Guidelines for Recognizing and Enforcing Foreign Judgments for Collective Redress

Chief Justice Warren Winkler
Chief Justice of Ontario
and President of the Court of Appeal

John P. Brown
(Chairman)

Laura Christa

Eric Gertner

David Harris

Colin Loveday

Michael Reardon

Janet Walker

A Report of the International Bar Association Task Force on International Procedures and Protocols for Collective Redress

Guidelines for Recognizing and Enforcing Foreign Judgments for Collective Redress

1. Actions for collective redress can take many forms, including multi-party actions, group litigation, representative litigation or the most well-known form - class actions.

2. Collective redress legislation, particularly class action legislation was at one time the exclusive creation of the United States, Canada and Australia. Recently, however, it has found its way on to the legislative agendas in Europe, Asia and South America. More significantly, in March of this year the European Commission announced an initiative to study the viability of continent wide collective redress legislation.

3. Multi-jurisdictional collective redress actions involving claimants and defendants from different countries and legal regimes are inevitable as parties press for broader, and perhaps global, resolutions of collective redress claims. Model laws for enforcing conventional foreign judgments are not well-suited to deal with the unique due process, jurisdictional and other issues created by collective redress judgments.

4. The Consumer Litigation Committee of the International Bar Association created a Task Force to study the potential problems associated with judgments rendered in multi-jurisdictional collective redress actions. In particular, the objective of the Task Force is to draft guidelines that can be used to address the recognition and enforcement of a judgment for collective redress in a jurisdiction other than the jurisdiction in which the judgment is granted (the "Guidelines").[1]

5. Judgments for collective redress can be granted as a result of a settlement of an action or at the conclusion of a trial. In either circumstance, claimants from jurisdictions other than the jurisdiction in which the judgment is granted will wish to know if they are or can be bound by the foreign collective redress judgment, and if so, how they go about enforcing, or objecting to the enforcement of, that judgment. Similarly, defendants against whom the judgment is issued after a trial and more so, if it is issued as a result of a settlement, will wish to ensure that the judgment resolves their liability in respect of the broadest group of claimants possible.

6. Although the recognition and enforcement of a *class action* judgment in a foreign jurisdiction has been addressed in some countries with class actions, such as between the United States and Canada, the issue has not received much consideration in an international context or in respect of collective redress actions more generally.

7. The starting point for the Task Force in considering appropriate Guidelines was the existing law in each jurisdiction for the recognition and enforcement of a foreign judgment. The assumption is that, at a minimum, the requirements set out in the existing law would have to be met before a judgment for collective redress from one jurisdiction would be recognized or enforced in another jurisdiction.

[1] A list of the members of the Task Force is attached as Appendix A.

8. The Task Force then considered whether the general rules for the recognition and enforcement of a foreign judgment could be applied to a judgment for collective redress or whether additional rules would be necessary. In considering this question, the Task Force looked at the types of defendants and claimants against whom a judgment for collective redress might be enforced.

9. In regards to defendants the Task Force determined that it would address the preclusive effects in respect of named defendants only. The preclusive effect of judgments purporting to affect the rights of "absent" defendants (i.e. defendants who are not named but who are included in an action as a result of the governing legislation) is beyond the scope of the current Guidelines.

10. In regards to claimants, depending on the form of collective redress action, such claimants can include (i) the representative claimant(s) named in the action, (ii) claimants who are permitted to opt into an action for collective redress that is commenced by others, and (iii) "absent" claimants, i.e. claimants who are included in an action as a result of the governing legislation unless they take active steps to opt-out of the action ("Absent Claimants").

11. The Task Force concluded that Absent Claimants give rise to the most difficult issues, both substantive and procedural. Generally speaking, named claimants and claimants who opt in to an action cannot complain later if a judgment in the action is enforced against them. The effect of the judgment on their rights is usually contemplated by the rules for recognizing and enforcing judgments in named-party litigation. Accordingly, these guidelines will focus primarily on the questions that arise in respect of Absent Claimants.

12. With respect to substantive issues, a fundamental question is whether a collective redress judgment should be recognized regardless of the jurisdiction's criteria for permitting such an action or whether recognition should be available only where the statute or rules authorizing actions for collective redress impose certain minimum requirements.

13. On the procedural side, the issue is one of fairness and due process – what notice and opportunity to be heard must be provided to claimants, particularly Absent Claimants before a court from one jurisdiction should recognize a judgment for collective redress from another jurisdiction so as to bind all claimants.

14. Before the Task Force could consider what Guidelines might be appropriate it reviewed the relevant laws that should be taken into account in the different jurisdictions both for enforcing judgments and for permitting actions for collective redress. To do this, a uniform set of questions was developed and these questions were applied to the many jurisdictions considered by the Task Force. These jurisdictions included most European countries, the U.K., the U.S., Canada, Australia, New Zealand and a number of South American countries.[2]

15. Background reports which answered these questions were prepared for each jurisdiction. The Reports contained very useful information regarding the different approaches to collective redress in the various countries around the world. It was apparent from those Reports that there are significant differences in the legal regimes from jurisdiction to jurisdiction and from

[2] A full list of the questions considered by the Working Group of the Task Force is included in Appendix B.

continent to continent which highlight the challenges in attempting to draft Guidelines for enforcing judgments in collective redress actions globally.[3]

16. At the simplest end of the "enforcement" spectrum are jurisdictions such as Canada, the United States and Australia because each of these countries has true class action legislation in place. Presumably, these jurisdictions will be more open to enforcing collective redress judgments, particularly class action judgments, from other class action jurisdictions because each country is familiar with and permits similar types of class actions in its own jurisdiction.

17. At the other end of the "enforcement" spectrum are many European countries that do not have class action legislation, do not have the same legal regimes (e.g. civil law vs. common law) and do not legally recognize some aspects of class actions which are frequently seen such as punitive damages and contingency fees.

18. The difficulties of enforcing collective redress judgments posed by the different legal regimes in Europe may disappear if the European Commission introduces continent wide collective redress measures. The discussions relating to this initiative are ongoing. As a result, there is a unique opportunity to exchange ideas and information with the stakeholders relating to enforcement issues in the context of a continent wide approach particularly if the drafters of any such measures believe it is important that European judgments in collective redress actions should be enforceable in multiple jurisdictions.

19. In drafting these Guidelines the Task Force has sought to identify the fundamental and minimum procedural and substantive rights that should be addressed (and protected) in any collective redress action. In taking this approach, the Task Force did not seek to rewrite or displace any Conventions, Model Laws, treaties, legislation or case law in any jurisdiction for the enforcement of judgments. Just the opposite, the Task Force hopes that courts will continue to apply those longstanding and proven standards when considering the enforcement of judgments in collective redress actions and in doing so will use these Guidelines to assess whether certain specified substantive and procedural rights were properly addressed in the process that resulted in the collective redress judgment.

20. The Guidelines are deliberately limited in scope and are designed to be responsive to the obligations and needs of national decision makers and the judiciary. They are intended to demonstrate the advantages of enforcing collective redress judgments because it will promote judicial economy through well defined criteria for membership in the "collective group" on whose behalf an action is brought and through provisions preventing repetitive litigation between the parties.

21. During its deliberations the Task Force noted that a request to "recognize and enforce" a foreign judgment most commonly occurs when a foreign judgment creditor is trying to collect on the judgment. That is, a creditor is seeking to enforce an unsatisfied judgment obtained from a foreign country against a recalcitrant judgment debtor.

---

[3] The Background Reports were prepared by Laura Christa (United States), Michael Reardon (Europe and South America), David Harris (United Kingdom), Eric Gertner (Canada) and Colin Loveday (Australia and New Zealand). They may be contacted directly.

22. However, the Task Force anticipates that these Guidelines will only rarely be invoked in those situations. Rather, the Task Force contemplates that these Guidelines will be most commonly used in situations where the preclusive effect of a foreign judgment will be at issue so as to prevent an Absent Claimant from re-litigating a claim that has been resolved by a foreign collective redress judgment.[4]

23. These draft Guidelines are intended to be the beginning, not the end of the process. The Task Force plans to consult broadly with respect to the purpose and scope of the Guidelines and invites comment from interested parties. When completed the Guidelines will not be legal provisions. Rather, the Task Force hopes that these Guidelines will find general acceptance in the international legal and judicial communities as an aid in assessing whether a judgment for collective redress from one jurisdiction should be enforced in a second jurisdiction.

24. In short, the Guidelines are intended to be a description of the minimum procedural and substantive rights which a foreign court should be satisfied were addressed by the court which issued the original judgment before the foreign court should consider enforcing the judgment. These Guidelines are necessary because the existing judicial tests for analyzing traditional ordinary judgments are inadequate for assessing judgments in collective redress actions. Collective redress judgments are unlike any other judgments.

---

[4] The Task Force envisions that these Guidelines will most commonly be engaged in the situations described below.

Scenario 1

An action for collective redress is brought in country X against defendant A. The action is certified and the claimants, including Absent Claimant includes residents of country Y, none of whom opt out. The action is unsuccessful and the claim is dismissed. An Absent Claimant, who is a resident of country Y, brings an action there against A. A asks the court in country Y to recognize the judgment and asks the court to dismiss the Absent Claimant's action on that basis.

Scenario 2

Same facts as in Scenario 1 except the action for collective redress is successful. Nevertheless, the Absent Claimant brings an action in country Y against A because the Absent Claimant is not satisfied with the relief granted by the court in country X. A asks the court in country Y to recognize the judgment from country X and to dismiss the Absent Claimant's action on that basis.

Scenario 3

Same facts as Scenario 1 but the action is settled and the court approves the settlement, which is incorporated into a judgment. The Absent Claimant brings an action against A in country Y because the Absent Claimant is not satisfied with the relief granted by the court in country X. A asks the court in country Y to recognize the judgment granted by the court in country X and to dismiss the Absent Claimant's claim on that basis.

ARTICLE 1 - JURISDICTION

1.01 **It is appropriate for a court issuing a judgment for collective redress to have assumed jurisdiction to do so provided that, in addition to existing rules for recognition and enforcement, it was reasonable for the court to expect that its judgment would be granted preclusive effect by the jurisdictions in which claimants not specifically named in the proceedings would ordinarily seek redress.**

Commentary

Established rules exist on an international basis which can be applied to assess whether it is reasonable for the judgment issuing court to expect its judgment will be granted preclusive or *res judicata* effect in respect of most aspects of a traditional judgment. For example, existing conflict of laws rules provide for jurisdiction over:

(a) representative claimants who are named in the action;

(b) persons who submit or opt in to an action; and,

(c) non resident defendants.

A collective redress action introduces a new and different party to the litigation – the Absent Claimant, i.e. claimants who are included in a collective redress action as a result of the governing legislation unless they take active steps to opt-out of the action. Guidelines are required to address the preclusive effect of decisions on Absent Claimants because they have not expressly consented to and are not present/resident in the territory of the forum issuing the judgment.

1.02 **It is reasonable for a court issuing a collective redress judgment to expect its judgment to be given preclusive effect in respect of Absent Claimants by the jurisdictions in which the Absent Claimants reside if:**

(i) the results obtained for Absent Claimants are not patently inadequate in the circumstances

(ii) the interests of Absent Claimants have been adequately represented; and

(iii) Absent Claimants have been given adequate notice of the proceedings and an opportunity to opt out.

Commentary

Existing rules for *res judicata* in named party litigation preclude successful claimants from re-litigating. However, most collective redress judgments will involve a compromise. Counsel for an Absent Claimant seeking to bring a subsequent action will have an economic incentive to

argue that the claimants have not received an acceptable result and will naturally seek a detailed review of the claims and the resulting judgment in the original action. However, the Task Force recommends that such a review should not be permitted unless the results achieved for the Absent Claimants are patently inadequate. For example, such as in situations in which Absent Claimants received no individual recovery in the collective redress judgment but would likely receive some compensation if they had sued separately.

In considering this issue (and as is discussed in more detail under Article IV below) the court should consider whether the claimant was adequately represented in the proceeding in which the judgment was issued. The court should ask whether the process leading to the result provided a reasonable opportunity for the claimant to participate or for the claimant's interests to be taken into account in determining the result. The court should consider whether the claimant was given proper notice of the proceedings and an adequate opportunity to take steps to preserve the right to sue independently.

1.03 When there are multiple fora which are otherwise appropriate jurisdictions for a collective redress action, the forum or fora in the best position to process claims from an administrative standpoint, to have access to evidence and witnesses, and to facilitate adequate representation of the claimants and other parties should assume jurisdiction. Multi-jurisdictional court to court communication and cooperation should be implemented as needed for this purpose.

Commentary

In practice, this issue will rarely arise in sequential proceedings, but will routinely arise in cases in which the same or similar claims are pending or imminent in several courts. In such circumstances it will be necessary for multiple courts to decide which court or courts should assume jurisdiction taking into account the discussion above of likely preclusive effect.

Applying the above Guideline could result in a single proceeding or a combination of proceedings, possibly involving an arrangement in which one or more proceedings take the lead on some issues with judgments on those issues to be granted *res judicata* effect in the other proceedings.

Procedurally, the Task Force recommends that the IBA develop a web based registry to assist in alerting potential collective redress representatives and counsel to related actions existing or pending in other jurisdictions. Protocols should be developed for intervention in certification hearings or at an earlier stage in the proceedings by representatives of claimants who might be better served by the claim being brought elsewhere. Additional protocols could be developed for court-to-court communications and cooperation to facilitate these steps.

ARTICLE 2 – PERMISSIBLE CAUSES OF ACTION

2.01 **A judgment for collective redress based on the causes of action listed below should be enforced[5], if the judgment otherwise satisfies these Guidelines.**

(i) Tort, delicts or wrongful acts

(ii) Contract

(iii) Securities

(iv) Product liability

(v) Violation of Human rights

Other causes of action, including statutory, constitutional and anti-trust causes of action, should be considered on an individual basis and enforcement should not be refused simply on the grounds that the claim is novel or unique.

Commentary

1) *In personam* claims

National decision makers and the judiciary usually insist on being the primary authorities over questions dealing with real property and boundary disputes within their borders. Exclusive jurisdiction is also regularly claimed in other situations, such as those identified in Article 22 of the Brussels Regulation. A Guideline that allowed issues to be determined by a foreign tribunal in areas where an enforcing court regarded itself as having exclusive jurisdiction could meet resistance. Similar concerns would not be expected in connection with *in personam* claims. This is why the actions listed above (and which are described more fully below) are limited to *in personam* actions.

(a) Tort – Given the widespread acceptance of and familiarity with the rules governing torts in common and civil law jurisdictions, judgments based on these principles should enjoy general acceptance.

(b) Contract – As in the case of torts, judgments based on contract principles should enjoy general acceptance.

(c) Securities - There has been a recent trend toward international and even global securities class actions. Given that securities are often listed on more than one exchange, these developments should come as no surprise. Some of these claims may be brought in the form of

[5] For the sake of convenience the Task Force has used the term "enforcing" in these Guidelines as shorthand for "recognizing and enforcing".

tort claims and the above comment with respect to tort claims applies equally in this context. Other claims are based on statutory causes of action, similar to tort claims, and such judgments should generally also be recognized.

(d) Product Liability – The nature and scope of the underlying claim may be an important factor in the general acceptability of a Guideline encompassing product liability issues. For instance, a catastrophic incident (plane crash or hotel fire) may best be handled by an action for collective redress given the strong connection between a tort or defect and the immediate damage caused in a single incident to a defined group of persons. However, other product liability claims where there are many individual issues to be determined, such as those involving diverse individuals who claim to have been injured over a long period of time, may not be suitable for collective redress treatment.

(e) Violation of Human Rights – The general recognition of human rights, coupled with broad support of the principles set out in treaties, conventions and charters dealing with these rights, should result in a wide acceptance of collective redress judgments which address human rights issues.

2) Statutory Causes of Action

Many statutory causes of action are based on specific statutes, proposed, reviewed and adopted by national decision makers. A Guideline that accepted collective redress treatment, and recognition, of specific statutory causes of action, might be deemed to be overreaching by a country that had specifically decided not to enact its own statute providing for the specific causes of action set out in another country's statutes. Therefore, the Guidelines do not include such causes of action specifically, but leave open the possibility that they might be enforced on a case by case basis.

3) Constitutional Causes of Action

In many jurisdictions, particularly in European Union member states, there can be expected a residual reluctance to accept Guidelines that include a requirement to enforce collective redress judgments based on constitutional issues. This reluctance arises out of the recent debates concerning the acceptability of an EU Constitution, and the inherently national character of a constitution. National decision makers may be reticent to undertake an obligation to recognize decisions giving effect to foreign constitutional rights, particularly if such rights have not been adopted in the jurisdiction being asked to recognize those foreign rights.

4) Antitrust or Unfair Competition Claims

These kinds of judgments may not be readily enforced or recognized in another jurisdiction. Indeed, a number of jurisdictions have enacted legislation to restrict the enforcement of such judgments. Antitrust judgments have also been excluded from the draft Hague Convention on Jurisdiction and Enforcement of Judgments. Antitrust actions for collective redress should be subject to these laws as well.

ARTICLE 3 - PERMISSIBLE TYPES OF DAMAGES AND/OR RELIEF

3.01 A judgment for collective redress awarding the types of damages listed below should be enforced if the amounts awarded are not patently unreasonable.

(i) Pecuniary Damages

(A) Out of pocket expenses

(B) Wage losses

(C) Costs of medical and related care

(ii) Non-Pecuniary Damages

(A) Compensatory damages for pain and suffering

(B) Anticipated future wage losses

(C) Anticipated costs of future medical and related care

(iii) Economic damages

(iv) Punitive/Exemplary Damages

Commentary

If, in applying this Guideline, a court determines that an award of damages is patently unreasonable, the court need not refuse enforcement entirely. The court should still consider enforcing the judgment at least to the extent that similar or comparable damages could have been awarded in its own jurisdiction. That is, the court may still enforce the judgment in an amount no less than that which could have been awarded in its jurisdiction in similar circumstances.

1) Pecuniary and Non-Pecuniary Damages

The Task Force recognized that the social support systems can differ significantly from jurisdiction to jurisdiction. For example, a number of countries provide universal health care, or unemployment and disability payments or similar benefits that may result in a windfall for claimants in their own jurisdictions if they are entitled to recover the types of pecuniary and non-pecuniary damages described in the above Guideline.

However, the Task Force also noted that in most jurisdictions where such damages are available there are legislative or legal principles in place which are designed to address this issue of double recovery by taking into account payments received from other sources for such matters as health care or loss of employment when assessing the quantum of damages to be awarded. Therefore, the Task Force concluded that if the issue arises, it should be addressed by the parties involved in

obtaining the original judgment and should not be a matter which the foreign court should be required to address when determining whether to enforce the judgment in its own jurisdiction.

2) Economic Damages

Damages may be awarded for economic losses or for personal injuries. Contract and securities claims will give rise to damage awards for economic loss. Similarly, tort claims, such as claims for misrepresentations, may result in an award of damages for economic losses. These types of damages do not present enforcement and recognition difficulties. Indeed, these types of awards are in individual cases generally enforced and recognized.

On the other hand, as already noted above, because of the different social welfare systems that exist around the world, recognition and enforcement of personal injury damage awards can give rise to important legal issues.

2) Punitive Damages

The Task Force acknowledges there is a debate over the efficacy of punitive damage awards. Many jurisdictions do not permit or recognize punitive damage awards. Those jurisdictions that do allow such damages intend that they be awarded only where the behavior of the defendant satisfies certain statutory or judicial tests.

It is beyond the mandate of our Task Force to determine whether punitive damage awards are valid or viable. This Guideline proposes that such awards be enforced subject to the right of the foreign court to review a judgment and to refuse enforcement of a punitive damage award if the amount is "patently unreasonable".

3.02 A judgment for collective redress granting declaratory relief may be recognized provided it does not adversely interfere with the sovereignty of the jurisdiction in which it is to be enforced.

Commentary

Declarations can take many forms, from simple declarations that a contract has been breached as a basis for awarding damages, to more complex declarations that may impact on the sovereign rights of other jurisdictions if recognized.

One of the purposes of this Guideline is to permit the foreign court to distinguish the former types of declarations from the latter and to exercise its discretion in deciding whether to enforce the latter.

The Task Force recognizes the potential for issues arising relating to bifurcated proceedings or individual trials following a judgment for collective redress that addresses some but not all matters in an action by way of a declaration or otherwise. The Task Force anticipates that the parties involved in obtaining the original judgment will deal with these issues in the original

judgment and so they should not be a matter which the foreign court will be required to consider when determining whether to enforce the judgment in its own jurisdiction. It is beyond the scope of these current Guidelines to address the range of issues that may arise if the parties to the original judgment do not deal with these issues adequately.

ARTICLE 4 – REQUIRED PROCEDURAL RIGHTS AND PROTECTIONS

4.01 A court should be satisfied before enforcing a judgment for collective redress from another jurisdiction that the principles of natural justice and due process were adequately addressed by the court issuing the judgment.

Commentary

The Task Force noted that courts in most jurisdictions will refuse to recognize or enforce a foreign judgment that was obtained contrary to the principles of natural justice or absent due process. Natural justice and due process require that a litigant receive notice of the proceedings and is given an opportunity to be heard. A court may not be entitled to assume jurisdiction over a claimant, particularly an Absent Claimant if it has not accorded proper protection to natural justice principles and due process.

In the case of an opt-in regime (or a partial opt-in regime for non-residents, for example), recognition and enforcement of a judgment for collective redress against those who choose not to opt in should not give rise to any issues other than the issues that arise in individual or non-representative actions. On the one hand, a person who opts in has accepted the jurisdiction of the court and any judgment in the action should be binding on him or her subject to generally recognized exceptions (natural justice, public policy). A person who has a right to opt in but chooses not to do so should not be bound by a collective redress judgment.

In an opt out regime (i.e. in which Absent Claimants are made members of the group who are subject to the judgment for collective redress by the enabling legislation unless they "opt out" of the action), the requirements of natural justice and due process may give rise to problems. An Absent Claimant may not have received actual notice of the action; he or she may not have a right to be heard; and although the Absent Claimant may be "represented" by the representative claimant, he or she will not be represented by either a representative claimant or counsel of his or her choosing.

Natural justice and due process as requirements for recognition or enforcement of a foreign judgment have universal acceptance. They are recognized as necessary elements for due process in the United States. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). They have been accepted by the Supreme Court of Canada. See *Beals v. Saldanha,* [2003] 3 S.C.R. 416 and *Currie v. MacDonald's' Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321 (C.A.). The principles form part of the Brussels Convention. They represent the common law of Australia and New Zealand. See *Femcare Ltd v Bright* (2000) 100 FCR 331. They are enshrined in a number of bilateral treaties. See, *e.g.*, the *Reciprocal Enforcement of Judgments (U.K.) Act* (Ont.). The principles are also reflected in the Preliminary Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters. See Art. 28. See also the Hague Convention on Choice of Court Agreements, Art. 9.

Accordingly, the Task Force has focused on natural justice and due process considerations in proposing in the Guidelines set out below minimum procedural rights that should be reflected in a judgment for collective redress.

4.02 "Representative" claimants eligible to commence an action for collective redress may include individuals, corporations, partnerships and government appointed agents or ombudsmen and may be brought for the benefit of or on behalf of other individuals, corporations or partnerships.

Commentary

Conflict of laws rules for the recognition and enforcement of foreign judgments generally preclude the recognition or enforcement of a foreign judgment if the foreign judgment is contrary to the public policy of the recognizing jurisdiction or if the foreign judgment is based on a foreign law that would be characterized by the recognizing jurisdiction as a revenue, a penal, an expropriatory or a public law. The same rules should apply to judgments in actions for collective redress.

Because actions for collective redress in some jurisdictions may be brought by a governmental authority, it is important to provide that the mere fact that an action for collective redress is brought by such a person will not result in any judgment obtained in such a proceeding being characterized as based on a revenue, a penal, an expropriatory or a public law. This determination should be based solely on the nature of the substantive claim and not on the character of the person bringing the claim.

Moreover, this Guideline is not intended to be an exhaustive list of possible claimants, but is only intended to illustrate a range of possible claimants.

4.03 A judgment for collective redress should reflect that the following criteria have been satisfied:

(i) the pleadings disclosed a permissible cause of action (see Article II above);

(ii) there is an identifiable group of claimants that are represented by the representative claimant;

(iii) the claims of the claimants raised common or collective issues;

(iv) an action for collective redress was the preferable procedure for the resolution of the common issues; and

(v) there is a representative who fairly and adequately represented the interests of the group of claimants.

Commentary

It is important to keep in mind that the starting point for the Task Force in considering appropriate Guidelines was the existing law in each jurisdiction for the recognition and enforcement of a foreign judgment. The assumption is that, at a minimum, the requirements set

out in the existing law will be met before a judgment for collective redress from one jurisdiction will be recognized or enforced in another jurisdiction. These Guidelines are meant to supplement the existing law.

In order to ensure that actions for collective redress are adequately supervised by the courts in the jurisdictions in which they are brought and that only proper claims for collective redress are permitted to proceed the Task Force concluded that certain minimum criteria should be satisfied before a judgment for collective redress should issue.

The purpose of this Guideline is not to encourage the foreign court to review the evidence in the original proceedings to assess anew whether the above criteria were satisfied. Rather, the foreign court should determine whether the judgment itself reflects that the court issuing the judgment was satisfied that these criteria were met before issuing its judgment. In making this determination, the court may consider the additional explanations set out below.

1) Common or Collective Issues

The reference to common or collective issues is intended to include within the scope of these Guidelines judgments based on aggregated claims or claims that are held collectively by groups such as environmental claims or claims based on the rights of indigenous peoples.

2) Preferable Procedure

In determining whether a class proceeding was the preferable procedure for the resolution of the common issues, the court which granted the original judgment may take into consideration such matters as the following:

(a) whether questions of fact or law common to the class members predominate over any questions affecting only individual members,

(b) whether a significant number of the class members have a valid interest in individually controlling the prosecution of separate proceedings,

(c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings,

(d) whether other means of resolving the claims are less practical or less efficient, and

(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

3) Representative

In determining whether a representative fairly and adequately represented the interests of the group of claimants, the court which granted the original judgment may take into consideration whether the representative:

(a) produced a plan for the proceeding that set out a workable method of advancing the proceeding on behalf of the group of claimants and of notifying them of the proceeding, and

(b) did not have, on the common issues for the group of claimants, an interest in conflict with the interests of other claimants.

The above commentary in paragraphs 2 and 3 is not intended to suggest that the court which granted the original judgment must take into consideration the matters described therein. Rather, the commentary is intended to illustrate some matters which that court may have taken into consideration before granting a judgment.

4.04 A judgment for collective redress should include provisions that address and protect the procedural rights of all claimants including (i) the representative claimant(s) named in the action, (ii) claimants who were permitted to opt into an action, and (iii) Absent Claimants, i.e. those claimants who were included in the action as a result of the governing legislation and who did not take active steps to opt-out of the action. Without limiting the generality of the foregoing, these should include the provisions set out below.

(i) Claimants should be provided with due and adequate notice of the significant stages of the proceedings which resulted in the judgment. Wherever practical individual notice by direct mail or similar means should be considered.

(ii) Claimants should be given a reasonable opportunity to be heard at each such stage either in writing and/or orally and either in person or through a representative.

(iii) Claimants should be given the right to opt out of the proceeding and an adequate period of time to do so.

Commentary

Natural justice requires that similarly situated litigants be accorded equal (although not necessarily identical) treatment. This includes proper notice and the right to opt out. The adequacy of the notice must be assessed in terms of what is required in an international action for collective redress involving the assertion of jurisdiction against non-resident claimants. The right to opt out is of vital importance to establishing the jurisdiction of the court to grant a judgment in international collective redress litigation. The right to opt out must be made clear and plain to the non-resident claimants.

ARTICLE 5 - PERMISSIBLE COSTS AWARDS

5.01 **An award of costs or counsel fees on any of the bases listed below in a judgment for collective redress should be enforced unless the amount awarded is patently unreasonable.**

(i) Costs awarded on a time and materials basis

(ii) Conditional costs

(iii) Contingency fees

(iv) Disbursements

Commentary

The Task Forces recognizes that the ability to recover costs and the quantum of any such recovery varies widely from jurisdiction to jurisdiction, It also recognizes that in some jurisdictions claimants' counsel may have to take on significant risk and expense to prosecute an action for collective redress. In those jurisdictions costs awarded on a conditional or contingency basis can be a critical element of the collective redress regime and in such instances the amounts awarded are usually subject to judicial scrutiny for fairness and reasonableness.

Accordingly, in this Guideline the Task Force proposes that a foreign court enforce judicially determined costs awards unless the amounts awarded are patently unreasonable.

If, in applying this Guideline, a court determines that an award of costs is patently unreasonable, the court need not refuse enforcement entirely. The court should still consider enforcing the judgment at least to the extent that similar or comparable costs could have been awarded in its own jurisdiction. That is, the court may still enforce the judgment in an amount no less than that which could have been awarded in its jurisdiction in similar circumstances.

Appendix A

IBA Task Force on International Procedures and Protocols for Collective Redress

Chairman: John P. Brown (jbrown@mccarthy.ca)

NAME	RESIDENCE	AREA OF EXPERTISE
Canada		
Chief Justice Warren Winkler	Toronto, Ontario	Chief Justice of Ontario and President of the Court of Appeal appointed June 1, 2007. Appointed to the Superior Court of Justice (Ontario) June 1993. Designated by the Chief Justice to hear Class Proceedings in the Toronto Region in 1994 and team leader Class Actions, Toronto Region. Regional Senior Justice for Toronto Region of the Superior Court of Justice (Ontario) March 2004 to May 2007. Heard class proceedings involving Bre-X, Breast implants, Hepatitis C, Ontario New Home Warranty furnace pipes, TTC subway crash, Via rail crash, Tobacco litigation, TMJ implants, Walkerton Tainted Water, YBM Magnex stock fraud, Mad cow disease, Nortel, Native Residential Schools.
John P. Brown	Toronto, Ontario	Mr. Brown is a senior litigator at McCarthy Tétrault LLP, the Vice-Chair of the Consumer Litigation Committee and the Chairman of the Task Force. He has extensive experience representing major corporations and institutions, both international and domestic, in class actions involving a wide range of issues including worldwide price-fixing, product liability and illegal interest rates. His current matters include defending a class action brought on behalf of international airline passengers.

NAME	RESIDENCE	AREA OF EXPERTISE
Eric Gertner	Toronto, Ontario	Mr. Gertner was a staff lawyer with the Ontario Law Reform Commission for more than five years. During that time, he participated in the research, writing and editing of the Commission's Report on Class Actions (1982). The Commission's recommendations became the foundation for Ontario's *Class Proceedings Act*. Since the introduction of the *Ontario Act*, Mr. Gertner has acted as a legal adviser in a many class proceeding.
Janet Walker	Toronto, Ontario	Janet Walker is a Professor and former Associate Dean at Osgoode Hall Law School where she teaches crossborder litigation and arbitration. Janet has taught in Europe, Africa, the Middle East, Far East and South Pacific, and closer to home, as a Global Visiting Professor at NYU. She is the author of Castel and Walker: Canadian Conflict of Laws, the Halsbury's Laws of Canada volume on the Conflict of Laws and various other publications, many of which can be found at http://research.osgoode.yorku.ca/walker
Michael Donovan	Halifax, Nova Scotia	Mr. Donovan is the Director of the civil litigation practice group in the Atlantic region of the Department of Justice Canada. His Group is responsible for the civil litigation of the Government of Canada in the four Atlantic Provinces. They are currently defending class actions in areas such as: environmental damage (Sydney Tar Ponds); product liability third-party claims (Vioxx and "light and mild" cigarettes); and public law (non-status Indian rights in Newfoundland).
Russell Raikes	London, Ontario	Mr. Raikes' practice is commercial litigation and native law. He acts generally for plaintiffs, usually in public interest litigation.

NAME	RESIDENCE	AREA OF EXPERTISE
United States		
Richard Cohen	Weston, Florida	Mr. Cohen is licensed in United States Courts and is a class action settlement administrator. His job is to assist parties in the evaluation of their cases, design class member outreach that satisfies due process requirements, process claims, distribute funds and interact with class members via mail, phone and the internet. The areas involved include antitrust, consumer and securities matters.
Laura K. Christa	Los Angeles, CA	Ms. Christa's represents domestic and international clients in complex litigation matters involving contracts, securities, intellectual property, business torts and business-related disputes. She has a special interest in class actions and regularly defends clients against class action claims especially in the consumer and labour areas.
David A. Lowe	San Francisco, CA	Mr. Lowe's areas of practice include class actions throughout the U.S. and cross-border employment litigation. His class action practice, like his individual practice, focuses on employment claims, such as wage and hour cases, family leave cases, and cases involving mass layoffs.
Brian Murray	New York	Mr. Murray has represented individuals and institutions in class actions in America in securities cases and some antitrust cases, some of whom were foreign domiciles seeking redress in US courts because the remedies in their home country were inadequate.

NAME	RESIDENCE	AREA OF EXPERTISE
Australia		
Colin Loveday	Sydney	Colin Loveday is a partner at Clayton Utz and an experienced litigation (trial) lawyer specialising in the areas of product liability, class actions and multi-plaintiff tort claims. He has extensive experience in the defence of liability claims, particularly those matters involving prescription drugs or pharmaceuticals, medical devices, scientific and causation issues.
Europe (Other than the United Kingdom)		
Daan Lunsingh Scheurleer	Netherlands	Daan Lunsingh Scheurleer is a defense lawyer, practicing in The Netherlands. He represents financial institutions in representative actions (class actions Dutch style) brought by groups of investors and customers. These claims relate to issues such as alleged prospectus liability, breach of duty of care towards customers in selling investment products or in the giving of investment advice.
Natalie Vloemans	Netherlands	Ms. Vloemans works as an attorney in the Netherlands, mainly in the areas of insurance, liability and tort law. She has dealt and is dealing with representative actions in product liability and tort matters.
Michael Reardon	Switzerland	Mr. Reardon handles international litigation for Altria and its affiliated companies. He is involved, as a board member of the European Justice Forum, in participating in debates relating to law reform issues in Europe.
Christer A Holm	Sweden	Christer A Holm focuses mainly on professional liability, tort and product liability cases and is also a frequent adviser to large international brokers and insurance companies. Sweden has a new class action law and is the only country within the EU that has such class action legislation which is

NAME	RESIDENCE	AREA OF EXPERTISE
		based on the US system but with an opt –in choice. His firm's clients include companies in the pharmaceutical industry, the car industry and the food industry.
Gosse Oosterhoff	Amsterdam	Gosse Oosterhoff works at Nauta Dutilh in Amsterdam with a defence practice focussing on corporate litigation. Class actions, or the Dutch equivalent thereof, are a relatively new phenomenon in Dutch law, and his firm is working on the relatively small number of cases pending so far. The recognition of foreign class action judgments and settlements is currently being considered in the Netherlands in relation to the US settlement with Ahold; in which voluntary acceptance is being promoted because it cannot be legally imposed.
United Kingdom		
Frank R. Johnstone	Glasgow, Scotland	Mr. Johnstone is the Chair of the Consumer Litigation Committee. He is a leading authority on Consumer Credit issues. He is Convenor of the Law Society of Scotland's Consumer Law Committee, Convenor of the Society's Privacy Committee and a member of the Finance & Leasing Association's Data Protection Working Party.
Tim Maloney	London, UK	Mr. Maloney is the past chair of the Consumer Litigation Committee. He specialise in the management and negotiation of business disputes, including international commercial litigation, arbitration, fraud, professional negligence and media.
David Harris	London, UK	Mr. Harris' expertise is as a claimant's lawyer in group litigation for United Kingdom claimants both in the United Kingdom and in the United States. For the past 20 years he has acted almost exclusively in this form of litigation. He represents claimants who wish to bring actions predominantly in the High

NAME	RESIDENCE	AREA OF EXPERTISE
		Court in England (irrespective of whether they be United Kingdom citizens or not) and for United Kingdom citizens who wish to bring proceedings in the United States. His principal area of expertise has been within the pharmaceutical group/class actions.
Richard Matthews	Leeds, UK	Mr. Matthews' practice includes the defence of product liability claims and multi-party claims in the UK.
South Africa		
Ronald Bobroff	South Africa	Mr. Bobroff has practised law in Johannesburg for 35 years; since 1974 in the practice Ronald Bobroff & Partners Inc. Specialist Personal Injury and Medical Malpractice Attorneys situated in Rosebank, Johannesburg. He writes widely, locally and internationally.

Appendix B

IBA Task Force on International Procedures and Protocols for Collective Redress

Recognizing and Enforcing Foreign Judgments for Collective Redress

Questions to be Addressed in the Background Reports

1. What is the existing law in each country in you region for the recognition or enforcement of a foreign judgment?

The assumption is that, at a minimum, the requirements of the existing law will have to be met before a class action judgment from one jurisdiction would be recognized or enforced in another jurisdiction. These requirements are well known, and in large part are embodied in such documents as the *Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (Hague 1971)* and *Supplementary Protocol to the Convention on the Recognition and Enforcement of Foreign Judgments.* Many jurisdictions also have complementary case law. Please identify and briefly summarize the relevant law(s) in your region, and address specifically the following issues:

(a) jurisdictional requirements for the recognition and enforcement;

(b) due process and notice requirements; and

(c) defences to recognition and enforcement.

2. What system of law is applied in the countries in your region?

Is it a common law or a civil law jurisdiction?

3. What countries in your region permit class actions either by existing (or pending) legislation or pursuant to established case law?

The term "class action" is being used generically and is meant to include any form of collective action in which one representative plaintiff is permitted to bring an action on behalf of a class of people who have common and similar claims against on or more defendants arising out of the same events or series of events.

4. What formal rules for class actions have been adopted or are being considered in your country?

Formal rules may include both statutory rules and rules adopted by the judiciary, and may include both private law and public law mechanisms. Please attach copies of any existing or pending statutory provisions and/or rules.

5. What are the essential aspects of the formal rules for class actions?

Please summarize the provisions in the formal rules for class actions which address the matters set out below.

(a) Who may bring a class action; e.g. who or what may be the representative plaintiff?

(b) Who may be a class member; e.g. must claimants opt in to the action to participate or opt out if they do not wish to participate?

(c) Who may be a defendant; e.g. against whom or what may a class action be brought?

(d) What types of claims or causes of action may be asserted?

(e) What type of relief is available; e.g. damages, injunction, declaration etc?

(f) What types of damages may be claimed; e.g. compensatory, consequential, punitive, etc.?

(g) Is there any limit on the amount of damages that can be recovered?

(h) The law of what jurisdiction would determine the answers questions (d), (e),(f) and (g) above?

(i) What criteria is applied to determine whether an action may proceed as a class action; i.e. what are the criteria that must be satisfied before an action is certified or accepted as a class action by the court?

(j) What notice requirements apply? In considering this question, you should consider two issues. First , you should consider when notice is required at the different stages of a class action e. g. at the commencement of the action, at certification, after the trial of the common issues, at settlement etc. Second you should consider what notice must be provided at each stage to (i) representative plaintiffs, (ii) class members who opt into a class action (as is possible in some jurisdictions), and (iii) absent class members. As a procedural matter, the issue is one of due process – what notice and opportunity to be heard must be provided to any class members, but in particular absent class members before a court will recognize a class action judgment so as to bind absent class members.

(k) What is the process for settling a class action; i.e. if class actions settle, who participates in negotiating the settlements? Does the court or do other public officials have responsibility for assuring the fairness of any negotiated outcomes, and if so what procedures exist to address the fairness issue? When a settlement is resolved with the payment of monetary damages, how are damages allocated among claimants? Do judges exercise oversight of fairness and/or the process of

allocation? Are class members entitled to participate in any hearing to approve a settlement?

6. How are attorneys in class actions paid?

Are there are special rules for paying attorneys in class actions that are different from the rules in non-class action litigation? Do courts have responsibility for determining or approving fees in these cases? Do attorneys make more, the same, or less, in proportion to their time, effort and risk, by comparison to non-class action litigation? Is there any public funding for class actions? Are class members other than the representative plaintiff liable for any attorney fees?

7. Are the existing laws regarding the enforcement or recognition of foreign judgments adequate for enforcing class action judgments against a defendant (or for the benefit of a class member) or will special rules be required?

The fundamental question is likely whether a judgment will be recognized regardless of the foreign jurisdiction's criteria for certification or whether recognition should be available only where the foreign jurisdiction's statute or rules impose certain minimum requirements for certification. Do the existing laws adequately address these issues?