RECOGNITION AND *RES JUDICATA* OF US CLASS ACTION JUDGMENTS IN EUROPEAN LEGAL SYSTEMS

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Abstract

Class actions, which allow individual plaintiffs to represent a group of others in a similar situation in a claim against a same defendant, are still a specificity of US law. Recently, transnational class actions, either against a foreign defendant or including foreign class members, have become popular. The author addresses the possibility of bringing such claims involving parties that are residents of a European country. The United States, traditionally known for the extraterritorial application of their laws and for easily retaining jurisdiction of their courts, are trying to coordinate the legal systems involved by being concerned with the possibility of recognition in a foreign country of class action judgments. Therefore, the original issue needs to be addressed of the recognition and the res judicata effect of these judgments in European countries that do not know similar collective judicial procedures.

1 Introduction

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In a globalised economy, the frequency of class actions brought before US courts involving a foreign element is extremely high. It is the existence of this foreign element that gives rise to private international law issues, which are particularly complex with regard to class actions procedures. The globalization of class actions is a recent phenomenon, which occurs when either the defendant or a putative class member resides outside the United States. For example, between 1998 and 2005, 145 securities class actions were brought before US courts against foreign private issuers (FPIs).[53] The plaintiffs are usually shareholders that have acquired shares of the company and are asking for compensation for the damage suffered because of wrong information about the financial situation of the defendant on the market. Very often, shares are held not only by United States shareholders, but also, and sometimes predominantly, by Europeans. As a consequence, courts are confronted with several private international law issues.

This article does not aim to discuss all private international law issues that arise in transnational class actions. According to US private international law, for example, the court has to determine whether it has personal and subject matter jurisdiction over the defendant. It is not the purpose of this article to discuss this issue, but what is important is to note that very often US courts retain jurisdiction under the 'conduct test'. In other words, the fact that the foreign defendant acted on US territory, even if this behaviour caused loss to foreign investors only, enlarges the possibility that claims will be brought against defendants residing abroad. Such was the case, for example, in the recent class action brought against Vivendi Universal, a corporation organized under the laws of France and shares of which are traded both on the New York Stock Exchange (American Depository Shares, ADSs) and the French *Bourse*, Euronext Paris (ordinary shares).[54]

However, regarding transnational class actions, US Courts have consistently ruled that certification of the class can be granted only if there is a good chance that a future class action judgment will be recognised abroad and, above all, both in the country of residence of the defendant and in the country of residence of the foreign absent class members. In Part II, I will

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[53] Source, PwC, 2005 Securities Litigations Study, 57. Comparing this data with the total of 2021 securities class actions brought to court in the same period (same source, at 7), we note that FPIs are involved in 7.2% of the claims. However, only some of the FPIs are European companies. It shall also be noted that European legal systems are not concerned when the defendant is one of their residents, but also when an absent class member is, which drastically increases the situations in which a recognition of a class action judgement can be required in one or more European countries.

[54] Dismissing defendant motion for lack of subject matter jurisdiction, *In re Vivendi Universal S.A.*, 381 *West's Federal Supplement 2d*, at 169 (4 November 2003).

detail the conditions for certification and explain for which practical reasons US law requires future treatment of US judgments be taken into account. This is a necessary step in the analysis, since it shows why and under which terms the question of the future recognition by European countries needs to be discussed. After this discussion, I will tackle the core issue of the article: the position of some European legal systems regarding US class action judgments. Legal doctrine and legal practice have shown that there are three main reasons why courts in Europe could refuse *Res Judicata* effect to a class action judgment. In Part III, I will discuss the first reason, which is often alleged to be contrary to international public policy. It concerns the specific US class action device of the 'opt-out rule', which allows courts to include in the procedure all plaintiffs unless they manifest their will to be excluded from the class. The second reason for non-recognition, discussed in part IV, is that European legal systems may consider US judgments awarding punitive or multiple damages to be contrary to international public policy. Finally, and this will be discussed in Part V, in some European countries an obstacle for recognition of a foreign judgment is that according to the law of the European country where the *Res Judicata* effect is sought, the US court could retain jurisdiction.

The study of these three issues and the recent evolution of European states law towards the introduction of collective procedures which are similar, though not identical, to the US class action procedures, seems to indicate a decrease of the hostility of European legal systems towards the US class action. This may signal an era in which there are fewer obstacles towards recognition of US class actions, which consequently will induce US courts to more easily certificate transnational class actions.

2 US law requirements for the certification of transnational class actions

2.1 Conditions for certification of class actions

In order for US courts to accept to decide on a transnational class action, several conditions have to be fulfilled. Traditional conditions regarding international jurisdiction have to be met as mentioned above. The most topical admissibility requirement is the certification, which is peculiar to class actions procedures, and needs to be discussed. Indeed, the issue of international jurisdiction of US courts is not the only private international law problem that has to be addressed. Once jurisdiction has been established, the class, the group of plaintiffs, has to be certified pursuant to Rule 23 of the Federal Rules on Civil Procedure, which sets the different conditions for the possibility of bringing a class action. The certification is a special stage of a class action procedure and aims at the constitution of the group of plaintiffs. For a class action to be certified, Rule 23(a) sets specific

requirements: numerosity, commonality, typicality and adequacy of representation.[55] If these conditions are fulfilled, the traditional procedure of Rule 23(b)(3), the 'poor man's class action', requires additionally that:

> 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. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

The conditions contained in this provision are usually referred to as 'predominance' and 'superiority'.

2.2 Transnational class actions

Federal Rule 23 raises particular concerns in case of a transnational class action. Indeed, the existence of foreign elements in the litigation could make it much more difficult to establish 'superiority' of the class action treatment of the dispute over other, more traditional litigation techniques. Furthermore, 'predominance of common issues in law' can be jeopardized by the differences in law that apply to the various putative class members. Such is for example the case in product liability class actions, where the action for compensation of the damage suffered by different members of the class may be governed by different laws when the *lex loci delicti* principle applies. In such a case, transnational class actions against the defendant are hard to certify or very difficult to manage because subclasses will need to be created. In turn, this may lead to splitting the litigation into several parts, at least on certain issues. This has happened not only in transnational class actions procedures, but also in litigation where class members were resident

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[55] Rule 23(a): "Prerequisites to a class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defences of the representative parties are typical of the claims or defences of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

in different states within the US and the legal situation of the plaintiff was governed by the law of yet another state.

A leading case of the US Supreme Court has shown the difficulty to certify a so-called multi-state class action, a class where members are spread over in various countries.[56] *Shutts* is a leading case concerning the issue of personal jurisdiction of state courts as regards non-resident class members. The case is also important for the issue of difference of the law applicable to different putative class members. In this case, the class-seeking certification consisted of putative members residing in 27 states and 15 foreign countries. Arguing that it would simplify the procedure, Kansas courts applied the *lex fori* to all class members, although different laws should have been applied according to their residence. The Supreme Court rejected the idea of facilitating the application of the law of the court seized in multi-state class actions,[57] considering that this could incite plaintiffs to adopt 'forum shopping' strategies.[58] More recent examples of decertification on the grounds of the differences in the applicable laws include the class action brought by haemophiliacs against a pharmaceutical company after having contracted AIDS.[59] This led authors to suggest an alternative solution in favour of the application of the law of a single legal system.[60]

If a single legal system can govern both the grounds and consequences of the defendant's liability vis-à-vis all class members, this problem does not arise. In fact, this happens rather frequently at present because of the extraterritorial application of US federal law, for example in case of violation of federal securities laws (which nowadays is the most frequent ground for transnational class actions).[61] In such a case, it is the

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[56] *Phillips Petroleum Co. v. Shutts*, 472 *The United States Reports*. 797 (1985), 105 *The Supreme Court Reporter*. 2965 (1985). On this case, see e.g. A. R. Miller, D. Crump, Jurisdiction and Choice of Law in Multi-state Class Actions After *Phillips Petroleum Co. v. Shutts*, 96 *Yale Law Journal* 1 (1986/1987).

[57] Some authors defend this idea, S. Lloyd Truax, 'United States Class Actions in Private International Law Decisions', 23 *California Western Law Review* 342 (1986/1987).

[58] *Id.* 105 *The Supreme Court reporter* 2965 (1985), at 2979, adding that in the case in point the laws of Texas, Oklahoma and Louisiana were different as to the answer to the legal issue at hand.

[59] *In re Rhône-Poulenc Rorer Incorporated*, 51 *West's Federal Reporter, Third Series* 1293 (7th Circ. 1995).

[60] See e.g. S. Issacharoff, 'Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act', 106 *Columbia Law Review* 1839 (2006), who argues that the law of the defendant should be systematically applied for standardized claims.

[61] In the past, securities class actions could not be certified because of the difference in law applicable, see e.g. *Zandeman v. Joseph*, 102 *Federal Rules Decisions* 924 (N.D. Ind. 1984), considering that the choice of law rule of Indiana provides for the

other condition set by Rule 23(b)(3), the 'superiority of class action treatment', that raises difficult issues in cases involving foreign elements. Among the different elements that a court has to take into account when deciding certification there is one that has to be addressed in particular in multi-state or transnational class actions: the desirability or the undesirability of concentration of litigation in the particular forum of the court seized. In other words, the question is whether it is desirable to concentrate a claim that concerns several legal systems in a single forum localized in the US, or whether foreign courts should retain jurisdiction to hear the case in respect of at least some of the plaintiffs.

2.3 The condition set in *Bersch v. Drexel Firestone* and its developments

The answer to this question is straightforward: a class action is desirable only in cases where the foreign courts would recognize the *Res Judicata* effects of the US court judgment. Such a solution can be found in the leading 1970s case *Bersch v. Drexel Firestone*, in which it was ruled:

> [T]he management of a class action with many thousands of class members imposes tremendous burdens on overtaxed district courts, even when the class members are mostly in the United States and still more so when they are abroad. Also, while an American court need not abstain from entering judgment simply because of a possibility that a foreign court may not recognize or enforce it, the case stands differently when this is a near certainty.[62]

According to this leading case, in order to refuse certification of a class including foreign absent members, a mere possibility of refusal to recognize the American judgment abroad is not sufficient. Instead, 'near certainty' is required. The *Bersch v. Drexel Firestone* case involved securities litigation in which the defendant was a Canadian corporation. According to the rule mentioned here, the court refused to certify a class including foreign buyers of the shares and thus limited the certification to US residents. The Court considered that it appeared from the expert opinions presented to the court by law professors that English, French, German, Italian and Swiss courts would refuse to recognize the American class action judgment, especially if

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application of the law of residence of the investor, which would have jeopardized the manageability of the class action. See also, *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 95 *Federal Rules Decisions* 168 (D. Del. 1982).

[62] 519, *West's Federal Reporter, Second Series* 974 (1975), at 996.

it were in favour of the defendant.[63] The expert opinions asserted that the reasons for rejecting the *Res Judicata* were mainly to be found in the US rule that absent class members are automatically included in the class unless they manifestly express their intention to be excluded from the procedure. This rule is described as the 'opt-out principle'. Following the expert legal opinions, it was therefore considered in this case that the *opt-in* requirement is fundamental to European legal systems and therefore a judgment rendered in respect of absent and even ignorant plaintiffs would be considered contrary to these countries' concept of international public policy.

In more recent cases, the requirement set by *Bersch* has been slightly modified and stricter conditions to the certification of a foreign class are often found. For instance, in the certification judgment of the Vivendi Universal securities class action, judge Holwell considered that the 'superiority' requirement is fulfilled when the plaintiffs prove that there is a considerable probability that a foreign court will recognise the American judgment.[64] More precisely, foreign putative absent class members will have the possibility to be part of the procedure if "foreign court recognition [of their place of residence] is more likely than not."[65] In other words, certification of this group of plaintiffs will be granted if the chances of recognition abroad of the outcome of the class action litigation are above 50 per cent. It is interesting to see that even though the conditions that are to be fulfilled in 2007 are stricter than in 1975, the Vivendi Universal certification decision included foreign plaintiffs from France, the Netherlands and the UK. It merely excluded putative class members from Germany and Austria. This indicates that the Vivendi court considered that recognition of a class action judgment is probable and that the opt-out rule is no longer seen as generally contrary to public policy in Europe.

Sooner or later, for the purpose of the certification of a transnational class action, the US court will have to explore the possibility of the future recognition and enforcement of its verdict abroad. Doing so will require exploring the conditions for recognition in other legal systems and therefore will also require the court to take into account foreign private international law rules. As a consequence, a US court has to apply its own system of private international law to assess jurisdiction and to determine the law applicable to the litigation, as well as give effect to foreign private international law rules.

The requirement of taking into account, and thus giving effect to, foreign private international law is rather unusual. It is widely accepted that in principle a court merely has to apply the rules of private international law

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[63] *Id*. at 997.
[64] *In re Vivendi Universal, S.A. Securities Litigation*, 241 *Federal Rules Decisions* 213, at 233 (S.D.N.Y.), 22 March 2007.
[65] *Id.*

of the *forum*. Exceptions to this rule are conceivable, for example as regards the theory of *renvoi*, which leads to the application of the foreign choice of law rule of the legal system indicated by the choice of law rule of the *forum*.[66] Indeed, the attention given to foreign private international law in transnational class actions demonstrates the intention of the US legal system not to impose its solution worldwide and instead to coordinate conflicting sovereignties in dealing with globalised litigation.

There is also a practical element to be considered. The fact that US Courts examine the potential recognition abroad of a US class action judgment does not aim at exploring the possibilities of enforcement. In fact, such enforcement will not be necessary in every case, because the defendant may have sufficient property in the US to pay the damages that the court may award against him. Why then is the absence of recognition seen as a problem? If recognition abroad were not an obstacle for satisfying the plaintiffs, even though their residence is abroad, one would think that the condition set by *Bersch* is useless. This, however, is not the case. The absence of recognition would be problematic if the US court were to decide in favour of the defendant. It is important to recognize the *Res Judicata* of the class action verdict in order to prevent deceived foreign class members from bringing a new claim against the very same defendant before a foreign court and especially the court of the plaintiff's place of residence. If that were possible, the defendant – being prevented from opposing the *Res Judicata* in the US – would face new claims relating to the same facts and run a new risk of paying damages. In the end, different courts may come to diverging solutions. The requirement of a foreign recognition is therefore at the same time a sign of respect for foreign legal systems and of protection of the defendant in a class action procedure. This requirement indicates that the US legal system is concerned with the question whether the extraterritorial application of its laws or the large jurisdiction of its courts is acceptable for other legal systems. The requirement also signals that the procedural rights of the defendant of a class action are taken into account.

As a consequence of the condition set by *Bersch*, in many European legal systems an important doctrinal debate is now taking place regarding the possibility to recognize a US class action judgment. In the absence of a clear line of the case law, the *Res Judicata* of a US class action ruling is uncertain most of the time. Moreover, the specificities of such a procedure make it nearly impossible to apply reasoning by analogy, simply because European courts have not had the opportunity to rule on similar situations. Moreover, the doctrinal debate presents particular features because it does not take

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[66] On this theory, Ph. Francescakis, *La théorie du renvoi et les conflits de systèmes en droit international privé* (Paris: Sirey 1958).

place in legal journals or other scholarly publications.[67] The fact is that most of the leading experts in the field of private international law in Europe are currently requested and accepting to give expert legal opinions (the term often used is *affidavit*) in the framework of pending class actions. Therefore, the legal arguments in favour of and against the *Res Judicata* effect of a class action judgment in most of the European countries are to be found in these expert opinions. The opinions are accessible to the public either on *Westlaw* or on the ad hoc websites edited for the purposes of the information of the interested parties to the litigation.[68] The specificities of the doctrinal debate oblige the observer to consider the possibility of partiality of the expert opinion. Even if the expert asserts that the content of the opinion is positive law by using expressions such as "I declare under penalty or perjury under the laws of United States of America that the foregoing is true and correct", it is remarkable to see that in the very same procedure and concerning the very same country, the experts will diverge considerably in their views. This divergence is explained by the uncertainty of the answer and also by the fact that American courts do not require a certainty of recognition, but merely a strong probability.

The purpose of this article is not to give a clear-cut answer to the question whether European courts will give *Res Judicata* effect to US class action rulings. Such an effort would be utopian. Instead, of interest here is the determination of the reasons of potential refusal of recognition. These reasons seem to be based on the idea that the features of a class action procedure offend the very foundations of domestic law of the European legal systems. There are mainly three features of a class actions judgment that are relevant in this respect. In the following parts, the issue of recognition will be discussed by dealing firstly with the opt-out rule and its compatibility with European civil procedure; secondly, with the possibility under US law to award punitive damages along with compensatory damages; and thirdly how jurisdiction of US Courts holds according to European private international law rules. At the end of this analysis it will be concluded that European legal systems are presently less allergic to class-action-like procedures than they used to be.

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[67] There are a few exceptions: J. C.L. Dixon, 'The Res Judicata Effect in England of a US Class Action Settlement', 46 *International & Comparative Law Quarterly* 134 (1997); I. Romy, 'Class actions américaines et droit international privé suisse', *Annales des justices de paix 1999, 796*; M.-L. Niboyet, 'Actions de groupe et droit international privé', *Revue Lamy de Droit Civil* 2006, n° 32; M. Matousekova, 'Would French Courts Enforce US Class Actions Judgments?', *Contratto e Impresa Europa*, 2006*,* 651; and the German legal doctrine quoted *infra*, n. 85 .

[68] Such is also the case for the *Royal Ahold* class action, <www.royalaholdsecuritieslitigation.com>.

3 The opt-out mechanism and *Res Judicata* in Europe

3.1 The conformity with the public policy of the forum

Rule 23(b)(3) class actions are not mandatory for plaintiffs. However, putative absent class members will be part of the litigation unless they expressly manifest their intention to be excluded. In other words, one can become a plaintiff without having asked to become one. Traditionally, in all European legal systems the principle is that one becomes a plaintiff only by having actually manifested one's intention to bring a claim and by not remaining silent. Therefore, it is almost certain that European legal systems will give *Res Judicata* effect to 'opt-in' class-actions judgments, but this is not self-evident regarding opt-out class actions. It has been argued by several experts that the binding effect of a class-action procedure over absent class members residing in European countries could be contrary to public policy and that the outcome of such procedures can therefore not be recognized by domestic courts.[69] Other experts have argued the contrary.[70] It is impossible

[69] Between the very large amount of expert opinions submitted before US courts in class actions proceedings in the recent years, the following argue that an opt-out mechanism is contrary to public policy in some European countries. In Austrian law, G. Kodek declaration in *Royal Dutch Shell* class action. In Belgian law, H. van Houtte, declaration in *Royal Dutch Shell* class action. In Dutch law, Th.M. De Boer declaration in *Royal Ahold* class action, H. A. Groen declaration in *Royal Dutch Shell* class action. In English law, E. Peel declaration in *Royal Ahold* class action, C. Staughton declaration in *Royal Dutch Shell* class action, L. Rabinowitz declaration in *Vivendi Universal* class action. In French law, P. Mayer declaration in *Royal Ahold* class action; B. Audit, F. Terré, D. Cohen, G. Geouffre de la Pradelle, G. Carcassonne, O. Renard-Payen declarations in *Vivendi Universal* class action; J. Lemontey declaration in *Royal Dutch Shell* class action. In German law, R. Stüner declarations in *Royal Ahold* and *Daimler Chrysler* class actions, W. Grunsky declaration in *Royal Dutch Shell* class action, G. Herman Otto Wegen declaration in *Vivendi Universal* class action. In Luxembourg law, G. Ravarani declaration in *Royal Dutch Shell* class action. In Swiss law, P. Oberhammer declaration in *Royal Ahold* Class action, G. Kaufmann-Kohler declaration in *Royal Dutch Shell* class action. All declarations are on file with author.

[70] See, e.g., in Austrian law, D. Czernich and B. Rudisch declarations in *Royal Dutch Shell* class action. In Belgian law, G. Horsmans, declaration in *Royal Dutch Shell* class action. In Dutch law, H. Smit declarations in *Royal Ahold*, *Royal Dutch Shell* and *Vivendi Universal* class actions. In English law, J. Harris declarations in *Royal Dutch Shell* and *Vivendi Universal* class actions. In French law, A. Mourre declarations in *Royal Ahold*, *Royal Dutch Shell* and *Vivendi Universal* class actions. In German law, P. Mankowski declarations in *Royal Dutch Shell*, *Vivendi Universal*

in the framework of this article to detail the different reasoning and nuances expressed by the authors of these expert opinions. What particularly strikes the observer, however, is the fact that the issue presents itself in a very similar way in all of the legal systems analysed here. Even if the legal grounds are not always the same, it is clear that everywhere in Europe the main problem with US class actions is the opt-out mechanism and its asserted contrariety to the domestic foundations of civil procedure.

The concept of public policy, referred to in many European countries with the French *ordre public*, relates to the comparison of a judgment – the merit, but also the adjudicating procedure – with the fundamental legal values of the forum where the judgement aims at producing its effects in case of a request for recognition of the foreign judgment.[71] What counts therefore is the outcome of the case, and not whether the legal provisions that underpin the outcome are contrary to public policy in abstract terms. It is a very concrete analysis that has to be carried out by the judge who has to decide on the recognition of a foreign judgment. When it comes to procedural public policy such as the opt-out rule of a US class action, the concrete and the abstract analysis coincide. Indeed, European courts have to determine whether the fact that absent European class members can be included in the class, simply because they have not opted out, is contrary to the fundaments of civil procedure. Deciding on this issue is not an easy task. International public policy does not prevent a juridical situation created abroad to produce effect in the forum simply because the legal institution or the procedure applied do not exist. In other words, the mere fact that a legal rule or a procedural tool that does not exist, or even could not be enacted, in the country where a foreign judgment is asked to produce its *Res Judicata* effects, is not enough to consider the foreign judgment to be contrary to public policy. The application of foreign rules is only contrary to the international public policy of the forum if these rules contradict the main, essential and fundamental legal principles of the forum. According to a leading French case, there is violation of public policy when a judgment infringes "principles of universal justice considered as having, in French opinion, absolute universal value".[72]

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and *Daimler Chrysler* class actions. In Swiss law, S. Baumgartner, declaration in *Royal Dutch Shell* class action. All declarations are on file with author.

[71] For a comparative analysis of this concept in private international law, see P. Lagarde, 'Public Policy', in 3 *International Encyclopedia of Comparative Law*, Ch. 11, 1994; J. Blom, 'Public Policy in Private International Law and Its Evolution in Time', 50 *Netherlands International Law Review* 373 (2003).

[72] Civ. I, 25 May 1948, *Lautour, Revue Critique de Droit International Privé* 1949, 89, with note H. Batiffol; *Recueil Dalloz* 1948*,* 357, with note P. L.-P.; *Recueil Sirey* 1949, 1, 21, with note Niboyet.

There are two ways to determine whether an opt-out class action is contrary to public policy. The first and most straightforward method is to verify whether there are similar, even if more confined, procedures in the law of the forum that bind plaintiffs according to an opt-out mechanism. This is still uncommon in European legal systems, but views have certainly changed in recent years. Clear examples of this are the collective claims procedures that have been enacted in the Netherlands, France and in a more limited way in England. The second method consists of analysing whether a legal institution unknown in the forum can still be considered compatible with its fundamental concepts. Such an analysis is more difficult, but it cannot be taken for granted that recognition should be refused simply because the legal system where recognition is sought does not know a class-action-like procedure, including an opt-out mechanism, such as in Germany.

3.2 The Netherlands

According to article 3:305a of the Dutch Civil Code, non-profit associations can bring a claim in representation of the category of persons (consumers, investors, et cetera) whose interests they defend. The court can give declaratory relief concerning liability of the defendant, which can be invoked later by the individual persons who were represented in the first procedure, in individual claims for damages. The *Res Judicata* effect of this collective judgment on the principle of liability is not as strong as the *Res Judicata* effect of a US class action.

However, article 7:907 of the Dutch Civil Code clearly uses an opt-out mechanism for cases of collective 'friendly' settlement. This article was enacted in 2005 by the Act on Collective Settlement of Mass Damages (*Wet collectieve afwikkeling massaschade*). This provision allows parties to a settlement agreement to request that the Amsterdam Appellate Court declare the settlement binding upon a class of persons having suffered similar losses. Therefore, if the association representing consumers or investors agrees with the defendant on a settlement of the litigation, its effects could extend to all victims, unless they opt out and thus express the intention not to be bound. The similarity of this procedure with the underlying principles of a US class action, even though its effects are more limited, is evident and considerably limits the risks of non-recognition of a US class action judgment.[73] This

[73] M.V. Polak, 'Iedereen en overal?: Internationaal privaatrecht rond "massaclaims"', 41 *Nederlands Juristenblad* 2346 (2006), is of the opinion that the opt-out must have been a real option, so in case of a US certified class action the Dutch interested parties must have had a real opportunity to opt out.

induced Judge Holwell in the Vivendi Universal class action to certify a class of plaintiffs, including investors residing in the Netherlands.[74]

3.3 England

The same probably holds true for English law, which allows, in a more limited fashion than in the US, collective claims that bind absent plaintiffs. Such a rule can be found in the 1988 Civil Procedure Rules, where section 19(6) clearly introduces such a solution:

> Representative parties with same interest.
> (1) Where more than one person has the same interest in a claim
> (a) the claim may be begun; or
> (b) the court may order that the claim be continued,
> by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.
> (2) The court may direct that a person may not act as a representative.
> (3) Any party may apply to the court for an order under paragraph (2).
> (4) Unless the court otherwise directs any judgment or order given in a claim in which a party is acting as a representative under this rule
> (a) is binding on all persons represented in the claim; but
> (b) may only be enforced by or against a person who is not a party to the claim with the permission of the court.[75]

Of course, English law introduces solutions that are different from what is in force in the US. The possibility, however, of including an absent party as a plaintiff without their express consent is sufficient to consider an opt-out mechanism to not be incompatible with the English legal system; therefore a refusal of recognition of an American class action judgment cannot be based solely on these grounds.[76] In England the issue has sometimes been addressed as an issue of personal jurisdiction concerning non-resident class members. However, section 19(6) of the Civil Procedure Rules does not

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[74] *In re Vivendi Universal, S.A. Securities Litigation*, 241 *Federal Rules Decisions* 213, at 243 (S.D.N.Y.), 22 March 2007.

[75] See, N. Andrews, 'Multi-Party Proceedings in England: Representative and Group Actions', 11 *Duke Journal of Comparative and International Law* 249 (2001*)*.

[76] This is also the conclusion of J. C.L. Dixon, 'The Res Judicata Effect in England of a US Class Action Settlement', 46 *International and Comparative Law Quarterly* 134 (1997), at 145 ff.

require the absent member to be residing in the forum in order to be bound. Consequently, US courts do not see why it should not be the same for the recognition of a foreign judgment that includes an English resident as absent member.[77] However, the main issue is indeed to know whether an opt-out US class action judgment is contrary to English public policy. It is true that foreign judgments are not enforceable in England if they are contrary to natural justice or public policy and this also implies an assessment of procedural guarantees. Considering the similarity of the English representative and collective actions regulation to the class-action system in the US, it is likely that the *Res Judicata* effect will indeed be granted.[78]

3.4 France

A similar reasoning can be followed in French law. It is true that France has a long-standing principle according to which *nul ne plaide par procureur*, that is, no one may claim in court by proxy. Additionally, it has been considered by several experts that requiring a plaintiff to actively opt out in order to be excluded from the class of plaintiffs would be contrary to principles of due process, according to which every litigant shall have personal freedom to appear and be heard in court during any proceedings affecting their rights. However, in French law there are also examples of opt-out collective claims, such as the one brought by a trade union on behalf of employees for the protection of their individual interests.[79] The conditions for bringing such an action are that the employees receive notice, that they do not refuse to be bound by it and that they have been identified or are at least identifiable. In 1989 the French Constitutional Court had the opportunity to examine and confirm the conformity of such an opt-out mechanism with the Constitution and the Declaration of Human and Citizen Rights of 1789, although it did require additional guarantees regarding the individual freedom of employees.[80] The Constitutional Court in particular accepts allowing trade unions the possibility of bringing a collective claim through an individual case including all employees who did not opt out, but

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[77] *In re Vivendi Universal, S.A. Securities Litigation*, above n. 74

[78] Legal doctrine is uncertain on the issue. If J.C.L. Dixon is of the opinion that a judgement has a 'good chance' to have *Res Judicata* effect in England (J.C.L. Dixon, 'The Res Judicata Effect in England of a US Class Action Settlement' above n. 76 at 150), other authors are more sceptical. Such is the case for P. Barnett, *Res Judicata, Estoppel, and Foreign Judgment*, (Oxford: Oxford University Press 2001) 74; A. Briggs, P. Rees, *Civil Jurisdiction and Judgments*, (London: LLP 2005, 4th ed.) 573.

[79] Artt. L. 122-3-16, L. 123-6, L. 124-20, L. 125-3-1, L. 135-4, L. 321-15, L. 341-6-2, L. 721-19 of the French Labour Code.

[80] CC 25 July 1989, 89-257 DC, *Droit social* 1989, 627.

it does require that the employee be notified of this initiative and that such a notification explains clearly the object of the claim and the possibility for the employee to be excluded from the class "at any time". It is clear that the requirements of the Constitutional Court for the introduction of a class action in France are more stringent than those in force in the US, especially because in French law the absent class member can exclude himself from the procedure at any time before the final judgment, and not only during a predetermined opt-out period. However, this does not seem sufficient to consider an opt-out US class action judgment contrary to French public policy. As noted above, international public policy only prevents a legal situation totally incompatible with the foundations of the law of the forum to produce effects on its territory. Indeed, it is said that public policy has a reduced effect (*effet atténué*) when it comes to the recognition of a juridical situation created abroad, as opposed to a strictly interior matter, that is in the case when a court has to decide whether a such juridical situation can be created on French territory.[81] This means that the fact that the French legislator cannot enact a rule because of constitutional requirements does not necessarily imply that a foreign legislator or judge will be bound by the same requirements. On the contrary, it is more likely that the Constitutional Court's decision of 1989 shows that there is no 'allergy' of the French legal system to the US opt-out mechanism and that there are only divergences on its modalities and the way the opt-out right can be exercised. There should be no reason therefore to refuse *Res Judicata* effect in France of a US class action judgment on this ground. This is in fact also the analysis made by Judge Holwell in the Vivendi Universal class action.[82]

However, in the petition to appeal, the Vivendi company submitted a brief from the French Ministry of Justice, signed by the Director of Civil Affairs, indicating that a US class action judgment is contrary to French procedural public policy and that French Courts will refuse to enforce it.[83] It is difficult to anticipate the effect of such an intervention of the French government. What is certain is that it is unusual for the French executive to intervene in a dispute between private parties. Giving such an expert opinion on a critical issue of French law can be clearly seen as both a violation of the separation of powers and a protective attitude towards the companies organised under its own laws.

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[81] The line of case law on '*effet atténué*' was started by the *Rivière* case, Cass. Civ. I, 17 April 1953, *Revue Critique de Droit International Privé* 1953, 412, with annotation H. Batiffol; *Journal du Droit International* 1953, 860, with annotation G. Plaisant.

[82] *In re Vivendi Universal, S.A. Securities Litigation*, above n. 74

[83] Letter dated 3 April, 2007 (on file with author).

3.5 Germany

The first way of addressing the public policy issue is to verify whether there are similar procedural tools in the legal system of the foreign forum. If that is the case, the *Bersch* test is positive and, most of the time, the US court then certifies a class including the relevant absent class members. By contrast, the second way of approaching the public policy problem of an opt-out mechanism is much more difficult. This approach is followed in order to satisfy the test whenever the foreign forum does not make use of similar procedural tools. Such is the case for Germany, for example, where, contrary to the Netherlands, England and France, class-action mechanisms are still unknown. This absence excludes recognition of foreign judgments that are manifestly incompatible with the principles of German law, in particular with fundamental rights.[84]

The only comparison that could be made is with the Investor Protection Model Procedure Act, entered into force on 1 November 2005, which organises multiple claims by shareholders regarding the loss suffered as a consequence of wrong, incorrect or lack of information on the situation of a company (*Gesetz zur Einführung von Kapitalanleger-Musterverfahren, KapMuG*). This procedure, however, is very different from a US securities class action, in the sense that shareholders who do not voluntarily take part in the procedure will not be bound by its results.[85] In other words, this procedure is based on an opt-in, not an opt-out system. Since the opt-out mechanism is the feature of US class actions that generates the highest difficulties for their foreign recognition, the fact that it was rejected by the German legislator in securities litigations cannot indicate that German courts will grant *Res Judicata* effect to a US judgment.

However, one cannot conclude that there is a very high probability of non-recognition, because it still needs to be ascertained that the German legal procedural law foundations are incompatible with an opt-out mechanism. The mere inexistence of it under the German law of civil procedure is insufficient. In other words, the recognition of a foreign judgment delivered on the basis of a foreign legal rule or institution unknown in the forum does not necessarily amount to a violation of the forum's concept of international public policy. The opposite, however, is the conclusion drawn by US courts in both the Vivendi Universal and Daimler Chrysler securities litigations, when they certify class actions and exclude

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[84] § 328 (1) (4) ZPO (*Zivilprozessordnung*).

[85] For a comparison of US class actions with the *KapMuG*, see R. M. Franklin, 'Truiken J. Heydn, KapMuG: Class Actions vor deutschen Gerichten?', 105 *Zeitschrift für Vergleichende Rechtswissenschaft* 313 (2006).

German absent class members.[86] This is also the conclusion of the vast majority of German doctrine in considering that the inclusion of absent class members without their consent violates plaintiffs' fundamental rights.[87]

Although it is not certain that non-recognition "is more likely than not" and therefore that the superiority test could have very well led to a certification of the class action, one has to assess the consequences of the non-inclusion of German residents to a US class actions. Some will analyse this solution as an advantage for German multinationals, which benefit from a sort of immunity from US class actions. However, this is not the case if most of the plaintiffs are not German residents, because then the class action will receive certification anyway and the German residents will not benefit from the resulting proceeds.[88] More exactly, the consequences of a refusal of recognition of a US class action can better be seen as a reduction of the protection of German resident plaintiffs. They can, indeed, only bring a claim in their own country and, therefore, cannot benefit from the advantages offered by a US class action procedure.

As noted above, the German legislator has recently enacted an ad hoc procedural scheme for securities litigations in 2005 because individual claim threatened to congest some first instance courts. As a side issue, the question can be raised whether such a procedure could be of use for securities litigations against corporations organised under the laws of a different EU member state. Indeed, the application of the Brussels I Regulation (2001/44) does not provide a jurisdiction prong to the courts of the place of residence of the investors, since they merely would have a choice between seizing the court of the place of residence of the defendant

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[86] *In re Vivendi Universal, S.A. Securities Litigation*, above n. 74; *In re Daimler Chrysler AG Securities Litigation*, 216 *Federal Rules Decisions* 291 (D. Del. 2003).

[87] See e.g. H. Spindler, 'Die amerikanische Institution der class action als Mittel des Konsumentenschutzes', in *Festschrift für Eugen Ulmer*, Munich 1973, 369 ff; R. Mann, 'Die Anerkennungsfähigkeit von US-amerikanischen "Class-action"-Urteilen', *Neue Juristische Wochenschrift* 1994, 1187; J. Mark, 'Amerikanische Class Action und deutsches Zivilprozessrecht', Europäische Zeitschrift für Wirtschaftsrecht *1994, 238*; Ch. Greiner, 'Die "Class Action" im amerikanischen Recht und deutscher ", Ordre Public"', (Frankfurt a. M.: Max-Planck-Institut, 1998) at 185 ff. *Contra*, J.C. Spindler, '*Anerkennung und Vollstreckung ausländischer Prozessvergleiche unter besonderer Berücksichtigung der US-amerikanischen Class Actions Settlements*', (Konstanz: Konstanzer Schriften zur Rechtswissenschaft, 2001), 246, who suggests that the opt-out mechanism of Rule 23 is an appropriate device to protect absent class members' fundamental rights.

[88] More recently, regarding *Daimler Chrysler*, an attempt to certify a class composed of foreign class members only has been rejected on the argument of the absence of jurisdiction of US courts, Markus Blechner et alii, individually and on behalf of all others similarly situated plaintiffs v. Daimler-Benz AG, Daimler Chrysler AG et alii, 410 *West's Federal Supplement.*2d 366 (2006).

(article 2) and the court of the country where the harmful event occurred (article 5(3)).

Regarding the latter, the provision seems to suggest that the harmful event does not occur at the place of residence of the investor, but rather in the country where the shares were traded (which often coincides with the country of the company incorporation).[89] This is not necessarily true, however, if the case involves misleading information that the company addressed to foreign investors at their place of residence in Germany. Following the interpretation of article 5(3) given by the European Court of Justice in the *Mines de Potasse d'Alsace* case, the place where the "harmful event occurred" is either the place where the tort can be located or the place where the damage was suffered by the victim.[90] According to the *Fiona Shevill* case of 1995 concerning breach of privacy committed by a press publication, the courts of all the countries where the publication was sold can retain jurisdiction limited to the damage suffered as a consequence of its distribution in that country.[91] In security litigations, all this would mean that German courts would indeed have jurisdiction in an action brought against a company incorporated in a different member state, but limited to the damage suffered by the investors who are German residents.

Having said that, I should add that the collective claim procedure (*KapMuG*) only applies to security litigations and not to other wrongs that can give rise to class actions in the US. This means that the exclusion of German absent class members will require individual actions, even though some of these could be brought before German courts according to the consumer jurisdiction prong of the Brussels I Regulation.[92] To conclude, in the Vivendi Universal case the exclusion of German investors from the US

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[89] Art. 5, Brussels I Regulation: "A person domiciled in a Member State may, in another Member State, be sued: […] (3) in matters relating to tort, *delict* or *quasi-delict*, in the courts for the place where the harmful event occurred or may occur."

[90] ECJ, 30 November 1975, C-21-76, *Bier BV v. Mines de Potasse d'Alsace SA*, [1976] *European Court Reports* 1735; *Recueil Dalloz-Sirey.* 1977, 613, with annotation Droz; *Revue Critique de Droit International Privé* 1977, 563, with annotation P. Bourel; *Journal du Droit International* 1977, 728, with annotation A. Huet; *Neue Juristische Wochenschrift* 1977, 493.

[91] ECJ, 7 March 1995, C-68/93, *Fiona Shevill v. Presse Alliance SA*, [1995] *European Court Reports* I-415; [1995] 2 *Law Reports, Appeal Cases* 18; [1995] 2 *Weekly Law Reports* 499; [1995] *All England Law Reports European Cases* 289; [1995] International Litigation Procedure 267; [1995] *Entertainment and Media Law Reports.* 543; *Revue Critique de Droit International Privé* 1996, 487, with annotation P. Lagarde; *Journal du Droit International* 1996, 543, with annotation A. Huet; *Neue Juristische Wochenschrift* 1995, 1882.

[92] Artt. 15-17 of the Brussels I Regulation introduce a particular consumer jurisdiction prong.

class action did not necessarily oblige these investors to bring a claim in France individually. In practice, such individual cross-border claims are very unlikely to be submitted anyway, at least on a large scale. This is because collective actions are often alternatives to the practical impossibility to access justice individually as a result of the frequent disproportion between legal costs and the compensation that can be expected from a successful judgment. However, such a solution is not satisfactory for the defendant and the plaintiffs. The defendant is obliged to appear before the courts in different jurisdictions and the plaintiffs could face diverging judicial decisions, even though the facts of the case are identical.

When all is said and done, it appears that the opt-out mechanism is the feature of US class actions that causes the most difficulties in practice and could lead to non-recognition of a judgment delivered following this procedure. Consequently, a US court, confronted with the question of certification of a transnational class action including foreign and especially European absent class members, could hesitate and either limit the certification of a class to include only class members residing in the US or simply refuse certification altogether on the ground of lack of superiority. However, the recent initiatives of several European legal systems to introduce class actions or procedural techniques of consolidation of individual judicial application into collective claims, some by including an opt-out mechanism, tend to indicate that the hostility towards class actions is disappearing progressively. This should facilitate the recognition, at least in some European legal systems, of US class action judgments, since the contrariety to public policy of the forum can hardly be upheld.

A similar reasoning can be followed as regards the possibility for US courts to award punitive or multiple damages. Moreover, this issue is easier to solve, since the *Res Judicata* effect can be granted independently to the compensatory part of the judgment, even though punitive or multiple damages awards can face a refusal of recognition. That part of the judgment may then meet the requirements set in *Bersch v. Drexel*, as will be seen in the next part of this article.

4 Punitive and multiple damages awards and *Res Judicata* in Europe

If the opt-out mechanism is indeed very rarely contrary to the international public policy (*ordre public international*) of the European legal systems analysed above, the opposite can be said for the possibility to award punitive or treble damages, which is often possible in the framework of a US class action. For example, in antitrust suits, according to section 6 of the Clayton Act, compensatory damages are automatically multiplied by three.[93] In fact,

[93] 15 U.S.C. §15: "[…] any person who shall be injured in his business of property by reason of anything forbidden in the antitrust laws may sue […] and shall recover

the issue that has to be addressed equally concerns all types of damages that can be awarded by a US court and that do not have a compensatory function but a preventive or deterring one instead. Traditionally, European legal systems deny courts the power to award damages – neither in contractual nor in extra-contractual matters – that go beyond what is necessary to compensate the injury suffered by the victim. Punitive damages are really a peculiarity of US law and can therefore limit the recognition of US judgment awarding them in Europe.[94] As regards ordinary procedures and not class actions, there is case law in many European jurisdictions where recognition has been refused on the ground of contrariety to public policy.

4.1 Germany

Such is clearly the case for Germany, according to both the Federal Court (1992 decision) and the Constitutional Court (2003 decision).[95] Moreover, the new German law on private international law on extra-contractual obligations of 1999 contains a provision that seems to exclude the recognition of foreign judgments in which a provision has been applied that leads to a different outcome on the issue of damages than German domestic law.[96] This provision leads to a refusal of recognition when either the function or the amount of damages differs from what is accepted under German law. A similar approach can be found in Switzerland, even though the line of case law is not clearly established.[97] However, it is feasible that

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threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[94] On the question in general, R.A. Brand, 'Punitive Damages and the Recognition of Judgments', 43 *Netherlands International Law Review* 143 (1996).

[95] BGH, 4 June 1992, *Entscheidungen des Bundesgerichtshofes in Zivilsachen* 118, 312, *Neue Juristische Wochenschrift* 1992, 3096, with annotation H. Koch; English translation in (1993) 32 *International Legal Materials* 1327; BVerfG 25 July 2003, 2 *BVR* 1198/03. On the latter, B. Friedrich, 'Federal Constitutional Court Grants Interim Legal Protection Against Service of a Writ of Punitive Damages', 4 *German Law Journal* 1233 (2003).

[96] Art. 40(3) of the introductory law to the BGB: Claims governed by foreign law cannot be relied on if: 1. They go considerably beyond what a reasonable compensation of the injured party requires, 2. They serve objectives that are manifestly different from a reasonable compensation of the injured party. (author's translation)

[97] In favour of the recognition, Trib. civ. Basel, 1 February 1989, quoted by R.A. Brand, 'Punitive Damages and the Recognition of Judgments', *Netherlands International Law Review* 1996, 143, at 169. However, a more recent case of the Swiss Federal tribunal retaining the criminal penalty qualification may lead the observer to think that a recognition is impossible, *Arrêts du Tribunal Federal Suisse: Recueil Officiel* 122 III 463, at 466 (1996). In legal doctrine, C. Lenz,

the situation will change with the enactment of provisions that allow disgorgement of profits from the tort-feasor. Such provisions have both deterring and punitive functions and therefore converge with the basic idea of punitive damages. Such is the case for article 28(a)(3) of the Swiss Civil Code, which allows courts to award the victim of a breach of privacy both compensatory damages and a sum equal to the profits gained by its author.[98]

4.2 England

The same approach to punitive damages can be found in English law, notably in the recent case of *Lewis v. Eliades*[99] concerning the issue of English public policy under the Protection of Trading Interest Act 1980. The 1980 Act provides that a judgment of an overseas country cannot be registered and no court in England may entertain proceedings at common law for the recovery of any sum payable under such a judgment, where that judgment is for multiple damages. Section 5(3) of the Act defines multiple damages as an "amount arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damage sustained by the person in whose favour the judgment was given". The question was whether an award for punitive damages can be granted *Res Judicata* in England is governed by this provision, as it only concerns *multiple* damages. The recognition of a punitive damages award cannot be denied on its penal law characterisation according to section 14(3) of the Private International Law (Miscellaneous Provisions) Act 1995, in view of its probable recognition in England.[100]

In *Lewis v. Eliades*, a part of the compensatory damages was trebled in application of US Racketeer Influenced and Corrupt Organisations laws (RICO).[101] In the proceedings to enforce the judgment in the UK, the issue was raised whether the entire judgment was unenforceable or the non-recognition should be limited to the multiple damages award. In other words, can a US judgment awarding compensatory and punitive or multiple damages be enforced for the compensatory part or shall the enforcement be

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'Amerikanische Punitive Damages vor dem Schweizer Richter', *Études Suisses de droit international* 147, 1992; Y.P. Piantino, 'Switzerland's Treatment of US Money Judgments', 46 *American Journal of Comparative Law,* 181 (1998).

[98] For a recent application, Swiss Federal Tribunal, 7 December 2006, *Arrêts du Tribunal Federal Suisse: Recueil Officiel* 133 III 153, disgorgement of the profits made by a newspaper because of the breach of privacy.

[99] *Lewis v. Eliades* [2003] 1 *All England Law Reports (Commercial Cases)* 850; Elaine Kellman, 'Enforcement of Judgments on Blocking Statutes, *Lewis v Eliades*', 53 *International Law & Comparative Law Quarterly* 1025 *(* 2004).

[100] See, P.M. North, J.J. Fawcett and G.C. Cheshire (eds.) *Cheshire and North's Private International Law*, (London: Butterworths 1999, 13th ed.) 118.

[101] 18 U.S.S.C. 1964(c).

refused entirely? In this question, the Court of Appeal ruled that the 1980 Act prevents the enforcement of the non-compensatory damages award only, granting it for the rest.[102] The question remains whether the compensatory element of a multiple award can be enforced. My impression is that the answer should be affirmative, since an exception, being general public policy and having been introduced by a special statute, is to be interpreted strictly. Moreover, as regards punitive damages awards, a US court is under the obligation to distinguish between mere compensatory damages and punitive damages. In other words, US case law is clearly of the opinion that a judgment cannot award a lump sum with both a compensatory and a punitive function. This is an essential precondition to enable superior courts to assess whether the balance between compensatory and punitive damages is proportional or excessive. In the latter case this would lead the superior court to conclude that due process provisions of the US Constitution have been violated.[103]

Regardless of this issue, looking at the *Lewis v Eliades* case from the perspective of the issue of *Res Judicata* effects of a US class action judgment, one can conclude that the *depeçage* (severability) of a judgment in enforceable and unenforceable parts will support certification of class actions, including absent class members from England, even though the judgment does in fact award punitive or multiple damages.[104] Indeed, what counts for US courts is the fact that an absent class member residing in England will be barred from bringing a claim in that part of the UK; this will certainly be the case if the prospective US judgment in the class-action case has *Res Judicata* effect, albeit only in part. It is important to note here that the principle of severability in *Res Judicata* procedures is more and more

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[102] Contrary, in legal doctrine, A.V. Dicey, J.H.C. Morris, L.A. Collins, A. Briggs (eds.) *The Conflicts of laws*, Vol. 1 (London: Sweet & Maxwell 2000, 13th ed.) at. 566, §§ 14-246: "Judgments caught by section 5 are wholly unenforceable, and not merely as regards that part of the judgment which exceeds the damages actually suffered by the judgment creditor." This opinion was expressed before *Lewis v. Eliades*.

[103] The leading case is the Supreme Court opinion in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 *West's Supreme Court Reporter* 1032 (1991), where it was held that in itself a punitive damages award is not unconstitutional in itself, particular awards can transgress Constitutional guarantees.

[104] The same goes for Germany, where according to legal doctrine the judgment would be only partly unenforceable, J. Mark, 'Amerikanische Class Action und deutsches Zivilprozessrecht', *Europäischen Zeitschrift für Wirtschaftsrecht*, 238 1994. This is also the solution held by BGH, 4 June 1992, 'Entscheidungen des Bundesgerichtshofes in Zivilsachen' 118, 312, quoted above n. 95, where the American judgment was enforced as regards compensatory judgment and refused for the punitive damages award.

strongly defended in legal doctrine. One example is the Convention on choice of court agreements of 30 June 2005, which provides that even though a country can refuse to recognise punitive damages awards if these are excessive or not generally awarded in the forum (article 11 Damages),[105] recognition can be refused only for the punitive damages part of the foreign judgment (article 15 Severability).[106]

4.3 France

Of all European countries, France is probably where the recognition of a US multiple and punitive damages award will be the most easily admitted, because it is not considered contrary to public policy by legal doctrine.[107] There is no case law dealing with the issue of recognition of foreign judgments awarding punitive of multiple damages.[108] Indeed, it has recently been proposed that the possibility for the judge to award punitive damages in case of wilful tort or breach of contract be introduced in French civil law.[109]

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[105] Art. 11 reads as follows: "(1) Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered. (2) The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings."

[106] Art. 15 reads as follows: "Recognition or enforcement of a severable part of a judgment shall be granted where recognition or enforcement of that part is applied for, or only part of the judgment is capable of being recognised or enforced under this Convention." The solution appears clearly from the Explanatory Report by T. Hartley and M. Dogauchi, Convention of 30 June 2005 on Choice of Court Agreements, edited by the Permanent Bureau of The Hague Conference on Private International Law, <http://www.hcch.net/upload/expl37e.pdf>, 62, no. 215.

[107] See, O. Boskovic, 'Les dommages et intérêts en droit international privé. Ne pas manquer une occasion de progrès', *La Semaine Juridique: Juris Classeur Periodique* 2006.I.163. The author expressed the same opinion in his dissertation, O. Boskovic, *La réparation du préjudice en droit international privé*, (Paris: LGDJ 2003) nos. 408 ff., stressing that what can hurt the public policy of the forum is not the punitive ground of damages, but its eventual excessive amount. See also, G. Légier, 'Sources extracontractuelles des obligations. Domaine de la loi compétente', *J.-Cl. Droit international*, Fasc. 553-2, 1993, 101.

[108] The only exception seems to be CA Paris, 21 September 1995, *Recueil Dalloz-Sirey* 1996, somm. 168, where recognition was granted and the defendant argument of violation of public policy by excessive and punitive damages was rejected. The motivation of the case is, however, not sufficiently developed.

[109] Art. 1371, proposal of reform of the law of obligations: "L'auteur d'une faute manifestement délibérée, et notamment d'une faute lucrative, peut être condamné, outre les dommages-intérêts compensatoires, à des dommages-intérêts punitifs dont le juge a la faculté de faire bénéficier pour une part le Trésor public. La décision du

Even if this proposal has not entered into force yet, it is at present impossible to consider the French legal system incompatible with non-compensatory sorts of damages in order to refuse enforcement of foreign judgments having awarded multiple or punitive damages. This is especially the case for US judgments in which punitive damages are awarded in proportion to compensatory damages and in which the award can be reduced after judicial scrutiny in case a reasonable proportion was not met (as was decided by the US Supreme court in 1996 according to the Due Process Clause of the Fourteenth Amendment).[110]

4.4 Pan European perspective

More generally, from a pan European point of view, it is currently difficult to consider that damages awards going beyond the compensation of the injured party can be contrary to public policy. It is true that the right to compensation has a supra-legislative nature, recognised both by the French Constitutional Council[111] and the European Court of Human Rights.[112] However, it is generally admitted that *full* compensation is not a right protected by the ECvHT and that, as a consequence, a limitation of liability

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juge d'octroyer de tels dommages-intérêts doit être spécialement motivée et leur montant distingué de celui des autres dommages-intérêts accordés à la victime. Les dommages-intérêts punitifs ne sont pas assurables."

[110] *BMW of North America Inc. v. Gore*, 517 *United States Supreme Court Reports* 559 (1996). Later, the Supreme Court gave additional guidance for the application of the proportion and nexus test in *State Farm Mut. Auto Insur. Co. v. Campbell*, 538 *United States Supreme Court Reports* 408 (2003).

[111] See e.g. CC 9 November 1999, 99-419 DC*, La Semaine Juridique: Juris Classeur Periodique* 1999.II.20173, with annotation G. Viney: "la faculté d'agir en responsabilité met en œuvre une exigence constitutionnelle posée par l'article 4 de la Déclaration des droits de l'homme et du citoyen de 1789 dont il résulte que tout fait quelconque de l'homme qui cause à autrui un dommage oblige celui par la faute duquel il est arrivé à le réparer." On this issue, N. Molfessis, 'La réécriture de la loi relative au PACS par le Conseil constitutionnel', *La Semaine Juridique: Juris Classeur Periodique.* 2000.I.210.

[112] ECHR 20 November 1995, *Pressos Compania Naviera v. Belgium*, [1995] 21 *European Human Rights Reports* 301; *Revue Trimestrielle de Droit Civil.* 1996, 1019, with observations J.-P. Marguenaud, for tortious liability; ECHR 9 November 1994, *Stran Greek Refineries And Stratis Andreadis v. Greece*, [1994] 19 *European Human Rights Reports* 293; *Revue Trimestrielle de Droit Civil.* 1995, 652, with observations F. Zenati, for contractual liability. Both cases decided that a liability claim is a credit protected by Protocol 1 to the ECvHR.

included in an international convention is valid.[113] This solution has generally permitted European legal systems to cap the compensation of certain categories of victims, which is nowadays frequent when the compensation is shifted from a liability system to be provided by 'solidarity systems', notably through special compensation schemes. In the literature it has been concluded that the principle of full compensation is now no longer a fundamental principle of the law that is internationally protected through the exception of public policy.[114] It is therefore difficult to understand why, at the same time, public policy should not be opposed to the statutory reduction of the compensation awarded to the victim, but should be allergic to its extension. Such a solution would be only understandable if tort law were considered as having a mere compensatory function and not a deterring or punitive function. However, following the evolution of statutory law and case law in European jurisdictions, legal doctrine is increasingly of the opinion that tort law does in fact have such functions (although not as much as in the US), at least when the liable party is at fault.[115]

The legal arguments expressed above can argue in favour of the *Res Judicata* effect of a US class action judgment that also awards punitive or multiple damages. It seems that in France such a judgment can be enforced entirely. In other European countries, the US judgment can be partially enforced, that is to say without the punitive award, which is considered a criminal sanction. However, the fact that part of the judgement will be enforceable prevents individual absent class members from bringing a new claim in these countries. This in turn is a sufficient condition for a US court to certify a transnational class, including absent class members residing in these jurisdictions. We can therefore conclude that the prospect that a US class action judgment may award punitive damages is not an obstacle to its (partial) *Res Judicata* effect.

Furthermore, there is also a practical consideration indicating that punitive damages class action awards will generate little recognition issues in European jurisdictions: Punitive damages are rarely awarded in multi-state and, *a fortiori*, transnational class actions. Apart from the issue of *Res Judicata* effect of the prospective judgment in the country of residence of

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[113] See, in France, Cass. Civ. I, 12 May 2004, *Bulletin des Arrêts de la Chambre Civile de la Cour de Cassation.* I, n° 136; *La Semaine Juridique: Juris Classeur Periodique.* 2005.II.10030, with annotation G. Légier.

[114] G. Viney, P. Jourdain, 'Les effets de la responsabilité: exécution et réparation en nature, dommages et intérêts, aménagements légaux et conventionnels de la responsabilité, assurance de responsabilité,' in J. Ghestin (ed.) *Traité de droit civil* (Paris: LGDJ 2001, 2nd ed.) no. 60 and the references quoted: "[...] n'est pas rangé aujourd'hui parmi les quelques principes essentiels du droit français qui demeurent protégés sur le plan international par l'exception d'ordre public".

[115] See e.g. S. Carval, '*La responsabilité civile dans sa fonction de peine privée'*, (Paris: LGDJ 1995), which also refers repeatedly to foreign experiences.

absent class members, there are several obstacles under US law to the certification of a punitive damages class action claim.[116] This does not mean that multi-state class actions concerning punitive damages are never certified,[117] but it does mean that certification is rendered much more difficult. For instance, punitive damages are usually matters of state law and that may indicate that if more than one state is involved, the requirement of commonality is not met.[118] Moreover, an opt-out class action may jeopardise the punitive damage assessment, because individual plaintiffs can be awarded punitive damages beyond the award in the class action procedure if they opt out and decide to bring a claim individually. These complications lead to a reduction of punitive damages class action claims and indeed incite authors to propose innovative solutions to tackle the issue of compensation and deterrence in mass torts.[119]

5 Jurisdiction of US courts concerning absent class members and *Res Judicata* in Europe

Finally, the most disputed issue in some European legal systems concerns jurisdiction of the US courts concerning absent class members. One of the traditional conditions for recognition of foreign judgment is the assessment of the jurisdiction of the foreign court. Normally this issue arises only with regard to subject matter jurisdiction or personal jurisdiction over the defendant. It is widely accepted that there is no point in assessing personal jurisdiction with regard to the plaintiff, because, by suing in a foreign country, they have simply withdrawn from their jurisdictional prerogatives to sue in another country, such as the one of their domicile. It is a logical consequence of the estoppel theory: one cannot claim in a foreign court and then before the courts of one's domicile, pretending the former had no jurisdiction. The idea is clearly expressed in English law by Dicey & Morris.[120] In France, this has long been analysed as a waiver of the recently

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[116] On this issue, L. J. Hines, 'Obstacles to Determining Punitive Damages in Class Actions', 36 *Wake Forest Law Review* 889 (2001), and the case law quoted.

[117] For a famous example of certification, see *In re"Agent Orange" Prod. Liab. Litig.*, 100 *Federal Rules Decisions* 718 (E.D.N.Y. 1983).

[118] L. J. Hines, above n. 116.

[119] See e.g. C. M. Sharkey, 'Punitive Damages as Societal Damages', 113 *Yale Law Journal* 347 (2003).

[120] Rule 36, at 487: "[…] a court of a foreign country outside the United Kingdom has jurisdiction to give a judgment *in personam* capable of enforcement or recognition […] if the judgment debtor was claimant or counterclaimed, in the foreign court."

abolished[121] plaintiff's privilege of jurisdiction of article 14 of the French Civil Code. According to this provision, a French citizen (or resident)[122] can bring proceedings against a foreign defendant before French courts, even concerning obligations imposed on the defendant in a foreign court.[123] The same goes for the Netherlands in the case of a foreign judgment having been rendered against a litigant who commenced the litigation abroad, because it would be contrary to good faith and fairness to permit the plaintiff to relitigate his claim after having sought the aid of a foreign court which ultimately rejected his claim.[124]

However, as noted above, the US class action procedure, through the opt-out mechanism, allows inclusion in the group of plaintiffs of persons who have not explicitly manifested their intention of bringing a claim before a foreign court. Therefore, it is not certain that foreign absent class members have both accepted jurisdiction of the foreign court and at the same time prevented foreign courts from assessing the existence of personal jurisdiction in their respect at the stage of recognition abroad. The first step is therefore to determine whether a court that is asked to recognize a US class action judgment is obliged to verify that the US court had personal jurisdiction over absent class members residing in the forum. That is not generally a condition required for recognition but the peculiarity of US class actions procedures does seem to require such supplementary investigation by the court in order to decide on recognition of a judgment rendered after following this procedure. The absence of case law on this point renders the issue very complex.

In the case that a US court is required to have personal jurisdiction over foreign absent class members, an explicit acceptance by these members will be necessary, because the transposition of personal jurisdiction requirements regarding defendants to foreign absent plaintiffs will very often lead to the conclusion that there is no personal jurisdiction other than voluntary.

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[121] Cass. Civ. I, 22 May 2007, *Banque de développement local*, no. 04-14716, *Gaz. Pal.* 2 June 2007, 11, with note M.-L. Niboyet. The privilege was abolished because art. 14 is no longer seen as introducing a case of exclusive jurisdiction, but a merely facultative one.

[122] Following, article 4(2) of the Brussels I Regulation (2001/44/EC). Cf. H. Gaudemet-Tallon, *Compétence et exécution des jugements en Europe: règlement no. 44/2001 : conventions de Bruxelles et de Lugano* (Paris: LGDJ 2002, 3rd ed.), no. 95.

[123] Cass. Civ. I, 30 June 1992, *Recueil Dalloz-Sirey* 1994, 169, with note Guez, considering that the plaintiff waived their privilege by suing abroad, even if an action in France was initially proposed.

[124] The leading case being, Hoge Raad, 14 November 1925, *Fur Coat case*, *Nederlandse Jurisprudentie* 1925, 91. On the issue, see H. Smit, 'International Res Judicata and Collateral Estoppel in The Netherlands: A Comparative Analysis', 16 *Buffalo Law Review* 165 (1966), at 197.

Therefore, the question is whether the absence of opt-out declarations of certified class members is sufficient to establish consent of the foreign absent member to jurisdiction. Although this legal issue is often confused with the matter of conformity of the opt-out mechanism with public policy, it must be distinguished intellectually because the two issues do not converge at the same level of scrutiny of the foreign judgment. However, in practice, the answer to the question of the validity of consent to US jurisdiction by absent class members can depend strongly on the analysis of the actual opt-out mechanism. Indeed, when it is considered that the right for absent class members to opt out from a class action lawsuit grants them sufficient protection and is therefore not contrary to international public policy, it is possible to conclude that the absence of opting out is also a valid consent of the absent plaintiff to the jurisdiction of US courts. Consequently, jurisdiction of the US courts cannot be challenged any longer at the stage of foreign recognition.

Of course, all this depends on whether the assessment of consent to the action will be assessed in the application of US law or of the law of the forum where the *Res Judicata* effect is sought.

If US law is applicable to determine this, the conformity of an opt-out mechanism to public policy will be sufficient to satisfy the jurisdiction prong required by most European legal systems as a condition for recognition of foreign judgments. Indeed, according to *Shutts*, personal jurisdiction requirements concerning defendants do not apply to absent class members and the failure to opt out is considered to be sufficient, because absent class members do not bear the same burdens as foreign defendants, as they do not need to appoint an attorney nor bear the costs of the litigation and are not exposed to counterclaims.[125] Therefore, a state court has personal jurisdiction over absent class members residing in other states even if they do not have any connection with the forum, provided only that they benefit from some specific guarantees, such as the notification of their inclusion in the class, a right to a fair representation and, above all, the right to opt out of the class: all guarantees that are granted by rule 23 of the Federal Rules on Civil Procedure. Even though this has been opposed by some authors,[126] it is accepted by judicial practice[127] that this condition required for multi-state class actions can also be applied to transnational class action. Therefore,

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[125] *Phillips Petroleum Co. v. Shutts*, 472 *United States Supreme Court Reports* 797 (1985).

[126] D. L. Bassett, 'US Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction', 72 *Fordham Law Review* 41 (2003/2004), arguing that a court has personal jurisdiction over foreign absent class members only in case they expressly join the lawsuit by opting in.

[127] See the references quoted by D. L. Bassett, *id.*

according to US law, a US court has jurisdiction over foreign absent class members since they have an actual right to opt out.

Only in cases in which a *lex fori* assessment of personal jurisdiction over absent class members is made will the public policy and jurisdiction prongs be two different conditions, to be met cumulatively. The result will be that recognition is often refused, for lack of personal jurisdiction. For example, in English law a foreign court is considered to have personal jurisdiction only if the party is resident in the foreign jurisdiction where the action is brought or has submitted to the jurisdiction of the foreign court by making a positive claim or counterclaim, by making a voluntary appearance in a claim already proceeding or by virtue of a previous agreement with the plaintiff. If these conditions are applied to the question of jurisdiction over absent class members, it appears that an English court will refuse recognition of a US class action judgment, for lack of personal jurisdiction.[128]

The answer to this question is difficult to give, since European courts have not had the opportunity to be confronted with a similar situation. My impression is that the important procedural guarantees that absent class members benefit from under rule 23 of the Federal Rules on Civil Procedure, together with the very limited burdens of the procedure, will probably incite European courts to give *Res Judicata* effect to US class action judgments or settlements. The advantages of this solution certainly outweigh the inconveniences.

6 Conclusion: The hostility of European legal systems seems to decline

The previous analysis seems to suggest that the hostility of European legal systems towards granting *Res Judicata* effect to US class action judgments is progressively declining. This is the consequence of a general acceptance of the necessity of renovating the old-continent civil procedures with tools allowing the consolidation of individual claims in collective claims. This has already been enacted, under different forms and for particular types of litigation, in several European legal systems. Moreover, at the level of the European Union several steps have been taken towards the introduction of collective claims. The vote of 27 March 2007 on a report on the European Commission's Green Paper on damages actions for breach of the EC antitrust rules showed the opening of European institutions towards the enactment of collective claims tools. Even though the intention not to adopt a US-like class action has been manifested, these steps are evident marks of

[128] This was the main point of divergence between Harris (for the class) and (for the defendant) Staughton expert opinions in the *Royal Dutch Shell* class action: the former considering that the personal jurisdiction requirement only concerns the defendant, the latter arguing for its application to foreign class members.

declining hostility towards collective settlements of consumer and security litigations.

Although this is still in the domain of prospective legal reform, this article has tried to show that the recent developments in European jurisdictions' laws go in the direction of the easier recognition of US class actions judgments. It has demonstrated that the issue of recognition does not aim at its enforcement against a losing defendant, but rather at preventing disappointed European absent class members to start new, individual lawsuits against the very same defendant before a court in a European jurisdiction. The serious prospect of potential recognition is a condition required by US courts to grant certification to a group of plaintiffs which also includes foreign absent class members. If European jurisdictions are prepared to give *Res Judicata* effect to US class action judgments, they will facilitate the certification of transnational class action.

Traditionally, legal doctrine argues in favour of refusal of recognition for several reasons. The most incompatible US class action feature seems to be the opt-out rule by which plaintiffs are incorporated in the group that have not expressly manifested their will to claim. However, it appears that several European jurisdictions also use the opt-out mechanism, at least for specific claims. Whenever that is the case, it is difficult to assert that granting *Res Judicata* effect to judgments decided in favour or against absent class members is contrary to the public policy of the forum. The same goes when the argument is phrased in terms of absence of personal jurisdiction of the US court over the foreign plaintiff.

On the other hand, the issue of US judgments awarding punitive or multiple damages is different. In most European jurisdictions, probably with the exception of France, a judgment awarding such damages will not be recognised. However, in such a case, *Res Judicata* will be refused only concerning the punitive part of the judgment, while the other parts – the ruling on the liability issue and the compensation of the damage suffered – will be recognised. It is this prospective partial recognition that counts for the US judge in order to allow certification of a transnational class action. The conclusion is that, in principle, European legal systems are no longer hostile towards the recognition of US class action judgments.

In my opinion this is also a good approach from a practical point of view, since the hostility of a European legal system to US class actions would not only grant a sort of immunity to the corporations organised under its own laws, but would also reduce the protection of its own citizens, even against foreign corporations. It has been noted above that what counts is the possibility to recognise a US class action judgment in the country of residence of absent class members in order to prevent individual actions in that country, and not the enforcement in the country where the seat of the company is situated. Indeed, enforcement abroad is often not necessary,

since the defendant in a class action will probably have sufficient assets in the US. The consequence is that a corporation organised under the laws of Germany, for example, will not prevent certification of a transnational class action against it, because the enforcement of an eventual damages award in Germany will not be considered necessary by US courts, since there will be other ways to execute the judgment and make the defendant pay. Instead, refusing to recognise a US class action judgment in Germany would be disadvantageous for German consumers, because they would not be able to benefit from the access to justice granted by US courts even against a non-German defendant. We can therefore conclude that, from a policy perspective, refusing to recognize a US class action judgment is not a good solution for European countries.[129]

[129] American legal doctrine adds that such a solution could jeopardise the deterrence effect of a US class action suit. Ilana T. Buschkin, 'The Viability of Class Action Lawsuits in a Globalised Economy. Permitting Foreign Claimants to Be Members of Class Actions Lawsuits in the US Federal Courts', 90 *Cornell Law Rev*iew 1563 (2005).