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Class Actions in Argentina: the need for a wider scope to embrace judicial efficiency

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Abstract: This paper discusses the evolution and new trends on class actions in Argentina.

I. Introduction

The open call for papers for this World Congress was made for its sixth and final panel, dedicated to "Forms of relief", and required participants to focus *"on the contemporary evolution of forms of relief in consideration of the economic crisis and of the tendency to promote austerity measures"*. From within this frame, I will present some concerns regarding how the Argentine Supreme Court of Justice (ASCJ) has been dealing with class actions for damages since it recognized its viability in 2009.

Firstly, I will explain how class actions for damages have arrived to Argentina and why, even though judicial efficiency is one of the main inherent features of this kind of proceedings, the ASCJ has been reluctant to recognize it as a public policy goal which should be advanced through these sort of litigation.[1] Moreover, as we will see (and without any plausible

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[1] As it is well known, class actions efficiency arises from its very collective nature. That is, from the possibility of aggregating multiple common claims and discussing them within only one single proceeding [among others, see

justification), as a matter of principle the ASCJ has limited the scope of class actions for damages to cases where access to justice is compromise, expressly forbidding the file of class actions when there are enough individual interests at stake to justify individual lawsuits.

Secondly, I will argue that this limitation in the scope of class actions for damages in Argentina not only lacks constitutional, legal and principle foundations, but also goes against a federal judicial reality characterized by an extremely heavy caseload to deal with every year. Finally, I will sustain that –if maintained according to the rules established by the ASCJ case law- class actions in Argentina could advance judicial efficiency, as well as other relevant values to a democratic judicial system, without seriously compromising absent members of the class' due process rights.

II. A short overview on class actions for damages in Argentina

Thanks to the 1994 constitutional reform, collective standing to sue has acquired constitutional status in Argentina.[2] Since then, legislative developments in the fields of consumers and environmental protection have established some collective procedural provisions at the federal level as well.[3] But it was not until the ASCJ leading case *"Halabi"* that class actions for damages were fully recognized as a plausible means to litigate collective grievances in that country.[4]

Elizabeth J. Cabraser *"The Class Action Counterreformation"*, 57 Stan. L. Rev. 1475, 1479 (2005) (underlying the utility of class actions to provide a fair, efficient and cost-effective procedural device to adjudicate common questions of law and fact); Edward F. Sherman "*Aggregate Disposition of related cases: The Policy Issues"*, 10 Rev. of Litigation 231, 237 (1991) (arguing that *"Aggregation of cases promises savings by eliminating duplication and providing economies of scale"*); Communication 2013/401 of the European Commission of 11 June 2013, defining *"collective redress"* as *"a procedural mechanism that allows, for reasons of procedural economy and/or efficiency of enforcement, many similar legal claims to be bundled into a single court action"*].

[2] Art. 43, 2nd parag. of Argentine Federal Constitution (AFC) vests certain kind of NGOs, the ombudsman and the individual "affected" with the right to promote representative lawsuits.

[3] Consumer Protection Act N° 24.240, specially as reformed in 2008 by Act N° 26.361; General Environmental Act N° 25.675, enacted in 2002.

[4] ASCJ *in re "Halabi Ernesto c/ Poder Ejecutivo Nacional",* opinion delivered in 02/24/09, *Fallos* 332:111. For the evolution and main features of collective redress in Argentina see 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; Eduardo D. Oteiza (Coord.) *"Procesos Colectivos"*, Rubinzal Culzoni Eds., Buenos Aires, 2006.

In that precedent, a tight 4-3 decision, the majority recognizes the existence of constitutional *"homogeneous individual rights"* and held that in Argentina is *"perfectly acceptable"* to file lawsuits *"with analogous characteristics and effects as US class actions"* in order to vindicate them.[5] Before *"Halabi"* the ASCJ has systematically rejected cases where NGOs, individuals or the ombudsman were litigating collective cases involving patrimonial rights.[6]

Four years and a half passed before the ASCJ delivered another relevant opinion in this field of law. That happened when deciding *"PADEC v. Swiss Medical"*.[7] This was a class action filed by an NGO seeking declaratory and economic relief for insurance consumers, while *"Halabi"* was filed by an individual "affected" and has only involved declaratory relief. Even more important, the ASCJ opinion in *"PADEC"* applied the *"Halabi"* doctrine in full (including long quotations) and confirmed the fundamental features of what can be described as a hybrid model of class litigation in Argentina: a basis conformed by a classification of collective substantive rights, taken from the Brazilian tradition,[8] and specific procedural rules and safeguards in order to protect absent members of the class' due process rights, taken from the class actions regulated by the U.S. Federal Rule of Civil Procedure 23 (FRCP 23).[9]

Specifically regarding environmental and consumers protection, see Francisco Verbic *"Procesos colectivos para la tutela del medio ambiente y de los consumidores y usuarios en la República Argentina. Relatório Nacional (Argentina)"*, Civil Procedure Review, Vol.4, Special Edition, 2013, pp. 310-371

[5] Parag. 19° of the majority opinion.

[6] Among many others, FSC *in re "Colegio de Fonoaudiólogos de Entre Ríos c/ Estado Nacional s/ Acción de amparo"*, opinion delivered in 08/26/2003, *Fallos* 326:2998.

[7] ASCJ *in re "PADEC c/ Swiss Medical s/ Nulidad de cláusulas contractuales"*, opinion delivered in 08/21/13, file N° P.361.XLIII.

[8] For an explanation of the origins of Brazilian laws on collective litigation and the influence played by the civil law tradition in the way they implemented the system, see Antonio Gidi *"Class Actions in Brazil – A Model for Civil Law Countries"*, Am. J. Comp. L., Vol LI, Spring 2003, No. 2. For several doctrinal approaches to collective rights in Brazil, see Luiz Rodriguez Wambier *"Liquidação da sentençã civil individual e coletiva",* 4a edição, Revista dos Tribunais Ed., São Paulo, 2006, pp. 241-263; Freddie Didier Jr. and Hermes Zanetti Jr. *"Curso de Direito Processual Civil"*, T. 4 *"Processo Coletivo"*, 9a edição revista, ampliada e atualizada, Editora Jus Podivim, 2014, pp. 67-86. For a recent and comprehensive explanation of protection of homogenous individual rights, what I call here "class actions for damages", see Sergio Cruz Arenhart "*A tutela coletiva de intereses individuales"*, Revista dos Tribunais Ed., São Paulo, 2013.

[9] Including adequacy of representation, notice and opt out rights. See Francisco Verbic *"La decisión de la CSJN en ´PADEC c. Swiss Medical´. Ratificación de ´Halabi´ y confirmación de las bases para un modelo de tutela colectiva de derechos en Argentina"*, Revista de Derecho Comercial, del Consumidor y de la Empresa, 2013-B.

Both in *"Halabi"* and *"PADEC"*, as well as in several opinions delivered since then,[10] the ASCJ has sustained that the admissibility of collective lawsuits filed to vindicate homogeneous individual rights demands the fulfillment of four requirements:[11]

(i) A relevant number of individuals affected (similar to the *impracticability of joinder* prerequisite of FRCP 23(a)(1)).

(ii) A common cause of damages, explained as the existence of a single or complex fact causing the grievances suffered by that group of people (similar to the *commonality* prerequisite of FRCP 23(a)(2))

(iii) A pleading and a cause of action focused on the issues common to the class (somewhat similar to the *typicality* prerequisite of FRCP 23(a)(3)); and

(iv) Individual interests at stake should not be of such importance to justify individual lawsuits *"so that access to justice could be compromised"*.

Besides these admissibility requirements, the ASCJ has established -both in *"Halabi"* and *"PADEC"*, as well as in the following precedents- several procedural safeguards which she considered as *"essential"* to protect absentees' constitutional due process rights. Among them: a precise definition of the group, adequacy of representation (which must be *"supervised"* by the court), notice to absent members, class members' opt out and intervention rights, and publicity of proceedings in order to avoid parallel and overlapping litigation.[12]

III. The lack of foundations for this narrow scope

As we have seen, as a matter of principle the ASCJ forbids class actions for damages when individual interests at stake justify individual lawsuits (requisite (iv)). However, there are

[10] Among many others, ASCJ *in re "Unión de Usuarios y Consumidores c/ Telefónica Comunicaciones Personales S.A."*, opinion delivered in 03/06/14, file N° U.2.XLV; *"Consumidores Financieros c/ Banco Itaú Buen Ayre Argentina S.A. s/ ordinario",* file N° C.1074.XLVI, and *"Consumidores Financieros c/ La Meridional Compañía Argentina de Seguros S.A. s/ ordinario"*, file N° C.519.XLVIII, both opinions delivered in 06/24/14; *"Unión de Consumidores de Argentina c. CTI PCS S.A. s/ Sumarísimo"*, opinion delivered in 07/15/14, file N° U.24.XLVI.

[11] *"Halabi"*, parag. 13° of the majority opinion; *"PADEC"*, parag. 10° of the majority opinion.

[12] *"Halabi"*, parag. 20° of the majority opinion; *"PADEC"*, parag. 16° of the majority opinion. Regarding how the ASCJ and Argentine legislators have dealt with adequacy of representation since *"Halabi"*, see Francisco Verbic *"Adequacy of representation in Argentina: Federal Supreme Court's Case Law, Bills Pending before Congress and the Preliminary Draft of a New Civil Code",* Civil Procedure Review, v.3, n.3: 47-58, aug.-dec., 2012, pp. 47-58.

neither constitutional nor legal or principle foundations to sustain such a narrow view of the scope of class action litigation. Art. 43 of the AFC does not contain any sort of limitation in this sense. The same could be said about the consumer and environmental protection Acts.

The problem with such a kind of approach to the phenomenon of collective redress, which seems to be aligned with the European one regarding this issue,[13] is that it deprives class actions from one of the main advantages they could advance in contemporary litigation landscapes: judicial efficiency. Nevertheless, the ASCJ case law provides no explanation at all about why collective redress could only be performed in Argentina when access to justice is compromised. That is particularly striking if we take into account the fact that official statistics from the national and federal judiciary show a quite heavy caseload to deal with every single year (and, even though there are no statistics regarding this topic, everybody knows that many of those cases are repetitive and could be efficiently handled in an aggregative basis).[14]

[13] Article 1 of the European Commission Recommendation 2013/396 defines its purposes without mentioning judicial efficiency among tis goals: *"The purpose of this Recommendation is to facilitate access to justice, stop illegal practices and enable injured parties to obtain compensation in mass harm situations caused by violations of rights granted under Union law, while ensuring appropriate procedural safeguards to avoid abusive litigation"*. Efficiency value is only mentioned in that Recommendation in respect to ADR (parag. 16° of the preamble: *"Alternative dispute resolution procedures can be an efficient way of obtaining redress in mass harm situations…"*) and the enforcement of injunctive orders (art. 20: *"Efficient enforcement of injunctive orders"*).For recent developments on collective redress in Europe, see Stefaan Voet *"European Collective Redress: A Status Quaestionis"*, Int'l Journal of Procedural Law, Volume 4 (2014), No. 1, pp. 97-128; Elisabetta Silvestri *"Towards a Common Framework of Collective Redress in Europe? An Update on the Latest Initiatives of the European Commission"*, Russian Law Journal, Vol 1 (2013), No 1, pp. 46-56.

[14] In 2013 (last available statistics) the National Commercial Appellate Court, with jurisdiction only in Buenos Aires City, delivered 13.453 opinions, while Commercial Courts of First Instance (district courts) had 210.898 pending cases. The Federal Civil and Commercial Appellate Court, in turn, by the end of 2013 had 4.594 pending cases, while Federal Civil and Commercial Courts of First Instance (district courts) had 50.449 pending cases. Other forum which presents a huge number of repetitive litigation is the one dealing with social security lawsuits: The Social Security Federal Appellate Court has, by the end of 2013, 59.446 pending cases; while the Social Security Courts of First Instance (district courts) have 138.266 pending cases. All statistics available at http://www.pjn.gov.ar/07_estadisticas/Libros/Estadi_13/Indice13.htm (last visit 03/31/2015). Numbers at the ASCJ are equally compelling: in 2012 the Court delivered 9.586 opinions in "no social security cases" and 6.452 in social security cases; in 2013 a total of 15.792 opinions; and in 2014 a total of 23.183 opinions (these ASCJ opinions are not necessarily on the merits of cases, but they demonstrate the demanding caseload that must be faced every year by a Court which, nowadays, has only four Judges).

IV. An exception to the rule that seems to be broader than the rule itself

Perhaps in order to preserve her discretion on this delicate field of litigation -which generally tends to involve deep social, economic and political implications, as Professor Chayes underlined almost 40 years ago-,[15] the ASCJ established in *"Halabi"* an exception to the rule of "meritorious individual lawsuits" as a limit for class action litigation. An exception which has been replicated in *"PADEC"* and all its progeny.

According to this exception, collective redress would also be admissible when the case involves a *"strong state interest"* in the protection of the rights involved in the dispute (not a *"public interest"* but a *"state"* one, whatever it may implies). That state interest could arise either from *"the social significance"* of the rights in dispute (the ASCJ mentioned environmental, consumers and health rights), or from the *"particular features of the affected class"* (the ASCJ referred to *"traditionally disadvantaged or weakly protected groups"*).[16]

As it is quite easy to appreciate, the exception is so broad that it affords the ASCJ almost absolute discretion to deal with collective conflicts every time she wants to (even when individual actions are justified). I sustain that because consumers and environmental rights are the main fields of collective litigation in Argentina. And if we talk about disadvantaged or weakly protected sectors of the population, the spectrum could include several minority groups who are way beyond consumers and environmental fields. Last but not least, what sort of collective conflict would not demand a "strong state interest" in its peaceful, equal and just resolution? As it was stated, this exception almost deprives the rule of any meaningful content.

The ASCJ has already begun to make use of the broad discretion provided by this exception. In a recent opinion, she vacated a Federal Appellate Court opinion in order to allow the maintenance of a class action where an NGO is seeking declaratory and economic relief for a group of children, women, elders and disabled people.[17] In this precedent, the ASCJ sustained that, even though individual actions were justify due to the stakes in dispute, collective redress

[15] Abram Chayes *"The Role of the Judge in Public Law Litigation"*, Harv. L. Rev. Vol. 89, No. 7, May, 1976.
[16] *"Halabi"*, parag. 13° of the majority opinion; *"PADEC"*, parag. 10° of the majority opinion.
[17] ASCJ *in re "Asociación Civil para la Defensa en el Ámbito Federal e Internacional de Derechos c/ Instituto Nacional de Servicios Sociales para Jubilados y Pensionados s/ amparo"*, opinion delivered in 02/10/15, file N° CSJ 000721/2007(43-A)/CS1.

was still admissible because it was *"not possible to avoid the unquestionable social content of the rights involved in the dispute, which pertain to groups that must be subject to preferential protection by constitutional mandates due to their vulnerable condition"*.[18]

V. Closing. Judicial efficiency and other judicial values

I completely agree with the contention that *"efficiency is one value among other important values of justice and that there is no predefined lexical order ranking efficiency above other values such as neutrality, impartiality, factual and normative accuracy, accessibility, intelligibility, and legitimacy of dispute resolution mechanisms"*.[19] However, I think that efficiency has become a main character in the theatre of 21st century judicial systems because society has changed and, with it, the sorts of conflicts we are supposed to deal with. Departing from this pretty obvious premise, it is important to remember that class actions are a proven rational response to collective conflicts. And if we talk about Argentine context, it is also important to bear in mind that class actions are the only effective device we have at hand to deal with collective grievances nowadays.[20]

I repeat: neither the AFC, nor the statutory provisions regulating collective procedural devices (or any principle of the law), imposed a limit on collective adjudication based on the fact that individual actions could be justified because of the stakes in dispute. Moreover, the AFSC case law –as we have seen- has established strong procedural safeguards to protect absent class members' due process rights. If these procedural safeguards are to be respected, class actions for damages could achieve important judicial efficiency while, at the same time, strengthen other values which are so relevant to civil procedure within a democratic system in

[18] Parag. 9° of the Court opinion.

[19] Fabien Gélinas and Clément Camion *"Efficiency and Values in the Constitution of Civil Procedure"*, Int'l Jorunal of Procedural Law, Volume 4 (2014), n° 2, pp. 202-216, 206.

[20] The situation is quite different in the U.S. and even in Brazil, for example, where there are different ways to deal with collective conflicts [for the U.S. see Samuel Issacharoff (General Reporter) *"Principles of the Law of Aggregate Litigation"*, American Law Institute, 2010; for the Brazilian perspective, see Freddie Didier Jr. and Hermes Zanetti Jr. *"Curso de Direito Processual Civil"*, T. 4 *"Processo Coletivo"*, 9a edição revista, ampliada e atualizada, Editora Jus Podivim, 2014, as well as the regulations regarding repetitive litigation on the new code of civil procedure enacted in March, 2015].

contemporary societies (deterrence effect, access to justice, participation on the political arena, and equal outcomes for people similarly situated, among others).

However, in order to reach this goal we ought to embrace judicial efficiency as a relevant value by itself, and not simply as an indirect outcome of collective redress necessarily justified by other public policy objectives.[21]

[21] See Richard Marcus *"Procedure in a Time of Austerity"*, Int'l Journal of Procedural Law, Volume 3 (2013), No. 1, pp. 133-158, 135, 158 (stating, referring to the US, that *"For legal academics, austerity has not been a preoccupation. Procedural reform, in particular, has not been significantly preoccupied with governmental cost"*).