



Guide to Class Actions in Latin America

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LATIN AMERICAN COUNTRIES HAVE SEEN nothing like the mass class action litigation in the US. That is not to say that procedures are not in place for the protection of collective rights and interests. The focus across Latin America tends to be on the protection of consumer rights, the environment and national heritage.

Although there are undoubtedly similarities across the region, the development of class actions (more commonly known as "collective actions" or *acciones colectivas*) is at a different stage in each country. The common theme, which has so far stemmed the flow of class actions, is the lack of a developed procedure for civil litigation. For example, there is no recognized discovery process or admission of oral evidence (let alone cross-examination) in any of the countries included in this guide.

The disparity in the mechanisms available for the protection of group rights between Latin America and the US also reflects cultural and ideological differences. Broadly, in Latin American countries, the state has a pivotal role in ensuring the protection of collective interests and in matters that are important to society at large, such as the environment. This has led to the creation of specific procedures in each country, such as the "popular action" in Colombia or the "collective injunction" in Brazil. In other countries, such as Argentina and Mexico, recent procedural changes have seen the courts open up to the possibility of class actions more similar to those seen in the US.

Before looking at each country individually, it is useful to explain the three types of "collective interest" commonly protected. In Brazil, Mexico and Chile, the legislation recognizes the need for protection of:

1. Diffuse interests. In this case, individual damages are not available; it relates to the protection of a common, indivisible interest. For example, a group may seek to protect the environment through an injunction against activity causing contamination, or an award of damages to be used for clean-up.
2. Collective interests (in the "strict sense"). This category also concerns rights of an indivisible nature, but belonging to an identifiable group / class of affected individuals. There is a common complaint that unifies those in the class, and the outcome corresponds to the whole group.
3. Homogeneous individual interests. This describes individual rights arising from a common origin. The members of the class are unified by virtue of their relationship with the defendant.

We look first at those countries where there is specific legislation on class / collective actions: **Brazil, Colombia, Mexico, Argentina, Chile and Venezuela**. It is no coincidence that this group also makes up six of the seven largest countries and economies in Latin America (only Peru is missing).

Whilst there is less-developed legislation on class / collective actions in the smaller Latin American countries, this is likely to change in line with economic development, as pressure increases for the protection of consumers and workers. There is often at least constitutional recognition of collective rights and interests, which may form the basis for the future development of class / collective actions in **Peru, Panamá, Ecuador, Uruguay, Bolivia and Costa Rica**.

Group 1: Countries With a Recognized System of Class / Collective Actions

Brazil

- The Brazilian Federal Constitution as well as Brazilian laws, such as the Consumer Code, recognize the need for protection of diffuse, collective and homogeneous individual interests. There are three main mechanisms for this protection:
 1. The most similar procedure to a US-style class action is known as the “Public Civil Action” (*ação civil pública*), as established by federal law. This action is available in respect of damage to diffuse and collective interests in areas such as the environment, consumer protection, national heritage and the economy.
 2. The Federal Constitution provides for a “Popular Action” (*ação popular*) as a mechanism available to any citizen to challenge any act (by a public or private entity) that is damaging a public asset, the environment, historical or cultural heritage, or “administrative morality”.
 3. Brazilian law also provides for a form of “Collective Injunction” (*mandado de segurança coletivo*) that can be filed by any political party, or workers’ syndicate or association, to protect its members against any authority exercising public power.
- The plaintiffs in a class action are protected against liability to costs, except in cases of bad-faith litigation.
- The Popular Action is available to individuals, whereas the Collective Injunction is available only in specific circumstances in respect of acts by public authorities. The most common collective action against individuals or private legal entities is the Public Civil Action.

Public Civil Action

- Available to public entities, such as the Attorney General (*Ministerio Público*), state entities and local authorities, as well as some private associations, such as those established for consumer protection.
- There is no provision for groups of individuals to commence an action. Private associations must have been formed for at least a year for the purpose of the protection of those collective interests established in law (environment, consumers, heritage, economy etc.)
- There is no minimum threshold for the number of plaintiffs represented or time limit to determine the size of the represented group. In fact, there is very little procedural regulation of these types of lawsuits.
- The Attorney General is always notified of the filing of an action, where the group seeks damages for the represented individuals. This requirement is satisfied by a single publication in an official newspaper (no other advertising is permitted).

- There is no “opt in/out” system; individuals often do not know if a suit is being pursued on their behalf. The ruling is only binding on any affected parties if favourable to their interests.
- All types of damages are permitted, from compensation for affected individuals to restitutary and protective measures. There is a special fund for the protection of diffuse rights, which safeguards fines or damages to be used for repair work, clean-up operations etc. However, settlements are not allowed, since the group cannot freely dispose of the represented members’ rights.

Colombia

- There are two types of collective action: the “Group Action” and the “Popular Action”.
- Popular Actions are a constitutional mechanism designed to protect collective rights and interests that are at risk.
- Popular Actions do not necessarily seek compensation, but are aimed at preventing damage by a public or private body. They may demand that the defendant takes measures to prevent damage being caused or to put things back to how they were.
- A Popular Action can be brought by one person seeking the protection of collective interests. There is no limitation period on bringing a popular action, so long as there remains a threat to the relevant collective interest.
- Group Actions are more similar to the US class action model, whereby individuals who share the same complaint can bring a joint suit for compensation.
- Group Actions require a minimum of 20 people, who have suffered damage from the same cause. One person is named as the representative for the group and more people can join at a later date. There is an “opt in” system requiring each plaintiff to demonstrate their right to be included in the group.
- The time at which the member is able to establish their right to take part in the Group Action will influence the compensation potentially available:
 - Signing up before the evidential stage commences means any compensation will be based on an assessment of their individual loss.
 - Submitting an application within 20 days of judgment limits compensation to the amount pleaded in the original claim.
- A Group Action will become time-barred after two years from the date of the damage.

Mexico

- A 2010 amendment to the Mexican Constitution introduced the concept of “collective actions”. The associated procedural changes were adopted in 2012.
- Collective actions in Mexico can be seen as an import of the US class action. However, they are restricted to the protection and enforcement of rights relating to the consumption of private or public goods and services, and the environment.
- The justification for collective actions is for the protection of “collective and diffuse rights and interests” and “individual rights and interests of a collective nature”. This protection is afforded through three types of action: diffuse, collective (in the strict sense), and homogeneous individual.

- There is a US-style class certification, whereby the court determines whether the class has standing. The defendant has a five-day window to challenge a class certification, following service of the suit.
- Among the different parties that have standing to bring class actions (or serve as representatives) are: the representative of an affected group of individuals, certain consumer protection agencies of the Federal Government, non-profit organizations and the Attorney General.
- There is a minimum requirement of 30 individuals to form a group with legal standing. It is more common for class actions to be led by consumer groups and associations that have standing in their own right.
- An affected individual may opt out of a diffuse interest action, but must **opt in** to a collective action (in the strict sense) or a homogeneous individual action. In the case of a collective actions (in the strict sense) and homogeneous individual actions, affected individuals have up to 18 months after a judgment or settlement to inform the representative that they wish to join the action.
- Collective actions become time-barred after three and a half years from the cause of the damage. Where damage is of a continuous nature, the period commences on the day the damage ends.
- The relief sought in these class actions may be compensation for direct or consequential damage caused to the individuals represented, specific performance or injunctive relief.
- The Federal Judicial Council is able to establish a fund for any awards not paid out in compensation. This fund may be used for individual damage awards, or for use in environmental remediation or clean-up costs.
- In a decision on October 19, 2012, the Mexican appeal courts ruled in favour of a collective action brought on behalf of 1789 people for poor service by the telephone company NEXTEL. This is the first time that collective rights have been recognized in this way, although the decision has been appealed to the Supreme Court.

Argentina

- The Argentinean legal system is unpredictable. Whilst it is evolving in an effort to cope with severe overcrowding, the courts remain overwhelmed by ongoing litigation. It takes approximately six years for a civil lawsuit to reach judgment in the appeal court.
- In principle, the Constitution allows for affected individuals, the National Ombudsman and duly registered non-governmental organizations (NGOs) to file suits in relation to any rights that have a “collective impact”. These range from discrimination to the protection of consumer rights and the environment, as recognized by specific statutes. Class actions are also available in respect of issues of particular public interest.
- There are no procedural rules or regulation on how class actions work in practice. However, the Argentinean courts are developing precedent in favour of allowing such actions.
- The Supreme Court in the leading case of *Halabi* (2009) acknowledged the potential of the Argentinean system to recognize class actions similar to those in the US.
- Halabi established that there must be a common cause of action that has affected collective assets, such that an individual action is not appropriate. There is no specific guidance on how many people must be affected to satisfy this requirement.
- There is also a requirement that anyone with an interest in the lawsuit must be properly informed. Again, there is no guidance on how or when this should be done.

- In a more recent Supreme Court judgment, *PADEC v Swiss Medical* (2013), it was confirmed that NGOs may bring collective actions on behalf of consumers.
- So far, most class actions have concerned issues of consumer protection. This has led to an amendment of the Consumer Protection Law to provide an “opt out” mechanism for any affected parties that do not wish to be bound by the ruling in a class action.

Chile

- One of the most sophisticated legal systems in Latin America with well-defined procedures for litigation.
- A restrictive class action system was introduced in 2004 for the protection of collective and diffuse interests.
- Class actions are permitted under the Consumer Protection Act. Such actions may be brought by the National Consumer Service (SERNAC) or any consumer association that has existed for at least six months, or a group of at least 50 consumers.
- Before the suit can proceed, the Chilean court will rule on its admissibility, i.e. whether there is a group of consumers with a common cause of action.
- Once the suit has been admitted, the court will make the suit public, so that other affected consumers may have the chance to join the suit. The plaintiff must also publish at least two notices in a national newspaper.
- The publication of the suit also triggers a 30-day period for affected consumers to reserve their position in favour of filing individual law suits for damages. This is similar to the “opt-out” right in the US.
- Unlike the US, Chilean collective actions only provide for compensation, not punitive or exemplary damages. However, the court may impose a fine, which varies according to the infraction. Examples include a fine of over US\$40,000 for endangering the environment to US\$12,000 for the failure of basic services (electricity and water).
- In a decision in 2013, the Supreme Court ordered Cencosud (the largest retail company in Chile) to pay an estimated US\$70m to consumers affected by increases imposed unilaterally on its supermarket cards. This is the first case fought successfully by SERNAC.
- There is scope in the procedure for the parties to reach a settlement and discontinue the action. SERNAC also takes a proactive role in securing compensation for consumers through settlements with entities such as retail groups.

Venezuela

- The current regime in Venezuela means that the courts are guided by political motives and the mandate for “natural justice”. This means the outcome of litigation may be influenced by politics, rather than the application of the law.
- In principle, the Constitution of 1999 (introduced by the late Hugo Chavez) recognizes the right of any person to seek to enforce individual rights and interests, including those that are “collective or diffuse”.
- It was left to the Supreme Court to define the essential characteristics of class actions. There are numerous rulings, in which it has recognized that groups of individuals with a common cause of action (collective interest) or shared interest (diffuse) can bring a joint action for the repair of the damage caused / injunctive relief.

- The Supreme Court has also recognized the duty of the Ombudsman (*Defensor del Pueblo*) to ensure the protection of diffuse interests, e.g. public services and human rights. In practice, the Ombudsman is guided by the government and rarely intervenes independently.
- Similarly, there is the right for specially designated public and private bodies, such as NGOs, unions, workers' syndicates etc, to act on behalf of affected groups. However, it is very difficult for any such organization to make any gains under the current political regime.
- There is no "opt-out" system. The Supreme Court has confirmed that rulings in collective actions will have the effect of *erga omnes*, i.e. the judgment will apply to all affected individuals whether or not they are party to the proceedings.
- The Supreme Court is prohibited from declaring any action for the protection of diffuse interests as inadmissible. It must always consider the matter fully.

Group 2: Countries With a Less-Developed Procedure for Class Actions

Peru

- The Public Ministry, local authorities, local native communities and NGOs may bring collective actions for the protection of "diffuse interests".
- Collective actions are available for the protection of consumers, the environment and national heritage.
- A type of proceeding called an *amparo* is an alternative method that may be used to defend individuals or groups against the violation of their constitutional rights.
- Any person or interested group may commence *amparo* proceedings to challenge rules or laws that they believe to contravene the Constitution. The court's ruling will only be binding on those parties involved in the proceedings.
- The legal system also provides for an "unconstitutional action" available to challenge laws and legislation, and a "popular action" available to challenge rules and regulations "without legal status". The rulings in such cases will be of general effect.
- All other legal actions are generally pursued by individuals.

Panamá

- Class actions are limited to consumer protection, following initial legislation in 1996 and a court judgment in 1999.
- Consumer protection law in 2008 recognized the right of consumers to bring collective action before specialist courts.
- Strong protection of consumers fits in with Panamá modelling itself as a regional hub for business and leisure.
- 2009 saw the first example of a class action in Latin America against a non-Latin American defendant, when Industrias Lacteas (a Panamanian livestock company) brought an anti-trust action against global healthcare corporation, Hoffmann-La Roche. This action was based on a 2008 law permitting class actions for the protection of homogeneous individual interests in international disputes. It opened up the possibility of other companies outside Panamá joining the class.

Ecuador

- Despite the lack of specific legislation, class actions are used for the protection of national heritage.
- The 2008 Constitution (under President Correa) recognizes the collective interest in the protection of social rights, such as a healthy environment, public education and health, and culture. Any individual or group can commence a suit for the protection of these rights.
- There is a special “Protection Action” (*acción de protección*) and “Extraordinary Protection Action” (*acción extraordinaria de protección*) available to individuals and groups to dispute the alleged violation of constitutional rights.
- The “Lago Agrio” case against Chevron is an example of a class action that was initiated through the ordinary procedure for civil damages. It highlights the risks created by regime change in politically unstable jurisdictions.
- The action against Chevron relates to the impact of alleged contamination on 30,000 residents. The Ecuadorian court issued a US\$18 billion award against Chevron in February 2011 for contamination of the Ecuadorian rainforest (later reduced to US\$9.5 million). Chevron continues to fight the enforcement of the award and recently obtained a judgment in the US that the Ecuadorean judgment had been obtained by “corrupt means”.

Uruguay

- There is a procedure for the protection of collective rights in the environment and national heritage. Any person, group or institution with a genuine interest in protecting matters of public importance, such as the environment or “cultural or historic values”, may have standing to bring a law suit.
- Civil Prosecutors and private organizations or associations will be assessed by the Judge hearing the case as to whether they have standing to bring the suit.
- There is no opt in / out system as such. All interested parties are bound by the court’s judgment, unless the claim is dismissed due to lack of evidence. In those circumstances, other interested parties would not be precluded from bringing a new suit on the same grounds.

Bolivia

- There is a specific constitutional procedure—“Popular Action”—for the protection of constitutional collective interests and rights, including environmental rights and national heritage. Any person, group or institution with a genuine interest in the protection of constitutional collective interests and rights may have standing to bring a lawsuit.
- There are no regulated “opt in/opt out” procedures for class actions. Under general rules for claims, however, every individual party must express his/her consent to be represented in the action (including a class action). Failure to do so means such person would not be bound by the final resolution.

Costa Rica

- There is some recognition of collective rights, which may be pursued under the procedures designed for individual claims. The procedure has been defined by judicial precedent, with the courts apparently willing to afford protection to collective interests.
- The Constitution affords protection to consumer bodies and recognizes the right to a healthy environment. This protection is used by the court in Costa Rica to accept claims related to certain activities that impact on collective interest.
- There is a summary constitutional action available for the protection of constitutional rights, such as health, the environment and natural resources.

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