TUMOU TOU Law Review
Volume 3 Nomor 1, Juni 2024
Penerbit: Bagian Hukum Tata Negara, Fakultas Hukum
Universitas Sam Ratulangi, Indonesia.
ISSN Online: 2964-2574

Comparative Analysis of Class Action Settlements: Key Factors in the Australian and Indonesian Legal Frameworks

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Abstract

This article explores the differences in settlement outcomes for class action cases between Australia and Indonesia. It examines the reasons behind the higher prevalence of settlements in Australia compared to the relatively low number of settled cases in Indonesia. The analysis considers factors such as variations in legal systems, judicial approaches, and economic considerations that contribute to this disparity. Through a comparative analysis methodology, the essay examines legislative provisions, case law, and academic literature in both jurisdictions. The findings highlight Australia's well-established legal framework for settlements, active judicial involvement, third-party assistance, and the consideration of adversarial costs as factors that favor settlement outcomes. In contrast, the limited scope of class action proceedings in Indonesia, frequent case dismissals, complex settlement processes, and higher plaintiff costs hinder the settlement option. This study sheds light on the implications of these factors on class action settlements in Australia and Indonesia. There is a big difference between both countries in regard to settlement in class action cases. In Australia, the provisions concerning settlement in class action cases have been in force for decades. Throughout this period, the legal framework has undergone numerous refinements which have conferred legal certainty upon parties to resolve their disputes. Secondly, it is the Judge's role that is actively involved in the settlement process along with the need for third-party assistance to assure fairness and reasonableness. Lastly, the existence of litigation funding and consideration of adversarial cost may outweigh the money in the dispute making the settlement method more favorable to resolving class action cases.

Keywords: *Class Action; Comparative; Judicial System; Legal System*

1. Introduction

A class action is a legal procedure that allows a group of individuals – in Australia, there have tobe 7 persons or more, while in Indonesia the country does not require a specific minimum number,[1] who share common claims against a defendant to pursue their case in a single lawsuit.[2] Essentially, this means that instead of each individual pursuing their case separately, the group can combine their resources and efforts to obtain the

[1] *Consumer Protection Act No. 8 of 1999* (Indonesia) s 46 (1).

[2] Legg, Michael, and Louisa Travers. "Necessity is the mother of invention: The adoption of third-party litigation funding and the closed class in Australian class actions." *Common Law World Review* 38, no. 3 (2009): 245-267.

reduction of legal costs, the enhancement of access by individualsto legal remedies, the promotion of the efficient use of court resources, ensuring consistency in the determination of common issues, and making the law more enforceable and effective.[3]

Both in Indonesia[4] and Australia, the representative plaintiff is the person who initiates the proceedingon behalf of the group, known as the "group members."[5] This individual will sue not only forthemselves but also on behalf of all the other members of the class who have similar claims. The classmembers may have suffered the same or similar alleged harm caused by the same defendant, and their claims share common issues of law or fact with those of the representative plaintiff.[6] The representative plaintiff is the only party involved in the legal proceedings, but their actions and decisions affect the entire class.[7]

In Indonesia, the Civil Law Procedure, or as it is recognized in Indonesia as HIR (*Herziene Indonesische Reglement*), was inherited from the Dutch East Indies administration and derives from IR (*Inlandsche Reglement*) contained in *Staatsblaad* No. 16 in conjunction with 57/1848, remaining inforce. However, the HIR does not address class actions or class representatives' proceedings.

The concept of a group representative proceeding, commonly known as a class action, usually is not recognized in the civil law legal system. However, due to its many benefits such as efficiency and economic convenience, the class action filing procedure has gained momentum and been adopted bycountries that adhere to the civil law legal system, including Indonesia.[8] Over the years, class action proceedings have become more prevalent alongside the increasing number of laws and regulations related to environmental protection.[9] Substantively, the right to file class action proceedings is governed by the Environmental Protection and Management Act No. 32 of 2009, Consumer Protection Act No. 8 of 1999, Construction Services Act No. 18 of 1999, Forestry Act No. 41 of 1999, Waste Management Act No. 18 of 2008, and Water Management Act No. 7 of 2004.

The class action proceeding is defined as a procedure for filing a lawsuit in which one or more individuals represent a group of people who share common facts or legal issues. The representative(s)file the lawsuit on behalf of themselves and the group, which may

[3] *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317, 374 [248].

[4] *Supreme Court Regulation No. 1 of 2002* (Indonesia) s 1.

[5] *Federal Court Act 1976* (Cth) s 33A.

[6] Lestari, Maryana, and Septhian Eka Adiyatma. "Class Action Lawsuit on Civil Issues in Indonesia as Common Law Adoption." *Indonesian Journal of Advocacy and Legal Services* 2, no. 2 (2020): 243-260.

[7] Jillaine Seymour, *'The Class Action in Common Law Legal Systems: A Comparative Perspective. By RachaelMulheron'* (2006) 65(1) Cambridge Law Journal 236-239.

[8] Elisabeth Sundari, *Pengajuan Gugatan Secara Class Action* (Suatu Studi Perbandingan dan Penerapannya diIndonesia) (Universitas Atma Jaya, Yogyakarta, 2002) page v.

[9] Laras Susanti, *Materi dan Prosedur Penetapan Gugatan Perwakilan Kelompok: Studi Perbandingan Indonesiadan Amerika Serikat* (2018) 30 (2) *Mimbar Hukum Universitas Gadjah Mada,* (347).

include a large number of people. The purpose of this mechanism is to simplify the litigation process and reduce the potential for disparities in court decisions.[10]

It is known that the class action procedure has been in use in Indonesia since 1987, in the case of RO Tambunan suing Bentoel Remaja, followed by the case of Mukhtar Pakpahan against the Governor of Jakarta, and the Head of the Jakarta Health Office related to the dengue fever epidemic (1988). It then developed in the 1990s, for example, in the case of the Advertising and Private Radio Company Niaga Prambors (1997) and the Consumers Foundation of Indonesia (YLKI) against PT. PLN Persero related to power outages (1997).[11] In response to the development of the use of class action, the Supreme Court then issued Supreme Court Regulation No. 1 of 2002 concerning Class Action Procedure.

Australia's federal class action regime originated from a request made by then Attorney General Robert Ellicott QC to the ALRC in 1977 that it write a report on the adequacy of and any changes that should be made to, federal law relating to grouped proceedings. In 1988, the Parliament then tabled the ALRC's final report, titled 'Grouped Proceedings in the Federal Court', and recommended the adoption of a federal class actions procedure.[12]

The Federal Court Act then amended in 1991 set out new provisions containing the Australian class action regime. The implementation of the new 'Representative Proceedings' section (Part IVA) began on March 4, 1992. The operation of Part IVA was shaped by decisions made by appellant courts, including rulings that explained the meaning of a substantial common issue.[13] This issue is a crucial element that must be established to proceed with class action proceeding. Therefore, unlike in Indonesia, the requirement for filing a class representative proceeding in Australia is not heavily reliedupon rigid rules and legislation making it easier for the plaintiff to file the case.[23]

In Australia, the majority of class action cases, which are recognized as representative proceedings in the legal system, are typically resolved through a settlement.[14] Meanwhile, in Indonesia, the number of cases resolved through settlement remains

[10] Adler, Vivian O. *"The Viability of Class Action in Environmental Litigation."* Ecology Law Quarterly, vol. 3, no.3, 1972, pp. 533.

[11] Emerson Yuntho, Course Materials Series on Human Rights for Lawyers XI Tahun 2007, Materi: MekanismeClass Action, Pengenalan Class Action, ELSAM dan LDF, 2007, p 12

[12] Michael Legg. & Samuel J. Hickey, *'Class Actions in Australia', in B.T. Fitzpatrick & R.S. Thomas (eds), The Cambridge Handbook of Class Actions*: An International Survey, Cambridge University Press, Cambridge, published 29 January 2021, pp. 367

[13] *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at 267, "substantial" does not indicate a large or significant issuebut instead is "directed to issues which are 'real or of substance'.

[14] Michael Legg. *Class action settlements in Australia -the need for greater scrutiny.* Melbourne University lawreview. (2014) 38, pp 590; *see also* Vince Morabito*, 'An Empirical Study of Australia's Class Action Regimes: First Report Class Action Facts and Figures'* (December 2009) ch 5

low.[15] This is in part due to the limited rules governing class actions in Indonesia and the growing number of such cases.

The issue being explored in this essay is the difference in settlement outcomes for class actioncases between Australia and Indonesia. Specifically, the essay aims to understand why settlement is a more popular resolution method for class actions in Australia compared to Indonesia, where the number of cases settled through this method is still low. The essay also examines the factors contributing to this difference, such as differences in legal systems, judicial approach, and economic consideration, and considers the implications of these factors in the settlement of class action cases in both jurisdictions.

2. Method

To explore the differences in settlement outcomes for class action cases between Australia and Indonesia, this essay will employ a comparative analysis methodology.[16] The research will involve examining the relevant legislative provisions, case law, and academic literature on class actions in both jurisdictions.

3. Analysis and Discussion

3.1. Assessing Legal Framework in Class Action Lawsuit: Comparative Approach

3.1.1. Australia

In common law systems, legal principles are derived from the interpretation and application ofpast court decisions, thereby establishing a body of case law. This system of precedent fosters predictability and consistency in legal outcomes. In contrast, the civil law system in Indonesia relies more heavily on legislation and codes, which can limit the ability of judges to interpret and apply the law flexibly.[17] This can make it more difficult for plaintiffs to bring successful class action lawsuits, as there may be less room for legal interpretation and development.

Australia has undergone several legal reforms relating to class action proceedings and litigation. These reforms unify the class action rules for national frameworks including reasonablesteps to resolve the disputes before commencing legal proceedings, and the introduction of contingency fee arrangements in some states. The requirement for the judge's approval arises from the notion that the presiding judge must remain alert to the potential risks of conflict and collusion that may arise during the settlement process. For instance, it is possible that class counsel may engage in collusion with

[15] Kurnia, R. (2015). Class Actions in Indonesia: *An Assessment of the Court's Practice*. Review of IndonesianLaw and Society, 42(1), 83-102

[16] Reitz, John C. "*How to Do Comparative Law*." (1998) 46(4) The American Journal of Comparative Law 617-36

[17] Joseph Dainow, *'The Civil Law and the Common Law: Some Points of Comparison'* (1966) 15(3) The AmericanJournal of Comparative Law 419, 435.

defendants, leadingto a biased or unfair settlement agreement.[18]

Moreover, conflicts may emerge between the representative plaintiff and other plaintiffs, or among different categories within the class itself, posing significant challenges to the integrity of the settlement process. Therefore, the settlement must be thoroughly evaluated by the court to ensure that it adheres to the highest standards of fairness and reasonableness. By doing so, the court can safeguard the rights and interests of all parties involved and maintain the integrity and credibility of the legal system.

These factors have been applied on numerous occasions and indeed they are very crucial.[19] It is to say that if the class members of the proceeding are excluded from the settlement agreement, then the agreement should be unfair and not reasonable in relation to the unrepresented members.Therefore, the court indeed should employ such thresholds to consider fairness and reasonableness.[20]

Additionally, section 33ZF in this act gives the court the power to make any necessary orders. This provision is often relied upon by the court to address new issues that may arise duringa settlement such as legal fees and disbursements, the distribution of the settlement payment, the confidentiality of evidence, and the resolution of the proceeding. During the hearing, group members also have the opportunity to express any objections they may have.

However, in fact, the number of objections by class members remains low.[21] Thus, it raises some questions: Whether the lack of appeals from objectors is due to the class action settlement process working well; or there are other factors, such as economic or non-economic barriers; or assumably the class members may lack legal knowledge in accordance with the objection of the settlement; hence, there may be a need to assist class members with legal assistance to effectively challenge the proposed settlements.

3.1.2. Indonesia

Similar to Australia's overarching purposes, the class action procedure in Indonesia is justifiedby the adoption of the general provision in the Judicial Power Act No. 4 of 2004, now superseded by Judicial Power Act No. 48 of 2009. The latter states that "the court proceeding shall be carried out through simple, quick and inexpensive judiciary

[18] Michael Legg. *Class action settlements in Australia -the need for greater scrutiny.* Melbourne University lawreview. (2014) 38. 594

[19] Michael Legg. *Class action settlements in Australia -the need for greater scrutiny.* Melbourne University Law Review. (2014) 38. 595

[20] Fitzharris, Colleen P. *"Can We Calculate Fairness and Reasonableness? Determining What Satisfies the FairCross-Section Requirement of the Sixth Amendment."* Michigan Law Review, (2013) 112, pp. 519

[21] Morabito, V. (2013). *An Empirical Analysis of Appeals by Class Members in Australia's Federal Class Actions.* Common Law World Review, 42(3), pp. 266

process" and "the courts shall assist those seeking justice and help overcome all barriers and constraints to achieve simple, quick and inexpensive judiciary process."

The process of examining a case using class action proceedings is essentially the same as the regular civil procedure in Indonesia. However, in class action proceedings, there are two stages of examination: Firstly, the initial examination stage where the judge will determine whether the claimmeets the requirements to be filed as a class action. This stage involves the judge deciding whether the claim is valid for class action proceedings or not. Secondly, the substantive examination stage, where the class action claim has been validated and continued for the examination of the substanceof the case.[22]

To be eligible to proceed the case to the substantive examination stage of a class action proceeding, in addition to considering the requirements as regulated in Section 2 of the Supreme Court Regulation No. 1 of 2002. In drafting the class action proceeding, attention must also be paid tothe formal requirements of the procedure in general and the requirements set out in Section 3 of theregulation:

a) Complete and clear identity of the group representative.
b) Detailed or specific description of the group, even without mentioning the names of itsmembers, meaning that the description of the group should not make administration difficult.
c) Information about the group members that are required in relation to the obligation tonotify, meaning that since group members may not be present in court (in absentee), their whereabouts must be known to facilitate notification in the future.
d) The position of the entire group, both the group representative and its identified or unidentified members, must be clearly and specifically presented.
e) In a representative lawsuit, several parts of the group or subgroups may be grouped if the claims are not the same due to different natures and losses.
f) The claims must be detailed and clear, including proposals for the distribution of compensation and proposals to form a team to assist in the smooth distribution of compensation.[47]

These strict initial requirements in fact caused many class action proceedings to be rejected bythe court. In Indonesia, the plaintiffs of the class representative proceeding take more responsibility in the case. As a result, neither the settlement nor the substantive issue in the proceeding is being heard before the court.[23]

[22] Laras Susanti, Materi dan Prosedur Penetapan Gugatan Perwakilan Kelompok: Studi Perbandingan Indonesiadan Amerika Serikat (2018) 30 (2) Mimbar Hukum Universitas Gadjah Mada, p 348

[23] *Lembaga Perlindungan Konsumen Nasional Indonesia v PT. Adira Dinamika Multi Finance, Tbk.* (2012) PN KEPANJEN 74/Pdt.G/2012; *M. Haris, Heri Joni, M. Yunus, Nursal, M. Syaharudin v PT Tandan Abadi Mandiri (PT. TAM)* (2021) PN SAROLANGUN 7/Pdt.G/2021; *Arpai Cs v Kementrian Pekerjaan Umu Direktorat Jenderal Sumber Daya Air Balai Wilayah Sungai Sumatera VI* (2021) PN SAROLANGUN 12/Pdt.G/2021

Furthermore, Indonesia's legal system does not have a well-developed framework for settlement in class actions. This has led to uncertainty and inconsistency in the treatment of class actions by the courts. Often, in practice, class actions are treated as individual claims, which can makeit difficult for plaintiffs to bring collective claims.

In an effort to provide a standardized procedure for the settlement of class action cases, Indonesia has implemented Supreme Court Regulation No. 1 of 2002. "*The judge is duty-bound to facilitate the parties in settling the dispute amicably, both at theoutset of the proceedings and during the course of the trial."* However, the section lacks sufficient detail as a means of resolving class action disputes. Also, it is essential to set out standards or criteria to approve a settlement to guarantee that the process accommodates all parties' interests. Therefore, without a clear guideline, it will be very difficult for the parties to negotiate a settlement in good faith resulting in the low number of cases settled throughthis method.[24]

In Indonesia, the provisions regarding settlement are also fragmented into several laws that recognize class action litigation. Similarly, most of this provision does not explain exactly how the settlement mechanism and procedures are as those of Australia with its Fairness and reasonableness which are guided through Practice Notes. As said above, the settlement process in Indonesia is highly dependent on laws related to class action cases. In certain circumstances, this can result in significant differences in settlement requirements and procedures. While it is undeniable that government intervention in dispute resolution can have its advantages, it is important to recognize that it may also lead to bias and be impractical in certain situations. A case in point is the class representative proceeding initiated in 2000 by Ali Sugondo and 10 other plaintiffs acting on behalf of 34 million residents of East Java against 18 members of the representative council.[25]

The claim was related to a study tour taken by the council members to another region that wasconsidered by the plaintiffs to be improper and violating the law. The plaintiffs argued that the council members abused their power by using public funds for a personal trip and that the trip did not have any clear educational or research purpose.

Another case involves 139 becak drivers in Jakarta, who are acting on behalf of 5,000 other drivers. They filed a class action lawsuit against the Indonesian Government, with the Minister of Internal Affairs and the Governor of Jakarta as the defendants. The claim was to challenge the legality of a government regulation that banned Becak from operating in Jakarta, which had resulted in the loss of livelihoods for many Becak drivers. The plaintiffsargued that the regulation violated their constitutional rights to work and

[24] Clarke, S. and Prakash, M. '*Class Actions in Indonesia: A Preliminary Assessment*' (2017) 13(3) Journal ofPrivate International Law 405-428

[25] *Ali Sugondo Cs (10 people) representing 34 million residents of East Java v 18 Members of Commission B of East Java Regional People's Representative Council* (District Court of Surabaya, 2000) 593 Pdt. G

earn a living and that it had been issued without proper consultation with the affected parties.

The case went through several rounds of litigation and appeals, with the final decision being issued by the Supreme Court in 2007. The Supreme Court ultimately ruled in favor of the government, upholding the ban on becak in Jakarta.[26] While the first case mentioned about the government refers to the legislative, however, given the multiparty system that is being adopted by Indonesia, the political parties may intervene in the decision of both the executive and legislative institutions as they win both elections.[27] Therefore, In the case of involving the government to provide services for the settlement but at the same time beingthe defendant of the proceeding, this provision may bias and provide a conflict of interest, and it is possible that political intervention may occur.

The second case shows how the provision opens up the opportunity to settle the dispute basedon a power-based approach rather than right-based negotiation. In a power-based approach, the disputing parties resolve their conflict through a contest of strength, which may encompass tactics such as lobbying, the use of political influence, demonstrations, industrial action, or physical force. Power-based approaches would also encompass administrative enforcement and when a power-based approach is taken, the most powerful party, in this case, the government would likely win.[28]

Australian class action settlements, as mentioned above, are facilitated by court-appointed settlement administrators, which can ensure that the settlement process is fair and reasonable for allparties involved. Therefore, this approach can ensure that settlements are consistent and predictable. The consumer dispute resolution as mentioned in section 45 (2), at every stage of the proceeding, prioritizes a settlement to resolve the dispute by the parties. The settlement defined in this provision is, so far as it does not intervene with the provisions in this act, a resolution made by the two parties—business owners and consumers—without bringing the case to be heard before thecourt or another institution that is responsible for solving the dispute.

Although it is good that the provisions prioritize settlement at every stage of the proceedings and emphasize the importance of guaranteeing which can help to prevent future disputes, both sections lack specific guidelines for determining the reasonableness of a settlement. In Australia, the range of reasonableness of a

[26] *139 becak drivers (representing other 5000 drivers in Jakarta) v Indonesian Government (represented by the Ministry of Internal Affairs and the Governor of DKI Jakarta* (District Court of Central Jakarta, 2000) 50 Pdt.G.

[27] Hanta Yuda AR, *'Presidensialisme Setengah Hati: Dari Dilema ke Kompromi'* (Gramedia Pustaka Utama, Jakarta, 2010) 107-121

[28] Nicholson, David. "*Environmental Dispute Resolution: Theoretical and Indonesian Perspectives." Environmental Dispute Resolution in Indonesia* (Brill, 2009) 1-48; see also Stevens, Carl M. *"On the Theory ofNegotiation."* The Quarterly Journal of Economics, vol. 72, no. 1, 1958, pp. 77–97

settlement is evaluated in light of the best recovery and all the attendantlitigation risks, and advice is sought from counsel or independent experts.

On the one hand, this approach in Indonesia indeed may provide a faster, and less costly resolution for the parties involved. Unfortunately, it may also result in a lack of deterrence for businesses to act responsibly toward consumers. By prioritizing settlement agreement over liability, businesses may not take the necessary steps to prevent similar harm from occurring in the future.

On the other hand, Australia's settlement criteria consider the risks of establishing liability forthe business, which can lead to greater accountability. Businesses are held responsible for their actions, and consumers are provided with a sense of justice and protection. This approach will necessarily ensure that businesses are not able to simply settle the disputes without facing the consequences of their actions, which could encourage businesses to act more responsibly andethically.

The appointment of the third party can be done before a dispute occurs, namely by agreeing onit and including it in the work contract construction. In the event that the appointment of a third partyis made after a dispute has occurred, this must be agreed upon in a written deed signed by the partiesin accordance with the provisions of the applicable laws and regulations. The third-party services referred to above include arbitration in the form of national or international institutional or ad-hoc, mediation, conciliation, or expert evidence.

In Indonesia, arbitration is governed by its laws.[29] In the context of the relationship between employers and employees in construction law, ADRemphasizes cooperative ways of resolution, making it suitable for those who seek to foster good relationships between employers and employees, for the benefit of their respective companies or future business relations. The broad scope of issues that can be addressed through ADR allows for comprehensive consideration of the agenda of issues. This is possible because the rules of engagement are developed and determined by the parties involved, according to their respective interests and needs. The ADR process is believed to be more flexible than litigation and is better equipped to generate agreementsthat reflect the interests and needs of the parties involved (Pareto optimal or win-win solution).[30]

[29] Herzien Inlandsch Reglement No. 16, *of 1848* (Indonesia) s 130; (Rechtreglement voor de Buitengewesten No. 227, 1927) (Supreme Court Act No. 2, 2003) (Arbritation and Alternative Dispute Resolution Act No. 30, 1999) (Federal Magistrates Act , 1999) (Indonesian Constitution, 1945) (Advocates Act No.18, 2003) *of 1927* (Indonesia) s 154; *the Supreme Court Act No. 2 of 2003 about the Procedure of Mediation* (Indonesia); *Arbitration and Alternative Dispute Resolution Act No. 30 of 1999* (Indonesia) s 3

[30] Erman Rajagukguk, *'Budaya Hukum dan Penyelesaian Sengketa Perdata di Luar Pengadilan',* Jurnal MagisterHukum, vol. 2, no. 4, October 2000, p 300 -315

So far, settlements made through the arbitration institution are considered the most advantageous option. This is influenced by the provisions which generally guarantee fair and reasonable negotiations. Settlements reached through arbitration are often considered advantageous in Indonesia due to their potential for ensuring fair negotiations and reaching a mutually acceptable settlement. The option to call upon expert witnesses to provide objective input can also help to ensure that settlement negotiations are fair and reasonable.

However, there are concerns surrounding the extent of control that arbitrators have in class action cases. On the one hand, the provisions outlined in Section 7 of Supreme Court Regulation No. 1 of 2002 state that settlement outcomes must be approved by the court. On the other hand, the decisions made by the arbitration body cannot be influenced or overturned by the court. Therefore, there is tension between the autonomy of arbitrators in the negotiation process and the need for court oversight to ensure fairness.

Moreover, arbitration can be costly, particularly in class action cases involving large numbers ofplaintiffs. Fees for arbitrators and administration costs can be high, with a minimum fee of 20 millionrupiahs. Compare this to Financial Ombudsman Service in Australia when the service is free for the applicant.[31] These expenses can often outweigh the benefits of pursuing a class action case.

4. Judicial System and Economy Consideration

In Indonesia, the judge encourages the parties to better consider the settlement method at thebeginning process. However, there is no provision to instruct the judge to actively play an active rolein whether a settlement has been done fairly and accommodate all parties' interest or not. Indonesia's settlement regime relies heavily on the third party to resolve the dispute. Although the settlement needs the judge's approval, to what standard the judge gives such approval remains unclear and unregulated. Judges are generally passive and provide the parties with the option to settle outside of court without intensive supervision.

The effort to achieve a settlement outside of court usually, as mentioned in the legal framework discussion above, can be taken the form of arbitration through the National Arbitration Body (BANI) or ad hoc methods agreed upon by the parties. When the disputing parties agree to settle the case through one or both of these methods, the case is left out of the court. During this process, the judge cannot interfere when a settlement occurs.

While this approach may allow for greater flexibility in resolving disputes, it also carries certainrisks. Without the active involvement of a judge, the parties may not be able to

[31] FOS, Terms of Reference (2015) FOS, Terms of Reference (2015), The Financial Ombudsman Service (FOS) is an independent organization in Australia that provides a dispute resolution service for consumers who have complaints or disputes with financial service providers. It was established under the Australian Securities andInvestments Commission Act 2001 and is a free service for consumers

fully understand the legal implications of their decisions. Also, there may be a risk of unequal bargaining power between parties as the settlement is being carried out by an unofficial institution or *ad hoc* methods agreed upon by the parties. Moreover, the lack of judicial oversight may also result in the settlement being unenforceable, which would defeat the purpose of the settlement.

On the other hand, Australian Federal Court judges may give directions relating to settlement under Federal Court Rules O 10 r 1, of particular relevance are O 10 r 1(2)(g) (which deals concerninga mediator or arbitrator) and O 10 r 1(2)(h). However, Australia is aware that there is a need to balance intervention and independence.[32] Similar to Indonesia's class action settlement regime[76], Australia employs the need for a third party toconduct the mediation in the settlement. It is done solely for the judge, although the judges should be alert to any possibilities that disregard the fairness and reasonableness of a settlement, they cannotbe the sole author of the settlement itself.

The importance of using the service of a third party and the judge not becoming the person in charge of resulting the settlement is because of the possibility of bias by the judge. if the judge continuously involves in the settlement negotiation without first clarifying the issue and weaknesses to be met on each's side, the judge may bias toward one party. Therefore, it is crucial that judges should not conduct settlement discussions but should try to stimulate them to ensure that they remain neutral.

Australian courts have taken steps to regulate cost agreements between solicitors and clients to ensure that access to justice is not impeded by prohibitive legal costs.[33] In addition, to provide access to justice for people, particularly in class action cases, Australia has long been known for its litigation funding arrangements. This entity is a crucial part of ensuring access to justice for people (plaintiffs) who may not have the financial resources to pursue legal action. In these arrangements, litigation funding agrees to pay the costs of litigation, including lawyer fees. In return, the funder receives a percentage of any funds recovered by the litigants, either through a settlement or judgment.[34]

In contrast, there is no legal aid system or litigation funding as such for class action litigation inIndonesia. The Indonesian Constitution Act provides for the right to legal aid for those who cannot afford it in criminal cases Section 28I, but it does not explicitly mention class action cases. The Advocates Act No. 18 of 2003 also includes provisions for legal aid, but again, it is primarily focusedon criminal cases. This can make it difficult for plaintiffs to pursue legal action, especially when the costs of litigation are high. In addition, Indonesian law requires plaintiffs to pay court fees upfront, which can be a significant barrier to accessing justice.

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[32] Michael Legg, *'Judge's Role in Settlement of Representative Proceedings: Lessons from United States ClassActions'* (2004) 78 Australian Law Journal p 66

[33] *Woolf v Snipe* (1933) 48 CLR 677, 678–9 (Dixon J).

[34] Michael Legg, '*Reconciling Litigation Funding and the Opt-Out Group Definition in FederalCourt of Australia Class Actions — The Need for a Legislative Common Fund Approach'* (2011) 30 Civil Justice Quarterly 52, 56

The limited access to justice has contributed to the low number of class actions brought in the country. According to the Indonesian Supreme Court database, only 35 class actions were filed between 2001 and 2014.[35] In comparison, the number of class actions filed in Australiahas increased significantly over the past decade, with over 422 class actions filed in the Federal Courtof Australia between 1992 and before March 2018.[36]

Therefore, the limited access to justice in Indonesia can impact the settlement process since using third-party assistance can be so much expensive. When plaintiffs face significant barriers to pursuing legal action, they will decide to agree upon any settlement method provided usually an unofficial *ad hoc* method and they may be more willing to accept a settlement, even if it is not optimal.This can reduce the bargaining power of plaintiffs and make it more difficult to reach a settlement that is fair and reasonable. In addition, without adequate legal representation, plaintiffs may not fully understand their rights and the potential value of their claims, which can impact their ability to negotiate a fair settlement.

5. Conclusion

There is a big difference between both countries in regard to settlement in class action cases. In Australia, the provisions concerning settlement in class action cases have been in force for decades. Throughout this period, the legal framework has undergone numerous refinements which have conferred legal certainty upon parties to resolve their disputes. Secondly, it is the Judge's role that is actively involved in the settlement process along with the need for third-party assistance to assure fairness and reasonableness. Lastly, the existence of litigation funding and consideration of adversarial cost may outweigh the money in the dispute making the settlement method more favorable to resolving class action cases.

In contrast, the legal notion governing class action proceedings in Indonesia remains limited in scope,and the number of cases that have been brought to court is relatively few due to several reasons. Firstly, the court often cancels the proceedings in the initial examination resulting in many cases are not even given a chance to be resolved through settlement, as they are dismissed before they can progress to the next stage. Secondly, the mechanism for settling cases is very limited and case- dependent, and may not be possible to reach a settlement in every case, and even when it is, the process for doing so can be complicated (Supreme Court Regulation No. 1, 2002) and time-consuming. Finally, the cost of the settlement option is relatively expensive. As the plaintiffs may need to bear a greater share of the legal costs associated with the case, making the settlement option less favorable.

[35] Kurnia, R. (2015). Class Actions in Indonesia: *An Assessment of the Court's Practice*. Review of IndonesianLaw and Society, 42(1), 83-102

[36] Australian Law Reform Commission. (2019). *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Table 3.2: Total number of class action proceedings filed in theFederal Court of Australia and the percentage that were funded (1992–2018), p 75

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