

STRATEGIC CONSIDERATIONS IN GLOBAL LITIGATION: COMPARING JUDICIAL CASE MANAGEMENT APPROACHES IN SOUTH AFRICA WITH THE UNITED STATES*

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1 Introduction

The world has become globalised. According to Hensler,¹ the possibility of mass injuries² in modern times has increased markedly with the rise of national and transnational corporations who provide services to large parts of the global population.³ She states that, coupled with the modernisation of societies, there is an increase in popular expectations of redress and also development of legal doctrine in many countries where it is now possible to hold private and public institutions accountable for violating legal standards.⁴ “With nationalization and globalization of economic activity, the incidence and scope of mass litigation has increased dramatically.”⁵ This has resulted in a continuously changing global litigation landscape.⁶ Litigation too has become globalised. Disputes that used to be contained within national borders are now transnational. Global litigation is increasingly characterised, not only by traditional cross-border litigation between parties situated in different jurisdictions, but also by parallel litigation in different countries arising from the same dispute, an apt example of which is the recent Volkswagen “dieselgate” litigation.

The Volkswagen litigation relates to Volkswagen’s unauthorised use of a software-based defeat device in diesel automobiles manufactured by it. The software enables the vehicles to evade emissions requirements by engaging

* The idea for this article is derived from my attendance of a course presented by Professor Deborah Hensler at Stanford University, namely “Global Litigation”. I would also like to thank the peer reviewers for their valuable input.

¹ DR Hensler “The Global Landscape of Collective Litigation” in DR Hensler, C Hodges & IN Tzankova (eds) *Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation* (2016) 4.

² IN Tzankova “Case Management: The Stepchild of Mass Claim Dispute Resolution” (2014) 19 *Unif L* 329 330 defines “mass disputes” as “disputes involving a large number of claimants that seek remedies from another party, usually a corporation, for alleged infringements of their rights”.

³ Hensler “The Global Landscape of Collective Litigation” in *Class Actions in Context* 4.

⁴ See also DR Hensler “How Economic Globalization is Helping to Construct a Private Transnational Legal Order” in S Muller, S Zouridis, M Frishman & L Kistemaker (eds) *The Law of the Future and the Future of Law* (2011) 249-261 as authority for the proposition that mass disputes increasingly occur because of globalisation and industrialisation.

⁵ DR Hensler “Financing Civil Litigation: the US Perspective” in M Tuil & L Visscher (eds) *New Trends in Financing Civil Litigation in Europe* (2010) 155.

⁶ GC Hazard “From Whom No Secrets are Hid” (1997-1998) *Tex L Rev* 1665 1666.

full emissions controls only when official emissions testing occurs.⁷ Lawsuits erupted in various countries. In the United States, the Judicial Panel on Multidistrict Litigation consolidated more than 500 suits in the federal United States district court of the Northern District of California.⁸ At the same time, in the Netherlands, *inter alia* the Volkswagen Investor Settlement Foundation and the *Stichting Volkswagen Investor Settlement* were established to seek settlement on behalf of Volkswagen investors worldwide to recover damages incurred on Volkswagen securities under the Dutch Collective Settlement Act.⁹ Meanwhile, in Germany, a lawsuit was filed at the Regional Court in Brunswick on behalf of numerous institutional investors from all over the world totalling more than three billion euros.¹⁰ In future, these claims may be pursued in a collective fashion through the Capital Markets Model Case Act of 2012 (commonly referred to as “KapMuG”).¹¹

Although these cases are being conducted in parallel, it is evident upon closer consideration that there is nevertheless a measure of overlapping and interplay between the litigation in the above jurisdictions. For example, the United States Judicial Panel on Multidistrict Litigation held that most of the underlying conduct occurred or is located outside of the United States, including potentially relevant witnesses and evidence from Volkswagen and other entities involved in the design, production, sale and marketing of the affected vehicles and the components at issue.¹² The German litigation is funded by an international consortium of funders, but largely spearheaded by American law firms.¹³ The lead counsel and funder¹⁴ of the Volkswagen Investor Settlement Foundation and the funder¹⁵ of the *Stichting Volkswagen Investors Claim* are both American law firms, with both of these firms utilising Dutch counsel. The German lawsuit comprises international investors from countries including, but not limited to the Netherlands and the United States.¹⁶

Moreover, the Volkswagen litigation stretches beyond American, Dutch and German borders, with similar consumer and security lawsuits being filed in

⁷ *In re: Volkswagen “Clean Diesel” MDL 15-MD-2672-CRB* (JSC) 1-2.

⁸ 2. The United States Judicial Panel on Multidistrict Litigation held that “the actions in this litigation involve common questions of fact, and that centralization in the Northern District of California will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation”.

⁹ Dutch Act on Collective Settlements, Law of 23 June 2005, Stb. 340. The websites of the foundations can be accessed at <<http://volkswageninvestorsettlement.com>> and <<https://www.stichtingvolkswageninvestorsclaim.com>>.

¹⁰ For the press release, visit <<http://tilp.de/press-release-first-german-multi-billion-lawsuit-filed-against-vw>>.

¹¹ The court order of the Brunswick District Court (Landgericht) can be accessed at <http://www.disputeresolutiongermany.com/wp-content/uploads/2016/09/Volkswagen-Dieselgate-5_OH_62_16.pdf>. The KapMug-procedure allows a German trial court to refer multiple investor suits with common questions of fact or law to a court of appeals. The appellate court then selects a model case that is run by a lead model plaintiff to try, the outcome of which is binding on the remaining cases.

¹² *In re: Volkswagen “Clean Diesel” MDL 15-MD-2672-CRB* (JSC) 2.

¹³ A Frankel “U.S. law firms are betting on control of VW litigation overseas” (02-11-2015) *Reuters* <<http://blogs.reuters.com/alison-frankel/2015/12/02/u-s-law-firms-are-betting-on-control-of-vw-litigation-overseas/>> (accessed 15-10-2016).

¹⁴ Bernstein Litowitz Berger & Grossmann LLP.

¹⁵ Labaton Sucharow LLP.

¹⁶ For the press release, visit <<http://tilp.de/press-release-first-german-multi-billion-lawsuit-filed-against-vw>>.

several other countries.¹⁷ Nevertheless, the interplay between the jurisdictions involved in the litigation continues to exist. For example, European lawyers working with Michael Hausfeld, a prominent American class-action lawyer who played a key role in the American Volkswagen litigation, are assisting Australian attorneys to pressure Volkswagen for settlements over its emissions-cheating scandal.¹⁸ Australia has reportedly become a significant battleground because its vehicle-emission regulations are almost identical to European Union laws and, if an Australian court determines that Volkswagen's emissions system illegally contained a defeat device, Australia could become a precedent for mass claims in Europe.¹⁹

The Volkswagen litigation is a prime example of the changing nature of global litigation. This type of litigation is often complex and presents vexing legal and practical challenges.²⁰ To participate in this realm successfully and to design, implement and coordinate an effective global litigation strategy, knowledge limited to one's own legal system will no longer suffice. Of fundamental importance is transnational knowledge of legal systems. It is important to keep in mind that, while litigation has gone global, the law has not. Law has resisted the globalisation trend. "It remains essentially national, emanating from sovereign rulemaking structures."²¹ There may be convergence and occasional harmonisation, but not uniformity.²² Essentially, therefore, the party that knows the legal system of the jurisdiction where the litigation occurs is in a better position to shape the proceedings to achieve the desired outcome. Ultimately, the global dimension of complex, high-stakes legal disputes shapes parties' and lawyers' strategies and judges' decisions.

Knowledge of the legal systems of the different jurisdictions involved in the litigation may assist in addressing the challenges that could arise during global litigation. It may also assist parties to make sensible strategic choices regarding the conduct of the litigation. Significant differences between common-law and civil-law systems, such as the prevalent role of judges in

¹⁷ R Yu & T Chen "Volkswagen Faces Lawsuit in China over Emissions" (15-12-2015) *Wall Street Journal* <<http://www.wsj.com/articles/volkswagen-faces-lawsuit-in-china-over-emissions-1450176206>> (accessed 15-10-2016); H Tabuchi & J Ewing "Volkswagen to Pay \$14.7 Billion to Settle Diesel Claims in U.S." (27-06-2016) *The New York Times* <<http://www.nytimes.com/2016/06/28/business/volkswagen-settlement-diesel-scandal.html>> (accessed 15-10-2016); W Boston "VW Facing Uphill Battle outside the U.S. in Emissions Claims" (23-08-2016) *Wall Street Journal* <<http://www.wsj.com/articles/vw-facing-uphill-battle-outside-the-u-s-in-emissions-claims-1471944601>> (accessed 15-10-2016).

¹⁸ In the United States, Volkswagen reached a settlement in terms of which it agreed to pay up to \$14.7 billion to settle claims stemming from its diesel emissions cheating scandal. In this regard, see Tabuchi & Ewing "Volkswagen to pay \$14.7 Billion to Settle Diesel Claims in U.S." (27-06-2016) *The New York Times*.

¹⁹ Boston "VW Facing Uphill Battle outside the U.S. in Emissions Claims" (23-08-2016) *Wall Street Journal*.

²⁰ RL Marcus, EF Sherman & HM Erichson *Complex Litigation: Cases and Materials on Advanced Civil Procedure* 5 ed (2010) 2 state as follows regarding the meaning of "complex cases": "three characteristics serve, individually or together, to distinguish complex cases. First, they may involve difficult legal and factual issues ... Second, the sheer number of parties involved may make litigation complex where it would not be in a one-on-one litigation format. Third, the amount of money or the stakes involved may prompt litigation efforts of such dimension that a case that would otherwise not be complex becomes complex".

²¹ C Silver "Educating Lawyers for the Global Economy: National Challenges" (2009/2010) *Kyung Hee University Law Review* 1 6.

²² M Tushnet "The Inevitable Globalization of Constitutional Law" (2008-2009) 49 *Va J Int'l L* 985 987.

civil-law systems to develop the evidence and elucidate the legal concepts that should govern decisions, may inform parties' litigation strategies.²³ Knowledge of civil procedural rules of the jurisdictions involved in the litigation could prove decisive, including knowledge of jurisdictional rules, rules relating to discovery and the admissibility of evidence, the application and scope of privilege rules and the applicable fee regimes and costs rules. For example, the rules relating to discovery in the United States give wide latitude for exploring potentially relevant evidence, which is not the case in England where discovery is much more constrained²⁴ or in most civil-law jurisdictions where there is generally no party-driven discovery of documents.²⁵ Further, from a practical perspective, consideration would need to be given to issues such as litigation financing and the coordination of the litigation when there are multiple claimants in different jurisdictions with diverse legal systems and dissimilar court procedures.²⁶ There may also be regulatory challenges that arise in multiple jurisdictions, each with its own unique legal requirements and cultural nuances, which a party to global litigation would need to consider.²⁷

As mentioned above, it is imperative that the litigation strategies of parties to global litigation take into account the differences that may exist between the legal systems of participating common-law and civil-law jurisdictions. However, of equal importance is not discounting the differences that may exist between the courts and procedural systems of two or more common-law jurisdictions involved in the same litigation. Moreover, there may also be civil procedural disparities that exist within a single legal system. This article first compares the extent to which, if at all, judges in South Africa and the United States have authority to manage complex litigation.²⁸ Thereafter, the article illustrates the strategic importance of variations between, and within, these legal systems in the context of global litigation. Both jurisdictions are of common-law origin. Further, the recently implemented South African judicial case-flow management pilot project incorporates aspects of the American approach to managerial judging.²⁹ Moreover, although global lawyering has

²³ Hazard (1997-1998) *Tex L Rev* 1673. See also JA Jolowicz "Adversarial and Inquisitorial Models of Civil Procedure" (2003) *Int'l & Comp LQ* 281 281.

²⁴ RL Marcus "Putting American Procedural Exceptionalism into a Globalized Context" (2005) 53 *Am J Comp L* 709 715.

²⁵ Hazard (1997-1998) *Tex L Rev* 1682.

²⁶ According to Silver (2009/2010) *Kyung Hee University Law Review* 4, global legal literacy includes elements of language and cultural fluency, as well as understanding differences in the roles of law and lawyers in national contexts.

²⁷ Eg, Tzankova (2014) *UnifL Rev* 329 states that:

"The set of issues identified earlier becomes even more apparent and difficult to deal with in transnational mass disputes. On the one hand, the existing legal and institutional infrastructure can be improved only by a coordinated national or supranational institutional effort, which involves complicated political processes. On the other hand, the national judges confronted with the handling of mass disputes have varying legal and cultural background and case management skills".

²⁸ E Hurter "Seeking Truth or Seeking Justice: Reflections on the changing face of the adversarial process in Civil Litigation" (2007) *J S Afr L* 240 256, states that in virtually all American courts some or other form of case management takes place.

²⁹ According to K Hawkey "Attorneys to benefit from better case management - KZNLS AGM 2012" (2012) 13 *De Rebus* 85, "Chief Justice Mogoeng had further led a delegation to the United States in 2011 to get insight into how that country deals with the effective disposal of cases. One method they believed could be used to improve the South African system was early judicial intervention in litigation".

only just begun to penetrate the major South African cities, these cities are the portals to “further expansion of the office networks of global law firms in the twenty-first century if and when political and regulatory hurdles facilitate expansion into such cities”.³⁰ Knowledge of the South African legal system will undoubtedly assist strategic decision-making in future global litigation where both countries are involved.³¹ Conversely, it is conceivable that a lack of knowledge would needlessly complicate cross-border collaboration and coordination of the parallel litigation.³²

Although it is trite that no two countries’ legal systems are identical,³³ this article aims, by structuring the comparison around the issue of judicial case management of complex litigation, to demonstrate the extent to which such differences are accentuated in the context of global litigation.³⁴ Importantly, differences in respect of judicial approaches to case management within these jurisdictions are also relevant to the analysis. This is essentially because “[m]anagerial decisions can affect parties’ strategic advantages and influence the outcome of the case”.³⁵ This article does not aim to engage in a critical analysis of the value of judicial case management as such, but rather to consider how differences in judicial approaches could inform strategic decision-making during global litigation.

2 Judicial case management

According to Tzankova, in common-law jurisdictions the term ‘judicial case management’ is defined as “the judge taking an active role in shepherding litigation to a conclusion, rather than leaving it to the lawyers to set the pace and determine the chronology of events”.³⁶ This constitutes a departure from the traditional approach in terms of which common-law judges in civil litigation were “passive arbiters of conflicting private interests who rule on questions of law”.³⁷ The parties investigated, prepared and presented

³⁰ R Faulconbridge, JV Beaverstock, D Muzio & PJ Taylor “Global Law Firms: Globalization and Organizational Spaces of Cross-border Legal Work” (2007-2008) 28 *Nw J Int'l L & Bus* 455 464. The growth of American law firms in South Africa has been slow but promising, with prominent American firms, including White & Case and Baker & McKenzie, establishing a significant South African presence.

³¹ Faulconbridge et al (2007-2008) *Nw J Int'l L & Bus* 468.

³² J Flood & F Sosa “Lawyers, Law Firms, and the Stabilization of Transnational Business” (2007-2008) 28 *Nw J Int'l L & Bus* 489 492-493.

³³ According to Faulconbridge et al (2007-2008) *Nw J Int'l L & Bus* 474, the steadfastly “national” nature of legal systems is one of the most fundamental problems global law firms face.

³⁴ Marcus (2005) *Am J Comp L* 740 states the problem in the United States is that comparative procedure is “barely on the map”.

³⁵ EG Thornburg “The Managerial Judge Goes to Trial” (2010) 44 *U Rich L Rev* 1261 1300.

³⁶ Tzankova (2014) *Unif L Rev* 336. D Elliot “Managerial Judging and the Evolution of Procedure” (1986) 53 *U Chi L Rev* 306 326, states that managerial judging as the “self-conscious restructuring of procedural incentives by trial judges on an ad hoc basis to achieve certain objectives” is a relatively recent innovation in the history of Anglo-American civil procedure.

³⁷ MF Connor “Taming the Tort Monster” (2000) 4 *Briefly* 1 8-9.

evidence and arguments whilst the judge assumed a passive role throughout the proceedings.³⁸

The Volkswagen litigation before Breyer J necessitated judicial case management in the pre-trial stage of the case and a shift from party control to judicial control.³⁹ This is because the adversarial approach to individualised justice is impractical when thousands of claims must be dealt with quickly and efficiently, which is generally the case in global litigation.⁴⁰ In addition, as global litigation involves complex issues, it requires greater administration and management of the case.⁴¹ In the Volkswagen litigation, for instance, the regional court in Brunswick registered more than 1400 complaints from institutional and individual shareholders seeking more than nine billion US dollars in damages.⁴² In California, Breyer J had to oversee more than 500 consumer lawsuits, including approximately 180 class actions, against Volkswagen. The United States Panel on Multidistrict Litigation stated that “[w]e select Judge Charles R. Breyer as the transferee judge because he is a jurist who is thoroughly familiar with the nuances of complex, multidistrict litigation by virtue of having presided over nine MDL dockets, some of which involved numerous international defendants. We are confident that Judge Breyer will steer this controversy on a prudent and expeditious course”.⁴³ Breyer J similarly stated that “the number and complexity of these actions warrant holding a single, coordinated initial case management conference for all actions”.⁴⁴

In view of the above, it is worth considering in more detail the extent to which there is judicial case management of complex litigation in South Africa and the United States. Have judges in these jurisdictions become “active managers and watchdogs, disregarding the traditional norms of judicial passivity and neutrality”⁴⁵ and, if so, to what extent? To facilitate the comparative analysis, the article specifically considers the judicial case management approaches in both jurisdictions during pre-trial proceedings and in class action litigation. The class action device has specifically been selected for comparison because it is one of the most common methods of litigating complex claims on behalf of large numbers of individuals in both jurisdictions.⁴⁶ It was also one of the primary mechanisms used in the Volkswagen litigation in the United States.

³⁸ See, eg, J Resnik “Managerial Judges” (1982-1983) 96 *Harv L Rev* 374 380-381; F James & G Hazard *Civil Procedure* 2 ed (1977) 4-8; RW Millar “The Formative Principles of Civil Procedure” (1923) 18 *Ill L Rev* 1 9-24.

³⁹ Hurter (2007) *J S Afr L* 256-259.

⁴⁰ Connor (2000) *Briefly* 1 8-9.

⁴¹ C Piché “Judging Fairness in Class Action Settlements” (2010) 28 *Windsor YB Access Just* 111 117.

⁴² N Clark “Volkswagen Shareholders Seek \$9.2 Billion Over Diesel Scandal” (21-09-2016) *The New York Times* <http://www.nytimes.com/2016/09/22/business/international/volkswagen-vw-investors-lawsuit-germany.html?_r=0> (accessed 16-10-2016).

⁴³ United States Judicial Panel on Multidistrict Litigation *In Re: Volkswagen “Clean Diesel” Marketing, Sales Practices and Products Liability Litigation* MDL No. 2672 Transfer Order.

⁴⁴ United States District Court Northern District of California *In Re: Volkswagen “Clean Diesel” Marketing, Sales Practices and Products Liability Litigation* MDL No. 2672 CRB (JSC) Pretrial Order No. 1.

⁴⁵ Connor (2000) *Briefly* 8-9.

⁴⁶ LJ Silberman, AR Stein, TB Wolff *Civil Procedure: Theory and Practice* 4 ed (2013) 1005.

2 1 Pre-trial judicial case management

Active judicial case management has become a defining characteristic of the federal civil pre-trial scheme.⁴⁷ Mullenix states, “particularly in the realm of complex litigation, the American managerial judge has undertaken roles that are indeed converging with the civil law inquisitorial judge”.⁴⁸ Similarly, Rowe posits “the extent that civil-law judges take initiative to shape the course of proceedings – as some do considerably and others less so – American pretrial managerialism does take us in their direction”.⁴⁹ Express authority for judicial case management can be found in rule 16 of the Federal Rules of Civil Procedure (“Federal Rules”), which deals with the court’s authority to issue scheduling and case management orders,⁵⁰ and in rule 23, which concerns class actions.⁵¹

The Federal Rules were conceived as one unified set of rules flexible enough to govern cases of all sizes and variations in complexity.⁵² Federal Rule 16 pertinently illustrates American pre-trial managerialism.⁵³ It does so through regulating a variety of issues pertaining essentially to the conduct of pre-trial conferences.⁵⁴ Over the years, the rule has been amended to further reinforce and broaden trial courts’ managerial authority.⁵⁵ Rule 16 is titled “Pretrial Conferences; Scheduling; Management” and it commences by stating the purposes of a pretrial conference, which include expediting the disposition of an action, establishing early and continuing control so that the case will not be protracted due to a lack of management, and facilitating settlement.⁵⁶ It requires, subject to certain exceptions, the issuing of a scheduling order⁵⁷ within a certain period of time⁵⁸ in terms of which the order limits the time allowed to join other parties, to amend the pleadings, to complete discovery, and to file motions.⁵⁹ There are also certain issues that the order may address, including the extent of discovery or other appropriate matters.⁶⁰ The rule further regulates the actionable⁶¹ issues that may be considered at the pre-trial conference, including the formulation and simplifying of issues, the amendment of pleadings if necessary or desirable, obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, ruling in

⁴⁷ S Gensler “Judicial Case Management: Caught in the Crossfire” (2010-2011) 60 *Duke L J* 674 669.

⁴⁸ LS Mullenix “Lessons from Abroad: Complexity and Convergence” (2001) 46 *Vill L Rev* 1 13.

⁴⁹ TD Rowe “Authorized Managerialism under the Federal Rules - and the Extent of Convergence with Civil-Law Judging” (2007-2008) 36 *Sw UL Rev* 191 205.

⁵⁰ This rule applies to all civil actions in the United States district courts. See Gensler (2010-2011) *Duke L J* 698; Rowe (2007-2008) *Sw UL Rev* 195-198.

⁵¹ Class actions are a form of complex litigation, especially when compared to ordinary civil litigation.

⁵² Baicker-McKee (2015-2016) *Am UL Rev* 355.

⁵³ Rowe (2007-2008) *Sw UL Rev* 195.

⁵⁴ WD Brazil “Pretrial Conferences; Scheduling; Management” in JWM Moore (ed) *Moore’s Federal Practice* 3 ed (Rel 188-12-2015) 16-1.

⁵⁵ Gensler (2010-2011) *Duke L J* 680.

⁵⁶ Rules 16(a)(1), (2) and (5) of the Federal Rules.

⁵⁷ Rule 16(b)(1).

⁵⁸ Rule 16(b)(2).

⁵⁹ Rule 16(b)(3)(A).

⁶⁰ Rule 16(b)(3)(B).

⁶¹ At the court’s instance.

advance on the admissibility of evidence, and so on.⁶² Courts have a general discretion to facilitate in other ways⁶³ the just, speedy, and inexpensive disposition of the action.⁶⁴ Courts may further issue sanctions where a party or their legal representative fails to appear at a scheduling or other pre-trial conference, is substantially unprepared to participate, fails to participate in good faith in the conference, or fails to obey a scheduling or other pre-trial order.⁶⁵

Rule 16 constitutes a relatively robust framework for judicial case management in the federal pre-trial scheme. Some suggest that active judicial case management is now a core feature of this scheme, along with notice pleading, liberal discovery, and summary judgment.⁶⁶ The present position, as set forth by rule 16, enables federal judges to take control of and manage complex proceedings from the outset of the litigation.⁶⁷ A judge may hold as many pre-trial conferences as he or she pleases and may raise almost any issue at those conferences, which often take place in chambers.⁶⁸ The judge, not the parties, conducts these conferences. The judge will review the proposed discovery plan and will issue a discovery order, which order typically identifies the scope and timing of discovery, who will be deposed, when and for how long, when discovery will be completed, and so on.⁶⁹ The extensive list of pre-trial orders issued in the Volkswagen litigation aptly illustrates the extent of the control assumed by Breyer J over the pre-trial stage of the global litigation.⁷⁰ It is also arguable that there is a direct correlation between the extent of control assumed by Breyer J and the unprecedented speed with which settlement was reached. “It was one of the fastest civil settlements in the history of corporate malfeasance, coming together in six months instead of the years usually required for such complex negotiations” with Breyer J setting the tone from the outset of the litigation.⁷¹ “The overriding theme is that judges who take the time to talk with the lawyers and involve the parties at the Rule 16 stage are in a much better position to tailor the pretrial process to achieve the ‘just, speedy, and inexpensive’ determination of the claims”.⁷²

⁶² Rule 16(c)(2)(A)-(C) of the Federal Rules.

⁶³ Not otherwise referred to in rule 16(c)(2).

⁶⁴ Rule 16(c)(2)(P).

⁶⁵ Rule 16(f).

⁶⁶ Gensler (2010-2011) *Duke L J* 674.

⁶⁷ 670-671.

⁶⁸ Baicker-Mckee (2015-2016) *Am UL Rev* 392.

⁶⁹ Silberman et al *Civil Procedure: Theory and Practice* (2013) 658-659. See also Gensler (2010-2011) *Duke L J* 693.

⁷⁰ The following website contains a list of close to 20 pre-trial orders dealing with a variety of issues in a variety of ways: <<http://www.cand.uscourts.gov/crb/vwmld>>.

⁷¹ J Ewing & H Tabuchi “Behind Volkswagen Settlement, Speed and Compromise” (15-07-2016) *The New York Times* <<http://www.nytimes.com/2016/07/16/business/international/behind-volkswagen-settlement-speed-and-compromise.html>> (accessed 19-10-2016).

⁷² Gensler (2010-2011) *Duke L J* 693. See also Brazil “Pretrial Conferences; Scheduling; Management” in *Moore’s Federal Practice* 16-1.

Compared to the United States, South Africa has been somewhat slow to transition to judicial case management.⁷³ For the most part, adversarialism continues to dominate with the parties exercising control over the pre-trial and trial phases of civil litigation.⁷⁴ Rule 37 of the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa (“Uniform Rules”) is the South African version of Federal Rule 16. The rule compels parties to attend a pre-trial conference with the aim of reaching a negotiated agreement regarding certain issues and to limit the duration of the litigation insofar as time-consuming administrative issues are concerned.⁷⁵ It affords the parties “an opportunity to endeavour to find ways of curtailing the duration of the trial by redefining the issues to be tried”⁷⁶ and “to facilitate settlements between the parties, narrow the issues and to curb costs”.⁷⁷ Although both rules 16 and 37 are, in broad terms, aimed at facilitating the efficient resolution of civil trials through various pre-trial mechanisms integrated in these rules, the lack of active judicial participation evidenced by rule 37 is striking. The rule presents comparatively few opportunities for the exercise of unencumbered judicial discretion⁷⁸ and, for the most part, judicial participation in the pre-trial process in terms of rule 37 is limited to circumstances where the parties have consented thereto. In this regard, rule 37(8)(c) provides that “[t]he judge may, with the consent of the parties...give any direction which might promote the effective conclusion of the matter”.⁷⁹

Whereas rule 16 envisions the judge at the head of the proverbial pre-trial table, the default position for the conduct of pre-trial conferences in terms of rule 37 is that they take place between the parties’ legal representatives, without the judge being present. This stands in stark contrast to rule 16 that, for example, enables the court to conduct a final pre-trial conference to formulate a trial plan, including a plan to facilitate the admission of evidence.⁸⁰ While rule 37(8)(a) enables a judge in certain circumstances to, *mero motu*, or at the request of a party, conduct a pre-trial conference in chambers, rule 37(8)(b) dampens enthusiasm by providing that “[n]o provision of this rule shall be interpreted as requiring a judge before whom a conference is held

⁷³ Regarding the origins of judicial case management in the United States, Marcus et al *Complex Litigation* (2010) 15 provide as follows:

“Whatever the overall tranquillity of federal civil litigation in 1938, by the late 1940s there was a widely-felt concern among federal judges about whether ‘protracted’ litigation, particularly antitrust litigation, should be handled differently. A 1951 study by the Judicial Conference of the United States suggested that the solution was greater involvement by judges.”

By the 1970s, Chayes commented that “[t]he judge is the dominant figure in organizing and guiding the case ...” See A Chayes “The Role of the Judge in Public Law Litigation” (1976) 89 *Harv L Rev* 1281 1284.

⁷⁴ HJ Erasmus “Judicial Case Management and the Adversarial Mindset – the New Namibian rules of court” (2015) *TSAR* 259 261.

⁷⁵ See *Lekota v Editor ‘Tribute’ Magazine* 1995 2 SA 706 (W) regarding the stock-tacking nature of the pre-trial conference. See also *T v T* 2016 4 SA 193 (WCC) para 26.

⁷⁶ *Road Accident Fund v Krawa* 2012 2 SA 346 (ECG) para 17.

⁷⁷ *MEC for Economic Affairs, Environment & Tourism: Eastern Cape v Kruizinga* 2010 4 All SA 23 (SCA) para 6.

⁷⁸ Eg, rule 37(10) provides that “[a] judge in chambers may, without hearing the parties, order deviation from the time limits in this rule”.

⁷⁹ HCJ Flemming “Case Management” (2011) *Advocate* 29 29.

⁸⁰ Federal Rule 16(e).

to be involved in settlement negotiations ..." All that the rule requires is that the pre-trial conference minutes must reflect "(c) that every party claiming relief has requested his opponent to make a settlement proposal and that such opponent has reacted thereto" and "(d) whether any issue has been referred by the parties for mediation, arbitration or decision by a third party and on what basis it has been so referred".⁸¹ Conversely, rule 16 aims to facilitate settlement by enabling the court to require that a party or its representative be present or reasonably available by other means to consider possible settlement.⁸² Rule 16 clearly envisages a more participatory role for judges insofar as settlement discussions are concerned.

Contrary to Federal Rule 16, the scope for judicial control and initiative within the ambit of Uniform Rule 37 is evidently limited. However, South African superior courts possess inherent jurisdiction. Taitz succinctly describes the courts' inherent jurisdiction as follows: "[T]hose (unwritten) powers, ancillary to its common law and statutory powers, without which the court would be unable to act in accordance with justice and good reason. The inherent powers of the court are quite separate and distinct from its common law and its statutory powers, eg in the exercise of its inherent jurisdiction the Court may regulate its own procedure independently of the Rules of Court".⁸³ The courts' inherent jurisdiction is utilised with a view to, *inter alia*, regulating the courts' procedures in the interests of the proper administration of justice,⁸⁴ especially where there is no rule dealing with a particular matter.⁸⁵ Where the rules provide for a particular matter, the scope for a court to exercise its inherent powers is more limited.⁸⁶ Compelling grounds must exist before a court may act outside the powers provided for specifically in the rules.⁸⁷ Where the rules do not provide for a particular set of circumstances, the court has inherent jurisdiction to read the rules in a manner that facilitates the administration of justice and to handle the matter along practical lines.⁸⁸

Section 173 of the Constitution of the Republic of South Africa, 1996 ("Constitution") empowers courts to develop the common law, which clearly

⁸¹ Rule 37(6).

⁸² Rules 16(a)(5) and (c)(1).

⁸³ J Taitz *The Inherent Jurisdiction of the Supreme Court* (1985) 8-9.

⁸⁴ *Universal City Studios Inc v Network Video (Pty) Ltd* 1986 2 SA 734 (A); *Krygkor Pensioenfonds v Smith* 1993 3 SA 459 (A); *White v Moffett Building & Contracting (Pty) Ltd* 1952 3 SA 307 (O); *California Spice and Marinade (Pty) Ltd* 1997 4 All SA 317 (W); *Soller v Maintenance Magistrate, Wynberg* 2006 2 SA 66 (C); *Carmel Trading Company Limited v Commissioner for the South African Revenue Services* 2008 2 SA 433 (SCA).

⁸⁵ *S v Pennington* 1997 4 SA 1076 (CC). See also *Phillips v National Director of Public Prosecutions* 2006 1 SA 505 (CC) para 46 for the limits of this power. *Krygkor Pensioenfonds v Smith* 1993 3 SA 459 (A); *Neal v Neal* 1959 1 SA 828 (N); *Matyeka v Kaaber* 1960 4 SA 900 (T); *Watson v Kriebs* 1963 3 SA 546 (O); *A v R Kinder- en Kindersorgvereniging* 1996 1 SA 649 (T); *Beinash v Wixley* 1997 2 All SA 241 (A).

⁸⁶ *Western Bank Ltd v Packery* 1977 3 SA 137 (T); *Collective Investments (Pty) Ltd v Brink* 1978 2 SA 252 (N).

⁸⁷ *Moulded Components and Rotomoulding SA (Pty) Ltd v Coucourakis* 1979 2 SA 457 (W).

⁸⁸ *Brown Bros Ltd v Doise* 1955 1 SA 75 (W), quoted with approval in *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 1 SA 773 (A) 783.

comprises not only procedural law but also substantive law.⁸⁹ In *Mukaddam v Pioneer Foods (Pty) Ltd (“Mukaddam”)*⁹⁰ the Constitutional Court stated the following:

“Section 173 makes plain that each of the superior courts has an inherent power to protect and regulate its own process and to develop the common law on matters of procedure, consistently with the interests of justice. The language of the section suggests that each court is responsible and controls the process through which cases are presented to it for adjudication. The reason for this is that a court before which a case is brought is better placed to regulate and manage the procedure to be followed in each case so as to achieve a just outcome. For a proper adjudication to take place, it is not unusual for the facts of a particular case to require a procedure different from the one normally followed. When this happens it is the court in which the case is instituted that decides whether a specific procedure should be permitted.”⁹¹

The Constitutional Court in *Mukaddam* also referred to *PFE International v Industrial Department Corporation of South Africa Ltd*⁹² where the principle that rules of procedure should be applied flexibly was reaffirmed by the court: “[i]t enables a superior court to lay down a process to be followed in particular cases, even if that process deviates from what its rules prescribe. Consistent with that power, this Court may in the interests of justice depart from its own rules”.⁹³ The South African superior courts would therefore, through the exercise of their inherent jurisdiction and in keeping with section 173 of the Constitution, be able to actively manage cases where it would be in the interests of justice to do so. This explains why the South African superior courts have generally managed class actions over which they have been required to adjudicate as was the case in, for example, *Trustees for the time being of the Children’s Resource Centre Trust v Pioneer Food (Pty) Ltd (Legal Resources Centre as amicus curiae)* (“*Children’s Resource Centre Trust*”).⁹⁴

Though there may be individual variations in the approaches adopted by American judges in applying Federal Rule 16 and the extent to which they tailor the rule to suit the needs of a specific case,⁹⁵ the existing framework within which American judges operate constitutes a platform which enables managerial judging from the outset of the proceedings.⁹⁶ Whereas “[b]y any measure, Rule 16 gives judges more managerial arrows than can fit in an ordinary quiver”,⁹⁷ the platform generated by rule 37 of the Uniform Rules is somewhat brittle in comparison. Judicial case management in South Africa is largely dependent upon the exercise of the South African superior courts’ inherent jurisdiction. Hence, it is conceivable that there exists a stronger possibility that *ad hoc* approaches adopted by judges in the respective

⁸⁹ *SABC Ltd v National Director of Public Prosecutions* 2007 1 SA 523 (CC) paras 35 and 36; *Legal Aid Board v S* 2011 1 All SA 378 (SCA); *Coetzee v National Commissioner of Police* 2011 2 SA 227 (GNP); *FirstRand Bank Ltd v Beyer* 2011 1 SA 196 (GNP); *SA Broadcasting Corporation Ltd v National Director of Public Prosecutions* 2007 1 SA 523 (CC) para 88; *S v Thebus* 2003 6 SA 505 (CC).

⁹⁰ 2013 10 BCLR 1135 (CC).

⁹¹ Para 42.

⁹² 2013 1 SA 1 (CC).

⁹³ Para 39.

⁹⁴ 2013 1 All SA 648 (SCA).

⁹⁵ Gensler (2010-2011) *Duke L J* 720.

⁹⁶ 687.

⁹⁷ Rowe (2007-2008) *Sw U L Rev* 196.

divisions of the High Court of South Africa to judicial case management of pre-trial proceedings may vary, sometimes inordinately, from case to case. To address this lack of uniformity, Mogoeng CJ recently stated the following:

“The leadership of the Judiciary at all levels has resolved to begin a massive project of overhauling all the Rules of the High Court and Magistrates’ Courts with the view of doing away with archaic Rules, progress- and efficiency-retarding Rules, to inject flexibility, facilitate the full scale implementation of electronic filing and electronic record-keeping, video conferencing, judicial case management harmonisation or streamlining of all Court Rules”.⁹⁸

A Judicial Case Flow Management Committee was established to implement the project to which Mogoeng CJ refers, called the Case-Flow Management Pilot Project (the “Project”). The Project was launched in 2012 in five pilot court sites, namely in both Gauteng divisions, the Western Cape division and the KwaZulu-Natal divisions (Pietermaritzburg and Durban) of the High Court of South Africa.⁹⁹ The project ended on 31 March 2015.¹⁰⁰ Apparently, the Project delivered positive results in the divisions in which it was implemented. Since the commencement of the Project, in the KwaZulu-Natal division, the waiting time for trial dates has decreased from 12 months to between six and eight months in Durban, and from two to three years to between eight and 12 months in Pietermaritzburg.¹⁰¹ In the Western Cape, the waiting time for the allocation of a trial date has decreased from between two to three years to three months.¹⁰² “In Gauteng, the waiting period for a trial date was reduced from one year to nine months. At the start of the project, the North Gauteng High Court had 224 921 outstanding cases on the civil roll, which were reduced to 144 027 by February 2015.”¹⁰³

Prior to the implementation of the Project, the Office of the Chief Justice issued a draft practice directive titled “Case Management, Allocation of Cases and Case Management Conferences”, which all pilot courts had to implement.¹⁰⁴ The directive distinguishes between two phases, from the institution of proceedings until the close of pleadings and from the close

⁹⁸ Mogoeng Mogoeng CJ *The Implications of the Office of the Chief Justice for Constitutional Democracy in South Africa* (2013) lecture presented at the Annual Human Rights Lecture hosted by the Faculty of Law, Stellenbosch University (copy on file with author).

⁹⁹ Hawkey (2012) *De Rebus* 85. A few other divisions appear to have attempted to adopt judicial case management approaches, such as the divisions situated in Bhisho and East London. In this regard, see eg, Anonymous “Judicial Services Commission Interviews” (09-10-2015) *Democratic Governance and Rights Unit* <http://www.dgru.uct.ac.za/sites/default/files/image_tool/images/103/Day%205%20Van%20Zyl.pdf> (accessed 16-10-2016). However, it is unclear whether they have adopted the Project’s practice directive or whether they have adopted any other judicial case management practice directives. Further, there does not appear to be any empirical data to assess whether judicial case management in these divisions has been successful compared to implementation at the Project’s pilot court sites.

¹⁰⁰ Media Advisory “Case Flow Management Workshop: An Efficient Justice System” (08-04-2015) *Office of the Chief Justice* <http://www.judiciary.org.za/doc/MEDIA-ADVISORY_CASE-FLOW-MANAGEMENT-WORKSHOP_08-April-2015.pdf> (accessed 16-10-2016); A Pule “New system to improve access to justice” (07-2015) *Vuk’uzenzele* <<http://www.vukuzenzele.gov.za/new-system-improve-access-justice>> (accessed 16-10-2016).

¹⁰¹ N Manyathi-Jele “Progress on judicial case-flow management” (2014) 10 *De Rebus* 65.

¹⁰² Pule “New system to improve access to justice” (07-2015) *Vuk’uzenzele*; Manyathi-Jele (2014) *De Rebus* 65; R Henderson “Justice System to go Hi-tech” (13-04-2015) *Times Live* <<http://www.timeslive.co.za/thetimes/2015/04/13/justice-system-to-go-hi-tech>> (accessed 16-10-2016).

¹⁰³ Pule “New system to improve access to justice” (07-2015) *Vuk’uzenzele*.

¹⁰⁴ Office of the Chief Justice *Draft Practice Directive: Case Management, Allocation of Cases and Case Management Conferences* (2012).

of pleadings until certification that a matter is trial-ready.¹⁰⁵ The directive provides that the Registrar must manage the first phase¹⁰⁶ and a designated judge is responsible for managing the second phase of the litigation.¹⁰⁷ Similar to Federal Rule 16, the judge must schedule an initial case management conference¹⁰⁸ and, before this conference takes place, the parties must confer about the nature and basis of their claims and defences, the possibilities for a prompt settlement or resolution of the case, and each of the issues to be addressed at the conference.¹⁰⁹ These issues include the control and scheduling of discovery,¹¹⁰ the possibility of settlement or mediation of the dispute¹¹¹ and such other matters as may facilitate the just and speedy disposal of the case.¹¹² Immediately after the completion of the initial case management conference, the judge must issue a case management order that addresses these issues.¹¹³ Further resembling Federal Rule 16, before the trial takes place, the judge must hold a final pre-trial conference.¹¹⁴ The directive also provides that it must, as far as possible, be implemented in consonance with rule 37 and that, where necessary, directions must be obtained from the judge to whom a matter is allocated in order to resolve difficulties in this respect.¹¹⁵

The Gauteng Local Division issued a further case management directive effective from the first term of 2015.¹¹⁶ This directive provides that only matters involving expert evidence shall be subject to judicial case-flow management and require certification before proceeding to trial on the set down date.¹¹⁷ In terms of the directive, a motion court dedicated to interlocutory matters is required to deal with all instances of non-compliance, in trial matters, with the rules, including rule 37, and the court's practice manual.¹¹⁸ Further, a judicial pre-trial conference to certify trial readiness is introduced.¹¹⁹ Before such a "certification-conference" takes place, the judge must be informed of various issues, including: confirmation that discovery is complete or, if it is

¹⁰⁵ PL Mokoena & R Willis "The High Court Committee of the Bar Council of the Johannesburg Society of Advocates Report" (30-09-2014) <<http://johannesburgbar.co.za/wp-content/uploads/SGHC-Precinct-Planning-Document-v2.pdf>> (accessed 16-10-2016).

¹⁰⁶ Office of the Chief Justice *Draft Practice Directive: Case Management, Allocation of Cases and Case Management Conferences* para 1.

¹⁰⁷ Para 5.

¹⁰⁸ Para 6(1).

¹⁰⁹ Para 6(2).

¹¹⁰ Para 6(3)(e).

¹¹¹ Para 6(3)(k).

¹¹² Para 6(3)(l).

¹¹³ Para 8.

¹¹⁴ Para 10.

¹¹⁵ Para 17. See also Anonymous "Important Circular: Case Management of Civil Trial Cases in the Gauteng Local Division of the High Court of South Africa (Johannesburg)" (08-2016) *Phoenyx Legal Services* <<http://www.phoenyx.co.za/wp-content/uploads/2016/08/Important-Notice-on-Civil-Trial-Case-Management-at-the-GLD-07102014122009.pdf>> (accessed: 16-10-2016).

¹¹⁶ Deputy Judge President "Case Management Directive Effective from First Term of 2015 (Amended up to June 2015) Gauteng Local Division Allocation of Trial Dates, Certification of Matters Involving Expert Evidence as Trial Ready, and Swift Remedies for Delays in Litigation: 2015" (10-12-2014) *Johannesburg Bar* <<http://johannesburgbar.co.za/wp-content/uploads/AMENDED-CASE-MANAGEMENT-DIRECTIVE-FOR-2015-20150625lt.pdf>> (accessed 16-10-2016).

¹¹⁷ Para 1.

¹¹⁸ Paras 4.1-4.2.

¹¹⁹ Para 7.

incomplete, why that is the case and when it will be complete; a succinct summary of common cause facts about which no further evidence will be allowed at trial; a statement of the questions of law and of fact that the trial court must decide; and so on.¹²⁰

The Project clearly envisages a more participatory judge compared to the position that existed in the pilot courts prior to its implementation. It certainly moves the judicial case management practice in these courts closer to managerial judging in the United States. Rather than simply leaving it to the parties to control the pre-trial process, as rule 37 essentially does, the judges in the pilot courts are expected to manage proceedings by continuously engaging the parties on various issues, including the scope of discovery and possible settlement of the dispute. One gets the sense that, whereas rule 37 entails that the parties report to the judge on what they have done during the pre-trial stage, under the practice directive such reporting merely confirms what the judge already knows because he or she is integrally involved in the pre-trial process.

The Project is commendable. However, implementation of the initiative was limited to pilot courts, leaving several divisions of the High Court of South Africa who have seemingly not implemented the practice directive.¹²¹ The approaches of South African courts to managing pre-trial proceedings may accordingly vary depending on which division has jurisdiction over the dispute. This does not take into account the variations in approaches of individual judges to managing complex cases. Importantly, just because a division has not adopted a practice directive that deals with judicial case management, does not mean that the court would otherwise be precluded from actively managing complex cases that come before it. However, as it currently stands, it would be misleading to say that it is generally the approach of the various divisions of the High Court of South Africa to employ managerial judging in pre-trial proceedings. The nature and extent to which judges are involved in managing the pre-trial stage of the litigation appears to be somewhat unpredictable and dependent on the specific division where the litigation occurs and on the specific judge of the division who is required to adjudicate over the matter.

2 2 Class actions

The Manual for Complex Litigation¹²² provides that “[f]air and efficient resolution of complex litigation requires that the court exercise early and effective supervision (and, where necessary, control) ... and that the judge and counsel collaborate to develop and carry out a comprehensive plan for the conduct of pretrial and trial proceedings”.¹²³ The Manual describes a trial

¹²⁰ Para 8(1).

¹²¹ See the text to n 99 above. Admittedly, it was somewhat challenging to obtain information from many of the divisions of the High Court of South Africa, other than the pilot courts, regarding their particularised approaches to managing pre-trial proceedings.

¹²² *Manual for Complex Litigation* 4 ed (2004).

¹²³ 7.

judge's appropriate management role as active, substantive and continuing¹²⁴ and it accordingly reinforces the active judicial case management role adopted by American judges during pre-trial proceedings in complex disputes. It is also indicative of the nature of the court's role in class actions.

Rule 23 of the Federal Rules regulates class actions in the United States. It contains various provisions governing the trial court's powers, obligations and discretion in managing class actions.¹²⁵ Rules 23(c), (d) and (e) confer upon courts managerial authority over class actions.¹²⁶ Rule 23(c) deals with the courts' management role *inter alia* in respect of the certification process, the giving of notice and in respect of classes and subclasses, whilst rule 23(e) refers to the courts' role in approving class-action settlements. Importantly, rule 23(d) affords to courts a broad discretion to accomplish their role as managers in the conduct of class actions.¹²⁷ According to Ball, the rule "allows the court authority to prescribe appropriate regulations for the conduct of the action, so that, rather than requiring a particular procedure, it permits and even encourages the courts to establish appropriate procedures tailored to the facts of a particular case ...".¹²⁸ Under the broad authority granted by rule 23(d) (1), courts can issue a variety of orders in aid of the effective management of class actions.¹²⁹

In *In re Air Crash Disaster at Florida Everglades*,¹³⁰ the court held that "[i]n class actions we recognize, indeed insist upon, the court's participation as the manager of the case".¹³¹ Piché, referring to class action law in the United States, reiterates that judges' traditional role in litigation has been revised as they are more actively involved in the prosecution of class actions, in part to protect absent class parties.¹³² The American Pocket Guide for Judges issued by the Federal Judicial Center comprehensively describes judges' unique and non-traditional role in class action litigation.¹³³ The Manual for Complex Litigation explains the reasons underlying the need for active judicial case management of class actions, which include that it is a form of high stakes, complex litigation and that it has the ability to bind people who are not individual litigants.¹³⁴

The American approach clearly favours active judicial management of class actions. In *Nkala v Harmony Gold Mining Company Limited* ("Nkala"),¹³⁵ Mojapelo DJP explained the current situation in South Africa regarding

¹²⁴ 12.

¹²⁵ PG Karlsgodt "United States" in PG Karlsgodt (ed) *World Class Actions – A Guide to Group and Representative Actions around the Globe* (2012) 35. See also Rowe (2007-2008) *Sw U.L Rev* 197-198.

¹²⁶ RH Klonoff *Class Actions and Other Multi-party Litigation in a Nutshell* 4 ed (2012) 25.

¹²⁷ DD Levenhagen "Class Actions: Judicial Control of Defense Communication with Absent Class Members" (1984) 59 *Ind L J* 133 133.

¹²⁸ LJ Ball "Damages in Class Actions: Determination and Allocation" (1969) 10 *BC Indus & Com L Rev* 615 632.

¹²⁹ MH Greer *A Practitioner's Guide to Class Actions* (2010) 5.

¹³⁰ 1972 549 F2d 1006 n8 (5th Cir 1977).

¹³¹ 1012.

¹³² Piché (2009) *J Civ L Stud* 128-130.

¹³³ BJ Rothstein & TE Willging *Managing Class Action Litigation: A Pocket Guide for Judges* (2005) 2. See also DR Hensler *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (2000) 445.

¹³⁴ *Manual for Complex Litigation* (2004) 243-244.

¹³⁵ (48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13) 2016 ZAGPJHC 97 (13 May 2016).

judicial case management of class actions with reference to section 173 of the Constitution:

“The trial court will, no doubt, be tasked with managing the process once the class action is certified... [T]hat court, using its powers in terms of s 173 of the Constitution, the various rules of court and practice directives, will be able to decide on the route(s) best suited to resolve the manifold disputes that are bound to surface. That court has significant powers to manage the proceedings in the interests of justice. It is, furthermore, within the wit of that court to determine whether sub-classes should be formed and for the proceedings to be arranged in such a manner so as to do justice between the parties.”

The above approach to managing class actions follows upon an earlier recommendation by the South African Law Commission (“SALC”) that, because class actions are generally more complex compared to ordinary civil litigation and entails the determination of the rights and obligations of absent class members, South African superior courts should actively manage class actions.¹³⁶ According to the SALC, “the courts should be given broad general management powers exercisable either on the application of a party or class member or on the court’s own motion”.¹³⁷ Hurter has also emphasised the need for judges to “step outside the usual passive role assigned to them by the traditional adversarial model of litigation and actively to take part in such management”.¹³⁸ Similarly, De Vos states that “[l]egal representatives and judges will have to act in innovative ways to overcome complex procedural issues relating to class actions, such as notice to class members, proof and distribution of damages and management of these proceedings”.¹³⁹

The United States has largely responded to difficulties in managing class actions by adopting a comprehensive court rule to regulate it,¹⁴⁰ conferring upon judges, extensive managerial powers and accordingly enabling active judicial management of these proceedings. The South African legislature has ignored repeated calls for the introduction of class action legislation.¹⁴¹ Federal Rule 23 caters for specific circumstances where a court would need to fulfil an active judicial management role and provides a framework for the exercise of the courts’ powers in this regard. However, South African superior courts adjudicating class actions, as is largely the case during pre-trial proceedings, are compelled to rely on their inherent jurisdiction without the benefit of legislative guidance on the issue of judicial case management. Although such discretionary freedom may encourage creativity and innovation insofar as judicial case management is concerned, it does not necessarily assist in promoting judicial certainty and uniformity across the different divisions of the High Court of South Africa. *Ad hoc* procedural activism is, after

¹³⁶ South African Law Commission Project 88: *The Recognition of Class Actions and Public Interest Actions in South African Law Report* (1998) para 5.9.2.

¹³⁷ Para 5.9.4.

¹³⁸ E Hurter “Some Thoughts on Current Developments relating to Class Actions in South African Law as viewed against Leading Foreign Jurisdictions” (2006) 39 CILSA 485 489.

¹³⁹ W de Vos “Judicial Activism Gives Recognition to a General Class Action in South Africa: *Children’s Resource Centre Trust v Pioneer Foods* (50/12) [2012] ZASCA 182” (2013) TSAR 370 380. See also LCT Harms “Demystification of the Inquisitorial System” (2011) PER 2 6.

¹⁴⁰ W de Vos “Is a Class Action a ‘Classy Act’ to Implement Outside the Ambit of the Constitution?” (2012) 4 TSAR 737 754.

¹⁴¹ 756.

all, one of the main criticisms of managerial judging.¹⁴² In any event, the legislative framework adopted to regulate class actions in the United States appears to afford to judges sufficient room to manoeuvre to enable them to manage such proceedings effectively and to tailor case management to suit the circumstances of each specific case.¹⁴³ It is submitted that legislative regulation of class actions does not necessarily preclude judicial innovation insofar as case management is concerned.

Further, the inherent limitations posed by the *ad hoc* nature of South African managerial judging has not been removed by developing comprehensive guidelines to assist judges to make managerial decisions. There is no South African equivalent to the American Pocket Guide for Judges or the Manual for Complex Litigation. The court rules and practice directives that a trial court could use to manage a class action, to which Mojapelo DJP refers in the *Nkala* case, was not created specifically for use in a class action context.¹⁴⁴ No other meaningful form of judicial guidance, training or support is available to the South African judiciary to assist them to properly manage complex litigation. Hence, as things currently stand, a relatively uniform South African judicial case management approach in the context of complex, high-stakes global litigation, like the Volkswagen litigation, is improbable.¹⁴⁵

3 Thinking strategically

There are clearly differences between the American and South African approaches to judicial case management in complex litigation. There are also variations in the approaches of individual courts within these jurisdictions, although the differences between the approaches of South African courts may be more significant. The question that arises is what the relevance of these differences is in the context of global litigation. In other words, how could these differences affect strategic decision-making in global litigation? The strategic considerations that are considered in the following part of this article reflect aspects of the well-documented debate regarding managerial judging.¹⁴⁶ Although “[i]n complex cases, at least, active judicial management has become a strongly encouraged norm”,¹⁴⁷ as mentioned, the purpose of this article is not to add to this debate. Rather, it aims to illustrate that the variances in the judicial case management approaches of two legal systems and between different courts within the same legal system, constitute considerations that

¹⁴² Resnik (1982-1983) *Harv L Rev* 444.

¹⁴³ Gensler (2010-2011) *Duke L J* 693. According to RL Marcus, EF Sherman & HM Erichson *Complex Litigation: Cases and Materials on Advanced Civil Procedure* 5 ed (2010) 19, “[m]any of the rules governing important matters such as joinder and class actions are phrased in general language that requires ad hoc application. As a consequence, they grant the judge great latitude in tailoring the treatment of cases under the broad mandate of the rules”.

¹⁴⁴ J Meiring “Manual or Automatic?” (2013) 26 *Advocate* 34 34.

¹⁴⁵ J Stander “South Africa’s first lady Judge President: Monica Leeuw” (2010) 23 *Advocate* 18 18.

¹⁴⁶ See, eg, JT Molot “An Old Judicial Role for a New Litigation Era” (2003) 113 *Yale L J* 27; D Elliot “Managerial and the Evolution of Procedure” (1986) 53 *U Chi L Rev* 306; J Resnik “Managerial Judges” (1982-1983) 96 *Harv L Rev* 374; Gensler (2010-2011) *Duke L J*; Rowe (2007-2008) *Sw UL Rev*.

¹⁴⁷ RL Marcus, EF Sherman & HM Erichson *Complex Litigation: Cases and Materials on Advanced Civil Procedure* 5 ed (2010) 485-486.

may affect a party's global litigation strategy. In view of the foregoing, it may be instructive to consider how these differences translate into strategic considerations in global litigation.

When a judge properly manages complex litigation, it could reduce litigation costs¹⁴⁸ and it could save time by preventing unnecessary delays.¹⁴⁹ Accordingly, one of the foremost factors that a party would need to consider when devising a global litigation strategy is whether they would prefer a judge who manages the litigation actively and efficiently. Though not necessarily obvious at first, there may be circumstances in global litigation where a party does not hold such a preference. Strategically, for example, to obtain a more favourable settlement, a well-resourced party could attempt to delay the litigation and increase the opponent's litigation costs by litigating in a forum where the judge is less participatory and by continuously engaging in process disputes.¹⁵⁰ Moreover, “[e]xcessive delays in litigation may induce a reasonable belief, especially on the part of a successful litigant, that the order or award had become unassailable”¹⁵¹

Imagine global litigation arising from mass injuries sustained owing to the use of an American pharmaceutical product that failed to warn consumers of potentially adverse consequences associated with its consumption. The American parent company has a subsidiary in South Africa. Thousands of South African consumers combine to form a class and to institute a class action lawsuit, largely financed by an American company, in one of the divisions of the High Court of South Africa. At the same time, large-scale litigation ensues against the parent company in the United States. It may be in the defendant's interests to delay the South African litigation to enable it to conduct further pharmaceutical studies in respect of the product and to introduce the results as evidence at a later stage of the proceedings, or to enable it to focus most or all its resources first on the American litigation. In the recent Apple-Samsung global litigation, this is exactly what the parties did – they “decided to scuttle their international disputes and focus solely on the

¹⁴⁸ Erasmus (2015) *TSAR* 263. Baicker-McKee (2015-2016) *Am U L Rev* 370-371, 396 states that plaintiff lawyers, defense lawyers, and clients all report that active judicial involvement in a case lowers the cost, increases the pace, and increases satisfaction with the outcome.

¹⁴⁹ GL Doerfer “Why Judicial Case Management Pays Off at Trial” (1990) 29 *Judges J* 13 13, states that active pretrial management reduces the time within which cases are settled or readied for trial because it focuses the parties and their counsel on the issues and encourages them to weigh the strengths and weaknesses of their cases. Not only do pretrial management techniques promote readiness for trial and produce settlements, but they also improve the chances that the trial itself will be efficient and the issues resolved with minimal distraction and delay.

¹⁵⁰ Thornburg (2010) *U Rich L Rev* 1269. See also S Ngcobo CJ “Opening Remarks, Access to Justice Conference: Towards Delivering Accessible Quality Justice for All” (06-07-2011) *Constitutionally Speaking* <<http://constitutionallyspeaking.co.za/wp-content/uploads/2011/07/Speech-of-the-Chief-Judge-2011.pdf>> (accessed 16-10-2016). LM Watson “The Case for Mediated Case Management” (2007) *Am J Mediation* 1 1, states that:

“‘Process debates’ are procedural arguments that seem to erupt and flourish in complex cases. They can involve a wide range of peripheral issues. They are always focused on the litigation process (the way we are going to argue) rather than the subject of the lawsuit (what we are arguing about) ... In particularly adverse cases, disputes over the time of day, and who picks up the lunch tab will get into the mix as well”.

¹⁵¹ *Toyota SA Motors (Pty) Ltd v CCMA* 2015 ZACC 40 para 45.

U.S.”.¹⁵² Litigating in a forum where the judge is passive and aloof would then generally be preferable.¹⁵³ Conversely, the claimants may favour instituting proceedings in a division of the High Court of South Africa where the judges appear to be generally more active in managing disputes and have a reputation for the expeditious resolution of civil litigation, at least when compared to the other divisions, including active participation in facilitating settlement of complex disputes. For instance, the Gauteng Local Division, a pilot site of the Project, may be preferable to litigating in the Limpopo Division of the High Court of South Africa, situated in Thohoyandou, where the court has encountered case-flow problems.¹⁵⁴

The above illustrates, through hypothesising, that where judges are passive in respect of the conduct of the litigation, the litigants will retain control over those aspects of their cases that characterise the adversarial system of civil litigation. Conversely, active judicial case management will result in reduced party control and may force the parties to cooperate with each other and the judge, especially insofar as pre-trial processes are concerned.¹⁵⁵ Consider, for example, where the defendant company and/or the counsel they retain have a reputation for being excessively hostile and uncooperative during litigation. The plaintiffs may prefer to litigate in a forum where management of the litigation, especially control over the pre-trial phase, is at the behest of the courts.¹⁵⁶ Conversely, the defendant may favour litigating in a forum where the parties retain control over the pre-trial phase, including the discovery process, to enable such a party to exert their authority over the proceedings.¹⁵⁷ According to Baicker-Mckee, disparities in the parties’ situations in high-stakes litigation without active and ongoing judicial management can lead to a messy discovery process¹⁵⁸ and “[a]ttorneys who are even marginally competent will realize that there are tactical advantages to certain outcomes in the discovery process” that can be achieved by manipulating discovery rules

¹⁵² D Reisinger “Samsung Wins Appeal In \$120M Patent Fight with Apple” (26-02-2016) *Fortune* <<http://fortune.com/2016/02/26/apple-samsung-patent-appeal/>> (accessed 16-10-2016).

¹⁵³ See, eg, F Rabkin “When Preliminary Litigation is used to Delay and frustrate” (09-07-2016) *Rand Daily Mail* <<http://www.rdm.co.za/politics/2016/07/19/when-preliminary-litigation-is-used-to-delay-and-frustrate/>> (accessed 16-10-2016); R Meenan “Mining companies are using delay tactics in a bid to slice silicosis payout costs” (28-06-2016) *Mail & Guardian* <<http://mg.co.za/article/2016-06-27/mine-companies-are-using-delay-tactics-in-a-bid-to-slice-silicosis-payout-costs/>> (accessed 16-10-2016).

¹⁵⁴ “SCA judges cross swords over delayed appeals” (03-08-2016) *Legalbrief* <[¹⁵⁵ Rowe \(2007-2008\) *Sw U L Rev* 213.](https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUK EwiqggbczvXV AhWLOsAKHZWRCTYgQFgnMAA&url=http%3A%2Flegalbrief.co.za%2Fdiary%2Flegalbrief-today%2Fstory%2Fscsa-judges-cross-swords-over-delayed-appeals%2Fpdf%2F&usg=AFQjCNEI4PK FUETYIpnlklYjlcqL6FsrKQ> (accessed 16-10-2016).</p>
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¹⁵⁶ According to R Peckham “The Federal Judge as Case Manager: The New Role in Guiding a Case from Filing to Disposition” (1981) 69 *Calif L Rev* 770 781-782, “the judge could be alert to the particularly combative attorney who, if the case is not actively managed during pretrial, might succeed in turning a trial that should be a molehill into a mountain.” See also WW Justice “The Two Faces of Judicial Activism” in DM O’Brien (ed) *Judges on Judging: Views from the Bench* 4 ed (2013) 42 46.

¹⁵⁷ There are obvious differences between the American and the South African approaches to discovery: The Federal Rules rely heavily on judicial discretion, and the case-management rules are no exception. This is particularly true with respect to discovery management, in which district judges have a wide discretion to regulate the scope, sequence, timing, and methods of discovery. See Gensler (2010-2011) *Duke L J* 720.

¹⁵⁸ Baicker-Mckee (2015-2016) *Am U L Rev* 378.

to frustrate and subvert the opposing party.¹⁵⁹ Without judicial control over the discovery process, the litigants may be in a position to inflict enormous expense by taking expansive, often unnecessary discovery.¹⁶⁰ Managerial judging should assist to limit or prevent this type of manipulation of court rules.¹⁶¹

Risk averseness, specifically insofar as the role of the judge is concerned, may also inform a party's global litigation strategy. The nature of *ad hoc* judicial case management is invariably such that the way cases are managed typically varies from one judge to another, from one court to another, and from one jurisdiction to another. This much is apparent from the above exposition of the differences in judicial case management approaches between, and within, South Africa and the United States. Managerial decisions are dependent on the framework within which such decision-making takes place and on the identity and attitudes of individual judges. Individual judges' managerial style can vary inordinately and be very unpredictable. Yet, such decisions could affect the outcome of the litigation.¹⁶² For instance, some judges who are opposed to judicial case management may do only the slightest management required by the court rules, whereas other overly enthusiastic case managers could go too far in using their knowledge of the matter to coerce parties into settling cases.¹⁶³ In an attempt to circumvent or limit such a risk the party may prefer to approach a court where the judge typically adheres to the strict application of the court rules and is likely to refrain from exercising his or her managerial discretion to limit the scope of discovery.

The above consideration becomes even more important when litigating in South Africa, where it is more likely that it may not be possible for the parties to determine prior to the litigation what the approach of the judge would be regarding the management of the litigation. In such circumstances, it is uncertain whether, and to what extent, rule 37 would be subject to *ad hoc* customisation by the judge in favour of judicial case management. The judge could leave the parties to their own devices during the litigation.¹⁶⁴ This unpredictability is the result of various contributory factors. Judges could simply be reluctant to engage in managerial judging; an approach which it is submitted would mostly be in accordance with Uniform Rule 37.¹⁶⁵ Even if a specific division has adopted a practice directive that encourages judicial case management, such a directive is not binding on the judge and he or she may

¹⁵⁹ 380.

¹⁶⁰ Silberman et al *Civil Procedure: Theory and Practice* (2013) 658.

¹⁶¹ R Marcus "Slouching Toward Discretion" (2003) 78 *Notre Dame L Rev* 1561 1589-1590 states that "[w]ithout case management, the growing centrality of the pretrial phase meant that the lawyers would be free of substantial constraint ... a laissez-faire attitude toward lawyer latitude hardly seems preferable".

¹⁶² Thornburg (2010) *Richmond Law Review* 1270.

¹⁶³ 1275. See also Baicker-McKee (2015-2016) *Am U L Rev* 386; D Neubauer "Judicial Role and Case Management" (1978-1979) 4 *Just Sys J* 223 224.

¹⁶⁴ Gensler (2010-2011) *Duke L J* 743.

¹⁶⁵ Manyathi-Jele (2014) *De Rebus* 65.

decide to deviate therefrom.¹⁶⁶ Assuming a judge does adopt an active judicial management approach, he or she would lack the necessary case management training and skills.¹⁶⁷ There are also insufficient resources to assist the judge to manage complex proceedings properly, such as information technology resources and skilled administrative personnel and filing clerks.¹⁶⁸ The following passage by Ngcobo CJ (as he then was) quite succinctly describes the South African civil justice system, although it appears to apply to a lesser extent to the Project's pilot courts:

“Our civil justice system is still characterised by cumbersome, complex and time-consuming pre-trial procedures, overloaded court rolls, which necessitate postponements, delays in matters coming to trial and, at times, compels litigants to conclude settlements not acceptable to them. It is expensive, slow, complex, fragmented, and overly adversarial.”¹⁶⁹

The unpredictability and uncertainty referred to above is prevalent in the South African judicial system and any global litigation strategy would need to consider this. The South African judiciary is clearly inexperienced in managing complex, high-stakes global litigation, compared to the United States. The lack of judicial case management training and inadequate judicial resources compounds the problem. Moreover, the degree of discretion afforded to our judges without providing legislative (or otherwise) guidance on how to manage complex cases, increases the uncertain nature of judicial case management employed in our superior courts. While the pilot courts have reported improvements following the implementation of case management, much work remains to establish a uniform judicial case management approach across all the divisions of the High Court of South Africa.

As alluded to above, a judge who adopts an active judicial management approach will inevitably gain considerable knowledge about the case before trial.¹⁷⁰ To impose time limits that are fair and that assist in moving the case forward in an efficient manner, judges must usually fully immerse themselves in the issues and evidence in the case.¹⁷¹ The same could be said regarding the

¹⁶⁶ The *High Court of South Africa: KwaZulu-Natal Division Practice Manual* (2014) 1 states as follows regarding the status of practice directives of the division, but it also applies generally:

“Obviously it does not seek to override the Rules of Court which of course have the force of law. Practice directions supplement the rules. They are intended to act as a ruling in advance, as it were, by all the judges of the Division as to how they expect things to be done and what is expected of practitioners. Judges are however not bound by practice directives. While we obviously strive to achieve uniformity it must clearly be understood that these directives cannot fetter the exercise of a judge’s discretion and in an appropriate case he/she may be persuaded to relax or change a practice of the court. We envisage that this will only arise in exceptional circumstances. If a judge does depart from a particular practice this will not be regarded as a modification of the practice. Changes can only come about if this is done with the authority of the Judge President in consultation with the other judges of the Division”.

¹⁶⁷ Tzankova (2014) *UnifL Rev* 329 states that “national judges confronted with the handling of mass disputes have varying legal and cultural background and case management skills”.

¹⁶⁸ Manyathi-Jele (2014) *De Rebus* 65.

¹⁶⁹ Ngcobo CJ *Constitutionally Speaking* (accessed 16-10-2016). Mogoeng CJ recently confirmed that the current South African judiciary does not function optimally and that they are not properly trained to conduct judicial case management: L Sidimba “Court lack skills” (26-01-2014) *IOL* <<http://www.iol.co.za/news/south-africa/court-lack-skills---mogoeng-1637001>> (accessed 16-10-2016).

¹⁷⁰ Rowe (2007-2008) *Sw U L Rev* 206. For example, often decisional processes will require the decision-maker to sift through documentation and have knowledge about specific expert issues and content before the actual process of ‘hearing’ the dispute: T Sourdin “Facilitative Judging” (2004) 22 *Law Context A Socio-Legal J* 64 77.

¹⁷¹ Thornburg (2010) *Richmond Law Review* 1289.

facilitation of settlement discussions between the parties. The way in which a judge utilises and acts upon this knowledge, especially during informal discussions in chambers, could be perceived by the parties as providing them with an early indication of the disposition of the judge regarding the merits of the case.¹⁷² Such an early indication could be invaluable from the perspective of informing a party's litigation strategy. Further, where a judge actively manages the litigation, it is likely that the judge's involvement will be less transparent compared to traditional proceedings. In the process of managing the pre-trial process, the judge may engage the parties in, and take decisions during, several in-chambers, off the record discussions.¹⁷³ The American defendant company may prefer concealed managerial decision-making where, for example, the rationale underpinning certain decisions, if ventilated in open court, could adversely affect the litigation outside South African borders. Although the plaintiff, as *dominus litis*, can choose where to institute proceedings, the defendant can nevertheless contest jurisdiction or consent to jurisdiction *ad confirmandam* or *ad fundandam jurisdictionem*, or would be able to utilise the information in the context of other strategic choices that do not necessarily concern jurisdiction.

Another important consideration is the court's role in facilitating settlement of complex disputes. Federal Rule 16(c) provides that judges may have the parties consider at pre-trial conferences, and "may take appropriate action, with respect to ... (9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule". It has been stated that "[m]ost American judges participate to some extent in the settlement of some cases before them. Indeed, this has become a respectable, even esteemed, feature of judicial work. In the United States it has been noted that there is an increasing pressure upon courts and judges to do 'more' to resolve cases and to actively pursue settlement".¹⁷⁴ However, judicial activism in the settlement process appears to be far more acceptable in the United States than in South Africa. As mentioned, rule 37 of the Uniform Rules contains the issues that should be dealt with at a pre-trial conference but does not require active judicial participation in settlement discussions.¹⁷⁵ The Project has moved some of the divisions closer to the American judicial approach to facilitating settlement. However, although "[o]rders entered in the immediate pretrial period that structure the trial are designed in part to create settlement pressure and the tactic often works",¹⁷⁶ settlement of complex disputes in

¹⁷² According to AR Miller "The Pretrial Rush to Judgment: Are the 'Litigation Explosion,' 'Liability Crisis,' and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?" (2003) 78 *NYUL Rev* 982 1006:

"Regardless of whether case management accomplishes its stated goals, its aggressive use clearly facilitates pretrial disposition. Rule 16 conferences, for example, often clarify what factual or legal issues may be in dispute, thus permitting focused discovery and identification of claims and defenses suitable for summary resolution. In addition, a judge who actively participates throughout the pretrial phase and is familiar with the dispute's facts and theories may be more inclined to believe that having the same evidence presented at trial is unnecessary and to resolve the case on summary judgment".

¹⁷³ Thornburg (2010) *U Rich L Rev* 1291.

¹⁷⁴ Sourdin (2004) *Law Context A Socio-Legal J* 69.

¹⁷⁵ This is reflected in subrules 37(6)(c) and (d) referred to above.

¹⁷⁶ Thornburg (2010) *U Rich L Rev* 1265.

South Africa, for the most part, remains dependent upon the initiative and willingness of the parties.

4 Conclusion

“[I]f you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can be most favourably presented: this should be a matter neither for surprise nor for indignation”.¹⁷⁷ This also applies in the context of global, parallel litigation arising out of the same dispute where each party would prefer to litigate in the jurisdiction where their case “can be most favourably presented”. For the reasons already mentioned, it is apparent that one of the considerations that is relevant to determine whether a forum would be favourable is whether and to what extent the judge will manage the litigation. However, its relevance extends further, beyond forum shopping. Even where there is no choice to be made between different forums, the managerial role of the judge is relevant to informing parties’ strategic decision-making. The parties to global litigation would therefore be well-advised to consider possible disparities in the approaches of courts to managing complex litigation, both nationally and transnationally. It is from this view that this article has attempted to broaden understanding towards a global litigation perspective. There are many issues that parties engaging in global litigation would have to consider. The role of the judge is only one of these considerations, but it could have a significant impact on the litigation, including its outcome.

SUMMARY

Economic activity has become globalised. As a result, the incidence and scope of mass litigation has increased dramatically. This has resulted in a continuously changing global litigation landscape. Litigation too has become globalised. Disputes that used to be contained within national borders are now transnational. To participate in this transnational litigation realm successfully and to design, implement and coordinate an effective global litigation strategy, knowledge limited to one’s own legal system will no longer suffice. Of fundamental importance is transnational knowledge of legal systems. Knowledge of the legal systems of the different jurisdictions involved in the litigation may assist in addressing the challenges that could arise during global litigation. It may also assist parties to make sensible strategic choices regarding the conduct of the litigation. One such relevant strategic consideration, which this article considers, is whether and to what extent the judge will manage the litigation. The managerial role of the judge is relevant to informing parties’ strategic decision-making in the context of global litigation. The article accordingly suggests that the parties to global litigation would be well-advised to consider possible disparities in the approaches of courts to managing complex litigation, both nationally and transnationally. The role of the judge is only one of these considerations, but it could have a significant impact on the litigation, including its outcome. The article does not aim to engage in a critical analysis of the value of judicial case management as such, but rather to consider how differences in judicial approaches could inform strategic decision-making during global litigation.

¹⁷⁷ *The Atlantic Star* 1974 App Cas 436 471 (appeal taken from Eng.) (HL) (Lord Simon of Glaisdale).