CERTIFICATION
class actions against the Crown

In addition to the criteria to certify a class action, there are a number of unique obstacles that must be considered when launching a class action based on public law principles against the federal government. Michael Kotrly focuses on two typical arguments the Crown could advance in order to invalidate such class actions. They are: the action should be struck as it should have been commenced as a judicial review; and a class action is not the preferable procedure because (1) the Crown cannot be subject to behaviour modification, or (2) a request for declaratory relief (pursuant to an application for judicial review) is a better alternative. However, recent jurisprudence and amendments to the Federal Courts Rules suggest that neither argument is as likely to succeed as before.

INTERNATIONAL
KapMuG: multi-party litigation in Germany

In the fourth in a series of articles, James Newland, Louise Moher and Lynda Morgan examine the development of multi-party litigation in specific jurisdictions outside North America. The North American-style class action has largely been rejected throughout Europe. In the past 10 years, however, many European countries have developed unique approaches to collective redress. Until recently, German law granted very little in terms of collective redress. However, when thousands of individual securities claims were filed against Deutsche Telekom, the German legislature was forced to reconsider its conservative position on collective redress. The product of this reflection is The Act on the Initiation of Model Case Proceedings in respect of investors in the Capital Markets (the “KapMuG”). In theory, the KapMuG strikes a balance between the right to be heard and judicial economy and access to justice. Upon closer examination, however, the KapMuG’s potential as an effective alternative to the class action is questionable at best.

NATIONAL CLASS ACTIONS
reigniting the national class actions debate

In a decision which flies in the face of the recent Wuttunee decision, Justice Cullity of the Ontario Superior Court of Justice issued a decision certifying a multi-jurisdictional opt-out class action in Canada which applies to all provinces except Quebec and Saskatchewan. Ronald Miller and Steven Seiferling examine Justice Cullity’s decision in Tiboni v. Merck Frosst Canada Ltd., which once again raises the issue of whether Canada needs a uniform code for class action certification on a national basis.
The North American-style class action has largely been rejected throughout Europe. In the past 10 years, however, many European countries have developed unique approaches to collective redress. This article is the fourth in a series of articles that examine the development of multi-party litigation in specific jurisdictions outside North America.¹

Until recently, German law granted very little in terms of collective redress.² The notion of a class action conflicts with Germany's fundamental right to be heard and right to court access by an individual to plead his or her case individually, all of which are constitutionally protected.³ However, when thousands of individual securities claims were filed against Deutsche Telekom, the German legislature was forced to reconsider its conservative position on collective redress. The product of this reflection is The Act on the Initiation of Model Case Proceedings in respect of investors in the Capital Markets (the “KapMuG”⁴).

The KapMuG is a particularly unique approach to the collective litigation of securities claims. In theory, the KapMuG strikes a balance between the right to be heard and judicial economy and access to justice. Upon closer examination, however, the KapMuG’s potential as an effective alternative to the class action is questionable at best.

The Genesis of the KapMuG: the Deutsche Telekom Litigation

In 1999, Deutsche Telekom AG, one of the world’s leading telecommunications companies, went public in Germany. In its prospectus issued at the initial public offers, the company valued its real property holdings en bloc rather than on an individual basis.⁵ In 2001, these valuations proved to be grossly overstated and Deutsche Telekom wrote down the land values by 2 billion euros. As a result, the stock’s value plummeted by 92%.⁶ The response of shareholders was overwhelming. Between 2001 and 2003, over 13,000 individual claims against Deutsche Telekom alleging misrepresentation were filed with the Regional Court Frankfurt am Main.

involving 754 different attorneys. Even more overwhelming was the fact that a single judge had exclusive jurisdiction over every claim. It was estimated that the resolution of these cases would take at least 15 years.8

Between 2001 and 2004, the individual claims idled as new claims continued to stream in. Frustrated with the delay, 11 plaintiffs filed a complaint with the Federal Constitutional Court alleging that the delay constituted a denial of justice. The Court rejected the complaint but demanded an expedited hearing of the cases.9

The Statutory Regime Under the KapMuG

In response, the German legislature enacted the KapMuG,10 a test project of model case proceedings. The KapMuG came into effect on November 1, 2005 and will expire by its sunset clause on November 1, 2010, unless incorporated into the Zivilprozessordung (ZPO), the German Code of Civil Procedure. The legislation applies strictly to: (1) claims for compensation of damages due to false, misleading or omitted public capital markets information; and (2) claims to fulfilment of contract, which are based on an offer under the Securities Acquisition and Takeover Act.11

The KapMuG applies to the Deutsche Telekom claims even though it was enacted after the individual claims were filed.

The basic premise of the KapMuG is that a model case is chosen from individual claims, the similar issues are decided and the outcome is then applied to all registered individual cases. The KapMuG contemplates three procedural stages: an application by the parties to use the procedure; the trial of the model case questions; and the application of the model case decision to the other individual cases.

The first stage is essentially the threshold requirement. Either a plaintiff who has filed an individual claim, or a defendant, applies for the model case proceeding to the court of first instance by proposing model questions, which are similar to common issues in a North American class action.12 The applicant must show that the proposed model questions “may have significance for other similar cases beyond the individual dispute concerned.”13 Cases are considered “similar” if they relate to the “same underlying circumstances.”14 Admissible applications are entered into the Complaint Registry,15 which is accessible to the public online.16 An application may be inadmissible if, for example, it has been made for the purpose of delaying proceedings or the evidence described in the application is unsuitable.17 At least nine other applications relating to the same subject matter must be filed within four months.

If the threshold is met, then the second stage begins, in which the model questions are submitted to the Court of Appeals and determined by a trial of the model claimant’s action. The Court selects the model claimant by considering the amount of each plaintiff’s claim as well as any agreement that has been reached between the claimants.18

In the Deutsche Telekom litigation, for example, the Court selected the model claimant based on the large size of his claim (1.65 million euros), and the fact that his claim covered the majority of issues relevant to the dispute.19 This provision is intended to prevent the “race to the courtroom.” The determination of the model claimant may not be appealed.

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7 “Collective Litigation German Style,” supra note 5 at 132.
9 “Class Actions, Group Litigation & Other Forms of Collective Litigation,” supra note 2 at 9.
10 The English version of this legislation can be found online at www.bmj.bund.de/kapmug.
12 Ibid., s. 1.
13 Ibid., s. 1(2).
14 Ibid., ss. 2(1), 5.
15 Ibid., s. 2.
16 www.ebundesanzeiger.de (in German only).
17 KapMuG, supra note 11 at ss. 1(3)1-5.
18 Ibid., ss. 8(2)(1) and 8(2)(2).
19 “Class Actions, Group Litigation & Other Forms of Collective Litigation,” supra note 2 at 16.
During the trial of the model questions, all other proceedings are stayed pending resolution of the model proceeding. However, individual claimants not already in the registry may opt in to the proceeding at any time during the trial of the model questions.

Once a decision on the model questions is rendered, those claimants who have opted in to the procedure are bound by the decision. It has been suggested, however, that parties are bound by the decision only to the extent that they were able to participate in the model proceeding. Therefore, a claimant who opted in late into the trial may theoretically not be bound by the decision.

With regards to costs, the general "loser pays" principle applies. If the model claimant loses, however, costs of the model trial are shared *pro rata* by all claimants in the registry in relation to the value of each party’s alleged claim. An interested party who withdraws his or her claim after the model case proceedings have started is bound by the decision but is not required to share in the costs.

The Appeals Court’s decision on the model questions may be appealed by all parties, including the claimants in the stayed actions. While the appeal is pending, all other claims remain stayed.

At the third stage, the decision of the Appeals Court is applied by the trial courts to the stayed individual actions. Each case is determined on an individual basis.

The Devil Is in the Details

At first glance, the model proceedings approach bears some resemblance to an opt-in version of the North American class action. Upon closer examination, however, several details of the KapMuG pose significant challenges to its success.

A principal challenge is the active role played by “interested parties” in the model proceedings. In order to preserve the claimant’s right to be heard, each claimant in the stayed actions is granted “interested party” status, which entitles them to produce materials and make submissions at the model case trial, provided their statements and actions are not contrary to those of the model claimant.

Interested parties may also expand the subject matter of the model proceedings if the court finds that the additional issues are relevant to the model questions. This means that each and every claimant – over 17,000 in the Telekom litigation – have the right to file written materials and make submissions at each stage of the model trial. This special status has the potential to lengthen and complicate the model trial interminably.

Another significant challenge is that settlement, which is the end result of most North American class actions, is virtually impossible under the KapMuG. Subsection 14(3) of the KapMuG provides that “if all interested parties do not consent to the settlement, conclusion of model case proceedings by way of settlement shall be inadmissible.” The power of the representative plaintiff to settle a class action in North America has prevented many a lengthy common issues trial and individual issues trials. The KapMuG’s requirement that all claimants must agree to a settlement renders protracted litigation inevitable.

Finally, there is little financial incentive for lawyers to take on the important role as counsel for the model claimant. The KapMuG makes no provision for contingency fee arrangements, which are prohibited under section 49b of the German Act on Lawyers’ Remuneration. While the Federal Supreme Court found in March of 2007 that this prohibition violated German constitutional law and gave the legislature one year to amend the law, it appears that contingency fee arrangements will only be permitted in extremely limited circumstances. Note that third party funding is available in Germany, in which specialized litigation financing entities pay court and attorney fees in exchange for up to

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20 KapMuG, supra note 11 at s. 7.
21 Ibid., ss. 16(1)3 and 16(2).
22 "Class Actions, Group Litigation & Other Forms of Collective Litigation," supra note 2 at 20.
23 KapMuG, supra note 11 at s. 17(3).
24 "Model Case Proceedings," supra note 8 at 263.
25 KapMuG, supra note 11 at s. 12.
26 Ibid., s. 13.
27 Ibid., s. 14(3).
50% of the award received if the client is successful. However, in the absence of special provision for contingency fee arrangements, the only financial incentive for plaintiff counsel to engage the KapMuG is to recover fees.

The KapMuG in Practice

In light of the aforementioned “quirks” of the KapMuG, it is no surprise that the implementation of this legislation has encountered significant obstacles. The lack of progress in the Deutsche Telekom litigation is demonstrative. This litigation is ongoing, with 17,000 shareholders represented by more than 800 lawyers, and claims totalling an estimated 80 million euros. The Regional Appellate Court in Frankfurt must decide a total of 33 issues relating to the model question. The trial of these issues began on April 7, 2008, and was the biggest trial of its kind in German history. The first week of the trial was held in a city hall that seated 800 people. It is estimated that the model trial may take several years. This is particularly striking when compared to the American experience, where Telekom has already settled a class action with American investors for $120 million.

An abundance of other model case proceedings under the KapMuG does not appear forthcoming. As of 2007, only 53 applications had been registered in the electronic register of claims and the majority of these related to the Deutsche Telekom litigation. Among the other registered claims, many did not proceed because nine similar cases were not filed within the four-month limitation period.

The KapMuG has proved to be more useful where the case weighed in favour of the defendant. The first case to be decided under the KapMuG involved DaimlerChrysler AG. The plaintiff investors alleged that the company had breached its disclosure obligations by failing to inform them immediately of the resignation of its CEO, the announcement of which triggered a dramatic change in the stock price.

On February 15, 2007, the Regional court in Stuttgart held that no such breach had occurred. As a result, the court of first instance dismissed the claims of all the individual investor claimants. This case is an example where the KapMuG has successfully resolved a multitude of claims in one trial, but it is a rare exception to the overall experience.

Conclusion: the Sun Will Likely Set on the KapMuG

The KapMuG, created by the German legislature in response to the overwhelming Deutsche Telekom litigation, is an attractive concept. In broad strokes, the determination of common issues and the subsequent application of that decision to individual cases bear some resemblance to a North American class action. However, the devil is in the details. The unanimous consent requirement for settlement, the role of the claimants as “interested parties” and the prohibition on contingency fees provide little incentive for would-be model claimant lawyers to utilize the KapMuG.

Practitioner opinion is that “the KapMuG will only be relevant in a limited number of exceptional cases” and the ability of the model case proceeding to save time and money is viewed with skepticism. This opinion appears to be well-founded, given the lack of progress in the Deutsche Telekom model trial and the lack of a groundswell

Opportunities,” online at http://www.bdi.eu/study_private_enforcement/, at 20 [hereinafter “Private Enforcement”].

Mark C. Hilgard and Jan Kraayvanger, “Class Actions and Mass Actions in Germany,” Litigation Committee Newsletter, IBA Legal Practice Division, September 2007.

“Private Enforcement,” supra note 35 at 50.

“Managing Investor Claims,” supra note 3 at 126.
of other model proceeding cases seeking to utilize the KapMuG.

In light of the fact that the European Commission in its 2008 White Paper has strongly advocated for European Union-wide legislation permitting opt-in securities class actions that more resemble North American class actions,\(^\text{39}\) the sun will likely set on the KapMuG in 2010.