.	Florida Appeals Court
FPT	Financing Promoting Technology Corp.
FSB	Financial Services Bill
FY	Fiscal Year
GDP	Gross Domestic Product
GNI	Gross National Income
GRL	Swedish Group Proceedings Act of 2002
H. Ct.	High Court
HL	House of Lords
HM	His/Her Majesty
i.e.	id es (it is)
ibid.	ibidem
Inc.	Incorporated
Ins.	Insurance
Int'l	International
IPPC	Integrated Pollution Prevention and Control
J.	Judge; Justice
JFTC	Japan Fair Trade Commission
JOR	Jurisprudence on Commercial Law

Jr.	Junior
JRS	Vietnamese Judicial Reform Strategy
K.K.	Kabushiki Kaisha (Japanese stock corporation)
Kan. Dist. Ct.	District Court of Kansas
KonTraG	Gesetz zur Kontrolle und Transparenz im <i>Unternehmensbereich</i> (German Corporate Sector Supervision and Transparency Act)
L.Ed.	Lawyers Edition
L.J.	Lord Justice of Appeal
L.JJ.	Lords Justice of Appeal
LCD	Liquid Crystal Display
LLC	Limited Liability Company
LOE	Law on Enterprise
LPG	Liquefied Petroleum Gas
Ltd	Limited
M.D. Pa.	Pennsylvania Middle District Court
Mass. Super. Ct.	Massachusetts Superior Court
MDL	Multidistrict Litigation
Me. Super Ct. Cumberland Co.	Main Superior Court Cumberland County
Mich. Cir. Ct.	Michigan Circuit Court
Minn. Dist. Ct.	Minnesota District Court
MITI	Japan's Ministry of Industry and Trade
MOJ	Ministry of Justice
n.	Note
N.D.	Northern District
N.D. Cal.	Northern District Court of California
N.D. Ill.	Northern District Court of Illinois
N.D. Ind.	Northern District of Indiana
N.W.	North Western Reporter
N.Y.	New York
N.Y.S.	New York Supplement (Law Reports)
NGO	non-governmental organization
No.	Number
NOAA	National Oceanic and Atmospheric Administration
NPO	nonprofit organization
OECD	Organisation for Economic Co-operation and Development
OFT	Office of Fair Trading
OJ	Official Journal
OPA	Oil Pollution Act
OPEC	Organization of the Petroleum Exporting Countries

p.	page
para.	paragraph
paras.	paragraphs
plc	public limited company
pp.	pages
pr.	Preface
Prods.	Productions
PSLRA	Private Securities Litigation Reform Act
PSPD	People's Solidarity for Participatory Democracy
Pt	part
r.	Rule
RB	Swedish Code of Judicial Procedure
rev'd	reversed
rev'd sub nom	reversed under the name
ROSC	Report on the Observance of Standards and Codes
rr.	Rules
s.	section
S. Ct.	Supreme Court
S.D. Fla.	Southern District of Florida
S.D. Iowa	Southern District of Iowa
S.D.N.Y.	Southern District of New York
SA	Société Anonyme
SARA	Superfund Amendments and Reauthorization Act
SCC	Supreme Court of Canada
SCR	Supreme Court Reports (Canada)
SEA	Strategic Environmental Assessment
SEC	U.S. Securities and Exchange Commission
sec.	section
SFR	Société Française de Radiotéléphonie
SFS	Swedish Code of Statutes
SI	Statutory Instrument
slip op.	slip opinion
SME	small and medium-sized enterprise
SOU	Swedish State Official Reports
SOX	Sarbanes-Oxley Act
SPC	People Supreme Court
SSC	State Securities Committee
sub nom	sub nomine (under the name)
Sup. Ct.	Supreme Court
SWP	Staff Working Paper
TFEU	Treaty on the Functioning of the EU
THC	Tokyo High Court

U.S.	United States
U.S.C.	United States Code
U.S.C.A.	United States Code Annotated
U.S. Jud. Pan. Mult. Lit.	United States Judicial Panel on Multidistrict Litigation
UFC Que Choisir	Union fédérale des consommateurs
UK	United Kingdom
UMAG	Gesetz zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts
UN	United Nations
US\$	United States Dollar
USB	Universal Serial Bus
v.	versus
VAT	Value Added Tax
VP	Vice-President
Vt.	Vermont
Vt. Super. Ct.	Vermont Superior Court
WCAM	Wet Collectieve Afwikkelingen Massaschade (Dutch Act on Collective Settlements of Mass Harm)
WL	Westlaw
WTO	World Trade Organization

CONTENTS

<i>Figures</i>	<i>page</i>	xvii
<i>Tables</i>	xix	
<i>Contributors</i>	xxi	
<i>Preface</i>	xxiii	
<i>Acknowledgments</i>	xxv	
<i>Abbreviations</i>	xxvii	
1	Access to justice and collective actions: ‘Florence’ and beyond	1
	STEFAN WRBKA, STEVEN VAN UYTSEL, AND MATHIAS M. SIEMS	
	Introduction	1
	The Florence Project and access to justice	3
	From ‘diffuse’ to ‘multilayer’ interests	8
	The role of collective actions in the context of multilayer interests	10
	Structure of and contributions to this book	12
	Conclusion	19
	PART I. Setting the stage	21
2	European consumer protection law: Quo vadis? – thoughts on the compensatory collective redress debate	23
	STEFAN WRBKA	
	Introduction	23
	Multilayer interests	24

Access to justice	27
Redress tools	31
Green Paper on Collective Consumer Redress	38
The way(s) forward	42
Conclusion	54
3 Collective actions in a competition law context – reconciling multilayer interests to enhance access to justice?	57
STEVEN VAN UYTSEL	
Introduction	57
Access to justice and collective actions	60
The justice concepts envisioned by law enforcement	60
Access to justice as redress for harm	61
Harm in a competition law context	63
Harm determined by the protective scope of competition law	63
The stakeholders in competition law infringements	67
Relationships among the stakeholders	70
Multilayer interests among the stakeholders	70
Tensions among the multilayer interests	72
Collective actions in a competition law context	73
Reconciling tensions through collective actions	75
Alleviating tension through joinder procedures or test cases	75
Representative actions' influence on tension among individual interests	76
A tension too big for class actions	78
The tension between individual interests and the public interest	81
Compensatory justice and the impediment of legal standing	81
The stakeholders and legal standing	82
Competitors	82
Direct purchasers	83
Indirect purchasers	84
Umbrella customers	84