

AGGREGATE PROCEEDINGS AS TOOLS FOR PROVIDING EFFICIENCY IN CIVIL PROCEDURE

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All aggregate proceedings encompass claims or defenses held by many persons for unified resolution, which may be trial or settlement¹. Examples of aggregate proceedings include class actions, mass tort actions², derivative lawsuits³, actions naming multiple conspirators, inventory settlements, intervention and bankruptcy proceedings. Diverse types of aggregate proceedings exist and new variations often arise. One can divide these proceedings into categories along functional lines. Based on that there are three categories: aggregate lawsuits, administrative aggregations and private aggregations⁴. All of these

¹ “Aggregate” is defined as “formed by combining into a single whole or total” (*Black’s Law Dictionary* with GARNER, B.A., St.Paul., Minn., 1999, p. 66). Some scholars use term “aggregate litigation” that refers to litigation in which the claims of many individuals are aggregated, whether by joinder, consolidation or class certification, e.g. SHERMAN, E.F., “Segmenting Aggregate Litigation: Initiatives and Impediments for Reshaping the Trial Process”, *The Review of Litigation*, 2006, vol. 25:4, p. 692. Professor Hensler, has used term “large scale litigation”, by which she means litigation comprising large numbers of like claims – hundreds, thousands, tens of thousands, or even more – pursued more or less collectively. As Professor Hensler has noted there are varieties of devices for pursuing large-scale litigation other than the class action, including multi-district litigation, formal consolidation, informal aggregation, and bankruptcy. HENSLER, D.R., “Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation”, *Duke Journal of Comparative & International Law*, 2001, vol. 11, pp. 181-182, 189-191. Sometimes, the term “group action” can be met to describe all forms of common, joint, procedural activity, for instance, consolidation of cases, and joinder of parties. Professor Lindblom has paid attention to the fact in this case the typical representative situation is not present. The essence of group actions is that they seek redress for wrongs done to a group and that the plaintiff, the representative, seeks recovery not only for himself but also (or only) for all the members of the group who are not appearing in court. LINDBLOM, P.H., “Individual Litigation and Mass Justice: A Swedish Perspective and Proposal on Group Actions in Civil Procedure”, *American Journal of Comparative Law*, 1997, vol. 45, p. 820.

² Mass torts may be class actions. However, a mass tort class action differs from the traditional representative litigation because in mass tort class action many class members have obtained individual legal representation and filed their own lawsuits prior to class certification, HENSLER, “Revisiting the Monster”, cit., p. 183.

³ A lawsuit arising from injury to another person, such as a husband’s action for loss of consortium arising from an injury to his wife caused by a third person, *Black’s Law Dictionary*, cit., p. 455.

⁴ *Principles of the Law of Aggregate Litigation. Tentative Draft No. 1 (April 7, 2008)* with The American Law Institute, p. 15. It should be emphasized that the most enormous literature on aggregate proceedings is American legal literature. Most of American scholars concentrate on class action. The problem is the lack of wider publications on that issue in Polish legal literature. The papers that have been published so far focus on class action and

have different structures and present different problems. The form of proceeding is one of factors affecting the extent to which aggregation separates ownership of claims from control of litigation.

Aggregate lawsuits can be joinder actions or representative actions. Joinder actions involve multiple plaintiffs or defendants and bind only parties. Representative actions involve at least one plaintiff and one defendant and have potential to bind other represented persons.

The most common way to bring a person into a lawsuit as a plaintiff or a defendant is by joining that person as a co-participant (joinder or co-participation). Sometimes, all persons who are jointly affected by a tort or are otherwise interested in the same litigation are required to join a complaint as co-plaintiffs (to join a defence as co-defendants), meaning that a lawsuit will not proceed if any are absent (compulsory joinder)⁵. In this case, if in the action any co-person that has to participate in litigation has been omitted and then the court passed the awarding judgment or judgment of dismissal due to reason other than lack of standing of the party, this judgment will be impracticable judgment (*sententia inutiliter data*). More often, the rules of procedure are permissive, allowing persons with related claims (defences or responses) to join as co-participates but not requiring them to (voluntary or permissive joinder)⁶. In a case involving permissive joinder it is important to determine the party (parties). According to legal system, either the group (of co-plaintiffs or co-defendants) itself (as one unit) or every member of group is the party (litigant).

The main reason for allowing joinder of plaintiffs with related claims is convenience. A plaintiff is free to sue multiple defendants separately or to decline to join with other plaintiffs having similar claims. Permissive joinder helps parties and courts avoid the unnecessary loss of time and money that the duplicate presentation of evidence relating to facts common to more than one demand for relief would entail⁷. As to compulsory joinder of parties, the goal of that is to protect absent individuals – as well as those before the court – from inconsistent judicial determinations or impairment of their interests. This category of joinder of parties also saves judicial resources by preventing multiple trials of similar issues⁸.

It must be underlined that the ability of joinder to reach all potential co-participants is inherently limited⁹. First, potential co-participants may be left out of a suit. Second, when they are, other parties may be unable to bring the missing person in. Third, other rules, such as concerning jurisdiction, also limit the potential of a permissive joinder action

present only general information on this institution (KASPRZYK, R., “Class Action”, *Acta Universitatis Lodzianis. Folia Iuridica*, 1986, vol. 27, pp. 55-88, and KULSKI, R., “Class Action in US Federal Civil Procedure”, which is being published and the basic theses of this paper were presented during the Congress of Polish Chairs of Civil Procedure in Niechorze in 2007).

⁵ See Article 72 § 2 of the Polish Code of Civil Procedure.

⁶ See Articles 72-74 of the Polish Code of Civil procedure.

⁷ KLONOFF, R.H., *Class Actions and Other Multi-party Litigation in a Nutshell*, Thomson West, 2007, p. 368; WRIGHT, CH. A., MILLER, A.R., KANE, M.K., *Federal Practice and Procedure*, 3d ed., 2006, vol. 7, § 1652.

⁸ KLONOFF, *Class Actions*, cit., p. 378.

⁹ *Principles of the Law of Aggregate Litigation*, cit., p. 25.

to encompass all interested persons. Therefore, in many instances a joinder is not recommended to achieve the efficiencies of party aggregation¹⁰.

The best known form of representative action is the class action¹¹ that permits a lawsuit to be brought by or against large numbers of individuals or organizations whose interests are sufficiently related so that it is more efficient to adjudicate their rights or liabilities in a single action than in a series of individual proceedings¹².

Class actions unquestionably have both a “representative” element and “aggregate” element¹³. This institution proceeds through the use of one or more named plaintiffs (defendants) who serve as class representatives and who represent the interests of all class members, both present and absent. Class action also involves claims of individuals that are heard together, or aggregated, into a single lawsuit. It should be noted that class action is the classic alternative model to permissive joinder because in the majority of world legal system the very first requirement of class action is that joinder of all members of a putative class must be impracticable.

Besides class action exist other representative lawsuits and they may be numerically more common. Examples include actions by agents, trustees or other persons authorized to manage affairs on behalf of represented persons or affecting their interests and actions by associations on behalf of their members¹⁴.

¹⁰ TIDMARSH, J., TRANGSRUD, R.H., *Complex Litigation: Problems in Advanced Civil Procedure*, New York, 2002, pp. 71-74, and 76-77. In theory, intervention could provide an important supplement, but in many situations, a nonparty may prefer not to intervene in continuing process to bide his or her time and bring an action in a different court. No court has a *sua sponte* power to order intervention. Articles 75-83 of the Code of Civil Procedure.

¹¹ Many EU countries already have a class-action-type of mechanism in the form of “group litigation” or “representative actions or proceedings” (such as England and Wales, Germany, Netherlands, Portugal, Russia, Spain, Sweden), and also Norway, Israel. See generally HODGES, CH., “Multi-party Actions: A European Approach”, *Duke Journal of Comparative & International Law*, 2001, vol. 11, p. 321. Some countries are still at the point of mere discussion and preparation of projects for possible reforms e.g. Poland. See also National Reports from International Conference co-sponsored by Stanford Law School and Oxford University “The Globalization of Class Actions” in 2007; <http://www.law.stanford.edu> and GIDI, A., “The Class Action Code: A Model for Civil Law Countries”, *Arizona Journal of International and Comparative Law*, 2005, vol. 23, pp. 37-53.

¹² See generally NOTE, “Developments in the Law – Class Actions”, *Harvard Law Review*, 1976, vol. 89, p. 1318.

¹³ BASSETT, D.L., “Constructing Class Action Reality”, *Brigham Young University Law Review*, 2006, pp. 1418-1419.

¹⁴ On the topic of rights of action to organizations (e.g., consumer associations) or independent public bodies (e.g., administrative agencies) see: MISIUK, T., “Powództwo organizacji społecznych w sprawach dotyczących ochrony środowiska”, *Studia z prawa postępowania cywilnego*, Warszawa, 1985; KOCH, H., “Non-Class Group Litigation under EU and German Law”, *Duke Journal of Comparative & International Law*, 2001, vol. 11, pp. 355-367. Representative litigation occurs in other contexts as well including administrator of estate or guardian protecting the legal interests of incapacitated person.

Representative proceedings of all types bind represented persons only when certain conditions are met. In general, the named party and the represented person must have a common interest. The named party must have an interest in prosecuting the claim or defense zealously, and must do so in fact. Moreover, the representative proceeding must produce a final order or decree. Other requirements apply to specific kinds of representative proceedings.

In all representative actions it is important to determine criteria according to which the group is constituted. It needs to be underlined that serious doubts concerning the number and character of the group may create problems with defining individuals bound by the judgment delivered in litigation. Representative actions come in many forms, ranging from those in which a nonparty expressly authorizes a party to provide representation to those in which representation occurs without the represented person's knowledge or consent and possibly against that person's wishes. The class action falls somewhere in between, its precise location depending on the amount of notice given, the existence and number of opt-out opportunities, and other considerations.

It should be pointed out that at present, the biggest discussion being held in Poland refers to choosing the opt out or opt in regime¹⁵. It is stated that the opt out model, the main concern of which is commencing a class action by the representative plaintiff without the express consent of the class members, is contrary to the rule of *vigilantibus iura scripta sunt*. It is also stressed that person is required to take a positive step to disassociate from litigation which he or she has done little or nothing to promote. It does not seem that arguments contra opt out approach would exclude the possibility of introducing this regime in Poland. Polish civil procedure allows to bring action not only by interested person but also by prosecutor or „social organization”¹⁶. It can be added that access to court of justice is the basic rationale for class action and attachment to the class should be promoted. Finally, the opt-out model causes that efficiency and the avoidance of multiplicity of proceedings are increased for all concerned.

No US-style class action exists in Poland¹⁷. However, as mentioned, such procedural mechanism enabling greater access to justice has been accepted by the Codification Commission. It is unlikely that an US-style class action mechanism would be eventually introduced, although adoption of some kind solutions of American class action is likely¹⁸. Representative actions, on the other hand, have had quite a long tradition in the Polish civil procedure, and are now being developed further. The most significant powers of initiating litigation and joining a lawsuit at a later stage on behalf of citizens have been

¹⁵ As an alternative to the election between an opt-out or opt-in regime, another option is to give the court the discretion to decide whether class members should be required to opt into or out of the proceeding. The choice of regime by court depends on which model is most appropriate to the particular circumstances and which one contributes best to the overall disposition of the case. MULHERON, R., *The class action in Common Law Legal Systems: A Comparative Perspective*, Oxford – Portland Oregon, 2004, pp. 33-34.

¹⁶ BRONIEWICZ, W., *Postępowanie cywilne w zarysie*, Warszawa, 2005, pp. 66-74.

¹⁷ It has to be mentioned that in cases to admit provisions of a contract to be illicit judgment of the court for the protection of competition and consumers is binding non-parties as well (Article 479[43] of the Code).

¹⁸ Rzeczpospolita on 10-11 May 2008, No 109.

entrusted by the Polish Code of Civil procedure to prosecutors¹⁹ and “social organizations”²⁰ (the Code describes the latter in generic terms and further description is provided by the Regulation of the Ministry of Justice of 10 November 2000²¹). Moreover, the amendment of the Code (in 1996 and 1998) introduced competence of labor inspectors and regional (town) consumer ombudsmen to bring action and join a pending lawsuit concerning determination of the existence of a labor relations (Articles 63[1]-63[2] of the Code) or to protect of consumers’ rights (Articles 63[3]-63[4] of the Code). In such cases the Code orders enforcement of provisions as to the role of the prosecutors.

Administrative aggregation includes all procedures that enable judges to coordinate separate lawsuits for efficient processing. Examples are intradistrict or multidistrict consolidations of actions, removal, and informal cooperation. Generally, all such procedures require that cases be factually or legally related, because only then is coordinating processing likely to be efficient.

Consolidation permits the amalgamation of actions or issues involving at least one common question of law or fact²². Courts have virtually unfettered discretion regarding consolidation. Court may consolidate two or more entire actions, require a joint hearing or trial of the issues common to several actions, or combine actions or issues only for the pretrial phase of litigation. The court can exercise the power to consolidate actions without the consent of the parties and without the parties being identical in all the actions. Sometimes, as the effect of consolidation of actions the situation resembling joinder may appear. As a practical matter, consolidation occurs mainly when separate lawsuits have strong overlaps, typically because all plaintiffs claim to have been injured by the same product, the same accident, or the same course of conduct. The nature of the underlying activity at issue in the cases may affect the desirability of consolidation, its timing, or its extent. When an accident affecting a sizeable population generates considerable litigation, early aggregation and pretrial consolidation of all or most of the individual cases generally has proved to be feasible and efficient. In deciding whether to consolidate, the judge will

¹⁹ The general note on the role of prosecutors in civil litigation is contained in Article 7 of the Code of Civil procedure which stipulates: prosecutor may require that litigation in any case be brought and may take part in pending litigation if according to his opinion such litigation is justified by the need of safeguard the law and order, rights of citizens, or social interest. See also Articles 55-60 of the Code, and STEFKO, K., *Udział prokuratora w postępowaniu cywilnym*, Warszawa, 1956.

²⁰ “Social organizations” may in cases prescribed by law in order to protect rights of citizens bring action or join a pending lawsuit (Article 8 of the Code). See also Articles 61-63, and 462 of the Code, and MISIUK, T., *Udział organizacji społecznych w ochronie praw obywateli w sądowym postępowaniu cywilnym*, Warszawa, 1972.

²¹ Rozporządzenie w sprawie określenia wykazu organizacji społecznych uprawnionych do działania przed sądem w imieniu lub na rzecz obywateli (Regulation on establishment of a register of social organizations empowered to act before courts for or on behalf of citizens) Dziennik Ustaw (Journals of Laws) 2000, No 100, poz. 1080).

²² Article 219 of the Code provides that “the court may order consolidation of a few actions pending in this court(...)”. See JĘDRZEJEWSKA, M., *Kodeks postępowania cywilnego. Komentarz. Część pierwsza. Postępowanie rozpoznawcze. Część druga. Postępowanie zabezpieczające*, with ERECIŃSKI, T., Warszawa, 2006, p. 518, and FRIEDENTHAL, H., KANE, M. K., MILLER, A. R., *Civil Procedure*, St.Paul, Minn., 1999, p. 323.

weigh the saving of time and effort that consolidation would produce against any inconvenience, delay or expense that it would cause²³.

Because common issues provide the basic for consolidation, a consolidated process resembles a class action based on predominating common matters²⁴. In both situations, the main object is efficiency and efficacy. However, there are significant differences between consolidation and class action²⁵. First, consolidation is restricted to pending cases and can not encompass “future” parties as can a class action. This device is not a mechanism for creating representational lawsuits that bind nonparties. Second, consolidation order does not entitle one party to represent another party. Actions do not lose their separate identity because of consolidation²⁶. Every party must still state its own case before court. Therefore consolidations lack the procedural guarantees from class action, where named parties litigate on behalf of others. Because of the danger of violating the due process rights of nonparty class members, in class action the essential problem is ensuring that lead parties keep and protect the interests of all absent class members. In consolidation, no such problem exists because each party is individually represented by counsel and can defend itself²⁷.

Removal and transfer can also be powerful tools for aggregation, especially when there is consolidation across divisions. It requires transfer of civil action to any other district or division where it might have been brought for the convenience of the parties and witnesses and in the interest of justice.

Private aggregations, also called informal aggregations, involve related claims (filed or unfilled) or defenses that proceed in a coordinated manner, though under the direction or control of private persons rather than judges²⁸. Usually, the claims or defenses share a factual connection and are managed by attorneys who work cooperatively on behalf

²³ WRIGHT, CH. A., MILLER, A.R., *Federal Practice and Procedure*, 2ed ed., 1995, vol. 9, § 2383, p. 439; KLONOFF, R. H., BILICH, E. K. M., *Class Actions and Other Multi-Party Litigation. Cases and Materials*, St. Paul, Minn., 2000, pp. 1114-1115.

²⁴ MARCUS, R. L., SHERMAN, E. F., *Complex Litigation. Cases and Materials on Advanced Civil Procedure*, St. Paul, Minn., 1998, p. 129.

²⁵ SILVER, CH., “Comparing Class Actions and Consolidations”, *Review of Litigation*, 1991, vol. 10, pp. 495, 499-512.

²⁶ Judgment of the Polish Supreme Court dated 22.09.1967, I CR 158/67, OSNCP (Orzecznictwo Sądu Najwyższego Izba Cywilna oraz Pracy i Ubezpieczeń Społecznych), 1968, No. 6, item 105; Judgment of the Polish Supreme Court dated 26.09.1983, IC PR 101/83, OSPiKA (Orzecznictwo Sądów Polskich i Komisji Arbitrażowych), 1984, No. 7-8, item 173. STEINMAN, J., “Effects of Case Consolidation on the Procedure Rights of Litigants: What They Are, Why They Might Be Part I”, *UCLA Law Review*, 1995, vol. 42, p. 717; STEINMAN, J., “Effects of Case Consolidation on the Procedure Rights of Litigants: What They Are, Why They Might Be Part II”, *UCLA Law Review*, 1995, vol. 42, p. 967.

²⁷ In representational context, courts are especially careful to ensure that the absent members have a suitable surrogate. If the court finds the existing representation inadequate, it may divide the class into subclasses, each with its own representative or it may appoint additional representatives.

²⁸ *Principles of the Law of Aggregate Litigation*, cit., p. 21; ERICHSON, H. M., “Informal Aggregation: Procedural and Ethical Implications of Coordination among Counsel in Related Lawsuits”, *Duke Law Journal*, 2000, vol. 50, p. 381.

of all claimants or respondents. All claimants may assert injuries stemming from the same product, and their attorneys may jointly attempt to negotiate a settlement of all claims with the manufacturer.

Administrative aggregation and private aggregation may occur together and may complete each other. The line between formal and informal aggregation may become not clear when activity of lawyer to coordinate in related cases is supported by the court and when it appears in the form of the committees appointed by the court. Private aggregation may even reflect the need to facilitate of administrative or aggregate lawsuit²⁹.

All types of aggregation have efficiency as a goal³⁰. Some, such as consolidation, may have only this objective. The obvious virtue of consolidation is that it increases the productivity of the judicial system by arranging for simultaneous resolution of issues or entire actions³¹. Consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause³². Remaining forms of aggregate proceedings promote efficiency along with other ends. However, many problems and shortcomings concerning aggregation relate to efficiency as well. For example,

²⁹ *Principles of the Law of Aggregate Litigation*, cit., p. 48.

³⁰ Cases, treaties and academic literature on class actions, joinder and consolidation routinely cite efficiency as the main object of aggregation. As Professor D.R. Hensler has described all of the devices provide means of aggregating large numbers of like claims, thereby allowing parties, lawyers, and judges to deal with large-scale litigation more efficiently, HENSLER, "Revisiting the Monster", cit., p. 189. Moreover, in *Phillips Petroleum Co. v. Shutts* (U.S. (United States Reports), 1985, vol. 472, pp. 797, 809), the Supreme Court held that class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. In lawsuit involving claims averaging about \$100 per plaintiff, most of plaintiffs would have no realistic day in court if a class action were not available. See also *Gen.Tel.Co.of the Sw. v. Falcon*, U.S. (United States Reports), 1982, vol. 457, pp. 147, 159. E. F.Sherman has stated that the class action serves the interests of economy by not having to try the same issues again and again in separate cases. It also serves the interests of consistency and finality by avoiding the possibility of inconsistent outcomes in separate trials of similar cases and resolving all claims in a single case that is binding on all class members, SHERMAN, E. F., *American Class Actions: Significant Features and Developing Alternatives in Foreign Legal Systems*, *Federal Rules Decisions* 2003, vol. 215, p. 130. J.Steinman has argued that treating consolidated lawsuits as a single case rather than as separate proceedings would enable federal courts to hear additional claims that can efficiently be heard together, enable the courts to assert supplemental jurisdiction and personal jurisdiction more effectively, and eliminate uncertainties concerning litigants' rights and obligations that currently waste trial and appellate resources, STEINMAN, "Effects of Case Consolidation on the Procedure Rights of Litigants", cit., p. 717. As Professor Marcus has noted consolidation is necessary for the adequate management of the very complex multiparty and multiclaim actions that are possible today, MARCUS, R. L., "Confronting the Consolidation Conundrum", *Brigham Young University Law Review* 1995, p. 879. Also judgment of the Polish Supreme Court dated 23.11.1984, II CZ 125/84, and judgment of Polish Supreme Court dated 22.09.1967, I CR 158/67, OSNC (Orzecznictwo Sądu Najwyższego Izba Cywilna), 1968, No. 6, item 105; NOTE, "Developments in the Law – Multiparty in the Federal Courts", *Harvard Law Review* 1958, vol. 71, pp. 877-878, and LINDBLOM, "Individual Litigation and Mass Justice", cit., p. 821.

³¹ FRIEDENTHAL, KANE, MILLER, *Civil Procedure*, cit., p. 323.

³² *Johnson v. Manhattan Railway Co.*, U.S. (United States Reports), 1933, vol. 289, pp. 479, 496-497. See also *Katz v. Realty Equities Corp. of New York* (2ed Circuit), F.2d (Federal Reporter Second Series), 1975, vol. 521, p. 1354.

methods of consolidating cases often miss many pending cases³³ and always miss unfilled claims.

It should be noted that the extent to which plaintiffs and defendants realize the benefits and costs of aggregation may differ by procedure. For example, plaintiffs whose cases are tried together in a consolidated proceeding may be able to attend the trial. On the other hand, class action rules require notifying plaintiffs of the pendency of litigation, providing them an opportunity to opt out and allowing them to participate in a court proceeding to voice their opinion of proposed settlement. Additionally, class rules require judges to review and approve settlements, providing some protection against agency problems.

Efficiency reached by aggregate proceedings may be considered in two dimensions. First, thanks to aggregation proceedings, lawsuit may be conducted efficiently with regard to time saving and to maximalize acts of parties and court in the process. Generally, it is about effective using of procedural devices in litigation. For example, instead of separate trials, the plaintiffs whose claims relate closely such as employers, workers harmed by the explosion in the factory sign out one action. A single lawsuit would avoid duplicating the effort and multiplied fees (costs) of separated processes. So, for plaintiffs, the costs of pursuing the litigation are spread among all plaintiffs and common issues are only litigated once. When the lawsuits are being filed anyhow, one class action instead of hundreds of separate actions offers a corporate defendant huge litigation advantages as well. Should the defendant win, *res judicata* offers shelter from further litigation. For defendants, large numbers of potential lawsuits are consolidated into one proceeding, thereby eliminating duplicative litigation. Economically ideal litigation “package” is as one that minimizes the sum of the re-litigation costs in future cases³⁴. Moreover, it should be stated that in class action and consolidation attorneys work in teams and important tasks are divided. In both kinds of proceedings, these lawyer-teams must be more creative and better managed. This meaning of efficiency refers to institutions of pending action and therefore it can be qualified as “a efficiency of litigation as such”.

Secondly, aggregate proceedings influence the efficiency through creating proper incentives for individuals interested in the process concerning the same matters. For example, important advantage is that representative actions permit the litigation of claims too small to be economically litigated alone. In a lawyer’s eyes, the „claim” becomes the aggregate of all individual damages and suddenly becomes economically worthy of his or her efforts. It is difficult to disagree with the notion that the costliness of litigation can often distort a person’s incentives to act in socially appropriate ways, can force some plaintiffs with small but meritorious claims to decide not to sue, and can blackmail some defendants into settling claims that lack merit purely in order to avoid litigation expenses³⁵.

³³ Because of that the discretion to consolidate exists principally within judicial district (court). Consolidation is not allowed when actions are filed in different courts (districts). See judgment of the Polish Supreme Court dated 4.05.1978, IV PR 95/78, OSNCP (Orzecznictwo Sądu Najwyższego Izba Cywilna oraz Pracy i Ubezpieczeń Społecznych), 1979, No. 2, item 35, and BRONIEWICZ, W., “Comment to the judgment of Polish Supreme Court dated 1.06.1967, PR 169/67”, OSPiKA (Orzecznictwo Sądów Polskich i Komisji Arbitrażowych), 1968, No. 4, item 177.

³⁴ TIDMARSH, TRANGSRUD, *Complex Litigation*, cit., p.10; Eisen v. Carlisle & Jacquelin (C.A. 2d), F.2d (Federal Reporter Second Series), vol. 391, p. 560.

³⁵ TIDMARSH, TRANGSRUD, *Complex Litigation*, cit., p. 4.

The facilitative value is particularly evident in the consumer field where claims are typically small and injured numerous³⁶. Many plaintiffs or defendants may also reduce the number of lawyers who work actively on their behalf by entering into joint arrangements or creating settlement consortia. This meaning of efficiency is connected with impact of aggregation proceedings on action of person (society) that is interested to take civil proceeding. Therefore, it can be termed as “efficiency outside of litigation”³⁷.

Both dimensions of efficiency are connected. Lacking possibility of not duplicating of costs may make it more difficult to contribute to efficiency outside of litigation. Analyzed efficiency is not efficiency in economic sense. Both dimensions of efficiency would be current only with regard to existence of justice under law. Considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial. The benefits of efficiency can never be purchased at the cost of fairness.

³⁶ CAPPALLI, R. B., CONSOLO, C., “Class Actions for Continental Europe? A Preliminary Inquiry”, *Temple International and Comparative Law Journal*, 1992, vol. 6, p. 225.

³⁷ In 2007 in *Principles of the Law of Aggregate Litigation* the American Law Institute used respectively terms such as „internal efficiency” and „external efficiency”.

