

Germany

Prof. Dr. Jens Kleinschmidt, LL.M. (Berkeley)

Introduction of a collective redress procedure: 'Musterfeststellungsklage'

- 'Model declaratory action' as a step towards facilitating collective redress
- Legislator intended to create 'a simple way of collective redress without a litigation risk for the individual'
- Background: the diesel emissions scandal – affected consumers had to initiate proceedings individually
- Entry into force: 1 November 2018
- sections 606 to 614 of the German Code of Civil Procedure ('Zivilprozessordnung')

Description of the procedure

- Procedure composed of two steps
- First step:
 - Model declaratory action brought by a 'qualified body' aiming at a court ruling on certain predefined factual or legal issues that are relevant for the existence or non-existence of consumers' individual claims
 - Individual consumer is not a party
- Second step:
 - Individual claimants rely on the court's findings in an action brought individually

Description of the procedure: The first step (I)

- Action may only be initiated by a 'qualified body' ('qualifizierte Einrichtung')
 - Acting exclusively in the interest of consumers
 - Not-for-profit and financially independent from traders
 - Existence for at least four years
- Claim form describes factual or legal issues and why these issues are relevant
- Competent court: Higher Regional Court ('Oberlandesgericht') with appeal ('Revision') possible to the Federal Court of Justice

Description of the procedure: The first step (II)

- Individual consumer not a party to the proceedings
 - Court publishes the model declaratory action
 - Interested individuals may register their claims free of charge with the Federal Office of Justice ('Bundesjustizamt') up to the day before the first hearing → 'opt in'-approach
 - Only consumers may register
 - Registration of 50 consumers within two months after publication required
 - Registration suspends prescription for individual claim

Description of the procedure: The first step (III)

- The court's decision
 - Declaratory ruling on the predefined factual or legal objectives of the action ('Feststellungsziele')
 - But: does not grant relief to individual consumer
 - Settlement with effect for and against each consumer possible: requires approval by the court, must not be rejected by more than 30% of registered consumers, must specify (inter alia) the individual relief

Description of the procedure: The second step

- Each registered consumer must seek redress for their claims individually
- Court proceedings, ADR, settlement?
- Factual and legal findings contained in the declaratory ruling are binding between the defendant and each registered consumer to the extent the individual claim relates to the objectives and facts of the model case
- Otherwise, ordinary civil procedure (not free of charge)

Evaluation

- The bigger picture: ongoing debate on European level
- Collective redress welcome development
- No transplant of US class action model
- Criticism:
 - Will the two-step model facilitate consumer relief?
 - Will the procedure relieve the courts?
 - Suitability for both dispersed and mass damage?
 - Other issues

Diesel emissions litigation: State of play

- 'Musterfeststellungsklage' against Volkswagen pending before Oberlandesgericht (OLG) Braunschweig
- Thousands of individual actions pending before Regional Courts (Landgerichte) all over Germany
- Divergent decisions handed down so far
- Typically, two potential defendants:
 - Car retailer: buyer's remedies under the sales contract
 - Producer of the engine: tort law

Diesel emissions litigation: Awaiting guidance by the Federal Court of Justice (BGH)

- BGH 6 June 2018 – X ARZ 303/18:
 - Actions against seller and producer may be joined before Regional Court that has jurisdiction for seller
- BGH 8 January 2019 – VIII ZR 225/17:
 - Procedural order containing an assessment of certain issues of the seller's contractual liability (in favour of the consumer)
- No statement by BGH on tort law as of yet
 - OLG Köln 3 January 2019 – 18 U 70/18
 - OLG Braunschweig 19 February 2019 – 7 U 134/17