

Class Actions

Contributing editors

Jonathan Polkes and David Lender



2019

GETTING THE
DEAL THROUGH

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Jonathan Polkes and David Lender
Weil, Gotshal & Manges LLP

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This article was first published in December 2018
For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

© Law Business Research Ltd 2018
No photocopying without a CLA licence.
First published 2015
Fourth edition
ISBN 978-1-78915-000-1

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Introduction – GTDT Class Actions	5	Japan	43
Jonathan Polkes and David Lender Weil, Gotshal & Manges LLP		Oki Mori and Eri Akiyama Nagashima Ohno & Tsunematsu	
Argentina	6	Korea	48
Gastón Dell’Oca and Federico Sánchez Cortina Forino – Sprovieri – Dell’Oca – Aiello – Attorneys at Law		Joo-young Kim and Jeong Seo Hannuri Law	
Australia	9	Mexico	51
Colin Loveday and Andrew Morrison Clayton Utz		Adrián Magallanes Pérez Von Wobeser y Sierra, SC	
Austria	13	Portugal	56
Alexander Klauser Brauneis Klauser Prändl Rechtsanwälte GmbH		Sandra Ferreira Dias and Sandra Jesus Caiado Guerreiro	
Brazil	17	Russia	59
Fernanda Ferrer Haddad, Ricardo Quass Duarte and Tiago Vaitekunas Zapater Trench, Rossi e Watanabe Advogados		Sergei Volfson and Elza Dauletshina Jones Day	
China	21	Switzerland	62
Frank Li, Yanhua Lin, Ellen Zhang and Tianyi Gao Fangda Partners		Philipp J Dickenmann CMS von Erlach Poncet Ltd	
Colombia	27	Taiwan	66
Nathalie Lozano-Blanco and Christian Cadena Lozano Blanco & Asociados		Alan TL Lin and Chun-wei Chen Lee and Li, Attorneys-at-Law	
Denmark	31	United Kingdom	70
Martin Christian Kruhl and Anders Julius Tengvad DLA Piper Denmark		Jamie Maples, Hayley Lund and Sarah Chaplin Weil, Gotshal & Manges (London) LLP	
France	35	United States	76
Céline Lustin-Le Core EBA Endrös-Baum Associés		Stacy Nettleton, Eric Hochstadt, David Singh, Luna Barrington, Matthew Connors and Erin James Weil, Gotshal & Manges LLP	

Preface

Class Actions 2019

Fourth edition

Getting the Deal Through is delighted to publish the fourth edition of *Class Actions*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would like to thank the contributing editors, Jonathan Polkes and David Lender of Weil, Gotshal & Manges LLP for their assistance with this volume. We also extend special thanks to Joel S Feldman and Joshua E Anderson of Sidley Austin LLP, who contributed the original format from which the current questionnaire has been derived, and who helped to shape the publication to date.

GETTING THE
DEAL THROUGH 

London
November 2018

Taiwan

Alan TL Lin and Chun-wei Chen

Lee and Li, Attorneys-at-Law

1 Outline the organisation of your court system as it relates to collective actions. In which courts may class actions be brought?

The Taiwanese court system can be roughly divided into civil tribunals, criminal tribunals, administrative courts and intellectual property courts. Group actions can be brought in civil tribunals and intellectual property courts. A civil complaint should be filed with the district court for the first instance trial. Generally speaking, the decision rendered by the district court can be appealed to the High Court, and the High Court judgment can in turn be appealed to the Supreme Court.

2 How common are class actions in your jurisdiction? What has been the recent attitude of lawmakers and the judiciary to class actions?

As explained in question 3 below, in Taiwan, there are four types of group actions, with joinder of parties being the most common type. In order to resolve disputes arising from contemporary lifestyle and business transactions, the group action system was introduced by the Consumer Protection Act in the 1990s. Subsequently, it extended its reach to protection of securities and futures investors, and individuals whose personal data are illegally collected, processed or used. The group action system under the Code of Civil Procedure (CCP) was further expanded in 2003 to include Types C and D group actions. (See question 3 for each type of group action under the CCP.)

In June 2018, a bill to facilitate employment group actions was sent to the legislature for deliberation. All the legal amendments point to one trend – group actions have become more prominent in civil suits.

Having said that, group actions in Taiwan remain relatively rare, compared with other types of civil actions. There are no statistics on what percentage of group actions are settled by the parties or adjudicated on the merits by the courts. The only public information available to us is that, up to May 2015, a total of 16 consumer class actions were concluded by the court, excluding those ultimately settled by both parties. The numbers of group actions brought on behalf of securities and futures investors in the past five years are six in 2013, five in 2014, 10 in 2015, eight in 2016 and 18 in 2017.

The judiciary has been fairly neutral towards group actions – group actions are permitted by the court as long as the statutory requirements are met.

3 What is the legal basis for class actions? Is it derived from statute or case law?

Taiwan adopts the civil law system and therefore the legal bases for group actions are stipulated in statutory laws. Below is a brief description of the four types of group actions permitted by the CCP. As can be seen below, the system in Taiwan is different from that in the United States in that Taiwan adopts an opt-in mechanism where the express consent of each de facto claimant to join the lawsuit is required. For the avoidance of confusion, throughout this chapter of this book, we refer to Taiwan's system as 'group actions', rather than 'class actions'.

Type A – joinder of parties

Article 53 of the CCP provides that two or more persons may be a party to the same lawsuit in certain situations, namely:

- where the rights or obligations that are the claims of the suit are common to them;
- where the rights or obligations that are the claims of the suit are based on the same factual or legal grounds; or
- where the rights or obligations that are the claims of the suit are of the same type and the factual or legal grounds on which the claims are based are also the same type; provided, however, that the domiciles of the defendants must be located in the jurisdiction area of the same court or the suit must be subject to a common court as provided by articles 4 to 19 of the CCP.

Type B – lawsuit brought by appointees

According to article 41 of the CCP, multiple persons having a common interest may appoint one or more persons from among themselves as the appointees to institute a lawsuit on behalf of the appointees and appointers.

If a Type B group action is initiated owing to public nuisance, traffic accidents, product defects or by claimants who have a common interest owing to the same factual grounds, the court may, after obtaining consent from the appointees, or pursuant to the motion of the appointees that the court finds appropriate or application by other persons with a common interest, publish a notice requesting other persons with a common interest to apply to join the suit by specifying the facts, evidence and relief sought within a specified period of time (article 44-2 of the CCP). The persons who come forward and make an application based on the public notice of the court are deemed to have made an appointment under article 41 of the CCP.

Type C – lawsuit brought by an appointed incorporated non-profit association

Pursuant to article 44-1 of the CCP, members of the same incorporated non-profit association who have a common interest, may appoint such association to institute a lawsuit to the extent consistent with the purpose of said association as stated in its charter documents.

Type D – representative lawsuit

Article 44-3 of the CCP provides that, with the approval of the competent authorities and to the extent consistent with the purpose stated in its charter documents, an incorporated non-profit association or foundation may institute a lawsuit against a person who has infringed upon the rights of multiple persons to seek injunctive relief prohibiting specific acts. In order to obtain approval from the competent authorities to initiate a suit under article 44-3, an incorporated non-profit association or foundation must satisfy the following conditions:

- the incorporated non-profit association must have 500 or more members; the value of the registered assets of the foundation must be NT\$10 million or higher;
- the initiation of a suit for injunctive relief is consistent with the purpose of the association stipulated in its charter documents and has been approved by its board of directors; and
- at least 20 people are alleged to have been harmed by the defendant's actions.

In addition to the above, there are rules on group actions for specific areas of laws such as protection of consumers and securities and futures investors.

Consumer Protection Act

Similar to article 44-2 of the CCP, article 54 of the Consumer Protection Act provides that when multiple persons who have suffered damages owing to the same consumer relationship appoint one or more persons to institute a lawsuit pursuant to article 41 of the CCP, the court may, after obtaining the consent of the appointees, publish a notice requesting other victims to join the suit by submitting an application to the court specifying the facts, evidence and relief sought.

Articles 49 and 50 of the Consumer Protection Act provide that a qualified consumer protection organisation may institute a lawsuit in its name after at least 20 consumers who have suffered from the same factual grounds assign their rights to claim to such consumer protection organisation. To be a qualified consumer protection organisation, the organisation must have been established for two years or longer, retained a staff for consumer protection matters and been given a rating of 'excellence' in an appraisal by the Executive Yuan. The consumer protection organisation must engage legal counsels for this type of lawsuit. The suit would not be affected if during the proceeding any of the consumers terminate the assignment and as a result the consumer protection organisation receives assignments by fewer than 20 consumers. When a qualified consumer protection organisation institutes a suit based on article 50 of the Consumer Protection Act, the court fees for the portion of the claim in excess of NT\$600,000 should be exempted.

Article 53 of the Consumer Protection Act states that a consumer protection officer or qualified consumer protection organisation may petition the court for injunctive relief for a material violation of consumer protection regulations by business operators. Legal representation is also required for a suit brought under article 53 of the Consumer Protection Act. The qualification requirements for the consumer protection organisation are the same as those stated in the preceding paragraph. The plaintiff of this type of lawsuit is exempted from paying court fees.

Securities Investors and Futures Traders Protection Act

With regards to securities investments, according to article 28 of the Securities Investors and Futures Traders Protection Act (SIFTPA), in order to protect public interest, the Securities and Futures Investors Protection Centre, a 'protection institute' established under the SIFTPA, may initiate a lawsuit or arbitration in its name after receiving authorisation from 20 or more securities or futures investors who have suffered damage owing to the same cause.

4 What types of claims may be filed as class actions?

There are no laws prohibiting certain types of claims being filed as a group action under the CCP, except for a Type D group action, which can be instituted only for seeking injunctive relief.

5 What relief may be sought in class proceedings?

As noted above, a Type D group action may be brought to seek injunctive relief. The law does not impose any restriction on the type of relief that may be sought by Type A, B and C group actions or a group action under the Consumer Protection Act. As such, they can be initiated for seeking monetary damages, restitution or even injunctive relief.

6 Is there a process for consolidating multiple class action filings?

A Type A group action by its nature is a consolidation of claims. There are no rules requiring the consolidation of two or more separate suits with the same factual bases but pending in different courts.

In addition, as indicated in our reply to question 3 above, when the alleged victims of public nuisance, traffic accidents, product defects or persons who have a common interest owing to the same factual grounds appoint one or more persons to initiate a Type B group action, the court may, with the consent of the appointees or at the motion of the appointees that the court finds appropriate or the motion by a person with a common interest, publish a notice requesting other people having a common interest to make a written submission specifying the facts, reasons, evidence and relief sought in order to apply for joining the suit. A similar mechanism is included in the Consumer Protection Act, as described in our reply to question 3.

7 How is a class action initiated?

A group action is initiated by filing a civil complaint with the court, as is the case for civil lawsuits in general. The plaintiff is not required to provide the defendant with an opportunity to cure the breach prior to filing the complaint.

8 What are the standing requirements for a class action?

Types A and B group actions can be brought by individuals. Type C group actions must be brought by an incorporated non-profit association, while Type D group actions must be initiated by an incorporated non-profit association or a foundation.

Group members must have a right to claim under the law owing to damage to their property or personality rights or owing to the death of their parents, spouse or children.

9 Do members of a class have to opt in or opt out of the action? Are class members notified that an action has been commenced on their behalf and, if so, how?

The members have to opt in for a group action. Because it is an opt-in system, the court will not notify the members that any action has been instituted on their behalf, nor will the members be bound by any court decisions on any group actions they do not opt in to. But where a Type B group action is filed, with all the requirements under article 44-2 of the CCP met, the court will notify potential group members of the pending action. See question 3 for details. The notice should be posted on the court's bulletin board and published in official gazettes, newspapers, or other similar means of communication for a minimum of 20 days.

10 What are the requirements for a case to be filed as a class action?

See question 3. There is no requirement on the minimum number of persons to be included in the group actions brought forth under the CCP. For group actions initiated based on article 50 of the Consumer Protection Act and article 28 of the SIFTPA, the nominee claimants (the consumer protection organisation or the Securities and Futures Investors Protection Centre) must have received assignment of claims from or been authorised by at least 20 people to institute the group action.

11 How does a court determine whether the case qualifies for a collective or class action?

It is the court's responsibility to examine whether the group action satisfies the necessary elements under the law. As noted above, article 249 of the CCP provides that if there is any procedural defect of the complaint (eg, the elements of a group action are not met), the court may ask the plaintiff to rectify such defects first. The counterparty may also challenge whether the group action meets the legal requirements. The nominal party representing the group bears the burden to prove that its claim qualifies for a group action. The court may or may not hold a hearing just for discussing this issue. More often than not, this issue will be addressed together with other disputed issues in the judgment, unless the court finds it appropriate to make an interim decision as the suit progresses or decides to dismiss the suit altogether because the procedural requirements of a group action are not met.

12 How does discovery work in class actions?

In Taiwan, there is no discovery procedure where each party is required to present the evidence that it has collected before the court proceeding commences.

13 Describe the process and requirements for approval of a class-action settlement.

Approval of the court is not required for a class-action settlement. Once a settlement is reached, the plaintiff would revoke the suit.

Pursuant to article 55 of the CCP, in a Type A group action, a settlement reached by one person of the co-parties with the counterparty does not bind the rest of the co-parties. Therefore, any one of the co-parties is free to enter into a settlement with the counterparty.

For Types B and C group actions, according to article 44 of the CCP, an appointee has the right to conduct all acts of litigation for the appointees; provided, however, that the appointors may impose

Update and trends

The labour litigation bill was announced on 22 January 2018, and sent to the legislature for deliberation on 21 June 2018. The bill aims to make group actions more accessible to employees, allowing labour unions to file group actions on the employees' behalf under more lenient requirements.

restrictions on the appointee's right to revoke or abandon the claim, make concessions or enter into a settlement.

For a Type D group action, once the incorporated non-profit association or foundation institutes a claim for injunctive relief, it may not settle the case without approval from the competent authority.

14 May class members object to a settlement? How?

See question 13.

In addition, for a Type A group action, if only one or a few of the co-parties reach a settlement with the other party, the suit will continue to the extent related to the co-parties who have not settled with the counterparty. In other words, unless all the co-parties settle, the suit will not be closed. With regard to Type B and C group actions, as explained in our response to question 13, pursuant to article 44 of the CCP, if the members did not restrict the appointee's ability to settle, such members cannot object to the settlement once the settlement is reached.

A Type D group action does not have any member and thus this question is not applicable.

15 What is the preclusive effect of a final judgment in a class action?

For a Type A group action, the final judgment is binding upon the parties of the suit, including the co-parties, as they are all de facto and de jure parties to the suit. For Type B and C group actions, the appointers who have duly made the appointment of the nominee party will be bound by the judgment. In other words, because Taiwan adopts an opt-in system, any person who has not made the appointment is not bound by the judgment. In a Type D group action, any judgment received by the incorporated non-profit association or foundation does not affect the de facto claimants' rights to initiate a new suit on the same matter against the defendant.

16 What type of appellate review is available with respect to class action decisions?

Taiwan adopts a three-tier system for civil proceedings. Generally speaking, a civil complaint should be filed with the district court for the first instance trial, and can be appealed to the High Court in the second instance. Only cases with claim amounts higher than NT\$1.5 million can be appealed to the supreme court. The first and second instance courts would review the facts of the case, while the third instance court would review only the legal issues involved.

17 What role do regulators play in connection with class actions?

The regulators involved in a dispute depend on the nature of the claim. For instance, for an environmental dispute, the regulators involved will likely be the Environmental Protection Administration or the local environmental protection authority. Because the judiciary is independent from the administrative power, the regulators tend to stay neutral in a private dispute. However, in certain circumstances, the administrative authorities do provide litigation aid. See our response to question 21. If a party would like to access the regulator's files, it can motion for the court to order the files, to the extent that the files are related to the party making the request or the dispute.

Generally speaking, a group action settlement does not have any direct effect on pending or future regulatory action. However, the regulators may take into account if a settlement has been reached when determining whether to impose any penalty or punishment on the violator.

18 What role does arbitration play in class actions? Can arbitration clauses lawfully contain class-action waivers?

As a rule of thumb, the parties to a dispute are free to submit the dispute to arbitration on the condition that there is an arbitration agreement in

place or it is specifically provided for by the law. Because the arbitration agreement is reached based on the parties' consensus, we are of the view that a group action waiver would not be deemed null and void. Nonetheless, the legality of such waiver is subject to test in court.

In Taiwan, arbitration is playing a more important role than before in resolving disputes over financial products. As noted above, according to the SIFTPA, the Securities and Futures Investors Protection Centre may initiate a litigation or arbitration proceeding after receiving authorisation from 20 or more securities or futures investors who have allegedly suffered from the same cause.

19 What are the rules regarding contingency fee agreements for plaintiffs' lawyers in a class action?

According to the ethical rules for lawyers, Taiwanese lawyers may not charge contingency fees for family cases, criminal cases and juvenile cases. Because group actions are unlikely to fall within these three types of cases, there is no restriction on contingency fee arrangements.

20 What are the rules regarding a losing party's obligation to pay the prevailing party's attorneys' fees and litigation costs in a class action?

According to article 78 of the CCP, the losing party should bear the litigation costs. In the event that each party prevails in part, the court would determine the allocation of the litigation costs. Nonetheless, in such a situation the court may still order one party to bear the litigation costs in its entirety. Attorneys' fees are usually not treated as litigation costs and each party has to bear its own attorneys' fees except in special situations. However, according to the CCP, a reasonable amount of the attorneys' fees for the third instance should be deemed part of the litigation costs and borne by the defeated party pursuant to the court's decision. For instance, according to the relevant regulation published by the Judicial Yuan in 2003, for a property right dispute, the reasonable attorneys' fee for the third instance to be borne by the defeated party should be capped at 3 per cent of the claim amount or NT\$500,000, whichever is lower.

21 Is third-party funding of class actions permitted?

Yes. Funding from third parties is permitted. The most common types are: legal aid from the court; legal funding from the Legal Aid Foundation, a non-profit association established to provide free legal consultation and funding; and legal financing for mass layoffs from the Commission of Labour Affairs, the competent authority administering labour affairs.

Legal aid from the court

A party unable to afford the litigation costs can apply to the court for legal aid. To decide whether to grant the application, the court should look into the basic livelihood needs of the party and the relatives the party lives with as well as the party's chances of winning the suit. The application should be denied if the party is found highly unlikely to win.

Legal funding from the Legal Aid Foundation

The Legal Aid Foundation provides legal advice and representation to individuals that lack the financial means. Any person who is involved in a dispute but does not have the financial capability to retain a lawyer may submit an application to the Legal Aid Foundation. The Legal Aid Foundation will evaluate the merit of the case and the financial condition of the applicant to decide whether to assign a lawyer to the applicant and waive the attorneys' fees in whole or in part or reject the application. However, if the applicant prevails in the lawsuit and receives compensation of NT\$500,000 or more, the Legal Aid Foundation may request compensation for the attorneys' fees in whole or in part, depending on the amount of the compensation.

Except in rare cases, legal aid provided by the Legal Aid Foundation does not go to the following five types of civil matters:

- arbitration;
- election litigation;
- small claims;
- retrials; and
- bankruptcy matters.

Legal financing in mass layoffs

Legal financing in mass layoffs is meant to reimburse the employees for the attorneys' fees. The financial aid in each instance is capped at NT\$40,000 for each application. If an application is made by a group of workers, the cap can be raised to NT\$100,000, or NT\$200,000 if deemed justifiable. Any financial grant an employee has received from local labour authorities should be deducted from the financial aid.

22 Can plaintiffs sell their claim to another party?

According to article 297 of the Civil Code, the right over a debt may be assigned by the creditor to a third party; provided, however, such assignment is not binding upon the debtor unless the debtor has been notified of the assignment by the assignor or assignee. Therefore, the plaintiffs may sell their claims to a third party with the exception that, according to paragraph 2 of article 195 of the Civil Code, with respect to a claim for monetary damages for infringement of personality rights, the claimant may not transfer its claim to a third party unless it has entered into an agreement with the tortfeasor for the damages or instituted a suit for its claim (note that, however, such claims may be transferred to a consumer protection organisation under article 50 of the Consumer Protection Act). Upon the transfer of the claim, the plaintiffs should notify the defendant of the sale in order for such transfer of claim to be binding on the defendant.

Paragraph 1 of article 254 of the CCP provides that the transfer of the legal relationship that is the claim of a dispute pending in court would not have any impact on the litigation proceeding; and, if agreed by the parties or approved by the court, the third-party transferee may succeed to the transferor in the suit.

23 If distribution of compensation to class members is problematic, what happens to the award?

For a Type A, B or D group action, distribution of compensation would not be an issue. With regards to a Type C group action or a group action under the Consumer Protection Act or the SIFTPA, there is no statutory provision providing for the handling of the undistributed amount. The

undistributed amount would not revert to the defendant. The court does not have the authority to award the undistributed amount to a charity or consumer group. If the nominee party has difficulties in making distribution, it could deposit the undistributed amount with the court and if no one claims such amount, it may be forfeited to the state.

Note that, however, paragraph 2 of article 44-1 of the CCP provides that in a Type C group action that is a claim for damages, if the entire body of the appointers enter into a written agreement stating its consent to receive a lump-sum judgment and consensus on the distribution method of the damages awarded, the court may grant a lump-sum judgment without determining the amount to be distributed to each de facto plaintiff. The party that is awarded damages (eg, an incorporated non-profit association) should be responsible for making the distribution to the persons on behalf of whom or for whose benefit the suit was brought based on the agreement on a lump-sum judgment if it exists or the decision of the court.

24 Describe any incentives the civil or criminal systems provide to facilitate follow-on actions.

The most common incentive to encourage group actions is court fee exemption or reduction. Under the law, the court fees for a NT\$600,000 claim are the maximum a consumer protection organisation has to pay for filing a group action. If the action is filed to seek injunctive relief, the consumer protection organisation can be exempted from all the court fees. The NT\$600,000 threshold is also applicable to any incorporated non-profit associations or foundations authorised to bring group actions for individuals whose personal data are illegally collected, processed or used. As to the Securities and Futures Investors Protection Centre, the foundation created to protect securities and futures investors, the statutory threshold for reducing the court fees is NT\$30 million.

In addition, allowing attorneys dealing with class actions to seek necessary reimbursements and lowering the requirements for establishing non-profit associations or foundations eligible for filing group actions have been used by lawmakers to facilitate group actions.



Alan TL Lin
Chun-wei Chen

alanlin@leeandli.com
chunweichen@leeandli.com

7F, No. 201 Tun Hua North Road
Taipei 10508
Taiwan
The Republic of China

Tel: +886 2 2715 3300
Fax: +886 2 2713 3966
www.leeandli.com.tw/en/

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