



Adequacy of representation in Argentina: Federal Supreme Court's Case Law, Bills Pending before Congress and the Preliminary Draft of a New Civil Code

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Abstract: In the paper I describe how adequacy of representation has recently arrived to Argentina's legal system in the field of representative litigation. First of all, in the Federal Supreme Court's case law. Then, in some bills which are nowadays pending before Congress. Lastly, in the Preliminary Draft of a new Civil Code recently announced by the President and the Chief Justice of the Federal Supreme Court. I take a critical approach towards the issue, particularly because of the little attention paid to such a relevant aspect of representative proceedings.

Key words: Class Actions – Adequacy of Representation – Latin America – Argentine Civil Code – Collective Standing to Sue in Argentina



I. INTRODUCTION

The purpose of this contribution is to briefly describe how adequacy of representation has recently arrived to Argentina's legal system in the field of representative litigation. First of all, in the Federal Supreme Court's case law. Then, in some bills which are nowadays pending before Congress. Lastly, in the Preliminary Draft of a new Civil Code recently announced by the President and the Chief Justice of the Federal Supreme Court.

I take a critical approach towards the issue, particularly because of the little attention paid to such a relevant aspect of representative proceedings.

II. PUTTING THE ISSUE INTO CONTEXT

1. AN OVERVIEW OF ADEQUACY OF REPRESENTATION

Representative models of group litigation require a strong, capable, dedicated and experienced representative party, defended by legal counsel with similar features. And the reason for being that way is that, within those models, proceedings work assuming that the affected group of people is actually present in the debate. Not physically present, of course. It is just a fiction: they are deemed to be present through their representative.¹

We also need to take into account that *res judicata* of decisions taken in those kind of proceedings will affect the whole group represented by the plaintiff. The way those effects will operate depends on the system (*pro et contra, secundum eventum litis*, etc.), that is true. But a fact remains: a group of people will be affected in some way by judicial decisions taken therein.² Decisions taken within a proceeding led by a representative party that they did not

¹ Samuel ISSACHAROFF "Governance and Legitimacy in the Law of Class Actions", 1999 S.Ct. Rev. 337.

² Michele TARUFFO "I limiti soggettivi del giudicato e le 'class actions'", Riv. Dir. Proc. 1970, p. 609; Andrea GIUSSANI "Studi sulle class actions", CEDAM, Padova, 1996; Antonio GIDI "Las acciones colectivas y la tutela de los derechos difusos, colectivos e individuales en Brasil", UNAM, México, 2004, pp. 95-113.



choose. A representative party who –in turn- is led by legal counsel that was neither chosen by the group.³

In this context, concerns about restrictions on individual autonomy and on the right to have “a day in court” almost automatically appear on the scene. And that is precisely why it is so important –indispensable I would say- to control that the representative party and her lawyers are in conditions of defending the group in a vigorous manner and have no strong conflicts of interest that could undermine her role as such. As Nagareda puts it, the requirement “is not merely the creature of present-day procedural rules but, more importantly, a component of constitutional due process of law”.⁴

In order to perform the control over parties and counsel, courts have to analyze several and quite different factors.⁵ These factors can be established either by statute or by case law (once again depending on the system, on political decisions). Three examples of the former methodology would be: (i) FRCP 23 [Section (g) after the 2003 reform], which rules adequacy of representation regarding class counsel in the class action context;⁶ (ii) The U.S. PSLRA, which

³ Jay TIDMARSH and Roger H. TRANSGRUD “Complex litigation and the adversary system”, Foundation Press, New York, 1998, p. 535.

⁴ Richard A. NAGAREDA “The Law of Class Actions and Other Aggregate Litigation”, Foundation Press, New York, 2009, p. 76.

⁵ Regarding Courts’ power in this respect see “*Manual of Complex Litigation, Fourth*”, Federal Judicial Center, 2004, pp. 278-282.

⁶ FRCP 23(g): “Class Counsel. (1) *Appointing Class Counsel*. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court: (A) must consider: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class; (B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class; (C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs; (D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and (E) may make further orders in connection with the appointment. (2) *Standard for Appointing Class Counsel*. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class. (3) *Interim Counsel*. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action. (4) *Duty of Class Counsel*. Class counsel must fairly and adequately represent the interests of the class”. See Robert H. KLONOFF “*The Judiciary’s Flawed Application of Rule 23’s ‘Adequacy of representation’ Requirement*”, 2004 Mich. St. L. Rev 671, 699-701 (commenting on the reform). Prior to the 2003 reform several American federal Courts have already required the control over class counsel (see Robert H. KLONOFF and Edward. K. M. BILICH “Class Actions and Other Multi-Party



rules adequacy of representation in the context of securities class actions;⁷ and (iii) the Model Code of Collective Proceedings for Iberoamerica (art 2, parag. 2°), which rules adequacy of representation mainly following U.S. standards.⁸ An example of the latter methodology would be the traditional approach towards the requirement: as it is well known, standards which govern adequacy of representation have been developed by the judiciary almost exclusively interpreting FRCP 23(a)(4).⁹ In fact, standards incorporated in FRCP 23(g) by the 2003 amendments have been taken from federal case law ruling on that provision.¹⁰

In any case, whether written in a statute or not, there is always place for discretion and flexibility in deciding the issue. Particularly due to the fact that adopting a rigid and uniform approach in this field would be -as CAPPELLETTI put it- like using an ax to perform a delicate surgery.¹¹

Litigation: Cases and Materials”, West Group, 2000, p. 108; Jay TIDMARSH and Roger H. TRANSGRUD “Complex litigation and the adversary system”, Foundation Press, New York, 1998, p. 580; Richard MARCUS and Edward F. SHERMAN “Complex Litigation. Cases and materials on advanced civil procedure”, West Publishing Co., St. Paul, Minnesota, 1985, p. 318).

⁷ See Richard A. NAGAREDA “The Law of Class Actions and Other Aggregate Litigation”, Foundation Press, New York, 2009, p. 314 [“The PSLRA directs the Court to ‘appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of the class (...) The Act creates a rebuttable presumption ... that the most adequate plaintiff ... is the person or group of personas that (aa) has either filed the complaint or made a motion in response to a notice ... (bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure”].

⁸ Art. 2, Par. 2° “To determine whether adequacy of representation is fulfilled in the case, the court must analyze data such as: (a) the credibility, prestige and experience of the representative; (b) its record in the judicial and extrajudicial protection of group rights of the class she wants to represent; (c) her conduct in other collective proceedings; (d) the coincidence between the interests of class members and those of the representative party; and (e) the NGO’s time of incorporation and the representativity of this kind of organizations or the individual with respect to the group, category or class” (literal translation).

⁹ Even though “For all the agreement on the centrality of adequate representation to the modern class action - indeed, on its constitutional status- there remains remarkably little agreement on the content of that concept or how to enforce it” (Richard A. NAGAREDA “Administering Adequacy in Class Representation”, 82 Tex. L. Rev. 287, 288).

¹⁰ See the Advisory Committee Notes on the 2003 Amendment [“Subdivision (g) is new (...) Until now, courts have scrutinized proposed class counsel as well as the class representative under Rule 23(a)(4). This experience has recognized the importance of judicial evaluation of the proposed lawyer for the class, and this new subdivision builds on that experience rather than introducing an entirely new element into the class certification process”].

¹¹ Mauro CAPPELLETTI “Vindicating the public interest through the courts: a comparativist’s contribution”, Access to Justice, vol. III (Emerging Issues and Perspectives), Dott. A. Giufrè Editore, Milan, 1979, p. 561.



2. COLLECTIVE STANDING TO SUE IN ARGENTINA

Collective standing to sue is nowadays part of the Argentine Federal Constitution (“AFC”). The 1994 reform has incorporated a new art. 43, vesting standing to sue to affected individual persons, certain non-governmental organizations and the ombudsman. The aim is to allow them to defend “collective incidence rights” such as the right to a healthy environment and several consumer rights. A couple of statutes have followed this line, regulating standing to sue in those two fields of law.¹²

The General Environmental Act N° 25.675 (“GEA”), promulgated in 2000, includes a chapter which regulates some procedural aspects regarding environmental collective damage proceedings. Among the provisions included therein, art. 30 recognizes the right to promote these kind of proceedings not only to those social actors mentioned in art. 43 of the AFC but also to national, provincial and local governments. It also recognizes the right of “any person” to promote a collective action seeking to stop the polluting activity (in this case, excluding damages).¹³

The second statute I am referring to is the Consumer Protection Act N° 24.240 (“CPA”). Promulgated before the 1994 constitutional reform, its original content was deeply altered in 2008 by the Act N° 26.361. Even though the CPA can be considered as a substantive law, the 2008 reform has incorporated therein several provisions dealing with different aspects of collective proceedings. Among them we have to mention art. 52, which confers collective standing to sue to several social actors. As well as the GEA, the CPA goes far beyond art. 43 of the AFC. It empowers not only the social actors mentioned in that constitutional provision, but also the enforcement authority and the Public Ministry.¹⁴

¹² For more information on collective proceedings in Argentina, see in general Leandro J. GIANNINI “La tutela colectiva de derechos individuales homogéneos”, Librería Editora Platense Ed., La Plata, 2007; Francisco VERBIC “Procesos Colectivos”, Astrea Ed., Buenos Aires, 2007; José M. SALGADO “Tutela individual homogénea”, Astrea Ed., Buenos Aires, 2011.

¹³ Full text of the Act (in Spanish) available at <http://infoleg.meccon.gov.ar/infolegInternet/anexos/75000-79999/79980/norma.htm>

¹⁴ Full text of the Act (in Spanish) available at <http://www.infoleg.gov.ar/infolegInternet/anexos/0-4999/638/texact.htm>



Neither in the GEA nor in the CPA will you find provisions regarding adequacy of representation.

To sum up: collective standing to sue has explicit constitutional foundations in Argentina. The AFC and some statutes provide for that sort of standing not only to individuals but also to NGOs and public organisms. Apart from that pre-established recognition, there are no legal provisions at all demanding a control over the quality of the representative party.

III. ADEQUACY OF REPRESENTATION IN ARGENTINE FEDERAL SUPREME COURT'S CASE LAW: THE "HALABI" CASE

Having analyzed what adequacy of representation means in the context of representative proceedings and how collective standing to sue is currently regulated in Argentina, let us go on by explaining how the Federal Supreme Court ruled on the issue for the first and last time.

In February 2009 the Court decided the "Halabi" case.¹⁵ Ernesto Halabi was a lawyer. He had a mobile phone and also used Internet services. He felt affected by a federal statute that had allowed the revision of private phone communications without previous judicial order. Invoking professional secret (as a lawyer) and its condition of user of the mobile telecommunication system, he filed an "amparo" (a particularly quick and simple proceeding, at least in theory) seeking a declaration of unconstitutionality regarding both the statute and the Presidential Decree which regulated its implementation.¹⁶ Dr. Halabi won the case in first instance. The Court of Appeals affirmed and expanded the solution's binding effects (i.e. the *res judicata* of the judgment) to all users similarly situated. The government appealed only the collective binding effect of the decision (not the solution given to the constitutional issue).

When deciding the case, the Federal Supreme Court held that in Argentina is "perfectly acceptable" to file actions "with analogous characteristics and effects as U.S. class

¹⁵ SCJA in re "Halabi Ernesto c/ Poder Ejecutivo Nacional", 24/02/09, Fallos 332:111. All the SCJA cases are available online at www.csjn.gov.ar.

¹⁶ Act N° 25.873 and Executive Decree N° 1563/04 (the media referred to the Act as "the spy statute").



actions”.¹⁷ He labeled this sort of “Argentine class action” as “acción colectiva” and held that - even in absence of legislation- standing to sue provisions included in art. 43 of the AFC are fully operative and must be enforced by courts. The Court also enunciated what constitutional requirements are necessary for obtaining a valid opinion in terms of due process of law standards. Moreover, after underscoring the lack of an adequate procedural regulation enacted by Congress regarding representative proceedings, the majority of the Court made quite relevant remarks to provide some guidance in order to protect absent members in future uses of the “acción colectiva”.¹⁸ Among those remarks, the Court ruled that adequacy of representation is one of the “formal admissibility requirements” of any “acción colectiva”.¹⁹

The Court held that this requirement was fulfilled in the case at hand. It based that ruling on consideration of 3 factors: (i) the publicity given to a hearing that took place before the Court; (ii) the fact that the constitutional issue has been already solved in favor of the plaintiff; and (iii) the intervention of two important Bar Associations as *amici curiae*. It is not difficult to see that none of these factors has anything to do with adequacy of representation.²⁰

Hence, to sum up: the Federal Supreme Court took an interesting position in requiring that the representative party must be an adequate representative of class members’ interests. However, it did not provide for any useful guidance in order to know whether the requirement is fulfilled or not in a particular case.

¹⁷ Parag. 19° of the opinion.

¹⁸ Parag. 20° of the majority opinion.

¹⁹ The other conditions mentioned by the Court are: (i) there has to be a precise identification of the group of people that is being represented in the case; (ii) the claim has to focus on questions of fact or law common and homogeneous to the whole class; (iii) there has to be a proceeding capable of providing adequate notice to all people that might have an interest in the outcome of the case; (iv) that proceeding has to provide class members with an opportunity to opt-out or to intervene; and (v) there should be adequate publicity and advertising of the action in order to avoid two different but related problems: on the one hand, the multiplicity or superposition of collective proceedings with similar causes of action; on the other, the risk of different or incompatible opinions on identical issues (Par. 20° of the majority opinion).

²⁰ We have criticized elsewhere the way the Court dealt with the issue (see Eduardo OTEIZA and Francisco VERBIC “La Corte Suprema Argentina regula los procesos colectivos ante la demora del Congreso. El requisito de la representatividad adecuada”, RePro N° 185, Revista dos Tribunais Ed., Sao Paulo, p. 283.



IV. ADEQUACY OF REPRESENTATION IN BILLS PENDING BEFORE CONGRESS

After “Halabi” many legislators rush towards the introduction of their own bills to regulate class actions in Argentina. I guess they wanted to show the society that they were doing their job according to what the Federal Supreme Court has ruled in “Halabi”. Some of them even participated in academic meetings and workshops on the matter.

Up to date there are at least eight bills on the matter pending before Congress. Four of them are pending before the Senate. I am talking about Negre de Alonso’s bill (N° S-1045/11), Escudero’s bill (N° S-204/11), Bortolozzi’s bill (N° S-3396/10) and Lores’ bill (N° S-18/11). Another four are pending before the Chamber of Deputies. I am talking about Yarade and others’ bill (N° 5996-D-2010), Gil Lavedra and other’s bills (N° 2540-D-2011 and N° 4033-D-2011) and Camaño’s bill (N° 4055-D-2011).²¹

As we have already seen, the Court ruled that adequacy of representation is one of the “formal admissibility requirements” of any “acción colectiva”. However, the content of the bills pending before Congress creates serious concerns regarding the issue. The majority of the bills does not provide for anything at all about adequacy of representation. Some of them do include this requirement within their provision, though without taking into consideration some relevant aspects to make it work within the Argentine legal system.

Let us see.

Six bills do not include adequacy of representation at all among its provisions. I count within this number three of them that present quite peculiar provisions regarding how to choose the representative party.

The first one is Escudero’s bill. It provides for an election by class members through a majority vote system and among those candidates previously registered.²² Candidates may be both class members who are also lawyers and class counsel himself.²³

²¹All of them can be downloaded from the official website of both Chambers, available at <http://www.diputados.gov.ar/> (Chamber of Deputies) and <http://www.senado.gov.ar/> (Senate).

²² Bill N° S-204/11, Arts. 27.

²³ Bill N° S-204/11, Arts. 22.



The second one is Negre de Alonso's bill. It rules that the representative party will be "the lawyer or group of lawyers who prove to be agents of the bigger number of class members".²⁴ Yes, you are reading well: the representative party is the lawyer with more clients.

Lastly, we have Lore's bill. It states that adequacy of representation is a "class action requirement".²⁵ However, there are at least three problems with it. First, it does not include any standard to assess whether the requirement is fulfilled or not in a particular case. Second, it does not provide for any certification stage or certification order. And third -the most serious problem of all-, the very same bill states that "The election of the representative party will be done through vote among class members. The class member who obtains the higher number of votes will be in charge of representing the class".²⁶

Allow me to insist on something obvious before moving on: majority of votes or majority of clients have little to do (if anything) with adequacy of representation in the context of representative proceedings like class actions. That is why I mentioned these three bills among those without provisions on the matter.

There are two bills which do regulate the issue, reproducing almost exactly FRCP 23(a)(4) wording. As I have anticipated, I think this is not a convenient way to do it. At least not in a civil law country like Argentina.

Camaño's bill states that adequacy of representation is a requisite for the action and provides for a kind of certification order to establish whether this requisite is accomplished or not in the case at hand.²⁷

In a similar trend, Gil Lavedra and other's bill N° 4033-D-2011 states that "class representation should be adequate".²⁸ It also provides for a kind of certification stage,

²⁴ Bill N° S-1045/11, Art. 14.

²⁵ Bill N° S-18/11, Art. 3, par. 4°.

²⁶ Bill N° S-18/11, Art. 8.

²⁷ Bill N° 4055-D-2011, Arts. 1, par. 4° and 7.

²⁸ Bill N° 4033-D-2011, Art. 3, par. "d".



determining that the court must rule “on the admissibility of the action and adequacy of representation” fifteen days after the answer.²⁹

Neither of these two bills provide for standards to control the requisite. And that is why I postulate that they do not regulate the issue in a convenient manner. Taking into account Argentina’s legal system pedigree (I mean, the civil law tradition) and the fact that its courts have no experience at all controlling adequacy of representation, I think it would have been more than convenient to include some guidance within the bills in order to help courts doing their job.

V. ADEQUACY OF REPRESENTATION IN THE PRELIMINARY DRAFT OF A NEW CIVIL CODE

The last development regarding adequacy of representation happened just some months ago. More precisely, at the end of March 2012 when the President and the Chief Justice of the Federal Supreme Court presented together the Preliminary Draft of a New Civil Code.³⁰ The original version of the Preliminary Draft included several provisions regarding collective proceedings and collective rights. However, almost all of them have been eliminated by the Executive Power. Among the eliminated provisions was art. 1747, aimed to regulate “admissibility requirements” of collective damage proceedings.

Notwithstanding its pretentious title, art. 1747 content was mainly devoted to adequacy of representation.³¹ It began ruling as follows: “For the recognition of standing to sue in proceedings involving damage claims related to collective incidence rights or individual homogeneous rights, the plaintiff must have sufficient attitudes to assure an adequate defense of collective interests”. It also provided for several standards to assess that requirement. And these standards –fortunately- had nothing to do with those employed by the Federal Supreme Court in “Halabi”. In respect to this point, the aforementioned article states that: “among other factors, the court must take into consideration: a) plaintiff’s experience, records and economic

²⁹ Bill N° 4033-D-2011, Art. 15.

³⁰ The Committee that prepared the draft was appointed by the President through Decree N° 191/2011.

³¹ It also established a superiority and predominance requirement, very similar to that included in FRCP 23(b)(3).



solvency regarding protection of these kind of rights; b) the coincidence between class members' interests and plaintiff's claims".

VI. FINAL REMARKS

There are several reasons that could explain the reluctance of civil law countries to regulate class actions devices. As TARUFFO says, some of them are ignorance and negative propaganda, distorted perspectives and simple inertia.³²

In Argentina we need to fight against these factors in order to reach a reasonable regulation on the issue. We have no choice. On the one hand, collective standing to sue is part of our Federal Constitution; on the other, in the "Halabi" case the Federal Supreme Court has summoned Congress demanding such a regulation.

Notwithstanding this context and the essential constitutional character of adequacy of representation in representative schemes, neither the Court nor Congress have dealt with this requirement in a convenient way until now.

FULL BIBLIOGRAPHY (ALPHABETICAL ORDER)

- Andrea GIUSSANI "Studi sulle class actions", CEDAM, Padova, 1996.
- Antonio GIDI "Las acciones colectivas y la tutela de los derechos difusos, colectivos e individuales en Brasil", UNAM, México, 2004.
- Eduardo OTEIZA and Francisco VERBIC "La Corte Suprema Argentina regula los procesos colectivos ante la demora del Congreso. El requisito de la representatividad adecuada", RePro N° 185, Revista dos Tribunais Ed., Sao Paulo, p. 283.
- Federal Judicial Center "Manual of Complex Litigation, Fourth", 2004.
- Francisco VERBIC "Procesos Colectivos", Astrea Ed., Buenos Aires, 2007

³² Michele TARUFFO "Some Remarks on Group Litigation in Comparative Perspective", 11 Duke Journal of Comparative & International Law 405, 413-417 (2001).



- Jay TIDMARSH and Roger H. TRANSGRUD “Complex litigation and the adversary system”, Foundation Press, New York, 1998.
- José M. SALGADO “Tutela individual homogénea”, Astrea Ed., Buenos Aires, 2011.
- Leandro J. GIANNINI “La tutela colectiva de derechos individuales homogéneos”, Librería Editora Platense Ed., La Plata, 2007
- Mauro CAPPELLETTI “Vindicating the public interest through the courts: a comparativist’s contribution”, Access to Justice, vol. III (Emerging Issues and Perspectives), Dott. A. Giufrè Editore, Milan, 1979.
- Michele TARUFFO “I limiti soggettivi del giudicato e le ‘class actions’”, Riv. Dir. Proc. 1970, p. 609;
- Michele TARUFFO “Some Remarks on Group Litigation in Comparative Perspective”, 11 Duke Journal of Comparative & International Law 405, 413-417 (2001).
- Richard A. NAGAREDA “Administering Adequacy in Class Representation”, 82 Tex. L. Rev. 287.
- Richard A. NAGAREDA “The Law of Class Actions and Other Aggregate Litigation”, Foundation Press, New York, 2009.
- Richard MARCUS and Edward F. SHERMAN “Complex Litigation. Cases and materials on advanced civil procedure”, West Publishing Co., St. Paul, Minnesota, 1985.
- Robert H. KLONOFF “The Judiciary’s Flawed Application of Rule 23’s ‘Adequacy of representation’ Requirement”, 2004 Mich. St. L. Rev 671, 699-701
- Robert H. KLONOFF and Edward. K. M. BILICH “Class Actions and Other Multi-Party Litigation: Cases and Materials”, West Group, 2000, p. 108;
- Samuel ISSACHAROFF “Governance and Legitimacy in the Law of Class Actions”, 1999 S.Ct. Rev. 337.