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Class action lawsuits: The way ahead? A round-table on the UK's litigation culture, with Thomas Dubbs (Labaton Sucharow), David Greene (Edwin Coe) and Peter Montagnon (ABI), held on Monday, March 3, 2008 at the City Club, 19 Old Broad Street, London, EC2N 1DS, from 12:30-2:15pm.

The legal system is one of the many areas where Britain and the United States are two countries divided by a common language – and no more so than with class actions. These play a significant role in the US and are increasingly doing so in the UK. But is this a step forward or a trend that should be resisted? The first speaker said it was clearly the former but suggested starting with some context. A class action is a group action brought by a lead plaintiff on behalf of other similarly affected parties. Although based on medieval English law, it really gained traction in the US in 1966 thanks to an innovative judicial revision. It was fine-tuned in 1995 when the lead role was deemed to be taken by the plaintiff with the largest loss. Previously the lead plaintiff was decided on a first-come, first-served basis allowing lawyers to use the mythical New Jersey dentist with 200 shares as the front for their own legal action.

There are four categories of class action - product liability, consumer defect, anti-trust and securities – but it is the last of those four that concerns the City. In 2007 there were 166 such actions and 116 in 2006 against an average of 194 between 1997 and 2006. Why then is the UK showing an interest? The first speaker said firms had realised there was a lot of money on the table in fraud cases but that only those who participated could gain. Not all countries are eligible but the UK is among those that were thanks to a US legal ruling that hinged on whether a US decision would be respected by foreign courts. Secondly institutions with an interest in corporate advance found class actions very useful parts of their tool kit as they often resulted in far-reaching reform. Thirdly it was useful to tracker investors in indices such as the S&P500 who found their performance hurt by a fraud. The speaker said there had been a radical swing in the last two years in favour of class actions, perhaps linked to the UK's light-touch regulation.

The second speaker said it was important to highlight the US/UK differences. The first was the opt-in/opt-out idea. In the US all victims are deemed to have joined a class action while those in the UK must sign up. Lawyers in the UK cannot earn contingency fees unlike their American counterparts. Damages in the US are significantly higher than the UK. Lastly the loser pays the costs in the UK, which is not always the case in the US. This last is a key factor behind the opt-in principle as it would be wrong to seem someone to have exposed themselves to potential liabilities.

Furthermore there is a cultural difference. The US is steeped in individualism and small government that has given litigation a greater role than Europe which is rooted in a tradition of bigger government and central regulation. American litigation is seen as awful but that is

a misperception. It has created a greater emphasis on corporate governance thanks to a fear of juries. This might be witnessed by the fall in the number of class actions.

Why does the UK need class actions? The US is increasingly happy to take claims from the UK. A current US case involves GSK and two UK pension funds. The potential for higher damages and the lower risk thanks to the US policy on cost shifting are attracting UK litigants. Secondly litigation can fill the gap left by light-touch regulation. Third is the disciplinary process that litigation applies to boards. Looking to the future, the European Commission is looking to adapt elements of the US system into anti-trust and consumer cases probably through the conduit of a regulator of a consumer group taking the lead role.

There was a vigorous debate about the equity of shareholders having to pay damages to other shareholders when the distinction is between those who have joined an action and those who haven't. The first speaker said that where a fraud had been committed victims were entitled to compensation. In many cases the costs are covered by insurance. Some members said it was wrong to see insurance as cost-free as premiums would rise as a result. However another member said that shareholders took a risk when they bought into a company while another said it should encourage them to scrutinise boards more closely.

The third speaker said there was a fundamental difference between the US and the UK – in Britain shareholders can sack boards of directors. This explains why class actions are popular in the US where that power doesn't exist. The problem is when these cultures clash. He cited an example of British investors blocked from holding discussions with Cable & Wireless because a US class action had made issues *sub judice*.

He said the impulse for a class action usually came from professional lawyer using a definition of fraud that was bound by time limits thus creating a specific group of plaintiffs who can "scoop" the damages. The burden then falls on: those shareholders not part of the class; the company that must pay damages; a rise in insurance premiums; and a large bill for lawyers' fees. He accepted UK institutions wanted to have it as weapon in their armoury. But he said litigation was tantamount to seeking retribution; it did not deliver pro rata damages to all victims; delivered unfair value to lawyers; and interfered with the board's ability to run the company. He cited an example of Shell where investor pressure backed by the potential power to remove directors led to a positive response from the company that delivered a bounce in the share price.

Is the UK going in the wrong direction? The last speaker thought so, warning that it was moving towards a litigation culture encouraged by the recent Companies Act. The City should be wary because it carries the risk of potentially enormous costs while the benefits are not clear. He said that the principle of the loser pays should not be lost, as that would certainly create a feeding frenzy.