2009

U.S. Class Actions and the "Global Class"

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Robert Casad's articles on comparative civil procedure were among the first comparative law pieces that caught my eye when, as a freshly-minted associate at a leading New York law firm, I found myself leafing through comparative law journals, rather than amassing billable hours. I had no idea then that comparative law could be as fascinating as I have come to find it, certainly not in a field like civil procedure where the dividends of comparative law work were by no means obvious to me. (Comparative law was not even taught in any guise at Yale Law School in the late 1960's and early 70's, and international law as taught there frankly resonated poorly with matters of civil procedure.)

Doing comparative law work back then struck me as a real luxury, and I suspect Robert Casad may have felt much the same way. But I also suspect that he had an intuition that something else was afoot—namely that civil procedure could, unexpectedly (as compared to a field like commercial law, for example) become terrain on which legal systems and law might not merely be compared (for whatever purely intellectual payoff the comparative law exercise might produce), but also powerfully interact in ways meaningful to the operation of legal systems in an interconnected world.

In those years the United States was, for the first time, participating in the work of the Hague Conference on Private International Law. In particular, the United States was involved in initiatives such as the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters[1] and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.[2] Congress was amending the Federal

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1. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, November 15, 1965, 1969 U.N.T.S 165, *available at* http://untreaty.un.org/unts/1_60000/19/15/00036746.pdf (ratified by the U.S. in 1969).

2. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, March 18, 1970, 1972 U.N.T.S. 241, *available at* http://untreaty.un.org/unts/1_60000/24/26/00047259.pdf (ratified by the U.S. in 1972).

Rules of Civil Procedure to address the pleading and proof of foreign law in U.S. courts,[3] and was revising the U.S. Code to facilitate international judicial assistance in service and evidence-taking.[4]

All of these initiatives showed that for law to function effectively in an interconnected world, different national civil procedure systems would have to find ways of intersecting with one another in a way that would allow each to serve the needs of international commerce. Only comparative law could unlock the differences in premises among systems of civil procedure that would have to be accommodated in any such undertaking. This is the background to the subject I address in this article, namely the challenge of defining the civil procedural interfaces among legal systems in ways that do justice both to those systems on their own terms and to the requirements of international commerce, without exacting too great a price from either.

In retrospect, the Hague Conventions and the amendments to the Federal Rules and the U.S. Code to which I have just referred look like fairly easy undertakings, whether measured by the stakes involved, the magnitude of the preexisting differences among nations, or the readiness with which devices may be found to bridge them. While these enactments produce occasional differences of interpretation and occasional differences of application,[5] they are rightly generally viewed as having responded to the problems they sought to address.

Anyone familiar with the transnational litigation scene today knows what the problems lying at the other end of the spectrum look like. With respect to them, the very same factors just mentioned—the stakes involved, the magnitude of the differences among nations, and the readiness with which devices may be found to bridge them – suggest far greater obstacles to mutual accommodation. Indeed, professions of international comity notwithstanding, they provide the landscape for something resembling a civil procedural "state of nature," if not inter-jurisdictional warfare. The best example, until recently, was the international anti-suit injunction, a device by which a court of one country enjoins a party from bringing or maintaining an action in another country's courts, with the avowed purpose of frustrating the other country's judicial process, when it finds the targeted action sufficiently offensive.[6] Now we are also, on mercifully rare occasions, seeing "clawback actions" which, if successful, allow a party who has been found liable in the courts of another country, and who has paid a judgment, to bring an action in a court of his or her own country against the party who prevailed overseas to recover all the

3. FED. R. CIV. P. 44.1.

4. 28 U.S.C.A. §§ 1696, 1782 (West 2009).

5. *See generally* Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988); Société Nationale Industrielle Aerospatiale v. United States Dist. Court for the S. Dist. of Iowa, 482 U.S. 522 (1987).

6. *See generally* Daniel S. Tan, *Antisuit Injunctions and the Vexing Problem of Comity*, 45 VA. J. INT'L L. 283 (2005).

damages that the foreign court may have awarded, plus interest, costs, and attorneys fees[7]—thus neutralizing the foreign judgment. To be sure, courts always tell us that "quasi-nuclear options" such as these should be deployed only under only the most compelling of circumstances.[8] But even so, the risk of using such explosive devices is real, as are the issues of principle they raise. Thus, the world of transnational litigation is not without inter-jurisdictional disputes that defy resolution.

I. GLOBAL CLASS ACTIONS

But we should not despair. There remains a vast middle ground of challenging inter-jurisdictional problems for which resolution is still a real possibility and for which the comparative civil procedure work exemplified by Robert Casad holds great promise.

The quintessentially American institution of class actions is one whose good functioning requires just this kind of international accommodation.[9] The time is long past when U.S. class actions played themselves out on the purely domestic stage. The new paradigm is one in which certification in U.S. litigation is sought for a class consisting heavily and possibly even preponderantly of nationals or residents of other countries. The emergence of multinational classes in securities, antitrust, and mass tort claims is something we can expect in a world of truly international markets. Of course, the multinational character of today's classes complicates class action practice significantly.

First, the presence of multinational claimants within a class will reopen questions of the extraterritorial application of U.S. law and of the very existence of subject matter jurisdiction as to those claimants and their claims.[10] For instance, it often is argued that an American lead plaintiff and his or her claims are not typical of this entire multinational universe of claimants.[11] Moreover, the substantive law that the class action forum should apply may, even under the forum's own conflict of law rules, differ according to the nationality or residence of the class member.[12] Then too, courts have found

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7. *See* Lawrence Collins, *Blocking and Clawback Statutes: The United Kingdom Approach*, *in* ESSAYS IN INTERNATIONAL LITIGATION AND THE CONFLICT OF LAWS 333 (Clarendon Press 1993).

8. *See, e.g.*, Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren, 361 F.3d 11, 19 (1st Cir. 2004).

9. *See generally* Hannah L. Buxbaum, *Multinational Class Actions under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14 (2007).

10. Restatement (Third) of the Law: Foreign Relations Law of the United States § 401 (The American Law Inst. eds., 1986).

11. *E.g.*, Mohanty v. Bigband Networks, No. C 07-5101, 2008 WL 426250, at *4 (N.D. Cal. Feb. 14, 2008).

12. *See* Debra Lyn Bassett, *U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction*, 72 FORDHAM L. REV. 41, 43-44 (2003).

that the appropriate level of damages to be awarded differs dramatically according to the social and economic features of the class member's geographic location.[13] For these and other reasons, subclasses may sprout or class certification may be denied altogether. All of this is new but, in a sense, to be expected since no conventional domestic civil procedure device as powerful as the class action can ultimately avoid coping with the internationalization of markets. In our world, all domestic civil procedure devices must, in varying degrees, do so.

Class actions have also become an arena of potential inter-jurisdictional conflict, however. The element of conflict in class actions may not be as high-stakes as it is in anti-suit injunctions or clawback statutes, but it is high-stakes just the same. Imagine the introduction of a large-scale action in the U.S. under the federal securities laws that the plaintiff seeks to convert into a class action representing all the allegedly defrauded shareholders of a European company world-wide. Imagine further that the vast majority of shares are held by non-Americans. The court may be prepared to assume that it has adequate subject matter jurisdiction under the securities laws, notwithstanding the foreign nationality of the company and the foreign nationality of the holders of most of the company's shares. It may find in the allegations the requisite contacts with the U.S. (e.g., place of dissemination of the false and misleading information) and conclude that applying the U.S. securities laws to the claims of the foreign shareholders would be neither impermissibly extraterritorial nor offensive to international comity. (We could easily replicate the scenario by converting our hypothetical international securities case into a mass tort or product liability claim, for example.)

However, the court must still determine whether the various preconditions for certification of a class are met, and whether the candidate lead plaintiff satisfies the relevant criteria for appointment. Rule 23(b) of the Federal Rules requires for class certification that the questions of law or fact common to class members predominate over the questions affecting only individual members. A class action must also be found to be "superior" to any other available methods for fairly and efficiently adjudicating the controversy.[14] Notwithstanding the variety of factors that go into deciding whether the criteria for class certification are met, and in particular the "superiority" of the class action vehicle, courts have lately focused on a prototypically pragmatic consideration, namely whether an eventual U.S. class action judgment would receive recognition and enforcement abroad, where the targeted company may

13. *E.g.*, In re Dow Corning Corp., No. CV-92-N-10000-S, 2000 WL 33321423, at *1 (E.D. Mich. Nov. 29, 2000).

14. FED. R. CIV. P. 23(b) ("(b) An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . . (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.").

have most of its assets.[15] The question is not so urgent if we assume that the plaintiff class will prevail in the litigation, and the level of recovery of damages is deemed adequate by all class members. Though not impossible, it is hard to imagine that foreign courts will consider it fundamentally unfair for the defendant company to have had to defend itself in a class action in a U.S. court, if everything else about the proceeding was proper.

But suppose the class action fails to yield a satisfactory level of damages. Would the adverse U.S. class action judgment operate abroad to bar a dissatisfied individual foreign class member from relitigating the question of liability in his or her home court under the shareholder protection legislation applicable there? That is to say, would the U.S. judgment be "recognized" in the sense of being deemed preclusive of further litigation? More specifically, would the judgment be deemed preclusive with respect to those foreign class members who had become members of the class not by "opting into" the class action, but merely by having failed to "opt out" of it? The scenario is problematic because, while U.S. law seems to be fundamentally comfortable with the notion of binding persons to class action outcomes merely on account of their failure to "opt out" (so-called "absent class members"),[16] jurists in other legal cultures may not be. They may not only reject it in their domestic procedure,[17] but also balk at the prospect of legitimating the judgments of foreign courts rendered under those circumstances.

Arguably, a U.S. court should not care whether a future adverse judgment in the class action will be granted preclusive effect in subsequent litigation abroad. For any number of practical reasons, such litigation is not likely to be brought, and so predicting the preclusive effect of the U.S. judgment may be an entirely academic exercise. Even if such subsequent litigation were probable, the U.S. court need not really care; it could simply go ahead and run the risk of including large numbers of persons in the class action, as against whom the resulting judgment may not be *res judicata* at a later date in their home court. What is there to lose?

Interestingly, not one U.S. court (and there have been many) that has faced this issue has taken this easy way out. Rather, courts have made the "recognizability" of the eventual U.S. class action judgment a central consideration in determining whether the class action is indeed a "superior" vehicle for adjudicating the controversy, within the meaning of Rule 23(b). That fact alone is worth noting for, in itself, it reveals a profound sensitivity to the delicacy of multinational class actions. But that is just the beginning.

In order to determine whether a U.S. class action judgment will receive *res judicata* treatment abroad, the court has no choice but to consult the

15. *See generally In re* Alstom SA Sec. Litig., 253 F.R.D. 266 (S.D.N.Y. 2008); *In re* Vivendi Universal, S.A. Sec. Litig., 242 F.R.D. 76 (S.D.N.Y. 2007).

16. *See infra* note 20 and accompanying text.

17. Buxbaum, *supra* note 9, at 61.

principles of foreign judgment recognition in each of the countries to which a disappointed absent class member might have recourse.[18] U.S. courts are obviously accustomed to deciding when they should (or should not) recognize or enforce a foreign country judgment,[19] but they are much less accustomed to predicting the fate of a U.S. class action judgment in a foreign court. And yet, prediction is the most one can reasonably offer, given that no foreign court has ever addressed the question or even a closely analogous one.

It all depends, then, on what a foreign court might think of giving preclusive effect in its own proceedings to a judgment in a U.S. class action in which one of its nationals was an absent class member only. He or she may never have received actual notice of the U.S. proceeding; he or she may have received the notice, but tossed it out thinking it could not possibly be of concern to him or her. The notice may not be comprehensible to him or her even if read. And, in the unlikely event that the notice was read and perfectly understood, the recipient may simply not comprehend, or even believe, that he or she can possibly be drawn as a plaintiff into a lawsuit without any affirmative action or indication of assent on his or her part.

To be sure, the United States Supreme Court has given its own blessing to the "opt-out" class action vehicle. It held in *Phillips Petroleum* that, provided certain safeguards are present—notably a requirement of notification reasonably calculated to give actual notice of the pendency of proceedings, a judicial finding of commonality of claims, a requirement of adequate representation, a requirement that the court approve any compromise or dismissal, a requirement that the named plaintiff adequately represent the interests of the absent class members, and a right to opt out or request exclusion from the class—it would not offend due process to bind a person to a U.S. class action judgment, whether successful or unsuccessful, merely on the basis of his or her failing to "opt out" by a certain date.[20] More particularly, that person need not have the kind of minimum contacts with the class action forum that would ordinarily be required for the exercise of personal jurisdiction over a defendant.[21] The Court was insistently realistic, stating that:

> requiring a plaintiff to affirmatively request inclusion would probably impede the prosecution of those class actions involving an aggregation of small individual claims, where a large number of claims are required to make it economical to bring suit. The plaintiff's claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually, nor would he

18. *See, e.g., Alstom*, 253 F.R.D. at 282.
19. Uniform Foreign Money-Judgments Recognition Act, 13 U.L.A. 39 (1962).
20. *See generally* Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).
21. *Id.* at 811.

affirmatively request inclusion in the class if such a request were required by the Constitution.[22]

But will foreign courts be so easily satisfied? How are we to know, considering that the question has never been decided by any foreign court anywhere in the world? Note that a scrupulous U.S. court following this method of analysis would need to come up with a satisfactory (and hopefully convincing) answer for each individual country whose nationals figure among the potential plaintiff class. And in the course of doing so, it would need to decide who bears the burden of establishing the "recognizability" or "non-recognizability" of the U.S. judgment abroad, and by what standard of proof that burden must be carried. At least one court has suggested that the party resisting class certification on judgment non-recognition grounds must show that non-recognition is a "near certainty."[23] Still, support is growing for shifting the burden to the party urging class certification, but requiring it to do no more than demonstrate that recognition abroad of an eventual adverse class action judgment is "more likely than not."[24]

II. UNRESOLVED QUESTIONS

It would be tedious to go through a U.S. court's full probability analysis in such a case. It should suffice to enumerate some of the questions that U.S. courts have been posing and attempting to answer before satisfying themselves that an adverse U.S. class action judgment would receive *res judicata* effect as against foreign nationals in their own courts, and that the class action vehicle might therefore be deemed "superior" within the meaning of Rule 23(b). The questions are many and far-ranging.

Does recognition of a foreign judgment in the particular country depend on the person against whom the judgment is invoked having minimum contacts with the jurisdiction that rendered the judgment (or meeting some comparable standard)? If so, would the foreign court apply the same jurisdictional requirements to judgment recognition against persons who have been brought into the foreign litigation as *plaintiffs* as it would in the case of *defendants*?[25] If so, what are the contacts that the foreign nationals allegedly had with the United States in the case at hand, and would the foreign court find them to be adequate for recognition or enforcement purposes? Are there any other peculiar jurisdictional requirements that the foreign country would likely impose before recognizing the U.S. class action judgment? For example, might the foreign country, as some countries do, reject any foreign judgment

22. *Id.* at 812-13.

23. *E.g.*, Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 996 (2d Cir. 1975).

24. *E.g.*, *Vivendi Universal*, 242 F.R.D. at 95.

25. *Alstom*, 253 F.R.D. at 289 (concluding that jurisdictional due process protections attach to plaintiffs only).

that was predicated on a basis of jurisdiction that it does not itself employ in its own domestic civil litigation (the so-called "mirror-image" criterion)?[26]

Assuming no personal jurisdiction obstacle to recognition or enforcement against persons who were absent class members in the U.S., would the foreign court consider absence of adequate notice of proceedings a basis for denying recognition to a foreign judgment? If so, would it consider the notice accompanying U.S. class action litigation to be adequate either in general or in the case of the particular individual who now seeks an opportunity to relitigate in his or her own court? Would the foreign court even require adherence to the technical requirements of the Hague Service Convention?

Assuming neither a personal jurisdiction nor a notice difficulty, in principle might a foreign judgment nevertheless be denied recognition in the country on the basis that granting recognition would violate its "public policy?" The legal answer in principle is invariably "yes." But what is the relevant public policy? Would it, for these purposes, entail the right not to be drawn into litigation as a plaintiff without one's consent and, if so, would the fact that U.S. class action law provides an opportunity to "opt out" satisfy that public policy requirement of consent? Or will only "opt-in" style class action litigation satisfy that test?

Might public policy also entail the right to manage one's own litigation (i.e. to decide when to sue, by whom to be represented, what arguments to make, whether to withdraw a claim, or whether to appeal). These concerns may seem quaint and even old-fashioned to a U.S. audience accustomed to class action litigation, but they will raise fundamental questions of potentially constitutional proportions in some jurisdictions. For example, would the U.S. class action model (particularly its "opt-out" feature) run afoul of some fundamental legal norm as a principle of "party autonomy" or, as it is elsewhere known, a "*Dispositionsmaxime*?"[27]

If public policy is a concern in regard either to consent or party autonomy, how are we to ascertain the compatibility of U.S.-style class action litigation with the public policy of each foreign state in question? After all, with rare exceptions (Canada and Australia, for example), foreign jurisdictions have not introduced into their own law the class action vehicle as it is known in the United States. Can we therefore reliably infer that these states will view giving preclusive effect to adverse U.S. class action judgments against absent class members as constituting a violation of forum public policy?

More specifically, has the country in question adopted for itself one or more models of collective or aggregate litigation, and if so, what do those

26. *E.g.*, *Vivendi Universal*, 242 F.R.D. at 104 (citing Section 328 of the German Code of Civil Procedure (ZPO)).

27. *See* Mauro Cappelletti, *Ordinary Proceedings in First Instance*, *in* 16 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW at 191 (Mohr Siebeck & Martinus Nijhoff Publishers, 1984).

models looks like? Are they more protective of absent class members than our model is, and if so, how much more? Can we tell from the contrast whether that country and the U.S. have simply made different "legislative judgments" about how collective or aggregate litigation is best conducted, or do we have reason to believe that the courts of that country will find the U.S.-style class action model to be so fundamentally unfair and unreasonable as to violate their public policy?

In addition to what little we can glean from a mere comparison of their legislative texts and ours, does the legislative history of their enactments (in the form of parliamentary debates or reports) tell us anything about whether U.S.-style class action procedures would be considered "over the line" for recognition or enforcement purposes? Have these enactments subsequently been the subject of judicial pronouncements as to their constitutionality—or as to how they would have to be construed in order to be considered constitutional?

Even if a foreign country has enacted no specific legislation on collective or aggregate litigation, it very likely is exploring the possibility. Around the globe, law reformers are trying to figure out a way to reap the advantages of collective or aggregate litigation without turning their backs on longstanding and fundamental tenets of their legal order.[28] The legal community will likely have been awakened to the challenge, with strong opinions voiced on all sides of the issues. Legislative studies, reports and recommendations may abound, and bar associations may have spoken. It may even be, as in France, that the Chief Justice of the Supreme Court has pronounced emphatically, if only informally, on the subject.[29]

What can we infer from all of these stirrings about the degree of acceptability of a foreign court considering an absent class member of the court's own nationality to be bound by an unfavorable U.S. class action judgment? These cases disproportionately have involved absent class plaintiffs from European countries that are either Member States of the European Union or parties to the European Human Rights Convention, or both.[30] The Convention may impose fair hearing requirements that go above and beyond those imposed in these countries by domestic law[31] and that may in themselves operate to bar recognition of a foreign judgment based on inadequate

28. *See generally Commission Green Paper on Consumer Collective Redress,* COM (2008) 794 final (Nov. 27, 2008).

29. *See Alstom*, 253 F.R.D. at 286 (quoting interview with Guy Canivet, then First President of the French Cour de Cassation, May 16, 2006).

30. Eur. Ct. H.R., *Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11*, Europ. T.S. No. 155 (1998) *available at* http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=005&CM=8&DF=04/09/2009&CL=ENG.

31. *Id.* art. 6 ("In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.").

jurisdiction, violations of procedural due process, or violations of public policy.[32]

Finally, even if the resulting U.S. class action judgment were to be entitled to recognition in a foreign country's court, the recognition may well extend only to future litigation *between the same parties* and *over the same claim.* But would the foreign court regard the claim before it as being the "same" as the securities law claim previously decided by the U.S. court?[33] And will that court regard the plaintiff who is now before it as being the "same" party as the one who had been before the U.S. court, if only as a fully absent class member?[34] (Almost needless to say, to regard the absent class member as having been properly before the U.S. court as a party plaintiff, for *res judicata* purposes, would be to assume the answer to the very question that U.S. class actions raise.)

It need hardly be emphasized that in larger actions of this kind—be they securities, antitrust, mass tort or product liability, or any other—the number of jurisdictions for which this exercise is required may be high. In a recent securities action against Royal Dutch Shell, the federal district court examined the likely fate of a future U.S. class action judgment in no fewer than eight foreign jurisdictions, with each side in the dispute proffering opinions and reply opinions by foreign country experts on the question.[35] As the analysis was conducted on a country-by-country basis, it resulted in thirty-two separate opinions in all, with no two countries taking exactly the same position for the same reasons and, thus, leading the court to appoint two opposing "super synthetic experts" who could somehow make sense of the whole.[36]

The inter-jurisdictional problem addressed here is typical of those that are difficult, even if not impossible, to solve. Perhaps the courts could deflect the entire problem through one device or another, such as denying subject matter jurisdiction[37] or invoking *forum non conveniens.*[38] But in fact they are confronting the challenge head-on. As the example of the global class action shows, neither courts nor advocates will be equipped to do so unless they have a powerful appreciation of civil procedure differences among nations.

This, of course, is where Robert Casad comes back into the picture. It is

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32. *See, e.g.*, Pellegrini v. Italy, Eur. Ct. H.R. App. No. 30882/96 (2001), *available at* http://www.olir.it/ricerca/getdocumentopdf.php?Form_object_id=1154.

33. Robert C. Casad, *Issue Preclusion and Foreign Country Judgments; Whose Law?*, 70 IOWA L. REV. 53, 76-77 (1984).

34. *See generally* Edward F. Sherman, *Class Actions and Duplicative Litigation*, 62 IND. L.J. 507 (1987).

35. *See generally In re* Royal Dutch/Shell Transp. Sec. Litig., 522 F. Supp. 2d 712 (D. N.J. 2007) (dismissed for lack of subject matter jurisdiction).

36. The court disposed of the issue without a judgment based on these synthetic expert reports. The author was one of those two experts.

37. *Royal Dutch/Shell Transp. Sec. Litig.*, 522 F. Supp. 2d at 723.

38. Buxbaum, *supra* note 9, at 35.

precisely the mission of scholars and teachers to do the difficult spade work in foreign and comparative law that is required in order to deliver solutions that are well-informed, sound, and adapted to the age of interconnectedness in which students and attorneys will practice their profession.