

# Class actions under Argentine law: evolution, present status and perspectives

'Where there is right there is a legal remedy to enforce it, since constitutional rights exist and protect individuals just for being included in the Constitution and irrespective of its supplementary laws, whose limitations cannot make up an obstacle towards its effective validity'

## Introduction

The initiative of the Argentine Supreme Court of Justice as it passed judgment in re *Halabi, Ernesto v Poder Ejecutivo Nacional* – ley 25.873, decreto 1563/04 s/ amparo ley 16.986 (*Halabi*) dated 24 February 2009, is of great significance for Argentine law and for the development of class actions regarding individual homogeneous interests.

This judgment represents the culmination of a period of debate between the courts on collective rights that were included in the Argentine Constitution in 1994, and on the collective claims to enforce them.

The above considerations express what Argentine courts have long held: 'where there is right, there is a legal remedy'. This is so because the Argentine Constitution rights exist and protect individuals per se, irrespective of the existence of laws that regulate them.

As we will further analyse, the Supreme Court did not just rule mere statements. On the contrary, given the lack of regulations by the Argentine Congress, it set forth the basic guidelines for the procedure that will guide courts and individuals in the group claims filed to enforce collective rights regarding homogeneous individual interests or, as the Supreme Court stated, 'rights or in rem rights derived from harm to the environment and to competition, rights of users and consumers, as well as the rights of those discriminated against'.

This article analyses the evolution of collective actions, the highlights of the judgment as it creates a new procedure within our law, its inclusion in the legislation of certain Latin American countries, and finally we share some perspectives and our opinion on what should be the main takeaways of this ruling.

## Certain definitions necessary for our analysis

As the United States Supreme Court held in *Supreme Tribe of Ben Hur v Cable*,<sup>1</sup> a class action is a procedural untraditional tool that enables a person to represent a group of individuals affected by the infringement, or a threat of infringement, of a right, provided that the subject matter 'be of common or general interest to such a big number of people that it makes it impossible to bring all of them before the court'.

This action, given the nature of the rights at stake, implies that the judgment on a given case that sustained the plaintiff's claim, benefits not only him but also all those who share certain circumstances that serve as requirements for the case to proceed. Hence, the judgment will be enforceable against the defendant by those who, despite not having been parties to the trial, share the same legal or factual standing with the plaintiff. This new procedure aims to achieve celerity, procedural economy and access to courts, providing effective court protection to rights.<sup>2</sup>

## Amendments to the Argentine Constitution in 1994: its Article 43, and the background of *Halabi*

*'Any person shall file a prompt and summary proceeding regarding constitutional guarantees, provided there is no other legal remedy, against any act or omission of the public authorities or individuals which currently or imminently may damage, limit, modify or threaten rights and guarantees recognised by this Constitution, treaties or laws, with open arbitrariness or illegality. In such case, the judge may declare that the act or omission is based on an unconstitutional rule.'*

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*This summary proceeding against any form of discrimination and about rights protecting the environment, competition, users and consumers, as well as about rights of general public interest, shall be filed by the damaged party, the ombudsman and the associations which foster such ends registered according to a law determining their requirements and organization forms...* (Argentine

Constitution, Article 43; emphasis added).

The protection of three categories of rights grants the standing to sue and these are: (i) individual; (ii) collective; and (iii) individual homogeneous rights. Of these categories, two already had legal means established for their defense before *Halabi*.

Individual rights are protected by the traditional injunctive relief measure (*Acción de Amparo*) that was also a creation of the Supreme Court in the leading cases *Siri*<sup>3</sup> and *Kot*<sup>4</sup> and was later adopted by law No 16.896.

Collective rights (ie, rights for the protection of goods that belong to the community as a whole, goods that are indivisible and do not admit exclusion), were also already recognised by the courts and the legal commentators previous to *Halabi*. The defence of these rights can be led by the Ombudsman (*Defensor del Pueblo de la Nación*), consumer associations or the individual. For the claim to proceed, it has to fulfill two requirements: its object has to be the protection of a collective good, and it has to be focused on the collective effects despite the individual damages that might have emerged from the infringement.

As for individual homogeneous rights, Consumer Defence Law No 24.240 (as modified by Law No 26.631), had already admitted the protection of the rights declared in such body of law through collective actions.

Despite the abovementioned, this law could not fill the legislative void because it did not establish any substantial provisions for this type of proceedings. Although it did provide more elements for the protection of these rights, it left without mention basic procedural issues and without clearing the uncertainties for the potential affected individuals and for the judges as interpreters and the ones in charge of enforcing the law.

### ***Halabi* and the establishment of class actions in the Republic of Argentina**

Fortunately the Supreme Court intervened; it held from the outset that group rights are fully operational, that it is a judge's

duty to guarantee their effectiveness when they are infringed and the right to access the courts by the right's holder is severely restricted, and that, as was said, where there is a right there is an adequate legal remedy. Therefore, with the ruling in *Halabi* the Court granted full operational effectiveness to Article 43 of the Constitution.

Apart from such an important initiative, *Halabi* was the first case in which the Supreme Court declared a law to be unconstitutional erga omnes ('against all') reinforcing in that way the 'equal under the law' principle stated in Article 16 of the Constitution. The Court fulfilled in that way its mandate to be the head of the branch of government in charge of restoring the validity of the Constitution once it has been infringed. The head of the judicial branch did not violate the principle of separation of powers with this ruling; in fact it strengthened the Constitution by acting according to the purpose of such body of law and that is: to do what the Constitution orders or allows.<sup>5</sup>

We shall now highlight the relevant features of this creation of the Supreme Court, features that, as was mentioned, shall not only serve as guidelines for the judges and the parties in a case but also for lawmakers when drafting the law for the regulation of these proceedings.

Regarding standing to sue, the Court said it is 'perfectly acceptable' for an individual affected, the Ombudsman or certain associations to file a collective claim on behalf of the class.

It was stated that it is of the essence for this kind of proceedings to have a unique or complex deed causing damages to a substantial plurality of individual rights. Furthermore, the claim has to be focused in the common effects, not in the individual ones; hence, the existence of a cause or controversy is related to the homogeneous elements that the plurality of individuals have by being affected by a single deed.

Moreover, this type of action was created to prevent situations where the right to access the courts is restricted given the lack of economic incentives caused by the high costs of legal fees and of evidence gathering.

The collective action shall also proceed in those situations in which matters related to issues, such as the environment, consumption, health or damages to groups that have traditionally been neglected, become more relevant. This is because under certain circumstances the nature

of these rights – despite their singularity – exceeds the individual interest while at the same time showing a strong interest of the state for its protection.

We have already highlighted the *erga omnes* effect given to the *res judicata*, which is inherent to the nature of the collective action in virtue of the significance of the rights that are seeking protection (with the exception of the proof of the damages, which shall be determined in special proceedings or judgment enforcement proceedings).

A number of procedural requirements were established for the claim to move forward:

1. the identification of the affected group;
2. the adequacy of that who intends to represent said group;
3. the claim has to revolve around factual and legal issues, beyond any individual matter, that are common and homogeneous for the whole group;
4. an adequate procedure to guarantee the appropriate notice of all of those who might have interest in the outcome of the trial, in such a way that they can choose whether to ‘opt-out’ or to join the plaintiff or defendant side; and
5. the proper implementation of publicity measures to avoid the multiplication or overlapping of collective actions that have the same object which also helps to prevent the danger of contradictory rulings over the exact same factual and legal issues.

### Comparative law: the situation in Brazil and Chile

The Brazilian Constitution, in Article 5, states that it is a duty of the state to protect consumer rights. Consistent with that provision the Consumer Defence Code was enacted in 1990 which allows for the collective protection of diffuse, collective and homogeneous individual interests or rights.

In Brazil the class decree in class actions for damages is limited to the declaration of the defendant’s liability and each individual class member must bring an individual class action to prove causation and the amount or extent of the individual damages suffered.<sup>6</sup>

The Attorney General’s office, the Federal, State and Municipal Governments and the Federal District, are vested with the standing to sue on behalf of private plaintiffs in collective actions of any kind, regardless of the private or public nature of the claims. Other party representatives – like consumer

associations – can also intervene on behalf of claimants. These other representatives must fulfill several requisites, in order to ensure that they represent the class in a fair and proper manner. The CDC also enables the filing of claims against multiple defendants, by allowing plaintiff to pierce the corporate veil of different entities and consolidate claims against them in a single suit. In order to allow potential victims to opt-in, the CDC established a public notice system.

The CDC grants *res judicata* effects of the decision rendered in the declaratory phase to the general population or to any potential members of the group, class or category of plaintiff. The effects in class actions for the protection of diffuse or collective rights shall not adversely affect the individual interests and rights of the members of the class. And in the case of the class actions for the protection of homogeneous individual rights the absent members who did not intervene in the class action as co-parties may file individual damage actions.

Chile passed a reform to its 1997 Consumer Law (Law No 19,995 of 2004) expanding the protection of consumer rights with the establishment of three types of remedies: actions on behalf of the collective interests of a defined group of consumers linked to the defendant by a contract, actions on behalf of diffuse interests, and individual actions.

The collective and diffuse interest actions may be brought by the National Consumer Service (SERNAC), by a consumer association duly organised under the Consumer Law, or by a group of no less than 50 individuals. The Chilean consumer statute does not require the intervention of lawyers in the proceedings. However, when counsels are present, the statute gives the presiding judge power to require the plaintiffs to appoint one of them as the lead counsel. In terms of opportunities to intervene, the statute establishes an ‘opt in’ procedure for those who were not part of the original group of claimants, and also allows for the organisation of plaintiffs in different sub-classes.<sup>7</sup>

### Conclusions

Without a doubt this initiative of the Supreme Court is of great significance, not only for creating the collective actions but also because it shows again the preponderant role of the Court as a guarantor of the rights established in the National Constitution.

Regarding the collective actions as an

extraordinary procedural tool for the protection of individual homogeneous rights, it is expected that the Supreme Court will confirm the criteria adopted in *Halabi*.

It may have the chance to do so soon in a case related to in rem interests in which a consumer association has moved to have certain clauses declared ineffective. These clauses are part of the contract of adhesion drafted by a prepaid medical care company that is signed by its customers and allow said company to increase the value of the monthly payments at its discretion. We are referring to in re *Padec v Swiss Medical SA s/ nulidad de cláusulas contractuales*, in which the Attorney General has already passed judgment supporting the criteria adopted in *Halabi*.

It is certainly nice to point out the development of institutions that clearly aim towards increasing society's wellbeing.

In this sense it is also expected that the Legislative Branch understands the clear message sent by the Supreme Court and

once and for all regulate, as Brazil and Chile have already done, the class actions, using as models some bills that were introduced some time ago or the Model Code of Collective Proceedings for Latin America (*Código Modelo de Procesos Colectivos para Iberoamerica*), drafted by the Latin American Institute of Procedural Law (*Instituto Iberoamericano de Derecho Procesal*).

#### Notes

- 1 *Supreme Tribe of Ben-Hur v Cable*, 255 US 356 (1921).
- 2 Sabsay, Daniel Alberto 'El derecho a la intimidad y la "acción de clase"' LA LEY 2009-B, 401.
- 3 Fallos 239:459.
- 4 Fallos 241:291.
- 5 Bidart Campos, Germán J, 'Tratado Elemental de Derecho Constitucional Argentino', t II (El Derecho Constitucional del Poder), p 366, Buenos Aires, 1991.
- 6 Antonio Gidi, 'Class Actions in Brazil: A Model for Civil Law Countries' 51 Am J Comp L 11 (2003).
- 7 Manuel A Gomez, *Class Actions, Group Litigation and Other Aggregative Procedures in Latin America: A General Overview*, FIU Legal Studies Research Paper Series (2009).