PAPER FOR AMINZ CONFERENCE

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"Class Actions – The New Frontier: What does ADR have to offer?"

I. Introduction

1. Class actions are an established part of the United States and Australian litigation scenes. Well-known examples of class actions include: (1) the claim on behalf of the people of Hinkley against Pacific Gas and Electric for groundwater contamination (made famous by the movie Erin Brockovich); (2) the claims arising out of the Exxon Valdez oil spill; and (3) the Master Tobacco Settlements between the tobacco companies and the Attorneys-General of the individual States of America.

2. By contrast class actions have been slow to develop in New Zealand. There are likely to be a number of reasons for this including:

    (i) We have no set of procedural rules for class actions. Rather, parties have had to utilise the existing High Court Rules and the courts have developed their own rules to accommodate class actions;
    (ii) Relatedly, there is no clear means in New Zealand for bringing a claim on an "opt-out" basis, i.e., a claim covering everyone within a defined group (unless they "opt-out") and irrespective of whether they actively participate in the litigation. This means that every claimant must actively sign up to be a part of the litigation;
    (iii) Personal injury class actions have been big business overseas but are limited by the Accident Compensation Scheme in New Zealand;
    (iv) Class actions tend to be backed by commercial litigation funders which themselves are a reasonably recent phenomena in New Zealand; and
    (v) Costs awards are likely to be issued against unsuccessful claimants in New Zealand (unlike the United States, where costs generally lie where they fall).

3. Despite the above limitations, we are seeing an increasing number of class actions in New Zealand, many of which are discussed in this paper. It is a topic that is generating a lot of discussion, although that discussion has largely centred around how these types of claims are dealt with in the courts. However, there is also a conversation to be had about what ADR might offer. Could the sort of benefits offered by ADR (flexibility, speed, efficiency etc.) be realised equally successfully in the class action context?

4. This paper will endeavour to address some of those issues. In doing so it will first give an overview of current and upcoming class actions in New Zealand, describe the legal framework for class actions in New Zealand, and address some of the challenges faced in this growing class action landscape (including the related issue of the role of litigation funding).

II. Class Actions in New Zealand

A. The Feltex Shareholders claim

5. This is a claim by former shareholders of Feltex Carpets who bought shares in Feltex's 2004 initial public offering (IPO). When Feltex subsequently went into receivership and liquidation those shareholders lost the value of their investment. In 2008, a Mr Houghton brought a claim on behalf of some 3,600 shareholders against Feltex's former directors, the vendor in the IPO (Credit Suisse), and the investment banks who acted as the Joint Lead Managers in the IPO (First NZ Capital and Forsyth Barr). The claimants allege that there were untrue statements and omissions in the IPO prospectus and that this breached the Securities Act 1978 and the Fair Trading Act 1986.

6. The claimants are funded by a UK based litigation funder, Harbour Litigation Funding Limited. The claim was the first litigation-funded class action in New Zealand and was delayed in getting to trial by six years of interlocutory disputes and a period where there was a stay of proceedings in place while the claimants sorted out their funding arrangements. The case went to trial in 2014 with judgment issued in September 2014 (*Houghton v Saunders* [2014] NZHC 2229). The judgment found for the defendants in all respects. This has been appealed and the appeal will be heard in April 2016.

B. Fair play on fees/the bank fee litigation

7. This is a claim by customers of the major trading banks in New Zealand alleging that certain fees they have been charged by the banks amount to unenforceable penalties at common law and in equity, and/or unreasonable fees under the Credit Contracts and Consumer Finance Act 2003. The fees at issue are honour and dishonour fees on deposit accounts, and over-limit and late payment fees on credit cards.

8. The claim is being managed by a group called "Fair Play on Fees" and funded by the New Zealand arm of an Australian litigation funder, Litigation Lending Services (LLS). Fair Play on Fees has advertised widely and encouraged bank customers to sign up to the claim on the Fair Play on Fees website. To date proceedings have been filed against ANZ, Kiwibank, BNZ and Westpac (with ASB apparently to come). There have been several interlocutory judgments concerning the nature of the representative orders and fixing a final opt-in date for claimants, but the proceedings are currently on hold while the parties await a decision of the High Court of Australia in an equivalent proceeding there.

C. The Kiwifruit Claim

9. This is a claim by kiwifruit growers and post-harvest operators for losses arising out of the effects the PSA vine disease had on the kiwifruit industry. The claim is against the Crown, on the basis that officials at the former Ministry of Agriculture were negligent in allowing PSA to be brought into New Zealand.

10. The Statement of Claim was filed on 28 November 2014. LPF Group Limited (a New Zealand based funder) are the litigation funders for the claim. Each grower claimant is being asked to contribute between $500 to $1,500 to the costs of the claim and post-harvest operators are being asked to contribute $10,000.

11. The Crown has denied any negligence. It filed its Statement of Defence on 6 March 2015 and has indicated it intends to oppose the application for leave to bring a representative action, the application for approval of use of a litigation funder, and the funding agreement.

D. The Rena grounding:

12. The MV Rena grounded on the Astrolabe Reef on 5 October 2011. The businesses and iwis that were affected by the grounding brought claims under the Maritime Transport Act 1994. 53 local businesses, clubs and individuals joined together to form an incorporated society (BAG-Rena Incorporated), which managed and administered their claims against the owners and insurers. The claims of BAG-Rena Inc and of various other businesses and iwis were filed in the High Court in October 2013.

13. Prior to the formation of BAG-Rena, a litigation funder was involved in the claim. However, ultimately, the claims were progressed without the involvement of a funder.

14. The claims were settled at mediation in June 2014.

E. The Cladding Claim

15. A class action is currently being organised against manufacturers of plaster cladding installed in buildings across New Zealand. Potential class claimants are able to register their interest on a website set up by lawyer Adina Thorn. The website (www.goodcladding.co.nz) states that funding has been obtained from Harbour Litigation Funding Ltd and that the damages claimed in the proposed action are likely to exceed NZ$100 million. Proceedings have not yet been filed, and it is not yet clear how potential claimants will be organised into a representative action or actions. The Good Cladding website states that the next phase will involve a detailed evaluation of the claims.

F. Christchurch Earthquake Insurance Claim

16. Southern Response Policyholders frustrated by delays in processing their Christchurch earthquake related claims can currently sign up for a class action being organised by GCA lawyers. The claim website (www.srca.co.nz) states that the damages sought will be for "anxiety, stress, relocation, rent storage and other costs caused because of payout delay." The action is being funded by the Australian litigation funder LLS (through its New Zealand incorporated vehicle, LLS (NZ) Ltd). There are no further details available at this stage as to how it this might work as a representative proceeding/class action.

III. The existing class action legislation in New Zealand

17. The mechanism that has been used to bring class actions in New Zealand is the High Court Rule permitting representative actions. That rule, HCR 4.24, provides:

> ***4.24 Persons having same interest***
>
> *One or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding—*

(a) with the consent of the other persons who have the same interest; or
(b) as directed by the court on an application made by a party or intending party to the proceeding.

18. This allows a representative to bring a proceeding in his or her name on behalf of others with the same interest (including a class of claimants). There is some debate about whether this provision allows for proceedings to be brought on an "opt-out" (as well as an "opt-in") basis. While HCR 4.24(a) expressly requires some form of consent to participate in the proceedings on the part of each claimant being represented, HCR 4.24(b) is expressed as an alternative to that opt-in approach. HCR 4.24(b) provides that a joint suit can be brought, "as directed by the court...".

19. This suggests that, if the court is minded to, it could allow an "opt-out" procedure, using the existing rules, as was initially allowed by the Associate Judge following an *ex parte* application in the *Feltex* proceedings (see above). The defendants then applied for a rescission of that order and the Hon Justice French reversed the opt-out order, but decided to allow an opt-in procedure (provided certain conditions were met).[1] She made a number of comments disapproving of the possibility of opt-out proceedings under HCR 4.24(b). She noted that the lack of detailed legislative rules surrounding opt-out procedures meant that the Court was being asked to operate in a vacuum. She stated (para 165):

> "… in my view an opt-out procedure represents too radical a departure from the existing Rules. In the absence of legislative change, the Court must work within the existing Rules which only contemplate opt-in."

20. However, at the Court of Appeal, the possibility of an opt-out procedure under the existing rules was left open. See *Saunders v Houghton* [2009] NZCA 610 (at para 12):

> "… The validity of an "opt-out" order in the absence of legislation was not argued and we offer no comment upon that or whether it can stop time running or create res judicata for those who have opted out."

21. Another option for representative or class action proceedings under the existing rules is that provided in High Court Rule 4.27 which allows for a "class of persons" or a community to be represented by a local authority, public body or other representative body.

> ***4.27 Representation by other persons***
> *In respect of a proceeding or intended proceeding, the court may, on an application by a party or an intending party or on its own initiative,—*
> *…*
> *(f) direct, with the consent of the Attorney-General, that a head of a government department or other officer represent the public interest:*
> *(g) direct that a local authority, public body, or other representative body represent the inhabitants of a locality or any class of persons, unless their interests, or the interests of a considerable section of them, may be adverse to those of the local authority, public body, or other representative body:*
> *(h) if a local authority, public body, or other representative body is a plaintiff or a party whose interests appear to be adverse to those of the inhabitants of a*

[1] *Houghton v Saunders* [2009] NZCCLR 13.

locality or any class of persons, or a considerable section of them, direct the manner in which the inhabitants, class, or section are to be represented.

22. The cases that have been brought under this rule (and its predecessors) largely involve applications for declaratory or injunctive relief. Where any environmental issues arise that affect a class of persons or a community, remedies are invariably pursued by local authorities under the Resource Management Act 1991, rather than under this provision. It is not clear whether the courts would allow for compensatory claims to be brought by a class of persons under this provision.

IV. Proposed changes to NZ law on Class Actions

23. Some years ago, a substantial body of work was done by the Rules Committee, leading to the production of a Consultation Paper in October 2008 on the introduction of class action legislation in New Zealand. In addition to a Consultation Paper, the Rules Committee prepared a Class Actions Bill and Class Actions Rules (for insertion into the High Court Rules) for consideration by the legal profession and the public generally.[2]

24. However, it appears that this issue has fallen down the list of legislative priorities and the introduction of class actions legislation and rules is not being pursued at this time.

25. The Class Actions Bill and proposed Rules included provision for both opt-in and opt-out class actions. The commencement of a class action would involve an application to the court for a "class action order" and the applicant (or lead plaintiff) would apply for a ruling that the class action would be an opt-in or opt-out procedure. Full discretion would be given to the court to decide which procedure was appropriate in the circumstances.

26. The Class Actions Bill and proposed Rules give an insight into the types of issues that a court would need to deal with, in managing class action procedures. The proposals are stated to have been greatly influenced by the class action legislation introduced in Australia by the Federal Court of Australia Amendment Act 1991 (No 181 of 1991). The issues dealt with in the draft bill and rules include:

    a. The minimum number of claimants needed to form a class (7);
    b. The information needed to define the class;
    c. Competing applications to form classes;
    d. The registration of claimants where there is to be an opt-in process;
    e. The process for opting out of a class action;
    f. Notification to potential class members;
    g. Court approval of settlements;
    h. Court control of the division of any damages amongst class members;
    i. Court oversight of funding and fees arrangements;
    j. Payment of unrecovered costs of the lead plaintiff out of damages awarded; and
    k. Maintenance of a fund for unidentified claimants in opt-out proceedings.

[2] http://globalclassactions.stanford.edu/content/new-zealand-class-action-legislation-and-rules

27. As matters stand, the law surrounding class actions in New Zealand is being developed on a case by case basis. A number of the matters listed above (applying to opt-in class actions) can be dealt with under the High Court's case management powers and, as is considered further below, the courts have already grappled with the issue of oversight of funding arrangements. However, it is doubtful that under the High Court Rules or its inherent jurisdiction, the High Court has the ability to control representative proceedings (and the division of the spoils) to the extent envisaged in the proposed Class Action Bill and Rules.

V. Third Party Funding

28. In addition to the lack of a legislative framework, two further obstacles to bringing representative proceedings/class actions are the up-front costs of pursuing the claim and the risk of an adverse costs awards against the representative party. Third party funding is a way to address these issues and has been a feature of the class actions before the New Zealand courts to date.

29. As a general rule, the third party funder will meet some or all of the costs of pursuing the claim and takes on the risk of adverse costs orders. In return the class members agree to pay the funder a portion of the proceeds (assuming success), which could be anywhere between 20-50% of the proceeds. For this arrangement to work, the class members each need to be parties to the agreement with the third party funder. This is facilitated by the opt-in approach to class actions, as signing up to the funding agreement is made part of the opt-in process.

30. The *Feltex* litigation was the first case in which third party funding of a class action came before a court in New Zealand. The Court of Appeal held that third party funding does not violate the common law prohibition on maintenance and champerty where the court is satisfied that:

    a. there is an arguable case for rights that warrant vindicating;
    b. there is no abuse of process; and
    c. the proposal is approved by the court.[3]

31. Since that judgment of the Court of Appeal, the Supreme Court addressed third party funding in *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89. Whilst this was not a class action case, the judgment discusses important principles many of which are likely to apply equally in a class action context. For example, the Supreme Court set out the circumstances in which a stay of proceedings might be granted where the third party funding amounted to an abuse of process. Those include where the third party funding agreement effectively amounts to an assignment of a cause of action where such an assignment is not permissible (e.g., because the funder is exercising too great a degree of control over the proceeding). While noting that the profit share of the funder may be relevant to whether the funding arrangement is an assignment, the Supreme Court expressly stated that it is not the role of the courts to act as regulators of funding arrangements or to assess the fairness of the bargain between the funder and the plaintiff. The Supreme Court emphasised though that "[w]hether or note the courts have a wider supervisory role in a representative action" was not before it and that the judgment was not to be taken as commenting on the supervisory role of the court under HCR 4.24 or the approach taken in the *Feltex* litigation.[4]

[3] *Saunders v Houghton (No 1)* [2010] 1 NZLR 91 at [79].
[4] At [28].

32. Another important issue before the Supreme Court in *Waterhouse* was the circumstances in which a funding agreement is required to be disclosed. The Court held that:

    a. Existence of a third party funding arrangement should be disclosed when proceedings are issued, together with the identity and location of the third party funder and whether it is amenable to the jurisdiction of the New Zealand courts;

    b. It is not necessary to disclose litigation sensitive material, including the terms on which funding may be withdrawn, and there is no need to disclose details of the financial standing of the funder;

    c. Disclosure of the third party funding agreement may be ordered (subject to redactions for confidential, privileged and litigation sensitive material) if an application is made to which it is relevant, for example an application for stay on abuse of process grounds, or an application for security for costs.

VI. How do you bring a class action before the New Zealand courts?

33. In terms of what practically needs to happen to bring a class action proceeding, to date the large representative/class actions in New Zealand have included the following steps:

    a. The party organising the claim has advertised for claimants and people have elected to join the claim by signing up and providing their personal details. In a number of recent cases the signup process has been via a claimant website.[5] Part of the signup process has been to agree to the terms of a funding agreement and a litigation services agreement with the lawyer acting. The case law has made it clear that there should be a direct client-solicitor relationship between the members of the represented group and the lawyer acting for the represented group in the litigation. The lawyer acting for the represented group should be responsible for advising the named plaintiffs and members of the represented group about the merits of the case and all material developments in the case. If a third party funder is involved, the lawyer's advice should be prepared and provided without interference by the funder.

    b. The representative claimant brings proceedings by filing in court a notice of proceeding, statement of claim, an interlocutory application for leave to bring a representative action and affidavits in support of the interlocutory application (including from any third party funder). The practice in recent class actions filed has been, at the time of filing proceedings, to apply for approval of the third party funder and third party funding agreement (although strictly speaking only disclosure of the existence of the funding arrangement and identity of the funder is required at that point – see discussion of the *Waterhouse* case above).

    c. The representative order or an aspect of the funding relationship may be opposed by the defendant and that will be resolved by the Court before the proceedings progress.

    d. Potential claimants have continued to sign up to the proceeding (or opt-in) after the court has granted the representative order, although the court may order that claimants opt-in

[5] For example, www.fairplayonfees.co.nz; http://goodcladding.co.nz/; http://thekiwifruitclaim.org/.

by a certain date. After that date the class is closed and the claim organiser cannot add new claimants (although that does not prevent it initiating fresh proceedings, as long as there are no limitation issues in doing so).

e. Consideration needs to be given to the structuring of the claim. The nature of the representative action procedure is that the position of the representative plaintiff (or plaintiffs) is intended to be representative of the wider represented class. Hence, in the normal course, a representative plaintiff would have his or her claim be the subject of a trial and determination with the intention that the court's ruling in relation to that plaintiff will be able to be applied to other class members so far as possible (in other words, common issues will be determined at a first stage and become binding as against the claimant class). In the *Feltex* proceeding for example, the court ordered that issues raised by the proceedings should be dealt with in two stages. The first stage determined the representative plaintiff's own claim, together with a set of issues common to all the other represented shareholders. If the representative plaintiff had succeeded at the first stage, the remaining individual issues arising for other shareholders who had opted-in were to be determined at a second trial. Such individual issues would have included evidence of actual reliance by claimants on the Feltex prospectus.

VII. How do you bring a class action in arbitration proceedings?

34. Arbitration is a consensual processes. All parties to the arbitration must consent to participating in the proceedings. That consent can be given once the dispute arises, through an agreement to refer the dispute to arbitration. Alternatively consent might be found in an agreement to arbitrate future disputes (for example in a dispute resolution clause in a contract). An arbitration award can only bind the parties to the arbitration agreement. The award cannot prevent potential claimants, in a similar position, from pursuing their claims against the defendant. In theory, it is therefore not possible to pursue an "opt-out" class action in arbitration proceedings.

35. However, there are a number of situations where multiple claimants could jointly pursue their claims in a single arbitration proceeding, effectively on an "opt-in" basis. For example where:

a. A contract or linked contracts involving multiple parties contain agreements to refer disputes to arbitration;
b. A standard form contract contains an offer to arbitrate disputes;
c. The rules of an organisation or association contain an arbitration provision;
d. Claims or proceedings are consolidated under Schedule 2 of the Arbitration Act 1996;
e. All parties consent to having their claims heard together, after the dispute arises; and
f. Multiple claims are brought under an offer to arbitrate disputes in an Investment Treaty.

a. A single contract or linked contracts involving multiple parties

36. An example of a single contract or linked contracts involving multiple parties could be leaseholders in a shopping mall where each lease contains an agreement to arbitrate. The leaseholders could join together to bring claims against the owner or manager of the mall if their contracts were linked (through cross-references in each lease agreement to the other lease agreements). If the agreements are not linked and each lease agreement has a separate (but identical) dispute resolution clause then, unless the defendant owner or manager agreed to have the claims heard

together, the leaseholders would need to commence separate claims and seek to have them joined under Schedule 2 of the Arbitration Act 1996.[6]

b. A standard form contract contains an offer to arbitrate disputes

37. An example of a standard form contract containing an offer to arbitrate disputes could be the general terms and conditions of an internet service or content provider or of an energy or telecommunications company. Alternatively, an arbitration provision could be contained in the standard terms of a money lender or insurance provider.

38. Section 11 of the Arbitration Act 1996 provides that arbitration agreements entered into before a dispute arises (for example in standard terms) cannot be enforced against consumers.[7] However, that provision does not prevent the consumer from relying on the arbitration agreement, should they wish to do so. Also, large numbers of customers of the types of suppliers referred to above (internet, energy, telecommunications and money lenders) will be companies rather than consumers.

39. Technically each service agreement would be separate and therefore a separate reference to arbitration would have to be made by each customer. However, as it is likely such claims would be consolidated under Schedule 2 of the Arbitration Act 1996, a defendant would be well advised to agree to the claims being heard in one proceeding from the outset. If they refused to do so, they could end up facing multiple claims in multiple fora. If the claimant was a consumer, they could choose to pursue their claims in court (as they cannot be required to go to arbitration). Also, there are a number of ombudsmen or adjudication processes applicable to these industries that the customer or consumer could choose to explore.

c. The rules of an organisation or association contain an arbitration provision

40. Many trade, professional and sporting associations wield considerable power in their sphere of influence. Decisions made by such organisations can affect the ability of their members to operate a profitable business or achieve success in their chosen field. It is foreseeable that such organisations could make decisions that affect a large number of members who could bring a group claim (for example to have the decision changed and/or for losses associated with the adverse decision).

d. Claims or proceedings are consolidated under Schedule 2 of the Arbitration Act 1996

41. Schedule 2 of the Arbitration Act 1996 contains provisions for consolidation of arbitration proceedings. However, consolidation of arbitration proceedings under these provisions is a fairly cumbersome process for the claimants. If possible, it would be preferable for the claimants to persuade the defendant to consent to having the claims all heard in one proceedings (obviating the need for consolidation under the Act).

[6] Note that joinder under Schedule 2 of the Act is not possible where it is an "international arbitration", unless the parties to the Agreement have opted in to Schedule 2.

[7] There is a carve-out in Section 11 for contracts of insurance to which section 8 of the Insurance Law Reform Act 1977 applies. Pursuant to section 8 of the Insurance Law Reform Act 1977, arbitration agreements entered into before a dispute arises will not bind the insured. As above, this does not prevent the insured from relying on the arbitration provision.

42. There are two main consolidation options provided for in the Act:

    a. Consolidation where the same tribunal has been appointed in each of the proceedings to be consolidated; and
    b. Consolidation where different tribunals have been appointed in the proceedings to be consolidated.

43. Each option requires the claimant to go through the process of establishing the tribunal before the claim can be consolidated with another set of proceedings.

44. Pursuant to Schedule 2, clause 4, orders may not be made to consolidate proceedings unless it appears:

    a. That some common question of law or fact arises in all of the arbitral proceedings; or
    b. That the rights to relief claimed in all of the proceedings are in respect of, or arise out of, the same transaction or series of transactions; or
    c. That for some other reason it is desirable to make the order or provisional order.

45. Also, Schedule 2 does not apply to "international arbitrations" (as defined in clause 1(3) of Schedule 1 of the Act) unless the parties specifically opt in to Schedule 2.

e. <u>All parties consent to having their claims heard together, after the dispute arises</u>

46. This is another way in which group claims or representative actions could find their way into arbitration proceedings. The reasons why claimants and defendants might prefer to have the claims considered in arbitration proceedings, rather than before the courts, are considered further below.

47. Any agreement to refer group claims to arbitration will have to be consented to by all of the participants in the arbitration process. Where additional claimants are to be added (for example after a period of advertising) there will need to be an agreement from all of the existing parties that the new parties may be added.

48. Where additional parties are likely to be added to arbitration proceedings after the Tribunal has been appointed, it is preferable to have an institution or third party appoint the Tribunal. That means that the new parties cannot claim that they were disadvantaged as they were not involved in the appointment of the Tribunal. It is also important to obtain a waiver from any party joined after the proceedings have started, waiving any right to claim that they have been procedurally disadvantaged by joining the proceedings after they had commenced.

f. <u>Multiple claims are brought under an offer to arbitrate disputes in an Investment Treaty</u>

49. A number of multi-lateral and bi-lateral trade and investment treaties entered into by States contain arbitration provisions for the settlement of investment disputes. An example is in Chapter

10 of the New Zealand-Malaysia Free Trade Agreement.[8] Pursuant to such dispute resolution provisions, the State parties effectively make a standing offer to arbitrate claims brought by investors of the other State party.

50. One example of where investors have brought an opt-in class action under an investment treaty is the *Abaclat* arbitration. This is a claim brought by Italian bondholders against the Argentinian government under the Italy-Argentina Investment Treaty. The claim relates to the actions of the Argentinian government, defaulting on bonds, during the debt crisis in 2001. The "class" of claimants initially consisted of 180,000 bondholders, all of whom had opted in to the claim. In a jurisdictional award, the Tribunal determined that it had jurisdiction over the claims of approximately 60,000 bondholders.[9]

51. The impressive logistical feat of signing up 180,000 claimants and organising their identification and documentation, was largely carried out by the banks that had sold the bonds to the bondholders. Those banks have also obtained a mandate to run the proceedings on behalf of the bondholders and it appears that the banks are funding the proceedings, in a manner similar to third party funders. Since the *Abaclat* claim was filed there have also been two subsequent group bondholder claims filed against Argentina (the *Ambiente*[10] and *Alemanni*[11] proceedings) which involved smaller groups of claimants (90 in *Ambiente* and 74 in *Alemanni*).

VIII. Why would parties to a class action choose Arbitration or ADR over the Courts?

52. For claimants, arbitration proceedings offer a number of practical advantages over bringing claims in court proceedings. One of the main advantages is that an arbitration tribunal has more flexibility than a judge of the High Court. Provided that due process is followed, the tribunal can require interlocutory issues to be dealt with in short order and they can be flexible and creative in how they manage the proceedings. It should therefore be possible to deal with interlocutory and procedural issues more rapidly in arbitration proceedings than before the courts. In particular, it will not be necessary to wait for issues to be argued through an appeal process before the courts.

53. In class action arbitration proceedings, the tribunal can use a number of procedural tools, including phasing the proceedings; for example hearing and deciding on jurisdictional issues at an early stage. They can also be creative in dealing with evidence, for example they could impose requirements for "sampling" of evidence (rather than reviewing every document or hearing from every witness); they can require reports from experts summarising the documentary evidence and they can limit the extent of cross-examination.

54. There may also be cost advantages in pursuing claims through arbitration proceedings rather than in court. If the dispute is dealt with more quickly in arbitration proceedings, that should reduce costs. It may also be possible to commence the proceedings rapidly, without the payment of a

[8] www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Malaysia/index.php

[9] *Abaclat and others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility of 4 August 2011.

[10] *Ambiente Ufficio S.p.A and others v Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility of 8 February 2013.

[11] *Giovanni Alemanni and others v Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility of 17 November 2014.

filing fee. There are very few procedural requirements around the content of a request for arbitration. The claim itself can be phrased in very broad terms. With no filing fee and a generally worded Request for Arbitration, the claimants can get the claim off the ground with very little outlay. Once the claim is commenced, that may encourage additional claimants to join the proceedings.

55. There will likely be a need to pay funds on account as soon as the Tribunal is appointed. However, if the request has been served and additional claimants are starting to join the group, it is more likely that the group will be able to gain the support of a third party funder (if they do not already have one involved).

56. In most cases a defendant to a class or group action is likely to prefer to defend the claims in court rather than in arbitration proceedings. Group actions tend to involve numerous interlocutory applications and challenges (generally raised by the defendants). Often the rulings are appealed as far up the line as they can go. The defendant generally aims to reduce the class on jurisdictional and procedural grounds, require a substantial security for costs payment and to have the claim dismissed at or before the liability stage.

57. However, where a defendant considers that it is on strong grounds and that the claim is really just a nuisance suit, it may wish to go to arbitration to swiftly obtain an award declaring that it has no liability. A defendant may also wish to obtain a swift decision on jurisdictional or limitation issues (for example, to limit the size of the class).

58. A defendant may also prefer arbitration proceedings over court proceedings (where they have an option) to avoid the precedent effect of a court decision. If the defendant considers that there is a risk that they will ultimately be held to have some liability for the claimants' losses, the defendant may want to ensure (as far as possible) that the proceedings are private and the tribunal's ruling is confidential to the parties. If an "opt-in" group action is lost by a defendant in court proceedings, then it is possible that further groups of claimants could seek to bring their own subsequent claims.

59. The privacy and confidentiality offered by arbitration proceedings may also be attractive to a defendant to a group action where there are claims that the defendant has mistreated or overcharged their customers. Such claims could have a considerable adverse impact on a defendant if they get into the public domain, even if the claims are not ultimately upheld.

IX. Mediation and the settlement of group actions

60. Mediation is ideally suited to the settlement of group actions. Generally a claimant group will see a number of advantages to participating in mediation proceedings. A settlement at mediation will likely involve a pay-out much earlier than might be achieved through arbitration or court proceedings. If the proceedings are being funded by a third party funder, the claimant group will not suffer any cost disadvantage in going to mediation.

61. A defendant party may wish to go to mediation to gain a better understanding of the case being put forward by the other side. A defendant may also wish to gain access to the wider group (rather than just the representative claimant and his or her legal advisers) in order to temper the expectations of the group, particularly if it is felt that the lead claimant and his or her legal advisers

are being overly bullish in the position they are taking. A defendant may also wish to go to mediation if they consider that they have a measure of litigation or arbitration risk. Settling the claims at mediation may allow the defendant to save costs and to avoid reputational damage.

62. As with arbitration proceedings, mediation proceedings are private and confidential to the parties. Where there is public interest in the proceedings, the parties can generally agree on a joint press statement, confirming that the parties have settled their dispute and keeping the details of the settlement confidential. This can be an advantage for a defendant as other potential claimants will not know what result was achieved by the first set of claimants and will not know whether it is worth pursuing their own claims.

63. In any mediation process, the group of claimants will need to have a clear agreement as to who can make decisions to bind the group and what the extent of their authority will be. This can be an area of considerable dissension in group actions. One option is to give authority to a committee to decide by majority, or another option is to give authority to the lead or representative claimant. There also needs to be a process for deciding how any settlement sum (if there is one) is to be divided among the claimants. It is preferable to have a formula or agreed approach decided upon prior to the mediation. This means that the claimants need to have a clear understanding on the strengths and weaknesses of their case (and the strength of the claims of each group member) prior to engaging in the mediation.

64. Mediation and arbitration can be particularly useful to deal with the quantum stage of a class action, particularly where each claim needs to be separately quantified. Rather than taking up weeks and months of court time, the parties could agree to go to arbitration or mediation to resolve their differences on the quantification of claims.

65. Members of the Australian judiciary have given clear indications that they consider that mediation and arbitration can be used to good effect in class action proceedings, particularly at the stage of assessing damages. In *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 2*) VSC 212, the plaintiffs made a proposal for the claims to be classified by value and for the larger claims to be assessed at trial and for the middle and lower value claims to be referred to mediation. If settlement could not be achieved at mediation, then it was proposed that the remaining claims be referred to a special referee. Gillard J stated (at [83]) that:

> "In my view, the parties should seriously consider a regime whereby the claims are referred to an arbitration pursuant to r50.08. This procedure is only available if the parties consent. However, it has the advantage that usually arbitration awards are final and the avenues open to dispute the findings are limited…".

66. Wilcox J of the Federal Court of Australia presented a paper on Class Actions in Australia in 2003. In his paper he described the procedures for dealing with quantification of claims in the case of *McMullin v ICI Australian Operations Pty Ltd* (1997) 72 FCR 1. He noted that as the circumstances relating to the assessment of damages payable to each group member varied enormously, there was no escape from individual assessment of the claims. However, the parties selected a few cases that raised major points of principle. Those cases were heard over a few days and rulings were made. The parties then entered into negotiations in relation to individual cases, exchanging information in accordance with directions made by the Court and with mediation in many cases

by a Court officer. In two or three cases, the claims were not settled at mediation and damages in those cases had to be determined by a judge. All the rest were agreed.

X. Conclusion on the future of class action claims in New Zealand

67. Notwithstanding the continued debate over reviving a set of class action rules, the lack of such rules does not seem to have impeded the progress of several significant class actions to date. The view of these authors is that class action litigation and ADR is only likely to increase, albeit that there will be two potential impediments. Those are:

    a. The appetite of litigation funders. For the reasons discussed, litigation funding and class actions tend to go hand in hand. Overseas-based litigation funders (who have had a key role in the development of class actions in New Zealand to date) are investing in a market which is much smaller than others they may have dealt with, and where the returns may be significantly less than what they are accustomed to. There have been no successes to date for those funders (the *Feltex* case was a loss but is being appealed). The funders' attitude towards investing in the New Zealand market will likely be influenced by the outcomes of those major class actions on foot or about to be filed in New Zealand.

    b. What the regulators do. In a number of areas regulators may have the power to bring proceedings and obtain relief on behalf of persons who might bring a class action proceeding for the same or similar loss. For example, the Commerce Commission has the ability to obtain compensation orders on behalf of consumers under the Fair Trading Act 1986, the Commerce Act 1986 and the Credit Contracts and Consumer Finance Act 2003. The Financial Markets Authority may (by High Court order) claim on behalf of persons with the same interest or substantially the same interest who are subject to a breach of the Financial Markets Authority Act 2011. If the regulators are active on certain issues there may not be the rationale or the desire for a class action to proceed along similar lines.

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