

THE CLASS ACTIONS
LAW REVIEW

FIFTH EDITION

Editor
Camilla Sanger

THE LAWREVIEWS

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This article was first published in April 2021
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Published in the United Kingdom

by Law Business Research Ltd, London

Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

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Enquiries concerning editorial content should be directed to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-83862-764-5

Printed in Great Britain by

Encompass Print Solutions, Derbyshire

Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ARENDT & MEDERNACH

ARNTZEN DE BESCHE

CMS CAMERON MCKENNA NABARRO OLSWANG LLP

CRAVATH, SWAINE & MOORE LLP

GORRISSEN FEDERSPIEL

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URÍA MENÉNDEZ

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PREFACE

Class actions and major group litigation can be seismic events, not only for the parties involved, but also for whole industries and parts of society. That potential impact means they are one of the few types of claim that have become truly global in both importance and scope, as reflected in this fifth edition of *The Class Actions Law Review*.

There are also a whole host of factors currently coalescing to increase the likelihood and magnitude of such actions. These factors include continuing geopolitical developments, particularly in Europe and North America, with moves towards protectionism and greater regulatory oversight. At the same time, further advances in technology, as well as greater recognition and experience of its limitations, is giving rise to ever more stringent standards, offering the potential for significant liability for those who fail to adhere to these protections. Finally, ever-growing consumer markets of increasing sophistication in Asia and Africa add to the expanding pool of potential claimants.

It should, therefore, come as no surprise that claimant law firms and third-party funders around the world are becoming ever more sophisticated and active in promoting and pursuing such claims, and local laws are being updated to facilitate such actions before the courts.

As with previous editions of this review, this updated publication aims to provide practitioners and clients with a single overview handbook to which they can turn for the key procedures, developments and factors in play in a number of the world's most important jurisdictions.

Camilla Sanger

Slaughter and May

London

March 2021

PORTUGAL

*Nuno Salazar Casanova and Madalena Afra Rosa*¹

I INTRODUCTION TO THE CLASS ACTIONS FRAMEWORK

The only collective action procedure available in Portugal that is similar to common law's class action is the 'popular action'.

In accordance with Article 52 of the Portuguese Constitution, every citizen has the right to individually, or jointly with others, submit petitions, representations, claims or complaints to defend: their rights; the Constitution; the laws or the general interest of sovereign entities; self-government bodies of the autonomous regions; or any authority. They also have the right to be informed of the outcome of any petition, representation, claim or complaint within a reasonable time frame.

All citizens with political and civil rights have the right to popular action, independently or through associations or foundations incorporated to defend relevant diffuse interests.

The general procedure and framework for bringing popular actions is set out in Law 83/95 of 31 August 1995 (Law 83/95). Law 83/95 establishes for all interested parties the right to opt out of a popular action. This is explained in more detail below.

While the rules concerning popular actions apply to all areas and sectors of the law, there are several provisions in addition to Law 83/95 that expressly prescribe the right to popular action. These provisions relate to specific areas of the law, such as the Environmental Policy Law,² the Consumer Protection Law,³ the Cultural Heritage Law,⁴ the Securities Code⁵ and the rules governing actions for damages for infringements of competition law.⁶

Comparable to class actions are the collective actions heard together when multiple claimants join separate claims on a similar or related subject in one action (joinder of parties). This type of group claim is provided for in Portugal in both the Civil Procedure Code and the Administrative Procedure Code. Moreover, when two or more proceedings are already pending before the court, it is possible to request that both cases be joined where there is a connection between the claims (joinder of actions).

The main difference between a joinder of parties or actions and popular actions is the opt-out rule. Also, whereas claimants generally only represent themselves and their interests (even when they join an action), popular actions' claimants represent all parties with an

1 Nuno Salazar Casanova is a partner and Madalena Afra Rosa is an associate at Uría Menéndez – Proença de Carvalho.

2 Law 19/2014 of 14 April.

3 Law 24/96 of 31 July.

4 Law 107/2001 of 8 September.

5 Decree-Law 486/99 of 13 November.

6 Law 23/2018 of 5 June.

interest or a right in the proceedings. In contrast to a mere joinder of parties, claimants may not have a direct interest in the claim submitted in a popular action. Furthermore, it is not mandatory that the claimants involved in a popular action have suffered any ongoing or impending injuries or damage. Claimants represent their class at their own discretion, without needing a proxy or express authorisation from the other class members.

Since these types of claims are not common, no specific court or judge has jurisdiction to hear popular actions. The administrative and the civil courts have general jurisdiction.

II THE YEAR IN REVIEW

As mentioned before, class actions (popular actions) are not very common in Portugal. According to statistical reports on the exercise of civil popular actions before first instance courts, only 220 cases were finalised from 2007 to 2019,⁷ and in 2019 alone, only 11 civil popular actions were closed. The average number of cases heard before first instance courts in Portugal is 17 per year.

Nonetheless, the number of popular actions filed by retail investors, or associations on behalf of retail investors, for the protection of the investors' homogeneous individual or collective interests in financial instruments, and popular actions filed by the Association for the Defence of Consumers (DECO) with the purpose of ensuring consumer safety and protection, has increased significantly.

In March 2016, 100 investors, from the Association of Aggrieved Investors of Banif (Alboa), filed a popular action before the administrative courts to annul the resolution measure taken against Banif.

In September 2016, more than a 1,000 investors filed a popular action before the Lisbon Administrative Court against the Bank of Portugal, its governor and the Portuguese state. They claimed compensation for damage caused by serious shortcomings in the prudential and market conduct supervision with regard to the defendants' involvement in the *Banco Espírito Santo* case.

Also, in April 2017, Alboa filed a new claim before the Lisbon Administrative Court against the Bank of Portugal to annul a new resolution that clarified and amended the resolution measure taken against Banif. This claim was also filed against the public prosecutor, in representation of the Portuguese state, the Resolution Fund, the Directorate General for Competition of the European Commission, the European Commission, Banif and Banco Santander Totta, among others.

In March 2018, a popular action was filed by DECO for the reimbursement of €60 million, allegedly charged unlawfully by the telecommunications operators Altice/MEO, NOS and NOWO to its clients in late 2016 and August 2017, through unilateral amendments to prices without prior written notice.

In April 2018, the Algarve Surf and Marine Activities Association filed a popular action before the Loulé Administrative and Tax Court to stop oil prospection and exploitation in Aljezur, Algarve. The proceedings were brought against the Portuguese state, the Ministries of Economy, of the Sea and of the Environment, the Directorate-General for Marine Natural

⁷ This statistical analysis was carried out by the Portuguese Directorate-General for Justice Policy and is available at <https://estatisticas.justica.gov.pt/sites/siej/pt-pt/Paginas/Processos-civeis-findos-nos-tribunais-judiciais-de-1-instancia.aspx>.

Resources, Security and Services, the Fuel Market National Institution, the Portuguese Energy Regulatory Body, the Directorate-General for Energy and Geology, the Portuguese Environment Agency, and the energy corporations GALP and ENI.

In November 2018, DECO filed a popular action against Facebook, regarding the misuse of users' personal data without their prior consent and the breach of their privacy, through apps operating in the social network. DECO is claiming a minimum amount of compensation of €200 for each Facebook user, for each year of registration on Facebook.

In September 2019, the Portuguese Competition Authority fined 14 of the leading banks in Portugal a total of €225 million in connection with the concerted practice of exchanging sensitive commercial data on their credit products in retail banking, namely mortgages, and consumer and small and medium-sized enterprise credit products, for more than 10 years. Following this ruling and the defendants' appeals, DECO announced the possibility of commencing a popular action against all 14 banks for damages arising from infringements of competition law.

Additionally, in November 2019, the Vila Franca de Xira Legionella Victim Support Association filed a popular action with the Administrative Court of Lisbon. This action to claim damages was filed against the Portuguese state on behalf of all 330 victims of legionnaires' disease who were not identified as carrying the strain of the legionella bacteria that reportedly caused the epidemic in Vila Franca in March 2017. The victims have requested minimum compensation of €8,050 each.

In September 2020, the hearing of the popular action brought by the Association of the Slow Death Land against the company Siderurgia Nacional began in the Court of Almada. The action concerned the air pollution allegedly caused by the industrial activity at the Seixal industrial site. The Association requested the immediate suspension of all works at the Seixal industrial site and claimed damages of €500 million.

In December 2020, the Association Ius Omnibus (created with the purpose of defending all European Union consumers) filed two popular action claims with the Competition Court. The first popular action was brought against Mastercard, and Ius Omnibus demanded damages of €400 million for anticompetitive practices that took place between 2000 and 2019. The second popular action was brought by Ius Omnibus, representing all Portuguese consumers, against the company Super Bock for anticompetitive practices regarding the price of beer, water, cider, etc., during the years 2000 to 2020, and a request for damages of €401 million.

Also in December 2020, the Municipality of Vila Velha de Ródão filed a popular action claim with the Administrative Court of Castelo Branco against the company Bioenergy requesting that the operating licence of Bioenergy's thermoelectric plant in Vila Velha de Ródão be declared invalid, to protect public health, the environment and the quality of life of all residents.

III PROCEDURE

i Types of action available

Popular action comprises the right for an aggrieved party or parties to request the applicable compensation, in the cases and under the terms provided for by law. In particular, popular action may be taken to promote the prevention, cessation or judicial prosecution of offences

against public health, consumer rights, the quality of life, or environmental and cultural heritage preservation. In addition, the right to popular action may also be exercised to safeguard property owned by the Portuguese state, autonomous regions or local authorities.

Popular action applications can be filed before the administrative or the civil courts. The choice of court depends on the interest in question and on whether the interest or right, and the damage caused, is related to a public or a private entity.

Popular action may take any of the forms set out in the Civil Procedure Code and the Administrative Procedure Code.

To initiate a popular action, the claimant must file the claim before the competent court.

Except for Paragraph 4 of Article 22, Law 83/95 does not provide specific rules regarding limitation periods applicable to popular actions. In addition, the statute of limitations regime in the Portuguese Civil Code⁸ applies.

However, one particular rule concerning the statute of limitations applicable to popular actions relates to the right to compensation for tort. This right expires three years from the date the judgment is final and is no longer subject to appeal.

ii Commencing proceedings

There are three requirements that must be fulfilled for an association or a foundation to be able to file a claim on behalf of a group of citizens: (1) the association or foundation must have legal personality; (2) the defence of the relevant interest in the popular action to be filed must be an activity covered by the foundation or the association's corporate purpose as set out in its articles of association; and (3) the association or foundation cannot carry out an activity that could, in any way, be deemed as competing with an activity carried out by a corporate entity or a liberal professional.

In addition to citizens, associations or foundations created to defend any relevant interest, Law 83/95 also allows local authorities or the public prosecutor to file a claim on behalf of a group of people with a relevant interest. Under Portuguese law, there is no specific definition of a class. In contrast with US law, Portuguese law does not determine class by preliminary certification and there are no prerequisites to be fulfilled for the proceedings to qualify as a popular action.⁹

Moreover, the new rules governing actions for damages for infringements of competition law establish that popular actions for such damages may also be filed by an association or foundation acting within the scope of consumer protection, or by an association of undertakings whose members are parties injured by the competition law infringements in question, even if the corporate purpose of the association does not include the defence of competition.¹⁰

As prescribed in Article 15 of Law 83/95, once a popular action claim is filed with the court, if a member of the class in question disagrees with the proceedings submitted, that person must opt out of the action.

After being summoned to accept or refuse the claim, the members of the class that have had no involvement in the proceedings will have three options: (1) they can declare

8 Decree-law 47 344/66 of 25 November.

9 Rule 23(c), (1), (a) of the US Federal Rules of Civil Procedures states that '[a]t an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action'.

10 Article 19, Paragraph 2 of Law 23/2018 of 5 June.

that they ratify the proceedings at the current stage and accept the claimant's representation; (2) they can say nothing, in which case their silence will be deemed as acceptance; or (3) they can declare their refusal of the claimant's representation and thereby not be bound by the decisions that follow.

The right to opt out of a popular action may be exercised until the end of the evidence production stage of the proceedings by submitting a statement to the court.

Law 83/95 does not foresee a minimum number of claims to be filed.

Portuguese law only requires the claim to be filed by an individual and does not exclude overseas claimants. Hence, popular action claims may be brought by Portuguese citizens or foreigners in, or residing in, Portugal. In accordance with the Portuguese constitutional principle of equal treatment, any person has the right to lodge a claim before a court irrespective of their national origin or citizenship.

iii Procedural rules

Once a claim is filed, the interested parties are summoned to join the proceedings, if they wish to, or to declare that they do not agree to be represented by the claimant that initiated the popular action. The judge will determine the deadline for interested parties to inform the court of their acceptance or refusal.

The summons to accept or refuse the claim issued to any potential members of the class covered by the claim will be publicly announced by the media or through a public notice, if the interests in question concern general interests or can be geographically recognised. The personal identification of the class of persons covered by the claim does not need to be provided in the summons. The potential members of the class covered by the claim may be referred to as holders of the relevant interests. The summons should also identify: the case file and the first claimant that submitted the claim, when there are several; the defendant or defendants; the subject matter of the popular action; and the grounds for the claim.

When the interested parties cannot be specifically identified, the summons should refer to the relevant scope of people. This scope should be determined based on the specific circumstances and features that the people have in common, the geographic area where they live or the group or community that they are part of. However, the court is not bound by the way in which the application identifies the class of persons covered by the claim.

Recently, the Portuguese Supreme Court of Justice issued a decision that determined that a popular action should be declared inadmissible if the defendants have grounds to raise specific arguments of defence against individual claimants.

Since popular actions are aimed at the defence of diffuse interests, particular circumstances with respect to each claimant must be disregarded. In addition, the Supreme Court held that the claimant who files the claim on behalf of the class cannot represent the class if there is a conflict of interest between the claimant and any member of the class.¹¹ While the parties must provide the necessary evidence to the court, judges have a more active role in Portugal than they do in adversarial systems, such as in the United States. Judges conduct the trial and have the power to question witnesses and also require the production of evidence.

The Portuguese civil litigation system, as opposed to the US legal system, is characterised by written procedure. The parties lodge their claim, defence and replies (if applicable). As a

11 See decision of the Supreme Court of Justice dated 8 September 2016, in case No. 7617/15.7T8PRT.S1, available at www.dgsi.pt.

general rule, the judge only intervenes after all written pleadings have been filed and, when necessary, calls for a pretrial hearing. At the pretrial hearing, the judge will verify if the procedural prerequisites have been fulfilled. If so, the judge will determine the subject matter of the case and the key issues that are to be subject to evidence. At the final hearing the judge will hear the witnesses' testimony, as well as the parties and the experts' clarifications, if requested. The hearing will end with the parties' closing arguments and be followed by the final judgment.

As provided by Law 83/95, in popular actions the judge is more independent than in civil procedure actions. The judge is not dependant on the evidence submitted by the parties and may require the parties to provide additional evidence.

In addition, if the judge believes that it is highly unlikely that the application will succeed, the judge can preliminarily refuse the claim. However, before reaching a decision of this kind, the public prosecutor must be heard and the judge should carry out the preliminary assessments deemed necessary or requested by the parties or the public prosecutor.

The public prosecutor may replace the claimant when the claim is withdrawn and settled or the claimant acts harmfully against the relevant interests to be defended.

When an appeal does not suspend the effect of the initial decision, the judge may rule in favour of suspension to prevent irreparable damage.

When the final judgment in a popular action is final and no longer subject to appeal (when it has the force of *res judicata*), the decision will be binding against all interested parties. Apart from the members of the class who expressly opted out of the proceedings, all remaining members who declared their acceptance or who did not opt out will be bound by the court's judgment.

The final judgment will be published in two newspapers, chosen by the judge, which are presumed to be read by the parties with a relevant interest in the subject. This publication must be made at the expense of the losing party. Failure to comply with this obligation will result in liability for disobedience. Instead of publishing the full text of the judgment, the judge may determine that only extracts of its key points are to be published. According to a recent decision of the Lisbon Court of Appeal dated 15 February 2018, if a preliminary injunction is filed before the court as part of a popular action, the publication of the judgment regarding the preliminary injunction in two newspapers is not compulsory.¹²

There is no difference between the time taken for popular actions and other actions in Portugal, where the average length of civil proceedings is three years though some actions last for several years.

The trial is heard and decided by a single judge, without a jury.

iv Damages and costs

Pursuant to Portuguese law, as a general rule, no punitive damages are awarded for popular actions. All types of damages may be recoverable, including general and special damages and compensation for loss of profit. The law does not impose a maximum limit on the damages that the court may award: the quantum is fixed taking into account the losses suffered by the claimants.

12 See case No. 3375/16.6FNC.L1-6, available at www.dgsi.pt.

The remedies available in popular actions include compensation for damage, specific performance, penalties for non-performance and injunctions.¹³

When it is not possible to identify the holders of the interests in question, the court fixes a global quantum to be awarded for civil liability.

When the class of persons covered by the claim has been identified, those people will be entitled to compensation under the general rules of Portuguese civil liability law.

Where the limitation period for compensation has expired, any damages awarded will be provided to the Ministry of Justice. These damages will be held in a special account and allocated to pay attorney expenses and support legal aid for popular action rights holders, who may lawfully request it.

The Securities Code provides that when compensation is not paid because of a statute of limitations or the inability of the court to identify the injured parties, payment should revert to the guarantee fund for the transaction giving rise to the claim or, if such a fund does not exist, to the investors' compensation system.¹⁴

The claimant is exempt from paying preliminary costs and judicial costs are only due after the final judgment. Under Portuguese law, the losing party must reimburse the court fees borne by the winning party. If the claimant's claim is totally or partially upheld, the claimant will be exempt from paying court fees. However, if the court refuses the claim, the judge will determine the court fees to be paid. This varies between 10 per cent and 50 per cent of the regular fees. The judge should take into consideration the claimant's financial situation and the substantial or formal grounds for the refusal of the claim.

Law 83/95 provides for the joint liability of claimants involved in the proceedings.

As in most Member States of the European Union,¹⁵ the use of contingency fees (also known as *pactum de quota litis*) is prohibited in Portugal (by Article 106 of the Portuguese Bar Association Statute¹⁶ and Article 3.3 of the Code of Conduct for Lawyers in the European Union). Contingency fees are defined as the agreement between a lawyer and client, entered into prior to the final conclusion of the case, whereby the client undertakes to pay to the lawyer a share of the damages awarded, regardless of whether the amount awarded represents payment in cash or in kind.

Nonetheless, lawyers and their clients can previously agree that the fees to be awarded are based on the value of the case's subject matter or that, apart from the fees awarded based on other criteria, the lawyer will be entitled to additional fees related to the outcome of the case.

v Settlement

In Portugal, there are no specific rules regarding the settlement of popular actions, so the general requirements set out in the Civil Procedure Code apply.

In accordance with Paragraph 3 of Article 290 of the Civil Procedure Code, when the parties to a popular action enter into a settlement agreement, the agreement must be submitted to the court for approval.

13 Injunction claims are foreseen in Article 10 of the Consumer Protection Law and Article 25 of the Regime concerning general contractual terms (Decree-Law 446/85 of 25 October).

14 Article 31, Paragraph 3 of the Portuguese Securities Code.

15 The *quota litis* is permitted in Spain, for example.

16 Law 145/2015 of 9 September.

To approve the settlement of the popular action, the court must assess if the class of people covered by the claim was adequately and lawfully represented.¹⁷

The settlement agreement will only be binding on, and enforceable in relation to, those who subscribe to it. The members of a class that refuse to subscribe to the agreement or that have expressly opted out of the popular action will not be bound by the settlement.

IV CROSS-BORDER ISSUES

In Portuguese law, there is no specific provision restricting forum shopping.

Additionally, the new Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 to be adopted by all Member States by the end of 2022 will be a breakthrough for cross-border representative actions. This Directive requires all Member States to set out rules to ensure that a representative action mechanism for the protection of consumers' collective interests will be available in all Member States, while providing appropriate safeguards to avoid abusive legislation.

Members States must also ensure that the representative actions mechanism to be created can be brought before their courts or administrative authorities by qualified entities, who may seek injunctive measures or redress measures.

The Directive covers infringements of the provisions of EU law referred to in Annex I, such as the rules concerning unfair terms in consumer contracts, the sale of consumer goods and associated guarantees, electronic commerce, distance marketing of consumer financial services, misleading and comparative advertising, the common rules for the internal market in electricity or natural gas, air carrier liability in respect of the carriage of passengers and their baggage by air, and the protection of natural persons with regard to the processing of personal data.

One of the core novelties of the Directive is that it covers both domestic and cross-border infringements, in particular where consumers affected by an infringement live in Member States other than the Member State in which the infringing trader is established. Member States must ensure that qualified entities designated in advance in another Member State for the purpose of bringing cross-border representative actions can bring these representative actions before their courts or administrative authorities.

Each Member State shall communicate to the Commission a list of all qualified entities enabled to bring cross-border representative actions. A list of all qualified entities will then be compiled and made public to all Member States.

V OUTLOOK AND CONCLUSIONS

There are many reasons why the Portuguese popular action mechanism was rarely used for years. The main problems with the implementation and enforcement of popular action have been summarised by Paula Meira Lourenço.¹⁸ Instead of popular action claims, consumers generally opt for filing injunction claims in accordance with the Portuguese Consumer Protection Law, as these tend to be more effective. Moreover, alternative dispute resolution

17 See, for example, Miguel Teixeira de Sousa, *A Legitimidade Popular na Tutela Dos Interesses Difusos*, cit., page 242.

18 See Paula Meira Lourenço on experience in Portugal, 'Programme for the public hearing on a horizontal instrument for collective redress in Europe?' (Brussels, 12 July 2011), page 8.

schemes, such as mediation or arbitration, have become entrenched and their use has significantly increased in recent years. Today they are seen as an expedient and efficient option. In most cases, the court cannot immediately set the level of compensatory damages that it awards. This is because the court requires settlement procedures to be filed, which further delays the enforcement process. Although exempt from payment of preliminary costs, potential claimants can also be discouraged by the prohibition on the use of contingency fees.

One of the primary challenges of the popular action procedure is the backlog in court proceedings. Also, the commencement of proceedings always suffers delays because of uncertainty over the legal standing of the association or foundation filing the claim on behalf of the group of citizens with a relevant interest. For example, take the case of the popular action filed by the Observatory on Competition Law Enforcement against the television sports channel Sport TV, regarding damages for competition law infringements. Not only did it take about a year for the preliminary hearing to be scheduled, but concerns regarding the Portuguese Competition Observatory's legal standing to bring proceedings also caused a one-year delay.

Nevertheless, it is already clear that we are witnessing a steady increase in the use of popular action claims, in particular with regard to the protection of retail investors' collective interests and consumer safety and protection.

First, following the collapse of Banco Espírito Santo, the downfall of Banif and the related resolutions passed, associations incorporated to defend and protect the individual or collective interests of investors who suffered injury or losses because of failure to repay their financial investments have strived to represent not only the interests of their members, but also those of any other interested parties. These cases are still pending and decisions have yet to be handed down.

Second, the *Facebook* popular action lawsuit may be a groundbreaking and revolutionary proceeding, since the final judgment may be enforceable by thousands of Facebook users and could involve international repercussions. If DECO goes forward with a popular action against all 14 banks for damages for their concerted practice of exchanging sensitive commercial data connected to their credit products in retail banking, and given that it could cover a period of more than 10 years, the action could entail the payment of unparalleled compensation to numerous aggrieved clients.

Though the Portuguese Consumer Protection Law already contains a representative action mechanism for the protection of consumers' collective interests, this legal regime will probably need to be amended in order to comply with the new rules set out in the new Directive (EU) 2020/1828, especially in regard to cross-border representative actions.

The increase of popular action claims will put the implementation and effectiveness of the Portuguese popular action mechanism to the test. The outcome will affect a considerable number of national and foreign citizens and will most definitely be widely publicised throughout Portugal and Europe. This is definitely a turning point that could define the future of the popular action system in the country. It is likely to address whether the system is an adequate form of group litigation for the defence of diffuse interests in Portugal. Additionally, the fact that popular actions are in the spotlight has been drawing out those features of the procedure that require improvement. Finally, it may also serve as evidence that certain rules are blocking the success of this scheme, such as the courts' uncertainty regarding the legal requirements for associations to bring proceedings, the opt-out system, the lack of preliminary certification by the courts or the prohibition of contingency fees.

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Nuno has been actively involved in national and international arbitration and litigation in relation to derivatives and other financial products, and has advised leading banks and other financial institutions on some of the largest and most complex cases.

He often leads high-profile cross-border disputes, including regulatory investigations and enforcement, class actions and other major reputation-threatening litigation, especially where a global strategy is required to deal with litigation that simultaneously involves civil, criminal, regulatory and administrative issues.

He also represents clients in insolvency and restructuring proceedings, and has participated in numerous cases involving multiple jurisdictions.

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ISBN 978-1-83862-764-5