Class Action Judgment Enforcement in Italy: Procedural "Due Process" Requirements

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I. INTRODUCTION

The mass legal wrongs associated with modern society have caused the collective justice of class suits to gradually displace the traditional American procedural model of party autonomy and control over litigation.[1] In numerous class actions the defendants are foreign

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1. *See* Geoffrey C. Hazard, Jr., John L. Gedid & Stephen Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1858 (1998); Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 CORNELL L. REV. 811, 814-18 (1998). Class actions appeared as a procedural device to enable courts to deal with questions of common or general interest in which the number of those interested in the litigation was so great as to make impracticable or inconvenient the joinder of all such persons as parties in conformity to the usual rules of procedure. Hansberry v. Lee, 311 U.S. 32, 41 (1940). The frequency of class actions increased as the American legal system responded to the civil rights, consumer, and environmental protection movements. Konstantinos D. Kerameus, *A Civilian Lawyer Looks at Common Law Procedure*, 47 LA. L. REV. 493, 504-05 (1987). The expansion of tort liability through strict liability theories and an increased ability to

corporations.[2] This introduces the possibility that in cases where foreign defendants are unwilling to settle, members of the class action may need to pursue recognition and enforcement proceedings in a foreign country.[3] Since the United States is not a party to any treaty that provides for the recognition and enforcement of U.S. judgments abroad,[4] the foreign country's municipal law will supply the criteria for recognition and enforcement.[5]

In recognition and enforcement proceedings, foreign courts scrutinize American judgments to determine whether such judgments violate the jurisdiction's substantive or procedural public policy.[6] Concerns of a substantive nature have included the foreign jurisdiction's

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obtain compensatory and punitive damages have added to their popularity. *See* Richard B. Cappalli & Claudio Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 6 TEMP. INT'L & COMP. L.J. 217, 227-28 (1992). Class actions proliferated also in antitrust litigation seeking treble damages. *See* Milton Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 4-5 (1971). It has been suggested that the increasing resort to class actions is also a result of recourse to the judicial system as an appropriate social engineering tool when the executive and legislature fail to provide an adequate safety net against the excesses of powerful manufacturers and sellers. *See* Jack B. Weinstein, *Some Reflections on United States Group Actions*, 45 AM. J. COMP. L. 833, 834 (1997); Kerameus, *supra*, at 504-05; Roundtable Discussion, *The Future of Class Action Mass Torts*, 66 FORDHAM L. REV. 1657, 1660-61 (1998) (writing by Hon. Edward R. Becker, stating class action suits demonstrate people's tendency to turn to courts, rather than to legislatures, for solutions to social problems); Samuel Issacharoff, *Group Litigation of Consumer Claims: Lessons from the U.S. Experience*, 34 TEX. INT'L L.J. 135, 146-50 (1999).

2. Dale A. Schreiber & Robert S. De Leon, *Representing Foreign Issuers in Securities Class Actions*, 218 N.Y. L.J., Sept. 29, 1997, at 1, 5. The press has reported on the class suits on behalf of victims of the Nazis commenced in the Southern and Eastern Districts of New York against German and Italian insurance companies and Swiss and French banks, respectively, in the District of New Jersey against a German automobile manufacturer, and in the District for the District of Columbia against Swiss banks.

3. The writer acknowledges that class actions tend to be settled and that this Article may be largely theoretical. A recent exception was the $145 billion verdict against the tobacco industry in a Florida class action. *See* Engle v. R.J. Reynolds Tobacco Co., 122 F. Supp. 2d 1355 (S.D. Fla. 2000).

4. It has been suggested that the extensive differences between American substantive and procedural rules and their foreign counterparts are a major reason why attempts to make these treaties have failed. Joachim Zekoll, *The Enforceability of American Money Judgments Abroad: A Landmark Decision by the German Federal Court of Justice*, 30 COLUM. J. TRANSNAT'L L. 641, 642-43 (1992). The United States is party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 4739, as well as to specialized agreements relating to enforcement of tax judgments.

5. Looking to the future, the United States participates in the Hague Conference on Private International Law for a new multilateral judgments convention. ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS 129 (1996). It is not known whether the Conference might address the issue of the recognition and enforcement of judgments in actions brought by classes of plaintiffs. Ronald A. Brand, *Enforcement of Judgements in the United States & Europe*, 13 J.L. & COM. 193, 207-08 (1994).

6. *See* Volker Behr, *Enforcement of United States Money Judgments in Germany*, 13 J.L. & COM. 211, 225 (1994).

view of American strict liability theories[7] or of damages that compensate for pain and suffering or of punitive damages.[8] On the procedural side, foreign courts have also addressed objections to recognition of American judgments that were obtained as a result of intrusive pre-trial discovery,[9] rules that fail to ensure that a party is notified of a default judgment for purposes of making an appeal,[10] the absence of written reasons to support outcomes in jury trials,[11] or a disregard for "substantial justice."[12] Clearly, foreign forums devote just as much scrutiny to the procedural as they do to the substantive aspects of American judgments.[13]

Foreign courts are more likely to scrutinize the procedural aspects when presented with American judgments resulting from class actions because the procedure is unique and, to most legal practitioners in the rest of the world, largely unfamiliar.[14] In fact, class action devices can be

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7. Joachim Zekoll, *Recognition and Enforcement of American Products Liability Awards in the Federal Republic of Germany*, 37 AM. J. COMP. L. 301, 302 (1989).

8. *See, e.g.*, Yves P. Piantino, *Recognition and Enforcement of Money Judgments Between the United States and Switzerland: An Analysis of the Legal Requirements and Case Law*, 17 N.Y.L. SCH. J. INT'L & COMP. L. 91, 126 (1997); LOWENFELD, *supra* note 5, at 133-36; Peter Hay, Comment, *The Recognition and Enforcement of American Money-Judgments in Germany—The 1992 Decision of the German Supreme Court*, 40 AM. J. COMP. L. 729, 729 (1992); Andre R. Fiebig, *The Recognition and Enforcement of Punitive Damage Awards in Germany: Recent Developments*, 22 GA. J. INT'L & COMP. L. 635, 635-57 (1992); Zekoll, *supra* note 7, at 302.

9. *See, e.g.*, Gerfried Fischer, *Recognition and Enforcement of American Tort Judgments in Germany*, 68 ST. JOHN'S L. REV. 199, 204-08, 210-11 (1994); Hay, *supra* note 8, at 734-35; Zekoll, *supra* note 7, at 302.

10. *See, e.g.*, Piantino, *supra* note 8, at 122 (citing Swiss decision finding that absence of notification for a default judgment in the United States did not violate Swiss public policy to deny enforcement of U.S. judgment).

11. *See, e.g.*, LOWENFELD, *supra* note 5, at 130-31 (citing German decision of nonenforcement of an American judgment that failed to give reasons not only to support liability but also to explain the amount of the damages award).

12. *See, e.g.*, Adams v. Cape Indus. Plc., 2 W.L.R. 657, 658, 660 (C.A. 1990) (U.K.) (holding that default judgment of U.S. district court that disregarded evidence and arbitrarily awarded damages to individual plaintiffs was impeachable because it offended English views of substantial justice). In *Adams*, the American judge, faced with 206 separate claims, merely indicated his willingness to grant an average of $75,000 to each plaintiff and left their lawyers to work out the actual figure which each claimant should receive. *Id.* at 658. Thus, there was no judicial consideration of the evidence relating to each plaintiff's injury, nor was there a judicial determination of how much each merited. *See id.*

13. *See, e.g.*, Ramon E. Reyes, Jr., *The Enforcement of Foreign Court Judgments in the People's Republic of China: What the American Lawyer Needs to Know*, 23 BROOK. J. INT'L L. 241, 250 & n.48 (1997); authorities cited *supra* notes 6-12. This scrutiny may be as much a result of a widespread preconceived attitude toward American judgments as it is an honest concern to protect the forum's public policy. *See* Lowenfeld, *supra* note 5, at 131.

14. The Transnational Rules of Civil Procedure and accompanying Commentary currently being drafted by Professors Geoffrey C. Hazard, Jr., University of Pennsylvania Law School, and Michele Taruffo, University of Pavia (Italy) Law Faculty, would permit national courts to apply these Rules instead of domestic procedural rules whenever the plaintiff and

found in very few foreign jurisdictions.[15] Although the class action is generally appreciated for its social utility at home,[16] its peculiarities might lead a foreign court to look more closely at the procedure to determine whether it satisfies the foreign country's public policy concerns.

European commentators have acknowledged the advantages of the class action as a means of permitting access to justice by consumers.[17] They opine that this mechanism would also function as a valuable deterrent to the extent that it can fill the gap between the increasing array

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defendant are nationals of different states. John J. Barceló III, *Introduction* to Geoffrey C. Hazard, Jr. & Michele Taruffo, *Transnational Rules of Civil Procedure Rules and Commentary*, 30 CORNELL INT'L L.J. 493, 493-94 (1997). It is significant that the Commentary to Rule 11 clarifies that although a party may add additional parties, Rule 11 "does not authorize class-suit procedures." *Id.* at 518.

15. Some form of class action is found in Australia. *See* Vince Morabito, *Class Actions: The Right to Opt Out Under Part IVA of the Federal Court of Australia Act 1976 (CTH)*, 19 MELB. UNIV. L. REV. 615, 615-16 (1994); *see also* Arthur L. Close, Comment, *British Columbia's New Class Action Legislation*, 28 CANADIAN BUS. L.J. 271 (1997) (stating class actions exist in Canadian common law provinces of British Columbia and Ontario); ANDREA GIUSSANI, STUDI SULLE "CLASS ACTIONS" 338-42 (1996) (discussing class actions in the predominantly civil law Canadian province of Quebec); GIUSSANI, *supra*, at 342-45 (discussing group actions in Brazil); Note, *Class Action Litigation in China*, 111 HARV. L. REV. 1523, 1524 (1998) (stating that class actions also exist in China); Stephen Goldstein, *Forty Years of Civil Procedure*, 24 ISRAEL L. REV. 789, 801 (1990) (stating that a 1988 amendment to Securities Law introduced American-style class actions in Israel). Even though class actions descend from England's seventeenth-century bill of peace, Stephen C. Yeazell, *Group Litigation and Social Context: Toward A History of the Class Action*, 77 COLUM. L. REV. 866, 868 (1977) (quoting Z. CHAFEE, SOME PROBLEMS OF EQUITY 200-01 (1950)), class actions are absent in England. England and Scotland have considered the introduction of procedural devices that would handle multiparty actions. Sarah L. Croft & Karen A. Brady, *Multi-Party Litigation in the United Kingdom and the United States*, FOR THE DEFENSE, Apr. 1997, at 8.

16. The class action device has pragmatic objectives that include economies of time, effort, and expense, and the promotion of uniformity of decision with regard to persons similarly situated. FED. R. CIV. P. 23 advisory committee's note, 39 F.R.D. 73, 102-03 (1966). Class actions also allow small claimants to present claims that, for economic reasons, might not otherwise be brought, without sacrificing procedural fairness or bringing about other undesirable results. *Id.* There is broad consensus that class actions serve a vital public interest. *See, e.g.*, Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997) (stating that a class action overcomes problem that small recoveries do not provide individuals incentive to bring solo actions). For examples of reservations expressed, see William Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 394 (1973); Handler, *supra* note 1, at 5-12. At least one court opined that a federal or state administrative agency or a specially constituted tribunal would be a better method to obtain the desired results. Schaffner v. Chem. Bank, 339 F. Supp. 329, 337 (S.D.N.Y. 1972).

17. *See, e.g.*, VINCENZO VIGORITI, INTERESSI COLLETTIVI E PROCESSO: LA LEGITTIMAZIONE AD AGIRE 255-60 (1979); Claudio Consolo, *Class Actions Fuori Dagli USA? (Un'indagine preliminare sul versante della tutela dei crediti di massa: funzione sostanziale e struttura processuale minima)*, 39 RIVISTA DI DIRITTO CIVILE [RIV. DIR. CIV.], I, 609, 615-17 (1993); Catherine Kessedjian, *L'action en justice des associations de consommateurs et d'autres organisations représentatives d'intérêts collectifs en Europe*, 33 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE [RIV. DIR. INT'L PRIV. PROC.] 281, 281-82 (1997).

of substantive rights enacted to protect broad categories of individuals and the lack of an effective form of civil procedure to enforce these rights.[18] They have noted, however, essential differences between the American legal system and their respective systems that would make an indiscriminate adoption of the class action unlikely.[19] These differences include: the role of the judicial branch in accommodating disputes that arise from intricate social, political and economic interactions in American society; the power that the American judge wields in class action litigation; and the role of the American plaintiff's attorney.[20]

More problematically, Europeans view the American class action as a procedural mechanism whose peculiarities elude the fundamental concepts that characterize the formally defined structure of traditional civil litigation.[21] In Europe, the predominant model of civil dispute resolution continues to be individualized litigation. This model contemplates the adjudication of one or more clearly specified disputes through a lawsuit with fixed subject matter, identified litigants who have a direct and personal interest in the substantive rights in dispute, and with as many applications for relief as there are plaintiffs.[22] Among the

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18. VIGORITI, *supra* note 17, at 260; Consolo, *supra* note 17, at 621. In Europe, the functions of deterrence and prevention of norms enacted to protect collective interests are performed by state actions, not private ones, directed at imposing administrative or criminal sanctions. For Italy, see Consolo, *supra* note 17, at 617. It is interesting to note that one American critic of the class action has portrayed it as a criminal proceeding with extravagant penalties. Francis R. Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 207 (1976).

19. *See, e.g.*, Per Henrik Lindblom, *Individual Litigation and Mass Justice: A Swedish Perspective and Proposal on Group Actions in Civil Procedure*, 45 AM. J. COMP. L. 805, 819 (1997); Consolo, *supra* note 17, at 660.

20. *See, e.g.*, VIGORITI, *supra* note 17, at 285-87; Consolo, *supra* note 17, at 653-59; Cappalli & Consolo, *supra* note 1, at 288-91. One feature that has influenced the development of the American legal system is the tendency to look to the courts, rather than to legislatures, to compensate the victims of tortious behavior. William Tetley, Q.C., *A Canadian Looks at American Conflict of Law Theory and Practice, Especially in the Light of the American Legal and Social Systems (Corrective vs. Distributive Justice)*, 38 COLUM. J. TRANSNAT'L L. 299, 327 (1999).

21. *See* Cappalli & Consolo, *supra* note 1, at 219; Consolo, *supra* note 17, at 629. Italian scholars have attempted to portray the various aspects of this complex mechanism in conceptual terms proper to Italian civil procedure in order to give it systematic coherence. *See* Cappalli & Consolo, *supra* note 1, at 275-92; Consolo, *supra* note 17, at 629-53.

22. Kessedjian, *supra* note 17, at 291; Consolo, *supra* note 17, at 628. Where a plurality of persons have autonomous interests in seeking relief against the same defendant, they may appear in the lawsuit either by voluntary intervention as plaintiffs or by appointing the existing plaintiffs to be their representatives and to appear in the action on their behalf. This occurred in *Gatti v. Consob*, Cass. civ., sez. I, 3 marzo 2001, n.3132, Foro It. 2001, I, 1139, in which investors in a real estate venture on the island of Sardinia brought an action for damages against the Commissione nazionale per le società e la borsa (Consob), the agency entrusted with the protection of the interests of investors in securities, for failing to verify the accuracy and

fundamental tenets of European civil litigation that appear to exclude the adoption of American class actions are rules that require each plaintiff to execute a written power of attorney for litigation and rules that limit the binding effect of the judgment on parties to the action.[23]

While this conceptual and systematic heritage might prevent the adoption abroad of class actions, a number of European countries already provide for "group actions" of varying nature.[24] One type of group action permits consumer associations or other interest groups to initiate lawsuits for the protection of individual, as well as collective, interests.[25] Although the French *action en représentation conjointe* seeks collective protection of the individual interests of a category of plaintiffs, it differs from the class action in that it requires an explicit power of attorney from all members of the "class" and the plaintiff must be an entity, not an individual.[26]

A provision in the Italian Code of Criminal Procedure[27] permits entities, such as associations "representative" of interests harmed by the crime in question, to participate in the criminal proceeding and to exercise the same procedural rights and powers which the Code grants to the person *offesa dal reato*, or crime victim.[28] The entities, however, must first obtain the consent of the crime victim.[29] Moreover, where an entity can show that it incurred immediate and direct damages from a crime perpetrated against another, the entity has the right to claim restitution and damages (*azione civile*) within the context of the respective criminal proceeding instead of commencing a separate civil action after the criminal adjudication.[30] In addition, an Italian statute expressly permits

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completeness of the disclosures in a prospectus that had been filed with the agency. The action was commenced by five investors. *Id.* at 1143. Two months later, several more plaintiffs voluntarily intervened. *Id.* The intervenors were also the appointed representatives of 886 other investors seeking damages. *Id.* at 1143-44.

23. Serge Guinchard, *L'action de groupe en procédure civile française*, 42 REVUE INTERNATIONALE DE DROIT COMPARE I, 599, 600 (1990).

24. Lindblom, *supra* note 19, at 820-22 (detailing the different types of limited group public actions in the EU, United Kingdom, Denmark, and Ireland; public and private organizational actions in Belgium, the Netherlands, and Sweden; and damages group actions in France).

25. Kessedjian, *supra* note 17, at 282-83; Guinchard, *supra* note 23, at 599; William B. Fisch, *European Analogues to the Class Action: Group Action in France and Germany*, 27 AM. J. COMP. L. 51, 78-79 (1979).

26. Kessedjian, *supra* note 17, at 282 & n.3.

27. CODICE DI PROCEDURA PENALE (C.P.P.) art. 112 (It.).

28. *Id.* art. 90.

29. *Id.* art. 92.

30. GILBERTO LOZZI, LEZIONI DI PROCEDURA PENALE 105-06 (2d ed. 1997). The provision that entitles the person damaged by the crime to claim civil damages within the criminal proceeding currently is found in C.P.P. art. 74. For a description of the analogous *action civile* and

associations of manufacturers, consumers, and other interested associations to claim restitution and damages within the context of criminal proceedings concerning the marketing of dangerous foods, even if these entities are unable to show that their damages were an immediate and direct consequence of the crime.[31]

The European Union Directive 98/27/EC[32] on injunctions for the protection of consumers' interests defines certain "qualified entities" that, as representative organizations, may be empowered to bring actions on behalf of consumers.[33] To comply with European Union principles for the protection of consumers' interests, Italy enacted Law No. 281 of July 30, 1998.[34] Law No. 281 provides that formally recognized consumer associations may bring lawsuits to protect common interests, principally through injunctions.[35] The statute does not contemplate actions for damages.[36]

In contrast to the limited departure from the traditional model of private litigation displayed by these instances of "group action" in Europe, the American class action[37] exhibits perplexing peculiarities that may cause an Italian court to hesitate when requested to recognize and enforce the American class action judgment. When a plaintiff class petitions an Italian court for recognition and enforcement of a judgment, the question whether the petition is on behalf of the class or on behalf of identified individuals would present practical and conceptual problems.

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the participation of groups as claimants in French criminal procedure, see Fisch, *supra* note 25, at 60-71.

31. Art. 8-*bis*, Decree-Law No. 282 of June 18, 1986 (Gazz. Uff., 20 giugno 1986, n.141, Lex LXXII, part I, 1236 (1986)), converted with amendments into Law No. 462 of August 7, 1986 (Gazz. Uff., 11 agosto 1986, n.185, Lex LXXII, part I, 1589 (1986)).

32. 1998 O.J. (L 166) 51.

33. *Id.* at 53. The legislative history leading to the adoption of Directive 98/27/EC included consideration of class actions as a means of collective access to justice for consumers, but the idea did not obtain the unanimous approval of the Member States. ANNA BARTOLINI, GUIDA AI DIRITTI DEL CONSUMATORE 228 (1999).

34. Law, Gazz. Uff., 14 agosto 1998, n.189, Lex LXXXIV, part I, 3440 (1998) [hereinafter Law No. 281].

35. *Id.* art. 3(1).

36. *See generally id.*

37. This discussion focuses on plaintiffs' class actions for damages contemplated under Federal Rule of Civil Procedure 25(b)(3). Although many states have enacted class action statutes, for the most part their provisions are similar to the federal class action rules. *See* FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE § 10.22 (3d ed. 1985); *see also* Ronan E. Degnan, *Foreword*, *Adequacy of Representation in Class Actions*, 60 CAL. L. REV. 705, 706-07 (1972) (discussing the effect of Rule 23 on California's class action rules); Adolf Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 612 (1971) (examining New York's and other states' class action rules that are similar to Rule 23).

In a class action, the litigants are largely unidentified.[38] The class action scheme distinguishes between the few "representative parties" and the many "members of the class"[39] and permits the adversarial contest to be waged by only the few "representative" members of the class, with all other class members permitted passively to await the outcome of the action.[40] In *Hansberry v. Lee*, the Supreme Court noted that a class suit is an exception to the general principle that one is not bound by a judgment in a litigation in which one was not designated as a party or was not made a party by service of process.[41] In fact, a significant characteristic of the class action is that the ensuing judgment on the merits may have a binding effect upon even the "absent" class members[42] and may preclude them from re-litigating the adjudicated claims.[43]

Courts have been reluctant, however, to extend to class members other than the representative parties a number of the effects of litigation which traditionally have touched parties.[44] Absent class members are not parties to the action for the purpose of assertion of counterclaims against them.[45] Nor are they parties in the sense that would subject them to discovery to the same extent as an individual party.[46] Moreover, if the action is unsuccessful, absent members are not considered parties with

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38. Rule 23(c)(3) requires that the final class judgment *describe* the members of the class, not specifically identify all class members. FED. R. CIV. P. 23(c)(3); HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 2.04 (3d ed. 1992). The judgment must specify only the individual members who have been identified. FED. R. CIV. P. 23 advisory committee's note, 39 F.R.D. 73, 105 (1966).

39. FED. R. CIV. P. 23(a), 23(b)(3). Plaintiffs in 23(b)(3) class actions may be divided into three distinct groups: those who are actually involved in the litigation, the "representative parties"; those who opt out under Rule 23(c)(2)(A) and who are not bound by the result of the litigation; and those who do not actively participate in the litigation but who are bound by the result. Jeffrey A. Hearn, Note, *Obtaining Discovery from Absent Class Members in Federal Rule of Civil Procedure 23(b)(3) Class Actions*, 30 DRAKE L. REV. 347, 348-49 (1981).

40. Donson Stores, Inc. v. Am. Bakeries Co., 58 F.R.D. 485, 489 (S.D.N.Y. 1973). A member of the class may enter an appearance in the action through his counsel. FED. R. CIV. P. 23(d); FED. R. CIV. P. 23 advisory committee's note, 39 F.R.D. 73, 105 (1966).

41. 311 U.S. 32, 40-41 (1940).

42. *See* Hazard, Gedid & Sowle, *supra* note 1, at 1946-47 (finding that class actions bind absent members, provided that there is adequate representation by the named parties on common interests). The class action court rules on the "coverage" of the judgment. *See* Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 45-46 (1968); FED. R. CIV. P. 23 advisory committee's note, 39 F.R.D. 73, 106 (1966).

43. *See* Lee A. Freeman, Jr., *Current Issues in Class Action Litigation*, 70 F.R.D. 251, 286 (1976) (citing Hansberry v. Lee, 311 U.S. 32, 43 (1940)).

44. *See, e.g.*, *Donson Stores*, 58 F.R.D. at 489.

45. *Id.* at 489-90.

46. JAMES & HAZARD, *supra* note 37, § 10.23; *see also* Wainwright v. Kraftco Corp., 54 F.R.D. 532, 534 (N.D. Ga. 1972); Fischer v. Wolfinbarger, 55 F.R.D. 129, 132 (W.D. Ky. 1971); Hearn, *supra* note 39, at 354.

regard to liability for court costs.[47] In view of these equivocal notions of "party" in American class actions, an Italian court will be faced with the uncertainties that arise from the doctrine of mandatory joinder of indispensable parties on appeal[48] and the apparently settled principle that requires indispensable parties to participate in a proceeding for the recognition of a foreign judgment.[49]

Italian courts also would have difficulty recognizing aggregate class action damage awards. In situations in which hundreds of plaintiffs share a number of discrete, potentially dispositive issues, Rule 23 permits courts to try common issues such as breach of duty, causation, and damages on a class-wide basis.[50] Just as joinder is impracticable in class action suits,[51] individual proof of damages is often similarly impracticable.[52] In the American view, there are various circumstances under which proof of aggregate monetary relief for the class is not only feasible and reasonable, but also proper.[53] This departs from the traditional tenet of tort law that holds a defendant responsible only when a specific plaintiff proves, after full due process of law, that the defendant is liable for specific damages.[54] European legal systems still require proof of the amount of damages incurred by each plaintiff.[55]

Another question that would confront the Italian court derives from the concept of a class representative. Class action representatives are self-proclaimed protectors of the interests of others, purporting to sue on behalf of themselves and "all others similarly situated."[56] The doctrine of

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47. *See, e.g.*, Lamb v. United Sec. Life Co., 59 F.R.D. 44, 48 (S.D. Iowa 1973).

48. The mandatory joinder of indispensable parties continues in the appeal stage in the attempt to avoid inconsistent judgments. SALVATORE SATTA, DIRITTO PROCESSUALE CIVILE 357 (Carmine Punzi ed., Cedam-Padova 9th ed. 1981) (1967). Article 331 of the Code of Civil Procedure provides that the appeal of an action with indispensable parties cannot go forward unless all the parties in the action are parties to the appeal. CODICE DI PROCEDURA CIVILE [C.P.C.] art. 331 (It.).

49. GAETANO MORELLI, DIRITTO PROCESSUALE CIVILE INTERNAZIONALE 346 (1954). An en banc Corte di Cassazione held that where the foreign action is analogous to an adversarial Italian proceeding, which would require the participation of indispensable parties, the procedure for recognition of the foreign judgment must be in adversarial form with the participation of all the persons who would have been entitled to participate in the analogous Italian proceeding. Cass., sez. un., 8 agosto 1990, n.8061, Giur. It. 1991, I, 1, 418, 422-23.

50. FED. R. CIV. P. 23(c)(4).

51. Kohn v. Am. Hous. Found., Inc., 178 F.R.D. 536, 540 (D. Colo. 1998) ("'[T]he real inquiry under Rule 23(a)(1) . . . is whether joinder would be impracticable.'") (quoting Daigle v. Shell Oil Co., 133 F.R.D. 600, 603 (D. Colo. 1990)).

52. NEWBERG & CONTE, *supra* note 38, § 10.02.

53. *Id.*

54. Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1824-25 (1995).

55. *See infra* notes 194-196 and accompanying text.

56. Degnan, *supra* note 37, at 711.

representation of "absent parties" in a class suit does not require a preexisting relationship among the class members, but rather a joint interest either in claiming a common right or challenging an asserted obligation.[57] The class representative derives his authority from his situation as a member of the affected class, coupled with judicial approval of designation of the action as a class suit and of the representative's status.[58] Instead, representative actions abroad generally require the consent of those represented.

Accordingly, for the reasons that will be considered, Italian courts will likely closely scrutinize American judgments obtained in class actions to determine whether these procedures fall short of Italian public policy concerns. This should not be a surprise, as fairness issues in class actions continue to present themselves even in U.S. courts.[59] Moreover, what passes due process muster in the United States might be deemed otherwise in Italy. This writing attempts to describe aspects of the Italian legal framework within which one must operate when requesting the recognition and enforcement of an American class action judgment. Part II briefly describes the Italian procedure for recognition and enforcement. Part III examines Italian procedural due process principles. Part IV

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57. Hansberry v. Lee, 311 U.S. 32, 44-45 (1940).

58. RESTATEMENT (SECOND) OF JUDGMENTS § 41 cmt. e (1982). "Because the representative's status is voluntary and non-contractual, it is subject to careful judicial scrutiny." *Id.*

59. *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) (acknowledging that class certification may skew trial outcomes by strengthening number of unmeritorious claims, making it more likely that defendant will be found liable and significantly higher damages awards will result); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299 (7th Cir. 1995) (expressing concern with forcing a defendant to stake its company on outcome of a single jury trial, especially if it is feasible to allow a final, authoritative determination of its liability to emerge from a decentralized process of multiple trials with different juries and different standards of liability); Kohn v. Am. Hous. Found., Inc., 178 F.R.D. 536, 543 (D. Colo. 1998) (determining class-wide liability separate from causation and damages for the sake of efficiency would be at expense of fairness). Studies have shown that the presence of a severely injured plaintiff with lesser injured plaintiffs may dramatically increase the damages awarded to all plaintiffs, a distortion that is contrary to traditional notions of individualized justice. Barry F. McNeil & Beth L. Fancsali, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 491 (1996) (citing Irwin A. Horowitz & Kenneth S. Bordens, *The Effects of Outliers Presence, Plaintiff Population Size, and Aggregation of Plaintiffs on Simulated Civil Jury Decisions*, 12 LAW & HUM. BEHAV. 209, 211-12, 226 (1988)). There has been disagreement on whether collective determination of damages impermissibly alters litigants' rights to due process and a fair trial. *See* Amy Gibson, Note, Cimino v. Raymark Indus.*: Propriety of Using Inferential Statistics and Consolidated Trials to Establish Compensatory Damages for Mass Torts*, 46 BAYLOR L. REV. 463, 465 (1994). In favor of collective damage determination, some commentators suggest that class adjudication meets traditional notions of procedural due process and that, in the context of mass tort litigation, an aggregated trial may be necessary to vindicate due process values. *See* Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 826-27 (1992).

discusses whether particularly troublesome aspects of class action procedure may be compatible with those Italian due process principles.

II. ENFORCEMENT OF FOREIGN JUDGMENTS IN ITALY

Italy is party to a number of bilateral treaties and multilateral conventions that govern the recognition and enforcement of foreign judgments.[60] Where such an agreement is applicable, it preempts the domestic statutory provisions for recognition and enforcement of judgments.[61] Until recently, these provisions were contained in articles 796-805 of the Code of Civil Procedure.[62] The provisions currently are found in articles 64-67 of Law No. 218 of May 31, 1995.[63]

Since Italy is not party to any treaty with the United States for the recognition and enforcement of judgments, an American judgment creditor seeking enforcement in Italy, or an Italian corporation seeking to rely on the res judicata effects of the American judgment, must do so in accordance with Italy's statutory provisions.[64] In particular, article 67(1) of Law No. 218 provides that any interested person wishing to enforce a foreign judgment must petition the appropriate Italian court of appeal for an order that finds that the foreign judgment in question satisfies the conditions for its recognition.[65] The court of appeal's *procuratore generale* reviews the petition and writes a nonbinding opinion as to whether recognition of the judgment would violate Italian public policy. The file then goes to the judge on the court of appeal assigned to report the case to the panel, which will decide by decree whether to grant the petition. The clerk will then enter the panel's decree and notify the petitioner's attorney. If the petition is granted, the petitioner's attorney

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60. *See, e.g.*, Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L 299) 32, as modified by the Luxembourg Convention of 1978, 1978 O.J. (L 304) 78; Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9.

61. Paolo Fois, *Condizioni per la delibazione e convenzioni internazionali*, Foro It. 1971, I, 2986, 2988.

62. C.P.C. arts. 796-805.

63. Law No. 218 of May 31, 1995, Gazz. Uff., 3 giugno 1995, n.128, suppl. ord. n.68, Lex LXXXI, part I, 1808 (1995) [hereinafter Law No. 218]. Article 73 of Law No. 218 expressly repealed articles 796-805 of the Code of Civil Procedure, which governed recognition and enforcement until January 1, 1996.

64. *Id.* art. 67(1).

65. *See id.* At the time of filing, it is the practice to attach to the petition a copy of the foreign judgment, the evidence that the judgment has become final and, if a default judgment, a copy of the summons and complaint with proof of proper service. In addition, all documents must be accompanied by a sworn translation into Italian. The petition must include the *mandato* by which the petitioner retains the attorney to litigate on his behalf.

serves a copy of the decree upon the debtor, who, in turn, has thirty days to file a complaint contesting the decree. If the decree is not contested, it becomes final and the petitioner may begin enforcement proceedings.

Article 64 of the statute provides that the foreign judgment "shall be recognized" when:

> (a) the court that issued [the judgment] had jurisdiction over the action in accordance with the rules on jurisdiction of the Italian legal system;
> (b) the process that commenced the action was served upon the defendant in compliance with the provisions of the law of the place where the proceeding took place and there was no infringement of the essential rights of defense;
> (c) the parties made an appearance in accordance with the law of the place where the proceeding took place or there was a finding of default pursuant to that law;
> (d) [the judgment] became final in accordance with the law of the place where it was issued;
> (e) [the judgment] does not conflict with a judgment issued by an Italian court which has become final;
> (f) there is no pending proceeding in an Italian court for the same relief and between the same parties, which commenced prior to the foreign proceeding;
> (g) [the judgment's] provisions do not create effects contrary to public policy.[66]

Despite the finality of the foreign judgment, the Italian court of appeal reviews the record to determine whether specific foreign rules of procedure, to which letters (b) and (c) of article 64 refer, were violated; furthermore, should the court find a violation, it must deny recognition of the judgment notwithstanding its finality.[67]

Letters (a), (b), (c), (d) and (g) of article 64 substantially reproduce equivalent provisions of the repealed rules,[68] except that letter (b) of article 64 adds the broader requirement that there be no infringement of the essential rights of defense[69] (an issue which this Article will examine in Part III). In addition, although the old rules required that the foreign judgment did not conflict with an Italian judgment,[70] letter (e) now specifies that there shall be no conflict with a *final* Italian judgment.[71]

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66. *Id.* (translation by author).

67. GIUSEPPE CAMPEIS & ARRIGO DE PAULI, IL PROCESSO CIVILE ITALIANO E LO STRANIERO 313-15 (2d ed. 1996).

68. C.P.C. art. 797. For commentary on the repealed rules, see GIUSEPPE CAMPEIS & ARRIGO DE PAULI, LA PROCEDURA CIVILE INTERNAZIONALE 454-70 (2d ed. 1996).

69. *See infra* Part III.

70. C.P.C. art. 797(5).

71. Law No. 218, *supra* note 63, art. 61(1)(e) (emphasis added).

Letter (f) now requires that no Italian proceeding be pending for the same claim between the same parties that was commenced prior to the commencement of the foreign proceeding,[72] whereas the old rules merely required that there be no pending Italian proceeding that was commenced before the foreign proceeding *became final*.[73]

III. ITALIAN DUE PROCESS: THE ESSENTIAL RIGHTS OF DEFENSE AND THE ADVERSARY PROCESS PRINCIPLE

The repealed statute that governed recognition of foreign judgments required the summons, served in accordance with the procedures of the forum, to specify a reasonable time for the defendant to appear.[74] Law No. 218, however, now in addition specifically directs the court to find that "there was no infringement of the essential rights of defense."[75]

Compliance with the essential rights of defense and the adversary process principle traditionally has been an added requirement for the recognition and enforcement of foreign judgments, even though the repealed statute did not expressly include this condition.[76] The Italian Constitutional Court had ruled that, in actions for recognition of a foreign judgment, the Italian court must determine whether the foreign proceeding honored the essential elements of the right to prosecute and oppose an action for the protection of one's interests, one of the "supreme principles of the constitutional system."[77] That principle together with the guarantee of adversary process (*principio del contraddittorio*) are principles of a procedural nature that express inalienable values of the Italian legal system.[78] In fact, Italian courts have held that the guarantee of these "rights of defense" constitutes an expression of Italian *procedural* policy (*ordine pubblico procedurale*).[79]

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72. *Id.* art. 64(1)(f).

73. C.P.C. art. 797(6) (emphasis added).

74. *Id.* art. 797(2).

75. Law No. 218, *supra* note 63, art. 64(1)(b). This condition appears to be universal. The corresponding New York statute mandates denial of recognition of a judgment where the foreign procedure was not compatible with the requirements of due process of law. *See* N.Y.C.P.L.R. § 5304 (McKinney 1997).

76. Maurizio Maresca, *Efficacia di sentenze ed atti stranieri*, *in* 19 LE NUOVE LEGGI CIVILI COMMENTATE [NUOVE LEGGI CIV.] 1460, 1473 (1996).

77. Corte cost., sez. un., 2 feb. 1982, n.18, Racc. uff. corte cost. 1982, LIX, 165, 209-10, Giur. It. 1982, I, 1, 965, 984.

78. Maresca, *supra* note 76, at 1473.

79. *See, e.g.*, S.p.A. Emilianauto v. Bicketts Solicitors, Cass. civ., sez. I, 18 maggio 1995, n.5451 (unpublished) (holding public policy refers not only to the content of the foreign judgment but also to its procedure, which must comply with those inalienable principles that safeguard the rights of defense) (citing Corte cost., 29 luglio 1982, n.160, Racc. uff. corte cost. 1982, LX, 613,

The rules that ensure the appropriate and egalitarian exercise of the right to prosecute and oppose an action and other fundamental procedural guarantees are a part of Italian "constitutional procedural law."[80] The Italian Constitution enunciates certain ethical principles that must characterize judicial proceedings in order to ensure the fundamental right to a fair hearing.[81] When all of the procedural constitutional guarantees are present in a judicial proceeding, that proceeding meets the minimum requirements for a fair hearing.[82]

One of the procedural guarantees is the right to be heard. The right to prosecute and defend an action for the protection of one's interests arises mainly from article 24 of the Italian Constitution.[83] The Constitution specifies that the right to be heard in all stages of a proceeding, whether at the trial level or on appeal, shall not be infringed.[84] However, the Constitution does not require that the exercise of this right must be governed in an identical manner for all procedures and in all procedural stages.[85] Rather, it mandates only that there be no limitations or conditions that make the exercise of the right impossible or unreasonably difficult.[86] Therefore, it is the legislature's responsibility to indicate the modalities for exercising the right to be heard in light of the different forms of civil adjudication, the substantive rights at issue, and the peculiar purposes of the various stages of the procedure in question.[87] The only qualification on the legislature's authority in this respect is the requirement that the right be effectively guaranteed to all persons in compliance with the principle of equality.[88]

The *principio del contraddittorio*, or adversary process principle, characterizes Italian civil procedure and is one of the fundamental

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Giur. It. 1983, I, 1, 537; Corte cost., 10 ott. 1979, n.125, Racc. uff. corte cost. 1979, LIII, 337, Foro It. 1979, I, 2513); Maresca, *supra* note 76, at 1468.

80. Luigi Paolo Comoglio, *Valori etici e ideologie del "giusto processo" (modelli a confronto)*, 52 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 887, 896-97 (1998).

81. *Id.* at 898-99.

82. *Id.* at 904-05.

83. Corte cost., 2 feb. 1982, n.18, Racc. uff. corte cost. 1982, LIX, 165, 209, Giur. It. 1982, I, 1, 965, 984.

84. COST. art. 24(2).

85. Corte cost., 29 luglio 1982, n.160, Racc. uff. corte cost. 1982, LX, 613, 618, Giur. It. 1983, I, 1, 537, 539.

86. Mauro Cappelletti & Vincenzo Vigoriti, *I diritti costituzionali delle parti nel processo civile italiano*, 26 RIVISTA DI DIRITTO PROCESSUALE [RIV. DIR. PROC.] 604, 622 (1971).

87. Corte cost., 10 ott. 1979, n.125, Racc. uff. corte cost. 1979, LIII, 337, 343, Foro It. 1979, I, 2513, 2514; Cappelletti & Vigoriti, *supra* note 86, at 622.

88. Corte cost., 10 ott. 1979, n.125, Racc. uff. corte cost. 1979, LIII, 337, 343, Foro It. 1979, I, 2513, 2514.

guarantees that for centuries has been a cornerstone of civil procedure.[89] The adversary process principle represents a set of rules governing the interplay and dialectic between litigants throughout the entire action and ensures that the parties have equal opportunities to persuade the court to hand down a favorable decision.[90] Moreover, the adversary process is also an essential aspect of procedure that enables the true purpose of the action to be achieved—the determination of legal rights in a process in which the parties have equal opportunities to be heard.[91]

The adversary process principle requires that every essential stage of the proceeding be structured in a manner that allows the parties a real opportunity to advocate their respective positions.[92] The irreducible essence of this adversary process consists of allowing the parties active participation in the proceeding with the power to affect the outcome of the action, whose consequences they will incur.[93] Meaningful participation, in turn, requires that the parties be adequately informed of the developments of the proceeding and be given reasonable opportunity to use the system's procedural devices to advance their respective positions.[94] With respect to defendants in particular, the adversary process guarantees adequate opportunities to challenge the factual and legal bases of the claims advanced against them; that is, it provides an irreducible minimum of possibilities of defense through affirmative defenses, the presentation of contrary proofs and, in general, through the opportunity to be heard by the court prior to its final adjudication.[95]

To the extent that adversary process ensures the confrontation between litigants, especially in the presentation of evidence and determination of disputed facts, it is an essential instrument in the search for truth and the rendition of justice. Accordingly, adversary process is the "means" to the "end" of the right to defense that article 24 of the Italian Constitution guarantees to all litigants in equal measure.[96]

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89. Cappelletti & Vigoriti, *supra* note 86, at 605. In the French Code of Civil Procedure, articles 14-16 emphatically enunciate the *principe de la contradiction*. NOUVEAU CODE DE PROCÉDURE CIVILE [N.C.P.C.] arts. 14-16 (Fr.). In particular a court may not base its decision on facts and proofs presented to it unless the parties had the opportunity to address them *contradictoirement*. *Id.* art. 16 cmt. 2.

90. Luigi Paolo Comoglio, *Contraddittorio (Principio Del)*, *in* VIII ENCICLOPEDIA GIURIDICA TRECCANI 1, 2 (1997).

91. *Id.* at 4.

92. Cappelletti & Vigoriti, *supra* note 86, at 634.

93. CAMPEIS & DE PAULI, *supra* note 67, at 313.

94. *Id.*

95. Comoglio, *supra* note 90, at 6.

96. *Id.* at 4.

Article 101 of the Code of Civil Procedure formally requires adversary process at the commencement of an action: unless otherwise provided by law,[97] no court shall grant relief if the party against whom the relief is sought was not duly summoned and did not appear.[98] The constitutionally guaranteed right to defense, introduced several years after enactment of the Code of Civil Procedure,[99] enlarged the concept of adversary process from a guarantee of equal opportunities at inception to a series of guarantees of confrontation throughout the duration of the proceeding.[100] Just as American courts have refined the meaning of the due process clause of the Fifth and Fourteenth Amendments of the Constitution of the United States,[101] the Italian Constitutional Court, in numerous decisions, has given substance to the basic and broad procedural principles expressed in the Italian Constitution.[102]

The Constitutional Court, which began to function in 1956, devoted much of its activity to the development of the fundamental guarantees of parties in civil and criminal litigation.[103] The Court developed the concept of the right to defense to a degree which increasingly resembled American procedural due process of law.[104] Early on, the Court ruled that the right to prosecute and defend an action is prejudiced where the adversary process is not guaranteed and procedural obstacles prevent the parties from advocating their claims.[105] The Court later emphasized that it is not sufficient to find that the adversary process existed at the moment the action was initiated and thereby assume that the defendant is

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97. *See, e.g.*, C.P.C. arts. 633-656 (It.). These articles govern the *procedimento di ingiunzione*, an ex parte "summary proceeding" brought typically by a creditor to recover a sum of money based upon documentary evidence and in which the court gives judgment on the papers submitted. Should the debtor oppose the judgment, the action is transformed into an ordinary, adversarial, proceeding. *Id.* art. 645.

98. *Id.* art. 101.

99. The Italian Constitution entered into force January 1, 1948. Regio Decreto, 28 ott. 1940, n.1443, Gazz. Uff., 28 ott. 1940, n.253, Supp. 1. The Code of Civil Procedure entered into force in 1942.

100. Comoglio, *supra* note 90, at 2.

101. *See, e.g.*, Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532 (1985).

102. *See, e.g.*, Corte cost., 22 dic. 1961, n.70, Racc. uff. corte cost. 1961, XII, 319, 324, Giur. It. 1962, I, 1, 515, 517; Corte cost., 18 mar. 1957, n.46, Racc. uff. corte cost. 1957, II, 501, 504, Giur. It. 1957, I, 1, 497, 498.

103. Cappelletti & Vigoriti, *supra* note 86, at 608 & n.2. The Court's rulings with respect to criminal proceedings have been stated in such terms that they may well be applicable to civil procedure. *Id.* at 635.

104. Mauro Cappelletti, *Diritto di azione e di difesa e funzione concretizzatrice della giurisprudenza costituzionale (Art. 24 Costituzione e "due process of law clause")*, 6 GIURISPRUDENZA COSTITUZIONALE 1284, 1286 (1961).

105. See sources cited *supra* note 102.

fully in a position to exercise its right to defense.[106] The Court reasoned that the fundamental responsibility of a judicial system is to ensure the performance of a fair proceeding, which includes meaningful participation by the persons who have an interest in the substantive right that is the subject of the litigation.[107] Applying article 24 of the Constitution to the various types of proceedings and their different stages, the Court created a series of specific procedural guarantees, that share the common purpose of ensuring adversary process.[108]

One example of such rulings concerned a clause of the bankruptcy law which provided that the bankruptcy court could, in its discretion, order the appearance of the debtor and hear the allegations the debtor might assert to challenge the claims of the creditors who filed the petition to declare the debtor bankrupt.[109] The Constitutional Court held that leaving the introduction of adversary process in the bankruptcy proceeding to a court's discretion was unconstitutional.[110] The Court reasoned that in this type of proceeding the constitutionally protected right to defense required that a debtor always have the opportunity to challenge the assertions of a debtor's insolvency through factual allegations, memoranda of law, and the assistance of counsel.[111]

Corollaries of the adversary process principle include party initiative for the commencement and prosecution of an action, party responsibility for the submission of evidence, and the court's duty to base its decision on evidence submitted by the parties.[112] It is well settled that an essential component of the right to prosecute and defend an action is the *diritto alla prova*, or right to present evidence.[113] Its purpose is to ensure that each party has the opportunity to submit all the kinds of evidence available to prove the truth of the alleged facts and convince the

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106. *See* Comoglio, *supra* note 90, at 13 (citing Corte cost., 4 mag. 1984, n.137, Racc. uff. corte cost. 1984, LXVI, 91, 97, Foro It. 1984, I, 1775, 1780).

107. *Id.*

108. Cappelletti & Vigoriti, *supra* note 86, at 622-23.

109. *See* Corte cost., 16 luglio 1970, n.141, Racc. uff. corte cost. 1970, XXXII, 393, 402, Foro It. 1970, I, 2038, 2042.

110. *Id.*

111. *Id.* Where the debtor does not initiate the proceeding, it is in the interest of the debtor to oppose the declaration of bankruptcy to avoid the serious consequences associated with bankruptcy.

112. SATTA, *supra* note 48, at 144.

113. CAMPEIS & DE PAULI, *supra* note 67, at 313; Luigi Paolo Comoglio, *Preclusioni istruttorie e diritto alla prova*, 53 RIV. DIR. PROC. 968, 979 (1998). It is the responsibility of the parties to indicate and prove the facts on which the judge must decide the case. SATTA, *supra* note 48, at 144. The general rule is that the judge must base the decision on evidence submitted by the parties. C.P.C. art. 115.

court accordingly.[114] Obviously this includes the right to offer *la prova contraria*, that is, evidence that disputes what the adversary alleges and intends to prove.[115] A 1995 modification of the Code of Civil Procedure has reinforced the essential importance of the right to present evidence: should the court *sua sponte* direct the admission of evidence, each party may present proofs that it believes necessary and that relate to the evidence ordered by the court.[116] The Code thereby ensures that the adversary process will be honored where a court exercises its inquisitorial powers in the presentation of proof phase.[117]

In a number of decisions, the Constitutional Court has recognized that parties have a constitutionally protected right to present evidence and has further defined what the right entails. This right includes the entitlement to submit kinds of proofs that are ordinarily available to a party and the protection against the enactment of statutes that place unreasonable limitations on the proof of relevant facts. In this regard, the Constitutional Court held that a statute directing courts to base their decisions on facts submitted by a state agency to the preclusion of any other evidence parties ordinarily might have offered infringed upon the right to defense.[118] In subsequent decisions, the Court continued to emphasize the primacy of the right to defense, as expressed in the parties' right to present evidence.[119] In one decision the Court ruled that the right to defense is infringed where a party's ability to show the court the existence of facts favorable to its position or its right to submit evidence of these facts is denied or qualified.[120] In another decision, the court ruled that "the right to defense . . . must be understood to include . . . the right to an adjudicative judicial proceeding which permits the freedom to submit any exculpatory evidence and which ensures complete adversarial process."[121]

Because the right to present evidence is constitutionally protected, statutes that limit this right must be strictly construed to ensure that the limitation is fair and reasonable.[122] Rules that make the exercise of the

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114. Comoglio, *supra* note 113, at 979.

115. *Id.*

116. C.P.C. art. 184, ¶ 3.

117. *See* Comoglio, *supra* note 90, at 19.

118. Corte cost., 22 dic. 1961, n.70, Racc. uff. corte cost. 1961, XII, 319, 323, Giur. It. 1962, I, 1, 515, 516-18.

119. *See* Cappelletti & Vigoriti, *supra* note 86, at 637-39.

120. Corte cost., 3 giugno 1966, n.53, Racc. uff. corte cost. 1966, XXIII, 469, 475, Giur. It. 1966, I, 1, 1572, 1574.

121. Corte cost., 14 luglio 1971, n.175, Racc. uff. corte cost. 1971, XXXIV, 525, 552, Foro It. 1971, I, 2453, 2462.

122. Comoglio, *supra* note 113, at 982-83.

right to prosecute and defend an action unreasonably difficult, if not outright impossible, are incompatible with the constitutionally protected right to defense.[123]

Several of the Constitutional Court's decisions concerned the preclusive effect that judgments rendered in a criminal proceeding have on civil actions for damages.[124] Traditionally, persons who suffered injury from a crime are entitled to bring a private action for restitution and damages within the respective criminal proceeding, rather than commencing a civil suit after criminal adjudication.[125] Under the recently repealed Code of Criminal Procedure, when a person brought a civil suit for restitution and damages after the criminal adjudication became final, the findings of the criminal proceeding were res judicata for purposes of the proceeding in the civil court.[126] The issue brought before the Constitutional Court on several occasions was whether a person who was not a party in the criminal proceeding was bound by its factual findings for the purposes of the civil suit.[127]

In an early decision, the Court held that, even though the Code of Criminal Procedure provided that persons who were not a party to the criminal proceeding were barred in a later civil suit from challenging the facts on which the criminal adjudication rested, this did not infringe the constitutionally protected right to defense.[128] The Court reasoned that the right to defense, like other constitutional guarantees, is not an absolute right, but is subject to legislative adaptations and limitations when justified by other rules or fundamental principles of the constitutional system.[129] One such fundamental principle, the Court explained, was article 28 of the Code of Criminal Procedure, which emphasized that the dominant requirement of justice is served by the certainty and stability of

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123. *Id.* at 977-78. Whether the exercise of a right becomes "unreasonably difficult" (*eccessivamente difficile*) is borrowed from the Civil Code's standard to test the validity of agreements that shift a party's burden of proof. CODICE CIVILE [C.C.] art. 2698 (It.); *see* THE ITALIAN CIVIL CODE AND COMPLEMENTARY LEGISLATION § 2698 (Mario Beltramo et al. trans., Mario Beltramo ed., 1996) [hereinafter ITALIAN CIVIL CODE].

124. LOZZI, *supra* note 30, at 113-14.

125. This provision currently is found in C.P.P. article 74.

126. LOZZI, *supra* note 30, at 113-14.

127. Cappelletti & Vigoriti, *supra* note 86, at 638.

128. Corte cost., 19 feb. 1965, n.5, Racc. uff. corte cost. 1965, XXI, 39, Foro It. 1965, I, 400. The decision was criticized by writers who noted how the Court failed to adhere to principles of due process that were well settled in the United States. *See, e.g.*, Vincenzo Vigoriti, *Garanzie costituzionali della difesa nel processo civile*, 20 RIV. DIR. PROC. 516, 521-22 (1965); Luigi Paolo Comoglio, *L'art. 28 cod. proc. pen. e i profili costituzionali dei limiti soggettivi del giudicato*, 21 RIV. DIR. PROC. 653, 665-67 (1966).

129. Corte cost., 19 feb. 1965, n.5, Racc. uff. corte cost. 1965, XXI, 39, 46 Foro It. 1965, I, 400, 401.

legal relationships.[130] The Court added that even its own prior decisions had found that the right to defense may vary in its practical implementation, as the legislature might diversify the manner in which the right to defense operates in accordance with the peculiar characteristics of different forms of civil adjudications.[131]

In subsequent decisions, however, the Court overruled itself and emphasized that the right to defense was not to be compromised.[132] The Court held that the preclusive effect of a criminal proceeding's factual findings, which barred nonparties to the proceeding from submitting evidence in the civil suit to challenge those findings, infringed their right to defense if they had not been given the opportunity to participate in the criminal proceeding.[133] Similarly, the Court found it unconstitutional to give preclusive effect to findings made in a criminal proceeding that are prejudicial to the person liable for damages, the *responsabile civile*, where that person had not been given the opportunity to participate in the criminal proceeding.[134]

In another decision, the Court reviewed a rule that prohibited the commencement or prosecution of a civil suit for damages after an acquittal in a criminal proceeding.[135] The rule was unconstitutional to the extent that it applied to persons who may not have participated in the criminal proceeding, either because they were not entitled to bring an action for damages in the criminal proceeding or were, for other reasons, not afforded the opportunity to participate.[136] The Court explained that neither the requirements of judicial economy nor the need to avoid conflicting adjudications justified such an infringement of the right to defense.[137] These decisions clarified the need to comply with the

130. *Id.*

131. *Id.* The Court, in fact, departed from an earlier decision in which the Court acknowledged that the right to defense might vary in its modalities, *provided the modalities do not compromise the right to defense*. Corte cost., 18 mar. 1957, n.46, Racc. uff. corte cost. 1957, II, 501, 504, Giur. It. 1957, I, 1, 497, 498.

132. *See, e.g.*, Corte cost., 22 mar. 1971, n.55, Racc. uff. corte cost. 1971, XXXIII, 337, 342, Foro It. 1971, I, 824, 825.

133. *Id.*

134. Corte cost., 27 giugno 1973, n.99, Racc. uff. corte cost. 1973, XXXVIII, 269, 273, Foro It. 1973, I, 2009, 2010.

135. Corte cost. 26 giugno 1975, n.165, Racc. uff. corte cost. 1975, XLIV, 469, 471, Foro It. 1976, I, 36, 38-39.

136. *Id.*

137. *Id.*

constitutionally guaranteed right to defense by providing nonparties with adequate means of protection against the binding effects of judgments.[138]

In accordance with Law No. 218 and the holdings of the Constitutional Court, when an Italian court reviews a U.S. judgment for compatibility with the Italian legal system, it must decide, inter alia, whether the parties were afforded an effective right to defense.[139] This determination is left to the broad discretion of the court.[140]

In making this determination, the court takes into account whether the rights of defense were substantially available in the legal system that produced the judgment.[141] However, the court will not scrutinize individual provisions of that system, seeking merely formal similarities with the Italian system.[142] This approach is exemplified in a recent decision by the Corte di Cassazione. The Court clarified that while article 111, first paragraph, of the Italian Constitution requires that judgments are supported by a reasoned opinion, this requirement is an expression of the peculiarities of the Italian system of division of constitutional powers and is not included among the public policy requirements that must be met to permit recognition and enforcement of foreign judgments.[143]

It has been suggested that for the infringement of the rights of defense to be significant, it must be sufficient to affect the outcome of the proceeding.[144] Because there is no formal standard that governs whether an infringed right of defense is essential, the determination is left to the broad discretion of the Italian court.[145] Accordingly, an Italian court found:

> [A foreign procedural law] is not incompatible with Italian public policy when it fully honors the essence of the adversary process principle. [I]n this respect it bears repeating that [Italian] public policy, with which foreign judgments must comply for the purpose of a decree of enforceability in Italy, consists not so much in the individual rules of the [Italian] legal

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138. Andrea Proto Pisani, *Appunti sui rapporti tra i limiti soggettivi di efficacia della sentenza civile e la garanzia costituzionale del diritto di difesa*, 25 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 1216, 1240-41 (1971).

139. CAMPEIS & DE PAULI, *supra* note 67, at 313.

140. Antonio Saggio, *Efficacia di sentenze ed atti stranieri (art. 64-71)*, IL CORRIERE GIURIDICO 1259, 1260 (1995).

141. CAMPEIS & DE PAULI, *supra* note 68, at 463 (citing Cass., 23 gen. 1980, n.543, Giur. It. 1981, I, 590).

142. *See id.*

143. S.p.A. Emilianauto v. Bicketts Solicitors, Cass. civ., sez. I, 18 maggio 1995, n.5451 (unpublished).

144. Saggio, *supra* note 140, at 1260.

145. *Id.*

> system, but in the concepts that inspire the legal system and, more precisely, consists in the fundamental principles recognized by the legislature to be necessary conditions for the very existence of society. And in this light it is clear that compliance with the adversary process principle is not to be determined by a passive comparison of the foreign rules with those of the Italian procedural system, but rather by the requirement that the foreign proceeding substantially guaranteed the parties an adequate opportunity to be heard.[146]

It is understood, moreover, that the clause of Law No. 218 that requires compliance with the essential rights of defense also confirms an Italian court's power to determine whether the foreign proceeding honored the essential rights of defense of all the parties[147] and throughout the duration of the proceeding.[148]

Therefore, the question is whether, in the opinion of an Italian court requested to recognize a U.S. judgment obtained in a Rule 23(b)(3) class action, such a proceeding deprives a litigant of the essential rights of defense and is repugnant to the adversarial process principle.[149]

IV. WHETHER THE CLASS ACTION PROCEEDING INFRINGES THE ESSENTIAL RIGHTS OF DEFENSE AND IS REPUGNANT TO THE ADVERSARY PROCESS PRINCIPLE

A. The Defendant Is Unable to Make a Full Defense Against the Individual Claims of Unknown or Unidentified Plaintiffs in the Class

In appropriate circumstances an American court may certify discrete issues such as liability, causation, or damages for class

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146. Cass. civ., sez. I, 23 gen. 1980, n.543, Giur. It. 1981, I, 1, 590, 596 (translation by author) (citations omitted). In a recent decision that granted recognition of an Iowa judgment, the Italian court of appeal held that the Iowa procedural rules governing requests for admissions are not repugnant to the principle of adversary process because, under those rules, the requested party is given a reasonable period of time to submit its defense by providing written denials. Mercy Hosp. Med. Ctr. e Iowa Heart Ctr. P.C. v. Deutsche Bank Leasing s.p.a., Corte app. Milano, 24 mag. 1996, *reprinted in* RIV. DIR. INT. PRIV. PROC. 443, 452 (1997).

147. Maresca, *supra* note 76, at 1473-74.

148. Aldo Attardi, *La nuova disciplina in tema di giurisdizione italiana e di riconoscimento delle sentenze straniere*, RIV. DIR. CIV., I, 727, 762-63 (1995).

149. Even a member of the plaintiff class, despite a favorable outcome, might argue that his or her interests were not fairly and adequately protected. This contingency will not be addressed in discussing the recognition and enforcement of class action judgments in Italy. Also not addressed is the related question of whether an Italian court would recognize and enforce a judgment obtained by a claimant who had opted out of the class to initiate an independent lawsuit against the defendant.

treatment.[150] Whether an issue in the lawsuit is proved on a common basis depends upon the court's evaluation of the circumstances of each case.[151] When an American court certifies an issue for class-wide determination, such as proximate causation, even when no pertinent factual differences exist among plaintiffs relating to that issue, this use of the class action might impair the defendant's ability to ascertain necessary information and might deprive the defendant of the opportunity to develop essential elements of defense with which to confront the claimants.[152] Because the procedure treats discrete claims as fungible claims, it dispenses with proof that a particular defendant's behavior actually caused a particular plaintiff's harm.[153] Accordingly, the outcome of a class action might hold an Italian defendant liable for damages to unknown or unidentified plaintiffs despite the defendant's inability to challenge their individual claims.

To oppose recognition and enforcement of the American judgment in Italy, the defendant might plead that the class-wide determination of the elements of the cause of action infringed upon the essential rights of defense and violated the adversarial process principle. The defendant might argue that although it had the opportunity to challenge the claims of the named "representative" plaintiffs upon issues of fact relevant to those named plaintiffs, it did not have the opportunity to offer evidence or cross-examine witnesses with respect to the particular situations of unknown and unidentified class members. The defendant might

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150. *See* FED. R. CIV. P. 23(c)(4); Bogosian v. Gulf Oil Corp., 561 F.2d 434, 454-55 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). In tort cases, for example, duty, breach, causation, the plaintiff's conduct and damages are potentially contestable issues that in turn may break down into sub-issues. *See* James A. Henderson, Jr., Fred Bertram & Michael J. Tōke, *Optimal Issue Separation in Modern Products Liability Litigation*, 73 TEX. L. REV. 1653, 1655 & n.11 (1995).

151. *Bogosian*, 561 F.2d at 454.

152. Such a procedure may be prejudicial to the defendant's substantive rights. Roger H. Transgrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 825-26 (1985). The use of rules of procedure in a manner which affects the defendant's substantive rights would be a violation of the United States Constitution's Seventh Amendment and the Rules Enabling Act. *Id.* (citing 28 U.S.C. § 2072 (1982)). "[T]he Seventh Amendment guarantees defendants a constitutional right to a jury trial with respect to each damage claim asserted." Handler, *supra* note 1, at 7 (citing U.S. CONST. amend. VII). Section 2072 was repealed and replaced in 1988 and amended in 1990, but the relevant subdivision (b) currently provides that the "rules [of practice and procedure and evidence] shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b) (1994); *see In re* Fibreboard Corp., 893 F.2d 706, 711-12 (5th Cir. 1990) (holding that the procedure that substitutes the claim of a unit of 2990 persons for the individual claims of 2990 persons, so that experts can provide proof of causation and damages for the group, changes the substantive duty owed by defendant in violation of enabling acts). The requirements of Rule 23 must be interpreted in keeping with the Rules Enabling Act. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613 (1997).

153. *See Fibreboard*, 893 F.2d at 712.

conclude that the inability to question the absent class members on issues such as contributory negligence or assumption of risk was a denial of its right to confront the absent members that determined the unfavorable outcome on the issues of liability and causation.

An Italian court might be inclined to view the verdict as the result of an inevitably unfair procedure characterized by the absence of meaningful participation on the part of the defendant. Additionally, the court might question whether the procedure afforded the defendant opportunities that were equal to those available to the plaintiffs to persuade the court to hand down a favorable decision. The question becomes whether, despite the perceived unfairness of the class action proceeding, the procedural rules that safeguard the due process rights of class action defendants will satisfy the Italian court that the defendant's essential rights of defense were substantially available.

1. Discovery Limitations

In a class-wide inquiry, a defendant is able to challenge the claims of the named plaintiffs upon issues of fact that relate to those named plaintiffs.[154] In contrast, the defendant does not have the opportunity to gather information, offer evidence, or cross-examine witnesses relating to the particular situations of the mass of unknown and unidentified class members.[155] Absent members may have relevant information as to the defendant's liability to the class; fairness considerations would suggest that these individuals should be subject to discovery as parties.[156] On the other hand, deploying the whole discovery apparatus against every class member would be impractical.[157] These juxtaposed considerations raise the question whether discovery against absent members should be as available a right as it would be against a party to a nonclass suit.[158]

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154. Francis R. Kirkham, *Problems of Complex Civil Litigation*, 83 F.R.D. 497, 525 & n.84 (1980).

155. *See id.*

156. *See* JAMES & HAZARD, *supra* note 37, § 10.23; McNeil & Fancsali, *supra* note 59, at 505; Hearn, *supra* note 39, at 359.

157. JAMES & HAZARD, *supra* note 37, § 10.23.

158. *See id.*; Hearn, *supra* note 39, at 354; Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1001 (7th Cir. 1971), *cert. denied sub nom.* Herriman v. Midwestern United Life Ins. Co., 405 U.S. 921 (1972). In addition to the discovery limitations, a defendant in a class action may be prevented from asserting counterclaims against class members. The district court in *Donson Stores, Inc. v. American Bakeries Co.* held that absent class members are not parties under Rule 23 for purposes of having counterclaims asserted against them. 58 F.R.D. 485, 489 (S.D.N.Y. 1973).

Discovery of unnamed class members is neither prohibited nor sanctioned explicitly.[159] Courts have generally agreed that the discovery procedures, which may be directed only to parties—interrogatories, requests for production and examination, and requests for admission, may not be used to obtain information from putative class members prior to certification of a class.[160] As to discovery after certification, the courts have been divided.[161] Some courts have restricted the number of class members to whom the requests may be directed and the extent of the information that may be sought.[162] Moreover, a court may postpone discovery from class members on their particular issues, such as individual damages, until a decision on the common questions of law and fact has been made.[163]

Some district courts have disallowed discovery of absent class members on the grounds that such persons could not be considered as parties under Rule 33 or 34.[164] The courts have expressed concern that the unwieldiness of deploying the "whole apparatus of discovery" against every class member would reduce or destroy the effectiveness of the class action device.[165] They reasoned that if absent class members were treated as parties subject to normal discovery procedures the purpose of Rule 23 would be defeated,[166] since all class actions would be converted into mass joinders which undermine the Rule.[167]

A group of cases seeks to strike a balance between fairness to the defendant and preservation of the advantages of the class action device.[168] These cases hold that courts have discretion to allow a defendant to obtain reasonably necessary discovery of class members who are not a

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159. Krueger v. N.Y. Tel. Co., 163 F.R.D. 446, 450 (S.D.N.Y. 1995) (citing FED. R. CIV. P. 30, 33-34).

160. *See* MANUAL FOR COMPLEX LITIGATION (SECOND) § 30.12 (1985).

161. Freeman, *supra* note 43, at 277-78.

162. MANUAL FOR COMPLEX LITIGATION (SECOND) § 30.232 (1985); *see* Transamerican Ref. Corp. v. Dravo Corp., 139 F.R.D. 619, 622 (S.D. Tex. 1991).

163. Comment, *Party Discovery Techniques: A Threat to Underlying Federal Policies*, 68 NW. U. L. REV. 1063, 1083-84 (1974).

164. Freeman, *supra* note 43, at 277; *see also* Wainwright v. Kraftco Corp., 54 F.R.D. 532, 534 (N.D. Ga. 1972) (finding Rules 33 and 34 permit discovery against "parties" and class members are not parties).

165. *See* JAMES & HAZARD, *supra* note 37, § 10.23; Fischer v. Wolfinbarger, 55 F.R.D. 129, 132 (W.D. Ky. 1971) (holding that if class members were treated as party plaintiffs and subject to normal discovery, the purpose of the class action would be defeated).

166. *Fischer*, 55 F.R.D. at 132.

167. *See Wainwright*, 54 F.R.D. at 534.

168. *See, e.g.*, Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1004 & n.2 (7th Cir. 1971) (citing FED. R. CIV. P. 37), *cert. denied sub nom.* Herriman v. Midwestern United Life Ins. Co., 405 U.S. 921 (1972).

party plaintiff as long as certain requirements are met.[169] A recent expression of this approach requires the defendant to show:

> [(1)] its need for the discovery for purposes of trial of the issues common to the class, [(2)] that the discovery not be undertaken with the purpose or effect of harassment of absent class members or of altering the membership of the opposing class, and [(3)] that the interrogatories be restricted to information directly relevant to the issues to be tried by the Court with respect to the class action aspects of the case.[170]

The court may also require the defendant to show that the requested information is not available from the representative parties.[171] Most important, the court must be satisfied that justice to all parties requires that absent class members furnish certain information.[172]

To compel compliance with discovery orders directed to class members, Federal Rule of Civil Procedure 37 sanctions are available against absent class members and might also result in dismissal of their claims.[173] A class action proceeding in which the court directed discovery of the absent members of the plaintiff class as if they were parties, might persuade the Italian court that the defendant had adequate opportunities to challenge the claims advanced against it. Even if the court does not permit the defendant to use the party discovery methods under Rules 33, 34, and 36 against absent class members, the defendant would be entitled to proceed with discovery of the class under the nonparty deposition techniques of Rules 30 and 31.[174] With this tool still available to the defendant for its pretrial preparation, the Italian court might find that the defendant's right to challenge the assertions of the plaintiffs was substantially available.

2. Aggregate Proof of Liability

When common factual issues are identical as to all plaintiffs, the class action permits the plaintiffs' various claims to be tried jointly.[175] In

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169. Hearn, *supra* note 39, at 351-52 (citing *Brennan*, 450 F.2d at 999).

170. Krueger v. N.Y. Tel. Co., 163 F.R.D. 446, 450 (S.D.N.Y. 1995) (quoting United States v. Trucking Employers, Inc., 72 F.R.D. 101, 104 (D.D.C. 1976); *see* Marcera v. Chinlund, 595 F.2d 1231, 1240 (2d Cir. 1979), *vacated on other grounds*, 442 U.S. 915 (1979); Enter. Wall Paper Mfg. Co. v. Bodman, 85 F.R.D. 325, 327 (S.D.N.Y. 1980); Baldwin & Flynn v. Nat'l Safety Assocs., 149 F.R.D. 598, 600 (N.D. Cal. 1993)).

171. *In re* Folding Carton Antitrust Litig., 83 F.R.D. 260, 264 (N.D. Ill. 1979).

172. Transamerican Ref. Corp. v. Dravo Corp., 139 F.R.D. 619, 621 (S.D. Tex. 1991).

173. *Brennan*, 450 F.2d at 1004 & n.2 (citing FED. R. CIV. P. 37).

174. Comment, *Party Discovery Techniques: A Threat to Underlying Federal Policies*, 68 NW. U. L. REV. 1063, 1076 (1974); *see* Wainwright v. Kraftco Corp., 54 F.R.D. 532, 535 (N.D. Ga. 1972).

175. FED. R. CIV. P. 23(a).

situations where hundreds of plaintiffs share a number of discrete, potentially dispositive issues yet do not share other issues raised by the lawsuit, Rule 23 permits courts to try the common issues through the class action mechanism while preserving the other issues for litigation at a later time.[176] In Rule 23(b)(3) class actions, certification is permitted only if, in addition to the Rule 23(a) requirements, (1) "[c]ommon questions must 'predominate over any questions affecting only individual members' and (2) class resolution must be 'superior to other available methods for the fair and efficient adjudication of the controversy.'"[177] Once the "predominance" and "superiority" requirements are satisfied with respect to one or more elements of the class members' claims, the court may certify these common issues for determination on a class-wide basis.[178] The defendant's conduct may well be a common issue, but the liability issue may constitute only a minor part of the trial.[179]

In mass tort situations where the cause of the common disaster is the same for each of the plaintiffs, the court may find that the "predominance" and "superiority" requirements justify class-wide determination of the proximate cause issue.[180] Instead, where the mass tort concerns defective products, individual issues may outnumber common issues.[181] "No single happening or accident occur[s] to cause similar types of physical harm or property damage. No one set of operative facts establishes liability. No single proximate cause applies equally to each potential class member and each defendant."[182] In such cases, the common questions fail to predominate over the individual attributes of each claim, and adjudication by class is not fair and efficient.[183] Not only does each victim have a particularized story to tell,

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176. Dhamer v. Bristol-Myers Squibb Co., 183 F.R.D. 520, 525 (N.D. Ill. 1998) (citing FED. R. CIV. P. 23(c)(4)).

177. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615 (1997) (quoting FED. R. CIV. P. 23(b)(3)).

178. *See In re* N. Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 853 (9th Cir. 1982) (finding that, in a typical mass tort situation, such as a plane crash, proximate cause can be determined on a class-wide basis because each plaintiff shared a common disaster) [hereinafter *Dalkon Shield*].

179. Where a court finds that the problems involved in aggregate proof of damages outweigh the advantage of class certification on the damages issue, this does not preclude certification of a class limited to the issue of liability. Bogosian v. Gulf Oil Corp., 561 F.2d 434, 456 (3d Cir. 1977) (citing FED. R. CIV. P. 23(c)(4)(A)), *cert. denied*, 434 U.S. 1086 (1978).

180. *Dalkon Shield*, 693 F.2d at 853.

181. *Id.*

182. *Id.*

183. *See In re* Fibreboard Corp., 893 F.2d 706, 712 (5th Cir. 1990); Cappalli & Consolo, *supra* note 1, at 250-51. There has been reluctance to certify classes in drug or medical product liability and other mass tort cases. *See* Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996); *In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1089 (6th Cir. 1996).

but each defendant has a constitutional right to a full defense against each alleged victim,[184] including person-specific affirmative defenses that are specific to the individual, such as failure to follow directions, assumption of risk, contributory negligence or comparative fault, as well as the statute of limitations.[185] A number of courts have denied class certifications in drug or medical product liability actions for these reasons.[186]

Although American judges tend to be "conservative, procedurally speaking, when faced with important individual rights and highly fact-specific claims,"[187] the court still has broad discretion whether to certify a class.[188] When requested to recognize and enforce a class action judgment in which liability was determined on a common basis, the Italian court will likely view the judgment as a violation of the right to defense and adversary process. Under Italian law, liability can arise only with respect to identified or identifiable creditors and must be based on a legally significant event that may qualify as a "source of obligations" under article 1173 of the Civil Code.[189] Therefore, when liability is treated as a common issue, the Italian court is likely to find that the defendant did not have the opportunity to present a full defense against each alleged victim.

3. Aggregate Monetary Relief

Just as the American court may certify liability issues for class treatment, in appropriate cases the court may permit aggregate proof of a defendant's monetary liability.[190] When a class action involves a large number of class members, but only a small individual recovery, the cost of separately proving each class member's damages may greatly

184. Cappalli & Consolo, *supra* note 1, at 250-51.

185. *Id.*; *Dalkon Shield*, 693 F.2d at 853. Even if the plaintiffs' claims in a mass tort class action present only common issues of fact, "the Rules Enabling Act may bar joint trial of the defendant's liability if it deprives the defendant of a fair opportunity to assert and prove affirmative defenses he may have against some, albeit not all, of the plaintiffs." Transgrud, *supra* note 152, at 826.

186. *See, e.g.*, *In re* Am. Med. Sys., Inc., 75 F.3d at 1085.

187. Cappalli & Consolo, *supra* note 1, at 255.

188. *In re* Am. Med. Sys., Inc., 75 F.3d at 1079.

189. ITALIAN CIVIL CODE, *supra* note 123, art. 1173 ("Obligations arise from contracts (arts. 1321-1469), unlawful acts (arts. 2043-2059), or any other acts (arts. 1987-1991), or facts (arts. 433, 2028-2042), which are capable of producing obligations under the law.").

190. *See, e.g.*, Bogosian v. Gulf Oil Corp., 561 F.2d 434, 454-55 (3d Cir. 1977) (finding no impediment as "a rule of law" to class-wide proof of causation or damage in actions for antitrust violations), *cert. denied*, 434 U.S. 1086 (1978).

outweigh the potential recovery.[191] On the other hand, there is concern that, despite the difficulties inherent in proving individual damages for the entire class, to permit aggregate calculation of damages would significantly alter substantive rights, and therefore be improper.[192] Collective or statistical damage awards are highly controversial, and the courts have rarely resorted to such determinations in mass tort litigation.[193] It appears unlikely, therefore, that an American class action judgment in which damages were determined collectively would find its way to an Italian court for recognition and enforcement.

For the sake of argument, however, let it be assumed that an American judgment in which damages were determined collectively is presented to an Italian court. Under Italian law, the defendant's obligation to compensate a plaintiff for noncontractual liability is determined on an individual basis pursuant to Civil Code article 2056.[194] As a result, Italian substantive law requires a plaintiff to prove the facts that support the claim and correspondingly permits a defendant to challenge the proofs.[195] To recover, therefore, the plaintiff must prove the extent of his or her damages.[196]

In contrast, the American court for the class action proceeding determined the damages collectively and not by individual proofs. According to Italian law, the defendant is thereby deprived of the opportunity to address the factual and legal issues relating to the individual claims advanced against it. The defendant is also deprived of

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191. Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1305 (9th Cir. 1990).

192. *Id.* The amount of damages each plaintiff is entitled to will vary greatly depending on specific factors that include the "extent of the injury and its physical effect, the reasonable medical expenses incurred, the effect of the injury on employment opportunities and future earnings, and the degree of pain and suffering." Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561, 570 (1993).

193. McNeil & Fancsali, *supra* note 59, at 507-08. The Fifth Circuit held that lump sum or "omnibus" awards of damages to a class of asbestos plaintiffs violated due process because of the inherent individuality of the claims. *In re* Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990). The Fifth Circuit confirmed the view that actual damages are to be determined for "individuals, not groups." Cimino v. Raymark Indus., Inc., 151 F.3d 297, 319-21 (5th Cir. 1998).

194. ITALIAN CIVIL CODE, *supra* note 123, art. 2056 ("Measure of damages. The damages owed to the person injured shall be determined in accordance with the provisions of Articles 1223, 1226, and 1227. The damage arising from loss of earnings shall be equitably estimated by the court according to the circumstances of the case.").

195. *Id.* art. 2697 ("Burden of Proof. One who asserts a right in judicial proceedings must prove the facts on which the right is based. One who asserts the invalidity of such facts, or claims that the right has been modified or extinguished, must prove the facts on which the defense is based.").

196. ADRIANO DE CUPIS, DEI FATTI ILLECITI 34 (Commentario del Codice Civile a Cura di Antonio Scialoja e Giuseppe Branca, 2d ed. 1971).

the right to submit evidence of facts favorable to its position with respect to those claims. For these reasons, the Italian court will likely find this collective determination of damages to violate the right to defense and adversary process,[197] despite the fact that appropriate methods of collective determination of damages produce aggregate liability very close to total damages.[198]

A different conclusion may be reached if one looks more closely at the Italian rules governing the measure of damages. The plaintiff, who has the burden of proving the damages caused by the defendant's negligent act, is entitled to recover both the "loss sustained" and the "lost profits."[199] When damages are difficult to prove, such as those for "lost profits," the court may quantify them "equitably."[200] In addition, damages of a nonpecuniary nature for disabilities resulting from personal injuries, such as the effect of the disabilities on the person's quality of life, are difficult to establish even with the reports of expert witnesses. In these cases, the court is required to assess them equitably with reference to the individual's personal history.[201] One may speculate whether this provision, which directs the court to determine equitably the measure of damages to which the individual plaintiff is entitled when it is difficult to establish their monetary value, might open the door to acceptance of a fair and just collective determination of damages in the context of a class action.

B. The Judgment Binds the Class Members Who Did Not Participate Personally in the Action

It is an accepted exception to the due process principle that a judgment on the merits in a class action suit may bind the absent members of the plaintiff class, provided the procedure ensures the

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197. Where an American court determined the damages of plaintiffs collectively, an English court denied recognition of the judgment. Adams v. Cape Indus. Plc., 2 W.L.R. 657, 658, 660 (C.A. 1990) (U.K.).

198. *See* Bone, *supra* note 192, at 600. Among various statistical methods for calculating class-wide damages, adjudication by sampling results in individual judgments and is therefore closest to traditional tort adjudication. *Id.* at 618. If the sampling is properly conducted, it can overcome due process defects. Saks & Blanck, *supra* note 59, at 826-39.

199. ITALIAN CIVIL CODE, *supra* note 123, art. 1223 ("Measure of damages. The measure of damages arising from non-performance or delay shall include the loss sustained by the creditor and the lost profits insofar as they are a direct and immediate consequence of the non-performance or delay.").

200. *Id.* art. 1226 ("Equitable measure of damages. If damages cannot be proved in their exact amount, they are equitably liquidated by the court (2056).").

201. LA VALUTAZIONE DEL DANNO ALLA SALUTE. PROFILI GIURIDICI, MEDICO-LEGALI ED ASSICURATIVI 113-17 (Bargagna & Busnelli eds., 3d ed. 1995).

protection of the interests of the "absent parties."[202] Those members who are not joined as named parties, while not formal or actual parties, are in a sense before the court because they are being virtually represented through the person of the representative plaintiff, and their rights and liabilities are adjudicated.[203] Thus, an essential characteristic of the class action is that the ensuing judgment on the merits binds the members of the class, "notwithstanding that they did not personally participate in the adjudication."[204] Indeed, a primary purpose of the class action device is "to establish the binding effect of class action judgments on absent class members so that they cannot burden opposing parties or the courts with claims similar to those which have been previously adjudicated."[205]

The Italian court requested to recognize and enforce the judgment might object that this aspect of representative suits is fundamentally unfair to the absent members of the class because, even though they knew nothing of the lawsuit, they are fully bound by the res judicata effect of the judgment.[206] The constitutionally guaranteed right to defense requires that nonparties be adequately protected against the binding effects of judgments.[207]

Since an absent member may be faced with an adverse judgment, or one considered less than fair, the issue that the Italian court is likely to address, for the purposes of article 64(1)(b) of Law No. 218,[208] is whether American procedure provides suitable protection of the essential rights of

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202. Hansberry v. Lee, 311 U.S. 32, 41-42 (1940). Judgments in class actions under rule 23(b)(3) bind all members of the class described in the judgment. FED. R. CIV. P. 23(c)(3); Comment, *The Importance of Being Adequate: Due Process Requirements in Class Actions Under Federal Rule 23*, 123 U. PA. L. REV. 1221 (1975). In a class action under Rule 23(b)(3), the judgment embraces those to whom the notice prescribed by subdivision (c)(2) was directed, with the exception of those who requested exclusion or who are ultimately found by the court not to be members of the class, whether the judgment is favorable or unfavorable to the class. FED. R. CIV. P. 23(c)(2); FED. R. CIV. P. 23 advisory committee's note, 39 F.R.D. 73, 105 (1966).

203. *See* Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1005 (7th Cir. 1971), *cert. denied sub nom.* Herriman v. Midwestern United Life Ins. Co., 405 U.S. 921 (1972); RESTATEMENT (SECOND) OF JUDGMENTS § 41(1)(e) (1982). Ultimately it is necessary to identify specific class members for claiming damages, Degnan, *supra* note 37, at 708, and for purposes of res judicata and related principles. NEWBERG & CONTE, *supra* note 38, § 2.04. For the attributes that denote a party in Italy, see Andrea Proto Pisani, *Parte nel processo*, *in* 31 ENCICLOPEDIA DEL DIRITTO 917 (Antonio Giuffré ed., 1981).

204. Hazard, Gedid & Sowle, *supra* note 1, at 1946-47.

205. Freeman, *supra* note 43, at 286. Even though the court cannot predetermine the res judicata effect of the judgment, the court must rule on the "coverage" of the judgment. Frankel, *supra* note 42, at 45 (citing FED. R. CIV. P. 23, advisory committee's note, 39 F.R.D. 73, 106 (1966)).

206. Cappalli & Consolo, *supra* note 1, at 233-34.

207. *See* Proto Pisani, *supra* note 138, at 1240-41; *see also* Cappalli & Consolo, *supra* note 1, at 282 n.341; Consolo, *supra* note 17, at 644 n.74.

208. *Supra* note 75 and accompanying text.

defense of the absentee who is bound by the class action judgment. In view of the principles of Italian due process examined above, it would seem that the protections available to the absentee would not be found suitable where the American procedural rules make it unreasonably difficult for an absentee to exercise the right to prosecute and defend an action.[209]

V. CONCLUSION

With the increase of mass civil wrongs resulting from the globalization of production, distribution and consumption of goods and services, it is likely (if not inevitable) that lawsuits against foreign entities will be brought on behalf of groups of similarly situated claimants. It should not be assumed, however, that a judgment obtained in a class action procedure will be recognized and enforced abroad in the same manner as foreign courts have recognized and enforced typical American judgments resulting from "individualized" litigation by identified litigants. Class suit procedures are largely unknown outside the United States, and a foreign court presented with an application for recognition of a judgment in such a proceeding is likely to scrutinize whether the judgment satisfies due process requirements.

In Italy, the court requested to recognize a foreign judgment must find that the foreign proceeding did not infringe the essential rights of defense of the parties and that the parties had the opportunity to engage in adversary process. Numerous Italian decisions have given substance to these concepts. The due process standards that have emerged from this jurisprudence should apply in determining an application for recognition of a judgment in a class action suit. The Italian court would most likely inquire whether the defendant was able to make a full defense against the individual claims of the members of the plaintiff class. It would consider whether the class suit procedure limited the opportunity for discovery or permitted the determination of liability and damages on an aggregate basis, as these aspects of the proceeding might fall short of due process protections.

A district court should be sensitive to the reality that a foreign court may inquire whether the rights of defense of the parties were substantially available in the class action procedure. Accordingly, where it is possible that the resulting judgment might lead to the need for enforcement proceedings abroad, the district court should adopt even greater caution to comply with the requirements of due process.

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209. Comoglio, *supra* note 113, at 977-78; Proto Pisani, *supra* note 138, at 1260-61.