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as the only available recourse of those who cannot afford the costs and risks of litigation, and the chance of justice that it affords."

Interestingly, he was worried that the Court of Appeal had effectively discouraged mediation in a recent decision by refusing to impose it on parties. However, trial lawyers on both sides of PI litigation are coming to recognise that the court system is not providing a service of value and they should therefore look elsewhere.

In other words, it is possible that lawyers will drive alternative dispute resolution (ADR) forward even though the Court of Appeal has not forced it on us. Barristers and lawyers are the customers of the court service and if we decide that we are not getting what we are entitled to (hugely increased court fees may raise our entitlement, or at least our expectation), we might do what customers do all over the world whenever they have a choice: vote with our feet.

Of course, you do have to have a choice, and that means an effective alternative system for resolving disputes. There is a possibility that PI lawyers will get together to create their own system. It would not be easy, but it would certainly be feasible. It has been done in the past in isolated areas and it could be done now by agreement.

Looking, for example, at high-value PI claims, it would be possible to agree early on that the claim should be mediated. That could be a binding agreement, but it would not resolve the entire range of litigation procedures, for example the interlocutory management and the final trial.

If the parties agreed to nominate a PI specialist as a mediator, in the widest sense of the concept that person could do all the interlocutories – almost certainly far better than the district judges, who so often make such a mess of these big claims. The trial would be more difficult, but could be managed in the same way as an arbitration agreement.

An incidental effect would be a reduction of costs, which ought to appeal to the insurers in this market and to the National Health Service, which continually complains about the cost of compensating for the negligence of their employees.

Perhaps one of the innovative insurers will take the initiative and start to develop an ADR system. ■

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Oiling the wheels

In the wake of the Royal Dutch Shell class action, Europe could soon have a more claimant-friendly consolidated legal framework from which to work. By Daan Lunsing Scheurleer and Ianika Tzankova

European multinationals have been, and continue to be, faced with class action lawsuits in the US. Some recent examples include Vivendi, Ahold and Shell.

The presence of European multinationals in the US is substantial: UK companies are the largest foreign investors in the US, with Dutch, German and French companies third, fourth and fifth respectively (Japanese companies are second). Moreover, many of the European multinationals with investments in the US are also listed there.

When US lawyers file class action suits against European or US multinationals, they may wish to include foreign claimants in the class. US courts have numerous grounds for denying certification. The certification of an international or global class imposes additional burdens on both defendants and the US courts.

While the preclusive effect of a US class action judgment in the courts of another US state is clear, its preclusive effect in the courts of a foreign country is not. US courts and taxpayers run the risk of significant wasted effort.

A second issue, although of less concern than the first, is that of notice: giving notice abroad can raise difficult issues from both a legal and practical point of view, particularly when not all class members are explicitly identified. Many US courts consider the res judicata and notice problems introduced by foreign claimants to be valid reasons for denying class certification to those claimants.

Traditionally, an important argument for the inclusion of foreign claimants in a US class action has been the absence of class action devices in Europe, which means that the US legal system offers European plaintiffs access to justice on an almost exclusive basis. A second, related argument is that the exclusion of foreign claimants from class actions undermines the deterrent function of this type of lawsuit. Deterrence is seen as a global problem and as such demands a global approach.

A way to encourage such a global approach, particularly in the absence of the possibility to file class action suits in Europe in addition to US class actions, would obviously be to include foreign claimants in a US class action. These arguments can make US courts more likely to admit such claimants into a class. Although the European judicial landscape is changing, the consequences of these changes are still uncertain.

The changing European judicial landscape

An increasing number of European countries are developing their own kind of multi-party or collective action devices. Examples are the UK test case approach provided for in Part 19.III of the Civil Procedure Rules and the Dutch court-approved collective settlement.

The rules governing Dutch collective settlements are laid down in the Collective Settlements of Mass Damages Act 2005 (the Dutch Act), which provides for the court approval of collective settlements on an opt-out basis. If a defendant and a non-profit organisation of plaintiffs agree to settle the dispute out of court, they can apply to the court to declare the settlement fair and binding, even on non-parties to the agreement, on an opt-out basis.

The Dutch Act introduces the damage scheduling approach, under which compensation is awarded to claimants not on the basis of their personal characteristics, but rather on the basis of the characteristics of the class/group of which the particular individual claimant is a member.

The collective settlement agreement should describe the class and the various sub-classes and give information about: the number of class and sub-class members (an estimate); the compensation that will be awarded to these persons; the eligibility requirements for compensation; the procedure by which the amount of compensation will be established; and the method of obtaining payment.

The new legislation has already produced two court-approved collective settlements. A third one, which we will discuss later on, is on its way: the Royal Dutch Shell reserves recategorisation settlement was submitted for court approval on 11 April 2007.

The new rules were originally intended to apply only to the resolution of mass exposure and mass disaster personal injury claims. This was indeed true of the first collective settlement under the Dutch Act, but not the second: the Dexia settlement related to financial services and was approved in January 2007, while the Shell settlement relates to a securities action.

The result of all the national legislative initiatives is a patchwork of national legislation. Apart from those initiatives, initiatives at EU level are aimed at making private law enforcement easier in the fields of anti-trust and consumer litigation. We refer to the green paper on actions for damages of Dutch Competition Commissioner Kroes and to the plans of Bulgarian Consumer Commissioner Meglena Kuneva.

While the options for plaintiffs seem to be increasing, it can be asked whether they will be better off – and the answer is not necessarily. It remains to be seen whether the new legislation in the various European countries can grant European class members the same level of access to justice as the US class action can. It is also uncertain whether US courts will, in response to the growing availability of European alternatives, increasingly refuse to include European claimants in US class actions.

A March 2007 decision in the Vivendi case possibly suggests otherwise. In that case, the US District Court of New York ruled that claimants from the UK, France and the Netherlands could be included in the US class action on the grounds that their legal systems are "hospitable to the class action-style litigation". Apart from the question of whether the legislators and courts of those countries would agree with this characterisation, it is unclear how other courts will respond to that argument in other cases involving claimants from those and other legal systems. This creates confusion and uncertainty for European plaintiffs.

What about the defendants?

It does not look much better for the defendants. As more EU countries develop their own kind of multi-party or collective action approach, there is a growing risk of multinationals having to battle on multiple fronts: in the US and in various jurisdictions within Europe. In a worst-case scenario, the multinationals could end up facing US class actions and a variety of European multi-party or collective actions, all involving both US and European claimants.

The EU is not a federal regime so a centralised, pan-European collective procedure does not seem to be a realistic option. At a certain point defendants may prefer to settle provided they can obtain 'global peace'. They want finality. In the past their global settlement options were limited, but that situation seems to be changing.

The Shell re-categorisation settlement is a potential groundbreaker because it aims to achieve a worldwide settlement, excluding only US claimants, under the Dutch Act. Obviously, this new 'global resolution option' can only be applied if a Dutch court has jurisdiction, for example because the defendant multinational is a Dutch company.

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We believe that a court-approved opt-out collective settlement has many advantages for European plaintiffs and defendants as a vehicle for resolving mass disputes, especially if it is implemented by other European jurisdictions as well.

All European mass disputes, not only the ones linked to the Netherlands, could then be resolved in Europe, where res judicata problems are easier to address due to the Brussels regulation on the recognition and execution of foreign judgments. There is no treaty on the recognition and enforcement of judgments between the US and the EU and it is not very likely to come about in the near future.

Another important factor is that the damage scheduling approach applied in the Dutch Act makes it possible, and this is especially important in personal injury cases, for a tailor-made settlement to be designed. Last, but not least, transaction costs in the EU are lower than in the US due to the absence of a jury system, extensive discovery and far-reaching no cure, no pay arrangements. Lower transaction costs are in the interest of both plaintiffs and defendants.

All this makes Europe an attractive forum for the settlement of mass disputes: it's a win-win situation. ■

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Raising interest

A recent House of Lords judgment has paved the way for companies to claim back compound interest, which has had a significant impact on commercial litigation. By Steven Elliott

The decision of the House of Lords in *Sempra Metals Ltd v Inland Revenue Commissioners and another* (2007) brings to a successful conclusion the efforts of that company to claim restitution in respect of millions of pounds worth of advanced corporation tax (ACT) that Sempra had paid over the course of nearly twenty years.

In this final episode, the House of Lords has taken up Sempra's invitation to rewrite the law of interest so as to allow compound interest to be awarded much more frequently than had previously been the case. In so doing, their Lordships overruled two of their own decisions and side-stepped another.

The decision in *Sempra* will have a substantial impact on commercial litigation generally and will lead to higher recoveries, particularly in cases where sums have been outstanding for longer periods. The existing practice of claiming statutory pre-judgment interest will continue, but many claimants will now have the option of claiming compound interest under the general law.

Sempra is likely to be followed by cases raising difficult questions about the proof and measurement or calculation of that compound interest.

Metallgesellschaft/Hoechst in the ECJ

In proceedings launched as far back as 1995, Sempra challenged the conformity of the ACT regime with EU law. That challenge was referred to the European Court of Justice (ECJ) along with the parallel claim made by Hoechst AG. (Sempra was then called Metallgesellschaft Ltd.)

The ACT regime required that upon the payment of a dividend, the paying company should also pay an advance on its corporation tax. But where the payment was made within a group of companies, all of which were resident in the UK, the group could make what was called a 'group income election', the effect of which was that no advance payment was required.

The option to make a group income election, and so avoid having to pay corporation tax early, was not available to Sempra because it was the subsidiary of a German parent company. The effect was that Sempra was required to pay part of its corporation tax months and sometimes years earlier than would have been the case had it belonged to an entirely British group of companies.

The ECJ upheld Sempra's and Hoechst's contentions, ruling in 2001 that the ACT regime had discriminated against them in a manner that imposed an unwarranted restriction on their EU treaty rights to freedom of establishment.

In point of law, that decision involved a landmark expansion of the role of EU law in regulating national tax regimes. In practical terms, the decision had potentially enormous financial implications for the Inland Revenue. While ACT had by this time been abolished in 1999, the Revenue now found itself facing multinational groups claiming to recover in respect of ACT paid since as far back as the UK's entry into the European Community in 1972.

Because ACT was periodically offset against ordinary corporation tax, the principal sums of ACT had already been accounted for. The ECJ held, however, that Sempra and Hoechst were entitled to be reimbursed in respect of the notional interest they had lost and the Revenue had gained while the advance payments remained outstanding. The precise nature of their remedy would, however, be a matter for English law.

Two points of principle fell to be decided by the English courts. The first was whether claims were limited to ACT paid within the previous six years and whether that period could be extended; and the second was how the notional interest should be calculated, and in particular whether it should be compounded.

By now several multinational groups had joined Sempra under the aegis of a group litigation order. Within that framework test cases were advanced in respect of both issues.

The decision in *Sempra* will have a substantial impact on commercial litigation generally and will lead to higher recoveries, particularly in cases where sums have been outstanding for longer periods

DMG in the House of Lords

Deutsche Morgan Grenfell (DMG) was put forward as the test claimant in respect of the limitation issue in *DMG v Commissioners of Inland Revenue* (2006). The question was essentially whether DMG was entitled to frame its case as one seeking restitution for mistake of law and thereby bring its case within Section 32(1)(c) of the Limitation Act 1980. Under that provision time does not run until the mistake in question is discovered or becomes discoverable with reasonable diligence.

The Court of Appeal took the view that English law does not allow claims to recover taxes overpaid by mistake of law, but this decision was reversed by a 4:1 majority in the House of Lords in 2007, Lord Scott dissenting. Their Lordships held that the cause of action of restitution for mistake of law they had recognised in *Kleinwort Benson Ltd v Lincoln City Council* (1999) was available in tax cases just as in cases involving payments of other sorts. Their Lordships also held that DMG's mistake in believing that it was bound to pay ACT was not discoverable until the ECJ gave its decision in 2001. The consequence was to allow recovery of notional interest in respect of ACT payments dating as far back as 1973 in some cases. Pundits speculated in the newspapers whether the financial consequences of the decision, across all ACT claimants, would be in the billions or the tens of billions of pounds.

Given this threat to the Treasury, within a few short months the Government brought forward legislation attempting to reverse the effect of the *DMG* decision (Finance Act 2007 section 107). DMG itself and the other members of its group litigation order are allowed to enjoy the fruits of their victory, but so far as others are concerned, tax claims are retroactively excluded from the scope of Section 32(1)(c).

Sempra in the House of Lords

Sempra was itself put forward as test claimant of the question of whether the notional interest should be compounded. In the lower courts, Sempra succeeded on the basis of a contention that the ECJ had specifically mandated compounding. In the House of Lords, however, the case took a different direction. Their Lordships preferred to decide the case on a point of domestic English law that was only fully developed in a second set of written submissions and during a second hearing requested by their Lordships.

In finding for Sempra, the House of Lords has held that compound interest can be given as damages in contract and tort where it is the true measure of the claimant's loss, and as restitution where it is the true measure of the defendant's gain. Claimants are still entitled to instead claim pre-judgment interest under Section 35A of the Supreme Court Act 1981 or under the Late Payment of Commercial Debts Act 1998, which do not allow for compounding, but also do not require the same exercise of pleading and proof. This is a radical decision in that compound interest has until now only been available in very exceptional cases.

In reaching their conclusion that compound interest should be available as general damages for breach of contract, their Lordships overruled two of their own decisions – *London, Chatham and Dover Railway Co v South Eastern Railway Co* (1893) and *President of India v La Pintada Cia Navegacion SA* (1985). Further, in deciding that compound interest can be given as restitution, their Lordships overruled a clear line of early authorities and sidestepped another more recent decision where the contrary position had been assumed by all parties and compound interest refused – *Westdeutsche Landesbank Girozentrale v Islington LBC* (1996).

The decision in *Sempra* is to be welcomed for finally putting the English law of interest onto a broadly defensible footing. ■

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