

The Recognition in England and Wales of United States Judgments in Class Actions

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The U.S. class action is an unusual animal. To the extent that its “opt out” mechanism purports to bind class members who never affirmatively commenced proceedings in the United States, controversy surrounds the question whether such a judgment is entitled to recognition in England and Wales. Only if it is so entitled will the judgment be effective to prevent non-participant class members from (re)litigating their claims in England. This Article identifies the primary difficulty as being the existence of English common law rules that presuppose that only a defendant, or at least a party, to foreign proceedings would object to the recognition of a foreign judgment in England. It explores various potential avenues for resolving this dilemma of having defendant-based rules and a plaintiff-based problem. It concludes that the most satisfactory solution would be for the common law to develop a “representative action” criterion of recognition, and it proffers a formulation of such a requirement.

INTRODUCTION

It is relatively rare for the common law to offer no appellate guidance whatsoever on an issue of tremendous practical and theoretical importance. Yet that is precisely the position one finds oneself in when considering the potential recognition in England and Wales¹ of class action judgments rendered by the federal courts of the United States of America. In particular, the law on the following “core case”² has not even tentatively been resolved.

The defendant corporation issues securities to individuals domiciled around the world. It is alleged that, through the defendant’s fraudulent misrepresentations, these individuals have suffered financial loss. A number of these individuals (“the representative plaintiffs”) are selected to represent the other individuals (“the non-participants”) in a class action claim before a U.S. federal

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1. This Article is concerned solely with the position as to recognition in England and Wales, which share a single legal system. It does not address the positions as to recognition in the United Kingdom’s other legal systems – Scotland and Northern Ireland. For convenience, the terms “England” and “English” will hereinafter be used in place of “England and Wales” and “English and Welsh” respectively.

2. There will, of course, be other scenarios in which the recognition of a U.S. class action falls for consideration. However, for clarity of exposition, these scenarios are dealt with separately. *See infra* Part IV.

court. The non-participants are given adequate notice of the class action and are offered the chance to “opt out” of the class if they do not wish their claims to be determined in this manner. The non-participants fail to respond but, once the class action has proceeded to judgment in favor of the defendant, seek to (re)litigate their own claims before the English courts.

It remains undecided whether, as a matter of the English common law rules on the conflict of laws, the judgment of the federal court (insofar as it relates to the claims of the English non-participants) is entitled to recognition. Only if it is so entitled will the defendant be able to raise a plea of *res judicata*³ that will prevent the continuance of the English proceedings via a “cause of action estoppel.”⁴

The recognition question is of practical importance because the essential fact pattern of the core case is by no means uncommon. Indeed, although it has hitherto not reached the appellate courts of England and Wales, it has already fallen for consideration before at least one lower court in England⁵ and, indirectly, before numerous appellate courts in the United States.⁶ Consideration of the matter therefore bears relevance for lawyers on both sides of the Atlantic, particularly those involved in securities litigation concerning English plaintiffs and foreign private issuers with some connection to the United States.⁷

The issue is of theoretical importance because it raises foundational questions about the English common law requirements for the recognition of foreign judgments. If and when it reaches the appellate courts in England, it will constitute a case of first impression of the most genuine kind.⁸ This novelty stems from the English rules’ assumption that it will be the *defendant*, or at least a *party*, seeking to avoid the recognition of a judgment procured abroad by the plaintiff. The courts that developed the rules clearly

3. By pleading this rule of evidence, the defendant alleges that the claim before the English court is, literally, “a thing already adjudicated upon.” It forms the basis for a defense of “estoppel” or, in U.S. terminology, “preclusion.” John C. L. Dixon, *The Res Judicata Effect in England of a US Class Action Settlement*, 46 INT’L & COMP. L. Q. 134, 139 (1997) (“*Res judicata* is a rule of evidence which provides the basis for a defence of estoppel.”).

4. The equivalent of the U.S. notion of “claim preclusion.”

5. *Campos v. Ky. & Ind. Terminal R.R. Co.*, (1962) 2 Lloyd’s Rep. 459 (Q.B.) (Eng.).

6. See *infra* text accompanying notes 124–141. At the time of writing, the issue looks set to arise again in a case recently filed in the U.S. District Court for the Southern District of New York. *In re Royal Bank of Scotland Grp. Plc. Sec. Litig.*, 09 Civ. 300 (S.D.N.Y.) (DAB).

7. The act of trading on a United States stock exchange generally suffices for federal courts to accept subject matter jurisdiction over such claims, even if the shares are bought elsewhere (such as in England). The federal courts have also been willing to accept subject matter jurisdiction in broader circumstances. For an example, see *infra* text accompanying notes 129–133. Throughout this Article, it is assumed that the U.S. court has validly assumed subject matter jurisdiction, both as a matter of U.S. law and from an English conflict of laws perspective. On the latter requirement, see *infra* text accompanying note 164.

8. In other words, this is not simply a matter of determining whether a former decision should be extended to cover different factual circumstances. As Dixon puts it, “[t]he law in this area is difficult to analyse as there is no case that has really come close to considering this issue.” Dixon, *supra* note 3, at 150.

never envisaged a situation in which the plaintiff⁹ in the foreign proceedings would object that the foreign court was not one of competent jurisdiction over her.¹⁰ Resolution of the issue therefore seems to require a much deeper and more subtle inquiry into the nature and purposes of the existing defendant-based rules than courts and academics¹¹ have hitherto given it.

The present Article attempts to provide just such an inquiry. At the very least, it strives to posit a clear framework for considering the novel conflict of laws issue presented by the U.S. class action. To that end, five particular areas will be focused upon. Part I outlines the nature and operation of the U.S. class action, with a particular emphasis on how the non-participants are brought within the class as a matter of U.S. law, and on how this serves the purposes behind the class action device. Part II provides an analogous summary of the available group litigation procedures in England, with a view to isolating differences that might affect the decision on recognition of a U.S. class action judgment in England. Part III sets out the English common law rules on the recognition of foreign judgments and the difficulties presented by U.S. class actions in this regard. It highlights as the major difficulty the existence of rules presupposing *defendants*, or at least *parties*, objecting to recognition. Part IV then deals with a number of possible variations on the core case, each of which throws up an additional conflict of laws issue. Part V returns to the core case in order to summarize and critique the various suggestions that have been made for resolving the dilemma of having defendant-based rules and a plaintiff-based problem. Finally, Part VI suggests a method for developing a new, “representative action” criterion that can be applied to U.S. class action judgments. In so doing, the Article attempts to illuminate a method by which the English courts could both facilitate the beneficial effects of the class action institution and enforce their traditional substantive and procedural interests in not recognizing certain foreign judgments.

I. GROUP LITIGATION IN THE UNITED STATES

A. *Policy Underpinning the U.S. Class Action*

The class action constitutes a procedural device for the aggregation of claims that, economically speaking, could not or would not otherwise be litigated. The process of aggregation “creates something of an economy of

9. Except for the situation where a party sues for a declaration of non-liability abroad. In that scenario, her role is effectively that of a plaintiff for recognition purposes, and it is therefore acceptable to allow the natural plaintiff (the party who has the primary cause of action) to object to recognition in England using defendant-based rules.

10. Ordinarily, the plaintiff will have submitted to the foreign court’s jurisdiction by starting her case abroad.

11. Two academic articles have focused specifically upon the essential question of the core case. See Dixon, *supra* note 3; Jonathan M. Harris, *The Recognition and Enforcement of US Class Action Judgments in England*, 22 *CONTRATTO E IMPRESA/EUROPA* 617 (2006).

scale, hopefully, whereby a large number of claims can be resolved with, supposedly, greater efficiency and greater dispatch than resolving each of the claims individually.”¹² As then-Justice Rehnquist had occasion to note for the U.S. Supreme Court:

Class actions . . . may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. For example, this lawsuit involves claims averaging about \$100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available.¹³

Although the language of a “day in court” is suggestive of a compensatory function,¹⁴ the institutional mechanism of the class action really strives to secure deterrence,¹⁵ and perhaps even increase public good.¹⁶ Put simply, “[w]ithout representative litigation, wrongdoers will escape liability so long as they can spread the harm in small quantities among large groups of people.”¹⁷ By facilitating group litigation, therefore, a legal system is able to provide powerful incentives for defendants to internalize the costs of their enterprises.¹⁸

It is imperative to grasp the importance of this non-compensatory rationale for class actions. Failure to do so will all too often lead to the “fundamental error” of attempting “to treat entrepreneurial litigation as if it were essentially the same as standard litigation, in which the client exercises sub-

12. George Priest, *Economics of Class Actions*, 9 KAN. J.L. & PUB. POL’Y 481, 481 (2000).

13. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985).

14. This commonly gives rise to a view that class actions address a “collective action” problem. In other words, the class action is said to be required in order to overcome the problem that individual plaintiffs tend to lack incentives to bring litigation that will serve the broader interests of the group. See Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991); see also Mary J. Davis, *Toward the Proper Role for Mass Tort Class Actions*, 77 OR. L. REV. 157, 169 (1998) (arguing that the class actions procedure has “the substantive concern of affording a meaningful remedy to large numbers of otherwise disenfranchised victims of breached obligations”) (footnote omitted).

15. David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 565 (1987) (arguing that class actions have the “potential for reducing litigation costs and burdens, and, consequently, enhancing the system’s capacity to achieve its compensation and deterrence objectives”) (footnote omitted).

16. William B. Rubenstein, *Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC L. REV. 709 (2006) (defending the small claims class action on a theory of positive externalities). But see RACHAEL P. MULHERON, *THE CLASS ACTION IN COMMON LAW LEGAL SYSTEMS: A COMPARATIVE PERSPECTIVE*, 63–66 (2004), (explaining that the deterrence rationale for class actions does not figure prominently in all jurisdictions, particularly Australia).

17. William B. Rubenstein, *Finality in Class Action Litigation: Lessons from Habeas*, 82 N.Y.U. L. REV. 790 (2007) (citing Rubenstein, *Why Enable Litigation?*, *supra* note 16, at 715–20).

18. If one is uncomfortable with the language of economics, the problem of defendants escaping liability can be put in moral terms. See Richard H. S. Tur, *Litigation and the Consumer Interest; the Class Action and Beyond*, 2 LEGAL STUDIES 135, 159 (1982) (describing as “obviously. . . unacceptable” the assumption “that the law-breaker should be entitled to his unjust enrichment where individuals do not assert their rights by way of litigation”).

stantial influence.”¹⁹ In other words, class action cases differ significantly from individual litigation precisely because the non-participants are generally *not* looking for their day in court. To the contrary, class action cases in the United States are driven by the plaintiffs’ bar, whose members actively seek out cases that will return a sizeable contingency fee. It is often the case that successful class action plaintiffs and non-participants end up with a quantum of damages not far above zero.²⁰ They may even end up with a lower quantum of damages per person than individual litigation would have returned.²¹ All this is not to say, of course, that the *end* of the class action is to fill the pockets of private lawyers. Rather, these attorney incentives constitute the *means* by which the class action device seeks to further a social goal, namely a reduction in the ease with which defendants can externalize the social costs of their activities.

The issue is raised at this early stage because of the implications that it may carry for the decision of a foreign court as to the recognition of a class action judgment. Most significantly, the adjudicating court must be alert to the danger of attempting to carve out the individual claims within a class action. Particularly in the “core case” outlined above,²² where the defendant has successfully defended the U.S. class action suit, the non-participants will have obvious incentives to portray the U.S. court as having rendered *multiple* judgments against plaintiffs who enjoyed various degrees of participation and of representation. The court adjudicating upon recognition must bear in mind that the nature of the U.S. class action, in terms of its means and its ends, militates against too readily accepting the portrait of a thousand claimants having each been denied their individual day in court.²³ As a result, in adjudicating upon the recognition of a U.S. class action judgment, a court will necessarily be dealing with a very different animal from the run-of-the-mill foreign judgment. With this in mind, it will be illustrative to turn to the rules governing the U.S. class action, to gain an understanding of how it proceeds from suit to judgment.

19. Cf. Macey & Miller, *supra* note 14, at 3 (making a similar observation in relation to the regulation of plaintiffs’ attorneys).

20. See Rubenstein, *Why Enable Litigation?*, *supra* note 16, at 709 (“[P]laintiffs in small claims class actions do nothing, they do that nothing far from the courtroom, and what they collect is likely to be about as close to nothing as was the effort they put in to collecting it.”).

21. See MULHERON, *supra* note 16, at 51 (“[C]ertifying a class action may well entail the proportionality of lower compensatory awards.”).

22. See *supra* text accompanying note 2.

23. See Rubenstein, *Why Enable Litigation?*, *supra* note 16, at 19 (“[M]ost observers, including lawyers and judges, believe that a class case involves a group of people descending on the courthouse *en masse* and most fail to appreciate that in fact representative litigation is precisely the opposite.”).

B. *The Basic U.S. Rules*

The primary role of the U.S. court lies in the process of “certification” of the class action,²⁴ which constitutes a purely procedural stage in the progress of the litigation.²⁵ The reason for this is that U.S. class actions almost invariably settle without litigation on the merits. Owing to the “nuclear bomb assured destruction form of risk” experienced by defendants facing aggregated claims, “the defendant tends to settle out those cases that the defendant might lose, even possibly might lose.”²⁶

The court’s authority for the process of class certification derives from Rule 23 of the Federal Rules of Civil Procedure,²⁷ which also sets out the court’s obligations as to class certification. What follows is a skeleton outline of the prerequisites for (and types of) class actions, the nature of the certification order, the requirements of notice to be given to non-participants, and the court’s role as to the conduct of class action proceedings and settlements. Some flesh then is added to the skeleton insofar as it relates to bringing non-participants within the class. The purpose of generating this image is to provide the base level of familiarity that will be necessary for a foreign court to render an informed decision as to the potential recognition of the class action judgment.

1. *The Class Action Skeleton*

Rule 23(a) sets out, as prerequisites for a class action suit, the four requirements of “numerosity,”²⁸ “commonality,”²⁹ “typicality”³⁰ and “adequacy of representation.”³¹ Furthermore, a class action may only be certified if one of the further requirements in Rule 23(b) is established. In essence, the class action must be:

- (i) necessary to avoid the risk of setting incompatible standards for defendants,³²

24. See Priest, *supra* note 12, at 482 (“[T]he certification process . . . becomes the only avenue for a court to rule in a way that is relevant to the ultimate outcome of the case.”).

25. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 156 (1974).

26. See Priest, *supra* note 12, at 482.

27. FED. R. CIV. P. 23. It was substantially amended in 1966. See Advisory Committee’s Notes to Rules of Civil Procedure, 39 F.R.D. 69, 95–110 (1966); see also John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419 (2003).

28. The class must be “so numerous that joinder of all members is impracticable.” FED. R. CIV. P. 23(a)(1).

29. There must be “questions of law or fact common to the class.” FED. R. CIV. P. 23(a)(2).

30. The “claims or defenses of the representative parties” must be “typical of the claims or defenses of the class.” FED. R. CIV. P. 23(a)(3).

31. The “representative parties” must “fairly and adequately protect the interests of the class.” FED. R. CIV. P. 23(a)(4).

32. FED. R. CIV. P. 23(b)(1)(A).

- (ii) necessary to avoid the risk of impeding or impairing the interests of those not party to individual claims (typically, by early individual claims exhausting the defendant's funds),³³
- (iii) necessary to secure injunctive or declaratory relief for the class as a whole,³⁴ *or*
- (iv) "superior to other available methods for fairly and efficiently adjudicating" questions of law or fact that are common to the class members and that "predominate over any questions affecting only individual members."³⁵

Once a party has sought to invoke the class action mechanism, the court is required, under Rule 23(c), to determine "whether to certify the action as a class action."³⁶ If it decides in the affirmative, the court's "Certification Order" "must define the class and the class claims, issues, or defenses, and must appoint class counsel."³⁷ The class certification order may be appealed if a petition is filed within 14 days after the order is entered.³⁸

The court is empowered to "direct appropriate notice to the class" for class actions justified under rationales (i) to (iii), above, and is *required* to do so for class actions justified on the "predominance" and "superiority" basis of (iv). In the latter scenario, "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."³⁹

In addition to the procedure outlined above, two additional features of the class action merit brief attention. First, the conducting court is empowered, under Rule 23(d), to issue additional orders designed to streamline proceedings and to notify vulnerable class members of potentially prejudicial developments. Secondly, the settlement of a class action may proceed "only with the court's approval" and in accordance with the procedure defined in Rule 23(e). Once a settlement has been agreed to and approved by the court, and subjected to a limited range of collateral attacks,⁴⁰ it is left to the class counsel to administer the settlement fund by distributing any damages amongst the representative plaintiffs and the non-participants.⁴¹

33. FED. R. CIV. P. 23(b)(1)(B).

34. FED. R. CIV. P. 23(b)(2).

35. FED. R. CIV. P. 23(b)(3). This rule also provides a non-exhaustive list of factors pertinent to this determination.

36. FED. R. CIV. P. 23(c)(1)(A).

37. FED. R. CIV. P. 23(c)(1)(B).

38. FED. R. CIV. P. 23(f).

39. FED. R. CIV. P. 23(c)(2)(B).

40. See generally Rubenstein, *Finality in Class Action Litigation*, *supra* note 17, at 809–20.

41. This process can generate all manner of problems. In particular, since the defendant generally loses interest once the settlement quantum is determined, there exists a real danger that the settlement fund becomes something of a general welfare pool distributed according to "communitarian norms" and the sympathies of the class counsel, rather than a pot from which allocation can be made based upon individual plaintiff desert or "justice norms." See Priest, *supra* note 12, at 484–86.

2. *Fleshing Out the Skeleton: The “Opt Out” Mechanism*

Having sketched a rough skeleton of the class action, it will be helpful to add some flesh to an important part of the beast. In particular, it is important to understand the process by which non-participants become part of the class for which the representative plaintiffs are to stand in court.

As set out above, the requirements of notice embodied in Rule 23(c)(2) vary according to the type of class action at issue. Notice to non-participants is mandatory only as regards type 23(b)(3) (preponderance and superiority) class actions.⁴² However, the requirements of this mandatory notice are set out in some detail.⁴³

As is clear from element (v) of Rule 23(c)(2)(B), the Federal Rules of Civil Procedure clearly contemplated an “opt out” mechanism for bringing non-participants within the class. For a time, it was uncertain whether this provision was compatible with the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.⁴⁴ However, in its celebrated decision in *Phillips Petroleum Co. v. Shutts*,⁴⁵ the U.S. Supreme Court decisively rejected the argument that the Kansas state courts should not have been able to exert jurisdiction over the plaintiffs’ claims in the absence of sufficient minimum contacts with Kansas.⁴⁶ Although due process might have been violated had non-Kansas U.S. citizens been forced to *defend* themselves in Kansas, “[t]he burdens placed by a State upon an absent class-action plaintiff are not of the same order or magnitude as those it places upon an absent defendant.”⁴⁷ Indeed, the Supreme Court affirmatively stated that the nature and purposes of the class action would be undermined if an “opt in” mechanism were required:

Requiring a plaintiff to affirmatively request inclusion would probably impede the prosecution of those class actions involving an aggregation of small individual claims, where a large number

42. The Rule 23(b)(3) class action is the type typically litigated in our “core case.” Consideration of the potential recognition of the other Rule 23 class action types is therefore postponed until *infra* text accompanying notes 260–267.

43. FED. R. CIV. P. 23(c)(2)(B) provides that:

the notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members

44. The Fourteenth Amendment provides, in relevant part, that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1.

45. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

46. The non-participants’ chose in action (their right to sue) constituted a constitutionally-protected property right. *Id.* at 807 (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)). As this property right is forever extinguished via *res judicata*, the question of due process was brought into play.

47. *Id.* at 808.

of claims are required to make it economical to bring suit The plaintiff's claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually, nor would he affirmatively request inclusion in the class if such a request were required by the Constitution.⁴⁸

The "essential question" was rather "how stringent the requirement for a showing of consent will be," and the answer given (on the facts of *Shutts*) was that "a fully descriptive notice . . . sent first-class mail to each class member, with an explanation of the right to 'opt out,' satisfies due process."⁴⁹

For present purposes, the essential point is a simple one: the U.S. class action operates by virtue of an "opt out" mechanism, the effect of which is that non-participants can be subjected to the binding effect of a class action judgment or settlement without having taken any positive steps to bring themselves within the class. This is the case irrespective of whether the class action forum would have had personal jurisdiction over the non-participants had they been sued as defendants in non-class action litigation. All that is required is that the non-participants are given notice of the class action, the ability to opt out, and, of course, adequate representation. As Justice Rehnquist put it, "[u]nlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection."⁵⁰

The Supreme Court in *Shutts* therefore affirmed the non-participants' "right to do nothing."⁵¹ Given a sufficiently enterprising attorney, a class action may, and often does, go ahead without the non-participants lifting a finger. The nature and purposes of a class action are used so as to dispense with the conventional idea of personal jurisdiction as regards non-participants in class action suits.

48. *Id.* at 812–13 (citation and footnote omitted).

49. *Id.* at 812. The precise test formulated by the Supreme Court was as follows:

The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' . . . The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.

Id. (citations omitted).

50. *Id.* at 810.

51. See Rubenstein, *Finality in Class Action Litigation*, *supra* note 17, at 827.

II. GROUP LITIGATION IN ENGLAND AND WALES

Following the brief excursion into the nature of the U.S. class action, it makes sense to consider the availability of group litigation procedures in England and Wales. Although the group litigation phenomenon is far less popular than it is in the United States,⁵² it comes as little surprise, given the rationales for class actions, that there exist English devices for the aggregation of small or complex claims. As one commentator has put it, class actions are “a concomitant of a complex society.”⁵³

A brief analysis of the available generic⁵⁴ English procedures, including a comparison with the U.S. mechanisms, will shed further light upon the unusual creature that is the class action judgment. Although neither the U.S. position, nor the English domestic approach, necessarily dictates any particular result in terms of the English conflict of laws,⁵⁵ a fuller understanding of both domestic positions can only assist in reaching an informed decision regarding the international dimension of recognition. Indeed, to the extent that this Article is theoretical and concerned with identifying ideal-type approaches to the question of recognition, lessons may be drawn from how both the U.S. and the English courts deal with the question of binding non-participants. Furthermore, to the extent that English domestic law facilitates aggregate litigation, it may well militate against certain public policy objections to recognition.⁵⁶

A. Representative Actions

The English Civil Procedure Rules (“CPR”) have long facilitated the aggregation of claims via the “representative action.” Rule 19.6 of the CPR, entitled “Representative parties with same interest,” provides that:

- (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,

52. Partly because of a belief that the class action lacks the flexibility to deal adequately with the potential diversity of group litigation, see MULHERON, CLASS ACTION IN COMMON LAW LEGAL SYSTEMS, *supra* note 16, at 69, and partly because of a fear of “U.S.-style” litigation, see *id.* at 72.

53. *Id.* at 3.

54. Independent regimes also exist to govern group litigation in the following specific fields: antitrust (Competition Act 1998, c. 41, s.47B); misleading advertising (Council Directive 84/450/EEC of 10 September 1984, art.4); consumer protection (Council Directive 93/13 of 5 April 1993, art.7; Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998, art.3; and Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005, art.11). See Rachael Mulheron, *Justice Enhanced: Framing an Opt-Out Class Action for England*, 70 MOD. L. REV. 550, 551 nn.17–18 (2007).

55. See Decl. of Edwin Peel at 9, *In re Royal Ahold N.V. Sec. & Erisa Litig.*, 437 F. Supp. 2d 467 (2005) (Civ. No. 1:03-MD-01539).

56. See Harris, *supra* note 11, at 640 (“[T]he approach of English courts in the domestic setting is indicative of the English court’s views as to acceptable standards of procedural protection, and suitable methods of efficiently bringing multi-party litigation.”).

by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.

. . . .

- (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 court⁵⁷

This mechanism undoubtedly provides for a form of representative litigation capable of binding non-participants via *res judicata*. Furthermore, it is somewhat broader than the Rule 23(b)(3) class action in the sense that non-participants are not even granted the ability to opt out of the class; there is no requirement of notice. Although the English representative action “may only be enforced by or against” the non-participants “with the permission of the court,” this goes to enforcement rather than to recognition of the decision as *res judicata*.⁵⁸ As one judge put it, “[t]he plaintiff is the self-elected representative of the others. He has not to obtain their consent. It is true that consequently they are not liable for costs, but they will be bound by the estoppel created by the decision.”⁵⁹

In exploring the contemporary relevance of this restriction, the present discussion is bifurcated. First, it considers how the early judicial approach to rule 19.6 deprived the provision of much of its utility.⁶⁰ Secondly, it analyzes the more recent judicial attempts to free the representative rule from this stranglehold. It is important to analyze the issue in this manner because the modern academic tendency has been to minimize the contemporary rele-

57. Civil Procedure Rules, 2000, S.I. 1998/3132, R. 19.6 (U.K.). Before being placed in its current location by the Civil Procedure (Amendment) Rules 2000, S.I. 2000/221, rule 9, schedule 2, the “representative rule” was to be found in the Rules of the Supreme Court 1965, Order 15, rule 12. Prior to that, its home was in the Rules of the Supreme Court 1883, Order 16, rule 9. Its life began as rule 10 of the Rules of Procedure scheduled to the Supreme Court of Judicature Act 1873 (Eng.) 36 & 37 Vict., c.66, rule 10. See MULHERON, CLASS ACTION IN COMMON LAW LEGAL SYSTEMS, *supra* note 16, at 77 n.60.

58. Irish Shipping Ltd. v. Commercial Union Assurance Co. Plc. (*The Irish Rowan*), (1991) 2 Q.B. 206 at 238–39 (C.A.) (Eng.) (“[T]he effect of rule 12(5) is merely to protect the member of the class sued from having the judgment enforced against him. The judgment is still valid for other purposes such as a counterclaim or other process in which that person may wish to rely upon allegations which will be denied to him by the findings of the judgment, the issues being *res judicata* for such purposes.”) (Purchas L.J.) (speaking in relation to an earlier formulation of the rule, namely Rules of the Supreme Court 1965, Order 15, rule 12(5)). On the enforcement/recognition distinction in general, see *infra* note 155.

59. Markt & Co. Ltd. v. Knight Steamship Co. Ltd., (1910) 2 K.B. 1021 at 1039 (C.A.) (Eng.) (Fletcher Moulton L.J.). However, the representative action contains a rather restrictive requirement that each of the potential plaintiffs have the “same interest in a claim.” Civil Procedure Rules, 2000, S.I. 1998/3132, R. 19.6(1) (U.K.).

60. MULHERON, CLASS ACTION IN COMMON LAW LEGAL SYSTEMS, *supra* note 16, at 83 (describing the early attitude of English judges as having “rendered the representative procedure almost useless”).

vance of the early cases.⁶¹ A more intellectually honest presentation recognizes that it is in the nature of the common law that organic development leaves traces of the past. Even a modern and self-avowedly liberal approach will, to some extent, be hampered by the residues of a bygone age.⁶²

1. *Early Interpretations of the “Same Interest” Requirement*

The early approach of the English courts to the “same interest” requirement confined the representative action to claims in which all the plaintiffs had an interest in a common fund or sued upon a private statute, or in which the remedy sought was non-monetary (such as an injunction).⁶³ The key early twentieth-century case is *Markt v. Knight Steamship*.⁶⁴ The plaintiff shippers sent a quantity of cargo aboard the defendants’ steamship, *Knight Commander*, which was traveling from New York to Japan. Suspecting it of carrying war materials for the Russo-Japanese war, a Russian warship captured and sank the vessel. The plaintiffs, suing on their own behalf and as representatives for forty-four others who had shipped goods on board the ship, sought “damages for breach of contract and duty in and about the carriage of goods by sea.”⁶⁵ The English Court of Appeal held that a representative action did not lie, and articulated three reasons for this conclusion.

61. See *id.* at 78 (“[I]n order to provide the rule with more utility, various English cases have sought to interpret the representative rule as containing elements of the class action, a wider device than the strict representative action, under which (for example) a commonality, rather than identity, of interest is sufficient. Such judicial interpretations may stretch the boundaries of the representative rule’s language, but reflect the more fully-developed and sanctioned features of a class action regime.”). From these two curiously-phrased sentences, it is difficult to avoid the sense that Mulheron’s descriptive analysis is being influenced by her own normative agenda. See generally Mulheron, *Justice Enhanced*, *supra* note 54.

62. See R. H. Helmholz, *Comment: Recurrent Patterns of Family Law*, 8 HARV. J.L. & PUB. POL’Y 175 (1985) (observing, in the context of family law, a recurrent pattern according to which unexpected consequences may flow from the indirect reformist approach of expanding the scope of legal rules, whilst simultaneously narrowing the breadth of historical public policy objections). This is not to say, of course, that the common law is to be enslaved by the remnants of archaic procedural requirements. See *United Australia Ltd. v. Barclays Bank Ltd.* [1941] A.C. 1 (H.L.) 29 (appeal taken from Eng.) (U.K.) (“When these ghosts of the past stand in the path of justice clanking their mediæval chains the proper course for the judge is to pass through them undeterred.”) (Lord Atkin). A further reason for setting out the English mechanisms in some detail is that it is quite normal for a student in England to go through law school with absolutely *no* awareness of the available mechanisms for conducting group litigation. This has the psychological effect of inducing a belief in an individual’s absolute entitlement to a “day in court,” which runs contrary to the essence of group litigation. See Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1058 (2002) (“A class action is simply, when all else is stripped away, a state-created procedural device for extinguishing claims of individuals held at quite a distance from the ‘day in court’ ideal of Anglo-American jurisprudence.”).

63. See The Hon. Michael Kirby, *Foreword* to PETER CASHMAN, *CLASS ACTION LAW AND PRACTICE*, at v (2007) (averting to a judicial “hostility . . . to a new way of organising litigation before the courts”); see also MULHERON, *CLASS ACTION IN COMMON LAW LEGAL SYSTEMS*, *supra* note 16, at 67–68 (noting a “high degree of resistance to the notion of representative actions”).

64. *Markt & Co.*, (1910) 2 K.B. at 1021.

65. *Id.* at 1022. The plaintiffs alleged that the shipowners were in breach of contract for carrying contraband of war.

The Court of Appeal's first reason for denying that the "same interest" requirement had been met was that the shippers all had separate contracts with the defendant shipowner, such that there was no common source of right.⁶⁶ The second reason was that the shippers were seeking damages, which were necessarily personal to each shipper.⁶⁷ The Court of Appeal's third reason was that the defendants might be able to raise different defenses against different shippers.⁶⁸ It was manifestly not sufficient "that the claims are alike in nature, and that the litigation in respect of them will have much in common."⁶⁹ Fletcher Moulton L.J. explained why he considered the plaintiffs to have been in "fundamental error" in trying to bring their claims as a representative action:

I can conceive no excuse for allowing any one shipper to conduct litigation on behalf of another without his leave, and yet so as to bind him. The proper domain of a representative action is where there are like rights against a common fund, or where a class of people have a community of interest in some subject-matter It is entirely contrary to the spirit of our judicial procedure to allow one person to interfere with another man's contract where he has no common interest.⁷⁰

As a result, *Markt* effectively "precluded use of the representative action in proceedings for damages for breach of separate and individual contracts"⁷¹ and has been described as a "set back"⁷² for representative action law. However, two features of this decision are worth stressing.

First, the Court of Appeal did not regard the representative action as unacceptable *per se*. It had a proper role to play, for example, where the representatives and the non-participants possessed "like rights against a

66. *See id.* at 1029–30 ("[I]n the present case there is no common origin of the claims of those who shipped goods on board the *Knight Commander*—the contracts were constituted by the bills of lading, which manifestly might differ much in their form, and as to the exceptions, and probably would vary somewhat according to the nature of the goods shipped.") (Vaughan Williams L.J.); *see also id.* at 1039–40.

67. *See id.* at 1035 ("[W]here the claim of the plaintiff is for damages the machinery of a representative suit is absolutely inapplicable. The relief that he is seeking is a personal relief, applicable to him alone, and does not benefit in any way the class for whom he purports to be bringing the action."); *see also id.* at 1040–41 ("Damages are personal only. To my mind no representative action can lie where the sole relief sought is damages, because they have to be proved separately in the case of each plaintiff, and therefore the possibility of representation ceases.")

68. *See id.* at 1040 ("Defences may exist against some of the shippers which do not exist against the others, such as estoppel, set-off, &c., so that no representative action can settle the rights of the individual members of the class.")

69. *Id.*

70. *Id.* Fletcher Moulton L.J. was also troubled, however, by the issue of fairness to the *defendants*. He suggested that joinder would have been "the proper course" and therefore to allow the various shippers (each with his separate contract with the defendants) to "evade" liability for costs by means of a representative action would be "unfair to the defendants." *Id.* at 1037–38.

71. CASHMAN, *supra* note 63, at 64.

72. *Id.* at 66. An Australian judge, Justice Kirby, also described the decision as a "set-back." *See Esanda Fin. Corp. v. Carnie*, (1992) 29 NSWLR 382 at 395 (Aust.).

common fund, or where a class of people have a community of interest in some subject-matter.”⁷³ Secondly, the key objection to the use of the representative rule, as expressed by Fletcher Moulton L.J., was that it would allow a party to conduct litigation on behalf of a non-participant “without his leave, and yet so as to bind him.”⁷⁴ It was considered unacceptable that, in circumstances where the non-participants’ legal rights arose from independent contracts, those rights could be subject to *res judicata* without even the non-participants’ *knowledge* of a suit. *Markt* does not speak to the situation in which the non-participants are given notice, and the ability to opt out, of any claim potentially determinative of their legal rights. Thus, even if *Markt* could be taken as evidence of some general English public policy, that policy would not necessarily be averse to the U.S. class action. Furthermore, the judicial hostility shown by the majority⁷⁵ of the Court of Appeal in *Markt* may well have been overtaken by subsequent developments.

2. Modern Approach to the “Same Interest” Requirement

a. Relaxation of the “Seeking Damages” Restriction

In the crucial case⁷⁶ of *Prudential Assurance v. Newman Industries*,⁷⁷ Vinelott J. sought to alleviate much of the strictness put in place by the *Markt* decision. The plaintiff was a shareholder in the first defendant corporation. The plaintiff sued in its own capacity and on behalf of other shareholders, alleging that the second and third defendants (respectively, the chairman and chief executive, and the vice-chairman, of the first defendant) had sent to shareholders a tricky and misleading circular that the second and third defendants could not honestly have believed to be true.

The plaintiff alleged that it and the represented shareholders had suffered damage as a result of the majority vote obtained by means of the fraudulent circular. The defendants, relying on *Markt*, objected that a plaintiff could not represent a class in cases, like the present, where each member of the

73. *Markt & Co.*, (1910) 2 K.B. at 1040.

74. *Id.* (emphasis added).

75. There was a dissenting voice. Buckley L.J. considered it obvious that it could be “no objection to a representative action that the rights as between each of the represented parties and the defendants arise under a separate contract made by one party with the defendants to which no other of them is a party. That is so in most if not in every representative action.” *Id.* at 1044 (Buckley L.J.). As to the damages point, he stated that all that was required was “that in a representative action the plaintiff must be in a position to claim some relief which is common to all, but it is no objection that he claims also relief personal to himself.” *Id.* at 1045. To the extent that different defenses might have existed against different shippers, Buckley L.J. saw the obvious solution as lying in subsequent proceedings on those matters. The various shippers therefore had “exactly the same interest,” namely in the shipowners observing “the duty of not shipping also goods which were contraband of war.” *Id.* at 1047.

76. See MULHERON, CLASS ACTION IN COMMON LAW LEGAL SYSTEMS, *supra* note 16, at 87 (referring to it as a “ground-breaking case”). It should be noted that much of the reasoning parallels that of the dissenting Buckley L.J. in *Markt & Co.*, (1910) 2 K.B. 1021, particularly insofar as subsequent proceedings are relied upon to resolve the difficulties of differing measures of damages and different defenses. See *supra* note 75.

77. *Prudential Assurance Co. v. Newman Indus. Ltd.*, [1981] Ch. 229 (Eng.).

class alleged a separate cause of action founded in tort. However, Vinelott J. considered that there was no such barrier, and stated that the case law established only two restrictions on the availability of a representative action in tort:

First, no order will be made in favour of a representative plaintiff if the order might in any circumstances have the effect of conferring on a member of the class represented a right which he could not have claimed in a separate action or of barring a defense which the defendant could have raised in such proceedings. Secondly, no order will be made in favour of a representative plaintiff unless there is some element common to the claims of all members of the class which he purports to represent.⁷⁸

Vinelott J. expanded upon this second point, so as to translate the “same interest” requirement into a “common ingredient” test:

The second condition is that there must be an “interest” shared by all members of the class . . . this condition requires, as I see it, that there must be a common ingredient in the cause of action of each member of the class.⁷⁹

Vinelott J. then identified a third and final condition to the ability of a plaintiff to bring a representative action on behalf of a class, each member of which is alleged to have a separate cause of action in tort. To ensure that the representative plaintiff is truly suing for the benefit of the class, the court must be satisfied that the common issues “will be decided after full discovery and in the light of all the evidence capable of being adduced in favour of the claim.”⁸⁰

The end result was that the plaintiff in *Prudential Assurance* was entitled to bring a representative action for declarations that the defendants had conspired to injure the shareholders or to commit an unlawful act,⁸¹ and to claim damages in its personal capacity only.⁸² To the extent that the other class members wished to claim damages, they would have to do so in separate proceedings, in which they could rely on the representative action decla-

78. *Id.* at 251–52.

79. *Id.* at 255.

80. *Id.*

81. *See id.* at 256. The specific declarations were:

[F]irst, that the circular was tricky and misleading; secondly, that the individual defendants conspired to procure its circulation in order to procure the passing of the relevant resolution; and thirdly, that in so doing they conspired either to injure the plaintiff and the other shareholders at that date or to commit an unlawful act, or to induce a breach by the first defendant company of its contractual duty to the shareholders.

82. *See id.* (“The court cannot in a representative action make an order for damages, though, of course, the plaintiff in its own non-representative capacity will be entitled to pursue its claim for damages.”).

rations as *res judicata*.⁸³ It was those declarations that “constitute[d] the common element of any claim by any member of the class for damages for conspiracy.”⁸⁴

b. Relaxation of the “Separate Contracts” Restriction

A development paralleling the *Prudential Assurance* decision on the “seeking damages” limitation took place in *The Irish Rowan*⁸⁵ with respect to the “separate contracts” restriction. The plaintiffs were shipowners who brought a representative action to recover an indemnity for certain cargo claims they had paid out. They brought an action against the lead underwriter and one liability insurer, who were sued “on their own behalf and on behalf of all other liability insurers” (the seventy-seven insurers who had subscribed to the policy and who were based in various jurisdictions worldwide), claiming from them “and those whom they represent in the respective proportions due from them as subscribing underwriters” the sums owed.⁸⁶ Each of the twelve underwriters had a separate contract with the plaintiff, but each contract contained a “lead underwriter clause” to the effect that each insurer undertook, among other things, to be bound by acts of the leading underwriter and to be liable for her share for all decisions taken against the leading underwriter.

First, the Court of Appeal confirmed that the relaxation of the “seeking damages” restriction was not confined to the tort context of *Prudential Assurance*.⁸⁷ In rejecting the defendants’ contention that claims for debt or damages were automatically to be excluded from a representative action when made by numerous plaintiffs severally or when resisted by numerous defendants severally, Staughton L.J. stated that “[t]he rule is more flexible than that.”⁸⁸ Secondly, on the “separate contracts” point, Staughton L.J. doubted “whether the precise form of the contractual arrangements can be determinative.”⁸⁹ On the facts, although there were technically twelve contracts with individual proportions of the risk, it could be treated as “one claim upon one contract, which the shipowners have an interest in pursuing and the insurers all have the same interest in resisting.”⁹⁰ The defendants

83. See *id.* at 257 (“A person coming within that class will be entitled to rely on the declarations as *res judicata*, but will still have to establish damage in a separate action.”).

84. *Id.* at 256.

85. *Irish Shipping Ltd. v. Commercial Union Assurance Co. Plc. (The Irish Rowan)*, (1991) 2 Q.B. 206 at 206 (C.A.) (Eng.). Some caution is needed in that this case concerned a representative action brought against a class of *defendants*, but it is difficult to see how the Court of Appeal’s reasoning would not apply similarly to plaintiff class actions.

86. *Id.* at 217.

87. See *id.* at 227.

88. *Id.*

89. *Id.*

90. *Id.* Sir John Megaw was prepared to assume that there were seventy-seven contracts of insurance, but still found that the “same interest” requirement was met. See *id.* at 231 (“I am unable to see how that requirement is not satisfied where, as here, each of the insurers has expressly agreed with the assured in the terms of the leading underwriter clause. The acceptance by all concerned of that clause as a term of

had the “same interest” because all defendants “say that the benefit of their obligation has not been transferred to the shipowners.”⁹¹ Furthermore, the Court of Appeal affirmatively granted its seal of approval to the bringing of such a representative action.⁹² Although in dealing with the authority of *Markt*, Purchas L.J. stated that “the present case is distinguishable by reason of the leading underwriter clause agreed to by all the class,”⁹³ a representative action was subsequently held to lie even in the absence of a leading underwriter clause.⁹⁴

c. Relaxation of the “Different Defenses” Restriction

The Court of Appeal in *The Irish Rowan* also took a markedly relaxed approach to the “different defenses” restriction formulated in *Markt*. In response to counsel’s objection that each insurer could have a different defense to the indemnity claim, Staughton L.J. considered that the appropriate approach was to disregard “theoretical possibilities” and to “turn to what are likely in practice to be the issues in the English action.”⁹⁵ Although there might exist an area in which different insurers stood in different positions and where the representative would not be personally concerned in that particular aspect of a case,⁹⁶ such issues were unlikely to arise and, if they did, any concerned insurers could “apply to be joined as defendants.”⁹⁷

B. Group Litigation Orders

Notwithstanding the increasingly relaxed approach taken to the “same interest” requirement, the Group Litigation Order (“GLO”) of Part 19.III of the CPR was introduced in May 2000⁹⁸ to deal with the supposed limitations of the representative action.⁹⁹ As it aimed to provide a flexible frame-

each of the contracts provides a vital distinction from the decision in *Markt & Co. Ltd. v. Knight Steamship Co. Ltd.*, (1910) 2 K.B. 1021.”)

91. *Id.* at 227.

92. Staughton L.J. considered it to be “in general desirable that many insurance companies or underwriters on one risk should be capable of suing or being sued by a representative action.” *Id.* at 228. In Purchas L.J.’s words, “[t]he benefits of a representative action, of course, in a multiple contractual arrangement of this kind are too obvious to require statement and on balance the convenience and expedition of litigation is far better served with a wide interpretation of the rule.” *Id.* at 241 (Purchas L.J.).

93. *Id.* at 242. Purchas L.J. also felt that “some other contractual arrangement of a similar nature” might suffice. *Id.* at 244.

94. *See, e.g.*, *Bank of Am. Nat’l Trust & Sav. Ass’n v. Taylor (The Kyriaki)*, (1992) 1 Lloyd’s Rep. 484 (Q.B.).

95. *Irish Shipping Ltd. v. Commercial Union Assurance Co. Plc. (The Irish Rowan)*, (1991) 2 Q.B. 206 at 223 (C.A.) (Eng.). In particular, it did not seem likely that misrepresentation, non-disclosure, or lack of authority to sign defenses would arise. *See id.* at 227.

96. The hypothetical envisaged was that foreign insurers might argue that the situs of their obligations lay elsewhere than those of the English insurers. *See id.* at 223.

97. *Id.* at 223–24.

98. By the Civil Procedure (Amendment) Rules 2000, S.I. 2000/221, R. 9, schedule 2.

99. *See* CHRISTOPHER J. S. HODGES, MULTI-PARTY ACTIONS, at ¶ 9.08 (2001). In view of the perceived need to allow judges to deal differently with different types of group litigation, the GLO rule formulated “was short and generalised, hence permitting maximum flexibility.” *Id.* at ¶ 1.07. The GLO

work,¹⁰⁰ Part 19.III of the CPR (entitled “Group Litigation”) simply defines a GLO as being “an order made under rule 19.11 to provide for the case management of claims which give rise to common or related issues of fact or law (the ‘GLO issues’).”¹⁰¹

1. *The GLO Mechanism*

Rule 19.11 contains three basic provisions. First, Rule 19.11(1) grants the court discretion to “make a GLO where there are or are likely to be a number of claims giving rise to the GLO issues.”¹⁰² Secondly, Rule 19.11(2) mandates that, where the court does make a GLO, that GLO must direct the establishment of a “group register” on which the various claims will be entered, specify the issues to be managed, and specify the “management court.”¹⁰³ Thirdly, Rule 19.11(3) permits the court to direct relevant claims to be transferred to the management court, to order their stay, and to direct their entry on the group register.¹⁰⁴ The same sub-rule enables the court to direct that claims arising after a certain date be started in the management court and be entered on the group register. It also allows the court to direct the publicizing of the GLO.

The *res judicata* effect of a judgment on one of the group register claims is provided by Rule 19.12:

- (1) Where a judgment or order is given or made in a claim on the group register in relation to one or more GLO issues –
 - (a) that judgment or order is binding on the parties to all other claims that are on the group register at the time the judgment is given or the order is made unless the court orders otherwise; and
 - (b) the court may give directions as to the extent to which that judgment or order is binding on the parties to any claim which is subsequently entered on the group register. . . .¹⁰⁵

In cases where the plaintiff’s claim is entered on the group register after a judgment or other binding order is made, that plaintiff “may apply to the court for an order that the judgment or order is not binding on him.”¹⁰⁶ In all other circumstances, “any party who is adversely affected by a judgment

has quickly become known as “the principal means by which to handle multi-party litigation in England” MULHERON, CLASS ACTION IN COMMON LAW LEGAL SYSTEMS, *supra* note 16, at 68.

100. HODGES, *supra* note 99, at ¶ 1.08 (observing that it resisted the approach of attempting “to prescribe the individual management techniques which may be adopted in any given circumstances”).

101. Civil Procedure Rules, 1998, S.I. 1998/3132, R. 19.10 (U.K.).

102. Civil Procedure Rules, 1998, S.I. 1998/3132, R. 19.11(1) (U.K.).

103. Civil Procedure Rules, 1998, S.I. 1998/3132, R. 19.11(2) (U.K.).

104. Civil Procedure Rules, 1998, S.I. 1998/3132, R. 19.11(3) (U.K.).

105. Civil Procedure Rules, 1998, S.I. 1998/3132, R. 19.12 (U.K.).

106. Civil Procedure Rules, 1998, S.I. 1998/3132, R. 19.12(3)(b) (U.K.).

or order which is binding on him may seek permission to appeal the order.”¹⁰⁷ It is also possible for parties to “apply to the management court for the claim to be removed from the register.”¹⁰⁸

The basic idea of the GLO is therefore straightforward. Where various claims give rise to related issues, they are to be entered upon a group register and controlled by a management court, which will direct the course of litigation. The general rule is that a judgment given in relation to any claim on the register will be binding upon the other plaintiffs whose claims are registered there. However, a number of important points can be appreciated only by considering the Practice Direction to Part 19.III of the CPR.

Practice Direction 19B elaborates a number of the procedural steps that must be taken for the GLO mechanism to be invoked successfully. Five of the most important features are as follows. First, plaintiffs must “opt *in*” to the GLO scheme; they cannot be bound by a judgment without taking affirmative steps.¹⁰⁹ Secondly, entry upon the group register of a plaintiff’s claim does not itself amount to the institution of proceedings. Therefore, each plaintiff must first issue his claim in the ordinary way,¹¹⁰ which may be crucial in terms of limitation periods. Thirdly, a GLO cannot go ahead without the consent of the Lord Chief Justice, the Vice-Chancellor, or the Head of Civil Justice, depending on the court to which the application is made.¹¹¹ Fourthly, the management court may direct certain claims to proceed as test cases,¹¹² or it may direct that “Group Particulars of Claim” be served, setting out the various claims of all the plaintiffs on the register.¹¹³ Finally, the applicant is directed to “consider whether any other order would be more appropriate,” such as an order for the consolidation of claims or the use of the representative action of Rule 19.6.¹¹⁴

2. *The GLO Rules Considered*

Rather than applying only to cases concerning plaintiffs or defendants possessing the “same interest,”¹¹⁵ a much less strict requirement of “com-

107. Civil Procedure Rules, 1998, S.I. 1998/3132, R. 19.12(2) (U.K.).

108. Civil Procedure Rules, 1998, S.I. 1998/3132, R. 19.14(1) (U.K.).

109. Civil Procedure Rules Practice Direction 19B, ¶ 6.2 (U.K.) (“An application for details of a case to be entered on a Group Register may be made by any party to the case.”).

110. Civil Procedure Rules Practice Direction 19B, ¶ 6.1A (U.K.) (“A claim must be issued before it can be entered on a Group Register.”). This has been criticized for having the potential to lead to large wasted expenditures “if the class fails on the common issues.” MULHERON, *supra* note 16, at 100.

111. Civil Procedure Rules Practice Direction 19B, ¶ 3.3 (U.K.).

112. Civil Procedure Rules Practice Direction 19B, ¶ 12.3 (U.K.) (“The management court may direct that one or more of the claims are to proceed as test claims.”).

113. Civil Procedure Rules Practice Direction 19B, ¶ 14.1 (U.K.) (“The management court may direct that the GLO claimants serve ‘Group Particulars of Claim’ which set out the various claims of all the claimants on the Group Register at the time the particulars are filed.”).

114. Civil Procedure Rules Practice Direction 19B, ¶ 2.3 (U.K.). Although Mulheron has suggested that this functions “as a superiority criterion,” MULHERON, *CLASS ACTION IN COMMON LAW LEGAL SYSTEMS*, *supra* note 16, at 99, the language does not appear to be mandatory.

115. As in the case of representative actions. See *supra* text accompanying note 57.

mon or related issues of fact or law” is employed by the GLO mechanism. It is perhaps surprising, then, that usage of the GLO has been relatively infrequent to date.¹¹⁶ Nonetheless, a senior member of the English judiciary has remarked that the GLO mechanism constitutes “a recently-developed but now tried and established framework of rules, practice directions and subordinate legislation” for “the conduct of group actions.”¹¹⁷ However, the GLO scheme *does not amount to a class action*, for the important reason that plaintiffs, to be bound, must be made parties to the litigation through entry on the group register.¹¹⁸

III. THE INTERNATIONAL DIMENSION: THE QUESTION OF RECOGNITION IN ENGLAND

Having surveyed both the American and the English procedures for the combined litigation of multiple, related claims, the present Part of this Article seeks to offer a bridge into the essential question at the heart of the “core case.”¹¹⁹ That essential question, of course, is whether the judgments of U.S. federal courts in Rule 23(b)(3) class actions will be entitled to recognition in the English courts. However, it makes little sense to jump straight into the debate on this question. For the relevance of the controversy to be appreciated in full, two background-setting questions must be answered. First, at which stages of the core case does the question of recognition in England arise? Secondly, what are the rules that generally apply in England to determine whether a foreign judgment is entitled to recognition?

A. *When Does the Question of Recognition in England Arise?*

Unusually, and rather interestingly, the question of a U.S. class action’s entitlement to recognition in England arises not once but *twice* in the “core

116. MULHERON, CLASS ACTION IN COMMON LAW LEGAL SYSTEMS, *supra* note 16, at 109 (describing the uptick as “fairly modest”). Whereas “[f]rom 1990 to 2001, the number of class actions filed annually in federal courts steadily increased, from 922 to over 3000,” *The Supreme Court, 2001 Term—Leading Cases*, 116 HARV. L. REV. 332 (2002), only 75 GLOs have been made since the scheme’s introduction in 2000. See Her Majesty’s Courts Service, Group Litigation Orders, *available at* <http://www.hmccourts-service.gov.uk/cms/150.htm> (last visited Mar. 6, 2011).

117. *Lubbe v. Cape Plc.*, (2000) 1 W.L.R. 1545 at 1559 (H.L.) (Eng.) (Lord Bingham of Cornhill).

118. See Neil Andrews, *Multi-Party Proceedings in England: Representative and Group Actions*, 11 DUKE J. COMP. & INT’L L. 249, 249 (2001) (“[C]oordinated group actions are really intended to act as a surrogate for a mature system of class actions. Group actions are different from class actions because each group litigant is a member of a procedural class as a party, rather than as a represented non-party.”). The GLO has therefore been described, together with the pre-1966 U.S. Rule 23 class action, as “schemas which are not representative class actions in the true sense, as they require that class members actively participate in the action as *parties . . .*.” See MULHERON, CLASS ACTION IN COMMON LAW LEGAL SYSTEMS, *supra* note 16, at 30 (emphasis in original); see also HODGES, *supra* note 99, at ¶ 2.04 n.10 (referring to the GLO, in contradistinction to the U.S. federal class action, as “a management tool for efficient administration,” with “flexibility and innovation. . . . acceptable”).

119. See *supra* text accompanying note 2.

case.”¹²⁰ In the “core case,” the defendant corporation proves successful in fighting off the ravenous plaintiffs in the U.S. federal courts. Unsurprisingly, though, the English non-participants wonder whether they might not get a more successful bite at the apple if they approach from the other side of the pond. Accordingly, they commence a second bout of litigation before the English courts on the same cause of action. Assuming that the defendant turns up to defend the claim,¹²¹ its first line of defense is likely to be a fairly obvious one: this cause of action is a thing already adjudicated upon, or *res judicata*.

The core question, then, is firmly upon the table, and in the orthodox, direct manner. If a class action judgment is entitled to recognition in England, the defendant can breathe a second sigh of relief. If not, the English plaintiffs remain free to rerun the arguments that failed to convince the U.S. federal court. The issue is plainly, therefore, one of considerable practical importance. In a fascinating class action twist, however, it is unlikely that the English judges will be sitting in the first court to have attempted some resolution of the essential question.

It is likely that the first court to “adjudicate” upon the essential question in the “core case” will actually have been the U.S. federal court that certified the class action. This peculiar quirk arises from the process of certification that occurs at an early stage of all federal class action litigation.¹²² Before it can certify a Rule 23(b)(3) class action, the U.S. federal court must, among other things, determine whether the requirement of “superiority” is met. That is, the federal court must satisfy itself that the class action mechanism is “superior to other available methods for fairly and efficiently adjudicating the controversy.”¹²³ Crucially for present purposes, a broad, internationally-minded construction of “the controversy” was adopted by the U.S. Court of Appeals for the Second Circuit in *Bersch v. Drexel Firestone, Inc.*¹²⁴

120. *Id.*

121. If the defendant has substantial assets in England, or plans at some future date to conduct business there, he may well turn up to defend, rather than risking the plaintiffs securing judgment in default.

122. See *supra* text accompanying notes 24–27.

123. FED. R. CIV. P. 23(b)(3), which also provides a non-exhaustive list of factors pertinent to this determination.

124. *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir. 1975). In actuality, the court in *Bersch* is not explicit that its treatment of recognition abroad is supposed to go to the issue of superiority. However, this seems a convenient way in which to categorize the rule. It is certainly the belief of some academic commentators that the holding went to the issue of superiority. See, e.g., Andrea Pinna, *Recognition and Res Judicata of US Class Action Judgments in European Legal Systems*, 1 ERASMUS L. REV. 31, 35–36 (2008). It has also been so regarded in subsequent case law. See *Cromer Fin. Ltd. v. Berger*, 205 F.R.D. 113, 134 (S.D.N.Y. 2001) (“The *res judicata* effect of a class action judgment is a factor that must be considered in evaluating the superiority of the class action device.”). Although the position was doubted in *In re Lloyd’s Am. Trust Fund Litig.*, No. 96 CIV. 1262, 1998 W.L. 50211, at *15 (S.D.N.Y. 1998) (“In *Bersch*, the issue was whether to allow the action to proceed as a class action on behalf of the foreign members of the class under principles of pendent jurisdiction. . . . Therefore, *Bersch* did not consider the question here, which is whether the class action is superior, nor did it decide that the *res judicata* effect in

Bersch constitutes an illustration of the “core case.” The plaintiff (Mr. Bersch) was a U.S. purchaser of stock in the Bahamas subsidiary (IOB Ltd.) of a Canadian corporation (IOS Ltd.). The public offering of IOB Ltd. had been underwritten by a U.S. corporation (Drexel Firestone Inc.). The shares had been offered at a price of \$10 each but, after an initial stabilization at \$14, this share price soon plummeted below \$10, and the stock became virtually unsaleable.¹²⁵ The plaintiffs alleged that the defendant underwriters had failed to reveal material facts in prospectuses pursuant to which the stock offerings were made,¹²⁶ and had committed common law fraud.¹²⁷ Mr. Bersch brought proceedings individually and, as a Rule 23(b)(3) class action, “on behalf of thousands of plaintiffs preponderantly citizens and residents of Canada, Australia, England, France, Germany, Switzerland, and many other countries in Europe, Asia, Africa, and South America.”¹²⁸ The class action also concerned two related offerings of IOS Ltd. and its subsidiaries.

The defendants, who had structured their offerings to try to avoid the reach of the relevant U.S. securities laws,¹²⁹ contested the subject matter jurisdiction of the U.S. federal courts. In its favor, the Court of Appeals accepted that the acts of the defendants within the U.S. were too preparatory for that factor alone to establish subject matter jurisdiction.¹³⁰ However, a significant number of U.S. plaintiffs had managed to acquire shares within the United States, despite the defendant’s attempts to avoid this.¹³¹ The Court of Appeals readily found subject matter jurisdiction over such claims.¹³² It also established subject matter jurisdiction over the claims of U.S. citizens who had purchased shares abroad, provided that some acts of material importance (even if merely preparatory) had occurred in the United States and had contributed to their losses.¹³³

That left the position of foreign purchasers in limbo. The Court of Appeals was clear that it would have had no subject matter jurisdiction over their claims if they had sued individually. However, did that necessarily mean that, where they were being represented *in a class action*, their claims

foreign jurisdictions is dispositive of the issue it did consider.”), the point seems to have been settled in *In re Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76, 95 (S.D.N.Y. 2007) (“[R]es judicata concerns have been appropriately grafted onto the superiority inquiry.”).

125. *Bersch*, 519 F.2d at 981.

126. These failures constituted alleged violations of two U.S. federal statutes: the Securities Act of 1933 and the Securities Exchange Act of 1934.

127. *Bersch*, 519 F.2d at 981.

128. *Id.* at 977–78.

129. *Id.* at 982.

130. *Id.* at 987. The various activities within the United States included meeting there to discuss and structure the offers, the retention of a U.S. law firm and a U.S. accounting firm, the drafting of parts of the prospectus, and the opening of certain U.S. bank accounts into which proceeds were deposited. *Id.* at 985 n.24.

131. The Court of Appeals was suitably perplexed. *Id.* at 991 (“If the record is thus murky on how Mr. Bersch came to subscribe, it is even murkier about how other American residents did.”).

132. *Id.*

133. *Id.* at 992. The Court found this test to be satisfied by the inclusion in the prospectus of an old report prepared in the United States. *Id.*

had to be stricken from the class? Crucially for present purposes, the Court considered “it unnecessary to resolve this difficult issue”¹³⁴ because the class could, in any case, not be certified in relation to the foreign plaintiffs. This was because of “the serious problem here presented of the dubious binding effect of a defendants’ judgment (or a possibly inadequate plaintiff’s judgment) on absent foreign plaintiffs or the propriety of purporting to bind such plaintiffs by a settlement.”¹³⁵ The Court later developed the point:

The 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. This point must be considered not simply in the halcyon context of a large recovery which plaintiff visualizes but in those of a judgment for the defendants or a plaintiffs’ judgment or a settlement deemed to be inadequate.¹³⁶

The Court appears to be offering two justifications for referring to the likelihood of recognition abroad. In addition to the strand of reasoning related to double jeopardy and fairness to defendants, there seems to be a concern for conserving federal court resources.¹³⁷ In other words, since district courts are already “overtaxed,” and since an expensive class action is made all the more costly and difficult if it concerns foreign plaintiffs, then the court would be astute not to waste its resources if the litigants are likely to run straight to a foreign court in the event of an unfavorable U.S. judgment.¹³⁸

Whatever the rationale, the essential holding of *Bersch* is clear. The possibility of non-recognition abroad will militate against a court’s allowing the continuance of a class action encompassing the claims of foreign plaintiffs. However, how this has played out in practice has varied from case to case. In *Bersch* itself, the effect of the newfound rule was essentially fatal to the class action. The Court relied on “uncontradicted affidavits that England, the

134. *Id.* at 996.

135. *Id.* at 986.

136. *Id.* at 996 (footnote omitted).

137. Although the court never explicitly states that the issue of recognition abroad is an aspect of the superiority analysis, this dual justification view would best suit the test that the class action mechanism be “superior to other available methods for *fairly* and *efficiently* adjudicating the controversy.” FED. R. CIV. P. 23(b)(3) (emphasis added).

138. For a critique of this approach, see Ilana Buschkin, *Viability of Class Action Lawsuits in a Globalized Economy—Permitting Foreign Claimants to be Members of Class Action Lawsuits in the U.S. Federal Courts*, 90 CORNELL L. REV. 1563 (2005) (arguing for a presumption in favor of certification on the basis that this is the only effective way of deterring corporate wrongdoing and thus promoting investor confidence, and that any efficiency loss is considered to be a price worth paying because increased deterrence and market confidence will ultimately redound to the benefit of U.S. citizens).

Federal Republic of Germany, Switzerland, Italy, and France would not recognize a U.S. judgment in favor of the defendant as a bar to an action by their own citizens, even assuming that the citizens had in fact received notice that they would be bound unless they affirmatively opted out of the plaintiff class.”¹³⁹ In an important footnote to this statement, the Court explained that, although these affidavits accepted that the essential question “had not been decided by a court in any of these jurisdictions,” one of the most problematic factors was the “opt out” mechanism of the U.S. class action.¹⁴⁰ The Court therefore terminated the class action insofar as it related to the foreign purchasers, directing “that the district court eliminate from the class action all purchasers other than persons who were residents or citizens of the United States.”¹⁴¹

However, in subsequent decisions, the rule has not operated in such a lethal manner. In at least two subsequent decisions, federal district courts have certified class actions concerning “core case” English plaintiffs.¹⁴² Part of the reason for this development lies in the adoption of a less strict test than that which might have been envisaged in *Bersch*.¹⁴³ Another part undoubtedly lies in the fact that, whereas the expert testimony on English law was uncontested in *Bersch*, a lively debate has grown amongst expert witnesses in subsequent cases, such that the U.S. courts have not been as ready to conclude that recognition will not be afforded to a U.S. class action judgment in England. However, until the English courts themselves come to consider the matter, the observations of the U.S. courts on this matter will remain something of a “guessing game.” In addition, as the determination of the “superiority” question now invites—but does not necessarily require¹⁴⁴—the U.S. court to speculate as to whether or not the English courts

139. *Bersch*, 519 F.2d at 996–97 (footnote omitted).

140. *Id.* at 997 n.48.

141. *Id.* at 997. This essentially killed the class action overall because, of the 50,000 purchasers, only 386 were American. *Id.* at 977–78 n.2.

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

143. Although it was stated in *Bersch* that “an American court need not abstain from entering judgment simply because of a possibility that a foreign court may not recognize or enforce it,” but that “the case stands differently when this is a *near certainty*,” *Bersch*, 519 F.2d at 996 (emphasis added), this has not been taken to imply a *test* of near certainty. As was suggested in *In re Vivendi Universal*,

[i]t seems more appropriate [than a test of ‘near certainty’] to evaluate the risk of nonrecognition along a continuum. Where plaintiffs are able to establish a *probability* that a foreign court will recognize the *res judicata* effect of a U.S. class action judgment, plaintiffs will have established this aspect of the superiority requirement Where plaintiffs are unable to show that foreign court recognition is more likely than not, this factor weighs against a finding of superiority and, taken in consideration with other factors, may lead to the exclusion of foreign claimants from the class. The closer the likelihood of non-recognition is to being a ‘near certainty,’ the more appropriate it is for the Court to deny certification of foreign claimants.

In re Vivendi Universal, 242 F.R.D. at 95 (emphasis added).

144. See Buschkin, *supra* note 138, at 1568 (“Federal Rule 23 provides no guidance on the subject of foreign class members, the U.S. Supreme Court has never granted certiorari to resolve the question, and

will recognize any ensuing judgment, *Bersch* has introduced both a helpful and a complicating factor to the analysis of the “core case.”

The helpful aspect of the guessing game is that it provides one with at least three new sources from which to build an answer to the essential question of the core case. First, and perhaps most importantly, a practice has emerged in which leading specialists in the practice, the judging and the academia of the English conflict of laws have offered “Expert Declarations” as to the English legal position in the core case. Secondly, U.S. attorneys have, building upon these Declarations, formulated their own arguments as to whether English courts will recognize U.S. class action judgments. Thirdly, American judges have had to decide, by drawing upon the views of counsel and the various experts, whether recognition is likely to be afforded to U.S. class action judgments in England.¹⁴⁵ Although none of these sources offers binding authority, it can only assist to have an extra range of arguments from which to draw.¹⁴⁶

However, the availability of these new sources also introduces a complicating factor. The potential for the essential question to arise twice, once in the United States and once in England, entails the possibility that plaintiffs, or defendants, or both, will seek to raise inconsistent positions. This specter is most apparent in relation to defendants. Although class actions defendants will not infrequently seek a broad definition of the class in a bid to achieve “global peace,” the tendency in real examples of the “core case” has been for defendants to oppose certification, in part by arguing that the English courts would not recognize any judgment that ensues.¹⁴⁷ However, if the defendant successfully defends the action in the U.S., it will have an incentive to switch views and to argue before the English courts that the judgment *is* entitled to recognition. This raises a novel conflict of laws question as to whether an “issue estoppel” or “judicial estoppel” can arise where a foreign court has *guessed* rather than *decided* the answer to a particular question.¹⁴⁸ It also raises an interesting question as to whether the plaintiffs would be enti-

the lower courts have taken a wide range of approaches. Judges are left to their own discretion whether to permit or deny foreign claimants access to class action lawsuits.”).

145. Unlike in the English conflict of laws context, where questions of foreign law are proved as *fact* (so that an English judge simply accepts one of the various expert views proffered by the parties), foreign law is proved as *law* in the United States. This means that, unlike in England, the U.S. judge may determine that *none* of the experts has described the true legal position in England. The U.S. judge is obligated to reason toward the actual position.

146. In particular, this Article makes no apologies for drawing upon the Expert Declarations. Although one might face the objection that these contain an inherent risk of partisanship, the relevant experts have all testified, under penalty of perjury under the laws of the United States, to the truth of their beliefs. Furthermore, as no English case has decided the essential question of the core case, this Article is largely theoretical and in search of ideal-type arguments. Therefore, the new sources can and will be drawn upon for their strengths and criticized for their weaknesses.

147. *Bersch*, 519 F.2d at 996; *In re Alstom*, 253 F.R.D. 266; *In re Vivendi*, 242 F.R.D. 76.

148. It constitutes yet another quirk of the U.S. class action that the U.S. court is invited, as part of its decision *whether* to allow a lawsuit to proceed, to render a decision upon a matter concerning the likelihood of recognition abroad *if* it is allowed to proceed.

tled to rely on any such estoppel, given that their incentives tend to mirror those of the defendants in each forum and tend to require the adoption of inconsistent views of their own.

Although one might be tempted to argue that an estoppel cannot arise where a court in the first forum for litigation ("F1") does not decide, but merely *predicts*, an outcome, that conclusion seems too readily reached if some advantage has been sought by raising the relevant arguments in F1.¹⁴⁹ In fact, the benefits of succeeding on the *res judicata* aspect of the superiority question in F1 can be immense: it can be the difference between certification and non-certification of the class. It therefore seems correct in principle that a judicial estoppel could arise from a prediction in F1 as to the likely decision on recognition in the second forum ("F2").¹⁵⁰ However, upon close consideration of the core case, it seems unlikely that either the defendant or the non-participants would *actually* be switching positions.

At first glance, the relative equities would appear to favor the defendant. This is because, by raising the point in F2, the defendant is not really switching positions. Rather, the defendant is holding up its hands and accepting that it lost the argument abroad, such that it is now willing to abide by the decision of the court in F1.¹⁵¹ It seems to be the non-participants who, having convinced the court in F1 that re-litigation in F2 could not occur, are now attempting to benefit from arguing the contrary. To the extent that the non-participants acquired their F1 judgment by stressing their inability to sue in F2, equity would seem to require that they be prohibited from suing in F2.

However, the plaintiffs in F2 are likely to argue that they never raised anything in F1: they were not parties to the claim. This peculiar feature of the class action regime is a familiar one in the U.S. domestic context. Although it is trite law that a plaintiff who wishes to re-litigate may circumvent the class judgment on the basis that she was not adequately

149. The essence of a judicial estoppel is that the litigant is estopped from arguing something inconsistently—from telling one court one thing, and another court the opposite. It operates against the *behavior* of the litigant, regardless of whether the contested issue is embedded in a final judgment. Judicial estoppel could therefore theoretically operate in *any* case in which inconsistent arguments are raised and litigated, even if the court in F1 does not rule upon them.

150. One should be careful to distinguish this issue from that which arose in the controversial case of *Desert Sun Loan Corp. v. Hill*, [1996] 2 All E.R. 847 (C.A.) (Eng.). There, the majority held that, where a court in F1 has specifically decided that the defendant has submitted to its jurisdiction, that decision may estop the defendant from arguing in F2 that he had not submitted to the jurisdiction of F1. The minority view of Roch L.J. found there to be a certain bootstraps quality to the argument that the courts of F1 could determine their jurisdictional competence in the eyes of the courts of F2, in a way that would bind the defendant in F2. However, assuming Roch L.J.'s argument to be correct, its force derives from the fact that the court in F1 was not deploying English conflict of laws rules, but its own *domestic* rules, on what constitutes submission. By contrast, a U.S. district court addressing the issue of recognition in England *would* be considering the relevant English conflict of laws position. Furthermore, the objection in our core case is not just that the same issue is being raised again in F2, but that the parties are raising views *inconsistent with* those put to the court in F1.

151. It is therefore sometimes said that, as a matter of U.S. law, judicial estoppel can operate only against a party whose argument in the earlier proceedings was *successful*.

represented, the class court (by certifying and settling the class suit) necessarily decided that the class *was* adequately represented. The U.S. courts therefore distinguish between plaintiffs who themselves litigated the issue of “adequacy” in F1 and the non-participants who did not.¹⁵² By analogy, it may well be that the non-participants who litigate in England will *not* be considered to be adopting an inconsistent position—although the *representative plaintiffs* in the United States ran the argument that the judgment would be recognized abroad, this argument was never made by the non-participants. The mere failure to opt out of the class should not attribute to them every position maintained by the representative plaintiffs.¹⁵³

It would therefore seem that, even if a prediction in F1 can give rise to an estoppel in F2, it would be difficult to accuse class action defendants or non-participants of adopting inconsistent positions.

B. *When are Foreign Judgments Entitled to Recognition in England?*

One of five sets of rules will apply to govern the recognition¹⁵⁴ and enforcement¹⁵⁵ in England of any foreign judgment. The first four sets of rules are legislative in form and derive their force from international agreements to which England is a party.¹⁵⁶ No such treaty has successfully been reached

152. The issue is explored at length by Rubenstein, *supra* note 17.

153. The implication of this discussion, of course, is that the only parties who *would* be estopped from denying their earlier position are the class representatives that appeared in F1 and argued that the ensuing F1 judgment would be entitled to recognition in F2.

154. *Recognition* of a judgment means treating the claim which was adjudicated as having been determined once and for all. It does not matter whether it was determined in favour of the claimant or the defendant, though judgments *in personam* are only ever recognized as effective against particular parties, and the material question will be whether that person is bound. By contrast, judgments *in rem* are recognized generally or universally, and not just against particular parties to the litigation. When the judgment is recognized, the matter is *res judicata*, and the party bound by it will be estopped from contradicting it in subsequent proceedings in an English court . . . The principles of *res judicata* can operate in relation to entire causes of action (‘cause of action estoppel’) as well as on discrete issues which arose and were determined in the course of the trial of a cause of action (‘issue estoppel’).

ADRIAN BRIGGS, *THE CONFLICT OF LAWS* 199 (2nd ed. 2008) (footnotes omitted).

155. The term “enforcement” is not synonymous with “recognition.” Although a judgment must be recognized before it can be enforced, the primary difference is that, whereas recognition can operate in favor of a plaintiff or a defendant, only the plaintiff in the foreign suit would bring enforcement proceedings, usually for “collecting money which the foreign court ordered to be paid and which remains unpaid.” *Id.* at 119. As a procedural difference, recognition as *res judicata* may be pleaded in any English proceedings, whereas enforcement may only be granted by way of a fresh action brought upon the foreign judgment. *Id.* at 136.

156. These include: (1) Judgments rendered by the courts of the Member States of the European Union are governed by Council Regulation 44/2001, 2001 O.J. (L 12), 1 (EC) (the “Brussels Regulation” or “Judgments Regulation”); (2) Judgments from the courts of Iceland, Norway and Switzerland are subject to the provisions of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Sept. 16, 1988, 28 I.L.M. 620 (the “Lugano Convention”), with applications for registration being made under section 4 of the Civil Jurisdiction and Judgments Act, 1982, c. 27, § 33(1); (3) The Administration of Justice Act, 1920, 10 & 11 Geo. 5, c. 81 governs the recognition and enforcement of judgments from various Commonwealth countries, including Malaysia, Singapore, Nigeria and New Zealand; (4) Judgments from Australia, Canada (excluding Quebec), Guernsey, Jersey, In-

between the US and England,¹⁵⁷ such that the fifth regime applies by default. This regime comprises the rules that have been built up at common law for dealing with foreign judgments.

The present section offers a basic overview of the common law regime of recognition.¹⁵⁸ It sets out the rules as they have typically been formulated, which has invariably been in terms of *defendants* objecting to plaintiffs seeking recognition in England. The difficulties of applying these rules to non-participant class action plaintiffs will be highlighted at appropriate points but, for the sake of analytical clarity, consideration of the possible solutions to the central difficulties is postponed until Part V.

At the most abstract level, the common law regime will entitle a foreign judgment to recognition if three requirements are met. First, it must have been rendered by a court of competent jurisdiction. Secondly, the decision of the foreign court must have been a “final and conclusive” one, rendered “on the merits.”¹⁵⁹ Thirdly, there must be no defenses available to recognition.¹⁶⁰

1. Court of Competent Jurisdiction

The first precondition for the recognition of a foreign judgment in England is that the rendering court¹⁶¹ (“F1”) must have had “international jurisdiction,” in the eyes of the English court (“F2”),¹⁶² to determine the

dia, the Isle of Man, Israel, Pakistan, Surinam and Tonga are governed by the Foreign Judgments (Reciprocal Enforcement) Act, 1933, 23 & 24 Geo. 5, c. 49.

157. See *Adams v. Cape Indus. Plc.*, [1990] Ch. 433 at 509 (C.A.) (Eng.) (“There is no statutory provision for the registration in this country of the judgments of the federal or state courts of the United States of America.”); see also Samuel P. Baumgartner, *How Well Do U.S. Judgments Fare in Europe?*, 40 GEO. WASH. INT’L L. REV. 173, 181 (“[M]ost European countries have a number of multi- and bilateral recognition treaties still in force with some of their most important non-EU trading partners. The United States, which has had a long history of staying out of international commitments in the area of private international law, is not among them.”) (footnotes omitted). In a leading case on the recognition of foreign judgments in England, and in the context of U.S. judgments in particular, the English Court of Appeal referred to “the possible desirability of a further extension of reciprocal arrangements for the enforcement (or non-enforcement) of foreign judgments by convention.” *Adams*, [1990] Ch. 433 at 518 (C.A.).

158. The additional requirements necessary for *enforcement* are postponed to *infra* text accompanying note 240. The “core case” is concerned only with the defensive use of *recognition*.

159. BRIGGS, *supra* note 154, at 136.

160. The test is sometimes formulated as having only two limbs, with the “final and conclusive” and “on the merits” questions being incorporated into the question of jurisdictional competence. *Id.* (“The basic scheme of common law recognition is that if the foreign court is adjudged to have been competent, as a matter of *English* law, to give a judgment by which the losing party was bound, this may, and if there is no other defence to the claim for recognition will, be recognised as making the cause of action or the issue *res judicata*.”) (emphasis in original).

161. This excludes the likes of arbitral tribunals and administrative bodies. *Id.* (“A court, and only a court, will do.”).

162. It is nothing to do with whether F1 had jurisdiction according to its own rules of procedure. See *Pemberton v. Hughes*, (1899) 1 Ch. 781 at 791 (C.A.) (Eng.) (“[T]he jurisdiction which alone is important in these matters is the competence of the Court in an international sense—i.e., its territorial competence over the subject-matter and over the defendant.”); see also ALBERT VENN DICEY ET. AL., *DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS* 620 (Lawrence Collins, et. al., eds., 14th ed. 2006)

controversy so as to bind the parties.¹⁶³ This requires F2 to be satisfied that F1 had jurisdiction both “over the parties and subject-matter.”¹⁶⁴

The issues in the English case law have almost always related to the requirement of *personal* jurisdiction over the parties, and more specifically over the *defendant*. The typical scenario is that the plaintiff successfully sues the defendant in F1 and, upon the plaintiff seeking to have the judgment recognized and enforced in F2, the defendant objects that the court in F1 was not competent to bind her (the defendant) for international purposes. For an illustration of why at least *some* recognition criteria must be required, one need only consider the facts of *Buchanan v. Rucker*.¹⁶⁵ The plaintiff brought an action to enforce in England a judgment rendered by a court in Tobago. The defendant had never been to Tobago, nor submitted to the jurisdiction of its courts, but the plaintiff had, in a manner valid under the procedural law of Tobago, served notice upon the defendant by nailing a copy of the writ to the door of the courthouse. In a flush of rhetoric, Lord Ellenborough found for the defendant, asking: “[c]an the Island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?”¹⁶⁶

The reason why these questions must obviously be answered in the negative was expressed by Lord Selborne, nearly a century later, in the following terms:

In a personal action . . . a decree pronounced *in absentem* by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the Courts of every nation except (when authorized by special local legislation) in the country of the forum by which it was pronounced.¹⁶⁷

The English courts have therefore formulated a regime focusing upon matters theoretically within the control of the party objecting to recognition in England. More specifically, F1 will be considered a court of competent jurisdiction only if the defendant had a *territorial connection* with F1 or if she *submitted* to F1’s jurisdiction. A third, related point is that one may be bound by the decision of a foreign court if one stands in a relationship of

(“It is not enough, it must be again emphasised, that the foreign court is duly invested with jurisdiction under the foreign legal system. It must also have jurisdiction according to the English rules of the conflict of laws.”).

163. *Pemberton*, (1899) 1 Ch. at 790 (Lord Lindley M.R.) (holding that the court in F1 must have had “jurisdiction . . . to summon the defendants before it and to decide such matters as it has decided”).

164. *Id.* at 792.

165. *Buchanan v Rucker*, (1808) 9 East 192 (K.B.).

166. *Id.* at 194.

167. *Sirdar Gurdyal Singh v. The Rajah of Faridkote*, [1894] A.C. 670 at 684 (P.C.) (appeal taken from India).

privity with a party over whom F1 was competent under the English tests of territorial connection or submission.¹⁶⁸

a. Requisite Territorial Connection: Presence or Residence

One of the two methods, sometimes said to be exhaustive,¹⁶⁹ by which the requirement of international jurisdiction can be met is to establish that the defendant had the requisite territorial connection with the country¹⁷⁰ in which F1 rendered its judgment.¹⁷¹ Although there is some debate as to whether presence without residence will suffice,¹⁷² it is generally thought that, “in the absence of any form of submission to the foreign court, such competence depends on the physical presence of the defendant in the country concerned at the time of suit.”¹⁷³ It was suggested in the current leading case, although without expressing a concluded view, “that the date of service of process rather than the date of issue of proceedings is to be treated as “the time of suit” for these purposes.”¹⁷⁴

In other words the defendant must be served with process while she is present in the country of F1. As this is not a circumstance that arises in the “core case,”¹⁷⁵ attention can be turned to the second method of establishing F1’s international jurisdiction. One should note, however, that the rule in relation to presence is formulated explicitly in terms of the *defendant’s* presence, which speaks to the general difficulties concerning the potential binding effect of a US class action judgment on a non-participant English *plaintiff*.

168. This convenient structure for discussing the interrelationship of territorial connection, submission and privity is employed by Edwin Peel, *supra* note 55, at 9.

169. BRIGGS, *supra* note 154, at 138.

170. For this purpose, the test appears to be whether the defendant was present (or perhaps resident without presence) in the particular U.S. state of F1 if the defendant is sued in a state court, but whether he was present in the United States generally if he is sued in a federal court (wherever located). See *Adams v. Cape Indus. Plc.*, [1990] Ch. 433 at 553 (C.A.) (Eng.) (“[I]f we had here been concerned with the enforcement of a judgment given by a state court in Texas, we should have been obliged to have regard to the territory of Texas alone, so that if the judgment now in suit had been given (say) by a Texas Supreme Court sitting in Austin, it would not (on the hypothesis of Cape and Capasco’s presence in Illinois) have been enforceable.”). The point is not accepted by all commentators. See BRIGGS, *supra* note 154, at 141 (“[I]nsofar as this ascribes an international relevance to rules of local jurisdiction it is to be questioned whether it is correct.”).

171. The justification is said to be “that by going to a foreign place he invests himself by tacit consent with the rights and obligations stemming from the local laws as administered by the local court: those laws including, of course, the local rules on the conflicts of laws.” *Adams*, [1990] Ch. 433 at 555.

172. *Id.* at 518. Some commentators therefore express confidence that mere presence is adequate. See, e.g., BRIGGS, *supra* note 154, at 137 (“[E]ither will suffice.”).

173. *Adams*, [1990] Ch. 433 at 518.

174. *Id.*

175. It is conceivable, however, that certain English non-participants might be *resident* in the United States. For example, they may be English citizens that travel frequently to and from a fixed location in the United States. See *Vogel v. R. & A. Kohnstamm Ltd.*, [1973] Q.B. 133 at 141 (Ashworth, J.) (“[R]esidence is a question of fact and when one is dealing with human beings one can normally approach the matter on the footing that residence involves physical residence by the person in question. I keep open the possibility that even in regard to such a person he may be constructively resident in another country although his physical presence is elsewhere.”).

b. Submission

The second method by which the international jurisdictional competence of F1 may be established is by demonstrating that the defendant submitted to the jurisdiction of F1. This tends to appear in two contexts.

The first is when the defendant has voluntarily appeared in F1 to defend the claim on its merits, or to counterclaim. Although the common law originally held otherwise,¹⁷⁶ statutory provisions now state that the “the person against whom the judgment was given shall not be regarded as having submitted to the jurisdiction of the court by reason only of the fact that he appeared” to contest F1’s jurisdiction, to ask F1 to dismiss or stay the proceedings, or to safeguard property seized or at risk of seizure.¹⁷⁷ Although this is unlikely to have any bearing upon the position of non-participant class action plaintiffs, who never appear before F1, it is interesting to note that the statutory rule is carefully formulated so as to apply both to defendants and to plaintiffs (“the person against whom the judgment was given”).

The question of potential submission to F1’s jurisdiction commonly arises in a second context, which may be of more relevance to the essential question in the core case. Submission to the foreign court’s jurisdiction can be established by showing prior agreement.¹⁷⁸ The regular context for this sub-rule is that of a contractual agreement on jurisdiction. In this context, it has been suggested at first instance “that an implied agreement to assent to the jurisdiction of a foreign tribunal is not something which courts of this country have entertained as a legal possibility.”¹⁷⁹ However, the decision acknowledged contrary dicta in previous cases,¹⁸⁰ and has been criticized as too wide.¹⁸¹ Indeed, it seems somewhat contradictory to insist upon express consent in the context of prior agreement, whilst the test of presence is avowedly based upon “tacit consent.”¹⁸²

The point may become important with respect to the essential question of the core case. This is because, if the existing rules are somehow to be applied in the context of the core case, the territorial connection requirement is unlikely to apply, leaving only the test of submission available. It would then be a matter of some consequence whether an agreement may be implied and, moreover, whether one might be implied from a failure to respond to a

176. *Henry v. Geoprosco Int’l Ltd.*, [1976] Q.B. at 726 (C.A.) (Eng.).

177. Civil Jurisdiction and Judgments Act, 1982, c. 27, § 33(1).

178. The idea being that “[n]o injustice is done to a party who submits to the jurisdiction of a court if its adverse judgment is taken as binding him.” BRIGGS, *supra* note 154, at 139.

179. *Vogel v. R. & A. Kohnstamm Ltd.*, [1973] Q.B. 133 at 145 (Ashworth, J.).

180. *See, e.g.*, *Blohn v. Desser*, (1962) 2 Q.B. 116 at 123 (Diplock J.); *Sfeir & Co. v. Nat’l Ins. Co. of N.Z. Ltd.* (1964) 1 Lloyd’s Rep. 330 (Mocatta, J.).

181. *See* BRIGGS, *supra* note 154, at 141 (“A better view may be that an implied agreement is possible, but will be found to have been made only in the clearest of cases.”); *see also* PETER R. BARNETT, *RES JUDICATA, ESTOPPEL, AND FOREIGN JUDGMENTS: THE PRECLUSIVE EFFECTS OF FOREIGN JUDGMENTS IN PRIVATE INTERNATIONAL LAW* 47 (2001) (“[A] defendant will have submitted by virtue of an express or implied agreement to submit.”).

182. *Adams v. Cape Indus. Plc.*, [1990] Ch. 433 at 555. *See also supra* note 171.

class action “opt out” notice. However, one should also bear in mind the inherent limitations of applying to this scenario a test developed in relation to contractual agreements, which necessarily presupposes that the individual objecting to recognition would have been a party to the contract and to the lawsuit in F1.

c. Privity of Interest

Even if one lacked the requisite territorial connection with, and did not submit to, the jurisdiction of F1, it is possible, as a matter of the existing English conflict of laws rules, to be bound in F2 by the *res judicata* effect of a judgment rendered in F1. This will be the case where the individual alleged to be bound stood in a relationship of “privity” with a party who was properly subject to the international jurisdiction of F1.¹⁸³

Although it has been stated judicially that “[i]t is not easy to detect from the authorities what amounts to a sufficient interest,”¹⁸⁴ Lord Reid, in the leading case of *Carl Zeiss Stiftung v. Rayner & Keeler Ltd.*,¹⁸⁵ stated that privity of interest “can arise in many ways,” with an essential precondition being “that the person now to be estopped from defending himself must have had some kind of interest in the previous litigation or its subject-matter.”¹⁸⁶ Again, this test is formulated with defendants in mind, but the more useful test formulated in *Gleeson v. J. Wippell & Co. Ltd.*¹⁸⁷ seems applicable to plaintiffs and defendants alike:

I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase “privity of interest.”¹⁸⁸

In addition to this seemingly broad and flexible test, it has been pointed out that the decision of the English Court of Appeal in *House of Spring Gardens Ltd. v. Waite (No.2)*¹⁸⁹ most closely deals “with issues analogous to

183. See *Carl Zeiss Stiftung v. Rayner & Keeler Ltd.*, (1967) 1 A.C. 853 at 910 (H.L.) (Eng.) (Lord Reid) (“It has always been said that there must be privity of blood, title or interest.”). The category most likely to be applicable to the U.S. class action scenario is that of “privity of interest.” See Decl. of Edwin Peel, *supra* note 168, at 14.

184. *House of Spring Gardens Ltd. v. Waite (No.2)*, (1991) 1 Q.B. 241 at 252 (C.A.) (Eng.) (Stuart-Smith L.J.).

185. *Carl Zeiss Stiftung*, (1967) 1 A.C. 853.

186. *Id.* at 910.

187. *Gleeson v. J. Wippell & Co. Ltd.*, (1977) 1 W.L.R. 510 (Ch.).

188. *Id.* at 515 (Robert Megarry V-C). Thus, for example, a decision binding upon a trustee would bind the beneficiaries, and vice versa. See *id.*

189. *House of Spring Gardens Ltd.*, (1991) 1 Q.B. 241.

those raised by a class action.”¹⁹⁰ Three defendants were successfully sued in Ireland as joint tortfeasors. This meant that the judgment against them was joint and several. Two of the three defendants brought separate proceedings in the courts of Ireland to have the joint and several judgment set aside (on grounds of fraud). These proceedings were rejected (ironically, on the ground that the *defendants’* witnesses had been bribed). The plaintiff brought an action in England to enforce the foreign, joint and several, judgment. Although the English conflict of laws rules generally permit a defendant to rerun allegations of fraud, even if these have been raised and rejected in the foreign court,¹⁹¹ the Court of Appeal in *Waite* held that this was not the case in circumstances where the allegations of fraud had been “litigated in a separate and second action in the foreign jurisdiction.”¹⁹² The question then arose whether the third defendant, who had not taken part in the separate fraud proceedings in Ireland, could raise the defense in England.

The Court of Appeal held that the third defendant could not rerun the fraud arguments because the fact that (instead of running the arguments in Ireland with his co-defendants) he had been “content to sit back and leave others to fight his battle, at no expense to himself” was “sufficient to make him privy to the estoppel; it is just to hold that he is bound by the decision.”¹⁹³ In reaching this conclusion, the Court agreed with a prior suggestion¹⁹⁴ that the following test was not confined to the wills and representative actions context in which it was formulated:

[I]f a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to re-open the case. That principle is founded on justice and common sense, and is acted upon in courts of equity, where, if the persons interested are too numerous to be all made parties to the suit, one or two of the class are allowed to represent them; and if it appears to the court that everything has been done bona fide in the interests of the parties seeking to disturb the arrangement, it will not allow the matter to be re-opened.¹⁹⁵

In addition to the fact that the language of “same interest” (with its aforementioned limitations)¹⁹⁶ has therefore been replaced with a test based on justice and common sense, the language of this passage is peculiarly apt to

190. Decl. of Edwin Peel, *supra* note 55, at 14.

191. *Abouloff v. Oppenheimer*, (1882) 10 Q.B.D. 295 (C.A.) (appeal taken from Eng.).

192. *House of Spring Gardens Ltd.*, (1991) 1 Q.B. at 251.

193. *Id.* at 254.

194. *Nana Ofori Atta II v. Nana Abu Bonsra II*, [1958] A.C. 95 at 102–03 (P.C.) (appeal taken from W. Afr.) (Lord Denning) (“[T]here is nothing in the principle itself which compels it to be limited to wills and representative actions. The principle, as Lord Penzance said, is founded on justice and common sense.”).

195. *Wytcherley v. Andrews*, (1871) L.R. 2 P. & D. 327 at 328 (Lord Penzance).

196. See *supra* text accompanying note 60.

cover the issues in the “core case.” The concern is *precisely* that the non-participants knew that they had the ability to “opt out” but instead elected to stand by while their battle was fought for them by the representative plaintiffs.

2. A “Final and Conclusive” Judgment, Rendered “On the Merits”

The second condition for the recognition in England of a foreign judgment is that the judgment was a “final and conclusive” one, rendered “on the merits.”¹⁹⁷ A judgment is “final” if it “cannot be reopened in the court which made the ruling,” and is “conclusive” to the extent “that it represents the court’s settled conclusion on the merits of the point adjudicated.”¹⁹⁸ The latter requirement can be expanded thus:

Looking at the matter negatively a decision on procedure alone is not a decision on the merits. Looking at the matter positively a decision on the merits is a decision which establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned.¹⁹⁹

This means that a foreign judgment may still be recognized if capable of being *appealed* in F1, but not if the court has not purported to resolve the controversy presented to it by the parties.²⁰⁰ Thus, the likes of freezing and other provisional orders will not be recognized.

The class action judgment of the “core case” should not give rise to any difficulties in this respect, since “[t]he requirement that the judgment is final and conclusive and on the merits . . . is very largely in the control of the US court.”²⁰¹ Thus, even if the judgment takes the form of a court-

197. *Carl Zeiss Stiftung v. Rayner & Keeler Ltd.*, (1967) 1 A.C. 853 at 918 (H.L.).

198. BRIGGS, *supra* note 154, at 137. See also *Carl Zeiss Stiftung*, (1967) 1 A.C. at 918 (Lord Reid) (“[A] final judgment on the merits . . . [w]hen we are dealing with cause of action estoppels . . . means that the merits of the cause of action must be finally disposed of so that the matter cannot be raised again in the foreign country.”).

199. *D.S.V. Silo und Verwaltungsgesellschaft mbH v. Owners of the Sennar (No. 2) (The Sennar)*, (1985) 1 W.L.R. 490 499 (H.L.) (Eng.) (Lord Brandon).

200. *Nouvion v. Freeman*, (1889) 15 App. Cas. 1 (H.L.). See also *The Sennar*, (1985) 1 W.L.R. at 494 (Lord Diplock) (“It is often said that the final judgment of the foreign court must be ‘on the merits.’ The moral overtones which this expression tends to conjure up may make it misleading. What it means in the context of judgments delivered by courts of justice is that the court has held that it has Jurisdiction to adjudicate upon an issue raised in the cause of action to which the particular set of facts give rise; and that its judgment on that cause of action is one that cannot be varied, re-opened or set aside by the court that delivered it or any other court of co-ordinate Jurisdiction although it may be subject to appeal to a court of higher Jurisdiction.”).

201. Decl. of Edwin Peel, *supra* note 55, at 7–8.

approved settlement, rather than a decision following trial, it is likely to be regarded as a final and conclusive one.²⁰²

3. *Unavailability of Defenses*

Even if rendered conclusively and on the merits in F1, by a court of competent jurisdiction, a judgment will not be entitled to recognition in F2 if any of a limited range of defenses apply. It should be stressed at the outset that it is *not* a valid defense to recognition that factual or legal errors were made in F1. This is the effect of the “doctrine of obligation,” under which the obligation arises from the foreign judgment itself, and not from the underlying cause of action.²⁰³

a. F1 Proceedings in Breach of Jurisdiction Agreement

As provided by statute,²⁰⁴ a foreign judgment rendered in F1 will not, in the absence of subsequent agreement or submission, be entitled to recognition in F2 if “the bringing of those proceedings in that court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country.”²⁰⁵ Any decision given on these matters in F1 will not be binding upon the court in F2.²⁰⁶

b. F1 Proceedings in Breach of Natural or Substantial Justice

A judgment rendered in F1 in breach of natural justice, as opposed to local procedural propriety, will not be recognized in F2. As stated in an early leading case, “English courts never investigate the propriety of the proceedings in the foreign Court, unless they offend against English views of substantial justice.”²⁰⁷ In applying the test, “the courts of this country must have regard to fundamental principles of justice and not to the letter of the rules which, either in our system, or in the relevant foreign system, are designed to give effect to those principles.”²⁰⁸

202. See Dixon, *supra* note 3, at 142 (“[T]he judgment of the US court would survive because the judge is obliged to, and would have, examined the issues and thus exercised a ‘judicial function’ in relation to the decision. It cannot just be a rubber stamping of the parties’ agreement. Indeed, the US court is under a positive obligation to protect the absent class members and to evaluate the settlement on its terms independently of the parties’ agreement. In doing so, the US judge is required to consider the strength of each party’s case (albeit without the benefit of a trial, but with circumstantial guarantees of the independence and expertise of counsel’s judgment).”).

203. *Godard v. Gray*, (1870) L.R. 6 Q.B. 139. However, it is arguable that the position is different if the foreign judgment is, under F1’s own laws on jurisdiction, a complete *nullity*. BRIGGS, *supra* note 154, at 144.

204. Civil Jurisdiction and Judgments Act 1982, c. 27, § 32 (U.K.).

205. *Id.* § 32(1)(a). The rule does not apply “where the agreement . . . was illegal, void or unenforceable or was incapable of being performed for reasons not attributable to the fault of the party bringing the proceedings in which the judgment was given.” *Id.* § 32(2).

206. *Id.* § 32(3).

207. *Pemberton v. Hughes*, (1899) 1 Ch. 781 at 790 (C.A.) (Eng.) (Lord Lindley M.R.).

208. *Adams v. Cape Indus. Plc.*, [1990] Ch. 433 at 559 (C.A.) (Eng.).

The rules of natural justice typically require “the right to be notified, represented, and heard”²⁰⁹ (basically paralleling the U.S. notion of “due process”) and now may be read in light of Article 6 of the European Convention on Human Rights.²¹⁰ The above discussion of *Shutts*²¹¹ revealed that the “opt out” mechanism of the U.S. class action has created local difficulties in this regard. However, it seems unlikely that the U.S. class action would fall foul of English views of natural or substantial justice. As one leading textbook points out:

The English courts are reluctant to criticize the procedural rules of foreign countries . . . and will not measure their fairness by reference to the English equivalents . . . If the foreign court, in proceedings in personam, is prepared to dispense with notice of the proceedings, or to allow notice to be served in a manner inadequate to satisfy an English court, the English court [should not] dispute the foreign judgment²¹²

Although dispensing with notice entirely would be problematic in terms of *jurisdictional competence*,²¹³ the English courts typically refrain from requiring foreign courts to comply with English *procedural* requirements.²¹⁴ Furthermore, given that the English representative action allows an individual to be bound without even *notice*, it would be somewhat hypocritical for an English court to declare a Rule 23(b)(3) class action, which at least grants non-participants the ability to opt out, to be inconsistent with English views of substantial justice.

Also of potential relevance in the context of the U.S. class action judgment, although not necessarily in the “core case,” is the English decision of *Adams v. Cape Industries Plc.*, where the Court of Appeal found that a particular U.S. class action judgment did *not* comply with the rules of natural jus-

209. BRIGGS, *supra* note 154, at 147.

210. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, Nov. 4, 1950, E.T.S. 5, 213 U.N.T.S. 221. Article 6(1) provides that: “[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.” *Id.* However, in a surprising decision, the House of Lords held in *Barnette v. United States*, [2004] UKHL 37, (2004) 1 W.L.R. 2241 (appeal taken from Eng.), that a non-“flagrant” violation of Article 6 will not lead to non-recognition of a foreign decision. The decision seems to have been based upon a misplaced analogy with decisions dealing with potential *future* violations of fair trial rights. See Adrian Briggs, *Foreign Judgments and Human Rights*, 121 L.Q.R. 185, 186 (2005).

211. *Phillips Petroleum v. Shutts*, 472 U.S. 797, 822 (1985). See *supra* text accompanying note 45.

212. J. J. FAWCETT ET AL., *CHESHIRE, NORTH & FAWCETT PRIVATE INTERNATIONAL LAW* 564 (14th ed. 2008) (footnotes omitted).

213. See *infra* text accompanying note 267.

214. See *Harris*, *supra* note 11, at 628 (“[T]he English courts have traditionally been reluctant to condemn foreign procedures.”).

tice. In that case, the U.S. (state) judge had directed the plaintiffs' counsel to divide the 206 class members into three bands, according to the severity of their injuries, so that the judge could determine an average quantum of damages to award per band.²¹⁵ This approach was castigated in both the High Court²¹⁶ and the Court of Appeal, the latter holding that, although it would have been an acceptable way for counsel to distribute an agreed settlement, "a judicial *award* so calculated is the antithesis of an award based upon the individual entitlements of the respective plaintiffs."²¹⁷

c. Recognition of F1 Judgment Contrary to Public Policy

It is also a defense in not recognizing a foreign judgment that its recognition would be contrary to English public policy. Whereas the natural or substantial justice test is supposedly supranational in defining the requirements of justice, wherever administered, the public policy defense is more insular. However, the test is rarely invoked successfully,²¹⁸ and when it is, the situations tend to be extreme. Examples include an order requiring the estate of a deceased father to provide perpetual maintenance to his illegitimate child²¹⁹ and a foreign judgment obtained in defiance of an English anti-suit injunction.²²⁰

The relevance of this defense to the essential question of the core case is likely to be low. Any objection to the aggregation of claims *per se* is likely to be given short shrift, given the existence of two mechanisms for conducting group litigation in England.²²¹ Furthermore, it has been stated by a senior member of the English judiciary that there exists an affirmative policy of

215. *Adams v. Cape Indus. Plc.*, (1990) 1 Ch. 433 at 564 (C.A.) (Eng.). It seems, however, that the judge had departed even from the local rules in this regard. *Id.* ("[T]he system of civil justice evidenced by the Federal Rules and explained by the witnesses was an unimpeachable system of justice within one of the great common law jurisdictions of the world and was plainly in accordance with the requirements of natural justice . . . [The defendants'] complaint was that, at the invitation of the plaintiffs' counsel, Judge Steger did not proceed in accordance with it.")

216. *Id.* at 500 ("The defendants were entitled to a judicial assessment of their liability. They did not have one. The award of damages was arbitrary in amount, not based on evidence and not related to the individual entitlements of the plaintiffs.") (Scott J.).

217. *Id.* (emphasis added). The problem, in other words, was that the judge had determined the *extent* of the defendants' liability on the basis of categories of injury upon which no evidence had been heard.

218. DICEY, MORRIS & COLLINS, *supra* note 162, at 629 ("There are very few reported cases in which foreign judgments *in personam* have been denied enforcement or recognition for reasons of public policy at common law.") (citations omitted).

219. *In re Macartney*, (1921) 1 Ch. 522, 527 (Eng.) (stating that this is true "especially having regard to the fact that the child's interest is not confined to minority.")

220. *Phillip Alexander Sec. & Futures Ltd. v. Bamberger*, [1997] I.L.Pr. 73, 103 ("It would seem to me *prima facie* that if someone proceeds in breach of, and with notice of, an injunction granted by the English court to obtain judgments abroad, those judgments should not, as a matter of public policy, be recognised in the United Kingdom.") (Waller J.), *aff'd* [1997] I.L.Pr. 73 at 115 (C.A.).

221. See MULHERON, *supra* note 16, at 111 ("Notwithstanding the *ad hoc* nature of English group litigation, there has certainly been a willingness to embrace the concept of multi-party litigation in this jurisdiction.")

supporting such litigation.²²² Whereas both sets of comments arise from the domestic context of group litigation, the English Court of Appeal has, in the conflict of laws context, had occasion to note that, if any aggregation procedures are to be found wanting, they are its own:

We recognize . . . that the federal courts have been required to determine, and to develop methods for the effective control and management of, civil litigation in product liability cases in which large numbers of plaintiffs have made claims against numerous defendants arising out of similar classes of injury and having broadly similar consequences but with differing degrees of severity. We have had some experience in this country of such litigation but in smaller volume. Our own procedures have to an extent been modified to deal with the preparation and settlement of such cases but we have not, to the same extent, developed the techniques of a class action or the role of the judge in procuring settlements. We are aware that our present system has been subjected to criticism in having failed, as it has been said, to respond sufficiently to the requirements of such litigation.²²³

Just as the mere fact of aggregation cannot constitute a public policy objection to a class action's recognition, the use of an "opt out" mechanism seems most unlikely to constitute one.²²⁴ Even at its most hostile stance, the objection of the early twentieth-century English judiciary was that the representative action might allow a non-participant to be bound without his leave.²²⁵ Since then, the English judiciary has taken a far more liberal approach to the representative action,²²⁶ including allowing it to bind individuals who have not affirmatively consented to the relevant action.²²⁷ As the Rule 23(b)(3) class action contains a requirement of notice, coupled with the ability to "opt out" of the class, it would be difficult to sustain an objection to recognition on grounds of public policy.

d. Prior Foreign Judgment

If there exists a judgment that was rendered in another forum prior to the class action judgment or settlement in F1, the F1 judgment will not be recognized in F2:

222. *Afrika v. Cape Plc.*, [2001] EWCA (Civ) 2017, [2002] 1 W.L.R. 2274 at [2] (C.A.) (Eng.) (Longmore L.J.) ("[I]t is the policy of the courts to facilitate such actions in appropriate cases and adapt traditional procedures accordingly.").

223. *Adams v. Cape Indus. Plc.*, (1990) 1 Ch. 433 at 564–65 (C.A.) (Eng.).

224. *See Harris*, *supra* note 11, at 639 ("The mere fact that the procedure adopted in the United States is different ought not to be reason enough in and of itself to refuse to recognize the judgment.").

225. *See supra* text accompanying note 74.

226. *See supra* text accompanying note 76.

227. *See Independentie Ltd. v. Music Trading On-Line (H.K.) Ltd.*, [2003] EWHC (Ch.) 470 (Eng.).

[T]he correct general rule is that where there are two competing foreign judgments each of which is pronounced by a court of competent jurisdiction and is final and not open to impeachment on any ground then the earlier of them in time must be recognised and given effect to the exclusion of the later.²²⁸

This is not a circumstance described in the core case. However, it would become relevant if, prior to judgment (or court-approved settlement) in F1, the plaintiffs managed to proceed to judgment elsewhere than in the United States. The scenario is unlikely and the outcome clear, such that this point is not developed further. A prior English judgment would necessarily have the same effect.²²⁹

e. F1 Judgment Obtained by Fraud

As briefly mentioned above,²³⁰ it is almost always²³¹ open to a party seeking to avoid the recognition of a foreign judgment to argue that the judgment in F1 was procured by fraud.²³² However, the issue does not arise in the core case and, should it arise in any variation thereupon, the consequences are clear.

The rule is discussed here only so as to complete the survey as to the common law requirements for the recognition in England of foreign judgments. The path is hereby cleared for a discussion of the real meat of the essential question at the heart of the “core case.” However, before turning to consider this dilemma of having defendant-based rules but a plaintiff-based problem, a number of potential variations on the core case warrant separate consideration.

IV. DEPARTURES FROM THE “CORE CASE”

The “core case” set out above envisages non-participant Rule 23(b)(3) class actions plaintiffs who are not awarded damages in the United States and who therefore attempt to litigate the same causes of action in England.²³³ However, three potential variations on this core fact pattern could give rise to quite separate conflict of laws issues. The first variation is that

228. *Showlag v. Mansour*, (1995) 1 A.C. 431 440 (P.C.) (appeal taken from Jersey).

229. *Vervaeke v. Smith*, (1983) 1 A.C. 145 (H.L.) (appeal taken from Eng.).

230. *Supra* text accompanying notes 191–92.

231. The one exception being where the party objecting to recognition, or her privies, have raised the matter in *separate* proceedings in F1. See *House of Spring Gardens Ltd. v. Waite*, [1991] 1 Q.B. 241 (C.A.) (Eng.).

232. *Abouloff v. Oppenheimer*, (1882) 10 Q.B.D. 295 at 300–01 (C.A.) (Lord Coleridge C.J.) (Eng.) (“[I]t has always been held in the courts of this country to be an answer to an action upon a judgment, that that judgment has been obtained by the fraud of the party seeking to enforce it.”). For repeated affirmations of the rule, see *Vadala v. Lawes*, (1890) 25 Q.B.D. 310 (C.A.) (Eng.); *Syal v. Heyward*, [1948] 2 K.B. 443 (C.A.) (Eng.); *Jet Holdings Inc. v. Patel*, [1990] 1 Q.B. 335 (C.A.) (Eng.); *Owens Bank Ltd. v. Bracco*, [1992] 2 A.C. 443 (H.L.) (appeal taken from Eng.).

233. See *supra* text accompanying note 2.

the non-participants are awarded damages in the United States and seek to recover *further* damages in England. The second variant is that the non-participants are awarded damages in the United States and simply seek to *enforce* that judgment in England. The final deviation from the core case is that the non-participants are brought within the U.S. class action by some means *other* than Rule 23(b)(3). Partly for the sake of completeness, and partly because such circumstances could possibly occur, these departures from the core case will be assessed in turn, leaving the remainder of the Article to concentrate upon the matters raised by the core case.

A. "Former Recovery"

The first possible variation on the core case would be a scenario in which the non-participants *are* awarded damages in the United States but, unsatisfied with their lot, attempt to litigate their causes of action in England in the hope of richer pickings. It goes without saying that, if class action judgments are *not* entitled to recognition in England, the plaintiffs are free to rerun their claims in this manner. If the English courts determine that the U.S. federal court was not jurisdictionally competent over the plaintiffs now before it, there is no injustice in allowing those individuals to litigate their claims.

However, if class action judgments *are* entitled to recognition in England, the non-participants will almost certainly be barred from seeking additional damages by section 34 of the Civil Jurisdiction and Judgments Act of 1982,²³⁴ which provides as follows:

No proceedings may be brought by a person in England and Wales . . . on a cause of action in respect of which a judgment has been given in his favour in proceedings between the same parties, or their privies, in a court in another part of the United Kingdom or in a court of an overseas country, unless that judgment is not enforceable or entitled to recognition in England and Wales²³⁵

The general aim of the provision is clear: when individuals have achieved "former recovery" abroad, the interests of finality outweigh their belief that justice was not accurately done.²³⁶ Although this Article stresses the non-party status of class action non-participants,²³⁷ it is unlikely that the English courts would, after holding the U.S. class action judgment to have *res judicata* effect, allow the non-participants to bypass the purpose of section 34 on the basis that it refers to a foreign judgment concerning "the same parties,

234. This is also the conclusion reached in Decl. of Jonathan Harris ¶ 37, *In re Royal Dutch/Shell Transport Sec. Litig.*, No. 04-374, 2008 WL 2166243 (D.N.J. May 21, 2008).

235. Civil Jurisdiction and Judgments Act, 1982, c. 27, § 34 (U.K.).

236. See *infra* text accompanying note 349.

237. See *infra* text accompanying note 295.

or their privies.” In addition to the fact that the term “privies” might well be broad enough to cover class action non-participants in any case,²³⁸ section 34 has generally been given a broad interpretation by the English courts.²³⁹

B. Enforcement

A second, potentially important departure from the core case concerns the scenario in which the non-participants have been victorious in the U.S. class action and seek to have that judgment enforced in England. This will tend to arise in circumstances in which the defendant has substantial assets in England but not in the United States. It gives rise to two sets of questions, the first concerning the general conditions for enforcement, and the second concerning fact-sensitive defenses which operate to block enforcement rather than recognition.

1. General Conditions for Enforcement

When a judgment creditor seeks a *remedy* from the English court, the criteria of *enforcement* must be met.²⁴⁰ The English courts will enforce foreign judgments for fixed and final sums of money,²⁴¹ provided that those judgments meet the requirements of recognition set out above²⁴² and are not subject to any of the defenses set out below.²⁴³ If the class action judgment from the core case is entitled to recognition, then it necessarily follows that the non-participants will be entitled to have a similar judgment enforced in England.²⁴⁴ However, the more interesting question concerns whether, even if a class action judgment *against* them would not be recognized, they could waive their objections in the event that they win in the United States.

To the extent that the international jurisdictional competence requirement exists to protect the non-participants, it would seem that they should be entitled to enforce such a judgment if they wish, particularly given that the existing common law rules all try to put some element of control in the hands of English plaintiffs. However, in his Expert Declaration in *In re Royal Dutch/Shell Transport Securities Litigation*, Sir Christopher Staughton, a retired

238. See *supra* text accompanying note 183 for the categories of privity. See *infra* text accompanying note 299 for its potential applicability to class action non-participants.

239. See generally *Republic of India v. India S.S. Co. Ltd. (The Indian Grace)*, [1993] A.C. 410 (H.L.) (Eng.) (suing for damaged cargo and suing for short delivery of a different part of the cargo amounts to two suits upon the same contractual cause of action).

240. See Harris, *supra* note 11, at 626 (“Enforcement of a judgment is required where the claimant seeks a remedy from the English court, such as damages. For a judgment to be enforced, it must first be entitled to recognition.”).

241. *Sadler v. Robins*, (1808) 170 Eng. Rep. 948 (Eng.).

242. See *supra* text accompanying note 154.

243. See *infra* text accompanying note 252.

244. Although this is subject to certain fact-specific defenses to enforcement. See *infra* text accompanying note 252.

judge of the English Court of Appeal, has suggested that this might not be so.²⁴⁵

Having reached his own conclusion that the judgment in the “core case” would not bind the non-participants in England,²⁴⁶ Staughton also finds it “probable that the English court will find that a U.S. judgment purporting to bind *or benefit* the Absent European Class Members was rendered in breach of natural justice.”²⁴⁷ Having already dismissed as unlikely the possibility that the U.S. class action judgment will be considered to have been rendered in breach of natural justice,²⁴⁸ the real interest of Staughton’s claim lies in his suggestion that a natural justice objection could not be waived:

[W]hen the question of enforceability is considered together with the question of recognition, it is to my mind plain that the US class action proceedings would be opposed to natural justice if the result were that the absent plaintiffs have the right to succeed if the class action wins, and the right to sue again if they lose. That is not justice. The aim of justice is to decide yes, or no, whether the plaintiff is entitled to his remedy. It should not be a bet that can win and cannot lose. It follows that, if considerations of natural justice prevent an English judge from binding the absent class members to the result of an adverse judgment, that same English judge would also consider that Absent European Class Members could not enforce the judgment.²⁴⁹

It is clear that the reasoning behind this passage is not confined to the context of a natural justice objection. If correct, it would apply equally to a jurisdictional competence objection, so as to allow a defendant to resist enforcement on the basis that the U.S. court was not competent to determine the non-participants’ claims. However, as pointed out by Jonathan Harris’s declaration in the same case, Staughton’s argument simply cannot be correct:

245. Decl. of The Right Hon. Sir Christopher Staughton, *In re Royal Dutch/Shell Transport Sec. Litig.*, (No. 04-37), 2008 W.L. 2166243 (D.N.J. 2008).

246. *Id.* ¶ 33–34 (“[A]bsent plaintiffs . . . have not chosen in any meaningful way to invoke the jurisdiction of the U.S. court.”). This analysis is question-begging because whether the “opt out” mechanism suffices to protect the interests of non-participants is precisely the question for determination. Staughton’s analysis offers no appreciation of the non-party status of the non-participants, rendering vacuous his conclusion that it is “unlikely that an English court would recognise the U.S. court’s jurisdiction to bind absent plaintiffs who did not positively avail themselves of the opportunity to sue in the United States.” *Id.* ¶ 34.

247. *Id.* ¶ 35 (emphasis added).

248. Staughton is only able to reach the conclusion that he does by mixing together the circumstances of our “core case” (in which adequate notice is received) with circumstances in which adequate notice has not been proven. Thus he states his belief that “an English court would consider a procedural mechanism in which absent plaintiffs around the world are considered bound by a judgment, merely because attempts have been made to notify them of the imminent disposition of their rights, to be in breach of natural justice.” *Id.* ¶ 40.

249. *Id.* ¶ 45.

A party who has himself been denied natural justice overseas may have the *right* to contest a foreign judgment on that basis. However, a right is meaningless if it cannot be waived by its holder. That would turn it into an obligation or a burden. A party who has in some way been denied access to natural justice, but who nevertheless chooses to rely upon a judgment, has effectively simply waived any objections to that judgment.²⁵⁰

Harris goes on to point out, quite correctly, that “it would be very curious if the *defendants* could in such circumstances seek to resist recognition and enforcement of the judgment on the basis that the *claimants* were denied natural justice.”²⁵¹ The gambling analogy drawn by Staughton is therefore plainly erroneous. Neither the issue of breach of natural justice, nor that of jurisdictional competence, is an event upon which the parties are “betting.” Rather, they both constitute conditions precedent for the U.S. court to be taken as competent to bind *the non-participants* to a judgment. If those non-participants, despite having been denied an entitlement, are nonetheless happy to enforce the resultant judgment, it would smack of double unfairness for their denial of justice to be used against them.

It therefore seems clear that a class action judgment will be entitled to recognition and enforcement in England when the judgment is invoked by the non-participants. This is so quite irrespective of whether a similar judgment in favor of the *defendants* would have been entitled to recognition.

2. *Specific Defenses to Enforcement*

There exist a number of defenses that specifically prevent the enforcement of judgments in England, even if those judgments are entitled to *recognition*.²⁵² If the class action judgment in question contains “a judgment for 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 is given,”²⁵³ the award will be unenforceable in England. Where a single judgment includes multiple causes of action, one of which resulted in multiple-damages being awarded, the non-multiplied awards remain enforceable.²⁵⁴

250. *Supra* note 234, ¶ 33.

251. *Id.* at 13, ¶ 34.

252. Where a judgment is entitled to recognition, but not to enforcement, it may still benefit a party by creating an issue estoppel or a cause of action estoppel. It simply cannot be used to target assets *directly*.

253. Protection of Trading Interests Act, 1980, c. 11, § 5(3) (U.K.).

254. *Lewis v. Eliades* (No.2), [2003] EWCA (Civ) 1758, [2004] 1 W.L.R. 692 (Eng.). However, the Court of Appeal left open the question whether, *within* the multiplied award, even the compensatory element is unenforceable.

Similarly, judgments that directly or indirectly enforce foreign penal,²⁵⁵ revenue,²⁵⁶ or other public laws²⁵⁷ will not be entitled to enforcement. However, if the authority of an Australian decision is followed in England, a claim brought by a regulatory body may be enforceable if, in substance, it seeks recovery on behalf of individuals.²⁵⁸ In addition, it is permissible to sever an award and to enforce only the compensatory element.²⁵⁹

C. Non-“Opt Out” Class Actions

The third potential variation on the “core case” arises from the fact that not all class actions employ “opt out” mechanisms like that of the Rule 23(b)(3) class action. Whereas so-called “opt *in*” class actions should present no problems (as they tend not to constitute genuine class actions),²⁶⁰ “opt out” and “opt in” do not exhaust the range of theoretically possible class actions.²⁶¹ Indeed, Rule 23 of the Federal Rules of Civil Procedure explicitly provide for two *mandatory* forms of class action. Rule 23(b)(1)(A),²⁶² Rule 23(b)(1)(B),²⁶³ and Rule 23(b)(2)²⁶⁴ class actions empower, but do not require, the court to direct notice to be given to the non-participant class members.²⁶⁵

Although the English representative action rule is similarly a mandatory class action,²⁶⁶ the international dimension is likely to create problems for the recognition of Rule 23(b)(1) and Rule 23(b)(2) class actions in cases where notice is not given. In the absence even of *notice*, it is difficult to see how English non-participants could be considered to have been provided

255. *United States of America v. Inkley*, [1989] Q.B. 255 (C.A.) (Eng.).

256. *Government of India v. Taylor* [1955] A.C. 491 (H.L.) (appeal taken from Eng.).

257. *Att’y Gen. of New Zealand v. Ortiz*, [1982] Q.B. 349 (C.A.), [1984] A.C. 1 (H.L.) (appeal taken from Eng.).

258. *Robb Evans of Robb Evans & Assoc. v. European Bank Ltd.*, [2004] N.S.W.C.A. 82 at 82–83 (holding that the U.S. Federal Trade Commission is entitled to enforce judgment in claim brought on behalf of victims of credit card fraud).

259. *Raulin v. Fischer*, [1911] 2 K.B. 93 at 93 (Eng.).

260. *See supra* note 118.

261. *See MULHERON, supra* note 16, at 29 (“The alternative procedures for the determination of class membership include: to enact by statute either an opt-in or opt-out approach; to statutorily dictate compulsory membership with no rights to opt out at all; to statutorily prescribe one approach or the other but then permit the courts to change the regime for a particular case at their discretion; or to provide by statute that the approach by which to determine class membership should be left entirely to the court’s discretion.”).

262. *FED. R. CIV. P. 23(b)(1)(A)* (those necessary to avoid the risk of setting incompatible standards for defendants).

263. *Id.* 23(b)(1)(B) (those necessary to avoid the risk of impeding or impairing the interests of those not party to individual claims—especially where early individual claims might exhaust the defendant’s funds).

264. *Id.* 23(b)(2) (those necessary to secure injunctive or declaratory relief for the class as a whole).

265. *Id.* 23(c)(2)(A) (“For any class certified under Rule 23(b)(1) or (b)(2), the court *may* direct appropriate notice to the class.”) (emphasis added).

266. *Markt & Co. Ltd. v. Knight Steamship Co. Ltd.*, (1910) 2 K.B. 1021 at 1039 (C.A.) (Fletcher Moulton L.J.) (Eng.) (“The plaintiff is the self-elected representative of the others. He has not to obtain their consent.”).

with adequate safeguards against the extinguishment of their legal rights in such class actions.²⁶⁷ Therefore, quite independently of the answer to the essential question in the “core case,” it may well be that mandatory U.S. class actions would not, in the absence of a treaty, be entitled to recognition in England.

V. THE “CORE CASE”: DEFENDANT-BASED RULES AND A PLAINTIFF-BASED PROBLEM

The central question presented by the “core case”²⁶⁸ is whether non-participant class action plaintiffs should be able to object to the jurisdictional competence of the U.S. federal court when they attempt to (re)litigate the same causes of action in England. The difficulty in answering this question stems from the fact that the English common law rules relating to the recognition of foreign judgments were developed in line with two assumptions. First, it was always taken for granted that both parties before the English forum (“F2”) would have been parties to the action in the U.S. forum (“F1”). If either the plaintiff or the defendant in F2 was not a party in F1, why would she care about its recognition in F2? Secondly, it was always presupposed that only a *defendant* could object that F1 was not a court of competent (international) jurisdiction. After all, the plaintiff ordinarily commences the claim in F1, so fairness demands that she be bound by that decision in F2 when it is unfavorable to her.²⁶⁹

However, the U.S. federal class action, being an animal quite unlike any that the English conflict of laws has seen, has managed to turn both assumptions on their heads. First, the representative nature of the class action means that non-participant plaintiffs can be legitimately bound, as a matter of the law of F1, by the *res judicata* effect of any judgment rendered. Accordingly, non-parties to the U.S. claim can have an interest in the proceedings in F2—any *res judicata* effect in F2 will limit the ability of the non-participants to sue upon the underlying cause of action. Secondly, the “opt out” mechanism for becoming a member of the class means that the non-participant

267. See *infra* text accompanying note 330.

268. See *supra* text accompanying note 2.

269. DICEY, *supra* note 162, at 595 (“It is obvious that a person who applies to a tribunal himself is bound to submit to its judgment, should that judgment go against him, if for no other reason than that fairness to the defendant demands this.”). The point about defendant-based, but not that about party-based, rules has been stressed by Dixon, *supra* note 3, at 138 (“The problem is that the discussion of the enforcement of foreign judgments in the case law and the treatises focuses on the enforcement of foreign judgments in relation to certain sums awarded against a *defendant*. We are, of course, more concerned with the impact of the judgment on the plaintiffs, i.e. [sic] we are concerned with *recognition* of the judgments rather than *enforcement*.”). In fact, the point about *party*-based rules is skirted over. Dixon, *supra* note 3, at 142 (“[T]here may be some question as to whether the class members are strictly *parties* to the US judgment. Under US law, they are for all purposes relevant to this enquiry.”). With respect, the “for all purposes relevant to this enquiry” statement begs the question, unless and until one considers the relevance of “party” status as a matter of the English conflict of laws rules.

plaintiffs cannot be met with the objection that they explicitly commenced proceedings abroad: it was only the *representative* plaintiffs that did so.

This renders it at least arguable that a plaintiff should be able to object to the jurisdictional competence of the U.S. federal court. However, that leaves the English court with a difficult, but crucially important, question. In simple terms, how does one construct an answer to a plaintiff-based problem if one's toolbox consists of defendant-based rules? Although no attempt has yet been made to categorize the various potential solutions to this question, four broad theses are discernable within the literature. To coin a typology, these are the "flip" thesis, the "no requirement" thesis, the "English rules" thesis, and the "new rules" thesis. In evaluating these arguments in turn, it will be suggested that the "flip" thesis is insufficiently attentive to the particular features of the class action mechanism, that the "no requirement" thesis is simply untenable, and that the "English rules" thesis neglects the vital international element involved in the question of recognition. It goes on to argue that only the "new rules" thesis is capable of overcoming these difficulties, although the sole attempt that has been made to date has fallen considerably short of achieving this.

A. *The "Flip" Thesis*

Amongst the limited range of sources available, one of the most popular suggestions for resolving the essential question of the core case has been to take the existing English conflict of laws rules, typically formulated in terms of defendants (and always in terms of parties), and to "flip" them so that they can be applied to those who were non-participant plaintiffs in F1. In other words, any condition that must be satisfied before a defendant can be bound by a foreign judgment is considered equally necessary to bind a class action non-participant. The present subsection investigates the arguments in favor of this "flip" thesis and seeks to offer a critique of the attempt to place square pegs in round holes.

It is understandable why the current rules were formulated in terms of parties and, in particular, defendants. In most circumstances, it is inconceivable that a plaintiff would seek to object to recognition on the grounds of her lack of territorial connection with F1. However, this should not prevent us from giving to the class action non-participants the opportunity to object to the international jurisdictional competence of the courts of F1. Moreover, so the "flip" thesis goes, we should afford them the protection of precisely the same rules that apply to defendants.

This thesis is illustrated by "the one English case which has come close to addressing the *res judicata* effect of a US class action."²⁷⁰ The plaintiff in *Campos v. Kentucky & Indiana Terminal Railroad Co.*²⁷¹ sought a judgment

270. Peel, *supra* note 55, ¶ 13.

271. *Campos v. Ky. & Ind. Terminal R.R. Co.*, (1962) 2 Lloyd's Rep. 459 (Q.B.) (Eng.).

from the English High Court (“F2”) that the defendant corporation owed it the gold value of certain bonds issued to her by the defendant. The defendant objected that the plaintiff was bound by a class action judgment rendered by the U.S. District Court for the Southern District of New York²⁷² and affirmed by the U.S. Court of Appeals for that district (“F1”), which had determined that the relevant bonds and interest coupons did not contain a gold value clause.²⁷³

The English court ultimately agreed that the bonds and coupons lacked a gold value clause, such that that judge felt that “it is not necessary for me as a matter of decision to state my views on the alternative defense of *res judicata*.”²⁷⁴ However, Justice McNair went on to offer, in *obiter dicta*, his views on the issue. As the *Campos* litigation all took place prior to the 1966 amendments to Rule 23, Justice McNair first had to determine whether the judgment rendered in F1 constituted a “spurious class action” (under former Rule 23(a)(3)) as opposed to the “true class action” (under former Rule 23(a)(1)). The relevance of this distinction lies in the fact that a spurious class action, unlike a true one, did not (even as a matter of U.S. law) bind the class non-participants.²⁷⁵ Finding that the judgments rendered in F1 did not concern a true class action, or at least that the defendants had not discharged their burden of showing that they did, Justice McNair concluded that the plaintiff was not bound by the judgments even in F1. Furthermore, he concluded that, even if it *had* been a true class action, the plaintiff “was not a bondholder at the date of the initiation of the *Lemaire* proceedings” and so could not be bound even as a matter of U.S. law.²⁷⁶ Thus, it was only in a form of *obiter dicta* within *obiter dicta* within *obiter dicta* that Justice McNair finally made it onto the essential question underlying the “core case.”

Although he had already accepted that the decision rendered in F1 constituted “a clear determination by a competent Court of jurisdiction as to the proper construction of these bonds,”²⁷⁷ Justice McNair found “great force” in the contention:

that in accordance with English private international law a foreign judgment could not give rise to a plea of *res judicata* in the

272. *Lemaire v. Ky. & Ind. Terminal R.R. Co.*, 140 F. Supp. 82 (S.D.N.Y. 1956).

273. *Lemaire v. Ky. & Ind. Terminal R.R. Co.*, 242 F.2d 884, 888 (2d Cir. 1957).

274. *Campos*, (1962) 2 Lloyd’s Rep. at 471.

275. See *Oppenheimer v. F. J. Young & Co., Inc.*, 144 F.2d 387, 390 (2d Cir. 1944) (“[O]n the face of the complaint the plaintiffs have brought themselves within the provisions of Rule 23(a)(3). Inasmuch as persons who do not become parties cannot be affected by the decision, we need not go further as to the adequacy of plaintiffs’ representation of others in the class. A stricter rule as to the adequacy of representation ought to obtain where the judgment is held binding on members of a class who do not intervene.”) (citations and emphasis omitted).

276. *Campos*, (1962) 2 Lloyd’s Rep. at 473.

277. *Id.* at 471.

English Courts unless the party alleged to be bound had been served with the process which led to the foreign judgment.²⁷⁸

Taken at face value, this statement is simply erroneous, since having the “requisite territorial connection” within F1 at the time of service of process is only one of *three* ways for establishing the jurisdictional competence of the courts of F1. It can also be established by the tests of “submission” and “privity.”²⁷⁹ Putting this point briefly aside, Justice McNair’s arguments are simply counterintuitive.

Justice McNair’s essential point is that the plaintiff could not be bound because she was never served with process. However, it is strange to apply to plaintiffs a test which, on its own terms, could never be met. The service of process rule is *necessarily* defendant-based: it is the plaintiff that does the serving of process, so she could never be served with process.²⁸⁰ As a matter of U.S. law, it is the “opt out” notice that fulfills the role ordinarily played by service of process, such that the real question must be whether such *notice* constitutes sufficient protection in the eyes of the English courts. The very same criticism of Justice McNair was made succinctly by Judge Holwell in the U.S. certification case *Re Vivendi Universal, S.A.*: “[t]his begs the question of whether a class member is a party.”²⁸¹

However, one might still hold to the “flip” thesis, but apply one of the less-obviously-inappropriate tests of “submission” or “privity.” Indeed, two leading scholars in the English conflict of laws have taken precisely this tack. The first applies only the test of submission, concluding that it probably could not be used to bind a non-participant.²⁸² The second agrees with the first on the test of submission, and then considers the potential relevance of the test of privity of interest.²⁸³ However, he too concludes that a non-participant could probably not be bound.

1. *Applying the Test of “Submission”*

One may be subject to a *res judicata* in F2 if one submits to the jurisdiction of the courts of F1.²⁸⁴ In the “core case,” the question of submission by

278. *Id.* at 473.

279. Although, technically speaking, the “privity of interest” test is not one of jurisdictional competence but of justice and fairness. *See supra* text accompanying note 188.

280. Except for the scenario in which a natural defendant sues for a declaration of non-liability in F1. In that circumstance, it is perfectly acceptable to apply a test based upon the natural plaintiff’s territorial connection with F1 at the time of service of process. This is because it *is* then possible for a natural plaintiff to be served with process—she simply plays the role of a defendant for conflict of laws purposes. *See supra* note 9.

281. *In re Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76, 102 (S.D.N.Y. 2007).

282. ADRIAN BRIGGS & PETER REES, *CIVIL JURISDICTION AND JUDGMENTS*, 781–84 (5th ed. 2009) (the relevant section is written solely by Briggs).

283. Peel, *supra* note 55, ¶ 13.

284. *See* text accompanying note 176.

appearance in F1 does not arise, which leaves only one common scenario, namely submission by prior agreement.

There is some debate in the English conflict of laws as to whether an agreement to submit can be implied, rather than expressed in a contract.²⁸⁵ As the idea behind the test of submission is that one voluntarily places oneself in the way of an obligation, it would make sense to allow an implied agreement, at least “in the clearest of cases.”²⁸⁶ The question for the core case would then be whether the failure to respond to an “opt out” notice can constitute a clear enough agreement to submit to the jurisdiction of the U.S. courts. This possibility is explored by Adrian Briggs.²⁸⁷

Briggs makes reference to the English case taken as authority for the proposition that one cannot accept a contract by silence or lack of response²⁸⁸ and argues that this “ordinary common sense of the common law . . . will provide a sensible answer”²⁸⁹ After considering the possibility that the English rules might be developed so as to facilitate, rather than to frustrate, the “social problem” addressed by the class action,²⁹⁰ Briggs nonetheless concludes that the test of implied consent could not be satisfied:

Consider it this way. If the natural defendant were to bring proceedings for a declaration of non-liability and serve a natural claimant out of the jurisdiction, a judgment in favour of the natural defendant would not be recognised in England if the natural claimant did not submit by appearance. The position cannot rationally be different when a natural claimant is made a party to the foreign proceedings by other claimants, or by the court: the foreign court is still not one of competent jurisdiction in relation to him: what, one may ask rhetorically, has the person in question done to assume the obligation to abide by the judgment? The answer is nothing. It follows that a court should be extremely cautious before proposing to alter the rules on the recognition of foreign judgments in this area.²⁹¹

Unfortunately, this approach both engages in sleight of hand and suffers from a fundamental misconception as to the nature of the U.S. class action.

The sleight of hand consists in the fact that Briggs is, through his analogy with the natural defendant serving the natural plaintiff out of the jurisdiction, subtly leading us away from the test of submission by implied consent

285. See text accompanying note 179.

286. BRIGGS, *supra* note 154, at 141.

287. BRIGGS & REES, *supra* note 282, at 783.

288. *Felthouse v. Bindley*, (1862) 142 Eng. Rep. 1037 (C.P.).

289. BRIGGS & REES, *supra* note 282, at 783.

290. Although that social problem is considered to be that “faced by multiple small claimants confronting a powerful single defendant,” rather than the deterrent-/externalities-based rational considered above. *Id.* at 783. See also *supra* text accompanying note 15.

291. BRIGGS & REES, *supra* note 282, at 783–84 (footnote omitted).

and back to the test of territorial connection. As the discussion of *Campos* revealed, it is futile to refer to a test based upon service of process in a scenario in which we know that the plaintiff has *not* been served with process. This retreat to territorial connection is then covered up by swinging us back to a *different* limb of the submission test, namely submission by *appearance*. But this, too, is futile, for we have already accepted that the non-participants did not appear—that was why we were considering the test of submission by *implied consent*.

Once this is appreciated, all one is left with is the bald assertion that the “ordinary common sense of the common law” provides the “sensible answer.” However, the obvious objection to this is that the “common sense” referred to is simply that of a domestic rule relating to offer and acceptance in contract. One could quite easily point to various common law contexts where obligations can arise, and entitlements can be lost, by virtue of *notice*. One could then assert that *this* is the common sense that should apply to the essential question in the “core case.”²⁹² To answer Briggs’s rhetorical question, what the person in question has done is that he has failed to “opt out” after being notified of his ability to do so.

Furthermore, in response to Briggs’s assertion that the position taken with respect to natural plaintiffs who are served with process “cannot rationally be different when a natural claimant is made a party to the foreign proceedings by other claimants, or by the court,” one need only point out that Briggs fundamentally misconceives the nature of the U.S. class action. The essence of a representative action is that the non-participants are *not* made “party to the foreign proceedings.” Once this point is grasped, a quick glance back upon the discussion of *Shutts*²⁹³ will reveal eminently rational justifications for applying a different test to non-participant class members than that applicable to parties. Indeed, this was the basis for the U.S. Supreme Court’s decision in *Shutts*:

The burdens placed by a State upon an absent class-action plaintiff are not of the same order or magnitude as those it places upon an absent defendant. An out-of-state defendant summoned by a plaintiff is faced with the full powers of the forum State to render judgment *against* it.²⁹⁴

292. Indeed, the concerns at play in the context of contractual offers and acceptances appear to be significantly different from those at issue in the class action “opt out” context. If silence could amount to the acceptance of a contractual offer, offerors could unilaterally enter contracts by sending reams of unsolicited “offers” to which recipients could not realistically reply. With a class action, there exist many more stages before the non-participants can become bound—not least that the U.S. court must permit the action to go ahead, having checked for adequate representation. Furthermore, the potential benefits of allowing class actions to bind non-participants (such as securing the adequate deterrence of corporations that might otherwise escape liability by spreading losses in small doses worldwide) appear to dwarf any benefits that might be gained from allowing offers to be accepted by silence.

293. See *supra* text accompanying note 45.

294. *Phillips Petroleum v. Shutts*, 472 U.S. 797, 808 (1985) (emphasis in original).

In other words, both an absent defendant *and* a natural plaintiff served out of the jurisdiction for a declaration of non-liability are subject to the power of the courts of F1 to render awards *against* them, particularly in the event of a default judgment. This is evidently not true with respect to non-participant (i.e. non-party) plaintiffs.²⁹⁵ As explained in *In re "Agent Orange" Product Liability Litigation*:

The prevailing view appears to be that class members are not parties, at least for such purposes as discovery and liability for sanctions. They are considered parties, however, for purposes of being bound by the judgment in a class action, receiving the benefit of the statutes of limitations toll, and having standing to appeal from decisions and object to settlements.²⁹⁶

This provides a potential, and certainly a rational, reason for drawing a distinction between parties and non-parties: the former have far more to lose. The English courts might therefore have a lesser substantive interest in refusing to enforce a class action judgment than one from a non-representative claim.²⁹⁷

The simple point, then, is that one cannot reject the case for the recognition of the class action judgment merely by analogy with an English common law domestic rule of contract formation, nor with the conflict of laws rules concerning the service of process on parties. One possible conclusion to draw from this is that the test of implied consent *could* be used to recognize a class action judgment. However, that still amounts to an endorsement of the "flip" thesis and faces a difficulty as to whether implied consent is, in any case, a current rule of the English conflict of laws. It also risks applying a test of consent that is insufficiently tailored to the intuitive unease that some feel with recognizing the judgment in the core case. It may well be that it would be better for the courts to formulate, explicitly, a criterion for dealing with the jurisdictional competence of foreign courts over non-participant class action plaintiffs.²⁹⁸

2. *Applying the Test of "Privity of Interest"*

Still within the "flip" thesis, one might argue that the international jurisdictional competence of the courts of F1 over class action non-participants could be established by use of the test of "privity of interest," particularly given that a rather open-ended and flexible version of this test has recently

295. *Id.* at 808–09 ("A class-action plaintiff, however, is in quite a different posture In sharp contrast to the predicament of a defendant haled into an out-of-state forum, the plaintiffs in this suit were not haled anywhere to defend themselves upon pain of a default judgment.")

296. *In re "Agent Orange" Product Liability Litigation*, 104 F.R.D. 559, 562 n.1 (E.D.N.Y. 1985) (citation omitted).

297. See *infra* text accompanying note 358.

298. See *infra* text accompanying note 362.

been incorporated into the English conflict of laws context.²⁹⁹ Edwin Peel, after agreeing with Briggs's conclusion on the issue of submission,³⁰⁰ has explored the possibility of the privity test being applied to the essential question of the core case.

Despite acknowledging the wide formulation of the test "that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party,"³⁰¹ Peel concludes that this test, formulated in the domestic context of wills and representative actions, has only been applied more narrowly in the conflict of laws context. In particular, Peel expresses two "reservations" about interpreting the *Waite*³⁰² decision (that it was just for a defendant to be estopped from objecting to recognition in F2 after he had sat back and left his co-defendants to run the same objections in F1) too widely.³⁰³ The first is that the test was initially confined to probate (although Peel here omits that the specific context within probate was that of representative actions). The second is that *Waite* is the only conflict of laws case in which the test has been applied and is special because it concerns both joint tortfeasors and "the fraud rule which has been the subject of judicial disquiet at the highest level."³⁰⁴ In other words, the implication seems to be that the Court of Appeal in *Waite* applied a test that they should not really have applied, and that they did so only because they were keen to restrict the operation of the fraud rule.

This conclusion seems far from convincing. On the first point, the Court of Appeal went to great lengths to approve the prior suggestion of Lord Denning that "there is nothing in the principle itself which compels it to be limited to wills and representative actions. The principle, as Lord Penzance said, is founded on justice and common sense."³⁰⁵ The (surely rhetorical) question is therefore whether the English common law rules on the conflict of laws should pursue justice and common sense.

Secondly, it is not clear why the test, once transposed to the conflict of laws context, should be confined to the special facts of *Waite*. It may well have been the case that the Court of Appeal was just trying to find a way to

299. See *supra* text accompanying note 194.

300. Peel, *supra* note 55, ¶ 17. However, in expressing this approval, Peel fails to correct Briggs' erroneous belief that non-participants are made parties to the action in F1, and therefore fails to appreciate the fallacy of the analogy with serving a natural plaintiff. One might agree that a building is aesthetically pleasing but, with foundations of sand, it is sure to crumble.

301. *Gleeson v. J. Wippell & Co.*, [1977] 1 W.L.R. 510 515 (Ch.) (Eng.).

302. *House of Spring Gardens Ltd. v. Waite* (No. 2), [1991] 1 Q.B. 241 (C.A.) (Eng.). See *supra* text accompanying note 189.

303. Peel, *supra* note 55, ¶ 24.

304. Here, Peel cites *Owens Bank Ltd. v. Bracco*, [1992] 2 A.C. 443 (H.L.) (Eng.), although without pointing out that the House of Lords there refused to modify the fraud rule.

305. *Nana Ofori Atta II v. Nana Abu Bonsra II*, [1958] A.C. 95 at 102-03 (appeal taken from W. Afr.).

restrict the operation of the fraud rule but that is not a rational basis upon which to confine the test, once so transported. The hallmarks of the common law are openness and generality of application, not secretive motives and the individualized application of justice.

Thus, it is far from evident that the test of privity of interest could not be used to bind the non-plaintiffs in the core case. However, there *is* something to be said for Peel's wider concern that a domestic test should not be incorporated too readily into the international context, where the English courts may have both procedural and substantive interests in not holding plaintiffs bound by foreign decisions.³⁰⁶ It may well be, therefore, that the best approach would be to discard the "flip" thesis, which relies on rules with party-based rationales, and to seek to formulate a specific criterion for dealing with the concerns felt by the likes of Peel.³⁰⁷ However, there first remain two broad, alternative suggestions to consider.

B. *The "No Requirement" Thesis*

To the extent that difficulties exist in trying to apply defendant-, or at least party-, based rules to non-participant class action members, the "no requirement" thesis offers to eliminate them. Put simply, the thesis is as follows. Since the existing conflict of laws rules apply to parties, and since there are no existing rules applying to non-parties, there is simply *no requirement* of jurisdictional competence over non-parties. The class action judgment of the "core case" is thus *necessarily* entitled to recognition in England. A review of the literature suggests two compelling objections to this thesis.

1. *The "No Requirement" Thesis Described*

The "no requirement" thesis has been endorsed by Jonathan Harris as an expert witness in a number of U.S. cases and, more recently, in an academic article.³⁰⁸ After setting out the tests of presence, residence and submission, Harris states the essence of the contention:

No other basis of jurisdictional competence in a foreign court can be found at common law. The key point to note is that the requirements of jurisdictional competence are all focused on the position of the *defendant*. There is nothing in English law to suggest that a foreign court's jurisdictional competence depends upon the

306. See *infra* text accompanying note 350.

307. Those concerns are alluded to by Peel when approving of Briggs's discussion of the test of submission. Peel, *supra* note 55, ¶ 17 ("[I]t would represent an unwarranted extension of the test for submission to hold that it was satisfied where all that a party may have done is fail to opt out of a class action, possibly not knowing of the need to do so, or not fully understanding the consequences of not having done so."). The "not knowing" concern represents a due process-type *procedural* interest of the English courts, while the "consequences" point goes to their *substantive* interest, in denying the recognition of certain foreign judgments. See *infra* text accompanying note 350.

308. See Harris, *supra* note 11.

position of the *claimant* to the action. There is no recognised requirement of competence over the claimant.³⁰⁹

Despite the initial reluctance to certify class actions concerning absent English class members,³¹⁰ the “no requirement” thesis has recently found favor in a U.S. federal district court. Judge Victor Marrero affirmed the “no requirement” thesis in *In re Alstom S.A. Securities Litigation*,³¹¹ noting that “English courts . . . have developed a framework for adjudging the jurisdictional competence of foreign courts, which focuses on the circumstances of the defendant and not those of the claimant,”³¹² and adding that:

Conceivably, the English common law framework for assessing the preclusive effect of foreign judgments may be modified in the future to require that the foreign court have proper territorial connections with the absent party, but English common law, as currently interpreted and applied, focuses the analysis solely on the territorial connections of the defendant.³¹³

The “no requirement” thesis was therefore used as a basis to find that superiority was satisfied and that the class could be certified.

2. *Objections to the “No Requirement” Thesis*

The “no requirement” thesis may secure determinacy but it is self-evident that it does so at the expense of some rather foundational principles. Put more strongly, the thesis suffers from two compelling objections; one jurisprudential, and one from absurdity.

a. *Legal Theory*

The essence of the “no requirement” thesis is that, in the absence of a legal rule, any proposed course of conduct is permitted. It is surprising that the U.S. courts have been willing to countenance this position, given America’s heritage of legal realism. Not even the most fervent of the American legal formalists, at the zenith of their influence, believed in the “no requirement” thesis. A useful example is contained in Joseph Beale’s discussion of *Commonwealth v. Temple*:³¹⁴

309. *Id.* at 625. This paragraph is reproduced, almost verbatim, from Harris, *supra* note 234, ¶¶ 17–18.

310. *Bersch v. Drexel Firestone Inc.*, 519 F.2d 974 (2d Cir. 1975).

311. *In re Alstom S.A. Sec. Litig.*, 253 F.R.D. 266 (S.D.N.Y. 2008).

312. *Id.* at 287.

313. *Id.* at 289. It should be noted, however, that Victor Marrero misquotes the decision in *In re Vivendi Universal, S.A.* 242 F.R.D. 76 (S.D.N.Y. 2007). Although it was stated in *In re Vivendi*, *id.* at 103, that “[t]here is no requirement, express or implied, that class members, foreign or domestic, must appear or be served in order to be bound,” this quotation is referring to the English law on Rule 19.6 *domestic* representative actions, and the court explicitly states that this only establishes “that English law recognizes the competency of its own courts to bind absent parties in appropriate situations.”

314. *Commonwealth v. Temple*, 80 Mass. 69 (1859).

A mass of rules is necessarily limited in its application; no legislator can formulate rules which will cover all future cases. Law must have the power of extension to novel facts. An example of this need occurred when streetcars were first introduced. A street-car line between Charlestown and Boston was opened about 1856, at a time when one man enjoyed a monopoly of public conveyance between the cities by omnibus and dray. The drays thereupon drove slowly along the tracks of the street-cars, while the busses hurried by. No formulated rule applied to the case, for it could not have been foreseen and guarded against. If the law had been regular but non-systematic, like the folk-law that preceded the common law, the wrong lacking a formal remedy, must have been unredressed. But the common law was systematic; that is, it consisted of a system of thought based upon principles which covered every possible occurrence. Every human act was either permitted or forbidden; every act either changed or left unchanged existing rights. Under this system of rights the act of a drayman in delaying the street-car was either forbidden or permitted by the law, *whether the rule that determined the answer had ever been formulated or not*; and the court was able to say that legal principle forbade the act of the drayman.³¹⁵

Two relevant points emanate from this source. First, the mere absence of a formulated rule cannot lead to the conclusion that a common law court will declare that *no* rule exists. Rather, upon the premise of “system,” the court will formulate a rule covering the relevant occurrence. Secondly, the absence of a formulated rule does not entail the conclusion that the court will *permit* the proposed conduct. The absence of a formulated rule did not mean that the drayman could drive slowly without coercion of law. Similarly, the absence of a formulated rule with respect to the recognition in England of U.S. class action judgments does not entail the conclusion that English law will recognize the judgment without insisting upon any requirement of the jurisdictional competence of the U.S. courts over those alleged to be bound.³¹⁶

b. Absurdity

If the jurisprudential objection to the “no requirement” thesis fails to convince, perhaps the reader will be more open to a related argument, parsed in terms of absurdity. The contention here is that the “no requirement”

315. 1 JOSEPH HENRY BEALE, A TREATISE ON THE CONFLICT OF LAWS § 4.12(b), at 48 (1935) (citation omitted) (emphasis added).

316. Decl. in Reply of the Right Hon. Sir Christopher Staughton at 39, *In re Royal Dutch/Shell Transp. Sec. Litig.*, No. 04-374, 2005 WL 6317472, at *5 (D.N.J. May 21, 2008) (“There is no orthodox rule in England and Wales for the treatment of its nationals who were once non-participants in America, and now have the American judgment interposed to defeat their claims in England or Wales. A judge in England or Wales would have to decide for himself. That is a task which judges often have to face, and that is what they would have to resolve in this case.”).

advocate throws the baby out with the bathwater. The existing common law conflict of laws rules on jurisdictional competence exist to provide a safeguard against the extinguishment of the legal rights of individuals. In denying the applicability of the existing rules, the “no requirement” theorist also discards the common law’s ability to ensure that individuals do not lose their legal entitlements by virtue of matters in F1 beyond their control.³¹⁷

Indeed, if the “no requirement” thesis was correct, the problem in *Buchanan v. Rucker*³¹⁸ would not only raise its ugly head but would defeat a fundamental tenet of international law. There, Lord Ellenborough asked: “[c]an the Island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?”³¹⁹ The “no requirement” thesis answers that England *would* so submit. Thus, if the courts of F1 were to hold that non-participant class members are bound, provided that a notice of the action has been nailed to the courthouse door in F1, the English courts would have to accept that the legal rights of the non-participants had been validly extinguished. Their substantive interest in avoiding this result would be rendered unrealizable.

Such cannot be the position, for the essence of the English common law rules on international jurisdictional competence is to ask for some further reason why a plaintiff ought to be bound by the determination of a foreign court. This is why it seems desirable to formulate a new criterion specifically for dealing with the peculiar position of non-participant class action members. However, before exploring this possibility, there remains one suggested theory to consider.

C. *The “English Rules” Thesis*

A third theory also purports to resolve the essential question at the heart of the core case. The “English rules” thesis holds that, rather than trying to apply the existing defendant-based conflict of laws rules to plaintiffs, or assuming that there is no requirement of jurisdictional competence over non-participants, the English courts should look to the English group litigation rules to see whether English judges would let a similar *English* class action bind absent plaintiffs. As the survey of the available English group litigation mechanisms has revealed,³²⁰ it is the representative action of Rule 19.6 that most closely matches the U.S. Rule 23(b)(3) class action.³²¹ After first analyzing the nature of the “English rules” claim, as formulated by

317. On which substantive interest of the English courts, see *infra* text accompanying note 352.

318. *Buchanan v. Rucker*, (1808) 9 East 192 (K.B.) (Eng.); see *supra* text accompanying note 164.

319. *Id.* at 194.

320. See *supra* Part II.

321. See John Sorabji, *The Hidden Class Action in English Civil Procedure*, 28 C.J.Q. 498, 498 (2009) (“[T]he English representative action, now embodied in CPR r.19.6, when properly understood is akin to r.23 of the U.S. Federal Court’s Rules of Procedure.”).

John Dixon,³²² the “fundamental misunderstanding”³²³ at its heart can be addressed.

1. *The “English Rules” Thesis Described*

In a single sentence, Dixon both rejects the “flip” thesis and advocates the “English rules” thesis:

Although it may be possible to rework the statements of law in relation to defendants in an effort to determine whether the plaintiffs fit within one of the categories by which defendants are held to be within the jurisdiction of the foreign court, perhaps the better view is to look to English law on representative actions and determine whether an English court, under similar circumstances, would allow the Order to be binding.³²⁴

After analyzing the English rules relating to the representative action,³²⁵ Dixon concludes that “[t]he short answer would appear to be that the English court would say that the U.S. court would have jurisdiction over that plaintiff.”³²⁶ Put more clearly as a statement of the “English rules” theory, “because English law allows absent represented parties to be bound, it is likely that an English court would hold that a U.S. court was a court of competent jurisdiction over the parties.”³²⁷

It is interesting to note that, as a matter of U.S. class action preclusion law, an approach remarkably similar to the “English rules” thesis currently prevails. In cases involving inter-state preclusion, a federal court in F2 will accord an F1 judgment the same preclusive effect that it carries in F1. That is, recognition in F1 is, by federal statute, transformed from a necessary into a sufficient condition of recognition in F2. In figurative terms, a judgment “carries with it” the preclusion law of its rendering forum.³²⁸ As applied to the essential problem of the core case, this approach is slightly different from the “English rules” thesis because, instead of treating the F1 judgment *as if it were* an F2 judgment, it accords decisive status to the preclusion law of F1. It might therefore be termed the “foreign rules” thesis.

The common feature, however, is that both the “English rules” and “foreign rules” theses would require that the English court attribute a benign status to the judgment in question. As discussed above, the requirement of

322. Dixon, *supra* note 3.

323. Peel, *supra* note 55, ¶ 25.

324. Dixon, *supra* note 3, at 145.

325. Dixon’s article was written and published before the introduction of the GLO mechanism discussed above in text accompanying note 98. However, the representative action is closer to the U.S. federal class action mechanism than is the GLO scheme, for the latter requires individuals to take affirmative steps to be bound, and treats them as *parties* to the claim.

326. Dixon, *supra* note 3, at 145.

327. *Id.* at 147.

328. *Matsushita v. Epstein*, 516 U.S. 367, 373 (1996).

international jurisdictional competence *in the eyes of the English court* is designed precisely so as to avoid the operation of the “foreign rules” thesis.³²⁹ The “English rules” thesis must meet a similar fate.

2. Objections to the “English Rules” Thesis

The “English rules” thesis advocated by Dixon has been criticized by Peel as deriving from “flawed reasoning.”³³⁰ Peel finds the approach fundamentally unsound because it completely eliminates the conflict of laws issue by treating the U.S. judgment as if it were an English judgment.³³¹ The same point has been made, albeit less explicitly, by a U.S. district court rendering a decision on certification.³³²

The criticism here is sound, for if a foreign judgment could simply be treated as if it were an English judgment, many of the English conflict of laws rules would be rendered redundant. Such rules are not, of course, mere redundancies. More caution is exercised with respect to foreign judgments so as to provide safeguards against the extinction of legal rights, and the rendering of significant financial awards, by foreign courts.

329. See *supra* text accompanying note 162. The U.S. approach only makes sense because the U.S. federalist system entitles “full faith and credit” to other U.S. judgments. In this respect, the regime is essentially “treaty-based,” whereas our “core case” must be dealt with by the common law in a manner sufficiently flexible as to allow the non-recognition of certain judgments rendered by foreign courts. Furthermore, even the U.S. statutes purporting to make recognition in F1 a sufficient condition for recognition in F2 have been read not to require such recognition in extreme situations, such as when F1 renders a judgment beyond its subject matter jurisdiction. See *Underwriters Nat’l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Ass’n*, 455 U.S. 691, 704–05 (1982) (“[A] judgment of a court in one State is conclusive upon the merits in a court in another State only if the court in the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment.”) (quoting *Durfee v. Duke*, 375 U.S. 106, 110 (1963)) (internal quotation marks omitted). Similarly, although not an interpretation of a recognition statute, F2 will not enforce a judgment in a class action if there are due process concerns with F1’s handling of the suit. See *Hansberry v. Lee*, 311 U.S. 32 (1940).

330. Peel, *supra* note 55, ¶ 25.

331. *Id.* (“[Dixon’s approach] demonstrates a fundamental misunderstanding about the different approach which the English courts take to the *res judicata* effect of their own judgments and the approach taken to the effect of foreign judgments. The English courts’ view of the binding effect of an English judgment in a representative action is confined to proceedings in an English court; it says nothing about how the binding effect would be viewed by a foreign court faced with an English judgment. For the same reason, an English court will make its own assessment about the binding effect of a foreign judgment in a class action and will continue to exercise the caution which is evident in the principles thus far considered for cause of action estoppel.”).

332. *In re Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76, 102–03 (S.D.N.Y. 2007) (“[T]his appears to be more of a procedural distinction than a jurisdictional one, the point being that English law recognizes the competency of its own courts to bind absent parties in appropriate situations.”). However, the court goes on to conclude, without explanation, that it is “more likely than not” that the class action would be entitled to recognition. *Id.* at 103. Although the court cites both Dixon and Harris in support of this conclusion, this has a decidedly hollow ring to it given that Dixon’s “English rules” approach was rejected by the court on the very same page and that Harris’s “no requirement” view is simply untenable. Furthermore, the court could not have meant to endorse the “flip” thesis, as it had earlier criticized the defendant’s expert for assuming, “without analysis, that absent members are subject to the same English common law jurisdictional rules that, as noted, refer only to the need for service upon, or an appearance by, individual party defendants.” *Id.*

The basic reason for rejecting the “English rules” thesis harks back to the fundamental tenet of international law expressed by Lord Selborne in *Sirdar Gurdyal Singh v. The Rajah of Faridkote*,³³³ namely that “[i]n a personal action . . . a decree pronounced *in absentem* by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity.”³³⁴ Were this not the case, the legal rights of English individuals would forever be subject to extinction by foreign courts with which they had no connection. Since the English court has this substantive interest in not recognizing certain judgments, it must not allow the fox to guard the chicken coop.

This concern does not apply to the binding effect of another English judgment, for an English plaintiff is, by his citizenship, presence or residency, necessarily subject to the jurisdiction of the English courts. He must abide by its rules, just as he takes the benefits of its protections. To continue a metaphor, the chicken does not need to be guarded from the farmer.

However, the dilemma posed by the U.S. class action cannot, as the “English rules” thesis suggests, be resolved by treating the foreign judgment as if it were an English judgment. It essentially treats the fox as if it were the farmer, giving the illusion that the U.S. court can be trusted in the same way that the English court can. The reality, of course, is that protection must be afforded against the fox, however much it resembles the farmer.

D. *The “New Rules” Thesis*

Having explored the inevitable limitations and distortions of language entailed by the “flip” thesis, and having rejected as fundamentally misconceived both the “no requirement” and the “English rules” theses, it seems natural to suppose that the common law should develop a new criterion for the recognition (or otherwise) of the U.S. class action judgment. It is surprising, then, that only one commentator has suggested that the way forward might be the development of a new, multi-parties criterion within the English conflict of laws framework. Peter Barnett puts the matter thus:

Given that it is not clear how the existing judgment recognition and *res judicata* criteria assist, perhaps a specific criterion—a “multi-parties” rule—is called for in these situations, to test whether an alleged class member should (in the interests of natural justice) be bound by a judgment in a foreign representative or class action.³³⁵

It is then stated that “the suggested ‘multi-parties’ criterion might require an English court to be satisfied that: (i) the claimant in the subsequent

333. *Sirdar Gurdyal Singh v. The Rajah of Faridkote*, [1894] A.C. 670 (P.C.) (appeal taken from India).

334. *Id.* at 684.

335. BARNETT, *supra* note 181, at 73 (citations omitted).

proceedings had notice of the foreign class action and had the chance to withdraw or object; and (ii) the foreign court, acting under an obligation to protect absent class members, held a hearing, considered the evidence and made a ruling as to membership.”³³⁶

However, while moving tentatively in the right direction, Barnett’s approach lacks analytical clarity. In particular, although purporting to advocate a new rule for the English conflict of laws context, his concern seems to be more with a “natural justice” objection to representative actions in general than with the international dimension of jurisdictional competence.³³⁷ This equivocation between the “new rules” and “English rules” theses is confirmed by his suggestion that the domestic GLO mechanism “offers, at least, a template for assessing *foreign* rules governing group litigation and, in particular, for assessing whether those rules would satisfy the suggested ‘multi-parties’ criterion.”³³⁸

Indeed, the whole approach seems confused because if one did apply the requirements of the GLO mechanism as a template through which to judge the U.S. class action, one would almost certainly be forced to conclude that the U.S. judgment could *not* be recognized. This is because, as explained above,³³⁹ the GLO mechanism, unlike the English representative action rule, requires both affirmative steps and that the relevant individuals become parties to the claim. The U.S. class action requires neither. Yet Barnett inexplicably concludes that, in his approach, the “courts might more safely conclude that a judgment in a foreign class action properly supports a preclusive plea in England.”³⁴⁰

Barnett’s suggested approach, at least as regards (ii), seems to proceed from a misapprehension as to the primary difficulty provided by the “core case.” Barnett perceives the essential difficulty to be that representative actions are potentially conducive to breaches of natural justice—an issue which seems easily dealt with by the existing rules concerning F1 proceedings in breach of natural justice.³⁴¹ He fails to appreciate that the real concern is with a foreign court purporting to extinguish the legal rights of an English individual. Another way of putting the criticism is that Barnett is focusing solely upon the English courts’ procedural interest in not recognizing certain foreign judgments, to the neglect of their substantive interest in not doing so.³⁴²

336. *Id.* at 73–74.

337. To the extent that the discussion is phrased in terms of “natural justice,” there is no discussion of why, if at all, the existing conflict of laws defense to recognition of breach of natural justice would be unsatisfactory. See *supra* text accompanying note 207.

338. BARNETT, *supra* note 181, at 74.

339. See *supra* text accompanying note 118.

340. BARNETT, *supra* note 181, at 74 (citation omitted).

341. See *supra* text accompanying note 207.

342. See *infra* text accompanying note 350.

As the existing rules on jurisdictional competence and privity of interest were not developed with a non-party situation in mind, the question is how best to determine whether a non-participant class member ought to be bound in F2 by a decision in F1. The *English* rules on group litigation therefore cannot fulfill the task that Barnett demands of them; at most, they³⁴³ provide a reminder that English law appreciates the basic distinction between parties and non-parties.

In this regard, and as a final criticism, the label “multi-*parties*” is apt to mislead, for the essence of the class action is that the non-participants do not become parties.³⁴⁴ Requiring all class members to become parties would substantially destroy all of the benefits served by the class action mechanism.³⁴⁵ Therefore, the task for the “new rules” advocate is to develop a “representative action” criterion for the English conflict of laws context that is sufficiently sensitive to the concerns and safeguards that the existing rules evince, and that could realistically be deployed by the courts when this case of first impression arises.

There can be no objection that the magnitude of this step is too great for it to be taken at common law. Although one might consider a bilateral judgment-recognition treaty to be desirable, the English courts would be obligated to decide the matter one way or another if it arose before any such treaty were put in place. In terms of a common law solution, the “no requirement,” “English rules” and “foreign rules” theses have been found incoherent, and the “flip” thesis inadequately addresses the true concerns at play. After all, the existing rules were developed in quite different scenarios. Thus, in response to the contention that the existing rules of “presence” and “submission” are exhaustive,³⁴⁶ one need only quote the sensible advice of the leading English treatise on the conflict of laws:

The rules of common law . . . as to jurisdiction are not necessarily exhaustive. Like any other common law rules, they are no doubt capable of judicious expansion to meet the changing needs of society.³⁴⁷

343. And, more accurately, the rules regarding representative actions.

344. For an example of the difficulties that this can cause, recall the discussion of Briggs’s approach to the test of “submission.” See *supra* text accompanying note 291.

345. See *supra* text accompanying note 18.

346. BRIGGS, *supra* note 154, at 138. Briggs’s suggestion is, in any event, really directed at rejecting any incorporation, into the rules on recognition, of the *forum non conveniens* doctrine.

347. DICEY, MORRIS & COLLINS, *supra* note 162, at 601–02. Civilian legal systems have also begun to appreciate the need for effective collective action procedures. Perhaps most prominently, Dutch law was modified in 2005 to permit court approvals of collective settlements reached on an “opt out” basis. The 2005 Collective Settlement of Mass Damages Act (WCAM 2005) was the means by which the Royal Dutch/Shell Transport Securities Litigation was effectively settled.

VI. FORMULATING A “REPRESENTATIVE ACTION” CRITERION OF RECOGNITION

Although Barnett purported to provide a new “multi-party” criterion for the recognition in England of U.S. judgments in class actions, the present Part of this Article seeks to respond more subtly to the problems posed by the U.S. class action, and to formulate a more aptly-named “representative action” criterion. The existing framework of the English conflict of laws rules appears suitable for the judicial development of a “representative action” criterion. First, the existing rules treat the foreign judgment itself, rather than the underlying cause of action, as providing the relevant obligation.³⁴⁸ Secondly, there exist three abstract conditions for the recognition of a foreign judgment: it must have been rendered by a “court of competent (international) jurisdiction”; the judgment must have been “final and conclusive” and “on the merits”; and there must be “no defenses” available. The “representative action” criterion would nest comfortably within the first of these three conditions.

However, in order to ensure that the formulated criterion adequately suits the purposes for which it is needed, it makes sense first to analyze the reasons why a rule of *res judicata* exists, the special policy features of the international dimension of *res judicata*, and the peculiarities of the position of a non-participant U.S. class action member. After doing so, these concerns will be reflected in a sample formulation of a “representative action” criterion.

A. *Re-Litigation in the Conflict of Laws*

Finality is a necessary goal in litigation, despite the fact that one individual may always be unhappy with the determination of her legal rights. There always exists conflict between the pursuit of the accurate administration of justice and the economic use of public resources, before even mentioning the burdens placed upon defendants by relentless litigation.³⁴⁹

The English conflict of laws rules aspire to such finality.³⁵⁰ However, the involvement of two international fora presents additional complications. In particular, there exist both procedural and substantive English policy interests in *not* recognizing foreign judgments.

348. *Godard v. Gray*, (1870) L.R. 6 Q.B. 139 (Eng.).

349. K. R. HANDLEY ET AL., *THE DOCTRINE OF RES JUDICATA* 10 (K. R. Handley ed., 3d ed. 1996) (“There are two policy reasons which have been invoked to support the doctrine of *res judicata* estoppel: the interest of the community in the termination of disputes, and in the finality and conclusiveness of judicial decisions; and the right of the individual to be protected from vexatious multiplication of suits and prosecutions.”) (footnote omitted). It therefore makes sense, at some point, to change the question from “When *has* justice been done?” to “When is justice *done*?” Rubenstein, *supra* note 17, at 792.

350. See DICEY, MORRIS & COLLINS, *supra* note 162, at 568–70. The “doctrine of obligation” (*Godard v. Gray*, (1870) L.R. 6 Q.B. 139 (Eng.)) has been said to serve “a strong public interest in ensuring that matters cannot readily be reopened in England.” Harris, *supra* note 11, at 627.

1. *Procedural Interests in Not Recognizing Foreign Judgments*

The English courts have an interest in not recognizing as binding foreign judgments rendered by courts that did not offer individuals an adequate opportunity to be heard or to shape the foreign litigation. In the context of the class action, this concern is brought into play by the “opt out” mechanism. However, this policy interest seems readily dealt with by the existing common law defense dealing with F1 proceedings in breach of natural or substantive justice.³⁵¹ The non-participants will be free to raise such matters in England and, if the U.S. procedures are deemed adequate (in English eyes) in the individual case, there will exist no procedural reason not to enforce the U.S. judgment.

2. *Substantive Interests in Not Recognizing Foreign Judgments*

There also exist English *substantive* policy interests in not recognizing foreign judgments. In addition to a general fear that something may not be done right abroad, and which cannot be corrected in F2, there exists a general principle of international law to the effect that the courts of F1 ought not to be able to extinguish the legal rights of, or render significant financial awards against, the citizens of F2. In the absence of a treaty reached between nations, and quite unlike the scenario when dealing with an earlier domestic judgment,³⁵² an element of trust is missing as to the competence of the courts of F1 to determine the rights of an individual in F2. This problem is rendered all the more acute in circumstances where the courts of F1 possess the power to impose upon individuals significant awards of damages or costs.³⁵³

It is therefore unsurprising that the existing English rules contain certain substantive safeguards for individuals. In addition to defenses such as that concerning foreign judgments contrary to English public policy,³⁵⁴ the existing rules relating to the international jurisdictional competence of the courts of F1 allow individuals some measure of *control* over the ability of the courts of F1 to bind their legal rights in F2. The test of “territorial connection,” for example, allows a plaintiff to avoid a plea of *res judicata* in F2 by never being *present* in F1. Similarly, the test of submission requires that an English individual *consented*, at least implicitly, to the jurisdiction of the courts of F1. The obvious question to ask in the context of the U.S. class action, then, is whether an adequate safeguard could be put in place to protect from extinction in F1 the legal entitlements of English non-participants in F2. Importantly, to the extent that class action non-participants occupy a different position from that of *parties* to a foreign claim, the requisite safe-

351. See *supra* text accompanying note 207.

352. See *supra* text accompanying note 330 for the rejection of the “English rules” thesis.

353. This is *not* the case as regards class actions.

354. See *supra* text accompanying note 218.

guards might be different. The chickens might require less protection from foxes without teeth.³⁵⁵

B. *The Peculiar Position of the Class Action Non-Participant*

In its decision in *Shutts*,³⁵⁶ the U.S. Supreme Court went to great lengths to differentiate the position of a class action non-participant from that of an ordinary party to a claim:

The burdens placed by a State upon an absent class-action plaintiff are not of the same order or magnitude as those it places upon an absent defendant. An out-of-state defendant summoned by a plaintiff is faced with the full powers of the forum State to render judgment *against* it.³⁵⁷

These burdens included the general need to hire counsel and to travel to F1, possible forced engagement in costly discovery, and potential awards of damages and costs against her. By contrast, a class action non-participant “is in quite a different posture”:³⁵⁸

In sharp contrast to the predicament of a defendant haled into an out-of-state forum, the plaintiffs in this suit were not haled anywhere to defend themselves upon pain of a default judgment.³⁵⁹

In other words, the *party* to a claim is subject to both the extinguishment of her rights *and* the risk of a substantial judgment against her, the latter of which can render illusory a defendant’s right not to turn up to defend the claim. That right may be meaningless, for instance, if the defendant³⁶⁰ has substantial assets in F1 or if she conducts, or plans to conduct at some future date, business in F1. A non-party, however, is subject only to the extinction of her legal rights.³⁶¹

355. That is to say, whereas a court in F1 ordinarily possesses the power to render a substantial judgment against a citizen of F2, including damages and costs following default judgment, the court in F1 lacks such teeth as regards class action non-participants. Its primary power over these individuals is the ability to extinguish their right to sue.

356. *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985).

357. *Id.* at 808.

358. *Id.*

359. *Id.* at 809.

360. Or a natural plaintiff served out of the jurisdiction.

361. See *Phillips Petroleum*, 472 U.S. at 810 (“[A]bsent plaintiff class members are not subject to other burdens imposed upon defendants. They need not hire counsel or appear. They are almost never subject to counterclaims or cross-claims, or liability for fees or costs. Absent plaintiff class members are not subject to coercive or punitive remedies. Nor will an adverse judgment typically bind an absent plaintiff for any damages, although a valid adverse judgment may extinguish any of the plaintiff’s claims which were litigated.”); see also *In re “Agent Orange” Prod. Liab. Litig.*, 104 F.R.D. 559, 562 n.1 (E.D.N.Y. 1985).

C. *Formulating a “Representative Action” Criterion*

To understand the position of class action non-participants, as explained in *Shutts* and “*Agent Orange*,” is not to say that the English courts would be addressing the same issues as those raised in *Shutts*. At least at the jurisdictional competence stage, the question would not be as to the procedural policy concerning the English plaintiffs’ fair trial rights³⁶² but as to the substantive policy of affording English plaintiffs sufficient control over the ability of a foreign court to extinguish their legal rights.

The existing English conflict of laws rules require a party’s consent, or actual presence in F1, if she is to be bound in F2 by awards of damages and costs in F1. However, in the context of the U.S. class action, the only realistic power that the U.S. court possesses over the English non-participant is to extinguish her legal rights. Furthermore, these rights will generally be more apparent than real, for it is normally the class action mechanism that provides the only realistic chance that the non-participants have of realizing their theoretical entitlement to damages.³⁶³ To the extent that most non-participants would recover nothing absent the class action judgment, neither the English courts nor the non-participants lose anything through its recognition: there is no substantive reason not to enforce the judgment.

In light of the relatively minor powers that the U.S. court possesses over the English non-participant, and of the comparatively huge benefits that the class action mechanism provides, the English courts could legitimately formulate a “representative action” criterion of recognition as follows:

- (1) A foreign court is to be regarded as having international jurisdictional competence over the claim of an English non-participant class action member to the extent that the non-participant received adequate notice of the class action and was afforded the opportunity to “opt out” of the class;
- (2) The burden is upon the natural defendant to establish that the non-participant received adequate notice and the right to “opt out”;
- (3) The non-participant shall always be entitled to argue that the method for opting out of the class imposed an undue burden upon her, such that recognition of the foreign judgment is to be denied;

362. Although they may have to do so when considering the defense to recognition of F1 proceedings in breach of natural justice. See *supra* text accompanying note 207.

363. See Buschkin, *supra* note 138, at 1596 (“The risk that absent class members will sue again in the courts of their home countries is often more theoretical than actual. A number of barriers, including lack of contingent fees, smaller damage awards, and the concentration of the evidence outside of the claimants’ home countries, make suing again on the same set of facts outside of the United States unrealistic.”); see also Harris, *supra* note 11, at 622 (“[T]here will rarely be sufficient incentive for the claimant to commence separate proceedings in the English courts.”). In circumstances in which the non-participant’s claim is substantial enough to justify separate litigation, the burdens of conducting such litigation would inevitably dwarf any burden imposed upon the non-participant by requiring her to opt out of the class.

- (4) The court shall not be bound, in relation to any of the matters referred to in (1)-(3), by any determination made in the foreign court.

The consequences of developing such a criterion could be significant. It would enable the English courts to continue to police their substantive interest in not recognizing certain foreign judgments but without imposing a blanket refusal of the recognition of those in class actions. The recognition in England of many judgments resembling the “core case”³⁶⁴ would therefore become a real possibility, helping to secure the goal of finality of litigation.

Furthermore, as the focus in England would become the adequacy of notice given to non-participants, and their opportunity to “opt out” of the class, attention in the United States could then turn to ensuring that foreign non-participants are particularly carefully informed of their rights and methods for opting out. Such a development should reduce the extent to which the U.S. courts have to play the “guessing game” as to the likelihood of recognition in England. Accordingly, it might well result in U.S. courts becoming more willing to certify classes that include English non-participants, thereby facilitating efficient litigation and defendants’ pursuit of “global peace.”

VII. CONCLUSION

The U.S. federal class action judgment is an animal as yet quite unknown to the English conflict of laws. Aside from the much easier context of natural plaintiffs³⁶⁵ being served by natural defendants seeking declarations of non-liability abroad, an English court has never had to deal with the peculiar circumstance of a *plaintiff* objecting that a judgment binding upon her abroad ought not to bind her in England. However, this is only the case because the existing rules, deriving from the nineteenth century,³⁶⁶ never foresaw the possibility that a judgment could have been given without the plaintiff having commenced the claim in the foreign court.

If and when the essential question of the “core case”³⁶⁷ arises before an English court, the court will face the basic dilemma of determining whether to try to apply the existing rules or to develop a new approach for a new problem. If the advocates of the “flip” thesis are correct, the court must distort the language of the existing rules and apply the existing tests of jurisdictional competence as best it can. Even if this approach is adopted,

364. See *supra* text accompanying note 2.

365. See *supra* note 9.

366. See Dixon, *supra* note 3, at 145 (“The difficulty here is that these rules, which stem from the 1800s, seem to deal exclusively with jurisdiction over the defendant. [J]urisdiction over plaintiffs is not usually an issue.”).

367. See *supra* text accompanying note 2.

the tests of “implied consent” and “privity of interest” could each provide a pathway to the recognition of the U.S. class action judgment.

However, the essential argument of this Article has been that, given the peculiar position of the non-participant class action plaintiff, the English court could and should develop a “representative action” criterion of recognition that is more tailored to the novel issues before it. In particular, it has been stressed that, unlike in the case of *parties* to foreign proceedings, the U.S. federal court lacks the ability to impose meaningful sanctions on non-participant plaintiffs, such that the only substantive concern of the English conflict of laws ought to be the potential extinguishment of individuals’ legal claims. In reality, the magnitude of such claims is likely to be so small that, when coupled with the benefits of the class action as an institution and the ability to avoid the *res judicata* effect by return of mail, the “opt out” mechanism ought to be treated as validly conferring international jurisdictional competence on the U.S. federal courts. Fortunately, as those well-versed in the Anglo-American legal tradition will appreciate, the common law has never yet lacked the resources for a socially-conditioned expansion of its ever-developing toolbox.

