

Article

Class Action in Taiwan: A New System Created Using the Theory of “Right of Procedure Options”

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ABSTRACT

The traditional civil litigation system has developed based on one plaintiff versus one defendant pattern; however, it has become increasingly less adequate to be applied to modern disputes, which involve more persons in one case. Designing a mechanism effectively facilitating such legal proceedings, at the same time sufficiently protecting all parties' interests, thus involves multiple factors and its exact models varies in different jurisdictions. The class action system in Taiwan, going through its 15-year development, was introduced and expanded by the Consumers Protection Act in 1994 and by the Code of Civil Procedure in 2003. This article will first brief the civil procedural laws in Taiwan and introduce the theory of “rights of procedural options,” which is one fundamental legal theory that lies behind Taiwan's class action system. In Part III this study will brief the evolution of Taiwan's class action system so as to give a general picture. This study will then introduce the class action by parties' assignment and class action by statutory assignment respectively in Part IV and Part V, and reach its conclusion in Part VI. It is anticipated that through this study the basic structure of Taiwan's class action system may be presented and thus allow the exchange of experiences on a comparative law basis.

Keywords: *Class Action, Right of Procedure Options, The Consumers Protection Act, Taiwan's Code of Civil Procedure, Securities Investor and Futures Trader Protection Act*

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I. INTRODUCTION

The traditional civil litigation system was developed based on the assumption of one plaintiff versus one defendant. While modern disputes have come to involve more and more persons, however, it has become increasingly difficult to apply the traditional litigation system to resolve modern disputes. On the one hand, there may be a strong need to gather all the parties related to the dispute into one civil proceeding for the purpose of saving the court’s cost or preventing contradictory judgments, while on the other hand not all the related parties may be willing to subject themselves to the designated civil proceeding due to personal considerations, such as if the proceeding is to be held in a jurisdiction not convenient for that party to participate in. How to design a mechanism that effectively facilitates such legal proceedings while sufficiently protecting all the parties’ interests implicates multiple factors. Therefore, while the importance of the “class action” or “group action” system may have been commonly recognized, the exact design still varies in different jurisdictions.¹ The so-called “class action” in this article means an action that handles a series or a group of homogeneous and/or related claims in Taiwan, rather than the American Class Action.

The class action system in Taiwan has not long history and only been around for about fifteen years. The Consumers Protection Act introduced several class action systems in 1994 and the general class action system that applies to all civil disputes did not even exist until 2003. Compared with the fact that Taiwan has had its Code of Civil Procedure [hereinafter *the Code of Civil Procedure*] since 1930, class action is just a new-born system. This new system, however, reflects some fundamental legal theories rooted in Taiwan’s civil litigation system, and thus to a certain extent differs from the class action systems in other jurisdictions. Observing the class action system in Taiwan, particularly in comparison to the ones in other mainstream jurisdictions, may well present the uniqueness of the spirit of civil procedural law in Taiwan. That means the “rights of procedural options” of parties.

This study aims to introduce the basic structure of the class action system in Taiwan. In Part II this study will first brief the civil procedural laws in Taiwan and introduce the theory of “rights of procedural options,” which is one fundamental legal theory that lies behind Taiwan’s class action system. In Part III this study will brief the evolution of Taiwan’s class action system so as to give a general picture of Taiwan’s class action systems. This

1. Deborah R Hensler, *The Globalization of Class Actions: An Overview*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 7 (2009).

study will then, based on the common classification of class action systems, introduce the class action by parties' assignment and class action by statutory assignment respectively in Part IV and Part V, and reach its conclusion in Part VI. It is anticipated that through this study the basic structure of Taiwan's class action system may be presented and thus allow the exchange of experiences on a comparative law basis.

II. THE THEORY OF "RIGHTS OF PROCEDURE OPTION": A FUNDAMENTAL THEORY ROOTED IN TAIWAN'S CIVIL PROCEDURAL LAWS

Before moving into the detail of Taiwan's class action system, the basic structure of Taiwan's civil procedural laws should be briefly introduced in advance.

A. *A Basic Introduction to Taiwan's Civil Procedural Laws*

Taiwan is a civil law system country, where the judges are only bound by statutes and not bound by judicial precedents in law. The court system in Taiwan is divided into two distinct jurisdictional branches: the "ordinary" courts and the "administrative" courts. The civil and criminal matters are handled by the ordinary court which is comprised of three levels: the district court, the high court and the Supreme Court. A third instance appeal may be made to the Supreme Court only on the grounds that the second instance appellate court's judgment is in contravention of the laws and regulations. The jury trial system has not been adopted in Taiwan.

The principle that parties have control over the initiation, termination and scope of a lawsuit is a fundamental guiding principle of Taiwan's civil justice. Parties have the responsibility to describe to the court the facts and means of proof in principle. Courts, however, still play an active role in Taiwan's civil litigation. Courts can question the parties or direct them to make factual and legal representations, state evidence, or make other necessary statements and representations; when the presented statements or representations are ambiguous or incomplete, the judge shall direct the presenting party to clarify or supplement.² Courts are also obligated to give hints and feedback to the parties to avoid any surprising decision and promote the fair and just judgment. In addition, when the disputes involve more explicit public policies or collective interests than others, such as an association's suit for injunction (which will be demonstrated later), and the court cannot obtain conviction from the evidence provided by the parties, the court may take evidence on its own initiative if such is necessary for finding

2. Minshih Susungfa [Taiwan Code of Civil Procedure] § 199 (2009) (Taiwan).

the truth.³

The American discovery process does not exist in Taiwan. However, the advantages of American pre-trial discovery were considered in the Reform of Taiwan’s Code of Civil Procedure in 2000 for the evidence preservation proceedings.⁴ According to Article 368 of the Code of Civil Procedure the party who has legal interests in ascertaining the status quo of a matter or object may move for expert testimony, inspection or perpetuation of documentary evidence. The scope of evidence preservation is wider in Taiwan than in Germany. With this way the parties may obtain or observe the means of proof which are in possession of the other party before the oral hearing and prepare for it. But the principle differences between American discovery and the development in Taiwan appears to be the greater participation by the judge in Taiwan and no oral examination of witness in the evidence preservation proceedings. The 2000 Reform to Taiwan’s Code of Civil Procedure laid more emphasis on the court’s and parties’ obligations to prepare before the oral hearing. The court shall support parties to formulate and simplify contested issues of facts, evidences or laws according to Articles 268, 268-1 II, 270-1, 271 of the Code of Civil Procedure. Before taking evidence, the court shall clarify to the parties the issues involved in the action, and then examine the witnesses and the parties in person in a consecutive manner in oral hearing according to Article 396 of the Code of Civil Procedure. This method is the so-called “concentrated model.”

In Taiwan, there are five forms of evidence available: proof by documentary evidence, proof by inspection by the court, proof by witness testimony, proof by expert testimony and proof by party testimony. Where the document identified to be introduced as documentary evidence is in the opposing party’s possession, a party shall move the court to order the opposing party to produce the document.⁵ The court orders the opposing party to produce the document by a ruling when the disputed fact is material and the motion is just. If a party disobeys an order to produce documents without giving a justifiable reason, the court may, in its discretion, take as the truth the opposing party’s allegation with regard to the document or the fact to be proved by such document.⁶

When a dispute involves professional knowledge such as scientific or technical issues, relevant evidence may be investigated through expert witness. The so-called “expert witness” in Taiwan refers to the expert appointed by the court, and differs from the American “expert witness” by the parties. Before appointing an expert witness, the court may accord the

3. *Id.* § 288.

4. *Id.* § 368.

5. *Id.* § 342.

6. *Id.* § 342.

parties an opportunity to be heard; where the parties have agreed on the designation of an expert witness, the court shall appoint such expert witness as agreed-upon by the parties, except where the court considers that the expert witness is manifestly inappropriate. While the expert testimony does not bind the court as a matter of law, the judicial practice in Taiwan is that courts will heavily rely on such testimony. In addition to the expert appointed by the court, parties may also submit the expert opinions they have gathered. These opinions, however, are not the expert testimony as prescribed by the Code of Civil Procedure, but merely part of the party's pleadings.

Civil litigation expenses in Taiwan mainly cover court costs and other costs, including: taxable fees for photocopies, video recordings, transcripts, translation, daily fees, travel expenses of witnesses and court-appointed expert witnesses,⁷ and other fees and disbursements necessary for the proceeding items. Court costs are calculated on the basis of the value in dispute. A detailed regulation is provided in Article 77-13 of the Taiwan Code of Civil Procedure. For the class actions there are some special rules with respect to the court costs, which will be introduced later.

In Taiwan, the losing party shall bear the litigation expenses in principle,⁸ but the attorney fees are not included. A party who fails to sustain his position in court must not only pay his own costs of litigation, but also defray the litigations costs of his victorious opponent. Nevertheless, in matters of appeal to a court of third instance, since an appellant is required to appoint an attorney as his/her advocate,⁹ the attorney fees in the court of third instance shall be exceptionally included as parts of the litigation costs, and the losing party must bear them.¹⁰ Additionally according to the Code of Civil Procedure Article 77-25, if the attorney is appointed by the court or the presiding judge to act as the special representative or advocate for a party, such as in an association suit by parties or by statutory assignment or in an adoption suit, the litigation costs would include the attorney fees.

A final judgment bears binding effect (the so-called *res judicata*) upon parties to the litigation.¹¹ When the final judgment is in favor of the plaintiff's claim of payment, the final judgment may also serve as an execution title. The plaintiff may file for compulsory execution based on the final judgment.¹² Before reaching the final judgment, the plaintiff may also take advantage of the provisional remedies proceedings, including filing for

7. *Id.* § 77-23.

8. *Id.* § 78.

9. *Id.* § 466-1.

10. *Id.* § 466-3.

11. *Id.* § 400(1).

12. Chiangchih Chihhsing Fa [The Compulsory Execution Act] § 4(1)(1) (2007) (Taiwan).

provisional attachment of the defendant’s assets in order to secure the plaintiff’s future execution of his/her monetary creditor’s right,¹³ or filing for provisional injunction relief to restrict the defendant’s disposal of its assets or fix the status quo.¹⁴

In Taiwan there are other mechanisms in addition to litigation procedures to resolve civil disputes. Common examples include settlement, mediation, and arbitration. A settlement between parties in its nature is a contract and thus does not bear the binding effect as the court’s final judgment, except this settlement is reached in front of the court which is recorded.¹⁵ Mediation in Taiwan may be further divided into mediation in courts,¹⁶ mediation in mediation committees in towns,¹⁷ and mediation in mediation committees in administrative agencies, such as in the Public Construction Commission of Executive Yuan. The mediation in courts and in Public Construction Commission has among the parties the effect of a legally effective court judgment. However, mediations in mediation committees in towns bear the binding effect as a final judgment only when a competent court has granted a recognition order.¹⁸ For certain types of disputes, compulsory mediation is a pre-requisite before a party to the dispute can bring the case to the court.¹⁹ For other types of disputes, the parties may also decide to apply for mediation before launching a lawsuit with the court and the charges for mediation is lower than court charges.²⁰ Should the mediation fail and the procedure be converted to a litigation procedure, the charges for mediation may be counted as part of the court charges for the litigation case and the case is deemed to be launched with the court at the time when the parties first applied to the court for mediation.²¹ In cases of voluntary dismissal, the plaintiff shall bear the litigation expenses. Arbitration is another common alternative dispute resolution mechanism in Taiwan, where the arbitral awards awarded by arbitrators are also as binding as the court’s final judgments.²²

In cases of a settlement, the parties shall respectively bear the expenses of the settlement and the litigation expenses. But in order to encourage parties to settle the disputes, if the plaintiff voluntarily dismisses the action prior to the closure of the oral-argument session in the court of first instance,

13. The Code of Civil Procedure, § 522.

14. *Id.* §§ 532 & 538.

15. *Id.* § 380(1).

16. As regulated by Code of Civil Procedure.

17. As regulated by Hsiangchenshih Tiaochieh Tiaoli [The Towns Mediation Act] [hereinafter *the Towns Mediation Act*] (2009) (Taiwan).

18. The Code of Civil Procedure, § 416; The Towns Mediation Act § 27(2).

19. The Code of Civil Procedure, § 403.

20. *Id.* § 404(1). For court charges for mediation, see § 77-20.

21. *Id.* §§ 419(2) & 423(1).

22. Chungtsai Fa [The Arbitration Act] § 37(1) (2009) (Taiwan).

within three months from the date of voluntary dismissal, the plaintiff may move for the return of two-thirds of the court charges paid.²³ Likewise, if a settlement is reached either during a court session or mediation session referred to by the court, within three months from the date of the settlement, the plaintiff may also move for the return of two-thirds of the court charges paid.²⁴

In most cases, the costs for bringing or defending a legal claim are supported by personal funds. If a party lacks the financial means to pay litigation expenses, except in cases where there is manifestly no prospect for a party to prevail in the action, the court shall, by ruling on a motion, grant litigation aid.²⁵ In addition to litigation aid under Civil Procedure Law, an eligible party can also refer to Legal Aids Act to obtain legal aid service from lawyers or other professionals with the help of the Legal Aid Foundation, which was established under the Legal Aids Act to provide legal aid to people who are qualified to receive legal aid under the Act.²⁶ The Foundation is mainly funded by the annual budget of Taiwan's Judicial Yuan, however, there are also donations from private sectors.²⁷ Regarding civil litigation, the Legal Aid Foundation will sponsor legal aid receivers to retain a lawyer to represent them in civil litigation cases. The lawyer will be paid by the Legal Aid Foundation directly at a lump-sum rate stipulated in Article 28 of the Legal Aids Act and related rules.²⁸

B. *Striking the Balance Between Truth and Efficiency: The Theory of "Right of Procedure Options"*

In designing civil procedures to protect people's civil right and resolve civil disputes, two fundamental principles play a guiding role: the finding of truth and the facilitation of procedures. Sometimes these two fundamental principles contradict each other, which raises a central issue in designing civil procedural rules: how to strike a balance between "truth" and "efficiency"?

The theory of "Right of Procedure Options" strives to resolve this central issue by resorting to the Constitution. Under the Constitution of the Republic of China, nationals' right of litigation is acknowledged.²⁹ Based on

23. The Code of Civil Procedure, § 83.

24. *Id.* §§ 84 & 420-1(3).

25. *Id.* § 107(1).

26. Falu Fuchu Fa [Legal Aids Act] § 5 (2009) (Taiwan).

27. *Id.* § 6.

28. *Id.* § 28. See also Tsaituanfajen Falu Fuchu Chichinhui Chehsiao Fuchu Chuehting Hou Shoufuchujen Fanhai Chouchin Chi Fei-Yung Tsoyehyaotien [Legal Aid Foundation's Rule of Compensation for Legal Aid Service] (2008) (Taiwan).

29. ZHONGHUA MINGUO XIANFA [The Constitution of the Republic of China] art. 16 (1947).

this, nationals should be vested with the position as the subjects in procedures, which means that nationals should be entitled the procedural right to participate in the proceedings that would have an effect on their interests, positions, liabilities, rights or obligations in order to influence the judgment. As the subjects of a procedure, parties in litigation not only are entitled to request the court to realize their substantive rights, but also are entitled to request the court to protect their procedural interests, such as their labor, time, or expenses spent in litigation. Therefore, the theory of “Right of Procedure Options” believes that parties can best decide how to balance “finding of truth” and “facilitation of procedures” as well as choose the best dispute resolution between civil litigation and the other ADRs, in order that their substantive interests and procedural interests can be balanced.³⁰ This theory has also been adopted in J.Y. Interpretation No. 591 by the Justices of the Constitutional Court Judicial Yuan.³¹

There are plenty of rules under the Taiwan Code of Civil Procedure that reflects the theory of “Right of Procedure Options.” For example, according to Article 427(3) of the Code of Civil Procedure, for ordinary disputes that do not automatically apply simplified procedures, parties may still choose to apply simplified procedures by their mutual agreement. Parties’ right to agree upon the dispute resolution method (such as arbitration agreement, mediation agreement, or jurisdiction agreement) may be another example of when where parties are entitled to choose the manners that they agree to be the most reliable for resolve disputes other than civil litigation. Another good example is that in Taiwan parties may agree to simplify the disputed issues in preparation proceedings,³² thus parties may decide not to spend labor, time, and expense in arguing a specific fact, though such a fact might be controversial from the court’s perspective.

And further, in contrast to a U.S. style class action, for a series or a group of homogeneous and/or related claims the plaintiffs may consider their best interests and then choose between the joinder of parties system, the representative party system, joining into the representative party system or

30. See generally LIAN-GONG CHIU, *Chenghsuhsuantsechuan chih Fali* [Legal Theory of Rights of Procedure Option], in CHENGHSUHSUANTSECHUAN LUN [THEORY OF RIGHTS OF PROCEDURE OPTION] 23 (2001).

31. J.Y. Interpretation No. 591 (2005): “The types of civil disputes have tended to become more and more diverse as the social and economic circumstances have constantly changed. In order to determine the relative duties of disputing parties and thus to resolve disputes, the State has established such mechanisms as arbitration and other non-litigious means in addition to the litigation systems. Under the doctrine of national sovereignty and the constitutional guarantee of the people’s fundamental rights, the people should assume principal roles in the procedure so as to enjoy the rights of procedural disposition and procedure option whereby they are enabled to choose through mutual agreement to resolve a dispute by means of litigation or any other statutorily prescribed non-litigious dispute resolution procedure to the extent that public interests are not contravened since they are the subjects of rights under private law.”

32. The Code of Civil Procedure, §§ 268-1(2), 270-1(1)(3) & 272(1).

association suits by parties' assignment system. The joinder of actions, which also leads to a multitude of parties, lacks in efficiency because each party's claim has to be examined on its own merits in terms of venue, subject matter jurisdiction or party's legal capacity. Also, there is no binding effect for the other parties as to factual allegations made by one party. For these reasons, the joinder of parties system is not very useful for collective litigation purposes, but can still be used for some cases, in which the injured people are few enough that they would like pursue their individual interests rather than collective procedural efficiency.

C. *Summary*

From the fundamental idea of respecting parties' right of litigation, the theory of "Right of Procedure Options" finds a way to strike the balance between "truth" and "efficiency" by leaving it to the parties' discretion. This basic principle, however, is subject to a noteworthy limit, i.e. public interests, which means that there is another balance strike that is, the balance between "parties' right of procedural options" and "public interests." From the introduction below we may further see how such a balance is made when designing the class actions system in Taiwan.

III. OVERVIEW OF TAIWAN'S CLASS ACTIONS

Taiwan's first Code of Civil Procedure was enacted in 1930, but it did not provide any provisions regulating class action. In its 1935 amendment, the Code of Civil Procedure first adopted the regulations of representative party in Article 41, which authorized multiple parties with common interests (the appointing parties) to appoint one or more persons among themselves (the appointed parties) to sue or be sued on behalf of the appointing parties. This was the only collective action mechanism that multiple parties could take advantage of.

In 1994, the Consumers Protection Act was enacted for the purpose of protecting consumers. In addition to providing numerous substantive rules in protecting consumers' rights and interests, this Act also provides several procedural rules to facilitate consumers to pursue their interests. Particularly, considering that consumers' disputes normally involve multiple parties, the Act provides a series of class action regulations, including: (1) empowering consumer protection groups to bring litigation in their own name when authorized by more than 20 consumers concerning a single incident.³³ The authorized consumer protection group who is not qualified as a party with

33. Hsiao Fei-chue Paohu Fa [Consumers Protection Act] § 50(1) (2005) (Taiwan).

“common interests” within the meaning of Article 41 of the Code of Civil Procedure may bring lawsuits for the injured parties; (2) empowering consumer protection groups to conduct suits for injunction against a business operator whose conduct has constituted a material violation of the law,³⁴ which authorizes a group to conduct lawsuits for public interests even without authorization from any party, as well as (3) providing a public notice system where the court may notify the other injured parties through public notice to request their damage in the same litigation process when the appointed parties already exist in a consumer dispute,³⁵ which establishes a mechanism to facilitate other injured parties to take advantage of the existing lawsuit. These mechanisms were all absent under the Code of Civil Procedure in 1994.

In 2002, the Securities Investors and Futures Trader Protection Act (hereinafter *the Investor Protection Act*) was enacted to protect the interests of investors in securities and futures market. This act creates the “protection institution,” which is a charity that undertakes the task of protecting investors. Similar with the role that consumer protection groups play under the Consumers Protection Act, the protection institution is also empowered to bring an action or submit a matter to arbitration in its own name with respect to a single securities or futures matter injurious to no less than 20 securities investors or futures traders who have been empowered by the protection institution to do so.³⁶ According to Article 41 of the Code of Civil Procedure, this authorizes an uninjured party who is not qualified as “a party with common interests” to serve the appointed party bringing lawsuits for the injured parties. This again expanded the class action system under the Code of Civil Procedure.

The 2003 amendment of the Code of Civil Procedure (hereinafter *the New Code*) also followed a similar trend and adopted a series of class action mechanisms. The New Code incorporates the said mechanisms under special laws so as to make it applicable to disputes other than consumers or investors disputes by adding that (1) all incorporated charitable associations may in their own name bring the lawsuit for their members as long as their members share common interests and assign the claimants’ rights to the association;³⁷ (2) incorporated charitable associations or charities that are approved by competent authorities may bring the injunction relief against the one who infringes on the multiple parties’ interests,³⁸ and (3) courts may

34. *Id.* § 53(1).

35. *Id.* § 54.

36. Chengchuan Toutzujen chi Chihuo Chiaojien Paohufa [Securities Investor and Futures Trader Protection Act] § 28(1) (2008) (Taiwan).

37. The Code of Civil Procedure, § 44-1.

38. *Id.* § 44-3.

notify other multiple parties with common interests through public notice to make their petitions in the same litigation process when the appointed parties are already in dispute.³⁹ After incorporating the development in the New Code as well as the special mechanisms under the Consumers Protection Act and the Investors Protection Act into the traditional representative party system, class action systems in Taiwan have begun stepping into a new era.⁴⁰

39. *Id.* § 44-2.

40. Yu-Hsin Lin, *Tsung Meikuo Chengchuanchitisung Tan Chengchuanchachisusung te Tienpusunhai Chihsiatsukungneng* [From United States Securities Class Action to Discuss the Function to Fill the Damage and Deterrence in Securities Fraud Litigations], 14 YUEHTAN TSAICHINGFA TSACHIH [FIN. & ECON. L. REV.] 173 (2008); Wen-Yu Chang, *Hsiaofeiche Paohu Susung chih Yenchiu* [A Research on Civil Procedure of Consumer Protection Law], in MINSHIHFAHSUEH HSINSSUWEI CHIH KAICHAN: LIUCHUNTANG CHIAOSHOU LIUCHIHUATAN CHUSHOULUNWENCHI [THE EXPANSION OF NEW THINKINGS IN THE CIVIL LAW: ESSAYS IN HONOR OF PROFESSOR CHUN-TANG LIU FOR HIS 60TH BIRTHDAY] 405 (Board of editors for essays in honor of professor Chun-Tang Liu for his 60th birthday ed., 2008); Wen-Yu Chang, *You Hsiaopaotuantitichi chih Sunhaipeichanghsiaofeisusung* [A Consumer Action for Damages Filed by the Consumer Protection Groups], 64 YUEHTAN FAHSUEH CHIAOSHIIH [TAIWAN JURIST] 8 (2008); Kuan-Ling Shen & Alex Yueh-Ping Yang, *Multi-Party Proceedings in Taiwan: Representative and Group Actions*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 7 (2009); Wen-Yeu Wang & Victor C.-M. Chang, *Feiyingshichai Chutao te Chengchuantuantisusung—Lun Toutzujen Paohu Chunghsin* [The Securities Class Action Dominated by Non-Profit Organization—Discussing Securities and Futures Investors Protection Center], 15 YUEHTAN MINSHANGFA TSACHIH [CROSS-STRAIT L. REV.] 5 (2007); KUAN-LING SHEN, *Toshufencheng Tangshihjen chih Chuanlichuichenghsu—Tsong Hsuantingtangshihjenchihtu tao Tuantisusung* [The Redress System of Multiple Parties in Dispute—From the Representative Party to Group Litigation], in SUSUNGCHUAN PAOCHANG YU TSAIPANWAI FENCHENGCHULI [THE PROTECTION OF LITIGATION RIGHT AND ALTERNATIVE DISPUTE SETTLEMENT] 175 (2006); Kuan-Ling Shen, *Tsong Tekuo “Toutzujen Shihfan Susung” chih Hsinchih Tsai Lun “Chuichia Hsuanting Tangshihjen” Chihhtu—“Kuosanhsing Sunhai” Fencheng Tangshihjen chih Chuanli Chiuchi Tuching* [From the New System of “Investor Model Suit” in Germany to Discuss “Joining-into Representative Party” System], in MAJU ERSHIHI SHIHCHI CHIH MINSHIHFAHSUEH YENCHIU: LO YUNG-CHIA CHIAOSHOU CHICHIHUATAN CHUSHOU LUNWENCHI [THE CIVIL LAW RESEARCH FOR STEPPING INTO TWENTY-FIRST CENTURY: THE COLLECTION OF THESIS CELEBRATING SEVENTY-YEARS-OLD BIRTHDAY OF PROFESSOR LO YUNG-CHIA] 161, 175 (Board of editors for essays in honor of professor Lo Yung-Chia for his 70th birthday ed., 2006); Lian-Gong Chiu, *Hsin Minshih Susungfa Lilun yu Shihwu: Tiichiang—Chuichia Hsuanting Tangshihjen Chihhtu chih Yunyungfangchen Chanshu chi Hsiangkuan Chieh Shihlun Chihchientao Fali* [The Theory and Practice of New Civil Procedure Law: Lesson 1—The Using Guidelines of Joining-into Representative Party System—To Described the Leading Principles About Relevant Interpret Theories], 23 YUEHTAN FAHSUEH CHIASHIH [TAIWAN JURIS] 107 (2004); Len-Yu Liu & Jun-Hong Lin, *Toutzujen Tuanti Susung Hsinshihtai te Lailin* [New Age of Investor Class Action’s Coming], 111 YUEHTAN FAHSUEH TSACHIH [TAIWAN L. REV.] 80 (2004); Cheng-Hsien Hsu, *Hsiaofeiche Paohu Tuanti Sunhaipeichang Susungchihtu chih Tsaitingwei—Shih I Chenghe Hsienfa · Fahsuehfangfalun chi Minsufa chih Kuantien Wei Chunghsin* [The Reposition of System of the Action for Damages Filed by Consumer Protection Groups—In the View of Integration of the Constitution, Juridical Methodology and Civil Procedure Law as the Center], 110 YUEHTAN FAHSUEH TSACHIH [TAIWAN L. REV.] 74 (2004); Kuan-Ling Shen, *Tuantisusung Wenti te Tanta* [The Discussion of Problems in Group Actions], 6(1) FAKUANHSIEHHUI TSACHIH [J. JUDGES ASS’N], 67, 67-82; Fee-Mei Chiu, *Wokuo Minshih Susungfa Chung Youkuan Tuantisusung Chihhtu chih Yenchiu* [The Research of the System of Verbandsklage in Our Civil Procedure Law], 49(1) FAHSUEH TSUNGKAN [CHINA L.J.], 89; Shu-Huan Shyuu, *Chituan Lii Paohu Chenghsu chih Hsinkaichan—I Tuantiptusowsesusung chih Ipanhua Wei Chichi* [The New Venture of Protecting Group Interests Procedure—With the Generalization of Group Actions for Cease Infringing Act as an Opportunity], 1149 SSUFA CHOUKAN [JUD. WKLY.] 2 (2003); Kuo-Chang Huang, *Susungtsanyu chi Taipiaosusung—Hsinminshihsusungfahsia*

The New Code has the following characteristics: (1) the class action system is possible for all civil disputes, not only for consumers or investors disputes; (2) the assigning members do not have more than 20 when incorporated charitable associations bring the lawsuit for their members; (3) the New Code adopted a remarkable mechanism which is referred to as the “lump-sum judgment and distribution agreement” between all assigning members. The members can consider their own material and procedural interests and then decide to reach this agreement which could have the advantage of procedural efficiency.⁴¹ According to this agreement the court could award a lump-sum judgment without further specifying the individual amount that each appointing party is entitled to. These new regulations for the “lump-sum judgment and distribution agreement” in the New Code should analog apply in the consumers and investors class action, even though the promulgation of the New Code does not replace the existing mechanism under the Consumers Protection Act and Investors Protection Act. Consumers and investors may still seek protection under these specific Acts.

IV. CLASS ACTION BY PARTIES’ ASSIGNMENT

Taiwan’s class action may be distinguished by their causes, i.e. whether such action is triggered by assignment of parties or by statutory assignment. The underlying rationale of these two categories of class action is quite different. Below, this study will introduce Taiwan’s class action based on such categorization, beginning with an introduction of the class actions by parties’ assignment.

Class action by parties’ assignment refers to where a representative (a.k.a. an appointed) party or an incorporated charitable association obtains his/her right of action through the assignment of the appointing parties. Currently such class action in Taiwan can be further categorized into two

“Chenghsupaochang” yu “Fenchengchiehchuehi Tzuhsing” chih Pinghengtien [Participation in the Proceedings and Representative Actions—The Blance of “Program Protection” and “One-Time Resolve of Disputes” in New Civil Procedure Law], 97 YUEHTAN FAHSUEH TSACHIH (TAIWAN L. REV.) 8 (2003); Shyh-Ming Chiang, *Hsuanting Tangshihjen Chihitu chih Pienke—Chienlun Tuantisusung* [The Transition of Representative Party System: Discussing the Group Litigation Concurrently], 96 YUEHTAN FAHSUEH TSACHIH (TAIWAN L. REV.) 8 (2003); Chih-Chun Chiang, *You Hsiaoifeiche Paohufa te Shihshih tan Kuonei Shoutsung Hsiaoifeituantisusung yu Panchueh* [By the Enforcement of Consumer Protection Law to Discuss the First Litigation and Judgment of Consumer Group Action in Taiwan], 273 LUSHIH TSACHIH [TAIPEI B. J.] 55 (2002); Symposium, *Seminar of Investor Protection Law—The Application of Groups, Public Interest Litigation in Securities and Futures Markets*, 49 YUEHTAN FAHSUEH TSACHIH [TAIWAN L. REV.] 68 (1999); Lian-Gong Chiu, *Minshihsusung chih Mute—I Hsiaoifeichepaohususung Weili* [The Purpose of Civil Procedure—Taking the Consumer Protection Actions as Example], 24(1) KUOLI TAIWAN TAHSUEH FAHSUEH LUNTSUNG [NTU L.J.] 289, 289-325 (1994).

41. The Code of Civil Procedure, § 44-1(2).

categories: the representative party system, wherein a member from the parties with common interests becomes the appointed party, and the association's suits by parties' assignment, wherein the representative party is an incorporated charitable organization.

A. *Representative Party System*

1. *Basic Structure of the Representative Party System*

The representative party system in Taiwan is provided in the Code of Civil Procedure. According to Article 41, Paragraph 1 of the Code of Civil Procedure, multiple parties, who have common interests and may not qualify to be an unincorporated association provided in the third paragraph of the preceding Article, may appoint one or more persons from themselves to sue or to be sued on behalf of the appointing parties and the appointed parties. The "common interests here" refers to that the main offense or defense approach in multiple parties' claim is identical.⁴² Therefore, multiple parties with common interests shall make the "appointment" to allow the appointed party(s) to conduct litigation acts. Under this mechanism, multiple parties with common interests may choose to authorize one or more persons from among themselves to conduct the lawsuit, instead of conducting the lawsuit on their own. By this way, individual disputes may be gathered in a single litigation proceeding so as to save parties' procedural costs and to enhance the judicial economy. In addition, it may further prevent the court from repetitively examining the common facts, thus reducing the possibility of contradictory judgments.

The "nominal" party in the litigation proceeding is the appointed party(s), not the appointing parties. According to Article 41, Paragraph 2 of the Code of Civil Procedure, "After the appointment has been made in a pending action in accordance with the provision of the preceding paragraph, all parties who are not appointed shall withdraw from the proceeding." As the nominal party, the appointed party should be the one conducting the action, which may be observed from Article 44, Paragraph 1 of the Code of Civil Procedure which provides that, "The appointed parties may conduct all acts of litigation for the appointing parties." However, the result of the lawsuit will eventually be attributed to the appointing parties, thus the provision of the said Paragraph states that, "the appointing parties may restrict the appointed parties' authority to abandon claims, admit claims, voluntarily dismiss the action, or settle the case" in order to protect the appointing parties' interests. One appointing party's such restriction,

42. Zuigao Fayuan [Sup. Ct.], Civil Division, 87 Tai-Shang No. 2917 Decision (1998) (Taiwan).

according to Article 44, Paragraph 2 of the Code of Civil Procedure, does not bind other appointing parties.

Judicial practice in Taiwan acknowledges the fact that the representative parties as the plaintiffs may directly plead the defendant to pay a certain amount of compensation to the appointing parties who are not in the litigation, for example, to state in the claim as “The Defendant shall pay [amount] to A, B and C respectively.”⁴³ It is different from the representative litigation system in some other countries,⁴⁴ which state the defendant’s responsibility to compensate before the claimants come up with the actual amount of the claim. It is also more consistent with the goal of efficient dispute settlement as well as the concept of judicial economy.

Unless otherwise provided by the act or by the contract, the compensation shall be limited to the injury actually suffered and the interests which have been lost (Article 216 of the Civil Code). But if the plaintiff has proved injuries but is unable to or is under great difficulty to prove the exact amount, the court shall, taking into consideration all circumstances, determine the amount by its conviction (Article 222(2) of the Code of Civil Procedure). Punitive damages are not admitted in principle. Only in a litigation brought in accordance with the Consumer Protection Law (see below IV.B.1.), the injured consumer may claim for punitive damages up to three times the amount of actual damages as a result of injuries caused by the willful act of the misconduct of business operators; however, if such injuries are caused by negligence, a punitive damage up to one time the amount of the actual damages may be claimed (Article 51 of the Consumer Protection Law).

The judgment awarded to the appointed party is binding upon the appointing parties. Article 401, Paragraph 2 of the Code of Civil Procedure provides that, “A final and binding judgment to which a party has acted as the plaintiff or the defendant for another person is also binding on such other person.” This binding effect, nonetheless, is only imposed upon those parties with common interests that have made the appointment for the appointed party. Who do not participate in the appointment are neither prevented from bringing another lawsuit, nor bound by the judgment imposed on the appointed party(s).⁴⁵

43. Zuigao Fayuen [Sup. Ct.], Civil Division Conference, the 15th Resolution (2001) (Taiwan).

44. Such as United Kingdom, see KUAN-LING SHEN, *Toshu Fencheng Tangshihjen chih Chuanli Chiuchi Chenghsu—Tsung Hsuantingtangshihjen Chih tu tao Tuanti Susung* [The Redress System of Multiple Parties in Dispute—From the Representative Party to Group Litigation], in SUSUNGCHUANPAOCHANG YU TSAIPANWAIFENCHENGCHULI [THE PROTECTION OF LITIGATION RIGHT AND ALTERNATIVE DISPUTE SETTLEMENT] 175, 177-80 (2006).

45. *Id.* at 180-81.

2. *Joining into the Representative Party System*

The representative party system has the advantage of gathering disputes with a similar nature into a single litigation proceeding, which may save parties' litigation costs enhance the judicial economy, and prevent contradictory judgment. Considering the above advantages, multiple parties should be encouraged to participate in such single litigation proceedings.

(a) *Joining into the Representative Party System Under the Consumers Protection Act*

To make multiple parties with common interests informed of the existing litigation proceeding conducted by the appointed party(s), thus allowing them to make informed decisions as to whether to join such proceeding, the Consumers Protection Act first allowed for joining into the representative party system in 1994. According to Article 54, Paragraph 1 of the Consumers Protection Act, "If a mass of parties injured out of the same consumer relationship select one or more persons to bring an action for damages in accordance with Article 41 of the Code of Civil Procedures, the court may announce by public notice after obtaining the consent of the chosen representative(s), whereby other injured parties may within a certain period of time set forth in writing the facts, evidences and declarations of claims resulting from the injury and request for damages in the same litigation proceeding." Therefore, when a group of injured consumers in a consumer dispute has appointed a party among themselves to conduct the lawsuit, courts may make the public notice to invite other injured consumers to join the appointment. The court, however, should acquire the consent from the appointed party before issuing a public notice.

In issuing a public notice, the court shall post the public notice on the court's bulletin board and publish it in official gazettes, newspapers, or other similar means of communication and set a period of no less than ten days for other parties to join the litigation therein.⁴⁶ The expenses for such publication shall be advanced by the national treasury, thus parties are not obligated to bear the publication fee.⁴⁷ When other parties file a pleading within the designated period, they are deemed to have made the same appointment in accordance with the provisions of Article 41.⁴⁸

(b) *Joining into the Representative Party System Under the Code of Civil Procedure*

In reference to the Consumers Protection Act, the New Code began allowing for joining into the representative party system in 2003. Article 44-2(1) of the Code of Civil Procedure provides that the court may issue a

46. The Consumers Protection Act § 54(3).

47. *Id.*

48. *Id.* § 54(1).

public notice stating that other persons with the same common interests are allowed to join the action “when multiple parties, whose common interests have arisen from the same public nuisance, traffic accident, product defect, or the same transaction or occurrence of any kind, appoint one or more persons from themselves in accordance with the provision of Article 41 to sue for the same category of legal claims.” Courts’ issuance of such public notice, however, is subject to one of the following circumstances: (1) the court actively seeks the consent of the appointed party(s);⁴⁹ (2) the appointed party(s) makes the petition to the court, which the court considers appropriate;⁵⁰ (3) other parties with common interests make the petition to the court to issue the public notice in accordance with (1) or (2), which the court considers appropriate;⁵¹ or (4) when the appointed party(s) disagrees with the public notice, the court may, on its own initiative, issue a public notice to inform other persons with common interests to initiate actions, and then the court will consolidate those actions.⁵²

In addition, similar to the Consumers Protection Act, the court shall post a public notice on the court's bulletin board and publish it in official gazettes, newspapers, or other similar means of communication, and set a period no less than twenty days for other parties to join the litigation in its public notice.⁵³ The expenses for such publications are also advanced by the national treasury, thus parties are not obligated to bear publication fees.⁵⁴ In addition, when other parties file a pleading within the designated period, they are deemed to make the same appointment in accordance with the provisions of Article 41.⁵⁵

While the design of the joining-into representative party system is similar with the one under the Consumers Protection Act, there are still some differences.

Firstly, under the New Code, even if the appointed party disagrees to represent other parties with common interests, the court may still on its own initiative, issue a public notice to inform other persons with common interests to initiate actions, and then the court will consolidate the actions in accordance with Article 44-2, Paragraph 5 of the Code of Civil Procedure. According to this regulation the appointed party’s willingness is sufficiently respected as it is not mandatorily required to represent those parties that it is not willing to represent, while the advantage of joining into the representative party system is still to a certain extent achieved by the court’s

49. The Code of Civil Procedure, § 44-2(1) para. 1.

50. *Id.* § 44-2(1) para. 2.

51. *Id.* § 44-2(2).

52. *Id.* § 44-2(5).

53. *Id.* § 44-2(4).

54. *Id.*

55. *Id.* § 44-2(1) para. 3.

consolidation of similar actions into a single litigation proceeding. In this sense, the New Code effectively supplements the deficiency of joining into the representative party system under the Consumers Protection Act.

Secondly, the New Code also provides some favors with respect to the court fee for those who take advantage of joining-into the representative party system. According to Article 77-22, Paragraph 1 and 3 of the Code of Civil Procedure, “The party who initiated an action in accordance with the provision of Article 44-2 may temporarily be exempted from paying the portion of the court costs in excess of NT\$600,000 if the amount of court costs taxed is more than NT\$600,000.” Also, “The court of first instance shall, after the action is concluded, make a ruling on its own initiative to tax court costs, the payment of which will be temporarily exempted against the party who should bear such cost in accordance with the provision of the first paragraph.” This special rule of court fees may allow parties that wish to join into the litigation proceeding to weigh their substantive and procedural interests and thus encourage those with higher winning chance to take advantage of joining into the representative party system.

(c) Summary

The strength of Taiwan’s allowance for joining into the representative party system is that it respects parties’ choice, disposition or decision to participate in a procedure. Besides, it balances the procedural interests of parties and the protection of parties’ hearing rights, avoiding the defects in the United State’s opt-out system. Whether or not to make use of joining into the representative party system is a decision left to the parties as they weigh their substantive as well as procedural interests. The system also respects the parties’ concern for their procedural interests by allowing the parties to decline to being appointed by other parties with common interests.⁵⁶

B. *Association Suits by Parties’ Assignment*

One of the key procedural requirements of the representative party system, as illustrated above, is that the appointed party should be selected from the multiple parties with common interests. Under this requirement, such multiple parties are prohibited from appointing a party that does not share common interests with them. The rationale behind this requirement is

56. Shen, *supra* note 40. *Tsung Tekuo “Toutzujen Shihfan Susung” chih Hsinchih Tsai Lun “Chuichia Hsuanting Tangshihjen” Chih-tu—“Kuosanhsing Sunhai” Fencheng Tangshihjen chih Chuanli Chiuchi Tuching [From the New System of “Investor Model Suit” in Germany to Discuss “Joining-into Representative Party” System]*, in MAJU ERSHIHI SHIHCHI CHIH MINSHIHFAHSUEH YENCHIU: LO YUNG-CHIA CHIAOSHOU CHICHIHUATAN CHUSHOU LUNWENCHI [THE CIVIL LAW RESEARCH FOR STEPPING INTO TWENTY-FIRST CENTURY: THE COLLECTION OF THESIS CELEBRATING SEVENTY-YEARS-OLD BIRTHDAY OF PROFESSOR LO YUNG-CHIA] 161, 175 (Board of editors for essays in honor of professor Lo Yung-Chia for his 70th birthday ed., 2006).

the fear that without such limitation, some people, for their own profit, might persuade others to make an appointment, thus leading to abusive motions and wasted judicial resources.

On the other hand, sometimes none from the multiple parties with common interests are willing to represent others in bringing on lawsuits. Thus, the representative party system needs to be improved so on one hand it can facilitate multiple parties to pursue their rights, while on the other hand it can prevent the abuse of representative party suits. Under these considerations Taiwan’s legislations provide that the injured persons may assign his/her the claimants’ rights to a group which should fulfill certain legal requirements. Taiwan’s law does not know a class action like in the United States. There are, nevertheless, other instruments of collective litigation, most notably complaints by interest groups or associations. In addition to the Code of Civil Procedure some other specific Acts also provide for association suits for civil disputes.

1. *Association Suits by Parties’ Assignment Under the Consumers Protection Act*

The “association suits by parties’ assignment” is firstly regulated by the Consumers Protection Act. According to Article 50, Paragraph 1 of the Consumers Protection Act, “Where a mass of consumers are injured as the result of the same incident, a consumer protection group may take assignment of the rights of claims from 20 or more consumers and bring litigation in its own name.” Again, from the said Paragraph it is clear that the consumer protection group’s authority to conduct the lawsuit is derived from consumers’ appointment, which is similar to the representative party system. This mechanism, however, is different from the representative party system in the sense that the consumers protection group is not the one that is injured by consumer disputes, thus it is not entitled to serve as the appointed party to bring the lawsuit for the injured consumers. Accordingly, Article 50, Paragraph 1 of the Consumers Protection Act expands the representative party system by permitting multiple parties with common interests to appoint a specific type of charitable association that is not amongst themselves to bring the actions.

To ensure that the consumer protection group may well represent the consumers’ interests so as to prevent the abuse of this association suit by the parties’ assignment, the Consumers Protection Act regulates the qualifications of the said consumer protection group in Article 49 of the Consumers Protection Act. According to Paragraph 1 of said Article, such qualifications include that the consumer protection group should (1) have been approved of establishment for more than 3 years, (2) have obtained a

rating of excellence by the Consumer Protection Commission, (3) maintain a special staff dealing with consumer protection, and (4) be either an association established as a juristic person having more than 500 members or a foundation established as a juristic person having total registered assets of NT\$10,000,000 or more. Moreover, its bringing of actions should be approved by the consumer ombudsman⁵⁷ and be conducted by retaining a lawyer.⁵⁸

As with the representative party system, the Consumers Protection Act also respects the consumers' decision as to whether to make and continue the appointment. According to Article 50, Paragraph 1 of the Consumers Protection Act, "Consumers may revoke such assignment of the rights of claims before the close of oral arguments, in which case they shall notify the court." Such termination will not preclude the appointed consumers protection group to continue litigating for other appointing consumers, as Article 50, Paragraph 2 further confirms that "if some consumers terminate their assignment of the rights of claims and thus the said litigation result in less than 20 consumers the function of the consumer protection group standing will not be affected."

To encourage consumers to take advantage of the association suit by parties' assignment, the Consumers Protection Act also provides some special rule with respect to the procedural costs in such litigation. Article 52 of the Consumers Protection Act provides that, "If a consumer protection group brings actions in accordance with Article 50 in its own name, the court fees for the portion of the claim exceeding NT\$600,000 shall be waived." Article 49, Paragraph 2 of the Consumers Protection Act also provides that, "The engaged lawyer may request the reimbursement of any necessary expenses but not claim any fees for such litigation." Article 50, Paragraph 6 also provides that, "Consumer protection groups shall not claim rewards from consumers for litigation." These regulations can reduce the procedural costs that consumers originally should incur.

2. *Association Suits by Parties' Assignment Under the Investors Protection Act*

The Investors Protection Act also provides similar association suits by parties' assignment in 2002. The Act also undergoes its amendment in 2009. According to Article 28, Paragraph 1 of the Investors Protection Act, "the protection institution may bring an action or submit a matter to arbitration in its own name with respect to a single securities or futures matter injurious to

57. Consumers Protection Act § 49(1).

58. *Id.* § 49(2).

a majority of securities investors or futures traders, after having been so empowered by not less than 20 securities investors or futures traders.” The 2009 Amendment also clarifies in Article 28, Paragraph 3 that such action or arbitration includes the compulsory execution procedures, provisional attachment, provisional injunction relief, participation in reorganization or bankruptcy, and other exercise of rights that are necessary to realize the investors’ rights. This provision again differs from the representative party system under the Code of Civil Procedure by expanding the qualification of the appointed regarding investor protection. Moreover, the 2009 Amendment also authorizes courts to establish professional tribunals or designate professionals to handle the actions brought by the protection institution.⁵⁹

According to Article 7 of the Investor Protection Act, the protection institution shall be established by securities or futures related organizations or enterprises as designated by the competent authority, including the Taiwan Stock Exchange Corporation, Taiwan Futures Exchange Corporation, GreTai Securities Market, Taiwan Securities Central Depository Company, Chinese Securities Association, Securities Investment Trust and Consulting Association of the R.O.C., Federation of Futures Industry Associations, all securities finance enterprises, etc. To date, the only protection institution legally established is Securities and Futures Investors Protection Center (SFIPC). For the furtherance of its operations, Article 18 of the Investors Protection Act also regulates that the protection institution shall establish a protection fund, whose sources include the allocation by every securities firm, every futures commission merchant, the Taiwan Stock Exchange Corporation, the Taiwan Futures Exchange Corporation and the GreTai Securities Market. As of September 15, 2009, the SFIPC has brought 73 cases to court for investors.⁶⁰

Similar with the association suits by parties’ assignment under the Consumers Protection Act, the Investors Protection Act respects investors’ decision as to whether to make the appointment and to continue the appointment, and thus acknowledges the investors’ right to withdraw the empowerment⁶¹ and such withdrawal will not preclude the appointed protection institution from continuing to litigate for other appointing consumers.⁶²

In addition, the Investor Protection Act also provides some special rules with respect to the procedural costs in such litigations. According to Article 35, Paragraph 1 and 3 of the Investors Protection Act after its amendment in

59. The Investors Protection Act § 28-1.

60. Securities and Futures Investor Protection Center (SFIPC), <http://www.sfipc.org.tw/english/main.asp> (last visited Feb. 16, 2010).

61. The Investors Protection Act § 28(1).

62. *Id.* § 29(2).

2009, “In the event the protection institution institutes an action or an appeal pursuant to Article 28, it shall be temporarily exempted from court costs on that portion of the value of the object of litigation or the compensation amount sought in excess of NT\$30,000,000. In the event an opposing party institutes an appeal and receives a final and unappealable judgment in its favor, its advance payment of court costs shall be returned after deduction of the other fees for which it is responsible” and “In the event the protection institution institutes an action or petition for preservation pursuant to Article 28 and petitions for compulsory execution after procuring the execution titles, it shall be temporarily exempted from execution fees on that portion of the value of the object of execution or the compensation amount sought in excess of NT\$30,000,000. The execution fee that is temporarily exempted shall be returned by the execution proceeds.” As with the Consumers Protection Act, the protection institution is not permitted to seek remuneration for itself, either.⁶³

3. *Association Suits by Parties' Assignment Under the Code of Civil Procedure*

(a) Basic Structure of the Association Suits by Parties' Assignment

As of its 2003 amendment, the Code of Civil Procedure also has had association suits by parties' assignment. According to Article 44-1, Paragraph 1 of the Code of Civil Procedure, “Multiple parties with common interests who are members of the same incorporated charitable association may, to the extent permitted by said association's purpose as prescribed in its bylaws, appoint such association as an appointed party to sue on behalf of them.” This provision relaxed the original rule which required the representative parties to be members of parties with common interests.

Compared with the association suits by the parties' assignment under the Consumers Protection Act and the Investors Protection Act, the one in Code of Civil Procedure expands its scope of application by allowing it to be applied to all civil procedures. However, the original provisions in the Consumer Protection Law and Investor Protection Act are not deleted and the consumer protection group and the protection institution are still able to initiate a compensation lawsuit based on the assignment of rights of actions by more than 20 injured consumers or investors. In comparison, two remarkable points are found in the New Code. The first point is that there is no restriction set to the number of appointing parties under the Code of Civil Procedure, while both the Consumer Protection Law and the Investor Protection Act require 20 such persons. The second is that the Code of Civil

63. *Id.* § 33.

Procedure requires the appointing parties to be members of an incorporated charitable association, while consumers and investors as protected by Consumer Protection Law or Investor Protection Act are not members of a consumer protection group or investor protection institution. Consumers and investors may opt to be under either the Code of Civil Procedure or special laws based on their individual circumstances.

Since the 2003 amendment which added the association suit by parties’ assignment to the present, there have been comparatively few cases taking advantage of this system in Taiwan’s judicial practice. So far there are three cases in the Taipei District Court. One of those is a suit concerning damages of industrial pollution; the other two are labor suits and the plaintiff is a labor union. In the RCA case⁶⁴ which involved environmental liability against Radio Corporation of America (RCA), Taiwan Taipei District Court decided firstly that “Taoyuan County Original RCA Corporation Employees Caring Association” organized by the workers of victims was not qualified to be the representative party under Article 44-1 of the Taiwan Code of Civil Procedure on the grounds that the association had not been registered as a juristic person and was thus not qualified to be incorporated as a charitable association. In addition, the court also made it clear that although the association met the conditions set in Article 40(3) of the Taiwan Code of Civil Procedure to be “an unincorporated association” with the capacity to be a party, since the victims in that case were the members of the association and not the association itself, the association was neither qualified to sue on its own nor as the representative party under Article 41 of the Taiwan Code of Civil Procedure. After the “Taoyuan County Original RCA Corporation Employees Caring Association” obtains the license from its concerned authorities and is registered on the book as a juristic person in District Court, the requirements for suit will all be fulfilled. This case reveals the weakness of Taiwan’s present association suit by parties’ assignment.

(b) Lump-sum Judgment and Distribution Agreement

One of the innovative designs under the association suits by parties’ assignment of the New Code is the “lump-sum judgment and distribution agreement.” According to Article 44-1, Paragraph 2 of the Code of Civil Procedure, “Where an incorporated association initiates an action for monetary damages on behalf of its members in accordance with the provision of the preceding paragraph, if the entire body of the appointing parties agrees to allow the court to grant the full amount of a monetary award to them as a whole body and prescribes how such total award shall be distributed, and furthermore, if the entire body has filed a pleading to such effect, then the court may award a total sum of money to the entire body of

64. Taipei Tifang Fayuan [Taipei D. Ct.], Civil Division, 93 Chong-Su No. 723 (2004) (Taiwan).

the appointing parties without specifying the amount that the defendant must pay to each of the appointing parties respectively.” Therefore, unlike the traditional representative party system that requires the appointed parties to specify the claims that each appointing party is entitled to, the court may, based on the agreement of the entire appointing parties, award a lump-sum to all the appointing parties.

The rationale behind this system is the respect of the parties’ right to dispose their substantive rights. Parties may choose to take advantage of this system to lessen their burden of proof or other relevant procedural burdens, and the court’s burden may also be thus alleviated. When awarding a lump-sum judgment, the court does not simply calculate the total substantive damage compensation claimed by the individual appointing parties, but examines all situations before reaching a decision on the total sum in an equitable manner. The decision might not be in conformity with the objective compensation rights of the appointing parties. However, it is the result obtained by each of the appointing parties disposing their own substantive rights through the agreement above and therefore it shall not be forbidden.⁶⁵

With respect to the distribution agreement, the appointing parties may arrange to distribute the sum to the individual appointing party according to a certain proportion and method; or, the appointing parties may agree not to distribute the sum to the individuals but donate it to an incorporated charitable association or authorize the use of the compensation such as establishing a public interest fund. The approach which separates the determination of compensation from its distribution not only is economical for the judgment procedure but also more efficient in the enforcement procedure.⁶⁶ However so far lump-sum judgment and distribution agreement do not play an important roll in judicial praxis yet. In one of above mentioned cases where the court held that the labor union has the right of action as the plaintiff, it also did not claim for a lump-sum judgment, but pleaded the court to award a monetary judgment, in which separate payments to each appointing party (777 people altogether) are definite and particularized.⁶⁷

C. *Summary*

The system of class actions by parties’ assignment in Taiwan clearly reveals its embodiment from the theory of right of procedural option. The theory of right of procedural option exactly explains why Taiwan does not

65. SHEN, *supra* note 44, at 203-04.

66. SHEN, *supra* note 44, at 204.

67. Taipei Tifang Fayuan [Taipei D. Ct.], Civil Division, 95 Lau-Su No. 206 (2006) (Taiwan).

adopt a mechanism similar to the United States’s opt-out system to mandate multiple parties to join a single litigation proceeding, as this theory believes that whether to make this decision or not should be left to the parties after considering their substantive interests and procedural interests. In the event that the parties decide to appoint someone to bring the lawsuit on their behalf, laws basically respect their decision, and thus the New Code loosens up the qualification of appointed parties and allows an incorporated charitable associations with no common interests to be appointed. In addition, based on the respect of parties’ such right of procedural option to join the litigation proceeding, the New Code also provides the joining-into representative party system to inform multiple parties of an existing litigation proceeding, so as to allow them opportunities to take advantage of such proceeding. Furthermore, the lump-sum judgment and distribution agreement is created to allow parties that plead to the court the freedom not to specify the compensation respectively and therefore save the resources that otherwise would be devoted by parties, provided that all of them are in agreement. This is another mechanism which obviously acknowledges parties’ right to dispose their substantive interests in exchange of procedural interests.

V. CLASS ACTION BY STATUTORY ASSIGNMENT

Class action by statutory assignment refers to a representative party who obtains his/her right of action through regulations of law without the assignment of adversely affected people. Under Taiwan’s current laws, there is only one type of class action by statutory assignment, i.e. the association’s suit for injunction relief.

A. *Association’s Suit for Injunction Relief Under the Consumers Protection Act*

The association’s suit for injunction relief is first regulated by the Consumers Protection Act. According to Article 53 of the Consumers Protection Act, “Consumer ombudsmen or consumer protection groups⁶⁸ may petition to the court for an injunction to discontinue or prohibit a business operator’s conduct which has constituted a material violation of the provisions of this law relating to consumer protection.” Thus, the consumer ombudsmen or consumer protection groups may bring the injunction relief against business operators even without the consumers’ assignment.

68. The qualifications for these consumer protection groups to bring the association suit for injunction relief are the same as the one to bring association suit by parties’ assignment, which may refer to the introduction in Part IV.B.1 of this study.

To reduce the procedural costs for bringing such lawsuit to protect public interests, Article 53, Paragraph 2 provides that, “Court fees for a litigation referred to in the preceding paragraph shall be exempted.”

B. *Association’s Suit for Injunction Relief Under Code of Civil Procedure*

The Code of Civil Procedure introduced the association’s suit system in its amendment in 2003, which expanded the scope of application of association suits from original consumer disputes to all civil procedural events. According to Article 44-3, Paragraph 1 of the Code of Civil Procedure, “An incorporated charitable association or a foundation may initiate, with the permission of its competent governmental business authority and to the extent permitted by the purposes as prescribed in its bylaws, an action for injunctive relief prohibiting specific acts of a person who has violated the interests of the majority concerned.” As the Consumers Protection Act, no court cost will be taxed on an action initiated in accordance with the said Paragraph according to Article 77-22, Paragraph 2 of the Code of Civil Procedure. Under the said Paragraph, there are four requirements for a group to initiate a lawsuit for injunction: (1) the association shall be an incorporated charitable association or a foundation which owns the legal person entity; (2) it shall obtain permission from its business competent authority;⁶⁹ (3) the lawsuit shall be limited to the extent permitted by the purposes as prescribed in its bylaws; and (4) a person’s specific act has caused an infringement upon the majority’s interests.

The Judicial Yuan and Administrative Yuan awarded the Regulation of Permission and Supervision of Bringing the Lawsuit for Injunction by Incorporated Charitable Association and Foundation (hereinafter “Permission and Supervision Regulation”) in 2003 as mandated by Article 44-3, Paragraph 2 of the Code of Civil Procedure to regulate the permission procedure and standard for the competent authority. With respect to the qualification requirement of the incorporated charitable association or foundation, Article 2 of the Permission and Supervision Regulation provides that, to bring the association’s suits to court as approved by the competent authority, an incorporated charitable association and foundation shall meet the following requirements: (1) the incorporated charitable association or foundation must be established over three years; (2) members for the

69. The so-called “business competent authority” here represents the supervisory governmental authority which supervises the activities of that juridical person. Generally speaking, when the establishment of that juridical person is required by law to obtain license from a specific governmental authority, that specific governmental authority is the business competent authority of the juridical person. The business competent authority is permitted to examine the juridical person’s financial situation and ascertain whether it has violated the conditions of the license and other legal requirements according to art. 32 of the Civil Code.

incorporated charitable association are over 500 or the foundation has a total registered assets of over NT\$10,000,000; (3) the association’s suits are consistent with the purposes as prescribed in the bylaws and as approved by the board of directors; and (4) the action is considered to be an infringement upon the majority’s interests by at least 20 persons.

Article 4 of the Permission and Supervision Regulation also provides the circumstances where the business competent authorities should disapprove the actions to be brought. Such circumstances include: (1) the party bringing such association’s lawsuit does not meet the qualification requirement as illustrated above; (2) the same facts have been filed by an incorporated charitable association or foundation as an association’s suit which is still pending; (3) the association’s suits that the party brought are considered groundless and are thus turned down three times by a court; (4) the party waived, withdrew, settled, or brought the appeal or retrial of the association’s suit without acquiring its business competent authorities’ permission; (5) the party’s application involves material misrepresentation or violation of the laws; and (6) the approval of such application is considered inappropriate based on other relevant facts.

Moreover, as the Consumers Protection Act, Article 77-22, Paragraph 2 provides that “No court cost will be taxed on an action initiated in accordance with the provision of Article 44-3.” Article 7 of the Permission and Supervision Regulation also provides that, “an incorporated charitable association or foundation and their appointed attorney are not permitted to claim remunerations or any fees from the injured party/parties for the association’s suits.”

A fundamental dispute to respect the association’s suit system in Taiwan is the scope of such suit’s binding effect. This issue implicates the nature of the association’s suits. Some scholars contend that the reason for an association which is allowed to initiate the suit in its own name is based on its inherent independent right. Therefore, it leads to the conclusion that although one association has already brought the suit for injunction, other associations may still bring another suit without violating Article 253 of Code of Civil Procedure which prohibits retaining of an action.⁷⁰ This study, however, believes that the nature of an association’s suit for injunction relief shall be regarded as the representative action by statutory assignment. On the basis of a reasonable distribution of judicial resources without the defendant’s unnecessary re-appearances in court as well as balancing the procedural protection for parties, it shall be recognized that actions initiated by these associations are for the collective interests, and these interests are

70. Shyh-Ming Chiang, *Hsuanting Tangssihjen Chihtu chih Pienke—Chienlun Tuantisusung* [The Transition of Representative Party System: Discussing the Group Litigation Concurrently], 96 YUEHTAN FAHSUEH TSACHIH [TAIWAN L. REV.] 8, (2003).

not only belong to the specific association, but also a community which includes all the relevant incorporated charitable associations and foundations as well as the majority of the injured parties. Accordingly, if one association has initiated the action towards a specific act and another association also brings the suit at a later time while the former is still pending, the latter will be a repetitive motion and thus incur the defense of violation of Article 253 of the Code of Civil Procedure. If a final and binding judgment has been awarded to the former suit, the latter will incur the defense of *res judicata*, except when the plaintiff fails the former suit and sufficient procedural protection is not provided to the association bringing the latter suit.

C. *Summary*

The focus of the class action by statutory assignment is quite different from the class action by parties' assignment. The characteristic of the system is the protection of public interest and collective interest rather than individual interest. This is because, considering that disputes today such as public nuisance, product defect and other incidents that may hurt the interests of the public, are often lasting, obscure and expansive in nature, while the victims often have little knowledge or lack the ability to independently claim their rights to remove the infringement. Awaiting individual injured parties to take legal actions may not be timely enough. Therefore, there is a need to call for some public interests groups to actively take actions without waiting for the empowerment from injured parties, which is reflected in the general rules of an association's suit for injunction relief as added to the New Code.⁷¹ Building on this perspective, it can be said that legislators have noticed the limit of parties' rights of procedure option by designing the system on behalf of the public interest.

VI. CONCLUSION: COMMENTS ON TAIWAN'S CLASS ACTIONS

From the above introduction, it may be observed that Taiwan's class action system has moved a huge step forward in the past fifteen years, in terms of both special laws and the Code of Civil Procedure. The development of these systems, however, is still immature compared with other civil procedural systems. This study hereby provides some comments on Taiwan's class action systems for discussion and future improvement.

Firstly, from the above introduction it may be observed that Taiwan has not adopted the so-called "model suit." Considering that multiple parties may be located in different jurisdictions, thus encountering difficulties to

71. SHEN, *supra* note 44, at 199-200.

join a single litigation proceeding, the model suit system may address this issue by focusing on the common issues in dispute while leaving the individual ones to the individual courts' examinations, thus allowing courts in different jurisdictions to proceed simultaneously and review incidents of massive, expansive natures with efficiency. Since model suits involve issues such as the binding force of a model judgment, court costs, etc, it can hardly function by the mutual agreement of parties without statutes provisions. Therefore, this study considers it worth researching whether to incorporate the model suit system in future amendments of the Code of Civil Procedure.

Secondly, while Taiwan has developed various class action systems during these fifteen years, future exploration of other unincorporated class action systems are still needed. For example, in the process of legislation, some members of commission had suggested that charitable association may be allowed to initiate the compensation action directly for the purpose of maintaining the public interest or collective interest and may claim a lump-sum of compensation,⁷² which was not adopted. Whether such association's suit of lump-sum compensation should be adopted, however, is still worth pondering, particularly considering that in modern disputes the injured persons often are not aware of their injury and may not be conscious of their right to take advantage of the existing litigation proceeding.

Last but not least, from the above records it appears that the association suits by parties' assignment under the Investors Protection Act are widely utilized, but the class action system as amended in the New Code has not been utilized yet. Which factors results in such a phenomenon also deserve further observation. One such factor may be that Securities and Futures Investors Protection Center, which is more active and better organized than the other associations. Since the promulgation of the Consumers Protection Act opens the first dramatic changes to Taiwan's class action systems in 1994, this new system has grown a lot with the breeds from the theory of right of procedure options. Whether this new system may in the future challenge modern Taiwan society or truly fits this society's needs, however, still needs more time to observe.

72 . See Lian-gong Chiou's statement in 11 SIFAYUAN MINSHI SUSONGFA YANJIU XIUZHENGZILIAO HUIBIAN [THE COMPILATION OF JUDICIAL YUAN CODE OF CIVIL PROCEDURE RESEARCH AND AMENDMENT STATISTICS] 604-05 (Judicial Yuan ed., 1995).

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