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TRANSNATIONAL CLASS ACTIONS AND THE RISK OF RELITIGATION

*Linda Sandstrom Simard**

In a world that has commodified everything from surrogacy to mortgage tranches, it should be no surprise that civil procedure holds value as a commodity. The procedural advantages that are traditionally assigned to the plaintiff as the master of the complaint, are negotiated, traded, and reassigned every day.¹ The American class action is a prime example of value created by procedure. By pooling together a large number of claims, the class action creates value that would not otherwise exist. This value consists of: (1) the aggregate value of the claims that would not be pursued but for the opportunity to share the cost of litigation as a member of the class; and (2) the increased bargaining power that is derived from the clout of a large group of claimants joining together against a common adversary. Combined, this value is shared by the class action lawyer, who earns a fee calculated from the pool created by the class of claims, and the class members themselves. By granting or denying class certification, the court regulates the value of the class action commodity. This model is exceptional when compared to aggregate dispute resolution models around the world.

Over the last several decades, the world has witnessed unprecedented economic change that has created an ever-increasing demand for transnational dispute resolution mechanisms. In response to these economic pressures, a growing number of countries have adopted private collective dispute resolution models that share some of the features of the American class action. None of these models, however, incorporates the financial incentives that fuel class action litigation in

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1. *See, e.g., AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (upholding mandatory arbitration clause in consumer agreement).

the United States.² This exceptionalism has made the American class action an attractive vehicle to enterprising lawyers who seek to resolve large, transnational disputes.³ The inclusion of foreign citizens in American class actions, however, raises a host of complicated issues relating to foreign recognition of American judgments and the risk of relitigation. While it makes little sense to include foreign citizens in an American class action if they remain free to relitigate an unfavorable judgment in a foreign court, American courts have struggled to determine when the risk of relitigation is so great that it justifies exclusion of foreign citizens.⁴

2. See Richard Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 20-25 (2009) [hereinafter Nagareda] (comparative chart of salient features of aggregate litigation models around the world).

3. The American class action is premised upon an incentive structure that encourages private lawyers to employ the civil justice system to enforce public norms in return for a contingency fee that results from the opportunity to aggregate many small claims together. Judith Resnick, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2145 (2000) (suggesting that the incentive structure at play in the American class action rule was seen as an alternative to centralizing enforcement power within the government); see also Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21, 22 (1996) (explaining that the class action provides a mechanism to allow private interests with small economic value to protect public values). This financial incentive is complimented by several other features that help make American courts attractive venues for resolving transnational disputes. Specifically, “opt out” class actions provide an efficient method for maximizing class size, while the absence of a “loser pays” rule limits the risk exposure for class counsel and claimants. Additionally, the legal regime for civil litigation in the United States provides procedural advantages, such as access to juries and discovery, not available in many other countries. See Nagareda, *supra* note 2, at 2.

4. The decision to include or exclude foreign citizens from an American class action has dogged American courts for at least three decades. See *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir. 1975). In 1975, Judge Friendly addressed the issue and suggested the rule that is applied by most courts today: If foreign citizens hail from a country that is unlikely to recognize an American class action judgment or settlement, courts should exclude them from an American class. *Id.* The rationale for the rule is twofold. First, transnational class actions impose unnecessary burdens on overtaxed district courts, particularly when foreign courts are free to disregard the resulting American judgments. *Id.* at 996. Second, a class action is inherently unfair if it binds a defendant to a result that favors the class, but does not bind the class to a result that favors the defendant. *Id.* Today, the rule is often incorporated into the superiority analysis of Federal Rule of Civil Procedure 23(b)(3), prompting courts to find superiority lacking when a class includes foreign citizens who hail from countries that are unlikely to recognize an American class action judgment. *In re Vivendi Universal, S.A.*, 242 F.R.D. 76, 95 (S.D.N.Y. 2007) (“[R]es judicata concerns have been appropriately grafted onto the superiority inquiry”). This consensus rule, however, is fundamentally flawed for a simple reason: It assumes that foreign citizens will sue in their home country. While this assumption may have been more reasonable in 1975 than it is today, aggregate dispute resolution regimes have proliferated around the world during the last three decades, providing a variety of alternative forums for resolving transnational disputes. Thus, in determining whether to include foreign citizens in an American class action, the concern that we seek to avoid is the risk of relitigation in any foreign forum – not the risk of relitigation in a foreign citizen’s home forum. See Linda Sandstrom Simard & Jay Tidmarsh, *Foreign Citizens*

Differences in the doctrinal architecture of civil litigation systems around the globe pose significant challenges to American courts seeking to determine the risk of relitigation in a foreign forum. During this symposium, Professor Wasserman suggests that the risk of relitigation depends upon two interrelated questions: (1) will a foreign court recognize an American class action judgment? and (2) if a foreign court will recognize the judgment, will doctrines of claim and issue preclusion bar relitigation?⁵ She suggests that American courts have erroneously blurred these two questions together and assumed that if a forum is likely to recognize an American judgment, it will bar relitigation of the claim.⁶ Professor Walker also recognizes the challenges posed by doctrinal differences among civil litigation systems. She seeks to identify the common doctrinal features among nations that have a regime for group litigation but who have expressed varying levels of alarm at the prospect of importing the American class action. She suggests that finding common ground among these disparate systems will pave the way for the development of a more uniform doctrine for recognition of judgments among nations.⁷ While these analyses illustrate the depth and breadth of the problem, the underlying question remains unanswered: when, if ever, should foreign citizens be included in American class actions?

In a previous paper, Professor Jay Tidmarsh and I used standard economic formulas to develop a framework for distinguishing those foreign citizens who are most likely to have an incentive to file subsequent litigation from those who are least likely to do so.⁸ From an economic perspective, if foreign citizens are likely to have an incentive to relitigate in a foreign forum, then their inclusion in the American class imposes costs that can be avoided by exclusion from the class.⁹ On the other hand, if foreign citizens are not likely to have an incentive to relitigate in a foreign forum, the feared costs of relitigation are unlikely to materialize and exclusion will result in under-deterrence and under-compensation.¹⁰

in *Transnational Class Action*, 97 CORNELL L. REV. 87, 89-91 (2011) [hereinafter Simard & Tidmarsh].

5. Rhonda Wasserman, *Transnational Class Actions and Interjurisdictional Preclusion*, 86 NOTRE DAME L. REV. 313, 316 (2011) [hereinafter Wasserman, *Transnational*].

6. Wasserman, *Transnational*, *supra* note 5.

7. See Janet Walker, *Who's Afraid of the Class Action*, 18 SW. J. INT'L LAW. ___ (2012) (discussing the fear held by many countries that adoption of the American class action model will create an undesirable litigation culture).

8. Simard & Tidmarsh, *supra* note 4, at 89-91.

9. *Id.*

10. *Id.*

The incentive to relitigate a claim arises when a litigant believes he or she will obtain a better result from a second bite at the apple. Thus, a foreign citizen will be likely to relitigate in a foreign forum only when the expected recovery from the foreign suit, less the costs incurred in bringing that suit, exceeds the amount recovered in the American action.¹¹ Stated differently, a foreign citizen will have an incentive to file subsequent litigation when the benefit obtained in the American action is less than the expected net benefit from a subsequent foreign suit.¹² Thus, an incentive based rule would include foreign citizens in an American class when the benefit that these citizens receive from the American proceeding exceeds their expected net benefit from subsequent foreign litigation, and exclude foreign citizens when the expected net benefit in a subsequent foreign proceeding exceeds the benefit they receive in the American class action. Informational deficiencies, however, make this incentive based rule extremely difficult to apply, particularly at the time of class certification.¹³ In light of the practical difficulties inherent in applying the incentive rule, we proposed a series of rebuttable presumptions that approximate the results of the incentive rule and provide an administratively simple substitute:

1. A court should presumptively include foreign citizens when they assert small-stakes claims (i.e., claims that would not be viable in an American court if pursued individually).
2. A defendant can overcome the presumption of inclusion by identifying foreign citizens for whom there exist one or more foreign forums (including arbitral forums) that (a) are open to these citizens, (b) would not bar relitigation, (c) provide cost-effective procedures for resolving small-stakes cases, and (d) employ rules of substantive, procedural, or remedial law that are likely to result in a more favorable outcome for the

11. *Id.* at 102-105. In making this calculation, we assume that a foreign court will offset the actual amount recovered in the American action from a recovery in the foreign court for the same injury. *Id.* at 103.

12. *Id.* at 102-105.

13. For example, a judge deciding whether to certify a class including foreign citizens would have to predict the benefit that will be obtained in the American proceeding and the net benefit from a subsequent foreign proceeding. These predictions would require estimates of: the value of the recovery to the plaintiff, the probability of plaintiff's success on the merits, the costs incurred to litigate and, for the foreign proceeding, the likelihood of finding a hospitable foreign forum that will refuse to recognize the American judgment. Informational deficiencies strongly suggest that an incentive based rule is only practical when the benefits of the American class action are known (i.e. in a settlement class action) and the expected benefits of a foreign proceeding are easily ascertained. *Id.* at 117-118.

foreign citizens than the rules employed in the American court will produce.¹⁴

3. The court can nonetheless include those foreign citizens who meet the criteria in (2) when:
 - a. The foreign citizens expressly consent to be bound by the American class judgment or settlement; or
 - b. The foreign citizens are unlikely to pursue their claims in the identified foreign forum(s), and the expected loss in value in the American class action from the exclusion of these citizens outweighs the expected costs of relitigation if these citizens are included.¹⁵
4. The court should presumptively exclude foreign citizens whose claims would be viable as individual suits in an American court. The class representative(s) can overcome this presumption for some or all foreign citizens by showing that:

14. *Id.* at 124. Defendants can overcome the presumption to include small-stakes foreign claims by pointing to one or more specific foreign forums that are “hospitable” to these claims. Hospitability first requires a showing that the foreign forum will be able to hear the claims (i.e., jurisdictional, venue, and comity concerns pose no barrier to resolving the claims). It also requires a showing that the foreign forum has a collective-action mechanism akin to the American class action; if it does not, there is little realistic chance that the small-stakes cases will in fact be relitigated. Hospitability also requires that the foreign forum’s substantive, procedural, or remedial rules provide an incentive to relitigate. Because the claims are small-stakes in nature, there is no incentive to relitigate them in a foreign forum unless the rules of the foreign forum provide some advantage unavailable in the American case (e.g., they are more cost-effective to bring on a collective basis or foreign law makes them large enough in size that, although regarded as small-stakes cases in the United States, they are large-stakes cases in the foreign forum). If the substantive law, procedures, and remedies are basically the same as they are in the American class action, the American court can logically conclude that the expected outcome in the two proceedings (the American and the foreign) would be comparable; in this case, there is little likelihood that relitigation will occur. Finally, hospitability also requires a demonstration that any identified foreign forums meeting the other criteria will not recognize the American judgment. To this limited extent, the concern for nonrecognition that underlay the *Bersch-Vivendi* rule affects the incentive to file subsequent litigation and is relevant to the determination of inclusion and exclusion of foreign citizens. It is likely that defendants will rarely overcome the presumption favoring inclusion of small-stake foreign claims. Most foreign forums with cost-effective collective-action processes are also likely to recognize an American class judgment or settlement and bar relitigation. *Id.* at 126.

15. *Id.* The first circumstance (step 3(a)) raises the possibility that foreign citizens might consent to be bound by the American judgment. Consent is a factor strongly favoring inclusion in the American action. The second circumstance (step 3(b)) calls attention to the reality that, even if a foreign forum is hospitable to hearing the claims of excluded foreign citizens, these citizens might not sue in that forum. The lack of incentive to file even an initial suit in a foreign forum, causes a loss to the foreign citizens who will not recover for their injury. The exclusion of foreign citizens can also result in a loss in the value of the claims that remain in the American class action. Together, these two losses might be greater than the savings from avoided relitigation. *Id.* at 126.

- a. The foreign citizens expressly consent to be bound by the American class judgment or settlement; or
- b. No foreign forum open to those citizens will allow relitigation.¹⁶

These presumptions divide small-stakes cases from large-stakes cases because relitigation is more likely when the claims are valuable enough to pursue in a foreign forum. Therefore, claims valuable enough to bring independently in an American court should be presumptively excluded, because these are the cases for which there exists an evident incentive to relitigate an unsatisfactory American judgment or settlement. Conversely, cases too small to bring independently in an American court are presumptively too small to bring in a foreign forum absent collective action. The lack of an incentive to relitigate eliminates concern for incurring relitigation costs and suggests inclusion is appropriate.¹⁷

While our previous paper suggests that this proposed framework offers an efficient and administratively simple method for determining whether foreign citizens should be included in American class actions, efficiency alone does not justify the adoption of a new rule. Indeed, before our courts reach out beyond national borders to bind foreign citizens to class action judgments, it is necessary to consider the implications of such an exercise of jurisdiction from the perspective of basic fairness, individual autonomy, and international comity.

Basic fairness suggests that the decision to certify a class should benefit the class members. Yet, the incentive structure of the American class action model does not necessarily advance this premise. As noted previously, the decision to certify a class creates value that is shared by the class action lawyer and the class members. By rewarding private lawyers with hefty contingency fees that correlate to the pool of claims, the model incentivizes lawyers to maximize the size

16. *Id.* at 125. The fourth step establishes an opposite presumption of exclusion for foreign citizens with large-stakes claims because these cases pose the greatest risk of relitigation. This presumption can be overcome. As with small-stakes cases, step 4(a) provides that a foreign citizen's consent to be bound is a relevant reason to include the citizen in the class. In such a situation, the attitude of any identified nonrecognizing foreign forums toward such consent—in particular, whether they will enforce the foreign citizen's consent—determines the effect that the American court should give to the consent. Under the second circumstance (step 4(b)), a class representative must show that all foreign forums open to the foreign citizen would bar relitigation. If any such forum would refuse to bar relitigation, the foreign citizen should be excluded because the large stakes in the litigation provide an incentive to pursue the case and create a significant risk of relitigation. *Id.* at 127-28.

17. *Id.*

of the class.¹⁸ Indeed, the financial incentives created by this structure can create conflicts of interest between the class action attorney, who seeks to sweep as many claimants into the class as possible, and claimants, who may prefer to maintain control over their individual litigation. Theoretically, the right to opt out of a class should alleviate the potential for conflict of interest because a claimant who prefers to avoid inclusion in a class can exercise the right to exclude herself. Realistically, however, absent class members may not read class action notices that include instructions for opting out of the class, or may fail to understand that affirmative action is necessary to be excluded from the class. This is especially true for foreign claimants who are less likely to be familiar with the American class action procedure than American claimants. As the gatekeeper for class certification, the court's role is to provide procedural protections that ensure adequate representation. Comparing the expected benefit from the American suit with the expected benefit from a foreign action will provide a measure of assurance that the interests of the foreign class members will be furthered by inclusion in the American class, thus creating a procedural counterbalance to the entrepreneurial incentives of the class action lawyer.

The framework also protects the autonomy of foreign claimants. First, by presumptively excluding individually viable claims, the framework protects the prerogative of foreign claimants who are most likely to have the incentive to actively control their litigation. Second, to the extent that small-stakes claims offer no right of autonomy because they are, by definition, only viable through representative litigation, their presumptive inclusion imposes no infringement on individual autonomy. Finally, when small-stakes claims are likely to offer greater benefit in a foreign forum, the framework simulates the decision that a rational actor would make under similar circumstances and thus correlates with individual autonomy interests.¹⁹

The proposed framework also advances our goal of maintaining positive international relations. Many foreign countries have expressed distaste for the incentive system that lies at the heart of the American class action model. The notion of encouraging lawyers to stir up litigation by sweeping unconsenting foreign claimants into

18. Resnick, *supra* note 3, at 2145.

19. Indeed, the proposed framework offers greater protections to individual claimants than the existing consensus which allows courts to include any foreign citizen who hails from a country that will recognize an American class action judgment, regardless of whether the suit involves a claim that is individually viable or not.

American class actions raises overwhelming concern among global leaders. When American courts certify far reaching classes that include foreign citizens and enter judgments seeking to bind these foreign citizens, foreign countries bristle at the extraterritorial scope of the American judgments, sometimes allowing relitigation of claims by disgruntled class members. To the extent that the framework seeks to define the contours of a class to include those foreign citizens who are most likely to seek inclusion in the class and to exclude those foreign citizens who are most likely to seek exclusion from the class, the framework responds to these criticisms by not only reducing the likelihood that foreign class members will seek to relitigate claims, but also enhancing the fairness of the process that binds the foreign citizens. As such, the framework furthers our national interest in maintaining international comity and increases the likelihood that foreign nations will be tolerant of the extraterritorial scope of American class action judgments.

While American courts admittedly lack the power to directly regulate the risk of relitigation in a foreign forum, the proposed framework provides a means of indirectly regulating the risk of relitigation through class certification. While the proposed framework is not perfect, it offers significant advantages over existing methods for determining when to include foreign citizens in American class actions. By distinguishing between those foreign citizens who are most likely to file subsequent litigation and those who are least likely to do so, not only does the proposed framework provide a cost effective mechanism for reducing the risk of relitigation, it advances fundamental principles of fairness, protects the autonomy of individual litigants, and furthers our national interest in maintaining international relations and comity.