**Access to justice in the 21st century – how can it be maximised?**

Part of only three clauses that remain on the statute book eight centuries later, Magna Carta’s promise that “we will sell to no man, we will not deny or defer to any man either Justice or Right” remains unfulfilled. The sad reality of modern day Britain is that spiralling costs coupled with crippling cuts to legal aid have rendered the legal system inaccessible for the vast majority of people. Regrettably, courts are all too often portrayed in public discourse as mere service providers for individual litigants pursuing their private interests. In truth, it is the public at large who reaps the rewards: much like herd immunity in the health care context, an accessible means of right enforcement benefits those who need never set foot in a court room. When flouting the law becomes cheaper than following the rules, society as a whole loses out.

Relatedly, Frederick Wilmot-Smith, writing in the *London Review of Books*, makes the pointthat it is the best-off who have the most to lose; in the absence of an effective legal system to protect their property rights, they would have to spend the most to keep hold of their assets. The Bach Commission’s final report, *The Right to Justice*, publishedin September, which built on an interim report released last year and has seven Appendices, is the most recent high-profile contribution to this field. Its proposals include enshrining a right to receive reasonable legal assistance, without costs one cannot afford in statute; the creation of a Justice Commission to advise on, monitor and enforce this newly created “right to justice”; and a swath of policy changes from changing eligibility requirements for legal aid to reforming legal aid contributions. Unfortunately, the history of legal aid has been a history of cuts, and it is unlikely that the political will can be found to reverse the tide.

Thus, what follows aims to avoid – as far as possible – the pitfalls of politics. The focus is rather different: two changes – one procedural, the other technological – that can help maximise access to justice in the coming century. Collective redress mechanisms bundle together otherwise worthless claims – or, more specifically, claims worth less than the expense of litigating them so as to enable the vindication of those rights collectively, and smart contracts have the potential to radically alter what is commonly seen as the legal process. Both of these developments illustrate how access to justice in the 21st century may be less about the traditional adversarial court process between individual litigants and more about finding innovative solutions that achieve the same ends by different means.

# Collective Redress: when the whole is greater than the sum of its parts

Under modern economic conditions, illegal conduct, such as anti-competitive behaviour that distorts the market, may cause identical and indiscriminate harm to a great number of natural or legal persons. Yet, the individual pursuit of claims is frequently unfeasible. The damages are simply too small to justify the expense of litigation so that private enforcement is rendered wholly illusory even though thousands, hundreds of thousands or even millions of individuals have been harmed. Collective redress mechanisms solve this issue by “aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labo[u]r”.[[1]](#footnote-1) The resulting lawsuit is greater than the sum of its parts as procedural tools are used to achieve a metamorphosis from practically unenforceable, albeit meritorious, *individual claims* into an enforceable *collective action*.

Whilst class actions have been a staple of civil procedure law in the United States for decades, they are a comparatively recent phenomenon on the other side of the Atlantic. The United Kingdom’s Consumer Rights Act 2015 introduced a new mechanism for the collective enforcement of rights in the area of competition law that came into force on 1 October 2015.

Because US-style class actions are viewed with suspicion on this side of the Atlantic, is it important to engage with how the system operates so as to appreciate the important differences. Four features of the US regime are commonly cited as having made it both very powerful and vulnerable to abuse as defendants can be forced into settlements of unmeritorious claims: contingency fees, extensive discovery rules, the possibility of seeking punitive damages, and the opt-out mechanism.

It is perhaps worth emphasising that there are some good policy justifications for these rules. Contingency fees allow claims to be brought on behalf of a class that could not afford to litigate otherwise. Admittedly, this means that the lawyers will always recover vastly more than any member of the class. This is natural because no individual member of the class would have such a large stake in the litigation: if the class has 100,000 members all of whom suffered precisely the same loss, they each receive 0.00001% of the total award; by contrast, a contingency fee may be in the region of 25%. Punitive damages make this arrangement more lucrative for attorneys and serve the regulatory function of punishing defendants for certain behaviour. Together with contingency fees, they provide powerful financial incentives for lawyers so as to make the pursuit of these claims worth their time. Furthermore, the cost allocation rules in US litigation incentivise settlements as both sides are facing enormous costs. Lastly, the opt-out rule makes the scheme more effective because members have little incentive to actively opt into class actions, particularly if the claims are themselves of low value.

Together, these features paint a picture of how class actions in the United States fit into a broader regulatory framework; they quite deliberately form an intrinsic part of it. Compared to the European Union, where national or Union authorities bear the brunt of the regulatory burden not only in competition law, but also other areas such as securities, the US class action regime creates “private attorneys general” who are financially incentivized to more effectively police the behaviour of actors in the marketplace. By contrast, regulatory agencies’ limited resources can be focused elsewhere. In some instances, a class action might even reveal wrongdoing that prompts the regulator to investigate it further. In other words, “class actions allow non-state actors to assume the collective responsibility that civil law systems have traditionally reserved exclusively for the state”.[[2]](#footnote-2)

The Consumer Rights Act 2015 (“CRA”) embraces some features, but rejects others. Importantly, it is limited in scope to violations of competition law, and the Competition Appeals Tribunal (“CAT”) is given the power to decide on a case-by-case basis whether a class should be formed on an opt-in or opt-out approach. The CRA’s procedure can also be used both to establish liability in the first place and in so-called “follow on” actions to recover damages once a breach has been found by a competent authority.

It is right for the CRA to have provided for opt-out procedures. They benefit claimants as they make enforcement more economically viable, and they benefit defendants because settlements create what is referred to as “global peace” – there is no risk for defendants to be sued again in respect of the same breach, and this also means that they “will pay more for settlements that offer assurances against future litigation”.[[3]](#footnote-3)

In any system of collective redress, certification of a class serves as the bottle neck. The CAT has recognised the need for a “rigorous”[[4]](#footnote-4) approach to certification which “require[s] the Tribunal to scrutinise an application for a [collective proceedings order] with particular care, to ensure that only appropriate cases go forward”[[5]](#footnote-5). Rule 79 of the Competition Tribunal Rules 2015 provides the rules for certification:

**(**1) The Tribunal may certify claims as eligible for inclusion in collective proceedings where, having regard to all the circumstances, it is satisfied by the proposed class representative that the claims sought to be included in the collective proceedings—

(a) are brought on behalf of an identifiable class of persons;

(b) raise common issues; and

(c) are suitable to be brought in collective proceedings.

The most important issue is that of commonality. Rejecting the US approach to certification, the CAT in the only two cases that have dealt with this issue – *Gibson* and *Merricks* – approved the Canadian Supreme Court’s test articulated by Rothstein J in *Pro-Sys Consultants v Microsoft* [2013] SCC 57 (at para 118):

[T]he expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.

In the event, neither the class in *Gibson* nor the class in *Merricks* were certified, but the use of the more liberal Canadian test is to be welcomed. In particular, it is clear that the CAT aims to avoid turning certification into an enormously costly quasi trial.

On funding, the CRA walks a fine line. Contingency fee arrangements with lawyers are prohibited, but third party funding can be obtained. Due to the English “loser pays” rule, the obtaining of third party funding will prove crucial in the vast majority of cases. Under the legislative scheme, it is the class representative, *not* the class members, who is liable for the costs. Interestingly, the CAT did not show itself overly concerned in either case that the representatives’ financing arrangements may not actually cover the defendant’s costs which further demonstrates a liberal approach to the problems. Yet, in the absence of punitive damages, the funder may need to be paid out of what were compensatory damages resulting in less than full compensation for the infringements to the rights that members of the class had suffered.

Although collective proceedings remain a relatively unexplored area in the UK, they have an enormous potential to improve access to justice. Class actions highlight the potential of procedural means to be used to achieve substantive ends, namely the effective enforcement of legal rights, and they should be extended beyond the area of competition law.

# Smart Contracts

The term “smart contracts” has been coined by Nick Szabo more than 20 years ago. Szabo is a reclusive cryptographer who some believe is hiding behind the pseudonym of Satoshi Nakamoto, the founder of Bitcoin. He denies it. In any case, Szabo made a notable contribution to the development of Bitcoin with his previous proposals for the Bit Gold system which described many of the core concepts used in Bitcoin, and his ideas about smart contracts have gained prominence in recent years.

Szabo defined a smart contract as “a set of promises, specified in digital form, including protocols within which the parties perform on the other promises”. In other words, a smart contract would put contractual transactions into the form of self-executing code. The Blockchain technology, which underlies Bitcoin, removed the need for a trusted third party to serve as a depository of contractual code. It thus became possible for two parties to create tamper-proof code that would transfer assets if certain conditions were met.

The creation of self-enforcing agreements renders recourse to the apparatus of coercion provided by the legal system of a statute to effect enforcement entirely unnecessary.

The problem is that smart contracts are neither smart nor contracts. As things stand, they are pretty feeble-minded conditional conveyances. The smart contract functions like an escrow account – an initial transfer of funds that is part of the transaction guarantees that payment can later occur. However, there is no need for a trusted third party to serve as the distributor of funds; distribution is automated upon the occurrence of specified conditions. This distillation of contractual arrangements into a set of if/else-clauses requires a mechanism by which the contract can know whether conditions of payment have been met: a so-called “oracle”.

The need for an oracle can be demonstrated with a fairly simple example: X enters a bet with Y that it will rain in London on a certain day. At midnight, the total of what has been initially transferred by both A and B will be deposited in X’s account if it rained that day and *vice versa*. Since the code has no way to interact with the world outside the Blockchain, it must rely on data coming from somewhere to determine whether it in fact rained. Thus, a trusted third-party *distributor* is replaced with a trusted third-party *data supplier*.

Another limitation inherent in smart contracts lies in their ability to interact with the real world – real in the sense of its Latin root *res*, i.e. the adjective to the word “thing”. Whilst a smart contract on the Blockchain can easily transfer asset that are on the Blockchain, such as a given unit of Bitcoin, it cannot transfer off-Blockchain assets. Crucially, this limitation is only significant to the extent that applications remain disconnected from the Blockchain. Accordingly, a smart contract could conceivably make the use of a connected autonomous car to the Blockchain subject to payment by the passenger. A smart contract could also effect the transfer of title to land on a land register.

Despite its current short-comings, the potential of the technology is vast. Furthermore, it brings with it a fundamental change in its conception of law and the legal process. It is often pithily expressed in the slogan that “code is law”. Transactions on the Blockchain are irreversible. Reversibility would imperil the central promise of a payment system free of censorship because it would require the appointment of a central authority – that is precisely what Bitcoin aimed to avoid. Importantly, censorship is in this context means the imposition of any barriers to the free movement of funds, including the freezing of funds and the blacklisting of organisations so as to prevent transfers to them.

Nevertheless, there are ways of coupling smart contracts with dispute resolution mechanisms. For instance, transfers can be conditional upon the decision of an adjudicator appointed by the parties. It is also important to emphasise that a reversibility layer can always be added. Due to the globalised nature of Bitcoin, appointment of a central authority would require either the creation of a multilateral body or the subjugation of the entire global network to one national authority. Neither are feasible. However, where this technology is embraced in individual sectors, particularly market players, such as banks or insurers, trusted means of dispute resolution, such as arbitrations, are already well-established.

Practical applications of smart contracts focus on their potential to reduce transaction costs. If legal obligations become self-executing, the need to resort to courts is going to be vastly reduced. This does not mean that there will be no disputes between those who continue to engage in highly sophisticated transactions; the potential of smart contract lies in the transformation of the vast majority of commercial interactions so as to be virtually free of even the possibility of breach.

*Conclusion*

Blockchain technology is already being embraced by a variety of large corporations, from Walmart to Maersk. For better or worse, the coming century will be shaped by the changes these innovations bring. Similarly, economies will only become more inter-connected so that harm can spread to large numbers of individuals who would have no means to vindicate their rights without collective redress mechanisms. Both of these developments to some extent undermine the traditional understanding of the common law process. None of this is diminishes its importance or, indeed, the importance of ensuring that the process is accessible to all by means of an effective system of legal aid. It is rather an acknowledgement that new ways need to be found, and are being found to achieve the same ends: maximise access to justice.

1. *Amchem Products Inc v* *Windsor* (1997)521 US 591, 617. [↑](#footnote-ref-1)
2. Samuel Issacharoff and Geoffrey P Miller, ‘Will Aggregate Litigation Come to Europe?’ (2008) 62 Vanderbilt Law Review 179, 209. [↑](#footnote-ref-2)
3. ibid 206. [↑](#footnote-ref-3)
4. *Gibson v Pride Mobility Products Ltd* [2017] CAT 9 [102]. [↑](#footnote-ref-4)
5. *Merricks v Mastercard Inc* [2017] CAT 16 [57]. [↑](#footnote-ref-5)