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THE CLASS ACTION CODE A MODEL FOR CIVIL LAW COUNTRIES

I. INTRODUCTION

This project's objective is to inspire the creation of the best possible code for class action suits, in light of the needs and peculiarities of civil law countries and international experience with class actions (or collective actions, as they are more appropriately called). The proposal offered below represents the author's choices among possible solutions to problems that arise in the judicial protection of group rights. Each possible solution has its own advantages, disadvantages, and opportunities for abuse.

This Model Code could be used as a benchmark to evaluate the effectiveness of the 2010 Polish class action law as well as a model for its future improvement.

Many rules herein recommended are repetitions, adaptations, or improvements of existing rules in other legal systems. Others are more innovative, and are the fruit of the author's vision of the class action process as a whole, influenced by comparative procedural law, both

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individual and collective, particularly derived from the law of Brazil, the United States, Canada, France, Italy, and Scandinavia¹.

One of the project's contributions is to eliminate unjustified procedural differences in class actions. For example, such differences exist in Brazilian and American class actions as a result, merely, of chance and historical mistake. There is nothing that justifies why notice in American class actions for damages should be more rigorous than that in injunctive class actions, or why *res judicata* in Brazilian class actions should be a function of the type of claim involved. This is an opportunity to correct such distortions.

Some differences in class action proceedings, however, are legitimate in light of the peculiarities of various types of claim or fact pattern. For this reason, the proposal includes special Titles for the protection of "transindividual rights" (rights belonging to the class as a whole) and for the protection of "individual rights" (rights belonging to individual members of the class). The amount of the claim and the type of controversy can also be a legitimate basis for procedural differences in class actions. For example, mass toxic tort cases pose questions substantially different from questions resulting from single incident mass tort injuries such as a shipwreck. Civil rights and antitrust cases also present different issues that may require specific procedural approaches. These variations are beyond the scope of this project.

This project also does not address the more complex issues that have been troubling American class actions recently, such as mass toxic torts, future classes, multi-state claims, costs, and unethical behavior. Rather, the objective is more modest – to introduce a simple class action device for those civil law countries that do not have such a device, and to improve the systems that do. The project is not directed at a contemporary American audience, although Americans could find, in some provisions, inspiration for law reform in the United States as well.

In view of the multiplicity of legal systems and the diversity of legal vocabulary used in different civil law countries, the language used in drafting this Code is deliberately non-technical. The project also has an educational and informative purpose; its goal is to develop

¹ See A. Gidi, *Class Actions in Brazil. A Model for Civil Law Countries*, *American Journal of Comparative Law* 2003, vol. 51, p. 311 et seq.

a self-explanatory system, avoiding the need for commentaries. It is anticipated that answers to questions that surface from application of this Code can be resolved in the use of the system itself.

TITLE I GENERAL PROVISIONS

Article 1. Applicability of Class Actions

1. A class action is suitable to protect transindividual rights and individual rights.

1.1 In particular, the class action may protect:

1.1.1 Transindividual rights – diffuse rights, of an indivisible nature, held collectively by a class of people linked among themselves or to the opposing party by legal or factual circumstances.

1.1.2 Individual rights – subjective rights belonging to each member of the class, and linked by legal or factual circumstances.

1.2 All types of suits capable of providing adequate and effective protection of the rights of the class and its members are permissible. In particular, the class claim may be a declaratory action, suit for damages, or for an injunction.

1.3 The class action is also suitable for protecting claims against a class of people, in accordance with the provisions of Title V.

Article 2. Standing to Bring a Class Action

2. Class actions may be concurrently brought by: (potential class representatives)

I – the Office of the Attorney General;

II – the Union, the States or Provinces, the Municipalities, or the Federal District;

III – the entities and agencies of public administration;

IV – non-profit associations legally constituted for at least two (2) years.

2.1 The class as a whole and its members are the party in the class proceeding, represented in court by the representative.

2.2 Whenever possible, the class will be represented in court by more than one representative, in order to promote an adequate representation of the rights of the class and of the class members. (See Articles 6, 9(IV), and 10.2.)

2.3 If the Office of the Attorney General does not file or intervene in the action, it shall nonetheless act as an overseer.

2.4 An entity or agency of public administration and the associations can only bring class actions related to their own institutional purpose (subject matter).

2.5 The judge shall dispense with the two-year prerequisite or the subject matter requirement or attribute class standing to class members, when there is no adequate representative interested in protecting the rights of the class in court. (See Articles 2(IV) and 2.4.)

2.6 The association represents the rights and interests of the class and of the class members, not of those of the members of the association.

2.7 The class counsel represents the rights and interests of the class and of the class members, not those of the representative that hired counsel.

Article 3. Prerequisites to a Class Action

3. An action shall only be conducted in class form if:

I - there are common questions of fact or law, allowing for the uniform adjudication of the class claim;

II - the representative and the class counsel can adequately represent the rights of the class and of the class members; (See Article 18(I))

III - the class action is not a means manifestly inferior to other viable means for the protection of rights.

3.1 Upon evaluating the adequacy of the representative and the class counsel, the judge shall consider, among other factors:

3.1.1 their competency, honesty, capacity, reputation, and experience;

3.1.2 their past involvement in judicial and extra-judicial protection of class interests;

3.1.3 their conduct and participation in the class suit and in other previous lawsuits;

3.1.4 their financial capacity to maintain the class litigation; and

3.1.5 the duration of the establishment of the organization, and its level of representativeness of the class interests.

3.2 In the case of groundless abandonment of the class suit or inadequate representation, the court shall give ample notice to the class, and another representative may continue the proceeding. (See Articles 5 and 6.) In the absence of an adequate representative interested in assuming the lead in the class action, the judge will dismiss the class action without prejudice.

3.3 When the group is too small, the members are easily identifiable, and the controversy can, in practice, continue in individual form, the court shall deny certification of the class action and permit the class members to intervene in the individual proceeding and litigate jointly.

TITLE II CLASS PROCEDURE

Article 4. Venue

4. In federal nations, class actions shall be brought:

I - in the forum where the injury occurred or would have occurred, for injuries of a local scale;

II - in the appropriate federal court in the Capital of the state, for injuries of statewide or region-wide scale;

III - in the appropriate federal court in the Federal District, for injuries of a national scale.

Article 5. Adequate Notice

5. In the initial phase of the class action, the court shall provide, with the assistance of the parties, the best possible notice to the class and its members, in light of the circumstances of the specific case. (See Articles 3.2, 14.6, and 16.1.)

5.1 The notice should be economical, efficient, and broad, focused on informing the greatest possible number of potential representatives (see Article 2) and class members. The Office of the Attorney General, the Fund for Group Rights, the relevant entities and public agencies, the most representative national and regional associations, and a small sample of easily identifiable class members shall always be notified. (See Articles 5.10, 14.9, and 24.3.)

5.2 The court shall employ all available methods in order to provide adequate notice to the class. Such methods include announcements in the press, on the Internet, or other media compatible with the dimensions and type of the group.

5.3 The notice and the identification of the class members and relevant entities is the responsibility of both parties and the court, but in principle it will be borne by the representative. (See Article 5.12.) When identification or notice is difficult or costly for the representative and not for the party opposing the class, the court shall confer such duty on the party opposing the class, which may have the right of reimbursement for its expenses from the representative. (See Article 5.13.)

5.4 The notice shall be transmitted in simple, clear, and practical language in light of the circumstances, and shall include, among other information, the following:

5.4.1 the definition of the class;

5.4.2 the identification of the defendant;

5.4.3 the identification of and the information for contacting the representative and the class counsel;

5.4.4 the description of the class controversy, with a summary of the facts alleged;

5.4.5 the class claim and the object of the proceeding;

5.4.6 the consequences of the class action for the class and its members;

5.4.7 the binding nature of the class judgment and the possibility of and period for the commencement of an individual suit, if the class member is interested in being excluded from the class (See Article 20.1);

5.4.8 a copy of the complaint, the response, and relevant documents, selected by the court with the assistance of the parties;

5.4.9 instructions on how to obtain more information about the class action;

5.4.10 any other information relevant to the specific case.

5.5 The notice shall be sent in the name of the court.

5.6 The notice shall be written in a neutral and impartial manner. The court may assign such duty to the class representative, under the scrutiny of the defendant and the control of the court.

5.7 The court shall reduce or eliminate the individual notification of a sample of class members if it is disproportionately costly or if the initiation of the class action has received adequate notoriety.

5.8 The class representative shall keep the class members continually informed of important aspects of the class action's development, or face disqualification for inadequate representation. If dissatisfied with the periodic notification provided by the representative, the court shall direct other notification of any procedural event.

5.9 The most significant potential class representatives, as identified by the court, shall receive, and those that so request may receive, notification of important acts realized in the process.

5.10 The court shall not provide notification if the class suit is manifestly without merit or unfounded.

5.11 In order to avoid prejudice to the defendant or in order to give the most complete information to the class, the court may postpone ample notification until convinced of the good faith of the class suit, initially limiting notice to the most significant potential representatives. (See Article 14.9.)

5.12 The court may order that the expenses, with ample notification and identification of class members, be fully or partially borne by the defendant, if there is a substantial likelihood that the class will eventually prevail on the merits. (See Article 5.13.)

5.13 If the party opposing the class sends correspondence to the class members, publishes newspapers or brochures, or maintains a site on the Internet, the court may order notice through that method, if there is a substantial likelihood that the class will eventually prevail on the merits, in order to adequately inform the class without substantially and unnecessarily increasing the expenses. (See Articles 5.3 and 5.12.)

5.14 The court may order the creation of an Internet site containing important information about the class proceeding and the facts that led to its commencement, with copies of the notice, complaint, answer, and principal statements, briefs, documents, and decisions. The site shall be updated frequently with the objective of informing class members about the case, and may contain important messages for the class and its members such as requests for information or evidence, and the announcements of an eventual settlement offer. The site's electronic

address shall be made widely known. The court may order that a link to the referenced website be placed on the site of the class representative, class counsel, intervenor, and party opposing the class.

Article 6. Intervention (See Articles 2.2, 3.2, 10.2, 19, and 28.4)

6. Any potential representative (see Article 2) may intervene in the class proceedings at any time and at any jurisdictional level in order to demonstrate the inadequacy of the representative or to assist the representative in the protection of the class interests. (See Article 24.3.)

6.1 The potential representative may also intervene as assistant to the party opposing the class.

6.2 The class members may participate in the class suit as informants, providing new evidence, information, and arguments.

6.3 An intervenor shall be compensated for his or her expenses and attorney's fees in a measure proportional to his or her participation and contribution. (See Article 21.)

Article 7. The Object of the Class Action Suit

7. The object of the class action shall be as far-reaching as possible, including the entire controversy between the class and the opposing party, regardless of express request or claim by the representative, and including both transindividual claims, which belong to the class as a whole, and individual claims, which belong to the class members. (See Articles 9 (II), 10.3, and 16.)

Article 8. Tolling the Statute of Limitations

8. The commencement of a class action suit shall toll the statute of limitations period for individual and transindividual claims related to the class controversy.

8.1 The prescription period shall recommence to run upon notification to the class and its members of the final decision. (See Article 16.1.)

Article 9. Class Certification

9. At the end of the pleading phase or at any early phase of the proceeding, after hearing the parties and intervenors, the court, in a reasoned and explained decision:

- I** – shall decide if the action can continue as a class action;
- II** – shall define the object of the class action in the broadest manner possible, regardless of request from the parties; (See Articles 7 and 16.)
- III** – shall describe the class, with the precision necessary and possible;
- IV** – shall select the most adequate representative to represent the class interests in court. (See Article 2.2.)

Article 10. Case Management

10. While the court is neutral and impartial, it has the duty to protect the rights, interests, and substantive and procedural guarantees of the class and its members.

10.1 The court shall maintain direct control over the class proceeding and shall take appropriate measures for the speedy, just, and efficient progress of the class action suit.

10.2 The representatives and intervenors shall participate in the proceeding and present evidence, arguments, and motions jointly, to avoid repetitions and contradictions. The court shall only admit evidence, arguments, and motions separately produced if not repetitive. (See Articles 2.2 and 6.)

10.3 The court may sever the claims or the causes of action into separate class actions if such separation enhances procedural economy or facilitates the development of the class action suit. (See Article 7.)

10.4 The court may divide the class into subclasses with similar rights and interests for better decision-making and operation of the class action suit. If there are conflicts or substantial divergences of interests between class members, the judge may name a representative and an attorney for each subclass.

10.5 The court may limit the object of the class action to the part of the controversy that may be adjudicated collectively, leaving the issues that are not common to the class to be decided in individual actions or in a later phase of the same class action suit. In a reasoned and explained decision, the court shall indicate which issues will be part of the class action suit and which will be left out for individual actions or for a later phase of the class action suit.

10.6 The court decisions may be modified at any time during the proceeding, as long as doing so does not represent undue prejudice or surprise to the parties, and the right to be heard is preserved.

10.7 The court may increase time limits when there is a great number of representatives or intervenors, or when the questions of fact or of law are complex.

Article 11. Burden of Proof

11. When the discovery of the truth of the facts depends on technical knowledge or on information that only one of the parties has or should have, the burden of proof falls on that party, if the allegations of the opposing party are credible.

Article 12. Cost of Proof

12. When the production of proof is difficult or costly for one of the parties and not for the other, the court shall allocate its production to the opposing party, which has the right to be compensated for its expenses.

Article 13. Statistical Proof

13. The use of statistical proof or proof by sampling is permitted as a complement to direct evidence, or when the production of direct evidence is costly, difficult, or impossible.

Article 14. Adequate Settlement

14. The class representative may enter into a settlement agreement with the opposing party. If the terms of the agreement are adequate to protect the rights and interests of the class and its members, the court shall approve the settlement, and the agreement shall bind the class and its members. The decision must be accompanied by a reasoned explanation of its legal and factual basis. (See Articles 18 and 20.1.)

14.1 The settlement shall protect the interests of the class as a whole and may include aspects not related to the object of the proceeding. The settlement shall include a daily penalty which shall be assessed to the party that does not comply with its terms. (See Article 15.2.)

14.2 If the settlement is partial, the class action suit shall continue with regard to the rest of the controversy. (See Article 17.)

14.3 The Office of the Attorney General and the intervenors have the right to participate in all phases of the settlement negotiation.

14.4 In exceptional circumstances, the settlement may establish that the defendant will compensate the class members through discounts on future purchases of parts and products of the defendant's making. The discount coupons should be unconditional if possible. Limitations of any kind should be justified and can jeopardize the adequacy of the offer. Whenever possible, the option of receiving a discounted value in cash should be given to the class members. The benefit to the class, for purposes of the computation of attorney's fees, shall be calculated based on the settlement's cash value, not the face value of the coupons. (See Article 21.4.)

14.5 The parties shall present the proposed settlement agreement to the court. The motion for approval should describe the proposed settlement in a neutral and comprehensive manner, alerting the court to the strengths and weaknesses of the proposal, including potential prejudice to the class, and the reasons why the proposed settlement should be considered adequate despite any imperfections. The proposed settlement or the representative shall be considered inadequate if there are grave omissions in the motion for approval.

14.6 If the court considers the proposed settlement satisfactory, it shall provide ample notification to the class and its members about the agreement's terms. The court shall also set a public hearing date for comment on the adequacy of the proposed settlement. (See Article 5.)

14.7 The notice of the settlement offer shall include, among other information: (See Article 5.4)

14.7.1 a neutral and impartial description of the proposed settlement, with information about its favorable and unfavorable aspects;

14.7.2 the procedure and a reasonable time period for challenging the adequacy of the proposed settlement;

14.7.3 the date and place of the public hearing to evaluate the proposal;

14.7.4 the net value or advantage to be received by the class as a whole and by each member of the class;

14.7.5 instructions on how to obtain more information about the agreement and the class proceeding;

14.7.6 any other relevant information on the specific case.

14.8 Any interested person may present, with or without an attorney, the reasons against or in favor of the proposed settlement. The court may assign one of the interested persons or a reliable person the task of presenting a summary of all the arguments raised.

14.9 Before providing broad notice to the class, the court may provide limited notice to the most significant potential representatives (see Article 2) and to the intervenors that participated most actively in the class action suit, inviting them to comment on the settlement offer. (See Articles 5.1 and 5.11.)

14.10. The court shall carefully evaluate the proposed settlement, taking into consideration factors such as:

14.10.1 the arguments for and against the proposed settlement;

14.10.2 the issues of law and fact involved in the litigation;

14.10.3 the probability of success of the class claim;

14.10.4 the risks involved in the litigation;

14.10.5 the complexity, cost, and duration of the class action suit in the absence of a settlement;

14.10.6 the sufficiency of the available evidence and legal arguments on which the class claim is based at the time of reaching the settlement, and the possibility that other information or evidence may be discovered during the development of the suit; and

14.10.7 a comparison between an eventual favorable judgment on the merits and the terms of the proposed settlement.

Article 15. Injunction

15. In suits for the performance or non-performance of an obligation of an individual or transindividual character, the court shall order specific performance of the obligation or ensure a practical result that is equivalent to the performance.

15.1 The obligation shall only be converted into damages if the class agrees to it, or if specific performance or obtaining the corresponding practical result is impractical.

15.2 The court *sua sponte* may impose upon the defendant a daily fine that is sufficient and compatible with the obligation, fixing a reasonable time period for compliance. The court shall modify the amount of the fine or the frequency of its imposition, if it has become insufficient or excessive. The fine is independent from the damage award and from the penalty for noncompliance with the judicial order. (See Article 14.1)

15.3 The court may determine the necessary methods to achieve specific performance or the equivalent practical result.

Article 16. Class Judgment

16. The class judgment shall decide the controversy in the broadest manner possible. The judgment shall address all individual and transindividual claims, including declaratory, injunctive, and damage claims on behalf of both the class and the class members, independently of express request by the representative, provided that it does not cause undue prejudice or surprise, and preserves the right to be heard. (See Articles 7 and 9(II).)

16.1 The class and its members shall be broadly and adequately notified of the class judgment, in accordance with the provisions of Article 5. (See Article 8.1.)

Article 17. Partial Class Judgment (See Article 14.2)

17. The court may decide part of the class claim, granting a partial judgment, when as to that part there is no need to produce proof or when the proof already available in the record is sufficient.

17.1 The partial judgment may be appealed and enforced in the same terms as the final judgment.

17.2 The class action shall continue with respect to the rest of the class controversy.

Article 18. Res Judicata

18. Res judicata shall bind both the class and its members whether the judgment is favorable or not, unless the class action claim is deemed groundless due to:

I - inadequate representation of the rights and interests of the class and of its members (See Article 3(II)); or

II - the insufficiency of evidence.

18.1 If the class action is unsuccessful due to lack of evidence, any potential representative (see Article 2) may commence the same class action by making use of new evidence that could lead to a different outcome.

18.2 The challenges referred to in this Article may be decided either by the class action court or by the court where the individual action or class action is subsequently commenced.

18.3 In an individual action commenced by a class member bound by res judicata in the original class action, the court may only decide those issues of an individual nature and issues not covered under the class judgment. (See Article 20.1.)

Article 19. Lis Pendens

19. The first class action suit shall prevail over other class actions related to the same class controversy. The subsequent class actions shall be dismissed, but their representatives may intervene in the first class action. (See Article 6.)

19.1 The defendant shall inform the court and the class representative about the initiation of another class action related to the same controversy.

Article 20. Class Actions and Corresponding Individual Suits

20. The class action does not prevail over corresponding individual actions related to the same class controversy. Individual actions shall not be dismissed.

20.1 The class member that brings an individual action to protect his or her individual rights before the date of the class judgment or before the approval of the proposed settlement shall be excluded from the class and shall not be bound by the class judgment. (See Article 18.3.)

20.2 The defendant shall inform the court presiding over the class action and the class representative of the existence of any individual actions relating to the same controversy, as they are commenced.

20.3 If a class member who is also the plaintiff in an individual action is notified of the existence of a corresponding class action, he or she may request a stay of his or her individual suit within a period of 60 days, if the class member wishes to be bound by the class action judgment.

20.4 If the class action is decided by a judgment on the merits, the member who requested the stay of his or her individual action shall be bound by the class judgment and, if it is the case, the individual action shall be dismissed. (See Article 18.3.)

20.5 If the class action is dismissed without a judgment on the merits, or if the class judgment otherwise has no *res judicata* effect (See Article 18.), the individual action shall continue.

20.6 In the absence of the notice referred to by Article 20.3, the class member who is the plaintiff in the individual action will be benefited but not prejudiced by the *res judicata* effect of the class judgment.

20.7 Before the class judgment is rendered or the proposed settlement is approved, the plaintiff in the individual action that had requested stay of his or her individual suit under the provisions of Article 20.3 may remove himself or herself from the class action and request continuance of the individual suit.

Article 21. Expenses and Fees

21. In plaintiff class actions, plaintiffs shall not pay initial costs or any other expenses.

21.1 The judgment, regardless of request, shall order the losing party to pay to the winning party expenses and attorneys' fees.

21.2 In unsuccessful plaintiff class actions, the class representative and the intervenors shall not be liable for the winning party's attorneys' fees, costs, and expenses, unless the class action was initiated or maintained in bad faith, in which case the class representative, intervenors, and those directly involved shall be jointly ordered to pay attorneys' fees and up to ten times the costs and expenses, without prejudice to the responsibility for damages.

21.3 Payment of the class attorneys' fees may be conditional upon the result of the class action, but the attorney may not finance the litigation. (See Article 24.1.)

21.4 In the calculation of attorneys' fees, the court shall take into consideration, among other factors, the benefits obtained for the class, the quantity and quality of the work performed, and the risks and complexities of the case.

21.5 As an incentive for potential representatives (see Article 2) to bring class action suits and for representatives to take active control of the suit, the court may grant a form of financial gratification to the representative and to the intervenor whose performance was relevant in the protection of the rights, interests, and guarantees of the class and its members. This amount may be taken from the damage award, or may be paid by the defendant in addition to the damage award. In its evaluation, the court shall take into consideration the participation of the representative and the intervenor in the discovery of the harm and in the resolution of the conflict, among other factors that demonstrate the utility of their involvement and their exemplary conduct.

21.6 The court may retain part of the payment of the attorneys' fees or of the award of financial gratification of the representative until the defendant complies with the class judgment or settlement.

Article 22. Precedence of the Class Action Suit

22. The court shall give priority to class action suits, when the public has an interest in the litigation, as evidenced by the scope and nature of the harm or by the significance of the legal claim to be protected.

Article 23. Motion for New Proceeding

23. Class judgments on the merits with *res judicata* effect (see Article 18) may be rescinded through a proceeding initiated by one of the potential representatives (see Article 2) when:

I - due to the scope, nature, or character of the offence or harm, an analysis of the adequacy or consequences of the settlement or decision was not possible at the time they were reached;

II - due to the complexity of the issues, it was not possible to perform an adequate analysis of the evidence produced or of the legal arguments raised in the class suit;

III - the decision or the settlement, after continuing relations, proves to be manifestly inadequate with the passage of time.

IV - another event set out in the individual procedural law occurs.

TITLE III PROTECTION OF TRANSINDIVIDUAL RIGHTS

Article 24. Fund for Group Rights

24. In class actions for damages, a damages award for harm caused to the class as a whole shall be paid to the Fund for Group Rights. The Fund shall be managed by a commission formed by members of the Office of the Attorney General, judges, and members of the community. (See Article 27.)

24.1 The Fund's resources shall be employed in the restoration or reparation of the harms caused to the class. In case restoration or reparation is not possible, the Fund's resources shall be utilized in a discretionary, creative, and flexible manner in connection with the nature of the infraction or the harm caused, including use in financing and supervising other class actions, and for scientific, educational, informational, and research projects. (See Articles 5 and 21.3.)

24.2 The Commission administering the Fund for Group Rights shall be constituted within 90 days after this Code enters into effect. While the Commission is not duly constituted, the money eventually awarded to the Fund shall be deposited in a bank account with interest.

24.3 The Fund for Group Rights shall be notified about the commencement of any class action and about the most important decisions in such proceedings, and may intervene in any class suit at any time in order to demonstrate the inadequacy of the representative or to assist the representative in the protection of the class interests. (See Articles 5.1 and 6.)

TITLE IV

PROTECTION OF INDIVIDUAL RIGHTS OF CLASS MEMBERS

Article 25. Calculation of Individual Damages

25. Whenever possible, the class action court shall determine the amount of individual damages owed to each class member, and the enforcement of the class judgment shall be in the class form.

25.1 When the amount of the class members' individual damages is uniform, prevalently uniform, or may be reduced to a mathematic formula, the decision shall indicate the amount or the formula for calculating the individual damages.

25.2 A class member who considers his or her individual damage award, or the formula for calculating it, to be different from that contained in the class judgment may file an individual action for computation of his or her damages.

25.3 If the class action court cannot calculate the amount of the damages individually owed to the class members, the class judgment shall be general, setting forth the defendant's liability for the damages caused and the duty to pay damages, deferring the computation of the individual damages to individual proceedings brought by each member of the class. (See Article 26.) The class members shall have a period of two years, commencing from the date of the notice of the final decision, in which to file individual actions for computation of individual damages and enforcement against the defendant. (See Article 27.)

Article 26. Distribution of the Money

26. When individual damages have been awarded, the money shall be distributed among the class members in a fast, economic, and effective manner.

26.1 Once the class judgment becomes final, the defendant shall voluntarily make payment to the class members, without the need for the filing of an action for the computation or enforcement of the individual damages, upon satisfactory evidence by class members that they qualify.

26.2 The class action court shall appoint one or more arbitration commissions to evaluate dubious cases. Appeals from arbitration decisions shall be directed to the class action court. The commissions shall be formed of one to three people, membership preference given to judges, attorneys, law students, or responsible citizens, recommended by the parties and appointed by the court. Individual suits may also be submitted to small claims courts or other appropriate tribunals.

26.3 The court shall determine the arbitrators' remuneration, which shall be borne by the defendant. The remuneration shall not be calculated in proportion to the amount given in the commission's decisions, but it shall be calculated as a function of the number and degree of complexity of the issues to be decided.

26.4 The arbitrators' decisions are not binding. Nevertheless, if the defendant refuses to voluntarily comply with individual claims that are clearly lawful, the court shall order the defendant to pay up to one hundred times the amount suggested by the commission, in addition to expenses and attorneys' fees. When deciding the amount of the fine, the judge shall take into consideration, among other factors:

26.4.1 the reasons for the non-compliance;

26.4.2 the degree of certainty of the class member's claim;

26.4.3 the number of times the defendant has repeated the conduct;

26.4.4 the necessity of restraining the defendant;

26.4.5 the good faith of the parties during the arbitration proceedings;

26.4.6 the defendant's financial condition.

Article 27. Aggregate Individual Compensation and the Fund for Group Rights

27. If only a small proportion of class members has been compensated or has brought an action within the period prescribed in Article 25.3, the court shall calculate the aggregate value of the damages individually caused to members of the class, and the defendant shall pay that amount to the Fund for Group Rights. (See Article 24.)

27.1 The value of the overall harm caused to the class members may be calculated immediately, but the moneys may only be disbursed to the Fund after the period prescribed in Article 25.3.

27.2 The court may order the payment of part of the total award to the Fund before the period prescribed in Article 25.3, if the commencement of individual suits is realistically improbable due to, for example, the difficulty of proof, the reduced value of the individual claims, or the insolvency of the defendant.

TITLE V DEFENDANT CLASS ACTIONS

Article 28. Defendant Class Actions

28. Class actions may be commenced against the members of a class represented by an association that constitutes them.

28.1 The association represents the class as a whole and the class members. All class members shall be bound by the class judgment whether favorable or not, even if the class member is not a member of the association that represented him or her in court. (See Articles 2.1, 2.6, and 18.)

28.2 If there is no such association, the defendant class action may be commenced against one or some of the class members, who shall function as representative(s) of the class. (See Article 2.2.)

28.3 The class members may form an association with the specific purpose of representing them in court in the defendant class action.

28.4 Class members may intervene in the defendant class action suit. (See Article 6.)

28.5 The representative shall have the right to be compensated by the class members, in proportion to the interest of each class member, for expenses related to the class proceeding.

Article 29. Plaintiff Class Action Provisions as Supplementary

29. The plaintiff class action provisions of this Code are applicable to defendant class actions, unless incompatible.

29.1 Whenever possible and necessary, the plaintiff class action provisions shall be interpreted with flexibility and adapted to the needs and peculiarities of defendant class actions.

TITLE VI PRINCIPLES OF INTERPRETATION

Article 30. Flexible Interpretation

30. This Code shall be interpreted in a creative, open, and flexible way, avoiding extremely technical applications that are incompatible with the class protection of transindividual and individual rights.

30.1 The court shall adapt the procedural rules to the needs and peculiarities of the controversy and of the class, taking into consideration factors such as the amount and type of the claim.

Article 31. Class Procedure as Supplementary

31. The rules of this Code are applied to all class actions, unless incompatible with a specific kind of class action.

Article 32. Individual Procedure as Supplementary

32. The rules, principles, and guarantees of individual civil procedure (non-class action procedure) are to be applied supplementarily to class action proceedings, in a way that does not conflict with the spirit of class litigation.

32.1 Whenever possible and necessary, the rules, principles, and guarantees incompatible with the spirit of class actions should be adapted to the needs and peculiarities of class litigation.

TITLE VII FINAL PROVISIONS

Article 33. Effective Date

33. This Code shall come into effect on the date of its publication, being applied immediately to pending class action suits.

