THE END OF THE AMERICAN *SHANGRI-LA*: CLOSING AMERICAN COURTS TO TRANSNATIONAL COLLECTIVE ACTIONS

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INTRODUCTION

Prior to 2010, American federal courts and procedural rules provided highly favorable opportunities for transnational litigants seeking access to justice in large-scale, complex litigation. These advantages derived in considerable measure from differences between civil law systems and the American common law regime. Thus, American substantive law often provided more expansive claims, remedies, and generous damages than might otherwise be available pursuant to civil law systems, including punitive damages. In addition, American venues provided procedural advantages largely unavailable in many civil law regimes, including but not limited to the class action device, liberal pleading and discovery rules, right to trial by jury, and attorney contingency-fee financing.

As a consequence, foreign litigants gravitated to American federal forums to pursue the resolution of complex litigation. During this era, the availability and advantages of proceeding in American courts caused commentators to suggest that, in the transnational securities fraud arena, American courts were the "*Shangri-la*" of litigation venues. However, much has changed in the past five years. In a series of landmark decisions, the United States Supreme Court has virtually closed the courthouse doors to transnational class litigation.

The Court's reversal of the open-forum trend represents a convergence of three different jurisprudential strands: (1) narrow construction of the American class action Rule 23 with regard to res judicata and enforcement of judgments as applied to foreign class members, (2) limitations on the extraterritorial subject matter reach of American courts in securities and human rights cases, and (3) limitations on the reach of personal jurisdiction doctrines over non-resident foreign plaintiffs and defendants. Moreover, the ability of American courts to sustain transnational class litigation has been greatly constrained by the American opt-out principle, which principle is rejected by most civil law countries.

Although American courts since 2010 have receded as the *Shangri-la* for transnational class litigation, it might be noted that other countries have stepped into this breach to afford new opportunities for the resolution of transnational class or collective litigation. Most notably, Canada seems to have replaced the U.S. as the *Shangri-la* for transnational securities litigation. The Netherlands, with their WCAM procedure, affords a novel means for transnational approval of settlement agreements. In addition, countries with newly adopted class or collective action statutes that incorporate an opt-in procedure afford a doctrinal solution to res judicata, enforcement of judgment problems.

(1) THE PROBLEM OF TRANSNATIONAL CLASS LITIGATION IN AMERICAN COURTS, GENERALLY. The primary means for adjudication of aggregate claims in the United States is through the American class action Rule 23. A transnational class action exists where plaintiffs pursue a class of claimants that embraces not only American citizens, but non-American foreign claimants allegedly injured by the defendant's conduct. A so-called "F" cubed litigation consists of an action where the plaintiffs are foreign (i.e., non-American citizens), the defendant or defendants are foreign, and the events giving rise to the claims in litigation arise outside the U.S. An array of securities, antitrust, and human rights cases have been based on such "F-cubed" scenarios. The majority of transnational classes seeking compensatory damages are pursued under Rule 23(b)(3), the American opt-out class.

(2) RES JUDICATA/ENFORCEMENT OF JUDGMENTS: When confronted with transnational class litigation, defendants typically oppose class certification of such transnational classes. Almost all American class action settle before trial or judgment. But, in either instance, defendants seek to secure a resolution of the claims of all class members, what is commonly denominated as "global peace." Unless class members opt-out, class members are bound by the judgment of the court. The failure of a class member to opt-out of a class has been construed as conferring implied consent to the court's jurisdiction, binding the class member to the judgment. In a transnational class, foreign plaintiffs may benefit from a favorable judgment, but may not be bound by an unfavorable result. Hence, if a foreign court fails to recognize an American class action settlement or judgment, this exposes the defendant to re-litigation of a foreign claimant's claim in some other country's legal system. The most common reason a plaintiff's home forum will not recognize an American class judgment is because the home country requires affirmative consent, or a class member to opt-in, in order to be bound by a class judgment.

Because American courts cannot assure finality of judgment for foreign claimants, defendants contend that courts should not certify classes that include foreign plaintiffs. For similar reasons, defendants argue that such class actions lack "superiority," a necessary requirement for certification of Rule 23(b)(3) class actions. Rule 23 itself provides little guidance concerning the propriety of including foreign claimants.

The problem of the determining the res judicata effect of an American transnational class action judgment, then, becomes intertwined with the threshold question whether the court should permit the action to be maintained. In evaluating a proposed transnational class action for certification, American courts focus on whether the foreign claimants' home jurisdiction would accord preclusive effect to an U.S. class judgment, which often is a highly speculative inquiry. Courts employ differing standards to assess the possible res judicata effects of class judgments in foreign courts, which inquiry typically entails dueling expert witness testimony on foreign law.

In addition to the problem of differing standards and speculation concerning foreign law, Professor Wasserman has argued that American courts improperly conflate the two separate questions of recognition of judgments and the preclusive scope of a judgment. She argues that the failure of courts separately to evaluation the preclusive effect of a judgment is potentially misleading, because even though a foreign court might recognize a judgment, it might also

determine not to give issue or claim preclusion to a judgment, thereby exposing a defendant to re-litigation.

Numerous academic commentators, recognizing the problems of res judicata/enforcement of American class action judgments have proposed various solutions. Most prominent is reversion to an opt-in system, a proposal endorsed by the American Law Institute.

(3) LIMITING THE EXTRATERRITORIAL JURISDICTIONAL REACH OF AMERICAN COURTS. In a series of three landmark decisions since 2010, the U.S. Supreme Court effectively closed American courts to transnational collective action by affirming a strong presumption against extraterritoriality. The limiting extraterritoriality principle was first announced in a transnational securities class action, which was reaffirmed and extended in an F-cubed transnational human rights litigation. In addition, the Court in 2014 rejected an expansive view of personal jurisdiction in another F-cubed class litigation, thus further restricting reach of American courts.

In 2010, the Court announced the presumption against the extraterritorial reach of American courts in *Morrison v. Nat'l Australia Bank*, a class action in a New York federal court for violations of the American securities laws. Australian investors sued, alleging that the bank had fraudulently written down the assets of a Florida mortgage lending company purchased by the bank. Shareholders were injured as a consequence of a drop in the value of their stock holdings. The Supreme Court held that § 10(b) of the securities laws does not provide a cause of action for foreign plaintiffs suing U.S. defendants for misconduct in connection with securities traded on foreign exchanges. The SEC Act focused not on where a deception originated, but on purchases and sales within the United States. Unless there is a clear indication of extra-territorial reach, Congressional legislation must be interpreted as meaning to apply only within U.S. territorial limits. The Court rejected prior tests for diving Congressional intent (the "effects" test or the "conduct" test). The Court held that such prior tests were complex in formulation, unpredictable in application, and not easy to administer.

In 2013, the Court in *Kiobel v. Royal Dutch Petroleum Co*. re-enforced the principle against the extraterritorial reach of American courts in a human rights class litigation. This litigation arose out of alleged human rights violations by the Abacha dictatorship in the Ogoni region of the Niger Delta, between 1992 - 95. The action was brought under the American Alien Torts Claim statute. Twelve Nigerian nationals sued three foreign oil company defendants in New York federal court, alleging the defendants had aided and abetted human rights violations. The plaintiffs alleged that the defendants had enlisted the Nigerian army in a widespread, systematic campaign of torture, extrajudicial executions, and prolonged arbitrary detention. These actions were aimed at suppressing grassroots movements protesting Shell Oil's operations in Ogoni.

The Supreme Court had to determine the jurisdictional reach of the Alien Tort Claim Act, which provides that "district courts shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States." A unanimous Court held that the presumption against extraterritoriality applies to claims under the

ATS, and that nothing in the statute rebuts this presumption. Nothing in the statute evinces a clear indication of extraterritorial reach. In addition, the historical background against which the ATS was enacted does not overcome the presumption.

In addition to re-affirming the presumption against extraterritoriality, the Court further counseled against unwarranted judicial interference in the conduct of foreign policy. Moreover, the Court found that there was no indication that the ATS was enacted to make the U.S. a "uniquely hospitable forum for enforcement of international norms." Finally, the Court expressed a concern with the possibility of U.S. citizens being haled into foreign courts for violations of the laws of nations.

In 2014, the Court in *Daimler AG v. Bauman* issued its most recent jurisdictional pronouncement further limiting the reach of American courts in F-cubed class or collective litigation. In this case, the Court answered whether an American court may exercise personal jurisdiction over a foreign company based because a subsidiary acted on its behalf in the California. The Court held that an American company cannot be sued for conduct occurring outside the United States and American courts do not have jurisdiction of such a claim.

Daimler AG is a German corporation with worldwide subsidiaries, including a wholly-owned U.S. Mercedes-Benz USA subsidiary. In 2004, survivors of Argentina's Dirty War sued DaimlerChrysler AG in California federal court, alleging that its subsidiary's activities gave rise to claims under the ATS, the Torture Victim Protection Act, and California tort law. The plaintiffs alleged kidnapping, torture, and murder arising from a labor dispute at an Argentine Mercedes-Benz plant. The plaintiffs contended that Mercedes-Benz officials reported labor leaders as subversives to the right-wing military junta, which conducted raids on plant workers.

The district court dismissed the suit for lack of personal jurisdiction, finding that DaimlerChrysler's wholly owned subsidiary Mercedes-Benz USA was not an agent of its owner, and that it would be unreasonable to exercise jurisdiction directly over DaimlerChrysler. Plaintiffs appealed. After an appellate court reversed and upheld jurisdiction, the U.S. Supreme Court unanimously reversed.

The Supreme Court held that the California court's assertion of personal jurisdiction over Daimler AG so "exorbitant" that it was an unconstitutional violation of the due process clause. In a lengthy opinion summarizing personal jurisdiction jurisprudence, the Court ended its historical account with the admonition to exercise general jurisdiction only when the defendant is "essentially at home" in the forum. Daimler could be subjected to general jurisdiction because its agent's activity in California merely established specific jurisdiction in California. The Court then implied that a corporation can only be "at home" and subject to general jurisdiction where it is incorporated or where it has its principle place of business. Lastly, the Court noted that recent cases have rendered had federal claims for human rights violations "infirm." Further, the Court gave weight to the Solicitor General's suggestion that "international rapport" might be damaged when US courts hear foreign corporations' foreign misdeeds.