The diffucult art of legal transplants: the case of class actions (*)

ELISABETTA SILVESTRI, UNIVERSITY OF PAVIA, ITALY

I want to express my thanks to prof. Cafaggi, to Prof. Micklitz, and to my friend Dr. Magdalena Bober for their kind invitation. I am happy to be here today to share with you some of my thoughts about class actions and the possibility of importing them into Europe. I'm pleased to remind you that in the early 1970s right here at the European University Institute prof. Mauro Cappelletti, the late distingushed chairman of the law department, started the Florence Project on access to justice, a project that included the first comprehensive study conducted in Europe on the topic of group actions for the judicial enforcement of the so-called 'diffuse' or collective rights, as they were named back then. And, if I may add a personal note, in the wake of the Florence Project and in the same turn of years, my alma mater, the University of Pavia, held the first Italian conference on group actions.

If someone ventured to draw up a top ten list of the hottest contemporary legal topics, worldwide and with reference to the many and disparate areas of the law, probably the topic of class actions would score very high on the list. Class actions are an interesting subject from many points of view: one can look at them through the lenses of procedural law, law and economics, political science, and the like, on the background of the American legal system with its unique characteristics. But for us, living on the other side of the Atlantic, the study of class actions presents further reasons for interest, since at the European Union level the debate on the topic of collective redress is very much alive, taking into account the different models of group actions adopted by the law in force in the member states, and wondering whether it would be useful, and even more whether it could be feasable, to harmonize such different models.

Are we going to have in the near future a pan-European form of group action? And, if so, will this procedural tool devised for collective redress take the shape of a class-action or will it be something else? At this stage, to answer these questions would be like predicting the future by looking into a crystal ball. But at least we can try to answer another, more general question: is it truly possible to conceive a class action European-style? Is it possibile to adapt an all-American institution to legal systems that in so many respects don't have much in common with the United States? Could class actions be the case of a successful legal transplant or are the dangers of constitutional and institutional rejections so high that it is advisable to orient one's mind towards another way to aggregate multiple claims against the same defendant? Again, I think these questions, too, will remain unanswered for the time being, but, whether we think the European countries are ready to

(*) Text of a lecture given on February 28, 2008 at the European University Institute, San Domenico di Fiesole.

incorporate class actions into their legal systems or not, we must keep in mind that class actions play a pivotal role in a system of private enforcement that is still quite underdeveloped in Europe. If we accept class actions, we are bound to accept what comes with them, that is, a certain degree of what prof. Robert Kagan has defined as "adversarial legalism", meaning the use of litigation (individual litigation, but most of all group litigation) as a regulatory tool, and not solely as the formal structure laid down by the system to resolve disputes. That could have advantages, but also drawbacks, and class actions are one of the best examples of how difficult it is to balance them out. I will expand on this point later on in my presentation.

Class actions don't seem to have a good reputation in Europe. Recently I read an essay in which class actions are defined as a Pandora's box: if one makes the mistake of opening it, every kind of evil will be on the lose and poison our society. Obviously, this is a case of extreme criticism towards class actions, but even when the expressions used to describe class actions and the impending danger of their adoption are less harsh, one can detect a good measure of suspicion and distrust. Such an attitude is epitomized by a passage in the speech given in March 2007 by Mrs. Kuneva, the European Union Commissioner for Consumer Protection, at the presentation of the European Union Comsumer Strategy 2007-2013. While committing herself to "put power back in consumers' hands" (I'm quoting from Mrs. Kuneva's speech) and to "look at the issue of group redress in detail", the Commissioner took a stand against class actions, and said: "Let me be clear – collective redress is not US style class action. That is not the road we intend to travel". Unfortunately, the Commissioner didn't mention which other roads the European Union commission is inclined to explore with a view to addressing the issue of collective actions in the field of consumer protection. Since the member States offer a variety of forms of group redress most of all in the field of consumer protection, it would have been interesting to have at least some hint as to which model of collective redress – a brand new one, or one inspired by the experience of one specific member State – we should expect at the European Union level.

In the United States, too, class actions are the target of strong criticism. A widespread opinion is that they are a good idea gone bad. In order to understand why that happened – if we assume it happened – a brief outline of the history of class actions is necessary.

The modern class action made its first appearance in Rule 23 of the Federal Rules of Civil Procedure enacted in 1938. Rule 23 has been amended several times, with the most significant amendments taking place in the 1960s. State legislation followed suit, with minor changes of the principles governing class actions filed in federal courts.

Class action is a form of representative litigation: a named plaintiff commences litigation as the representative of a proposed class, that is, a group of people identically situated or, in simpler

words, a group of people who have suffered a common injury from the same defendant. Rule 23 lays down several prerequisites to file and maintain a suit as a class action. Just to mention the most significant ones, *a)* the proposed class must be so numerous that the joinder of all members as individual plaintiffs is impracticable; *b)* there are questions of fact or law common to the class, and therefore the claim or defenses of the named plaintiff must be typical of the claims or defenses of the class; *c)* individual actions brought by the class members would bring about the risk of inconsistent adjudications; *d)* the named plaintiff must be able to "fairly and adequately protect the interests of the class". If these and other requirements are met, the court certifies the suit as a class action and appoints the class counsel, almost invariably choosing the same attorney who originally filed the complaint on behalf of the named plaintiff. A crucial juncture in the procedure is what rule 23 refers to as 'appropriate notice to the class'. Members of the class must be identified 'through reasonable effort', and are entitled to 'the best notice practicable under the circumstances', including individual notice whenever it is possible. Notice is essential to provide the members of the class an opportunity to opt-out, that is, an opportunity to let the court know they want to be excluded from the class. Class members who fail to opt-out will be bound by the outcome of the case, whether or not favorable to the class. Those who opt-out retain the option to initiate individual lawsuits, provided that the value of their claim is high enough to justify the investment necessary to go to court individually.

The smooth development of a class action requires a judge with strong managerial and administrative skills, which are essential to handle a suit that is likely to involve complex questions of fact, extensive discovery, and large amounts of money at stake. Rarely, though, do class actions go to trial; more often their outcome is a settlement. Settlement is another critical issue in class actions, since when settlement is in view the tensions among the different players come to the surface. In general, when a settlement proposal is on the table, additional notice to the members of the class is given and special hearings may be held to test the fairness of the proposed agreement. Settlement must receive the court's approval, conditional upon the fairness, reasonableness and adequacy of the agreement reached by the parties.

These are the 'nuts and bolts' of class actions. More could be said, but we can dispense with further procedural detail. However, I would like to call your attention to some issues that I will raise again later on, when I deal with group actions in Europe and a possibile import into Europe of American class actions. These issues are the following:

- The named plaintiff (that is, the person who brings the suit) is a self-appointed representative of the class;

- The class is a sort of legal nebula, a group of individuals who can't be identified *a priori*, and certainly are not yet identified when the action is filed. In the framework of a class action it is almost irrelevant to know whether the class comprises ten, one hundred, or one thousand members, since they all will be bound by the outcome provided that they have been afforded an opportunity to be excluded from the class.
- In order to certify a suit as a class action, the court is not required to take into account whether the claim has merit to it.
- Most class actions are settled, but the small percentage that proceeds to trial ends up before a jury, and that can have a tremendous effect on the amount of the damages awarded.
- In class actions the numer of stakeholders is high. While in a traditional adjudication we think of the plaintiff and the defendant as the main players and we are inclined to talk about each party without making any distinction between, for instance, the plaintiff John Doe and his attorney, proceeding from the assumption that they are on the same side, in class actions conflicts of interests are always looming even among those who are supposed to be on the same side, namely, the class counsel and the absent members of the class.

The American legal community has always looked at class actions with mixed feelings. In a famous essay, Prof. Arthur Miller described class action litigation as a phenomenon that, from time to time, is feared as a "Frankenstein monster" or praised as a "knight in shining armor": both images – he goes on – belong to the myth of class actions, since in truth class actions are neither the mother of all evils, nor do they offer a panacea for all the wrongs of modern societies.

In the last few decades the debate over class actions has been rekindled by the huge increase in the numer of class action suits filed in federal courts, and above all in state courts. Class actions have become a key issue in the controversy over mass-tort litigation and the favorite target of those who blame the so-called 'litigation industry' for the crisis of the American economy. Whether or not one is inclined to subscribe to such an opinionated point of view, it is difficult to escape the impression that class actions – most of all class actions for damages – can (and sometimes have actually) become the weapon of choice of greedy lawyers eager to embark on predatory litigation against corporate defendants. Apparently, some excess and abuse must have taken place since in 2005 the U. S. Congress passed the Class Actions Fairness Act, with the purpose to extend federal jurisdiction over class actions and limit the notorious practice of forum shopping in search of a friendly state court, carefully chosen among the so-called magnet jurisdictions.

Earlier I said that, according to widespread opinion, class actions are a good idea gone bad, that is, a case of good intentions that resulted in unintended consequences. We can agree on the good intentions, because class actions do serve some useful purposes. Class actions serve the interest of

the justice system, since they avoid the same issues being litigated again and again in separate cases, and therefore they foster consistency and finality, since their outcomes (whether a settlement or a judgment) are binding on all class members. Class actions allow the aggregation in a single adjudication of many claims that, taken individually, would be too small to stand the costs of litigation, and therefore they open up access to justice to individuals who otherwise would be forced to give up their rights. While an individual lawsuit would take a single person nowhere fast, class members collectively can force the defendant 'to disgorge his ill-gotten gains' (to use a recurring line in the literature on the purposes of class actions), and influence the defendant's future behavior, acting as a means of deterrence against further violations.

As far as the unintended consequences are concerned, the conventional wisdom is that a versatile tool originally conceived for expanding access to justice in the areas of consumer and civil rights (the areas that witnessed the heyday of class actions in the late 1960s and 70s) mutated into a device lawyers use to extort large settlements from corporate defendants and to make huge profits. And probably what is better known about class actions outside the United States are just their unintended consequences, not their original good intentions: that may explain why the European attitude toward class actions, generally speaking, is not very favorable.

All European countries have one or more forms of group actions. Almost as a rule, group actions are provided for in circumscribed areas of the law and in connection with specific types of claims. A recurring form of group action is what is commonly referred to as a collective action, that is the lawsuit some 'qualified entities', namely certain organizations, public bodies, and administrative agencies can file on behalf of specifically-defined groups of individuals (consumers, users, investors, workers, minorities, and so on) adversely affected by the conduct of the same defendant. Most of these actions were adopted by statutes enforcing EU directives, such as Directive 13 of 1993 on unfair terms in consumer contracts, Directive 27 of 1998 on injunctions for the protection of consumers, Directive 29 of 2005 on unfair commercial practices, and so on. These collective actions cannot be considered the European equivalent of class actions; they are not representative actions, since standing to sue is granted to an organization (for instance, a consumers association) by a statute on the assumption that the organization itself is the bearer of certain 'collective' rights or interests, meaning rights or interests shared by an indefinite number of persons, who are unnamed and unidentifiable. A common feature of such actions is that they can be filed with a view to obtaining mainly a declaratory judgment or an injunctive relief. Due to the nature of the remedy sought these actions don't seem to have ever given rise to much controversy; at the same time, the fact that collective actions cannot be filed for the recovery of damages suffered by individual

consumers, users, workers, etc. has granted these forms of actions quite a moderate success, at least in some countries, such as Italy.

In recent years some European countries have adopted statutes providing for group actions for damages typically in fields such as consumer protection, environmental protection, investor protection, and the like. Sometimes, these actions for damages bear a slight resemblance to American class actions, for instance because there are representative actions or they adopt an opting-out system, but – according to a commonplace notion – one should not be deceived by their appearance. These actions for damages in truth are not class actions, since European legal systems – it is argued – have some built-in safeguards against class actions, and most of all, against their excesses and abuses. In the United States attorneys are the driving force behind the development of class actions. They hunt for representative plaintiffs and finance the cost of the lawsuit: they are the real interested party to the litigation, since they work on a contingency fees basis, and therefore have strong economic incentives to set up a class action. Traditionally, European lawyers are less entrepreneurial; they are forbidden to accept cases on a contingency fees basis, and incentives to litigation are drastically curtailed by the 'loser pays rule' almost generally applicable to the allocation of legal costs. Most European legal systems have career judiciaries; European judges are used to playing an active role in litigation and won't be fooled by any attempts to set up predatory class suits whose only purpose is to blackmail corporate defendants. The laws governing civil and administrative proceedings in Europe don't contemplate discovery, and therefore no attorney can exploit the threat of inflicting on the defendant the efforts and oppressive expenses of an abusive discovery in order to extort from him an unfair settlement. Juries are unheard of in civil cases, and notoriously no jury means no outrageous awards of damages. Besides, damages tend to be conceived solely as compensation for the wrong suffered; punitive damages are rare, and in several European legal systems they are not available at all. Last but not least, regulation through litigation is not a European call, since there are enough public regulatory mechanisms whose functioning is, all in all, quite satisfactory.

Do all these propositions hold true? Probably some do. On the other hand, some certainly don't: for instance, many countries have softened the rules prohibiting contingency fees agreements, and nowadays allow at least conditional fees agreements. The 'loser pays rule' can be bent, either by statute or on a case-by-case basis. The legal profession, the structure of law firms, and in general the role played by attorneys in our societies are changing. Consumers associations and stakeholders at large press for reforms enabling courts to impose exemplary damages. And only a minority of people would be willing to acknowlegde that in Europe public regulation works at its best.

Leaving aside the alleged European built-in safeguards against the abuses of class actions, it appears to me that the importation of true American class actions into most European legal systems could meet other kinds of difficulties. The idea of an action filed by John Doe who appoints himself as the champion of other unnamed individuals, totally unaware of his initiative, runs against a principle that is deeply rooted in the rules governing the judicial protection of rights and interests in most continental countries: it is the principle according to which everyone is entitled to file an action in court provided that he seeks protection for his own rights. Standing to sue is granted only to the individuals or the legal entities who claim and are able to show that they bear a direct and personal interest in the outcome of a case, since it will affect their own rights. Representation in litigation is regulated in a restrictive way, and even when it is allowed, it can never concern a group of unnamed individuals. Therefore, from a procedural point of view, organizations such as consumers associations that have been granted standing to file collective actions are not different from an individual, and in fact they are treated as the true bearer of certain rights that belong, at the same time, to everybody and to no one in particular.

Rules of standing have a necessary connection with the discipline of *res judicata*. In civil law countries the traditional rule is that *res judicata* shall bind only the actual parties to a proceeding, while it shall never affect third parties, that is, those subjects who have been absent from the proceeding itself, and therefore have not been afforded any chances to defend themselves. Let's suppose for a moment that a hypothetical European country called Ruritania has introduced a damage class action, having overcome the difficulty of granting standing to sue to a class representative (for instance, by a statute enacted for just this purpose): how will Ruritania solve the problem of binding the absent members of the class to the outcome of the lawsuit? And more practically, how will the absent members benefit from a favorable judgment and receive their shares of the damages awarded? In light of the rule governing *res judicata* it seems to me that the only viable option is to provide for opting-in procedures. By opting-in, absent members become parties to the lawsuit, and as such they will be bound by its outcome. But opting-in raises problems of its own. Due process concerns make it necessary to identify all the potential members of the class and give them notice of the action filed, which can be difficult and cumbersome, to say the least. On the other hand, for the absent members of the class opting-in would mean joining the parties to the lawsuit in a formal way, in other words, meeting all the requirements laid down by the law in the field of joinder of claims. The result would be a very complex case: I cannot here expand on the many problems brought about by opting-in mechanisms, but I think intuitively everyone can perceive that they might nullify the advantages of a group procedure molded on class actions. As a matter of fact, opting-in mechanisms were adopted by the original version of Rule 23 of the

American Federal Rules of Civil Procedure, but they were dropped later on in favor of opting-out ones, which were viewed as a better way to achieve judicial efficiency and economy. However, opting-out mechanisms don't seem to fit legal systems in which standing to sue and *res judicata* follow some basic tenets of civil procedure according to the civil law tradition. For the sake of information, I want to mention a very interesting but controversial solution adopted by Brazil (which has a civil law system), a country with sophisticated legislation on class actions. In Brazil absent members of the class are bound by the judgment only if the class prevails in the lawsuit. That is known as *res judicata secundum eventum litis*, and you might recall that other legal systems (Italy, for instance) know this rule in a few well-defined areas of substantive law: actually, right in the field of group actions, the German *Verbandsklage* has similar rules as far as the binding effects of the judgment issued when the court finds for the plaintiff (for example, a consumers association) and enjoins a business from using unfair terms in its adhesion contracts.

In closing, many other procedural issues must be taken into account in the process of testing whether European legal systems could embrace American class actions. However, leaving aside technical issues, I think there are some fundamental policy issues that need to be settled prior to deciding whether Europe at large wants to take part in the phenomenon a recent conference held in Oxford defined as the 'globalization' of class actions. As I said earlier, class actions are neither a Frankenstein monster nor a knight in shining armor. They are a procedural tool and, as Prof. Lowenfeld wrote, procedure is always 'portable': we just have to remember that it never travels alone.