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# Cross-Border Collective Redress and Individual Participatory Rights: Quo Vadis?

S.I. Strong\*

## A. INTRODUCTION

Over the last few years, large-scale litigation has become increasingly important all over the world, with new forms of class and collective relief being adopted in both common law and civil law jurisdictions.<sup>1</sup> The European Union has been particularly active in this field, reversing decades of doubt about the viability and necessity of such procedures.<sup>2</sup> Not only do sixteen of the twenty-seven Member States currently provide for some form of large-scale litigation as a matter of national law (with more states contemplating such relief),<sup>3</sup> but European law provides for collective relief in a select number of subject matter areas.<sup>4</sup>

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<sup>1</sup> See DR Hensler, 'The Globalization of Class Actions: An Overview', in DR Hensler et al (eds), *The Annals of the American Academy of Political and Social Science* (London: Sage Publications, 2009) vol 622, 7, 7-11; HM Watt, 'The Trouble With Cross-Border Collective Redress: Issues and Difficulties', in D Fairgrieve & E Lein (eds), *Extraterritoriality and Collective Redress* 119, 119-20 (Oxford: Oxford University Press, 2012).

<sup>2</sup> See D Fairgrieve and G Howells, 'Collective Redress Procedures – European Debates' (2009) 58 *Int'l and Comp L Q* 379, 383-409.

<sup>3</sup> See Directorate General for Internal Policies, Overview of Existing Collective Redress Schemes in EU Member States, IP/A/IMCO/NT/2011-16, 5 (July 2011). One of the more well-known recent developments relates to a pan-European settlement under the Dutch Act on Collective Settlements of 2005 (WCAM). See *Scor Holding (Switzerland) AG v Liechtensteinische Landesbank AG*, Amsterdam Court of Appeal, 17 Jan 2012 (often referring to the settlement itself as SCOR Holding (Switzerland) AG/Zurich Fin Serv Ltd Stichting Converium Sec Compensation Found/Vereniging VEBNCVB), informal English version available at <http://www.converiumsettlement.com/images/stories/documents/Decision%2017%20January%202012.pdf>; see also *Scor Holding (Switzerland) AG v Liechtensteinische Landesbank AG*, Amsterdam Court of Appeal, 12 Nov 2010 (interim decision), informal English version available at <http://www.converiumsettlement.com/images/stories/documents/Judgment%2012%20November%202010.pdf>.

<sup>4</sup> See European Parliament, Resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress', P7\_TA(2012)0021, Recitals 10-14 [hereinafter Resolution]; see also B Hess, 'A Coherent Approach to European Collective Redress', in Fairgrieve & Lein (n 1) 107, 107-18; SI Strong, 'Cross-Border Collective Redress in the European Union: Constitutional Rights in the Face of the Brussels I Regulation' (2013) 45 *Arizona State L J* 233 (listing all relevant legislation).

While currently existing legislation provides important protections to persons suffering from large-scale legal injuries, concerns arose within the European Union that the right to collective relief had become too fragmented and difficult to understand, particularly in cases involving parties from different jurisdictions.<sup>5</sup> These concerns led the European Commission to undertake a public consultation in February 2011 to establish whether it was necessary, desirable and legally possible to create a coherent European approach to cross-border collective redress.<sup>6</sup> As a result of the consultation process and an own-initiative report, the European Parliament adopted a resolution in February 2012 (Resolution) calling for European and national authorities to work towards creating such a mechanism.<sup>7</sup> In June 2013, the European Commission promulgated two instruments – a communication to the European Parliament and a draft recommendation concerning collective redress – that are broadly analogous to the Resolution in content, principle and policy, although the Commission does not currently contemplate the creation of a single European-wide procedure to address issues relating to collective redress, preferring instead to put the onus on individual Member States to devise appropriate mechanisms and then reassess the situation in four years' time.<sup>8</sup>

Although these developments can be viewed as a step forward in the area of collective redress, the current situation is far from perfect. Some of the biggest problems arise when

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<sup>5</sup> See Watt (n 1) 121, 125 (noting importance of collective redress as a matter of private international law); see also SI Strong, 'Regulatory Litigation in the European Union: Does the U.S. Class Action Have a New Analogue?' (2012) 88 Notre Dame L Rev 899 (discussing global class and collective relief as a form of transnational regulatory litigation).

<sup>6</sup> See European Commission (EC), Public Consultation: Towards a Coherent European Approach to Collective Redress, SEC(2011) 173, 4 February 2011 [hereinafter Public Consultation].

<sup>7</sup> See Resolution (n 4). The two areas that generated the most attention in the Resolution involved consumer and competition law (antitrust) claims. See Resolution (n 4) ¶¶6, 17, 21, 28 (regarding competition law claims); see also *ibid* ¶¶4, 11, 14-17, 22-23 (regarding consumer law claims).

<sup>8</sup> See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Towards a European Horizontal Framework for Collective Redress', ¶¶2.3, 3, 3.7, 4, COM(2013) 401/2 [hereinafter Commission Communication]; Draft Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, Recital 26, C(2013) 3539/3 [hereinafter Draft Recommendation]. Because the European Commission adopted these instruments just as this article was going to press, it is impossible to discuss their contents in detail.

collective relief is placed into the context of the Brussels I Regulation in either its current or forthcoming state,<sup>9</sup> a move that is specifically contemplated by both the European Parliament and the European Commission.<sup>10</sup> Although commentators have addressed some of these issues,<sup>11</sup> one question that has been entirely ignored involves the theoretical and practical ramifications of the exercise of the individual right not to participate in a collective suit, either by refusing to opt in or by choosing to opt out of that action.<sup>12</sup> This right is at the heart of all forms of class and collective relief and is protected as a matter of constitutional law in numerous jurisdictions both inside and outside of Europe.<sup>13</sup> However, very little analysis exists regarding the nature of the right or its exercise in the cross-border context. Although numerous commentators have considered global class actions, those inquiries (1) begin from

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<sup>9</sup> See Council Regulation (EC) No 44/2001 of 22 December on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2001] OJ L12/1 [hereinafter Brussels I Regulation]. Long-anticipated revisions to the Brussels I Regulation were formally approved by the Council of the European Union in late 2012 and will go into effect on 10 January 2015. See Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ L351/1 [hereinafter Brussels I Recast]. However, none of the revisions affect the current analysis.

<sup>10</sup> See Resolution (n 4) ¶27 (noting that relief should be provided ‘in accordance with the general rules of private international law laid down in the Brussels I, Rome I and Rome II regulations’); Commission Communication (n 9) ¶3.7 (same).

<sup>11</sup> Most analyses of collective redress and the Brussels I Resolution focuses on the propriety of opt-out relief, although the scope of inquiry has expanded somewhat in the last year. See L Carballo Piñeiro, ‘Collective Redress in the Proposal for a Brussels I bis Regulation: A Coherent Approach?’ (2012) 2 *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht – J Eur Consumer & Market L* 81; M Danov, ‘The Brussels I Regulation: Cross-Border Collective Redress Proceedings and Judgments’ (2010) 5 *JPIL* 359, 360; D Fairgrieve, ‘The Impact of the Brussels I Enforcement and Recognition Rules on Collective Actions’, in Fairgrieve & Lein (n 1), 171, 171-89; B Hess, ‘Cross-border Collective Litigation and the Regulation Brussels I’ (2010) 2 *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 116, 120; J Kuipers, ‘Schemes of Arrangement and Voluntary Collective Redress: A Gap in the Brussels I Regulation’ (2012) 8 *JPIL* 225, 225-49; E Lein, ‘Cross-Border Collective Redress and Jurisdiction Under Brussels I: A Mismatch’, in Fairgrieve & Lein (n 1), 129, 129-42; H Muir Watt, ‘Brussels I and Aggregate Litigation’ (2010) 2 *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 111, 115.

<sup>12</sup> Only one commentator deals with matters that are even tangentially related. See JN Stefanelli, ‘Parallel Litigation and Cross-Border Collective Actions Under the Brussels I Framework: Lessons From Abroad’, in Fairgrieve & Lein (n 1), 143, 143-70.

<sup>13</sup> See Danov (n 11) 360; Hess (n 11) 120; Watt (n 11) 115.

a position of US rather than European law and (2) do not unbundle the various constituent elements contained within the individual rights of participation.<sup>14</sup>

This article therefore fills a critical gap in the commentary by undertaking a rights-based analysis of the various issues that arise in cases involving large-scale international litigation, focusing in particular on the Brussels I Regulation and what may be called ‘individual participatory rights’. In so doing, the discussion considers the nature and scope of individual participatory rights in collective litigation as well the ways in which these rights should be weighed and considered. Although the analysis is set in the context of European procedural law, this discussion is of equal relevance to parties outside the European Union, either because they will face similar issues in their own legal systems (since individual participatory rights are relevant to all sorts of class and collective actions) or because they will become involved in European collective actions by virtue of the extraterritorial reach of the Brussels I Regulation.<sup>15</sup> This article also contains several normative suggestions on how

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<sup>14</sup> See *infra* n 36 and accompanying text.

<sup>15</sup> The Brussels I Regulation has affected parties domiciled outside the European Union in the past. See *Owusu v Jackson*, Case C-281/02, [2005] Eur Ct Rep I-1381 (ECJ), [2005] QB 801; *Ferrexpo AG v Gilson Investments Ltd* [2012] EWHC 721, ¶¶131-55 (Comm); P De Verneuil Smith et al, ‘Reflections on *Owusu*: The Radical Decision in *Ferrexpo*’ (2012) 8 JPIL 389, 389-407; SI Strong, ‘Backyard Advantage: New Rules Mean That U.S. Companies May be Forced to Litigate Across the Pond’ (May 23, 2005) 28 Legal Times 43. However, the recast version of the Brussels I Regulation contemplates other instances in which the Regulation can affect persons domiciled outside the European Union. See Brussels I Recast (n 9). For example:

The recast regulation will provide that no national rules of jurisdiction may be applied any longer by member states in relation to consumers and employees domiciled outside the EU. Such uniform rules of jurisdiction will also apply in relation to parties domiciled outside the EU in situations where the courts of a member state have exclusive jurisdiction under the recast regulation or where such courts have had jurisdiction conferred on them by an agreement between the parties.

Another important change will be a rule on international *lis pendens* which will allow the courts of a member state, on a discretionary basis, to stay the proceedings and eventually dismiss the proceedings in situations where a court of a third state has already been seized either of proceedings between the same parties or of a related action at the time the EU court is seized.

policymakers in the European Union should consider and construct future legislation in this field.<sup>16</sup>

Some questions may arise as to whether it is worthwhile to analyse issues relating to collective redress under the current version of the Brussels I Regulation, given the recent adoption of the Brussels I Recast. However, none of the amendments reflected in the Recast affect this analysis.

## B. INDIVIDUAL PARTICIPATORY RIGHTS IN COLLECTIVE LITIGATION

Before discussing specific issues arising under the Brussels I Regulation, it is necessary to describe the nature of the rights in question. Individual participatory rights have long been recognized as a matter of national, international and European law, although the placement of those rights within the context of large-scale litigation is relatively new.<sup>17</sup> Particular problems arise when a claimant exercises his or her right not to participate in a collective suit proceeding in one jurisdiction but instead seeks to bring a secondary suit arising out of the same facts in another location. The assertion of this secondary suit, which can be individual or collective in nature, brings claimants' and defendants' individual rights into sharp tension, creating significant difficulties for courts.

### 1. Defining Individual Participatory Rights in Collective Litigation

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Press Release, The Council of the European Union, Recast of the Brussels I regulation: towards easier and faster circulation of judgments in civil and commercial matters within the EU (6 December 2012), 16599/12, PRESSE 483.

<sup>16</sup> Because the Resolution constitutes the first of several necessary steps in the development of a coherent European plan for cross-border collective redress, there is still time for European and national authorities to make any necessary adjustments to the procedures proposed by the European Parliament. *See* Resolution (n 4) ¶29 (noting any new proposals will be developed pursuant to the ordinary legislative procedure); *see also* Consolidated Version of the Treaty on the Functioning of the European Union, [2010] OJ C83/01, art 294 (outlining the ordinary legislative procedure, also known as the co-decision procedure). Indeed, the European Commission expects to revisit this issue in four years' time. *See* Commission Communication (n 9) ¶4; Draft Recommendation (n 9) Recital 26.

<sup>17</sup> *See* Carballo Piñeiro (n 11) 82; Hess (n 11) 116; Watt (n 11) 111.

(a) *General adjudicatory rights*

Although the phrase ‘individual participatory rights’ is not found in any constitutional document, the underlying concept is reflected in several different principles that are protected as a matter of national and European law.<sup>18</sup> The precise nature of these rights is still somewhat unclear, since theoretical analysis of individual participatory rights is in its nascent stages. However, US constitutional scholar Owen Fiss has defined the ‘right of participation’ as constituting ‘the notion that every person is entitled to a day in court and that no one can have his or her rights determined by a court without having participated in the proceeding’.<sup>19</sup> When translated into European terms, this right would appear to fall within the idea of access to justice. Indeed:

[a]lthough it has become an over-used expression, the term ‘access to justice’ is a good one to refer to this bundle of rights. Access to justice rights enable people (a) to obtain help and advice about possible litigation; (b) to initiate proceedings; (c) to have a full and proper hearing of their case; and (d) to be granted an effectual remedial order by the court.<sup>20</sup>

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<sup>18</sup> See A Le Sueur, ‘Access to Justice Rights in the United Kingdom’ (2000) 5 Eur HR L Rev 457, 458. Some Europeans may not view these rights as constitutional in nature, since individual participatory rights are a species of procedural rights, and European procedural law has traditionally been considered ‘sub-constitutional’. R Michaels, ‘Two Paradigms of Jurisdiction’ (2006) 27 Michigan J Int’l L 1003, 1009. However, an increasing number of European courts and commentators are viewing procedural issues from a constitutional or fundamental human rights perspective, which may heighten debates about individual participatory rights in collective litigation. See B Hess, ‘Procedural Harmonisation in a European Context’ in XE Kramer and CH van Rhee (eds), *Civil Litigation in a Globalizing World* (The Hague: TMC Asser Press, 2012) 159, 169-72; Le Sueur (n 18) 475; see also M Cappelletti, ‘Fundamental Guarantees of the Parties in Civil Litigation: Comparative Constitutional, International and Social Trends’ (1973) 25 Stanford L Rev 651. *But see* JJ Fawcett, ‘The Impact of Article 6(1) of the ECHR on Private International Law’ (2007) 56 Int’l and Comp L Q 1, 33 (noting a trend among courts to downplay the connection between constitutional and fundamental rights on the one hand and the Brussels I Regulation on the other).

<sup>19</sup> OM Fiss, ‘The Allure of Individualism’ (1993) 78 Iowa L Rev 965, 967. However, Fiss would note that ‘the legal system does not guarantee that every person will have a day in court, but only that the interest of each person will be represented in court’. OM Fiss, ‘The Political Theory of the Class Action’ (1996) 53 Washington and Lee L Rev 21, 25.

<sup>20</sup> See Le Sueur (n 18) 457.

Individual participatory rights are not held only by claimants. Defendants also have certain rights in the adjudicative process.<sup>21</sup> One key defence right involves the concept of preclusion, or the right to rely on a previously and properly adjudicated judgment in some fashion. This idea is subsumed within the notion of *res judicata*, which Peter Barnett describes as:

encapsulat[ing] a principle inherent in all judicial systems, namely that an earlier adjudication is conclusive in a second suit involving the same subject-matter and same legal bases. As such, the doctrine reflects two fundamental maxims of justice: that no person should be proceeded against twice in respect of the same subject-matter, and that it is in the interest of the state that repetitious and wasteful re-litigation be avoided.<sup>22</sup>

While the principles of access to justice and *res judicata* are normally associated with claimants and defendants respectively, there is no legal distinction limiting who may rely on which legal concept. The idea that both sets of parties hold both sets of rights is important to remember in the context of collective redress, since the ‘normal’ procedural posture found in bilateral disputes can sometimes be turned upside-down in cases involving large groups of claimants.<sup>23</sup> Thus, for example, jurisdictional rules relating to the court’s extraterritorial reach may be applied to claimants involved in a cross-border collective action, even though those principles are usually applied to defendants in a bilateral suit.<sup>24</sup>

Parties seeking to establish an individual participatory right can base their claims on national, international or European law. For example, Article 6 of the European Convention on Human Rights (ECHR) protects the ‘implied right of “access to a court” for disputes about

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<sup>21</sup> See A Layton, ‘Collective Redress: Policy Objectives and Practical Problems’, in Fairgrieve & Lein (n 1), 93, 94; see also Brussels I Regulation (n 9) ¶29 (noting the need to respect ‘the rights of the defense’).

<sup>22</sup> P Barnett, ‘The Prevention of Abusive Cross-Border Re-Litigation’ (2002) 51 Int’l and Comp L Q 943, 944 (citations omitted).

<sup>23</sup> See GA Bermann, ‘US Class Actions and the “Global” Class’ (2009) 19 Kansas J L & Pub Pol’y 91, 97.

<sup>24</sup> See *ibid.*

any “civil right or obligation”<sup>25</sup> while Article 13 provides for ‘effective remedies’ for violations of rights under the ECHR.<sup>26</sup>

Similar protections exist as a matter of EU law based on the ‘general principle of law establishing . . . the notion of “effective protection” of Community law rights by national courts and tribunals’.<sup>27</sup> An increasingly popular provision is Article 47 of the Charter of Fundamental Rights of the European Union (Charter), which states in relevant part that:

[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.<sup>28</sup>

Although the Charter does not specifically identify what an ‘effective remedy’ is, European and other authorities have suggested that there are times when collective redress may be the only means by which an effective remedy can be provided.<sup>29</sup>

Finally, parties to an inter-European collective dispute can rely on national law to establish various rights of access and procedural protections.<sup>30</sup> Indeed, in some instances, national law will be the primary source of law regarding an individual participatory right.<sup>31</sup>

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<sup>25</sup> *Le Sueur* (n 18) 457-58; *see also* European Convention on Human Rights, as amended by protocols nos 11 and 14, art 6, effective 1 June 2010.

<sup>26</sup> *Le Sueur* (n 18) 457-58.

<sup>27</sup> *Ibid* 458.

<sup>28</sup> Charter of Fundamental Rights of the European Union, 2000/C 364/1, art 47, 18 December 2000 [hereinafter Charter]; *see also* P Van Cleynebreugel, ‘Judge-Made Standards of National Procedure in the Post-Lisbon Constitutional Framework’ (2012) 37 *Eur L Rev* 90, 94-95; Hess (n 18) 169-70; S Douglas-Scott, ‘The Charter of Fundamental Rights as a Constitutional Document’ (2004) 1 *Eur HR L Rev* 37, 46.

<sup>29</sup> *See* Resolution (n 4) ¶F; *Deposit Guarantee National Bank v Roper*, 445 US 326, 339 (1980) (‘The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.’); *Abaclat v Argentine Republic*, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility dated 4 August 2011, ¶545 [hereinafter *Abaclat Award*]; Layton (n 21) 94.

<sup>30</sup> *See* *Le Sueur* (n 18) 458.

<sup>31</sup> *See* A Briggs and P Rees, *Civil Jurisdiction and Judgments* (London: Informa, 2009) ¶7.26 (discussing principles of preclusion); Barnett (n 22) 956.

Although claimants and defendants each hold certain rights of participation, those rights can be broken down into smaller components. Each set of rights is discussed in more detail in the following subsections.

(b) *Individual participatory rights from the claimants' perspective*

As their name suggests, individual participatory rights protect a party's ability to participate effectively in an adjudicatory proceeding. However, claimants' individual participatory rights may sometimes be overlooked if individual claimants are not considered the true motivating force behind a particular lawsuit.<sup>32</sup> For example, most tactical decisions about class disputes in the United States are made by class counsel, with very few individual claimants ever indicating a desire either to affect the litigation strategy or proceed individually apart from the class.<sup>33</sup> Indeed, class suits in the United States are specifically designed to eliminate or at least drastically reduce an individual claimant's need or desire to proceed separately from the collective.<sup>34</sup> Similar issues could arise in inter-European disputes, although the incentives for European forms of collective redress to be driven by counsel, as opposed to claimants, are much lower than in the United States.<sup>35</sup>

Most analyses regarding claimants' individual participatory rights has been conducted in the context of international (global) class actions.<sup>36</sup> The issue typically arises during the

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<sup>32</sup> This notion originated in the United States. See J Kalajdzic, 'Self-Interest, Public Interest, and the Interests of the Absent Client: Legal Ethics and the Class Action Praxis' (2011) 49 Osgoode Hall L J 1, 8, 10, 15-19; AD Lahav, 'Two Views of the Class Action' (2011) 79 Fordham L Rev 1939, 1948. However, individual claimants are provided with a number of protections, such as the right to object to settlements. See Federal Rules of Civil Procedure, Rule 23(e)(5) (US).

<sup>33</sup> See TE Willging et al, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (Washington, D.C.: Federal Judicial Center, 1996) 55-59, 79.

<sup>34</sup> See Hensler (n 1) 21; see also J Bronsteen and O Fiss, 'The Class Action Rule' (2003) 78 Notre Dame L Rev 1419, 1443.

<sup>35</sup> See Hensler (n 1) 22-25.

<sup>36</sup> See JCL Dixon, 'The *Res Judicata* Effect in England of a US Class Action Settlement' (1997) 46 Int'l and Comp L Q 134; Fairgrieve and Howells (n 2) 379; C Hodges, 'Collective Redress in Europe: The New Model' (2010) 29 Civil Just Q 370; S Issacharoff and GP Miller, 'Will Aggregate Litigation

class certification stage, when the defendant objects to the presence of claimants from outside the jurisdiction on the grounds that other nations do not permit collective relief on an opt-out basis and that those jurisdictions will allow their nationals to bring independent claims against the defendant notwithstanding the class judgment.<sup>37</sup> Although the debate does invoke concerns about *res judicata*,<sup>38</sup> the matter may perhaps be more accurately framed as involving claimants' individual participatory rights.

The content of these rights is somewhat ambiguous. Traditionally, individual participatory rights have been framed as reflecting the claimant's ability to choose whether, when and where to bring a legal claim.<sup>39</sup> However, there may be a previously unidentified fourth element that would protect a claimant's ability to choose the manner in which the suit is asserted. This fourth element is specifically contemplated in the Resolution in language stating that 'individual victims should remain free not to pursue the opt-in collective action but instead to seek redress individually'.<sup>40</sup> However, some questions remain regarding the scope and exercise of each of the constituent elements, including whether individuals retain only the right to proceed individually or whether they may join together to form a collective different than the one that they chose not to join initially, as discussed further below.<sup>41</sup>

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Come to Europe?' (2009) 52 *Vanderbilt L Rev* 179; TJ Monestier, 'Transnational Class Actions and the Illusory Search for *Res Judicata*' (2011) 86 *Tulane L Rev* 1; R Mulheron, 'The Case for an Opt-Out Class Action for European Member States: A Legal and Empirical Analysis' (2009) 15 *Columbia J Eur L* 409; R Mulheron, 'Recent Milestones in Class Action Reform in England: A Critique and A Proposal' (2011) 127 *L Q Rev* 288; RA Nagareda, 'Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism' (2009) 62 *Vanderbilt L Rev* 1; TL Russell, 'Exporting Class Actions to the European Union' (2010) 28 *Boston U Int'l L J* 141; G Wagner, 'Collective Redress – Categories of Loss and Legislative Options' (2011) 127 *L Q Rev* 55.

<sup>37</sup> See *In re Vivendi Universal*, No 02 Civ 5571, 2009 WL 855799, at \*3 (SDNY 31 March 2009) (noting the defendant argued that opt-out classes were unconstitutional in France); Monestier (n 36) 38-39 (discussing French, German and Swedish law). The issue arises in Canada as well as the United States. See R Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* 34 (Hart Publishing 2004).

<sup>38</sup> See *Phillips Petroleum v Shutts*, 472 US 797, 804-05 (1985).

<sup>39</sup> See Monestier (n 36) 38-39.

<sup>40</sup> Resolution (n 4) ¶27; see also *ibid* ¶20; see also Commission Communication (n 9) ¶22. The concept appears to be implicitly protected in other jurisdictions.

<sup>41</sup> See Commission Communication (n 9) ¶22; see also *infra* nn 70-147 and accompanying text. Another right that may or may not be protected is the ability to withdraw from an ongoing proceeding

(c) *Individual participatory rights from the defendants' perspective*

Claimants are not the only parties to lay claim to individual participatory rights in collective litigation. Defendants have their own set of rights to consider.<sup>42</sup> Although the focus is often on issues relating to preclusion, defendants also hold an interest in mounting an individualized defence against every claim that is brought. In some jurisdictions, this principle is protected as a matter of public policy, while in other instances it exists as a fundamental constitutional right.<sup>43</sup>

Collective proceedings are often characterized as infringing, albeit in a permissible manner, on defendants' individual participatory rights, based on utilitarian concerns about efficiency and preservation of judicial resources.<sup>44</sup> Under this reading, a defendant's individual participatory rights can be and in fact are trumped by state and other interests.<sup>45</sup> However, this is not the only way to frame this issue. Indeed, it is also possible to conclude that class or collective proceedings are permitted precisely because they do not infringe on defendants' individualized defence rights.

This latter interpretation is based on the requirement – explicit in some jurisdictions and implicit in others – that any claims must be identical or functionally identical if they are to be brought collectively.<sup>46</sup> In these types of cases, a defendant does not need to assert any

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in order to proceed individually or collectively elsewhere. This question would likely be decided as a matter of national law in at least the first instance, although the cross-border element could complicate matters. *See* A Stadler, 'Conflicts of Laws in Multinational Collective Actions – A Judicial Nightmare?' in Fairgrieve & Lein (n 1), 191, 191-214.

<sup>42</sup> *See Phillips Petroleum*, 472 US at 805; Layton (n 21) 94.

<sup>43</sup> *See* RH Dreyfuss, 'Class Action Judgment Enforcement in Italy: Procedural "Due Process" Requirements' (2002) 10 *Tulane J Int'l and Comp L* 5, 9-10, 19, 25-26; M Taruffo, 'Some Remarks on Group Litigation in Comparative Perspective' (2001) 11 *Duke J Comp and Int'l L* 405, 415; *see also* *Wal-Mart Stores, Inc v Dukes*, 131 SCt 2541, 2561 (2011).

<sup>44</sup> *See* Layton (n 21) 94; Le Sueur (n 18) 473.

<sup>45</sup> *See* Le Sueur (n 18) 473.

<sup>46</sup> *See* Federal Rules of Civil Procedure, Rule 23(a)(2), 23(b)(3) (US) (noting need for 'questions of law or fact common to the class'); Catherine Kessedjian, 'The ILA Rio Resolution on Transnational Group Actions', in Fairgrieve & Lein (n 1) 223, 237-28; Stefanelli (n 12) 150-51. This requirement is

individualized defences. Instead, a single standard defence is sufficient to address all outstanding issues.

This principle has been adopted in several different contexts. For example, US courts routinely reject certification of class actions in cases where there is insufficient ‘commonality’.<sup>47</sup> Lack of commonality can arise in two ways: either the claims themselves are not similar enough to warrant class proceedings or the defendant has raised certain defences that are applicable to some, but not all, members of the purported class.<sup>48</sup> Either allegation can defeat the creation of a class.

Sometimes the members of the purported class are similarly situated in some regards but not others. US courts address this situation through the creation of sub-classes or through bifurcation of the proceedings so as to allow the common issues to be heard collectively before separating the cases for individual resolution on the remaining matters. In either scenario, the court is protecting the defendant’s right to address each claimant’s individual case or to present an individualized defence. Therefore, defendants’ individual participatory rights may be characterized, at least in the first instance, as the right to assert an individualized defence to the extent such individualized defences are necessary.<sup>49</sup>

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framed as the need for ‘commonality’ in US jurisprudence, although defendants in US class actions ‘have not traditionally challenged commonality because they have viewed those challenges as losing battles’. AJ Trask, *Wal-Mart v Dukes: Class Actions and Legal Strategy*, 2011 *Cato Sup Ct Rev* 319, 354. However, defendants are expected to assert (and are in fact asserting) such challenges more often as a result of *Wal-Mart Stores, Inc v Dukes*. See 131 SCt 2541 (2011); Trask (n 46) 354.

<sup>47</sup> See Federal Rules of Civil Procedure, Rule 23(a)(2) (US); Mulheron (n 36) 165-217.

<sup>48</sup> See Federal Rules of Civil Procedure, Rule (a)(2), 23(b)(3) (US); Comments of the European Competition Lawyers’ Forum on the European Commission Staff Working Document, ‘Towards a Coherent Approach to Collective Redress’ (April 2011) ¶6; Mulheron (n 36) 165-217; S Peyer, ‘Private Antitrust Litigation in Germany From 2005 to 2007: Empirical Evidence’, (2012) 8 *J Compet L & Econ* 331, 335-36.

<sup>49</sup> See E Meriwether, ‘The “Hazards” of *Dukes*: Antitrust Class Action Plaintiffs Need Not Fear the Supreme Court’s Decision’ (Fall 2011) 26 *Antitrust* 18, 18; see also *Wal-Mart Stores, Inc v Dukes*, 131 SCt 2541 (2011); JC Massaro, ‘The Emerging Federal Class Action Brand’ (2011) 59 *Cleveland State L Rev* 645, 667; J Resnik, ‘Fairness in Numbers: A Comment on *AT&T v Concepcion*, *Walmart v Dukes*, and *Turner v Rogers*’ (2011) 125 *Harv L Rev* 78, 150-51.

Similar conclusions have been reached in the international investment context. The issue arose recently in *Abaclat v. Argentine Republic*, the first large-scale legal claim to be brought under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention).<sup>50</sup> The dispute involved 60,000 Italian bondholders who made a joint claim against Argentina following Argentina's default on approximately \$100 billion worth of sovereign debt, a move that rendered the bondholders' investments worthless.<sup>51</sup>

Although mass claims had never before been heard in the context of an ICSID arbitration, the *Abaclat* tribunal held that such proceedings were proper because all 60,000 claims were essentially the same. In considering the matter, the tribunal held that forcing Argentina 'to face 60,000 proceedings would be a much bigger challenge to Argentina's effective defence rights than a mere limitation of its right to individual treatment of homogenous claims in the present proceedings'.<sup>52</sup> While the dissenting panellist took issue with a number of aspects of the majority decision – not the least of which was whether the claims at issue in the dispute were indeed homogenous – there was no real dispute from a rights perspective about the general propriety of allowing identical claims to be brought jointly.<sup>53</sup>

## 2. Weighing the Various Rights

Before considering how individual participatory rights play out in the European legal context, it is important to discuss briefly how courts might balance competing rights and interests in

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<sup>50</sup> See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), 18 March 1965, 575 UNTS 159.

<sup>51</sup> See *Abaclat Award* (n 29) ¶58; see also *Abaclat v Argentine Republic*, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility, Dissenting Opinion dated 28 October 2011 [hereinafter *Abaclat Dissent*].

<sup>52</sup> *Abaclat Award* (n 29) ¶545; see also SI Strong, 'Mass Procedures as a Form of "Regulatory Arbitration" – *Abaclat v. Argentine Republic* and the International Investment Regime' (2013) 38 J Corporation L 259.

<sup>53</sup> See *Abaclat Dissent* (n 51) ¶¶142-44.

this area of law. Notably, designating a particular principle as a ‘right’ allows it to trump or override certain other types of laws or practices.<sup>54</sup> However, there are times when two rights come into conflict, making it necessary to apply some sort of balancing analysis.

Some balancing tests exist within the law itself. Thus, for example, Article 52(1) of the Charter states that:

[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

This provision requires a relevant right to exist at national law before the balancing test applies.<sup>55</sup> However, once it is established (as here) that such a right exists, then Article 52(1) usefully identifies the various factors that are relevant to a balancing analysis under European law.

However, simply identifying the relevant criteria is not enough. Judges also need to evaluate the relative weights of each of the individual rights and interests.

This second step may prove particularly challenging for courts faced with claims involving individual participatory rights because these rights are inextricably connected to a particular remedy (i.e., collective redress).<sup>56</sup> Owen Fiss has discussed the ‘complicated relationship between rights and remedies’ at some length, noting the common (mis)perception that:

[r]ights are ‘the true meaning of . . . constitutional values, such as equality, liberty, due process, or property. . . .’ Remedies are designed to ‘actualize’ the constitutional value and incorporate considerations that are not principled corollaries of the constitutional value but rather are ‘subsidiary’, ‘strategic’, and ‘instrumental’. Thus, remedies are ‘subordinate’ to rights. They are not only subordinate, but also metaphysically segregated, for ‘rights operate in the

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<sup>54</sup> See *Le Sueur* (n 18) 469-74.

<sup>55</sup> See *McB v E*, Case C-400/10PPU, [2011] Fam 364, ¶52 (ECJ, 5 October 2010); *ZZ v Secretary of State for the Home Department* [2011] EWCA Civ 440 ¶16.

<sup>56</sup> See MJ Hall and DC Weiss, ‘Human Rights and Remedial Equilibration: Equilibrating Socio-Economic Rights’ (2011) 36 *Brooklyn Int’l L Rev* 453, 501.

world of abstraction, remedies in the world of practical reality'. Judges have unique legitimacy and competence to discover the 'true meaning of our constitutional values' because of their independence and objectivity. When they attempt to 'actualize' these constitutional values by constructing remedies, however, judges move from the 'realm of abstraction', where they have a 'special claim of competency', to the 'world of practical reality', where they do not. Although Fiss wants to keep judges in the business of remedies, he worries that judges will distort the true meaning of constitutional rights by tailoring them to fit what effective remedies are available. Fiss fears that the purity of rights will be corrupted by the practicalities of remedies.<sup>57</sup>

Although Fiss writes in the context of US constitutional law, the concept of remedies being subordinate to rights is also seen in the national laws of some European Member States.<sup>58</sup> While some legal instruments (such as the Charter) attempt to overcome this subordination of procedural issues by making 'an effective remedy' a right in and of itself,<sup>59</sup> the tension between rights and remedies may make balancing tests particularly difficult to apply in the context of collective redress.

Theorists have proposed a number of approaches to rights balancing. For example, some methods promote the maximization of rights,<sup>60</sup> while others focus on the protection of the 'minimum core' of a particular constitutional concern.<sup>61</sup> Some courts and commentators believe that procedural rights may require or permit a slightly different analysis due to the

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<sup>57</sup> DJ Levinson, 'Rights Essentialism and Remedial Equilibration' (1999) 99 *Columbia L Rev* 857, 871 (citations omitted) (discussing O Fiss, 'Foreword: The Forms of Justice' (1979) 93 *Harv L Rev* 1); *see also* *ibid* 857-58.

<sup>58</sup> *See* A Lester, 'The Human Rights Act – Five Years On' (2004) 3 *Eur HR L Rev* 258, 260.

<sup>59</sup> *See* Charter (n 28) art 47. A similar technique appears to exist in international investment law. *See* C McLachlan et al, *International Investment Arbitration: Substantive Principles* 45 (Oxford: Oxford University Press, 2008) (stating that '[t]he protection offered to investors by the dispute resolution provisions of treaties is sufficiently important to rise to the level of a substantive principle in its own right').

<sup>60</sup> *See* Hall and Weiss (n 56) 489-90.

<sup>61</sup> *See* *ibid* 469 ('The concept of the "minimum core" has historical connections to constitutional principles. It inherits its structure from German basic law, which protects the essential content of a constitutional right from potential limitation. Many constitutions include structural references to a core, pure, or essential component of a right that cannot be infringed or derogated, either as part of the articulated constitutional right itself or via a constitutional limitation clause.' (citations omitted)).

presence of certain state interests and, perhaps, a diminished concern for rights that involve ‘mere’ remedies.<sup>62</sup> Thus, Andrew Le Sueur has written that:

[t]hrough the rhetoric of ‘fundamental rights’ is used to describe rights relating to access to justice, in practice the courts . . . have recognised that the rights are limited by utilitarian factors. Unlike many other fundamental rights (think of freedom of expression), rights about access to justice require public expenditure: they assume a functioning legal system with courts and (to an extent) provision of public funds to assist people finance [sic] litigation. In the light of this stark fact, no one can think of access to justice rights as absolute.<sup>63</sup>

One of the issues that arises frequently in rights discourse is whether it is possible to balance rights which are said to be inherently incommensurable.<sup>64</sup> This is particularly difficult when rights exist in opposition to one another, i.e., when what is good for one party is bad for the other.<sup>65</sup> Furthermore, ‘the metaphor of balancing “says nothing about how various interests are to be weighted, and this silence tends to conceal the impossibility of measuring incommensurable values”’.<sup>66</sup>

Just because certain factors are incommensurable does not mean that a balancing analysis cannot take place. However, in conducting this kind of analysis, it is often, as Cass Sunstein says, ‘desirable to have a highly disaggregated picture of the consequences of legal rules, a picture that enables the judge to see the various goods at stake’.<sup>67</sup> Furthermore:

[j]ust as it is possible to compare apples and oranges relative to a given covering value (vitamin content, for instance), it is also possible to compare and balance constitutional rights relative to a given covering value: their degrees of satisfaction and non-satisfaction. The fact that these rights may be

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<sup>62</sup> The question of whether the ability to proceed as a class or collective should be considered a right or a remedy can be complicated. *See* Strong (n 5).

<sup>63</sup> Le Sueur (n 18) 473.

<sup>64</sup> *See* MW McConnell and RA Posner, ‘An Economic Approach to Issues of Religious Freedom’ (1989) 56 U Chicago L Rev 1, 46, 51; CR Sunstein, ‘Incompletely Theorized Agreements’ (1995) 108 Harv L Rev 1733, 1748; R West, ‘Progressive and Conservative Constitutionalism’ (1990) 88 Michigan L Rev 641, 697.

<sup>65</sup> *See* VA da Silva, ‘Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision’ (2011) 31 OJLS 273, 284, 299.

<sup>66</sup> *Ibid* 275 (citation omitted).

<sup>67</sup> CR Sunstein, *Free Markets and Social Justice* (Oxford: Oxford University Press, 1997) 99; Sunstein (n 65) 1735-36; *see also* da Silva (n 65) 301; Le Sueur (n 18) 473.

incommensurable in the abstract does not alter their comparability in concrete situations.<sup>68</sup>

These suggestions provide an excellent methodology for analysis of individual participatory rights. Therefore, the following discussion will attempt to (1) separate out the various elements of individual participatory rights, (2) identify whether any of these constituent elements is more important than the others and whether any core elements exist; (3) place the rights analysis into a specific context; and (4) compare and balance ‘like to like’ (i.e., rights to rights) whenever possible, bringing in secondary issues, such as state interests in efficiency or costs, only as a secondary measure.<sup>69</sup>

## B. INDIVIDUAL PARTICIPATORY RIGHTS AND EUROPEAN CROSS-BORDER COLLECTIVE REDRESS

Quite often, European commentary on collective redress focuses on issues relating to the relevant merits of opt-in versus opt-out relief, with opt-in actions being considered less problematic because they are less likely to infringe on individual participatory rights.<sup>70</sup> The problem is that merely limiting the type of relief that is available does not necessarily provide adequate protection for individual participatory rights. These issues are clearly seen when collective redress is contemplated within the framework of the Brussels I Regulation.<sup>71</sup>

The Brussels I Regulation was enacted to facilitate inter-European litigation in two different ways: first, by providing clear and predictable rules concerning which national court has jurisdiction over any particular matter, and second, by providing an easy and predictable

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<sup>68</sup> Da Silva (n 65) 301; *see also* WJ Aceves, ‘Predicting Chaos? Using Scenarios to Inform Theory and Guide Practice’ (2005) 45 *Virginia J Int’l L* 585, 607-09; da Silva (n 65) 286; Sunstein (n 67) 101.

<sup>69</sup> *See Mathews v Eldridge*, 424 US 319, 347 (1976) (noting that ‘[i]n striking the appropriate due process balance the final factor to be assessed is the public interest. This includes the administrative burden and other societal costs that would be associated’ with fulfilling the right in question).

<sup>70</sup> *See supra* n 11 and accompanying text.

<sup>71</sup> However, similar problems can arise in other jurisdictions. *See* R. Wasserman, ‘Dueling Class Actions’ (2000) 80 *Boston U L Rev* 461, 464-65 (discussing secondary suits in the context of US law).

means of recognizing and enforcing judgments from other Member States.<sup>72</sup> However, the Brussels I Regulation was not designed with large-scale collective actions in mind.<sup>73</sup> This creates significant problems for individuals who want to exercise their right not to opt into a collective dispute and instead proceed in a separate action.

#### 1. Secondary Actions – Collective or Individual?

Before launching into an analysis of individual participatory rights under the Brussels I Regulation, it is useful to consider whether people who choose not to opt into a collective suit only retain the right to bring an individual action or whether they remain capable of banding together to bring a second large-scale litigation. Those people who see all collective proceedings as essentially indistinguishable will likely consider it unnecessary and perhaps inappropriate to protect the ability to bring a secondary collective action.<sup>74</sup> This has been the prevailing theory in the United States, at least in class suits that are brought in a single US state.<sup>75</sup>

However, not everyone agrees that all collective actions are created equal, particularly in inter-European disputes where proceedings may be asserted in different Member States. Collective redress procedures vary considerably between individual Member States, which might provide the basis for arguing that a secondary collective suit is in some cases necessary, since parties might have rights and remedies in some national courts that are not

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<sup>72</sup> See Brussels I Regulation (n 9) arts 11, 17.

<sup>73</sup> See Danov (n 11) 364-65.

<sup>74</sup> Multiple class actions regarding the same facts are seen as decreasing confidence in the legal system and the judiciary. See V Morabito, 'Clashing Classes Down Under – Evaluating Australia's Competing Class Actions Through Empirical and Comparative Perspectives' (2010) 27 Connecticut J Int'l L 245, 250-51.

<sup>75</sup> See Hensler (n 1) 21. However, the recent US Supreme Court decision in *Shady Grove Orthopedic Associates, PA v Allstate Insurance Co* may create tensions in this area and inspire a more rigorous debate about differences between state and federal procedures and about the scope of individual participatory rights in multijurisdictional disputes. See *Shady Grove Orthopedic Assoc, PA v Allstate Ins Co*, 130 SCt 1431, 1442-48 (2010); AM Steinman, 'Our Class Action Federalism: *Erie* and the Rules Enabling Act After *Shady Grove*' (2011) 86 Notre Dame L Rev 1131, 1179-80.

available elsewhere.<sup>76</sup> Differences could also arise as a matter of substantive law, although those issues could be addressed through conflict of law rules.<sup>77</sup>

One issue that is related to the question of the nature of the right to bring a separate suit is whether the right to collective relief is procedural or substantive in nature. This issue has created a number of difficulties in multijurisdictional suits in and between the United States and Canada,<sup>78</sup> and could give rise to similar problems in the European Union, particularly since the distinction between procedure and substance has not always been entirely clear-cut in European law.<sup>79</sup>

As courts and commentators consider the propriety of secondary collective relief, they must recognize that while such suits may be inefficient, they do not violate any of the parties' individual participatory rights. For example, a secondary collective action not only allows claimants to choose whether, when and where to assert their legal rights, it also permits claimants to determine the manner in which their claims will be resolved.

Furthermore, a secondary collective suit does not infringe on the defendant's individual participatory rights in any way, since defendants are still able to assert any individualized defences that are necessary and can seek to curtail or bar secondary collective suits on the grounds of non-commonality to the same extent as in the initial collective action.

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<sup>76</sup> See Directorate General for Internal Policies (n 3) 38 (noting European Member States have adopted four general types of collective redress: "group and representative actions, test case procedures and procedures for skimming off profits"); see also F Valguarnera, 'Legal Tradition as an Obstacle: Europe's Difficult Journey to Class Action' (2010) 10 *Global Jurist* 1, 8-19. However, the coherent system of cross-border collective redress contemplated by the European Parliament may do away with some or all of these procedural distinctions in multijurisdictional actions. See Resolution (n 4).

<sup>77</sup> However, some commentators see currently existing rules as inadequate to this particular task. See Stadler (n 41) 191-214. The Resolution contemplates a potential revamping of conflict of law rules to take these concerns into account. See Resolution (n 4) ¶27.

<sup>78</sup> See *Shady Grove Orthopedic Assoc, PA v Allstate Ins Co*, 130 SCt 1431, 1442-48 (2010); *Amchem Products, Inc v Windsor*, 521 US 591, 613 (1997); *Bisaillon v Concordia University* [2006] 1 SCR 666, 2006 SCC 19, ¶¶15, 17 (construing legislation from Quebec); Strong (n 4); SI Strong, 'Resolving Mass Legal Disputes Through Class Arbitration: The United States and Canada Compared' (2012) 37 *North Carolina J Int'l and Commercial Reg* 921.

<sup>79</sup> See *Le Sueur* (n 18) 463-66. However, the Resolution expressly states that 'access to justice by means of collective redress comes within the sphere of procedural law'. Resolution (n 4) ¶15.

The one defence right that may seem to be affected would be the right to use a collective judgment preclusively, but that right typically only applies between the parties to the first action.<sup>80</sup> Given that the claimants in the secondary suit were not present in the first action, this right would not seem to be at stake, although, as shall be discussed further below, the definition of ‘the same parties’ is a somewhat difficult question in cases involving collective redress.<sup>81</sup>

Although a rule allowing secondary collective proceedings does not appear to infringe on the parties’ individual participatory rights (at least in the abstract), a rule prohibiting such suits is more problematic, since it limits claimants’ right to pursue their claims in the manner that they choose (i.e., collectively). However, it is not clear whether the right to proceed collectively is or should be in any way protectable.<sup>82</sup> This is an issue that is very much under debate in the United States<sup>83</sup> and one that European authorities and individual Member States will have to consider going forward.

Regardless of whether the secondary action is individual or collective, there are two times when such an action can be brought.<sup>84</sup> For example, a secondary action could be brought at the same time as the first collective suit. Alternatively, the secondary action could be brought after the conclusion of the first collective suit. Each type of proceeding carries its own legal and tactical challenges, and will be considered separately below.<sup>85</sup>

In considering these and related issues, it is useful to place the discussion in context, as suggested by Cass Sunstein.<sup>86</sup> Therefore, the following analysis will assume that a

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<sup>80</sup> See Barnett (n 22) 943.

<sup>81</sup> See Stefanelli (n 12) 149-50; see also *infra* n 115 and accompanying text.

<sup>82</sup> See Bronsteen and Fiss (n 34) 1443; Strong (n 4) 921.

<sup>83</sup> The issue arises most frequently in the context of waivers of class or collective relief in arbitration. See SI Strong, *Class, Mass and Collective Arbitration in National and International Law* ¶¶3.151, 4.85-4.121, 5.70-5.72 (Oxford: Oxford University Press, 2013).

<sup>84</sup> See Morabito (n 74) 254; Wasserman, *Dueling* (n 71) 464-65 (comparing sequential and simultaneous class actions in the US).

<sup>85</sup> See *infra* nn 90-148 and accompanying text.

<sup>86</sup> See *supra* nn 64-67 and accompanying text (suggesting rights analyses should be contextualized).

collective proceeding has been properly instituted in the court of Member State A, a state with jurisdiction over the matter. The court in Member State A is therefore the first seized of the collective dispute.<sup>87</sup> However, an individual in Member State B (Person B) declines to opt into the suit in Member State A and instead initiates his or her own individual claim in Member State B, a state with jurisdiction under the Brussels I Regulation.<sup>88</sup> While various other permutations could arise (a secondary collective suit in Member State B, for example, or an individual suit filed in Member State B prior to the collective action in Member State A) those analyses will be left for another day.<sup>89</sup>

## 2. Simultaneous Actions

The purpose of the Brussels I Regulation is to ‘minimise the possibility of concurrent proceedings and . . . ensure that irreconcilable judgments will not be given in two Member States’.<sup>90</sup> These goals are achieved through Articles 27 and 28 of the Brussels I Regulation, which deal with the principle of *lis pendens* and related actions.<sup>91</sup> Therefore, the first question

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<sup>87</sup> See Brussels I Regulation (n 9) art 30.

<sup>88</sup> See *ibid* arts 2-26; Lein (n 11) 135-37 (discussing multiple jurisdictional options).

<sup>89</sup> One issue not addressed herein involves the ‘torpedo’ problem, wherein a defendant files suit for declaratory relief in order to establish jurisdiction in a Member State that offers particularly favorable provisions of substantive or procedural law. See Stefanelli (n 12) 149, 152-54.

<sup>90</sup> Brussels I Regulation (n 9) ¶15.

<sup>91</sup> Article 27 states:

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.
2. Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favour of that court.

*Ibid* art. 27. Article 28 states:

1. Where related actions are pending in the courts of different Member States, any court other than the court first seized may stay its proceedings.
2. Where these actions are pending at first instance, any court other than the court first seized may also, on the application of one of the parties, decline jurisdiction if the court first seized has jurisdiction over the actions in question and its law permits the consolidation thereof.

to arise when a party chooses to bring a secondary suit rather than opt into an ongoing collective action is whether that secondary litigation should be addressed under Article 27 or 28.<sup>92</sup>

Because the party bringing the secondary action in Member State B has consciously chosen not to opt into the collective suit in Member State A, it seems clear that Article 27, which refers to ‘proceedings involving the same cause of action and between the same parties’, cannot apply. Instead, Article 28, which refers to ‘related actions’, would appear the more appropriate means of addressing the secondary suit. Indeed, Article 28 seems tailor-made for these kinds of situations, since it applies whenever the related actions ‘are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings’.

Under Article 28, the second court may either stay proceedings or ‘decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof. This is a discretionary power, although courts are given no guidance on how best to exercise that discretion.’<sup>93</sup> Therefore, this discussion will again be put into a specific hypothetical context, consistent with the Sunstein methodology,<sup>94</sup> so as to facilitate analysis. The best way of analyzing these matters is to distinguish between situations where the claims brought in the individual action in Member State B are identical to those asserted in the collective suit in Member State A and situations where the individual claims are different than those in the collective claim.

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3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Ibid art. 28.

<sup>92</sup> See Stefanelli (n 12) 148-51.

<sup>93</sup> See Briggs and Rees (n 31) ¶2.245; Stefanelli (n 12) 149.

<sup>94</sup> See *supra* nn 94-97 and accompanying text.

(a) *Claimant's claim is identical to that asserted in the collective suit*

In this first scenario, the individual claimant's cause of action is similar, if not identical, to that being asserted in the collective suit, either as a matter of law, fact or underlying legal theory. When considered under a pure rights analysis, the best course of action appears to be for the court in Member State B to decline jurisdiction under Article 28(2) of the Brussels I Regulation, since consolidation would be proper in Member State A, given the nature of the claims and the collective proceeding.

Some defendants might initially find this approach objectionable, since it results in an increase in the size of the group proceeding in Member State A and many defendants believe that they should never take any step that might increase the size of the class.<sup>95</sup> However, that tactical philosophy was initially developed in the United States and was motivated in large part by two factors, punitive damages and widespread discovery, that are not typically present in European litigation.<sup>96</sup> The absence of punitive damages means that the defendant's financial exposure is limited to compensatory costs (which will likely be the same in both Member State A and Member State B, barring any unanticipated differences that might arise as a result of a conflict of laws analysis), while the European abhorrence of widespread US-style discovery means that the defendant will not become subject to additional suits or claims based on information produced in the current lawsuit.<sup>97</sup> These factors suggest that the defendant in an inter-European dispute should be largely indifferent as to where the secondary claim will be heard.

Furthermore, proceeding in Member State A will not injure the defendant's individual participatory rights because the claims in the secondary suit are identical or functionally

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<sup>95</sup> The one exception would be when settlement discussions are near to completion, since "defendants in a settlement posture routinely prefer a class definition that is as broad as possible in order to maximize the preclusive effects of the desired deal." Nagareda (n 36) 11-12.

<sup>96</sup> See *ibid* 2.

<sup>97</sup> See Strong (n 83) ¶6.27.

identical to those in the first suit.<sup>98</sup> While the decision is ultimately the defendant's to make (since the claimant will not make the application to decline jurisdiction and the court is without the power to make such an order *sua sponte*), the defendant should prefer to proceed in a single forum in this particular scenario, given that other (i.e., non-rights-based) factors such as savings of transaction costs and the avoidance of irreconcilable judgments bode in favour of consolidation of the secondary claims with the collective claims.

The situation looks very different from the claimant's perspective. The claimant obviously wants to proceed in Member State B, since he or she has brought the action there. If the claimant's individual participatory rights are to be given full effect, then the claimant has the right to choose the time, place and (perhaps) manner of asserting a claim as a matter of fundamental or constitutional law. Allowing the court in Member State B to decline jurisdiction would eviscerate all of those rights, at least on first glance.

However, declining jurisdiction may not be as problematic as it appears if the various elements are unbundled and considered separately. For example, in this scenario, the claimant has clearly decided to bring suit now, so the question of whether and when to assert this particular claim is moot.

Furthermore, parties do not appear to have an absolute right to assert a claim in a particular venue. For example, James Fawcett has suggested that '[w]hat Article 6 [of the ECHR] requires is that there is a trial somewhere and that this is before a tribunal in accordance with the requirements of Article 6. It does not matter that this trial is abroad'.<sup>99</sup> This principle is also reflected in the terms of Article 28 of the Brussels I Regulation itself, in that a court faced with a related action in a 'normal' dispute (i.e., a bilateral or traditional

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<sup>98</sup> See Fiss (n 19) 978 ('We may value individual participation in structural litigation, but only to serve instrumental rather than dignitary ends: to insure that all interests are accounted for and that the strongest arguments are made on their behalf.').

<sup>99</sup> Fawcett (n 18) 9 (discussing *OT Africa Line Ltd v Hijazy (The Kribi)* [2001] 1 Lloyd's Rep 76 (Aikens, J), which states that 'art. 6 of the ECHR does not provide that a person is to have an unfettered choice of tribunal in which to pursue or defend his civil rights').

multilateral matter) may decline jurisdiction so as to allow the proceeding to go forward in another court on the application of only one of the parties.

That leaves only the right (if indeed it is a ‘right’, as opposed to an interest) to proceed in the manner in which the claimant chooses. Certainly the European Parliament believes this to be an important concern, since the ability to proceed individually is expressly protected in the Resolution.<sup>100</sup> However, the question is whether the courts (which are sometimes seen as prioritizing the Brussels I framework over fundamental rights) would take the same view.<sup>101</sup>

The issue will likely turn on what is entailed by the right itself. Numerous possibilities exist. For example, the right to proceed individually could be seen as constituting (1) the right to make strategic decisions regarding the suit, including but not limited to the right to decide whether and when to accept a settlement; (2) the right to have counsel of one’s choice; (3) the right to have one’s ‘day in court’ (i.e., to be called to present evidence and tell one’s side of the story); (4) the right to seek individualized damages;<sup>102</sup> (5) the right to more speedy resolution of the dispute than might be possible with a collective proceeding; and/or (6) the right to be at risk only for one’s own litigation costs.<sup>103</sup> When considering the merits and relative weight of each of these interests, it is useful to see whether any concerns are satisfied by proceeding jointly with the collective claim. For example, the right to make strategic decisions regarding the suit might be considered less important if the facts and legal theories in the two cases are indeed identical, but the right to decide whether to settle the matter may

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<sup>100</sup> See Resolution (n 4) ¶27; see also Draft Recommendation (n 9) ¶22.

<sup>101</sup> Some commentators suggest that European authorities, including the European Court of Justice, are more concerned about upholding the Brussels I regime than about protecting human rights, including procedural rights of a constitutional and fundamental nature. See Fawcett (n 18) 16, 27 (citing *Maronier v Larmer* [2002] EWCA Civ 774, [2003] QB 620).

<sup>102</sup> Evidence from the United States suggests that cases that proceed separately result in higher individual damages awards than cases that proceed collectively. See *Petition for a Writ of Certiorari, AT&T Mobility LLC v Concepcion*, 130 SCt 3322 (2010) (No 09-893), at 12.

<sup>103</sup> See Fiss (n 19) 967; Fiss (n 19) 25; Le Sueur (n 18) 457 (parsing out constituent elements of the right to access to justice).

continue to be important and could be violated in systems that allow a collective dispute to be settled without an individual claimant's consent or ability to opt out of the settlement.

Considering all of these possibilities in detail is beyond the scope of this article. However, should the court in Member State B decide that the right to proceed in the manner of one's choosing constitutes a protectable right, then it will likely not decline jurisdiction. Instead, the court will likely stay proceedings under Article 28(1) of the Brussels I Regulation. However, that approach has its own difficulties, as discussed below.<sup>104</sup>

(b) *Claimant's claim is different than that asserted in the collective suit*

Although it is possible that the secondary suit is identical to the first, it is also possible that the claims brought in Member State B differ in some critical regard from the claims brought in Member State A. The differences could relate to the kind or quantum of damages claimed, as in cases involving personal injury,<sup>105</sup> or could arise as a result of various defences, as in cases involving competition law claims, where a defendant may argue that certain claimants are situated differently than others based on the extent to which the injury associated with the alleged anticompetitive behaviour has been passed on to consumers.

This scenario, of course, gives rise to core concerns relating to the right to assert an individualized defence. In this situation, a defendant will likely not want to ask the secondary court to decline jurisdiction, since the suits are sufficiently different from the defendant's perspective as to warrant separate proceedings. However, the defendant also needs to be cautious about seeking a stay under Article 28(1) of the Brussels I Regulation, since admitting that the cases are related could open a defendant up to later allegations that the judgment from the collective suit should have preclusive value in the individual action, as

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<sup>104</sup> See *infra* nn 109-48 and accompanying text.

<sup>105</sup> The Resolution contemplates the possibility that claimants can bring compensatory damages claims in cross-border collective proceedings. See Resolution (n 4) ¶20.

discussed further below.<sup>106</sup> This possibility is based on language in Article 28(3) noting that the actions are related when there is a ‘risk of irreconcilable judgments resulting from separate proceedings’. This provision suggests that stays under Article 28 are only appropriate because the Brussels I Regulation intends the court in the second proceeding to give some sort of preclusive effect to the judgment arising from the first proceeding.<sup>107</sup>

Therefore, it is probably best from the defendant’s point of view to allow an individual claim, brought simultaneously, to proceed in parallel with a collective suit, at least in situations where the individual suit is sufficiently different from the collective suit that a defendant would want to assert the right to an individualized defence. While this will place some burden on the defendant, in that the defendant will have to proceed in two courts simultaneously, it may be superior to the costs and risks that could otherwise arise. Certainly the claimant should not object to this course of action, since it has brought the independent suit, and thus is in a position to have its individual participatory rights fulfilled. Although there may be a state or institutional (i.e., European Union) interest in efficiency and preservation of resources in having the claims heard in one forum (even if those claims are not precisely the same), the court has no apparent power under the Brussels I Regulation to raise the issue of related actions *sua sponte* and the powers identified in Article 28 are ‘permissive, not compulsory’.<sup>108</sup>

### 3. Subsequent Actions

Although some claimants may bring a secondary suit while the collective claim is pending, other people will not bring an action until after a judgment has been rendered in the first suit. The types of issues that arise in this scenario are similar to cases where a secondary suit has

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<sup>106</sup> See *infra* n 130 and accompanying text.

<sup>107</sup> See Briggs and Rees (n 31) ¶2.245.

<sup>108</sup> *Ibid* ¶2.241; see also Stefanelli (n 12) 149.

been stayed pursuant to Article 28(1) of the Brussels I Regulation, so this discussion should be considered to apply equally to that scenario.<sup>109</sup>

The difficulty here involves the concept of preclusion, a subject that is not addressed in the Brussels I Regulation. Instead, the Regulation speaks only of recognition and enforcement. As a result, significant questions arise as to the effect a collective judgment rendered in Member State A will have on a claim in Member State B arising out of the same factual scenario.<sup>110</sup>

The first issue to address involves the law that governs issues of preclusion. Given the silence of the Brussels I Regulation in this regard, commentators have suggested that courts can and should turn to domestic law.<sup>111</sup> The problem is that national law varies significantly regarding the scope of preclusion in both bilateral and multilateral disputes.<sup>112</sup> For example, Rhonda Wasserman, analyzing data from a study conducted by the British Institute of International and Comparative Law (BIICL), found that:

[i]n . . . England and Wales, the Netherlands, Spain, and the United States . . . judgments have issue preclusive effect. In . . . other countries, however – Germany, France, Romania, Sweden, and Switzerland – judgments have no issue preclusive effect. When coupled with the narrow definition of the claim for purposes of claim preclusion employed in these countries and the failure to accord settlements claim preclusive effect, this lack of issue preclusive effect may leave parties with a fair bit of room to relitigate matters already adjudicated [in a previous collective suit] by changing the theory upon which they sue or by seeking different relief.<sup>113</sup>

According to Wasserman, the key issue is:

the willingness (or not) of . . . European countries to bind persons who were not formally named as parties to the prior litigation. . . . European countries uniformly limit the claim preclusive effect of a judgment to the parties to the proceedings, but not all of them define the ‘parties to the proceedings’ identically. All of the . . . European countries [participating in the BIICL study] bind persons named as parties to the first action and their legal

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<sup>109</sup> See *supra* n 104 and accompanying text.

<sup>110</sup> See Barnett (n 22) 945.

<sup>111</sup> See *ibid* 956.

<sup>112</sup> See *ibid* 953-57; Hensler (n 1) 20-21; R Wasserman, ‘Transnational Class Actions and Interjurisdictional Preclusion’ (2011) 86 *Notre Dame L Rev* 313, 344-45.

<sup>113</sup> Wasserman (n 112) 344-45 (citations omitted); see also Barnett (n 22) 953-57.

successors. Some countries also bind absentees if their interests were represented in the action. The BIICL Report notes that '[t]his may occur in the context of group and representative actions'.<sup>114</sup>

The situation is exacerbated by the fact that 'foreign laws authorizing group litigation are in an enormous state of flux right now', which means that 'foreign courts may hesitate before concluding that a class action and a follow-up action by an individual absent class member against the same defendant involve the "same parties" for purposes of claim preclusion'.<sup>115</sup>

Wasserman identified several issues that may be important to questions relating to the enforcement of cross-border collective judgments arising in the inter- or intra-European context, including (1) differences in national laws regarding the various types of preclusion,<sup>116</sup> (2) differences in collective procedures<sup>117</sup> and (3) differences in the types of claims or legal theories that are asserted in the two actions.<sup>118</sup> Notably, the European Parliament only appears to contemplate the need to address one of these issues (differences in collective procedures) in future legislation concerning large-scale litigation.<sup>119</sup> However, Wasserman's analysis suggests that the other two issues need to be addressed as well if the European Union is to establish a coherent system of cross-border collective redress.

Indeed, as the following scenarios show, the current approach experiences significant problems under the Brussels I Regulation. The analysis can be broken down into two separate categories of cases, one where the defendant loses the collective action and one where the defendant prevails.<sup>120</sup> Each is considered separately below.

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<sup>114</sup> Wasserman (n 112) 345 (citations omitted).

<sup>115</sup> Ibid 380 (writing in the context of US global class actions).

<sup>116</sup> See Barnett (n 22) 944 (identifying three basic types of preclusion).

<sup>117</sup> A significant amount of variation currently exists within the European Union. See D Fairgrieve & G Howells, 'Collective Redress Procedures: European Debates', in Fairgrieve & Lein (n 1) 15, 15-41 (discussing various national procedures).

<sup>118</sup> Wasserman (n 112) 366-80.

<sup>119</sup> See Resolution (n 4) ¶¶15-28.

<sup>120</sup> See Aceves (n 68) 607-09.

(a) *Defendant loses the collective action*

The first scenario involves situations where the defendant has lost the initial collective action. Of the two types of post-judgment actions, this may be the more likely to arise, since publicity surrounding the defendant's loss may inspire claimants who did not participate in the first action to bring their own separate suits, either because they now believe the case is winnable or because they believe they can benefit from some sort of preclusion.<sup>121</sup>

Very little attention seems to have been paid within Europe to the problem of subsequent actions, based perhaps on experiences in the United States, where subsequent cases appear to be brought only rarely by individuals who have opted out of a class action that has been brought to judgment.<sup>122</sup> However, the infrequent nature of subsequent actions in the United States may not be a good predictor of what will happen in Europe, for several reasons. First, US class actions use opt-out procedures that tend to create larger initial groups than the kind of opt-in approach that is currently used in most European Member States and that is likely to be used in any pan-European system of collective redress.<sup>123</sup> Second, the United States has adopted a number of practices relating to the settlement of class actions that minimize the likelihood or the availability of subsequent actions.<sup>124</sup> Third, the United States does not typically use a loser-pays approach to costs, although there are occasional fee-shifting provisions in US statutes providing for class relief.<sup>125</sup>

This final factor is intriguing, since the loser-pays principle that is prevalent in European Member States may provide an incentive for individual claimants to adopt a 'wait and see' approach to resolving claims associated with a mass injury. While some arguments

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<sup>121</sup> There are three basic types of preclusion. *See* Barnett (n 22) 944. Any one of these three could be at issue in a case involving collective suits.

<sup>122</sup> *See* Willging et al (n 33) 79. The situation is different in cases involving settlement. *See* Hensler (n 1) 21 (noting 'extensive litigation has followed the settlement of some class actions in the United States').

<sup>123</sup> *See* Hensler (n 1) 15-16; *see also* Resolution (n 4) ¶¶20, 27.

<sup>124</sup> *See* Hensler (n 1) 21.

<sup>125</sup> *See* *ibid* 22-25.

could be made that collective suits are conducted in the public interest and therefore should be subject to less onerous fee-shifting provisions, the European Parliament has suggested that no radical changes to loser-pays principles will be made in cases involving collective redress.<sup>126</sup> Applying this rule strictly could work to increase the incidence of secondary suits if individuals can bring a subsequent action in Member State B that allows them to reap the benefit of the collective suit through reliance on principles of preclusion. For example, if an individual claimant could use issue preclusion to establish some key fact or issue in the second suit, that might be seen as virtually assuring the claimant of a positive outcome at trial. The threat of preclusion could lead the defendant to settle all subsequently filed suits on the grounds that a negative judgment on the merits of those claims would be virtually assured, given the outcome of the earlier case, and early settlement avoids the imposition of attorneys' fees and costs. This approach would essentially turn the first collective suit into a multijurisdictional test case, something the European Parliament cannot have intended in the Resolution.

This creates a further dilemma for the court facing the second suit. While use of some sort of preclusion might reduce litigation in one way (i.e., by encouraging settlement), it also would appear to increase the number of claims filed. Furthermore, some judges might believe it inequitable to allow individual claimants to opt out of the first action because of a concern about costs, only to allow those parties to obtain a risk-free benefit from the earlier litigation.

Because these policy-based considerations suggest conflicting outcomes, a rights-based analysis may prove more useful. This inquiry involves several steps.

The first issue to address is whether a judgment of this nature would be subject to recognition and enforcement under the Brussels I Regulation. European preferences for opt-in

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<sup>126</sup> See Resolution (n 4) ¶20 (noting 'there can be no action without financial risk' and leaving issues relating to allocation of costs to individual Member States); Hensler (n 1) 22-25; TD Rowe, 'Shift Happens: Pressure on Foreign-Attorney Fee Paradigms from Class Actions' (2003) 13 *Duke J Comp and Int'l L* 124, 147.

procedures in cross-border collective disputes are intended to eliminate any possibility of a blanket objection to the enforcement of collective judgments under the public policy provision contained in Article 34(1) of the Brussels I Regulation.<sup>127</sup> Reliance on opt-in procedures helps ensure the presumptive enforceability of collective judgments in inter-European disputes.

While this approach is beneficial in situations where the parties in the original suit want to enforce the judgment against each other, it is problematic when a claimant in a secondary suit wants to use some aspect of the first judgment for preclusive purposes. Indeed, a cursory reading of Articles 34 and 35 of the Brussels I Regulation suggests that defendants have no grounds for blocking enforcement or recognition of a collective judgment, at least as a blanket concern.<sup>128</sup>

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<sup>127</sup> See D Fairgrieve, 'The Impact of the Brussels I Enforcement and Recognition Rules on Collective Actions', in Fairgrieve & Lein (n 1), 171, 176-86.

<sup>128</sup> Article 34 states:

A judgment shall not be recognised:

1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;
2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;
3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;
4. if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

Brussels I Regulation (n 9) art. 34. Article 35 states:

1. Moreover, a judgment shall not be recognised if it conflicts with Sections 3, 4 or 6 of Chapter II, or in a case provided for in Article 72.
2. In its examination of the grounds of jurisdiction referred to in the foregoing paragraph, the court or authority applied to shall be bound by the findings of fact on which the court of the Member State of origin based its jurisdiction.
3. Subject to the paragraph 1, the jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in point 1 of Article 34 may not be applied to the rules relating to jurisdiction.

Ibid art. 35.

Courts considering whether to block recognition of the collective judgment in a subsequent individual action could follow one of several lines of analysis. First, a judge could determine that a claimant in a secondary suit is not an ‘interested party’ for purposes of Article 33(2) and thus cannot apply for the judgment to have preclusive effect in an ongoing dispute.<sup>129</sup> However, this would not appear to be a proper reading of the Brussels I Regulation. The term ‘interested party’ obviously requires less of a connection to the initial suit than exists when ‘the same party’ is involved.<sup>130</sup> One good analogy would be to consider an ‘interested party’ to be someone who is involved in a ‘related action’ under Article 28 of the Brussels I Regulation, as distinguished from someone who is ‘the same party’ under Article 27. Since this type of secondary suit would fall under Article 28 if it were brought simultaneously with the first proceeding, the claimant in a subsequently brought dispute should be considered an ‘interested party’ under Article 33(2).

Second, a judge could conclude that recognizing the collective judgment in a subsequently brought secondary suit would constitute a violation of public policy under Article 34(1), since to do so would infringe upon the individual participatory rights of either the defendant or the claimant. For example, claimants have a strong (though not absolute) right to litigate their claims individually as a matter of national or European law.<sup>131</sup> However, defendants also have a right to mount an individualized defence whenever the claims or defences lack the requisite commonality. A court might conclude that the claimant’s decision to proceed individually reflects a determination on the claimant’s part that there is some sort of individualized issue at stake that would make collective treatment improper. Because it

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<sup>129</sup> Article 33(2) states:

Any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedures provided for in Sections 2 and 3 of this Chapter, apply for a decision that the judgment be recognised.

Ibid art. 33(2).

<sup>130</sup> See Fairgrieve (n 127) 187-88; Stefanelli (n 12) 149-51.

<sup>131</sup> See Resolution (n 4) ¶27; Fairgrieve (n 127) 176-86.

would be inequitable to allow a claimant to take the view that the suit is individual in one regard but collective in another, and because the claimant's and defendant's individual participatory rights are of equal weight and point towards the same outcome (i.e., a determination based solely on the facts and claims established in the secondary action between the two parties to that action), the court would be justified in denying recognition of the collective judgment in the second proceeding.<sup>132</sup>

This conclusion seems persuasive for several reasons. First, this analysis focuses on a rights-to-rights comparison, rather than a rights-to-interests inquiry, which is preferable as a matter of principle, given that legal rights 'trump' legal interests.<sup>133</sup> Therefore, any state interest in efficiency (which would have to be on the regional level rather than the national level, since the secondary suit is being brought in a different Member State than the collective suit) should be set aside in order to prioritize the ability of an individual claimant to choose the time, place and manner of bringing a legal action. Furthermore, while the defendant may have a policy interest in collective suits based on efficiency, any arguments in that regard would lead to a negative outcome for the defendant (i.e., recognition of a losing judgment), so it is unlikely that such an issue will be raised.

The above analysis relates to situations where the collective judgment has not yet been enforced or recognized in Member State B and the issue is raised for the first time by Person B in the secondary suit.<sup>134</sup> However, a party to the first suit may have already obtained recognition and enforcement of the collective judgment in Member State B at the time the

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<sup>132</sup> This issue is analogous to the principle that parties are supposed to raise all related claims and issues at the time the initial litigation goes forward. *See* Barnett (n 22) 951-53, 956-57. Failure to do so in this circumstance would not preclude Person B from bringing a claim, but would preclude him or her from seeking to rely on it for purposes of issue preclusion.

<sup>133</sup> *See* Le Sueur (n 18) 469-74.

<sup>134</sup> *See* Brussels I Regulation (n 9) arts. 33, 38.

secondary suit is brought, thus shifting the inquiry to issues relating to the preclusive force of a judgment that has been recognized.<sup>135</sup>

The defendant's first inclination may be to argue that even though the judgment has been recognized, it has no effect on the litigation with Person B because the parties are not the same. This may be a difficult point to win, given the suggestion by some commentators that claim or issue preclusion can withstand a formal lack of identity in cases involving collective redress.<sup>136</sup> While much of that analysis has been conducted in the context of opt-out rather than opt-in actions, some judges might find the arguments persuasive, particularly if the focus is on policy rationales regarding the reduction of litigation.<sup>137</sup> Furthermore, there is some European precedent, albeit in other contexts, that parties are regarded as identical where their interests are 'identical to and indissociable from' that of another party.<sup>138</sup> However, it has also been said that '[c]aution must be exercised before finding privity based on a community of interest'.<sup>139</sup>

Therefore, the defendant may be better served by relying on a rights-based analysis grounded in the right to assert an individualized defence. This argument is based on the position that because there is no way to tell, in advance, whether the defendant will be able to rebut arguments and facts presented by this claimant and this claimant's counsel, a court should not assume, *a priori*, that this claimant should prevail on certain issues or claims. This is essentially the same approach proposed as a means of avoiding recognition of the judgment under the public policy provisions contained in Article 33(1) of the Brussels I Regulation. However, because courts often construe public policy very narrowly in recognition

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<sup>135</sup> Notably, the question of preclusion also arises if Person B is able to argue successfully for recognition under Article 33(2) of the Brussels I Regulation.

<sup>136</sup> See Wasserman (n 112) 344-45, 380; see also Briggs and Rees (n 31) ¶2.245 (discussing *The Tatry* C-406/92, [1994] ECR I-5439); Stefanelli (n 12) 145-51 (same).

<sup>137</sup> See Wasserman (n 112) 344-45, 380; see also Briggs and Rees (n 31) ¶2.245.

<sup>138</sup> C-351/96 *Drouot Assurances SA v Consolidated Metallurgical Industries (CMI Industrial Sites)* [1998] ECR I-3075 ¶23; Briggs and Rees (n 31) ¶7.26.

<sup>139</sup> KR Handley, 'Some Overlooked Aspects of the Res Judicata Doctrine' (2011) 127 LQR 83, 95.

proceedings,<sup>140</sup> the outcome might be different in this type of unrelated action. Nevertheless, the argument could prove persuasive as a means of avoiding preclusion.

Another issue to consider is the possibility that the failure to give preclusive value to the collective judgment in the secondary proceeding might give rise to irreconcilable judgments. This issue is a major concern under the Brussels I Regulation, justifying both a stay of a related action under Article 28(1) and non-recognition of a judgment between the same parties under Articles 34(3) and 34(4).

However, the concern about irreconcilable judgments should not in most circumstances allow a court in Member State B to give some sort of preclusionary effect to a collective judgment from Member State A in cases where the defendant has already lost the collective claim. This is because an inconsistent judgment (i.e., a judgment that the defendant is not liable in the second suit) will only work to the favour of the defendant, who is the only common party between the various cases.<sup>141</sup> While this may be conceptually problematic, it is usually not practically problematic, since a determination that the defendant is not liable will usually not place the defendant in a situation where conflicting duties are imposed. While a different analysis might be necessary in cases where different (and conflicting) types of injunctive relief are sought, that will not usually be the case, since injunctive relief in the collective suit in Member State A would likely have already resolved the claims of Person B.<sup>142</sup> Therefore, if monetary liability is the only inconsistency at stake, then courts should be willing to allow the possibility of different outcomes because it gives the parties the ability to exercise their individual participatory rights while working no particular hardship to the defendant, the only party in common.

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<sup>140</sup> See Danov (n 11) 39 (noting the public policy exception is used only rarely); Fairgrieve (n 127) 176-86.

<sup>141</sup> See Fairgrieve (n 127) 187-88.

<sup>142</sup> See Briggs and Rees (n 31) ¶7.22 (discussing the meaning of irreconcilability).

(b) *Defendant prevails in the collective action*

The second scenario to consider is when the defendant has prevailed in the collective suit and is seeking to use the judgment preclusively against a claimant in a second action in Member State B. This situation has been considered with some frequency in the context of discussions about opt-out procedures in the United States, although it is unclear whether and to what extent those analyses should be applicable in European cases involving parties who have declined to opt into a collective action.<sup>143</sup>

Some of this commentary has suggested that the issue ought to turn on whether the facts, law or legal theories in the second action are the same as in the first.<sup>144</sup> However, it is not clear whether that approach would sufficiently take into account European concerns that ‘individual victims should remain free not to pursue the opt-in collective action but instead seek redress individually’.<sup>145</sup> To some extent, the outcome of this determination may depend on how claimants’ individual participatory rights are defined and whether the ability to litigate a matter independently of the collective suit is reliant on the claims being somehow different than those asserted in the collective litigation.

Interestingly, if a court were to conclude that individual participatory rights were contingent on the secondary claims being different in nature from those asserted in the collective litigation, that might be construed as turning what is currently considered to be a procedural right into a substantive one.<sup>146</sup> This would be problematic if the right to proceed independently is defined in inter-European disputes to be procedural in nature.<sup>147</sup>

Thus, allowing preclusion in situations where the secondary suit is not substantively different from the collective suit appears to pass muster from the claimants’ perspective.

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<sup>143</sup> See Wasserman (n 112) 344-45, 380; Bronsteen and Fiss (n 34) 1433.

<sup>144</sup> See Wasserman (n 112) 344-45, 380; Bronsteen and Fiss (n 34) 1433.

<sup>145</sup> Resolution (n 4) ¶27.

<sup>146</sup> See *Shady Grove Orthopedic Assoc, PA v Allstate Ins Co*, 130 SCt 1431, 1442-48 (2010); *Amchem Products, Inc v Windsor*, 521 US 591, 613 (1997); *Bisaillon v Concordia University* [2006] 1 SCR 666, 2006 SCC 19, ¶¶15, 17 (construing legislation from Quebec); *Strong* (n 78) 965-75.

<sup>147</sup> See Resolution (n 4) ¶15.

However, the analysis is not complete. The defendants' individual participatory rights must also be considered.

At first, the scales might seem to tip in favour of preclusion in secondary suits involving identical claims. For example, a denial of preclusion would appear to violate the defendant's right to rely on previously rendered judgments (i.e., establish the *res judicata* value of the award) as well as the defendant's policy-based interest in efficiency (in that the defendant would prefer to avoid incurring the cost of defending a second suit in what is essentially the same cause of action).

However, defendants' individual participatory rights are not limited to principles of preclusion. Defendants also claim the right to assert an individualized defence. Although this right could be seen as the mirror image of claimants' right to assert an individualized claim, the two actually exist in parallel.

In this case, the claimant has brought his or her claim too late for it to be joined with the collective suit. Furthermore, the claimant is bringing the claim in light of the knowledge that the defendant has prevailed on the first claim. This gives rise to two possibilities. First, the claimant could bring an action that is identical to the first. While this is theoretically possible, it is unlikely, since the claimant knows that the defendant will likely prevail (as in the first case) even without the application of preclusionary principles. Second, the claimant could bring an action that is in some way different than the first suit. This procedural posture augurs against preclusion, both as a matter of individual participatory rights and *res judicata* concerns. Therefore, preclusion in cases where a defendant has prevailed in the first suit appears either unnecessary or inappropriate.

#### D. CONCLUSION

Traditionally, most litigation has proceeded on a bilateral basis.<sup>148</sup> However, a growing number of disputes both within and between European Member States involve mass claims.<sup>149</sup> Indeed, in 2008, ten percent of the collective redress cases involving the then-thirteen Member States with collective redress mechanisms was estimated to be cross-border in nature, with the number rising to as high as forty percent if collective injuries in Member States without domestic forms of collective redress were included.<sup>150</sup> These figures, which are already significant, will undoubtedly rise in the coming years as the forces of globalization and European integration increase the amount of trade that is conducted between European Member States.<sup>151</sup>

The increasing volume of cross-border collective injuries was one reason behind European authorities' decision to consider the possibility of a coherent plan to cross-border collective redress.<sup>152</sup> However, European policymakers were also concerned about the effectiveness of existing mechanisms providing for collective redress.<sup>153</sup> Although creation of a dedicated procedure to deal with large-scale litigation involving parties in different Member States may resolve some of these issues, significant problems remain with respect to jurisdiction and enforcement under the Brussels I Regulation in its current or forthcoming form.<sup>154</sup> Although there is much work to be done in this regard,<sup>155</sup> two issues stand out as needing immediate attention.

First, legislators and policymakers need to determine whether individuals who choose not to join a collective suit only retain the right to proceed individually or whether such

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<sup>148</sup> See Hess (n 11) 116.

<sup>149</sup> See Directorate General for Internal Policies (n 3) 38; Hensler (n 1) 7; Watt (n 11) 111.

<sup>150</sup> See Directorate General for Internal Policies (n 3) 43; Green Paper, Consumer Collective Redress, COM(2008)794 ¶15 (27 November 2008).

<sup>151</sup> See D Hensler, 'How Economic Globalisation is Helping to Construct a Private Transnational Legal Order', in S Muller et al (eds), 1 *The Law of the Future and the Future of the Law* 249, 250-59 (Oslo: Torkel Opsahl Academic Epubliser, 2011); Watt (n 1) 119-21.

<sup>152</sup> See Resolution (n 4) ¶¶D, H; see also Public Consultation (n 6).

<sup>153</sup> See Resolution ¶G.

<sup>154</sup> See *supra* n 9.

<sup>155</sup> A recent collection of essays addresses a number of these matters. See Fairgrieve & Lein (n 1).

persons may also bring a second large-scale action.<sup>156</sup> This question is sure to arise, and legislative guidance is necessary to ensure predictability and consistency among the various national courts.

Second, legislators and policymakers must also determine how non-participants in a collective suit are to be considered under the Brussels I Regulation, i.e., whether they are the ‘same parties’, ‘interested parties’ or something else. This issue is central to a number of different analyses under the Brussels I Regulation, including those regarding both jurisdiction and enforcement, and it is important for courts to adopt a single, standard approach to this matter so as to avoid confusion.

Once those matters are decided, European policymakers will have to consider whether it is feasible to amend the Brussels I Regulation yet again to take collective redress into account or whether it is better to include the necessary procedural rules in any new form of cross-border collective redress that is eventually developed. Given the complexities of the issues involved, the latter seems the preferred course of action. However, in so doing, European and national authorities must take the various elements of both claimants’ and defendants’ individual participatory rights into account. While rights-based analyses can be complicated at times, they can provide useful answers to difficult questions and can overcome many of the impasses that arise under policy-driven inquiries, as this article has shown.

As important as individual participatory rights are, they are not the only interests at stake. For example, commentators have suggested that issues relating to collective redress should not be analyzed on a purely individualistic level, since large-scale disputes can affect matters of regulatory concern.<sup>157</sup> Although litigation may not initially appear to be capable of

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<sup>156</sup> See Hess (n 11) 119-20; Watt (n 11) 114-16.

<sup>157</sup> See Strong (n 5); Watt (n 11) 111-15; Watt (n 1) 120, 124-27.

reflecting a regulatory purpose or effect, the issue has received considerable attention from commentators in both the domestic and transnational realm.<sup>158</sup>

Another important consideration involves the way in which European procedures will interact with similar mechanisms used outside the European Union. Numerous commentators have remarked upon the difficulties associated with large-scale international litigation involving European and non-European nations, and the adoption of a new form of collective redress in Europe will only increase the analytical complexities involved in these sorts of suits.<sup>159</sup> This is particularly true given the expanded extraterritorial effect of the Brussels I Regulation under the recast regulation.<sup>160</sup>

Collective redress has acquired a considerable amount of “urgency in a short space of time,” putting significant pressure on governments to devise adequate procedural mechanisms.<sup>161</sup> Although the current analysis has taken place in the context of European procedural law, many of the issues discussed herein can and will arise in large-scale litigation in other jurisdictions, including global class actions seated in the United States. In considering these matters, it is important to understand what precisely is involved so as to ensure a process that guarantees procedural fairness to all parties. Indeed, only by

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<sup>158</sup> See F Bignami, ‘Cooperative Legalism and the Non-Americanization of European Regulatory Styles: The Case of Data Privacy’ (2011) 59 Am J Comp L 411, 412, 414-15; HL Buxbaum, ‘Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict’ (2007) 46 Columbia J Transnat’l L 14, 67; HL Buxbaum, ‘Transnational Regulatory Litigation’ (2006) 46 Virginia J Int’l L 251, 309-17; JM Glover, ‘The Structural Role of Private Enforcement Mechanisms in Public Law’ (2012) 53 Wm and Mary L Rev 1137, 1140; RD Kelemen, ‘Suing for Europe: Adversarial Legalism and European Governance’ (2006) 39 Comp Pol Stud 101, 102; P Luff, ‘Risk Regulation and Regulatory Litigation’ (2011) 64 Rutgers L Rev 73, 96, 113-14; Nagareda (n 36) 13; Strong (n 5).

<sup>159</sup> See Bermann (n 23) 94; Buxbaum, Securities (n 158) 35; Buxbaum, Transnational (n 158) 251; SJ Choi and LJ Silberman, ‘Transnational Litigation and Global Securities Class Actions’ (2009) Wisconsin L Rev 465; Dixon (n 36) 134; Monestier (n 36) 44-45; Mulheron, Opt-Out (n 36) 426-27; Mulheron, Vivendi (n 36) 181-82; Nagareda (n 36) 11-12; LS Simard and J Tidmarsh, ‘Foreign Citizens in Transnational Class Actions’ (2011) 97 Cornell L Rev 87, 89; M Stiggelbout, ‘The Recognition in England and Wales of United States Judgments in Class Actions’ (2011) 52 Harvard Int’l L J 433; Strong (n 5); Wasserman (n 112) 332-69.

<sup>160</sup> See Brussels I Recast (n 9); Press Release (n 15); see also *supra* n 15 and accompanying text.

<sup>161</sup> Watt (n 1) 120.

unbundling the constituent elements of the various participatory rights can the issues at stake truly be understood, weighed and protected.