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The Preclusive Effects of a Foreign Judgment in Subsequent Proceedings in England

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THESIS

The Preclusive Effects of a Foreign Judgment in Subsequent Proceedings in England

A study of the *res judicata* and abuse of process doctrines as these apply to foreign judgments in English private international law

by

Peter R. Barnett

A thesis submitted in partial fulfilment of the degree of Doctor of Philosophy within the University of Oxford.

22 September 1999

THESIS ABSTRACT

THE PRECLUSIVE EFFECTS OF A FOREIGN JUDGMENT IN SUBSEQUENT PROCEEDINGS IN ENGLAND

A study of the *res judicata* and abuse of process doctrines as these apply to foreign judgments in English private international law.

SUBMITTED IN PARTIAL FULFILMENT OF THE DEGREE OF DOCTOR OF PHILOSOPHY
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Trinity Term 1999

This thesis considers the preclusive effects generated in subsequent proceedings in England by a foreign civil and commercial judgment, once recognised as a *res judicata* according to either the common law rules of recognition (including the related statutory registration schemes), or the rules supplied by the Brussels and Lugano Conventions. In particular, this thesis examines four preclusive pleas which a foreign judgment might support: cause of action estoppel; the plea of former recovery under section 34 of the *Civil Jurisdiction and Judgments Act 1982*; issue estoppel; and, the abuse of process plea associated with the rule in *Henderson v Henderson* (1843) 3 Hare 100.

Chapter One introduces the four preclusive pleas and the schemes for the recognition (or registration) of foreign judgments. **Chapter Two** considers the pleas that preclude the contradiction or reassertion of a cause of action where the foreign judgment has been recognised at common law, and then examines the common law recognition process to ensure that it verifies the *res judicata* status of the judgment (including that process as reflected in the common-law-related statutory registration schemes). Chapter Two also examines the generic requirements for the *res judicata* preclusive pleas, namely: that the subject matter in the foreign and subsequent English proceedings must be identical, and that the parties (or their privies) must be the same. Much of the analysis of these requirements is useful for the discussion in **Chapter Three** of the issue preclusive effects of foreign judgments recognised at common law. Only relatively recently has the common law accepted that foreign judgments can support a plea of issue estoppel, and even more recently has issue preclusion by a final interlocutory issue decision of a foreign court been acknowledged. Thus, in light of these developments, adjustments in the recognition/*res judicata* requirements necessary to found the plea in subsequent English proceedings, are considered. In **Chapter Four** the traditional *res judicata* pleas so far discussed are contrasted with the *Henderson* abuse of process plea. If it applies at all in respect of earlier foreign proceedings, the *Henderson* rule precludes subsequent proceedings in England which seek to litigate subject matter that could and should have been litigated in the foreign proceedings, but which was not. **Chapter Five** examines the preclusive effects of judgments recognised in England according to the rules of the Brussels and Lugano Conventions. The underlying nature of the Conventions ensures that these judgments are effective as regards cause of action preclusion, since automatic recognition (which suggests full faith and credit) enables claim preclusive effects to result - the English court extending the law *of the foreign rendering state* in such cases. But it is argued that a different approach should be taken where issue preclusion and abuse of process preclusion are concerned. Finally, **Chapter Six** summarises the preclusive effect of a foreign judgment in subsequent proceedings in England, and conclusions are drawn.

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STATEMENT REGARDING CONTENTS

Except where otherwise indicated, this thesis is my own work. No part of this thesis has been accepted for a degree in the University of Oxford or elsewhere. This thesis is approximately 101,293 words including footnotes but excluding table of contents, table of authorities and the bibliography.

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CHAPTER ONE

INTRODUCTION

A foreign court has delivered a judgment in a civil or commercial matter. Subsequently, proceedings are brought (or continued) in England between (what appears to be) the same parties (or their privies), and involving (what appears to be) the same (or similar) subject matter, as was before the foreign court. Inevitably, the question arises: Can the foreign judgment be recognised in England as a *res judicata* in order to preclude the subsequent English proceedings?

This thesis explores that question, and discovers there are no simple answers. True, we can identify certain pleas known to English law that are capable of vindicating the preclusive effect of a foreign judgment. But each plea presupposes that the English court has *recognised* the foreign judgment and *verified* its status as a *res judicata.* Moreover, establishing whether the judgment must be recognised according to the common law or related statutory rules or under the Brussels or Lugano Conventions, is only the first question that must be considered. How do we tell, for example, whether this *particular* foreign judgment - as recognised - is a *res judicata*, and which law governs the criteria? What preclusive pleas can be founded on such a judgment in given circumstances, and who can plead them? How do we know that *this* subject matter is the same, or whether *that* party is bound by the judgment, and which law governs these questions? When should subsequent proceedings be precluded by the doctrine of *res judicata,* and when should they be precluded as an abuse of process? Who pleads what, where, when, how and why - and which law? It can all be very confusing!

In cutting a path through the jungle, this thesis takes the following four pleas to be those that properly secure the preclusive effect of a foreign judgment in subsequent proceedings in England. They can be grouped as follows:



Cause of action preclusion[1]

-- Cause of action estoppel - a plea that prevents the *contradiction* of an earlier judgment that affirms or denies the existence of a cause of action.

-- Former recovery - a plea that prevents the *reassertion* of a cause of action where a party has already recovered a foreign judgment in their favour upon the same cause of action. If the foreign judgment has been recognised in England according to the rules of common law, this cause of action preclusive plea is supplied by section 34, *Civil Jurisdiction and Judgments Act 1982* ("the 1982 Act").

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[1] In view of the new Civil Procedure Rules, arguably "claim preclusion", the term used in the United States, should be adopted. In this thesis, however, the term cause of action preclusion will be retained to refer either to cause of action estoppel or former recovery.

Issue preclusion

-- Issue estoppel - a plea that prevents the *contradiction* of a discrete issue, either determined as part of the dominant judgment upon a cause of action to which the issue was necessary and fundamental; or where, as a free-standing issue, its independent existence has been discretely determined, perhaps by an interlocutory decision.

Abuse of process

-- the rule in *Henderson v Henderson*[2] - a plea that appeals to the inherent jurisdiction of an English court to forestall subsequent proceedings that abuse the process of the court even though there is neither contradiction nor reassertion of subject matter rendered *res judicata* in earlier foreign proceedings, yet where the subject matter of the proceedings could and should have been so rendered.

As we have noted, each of these preclusive pleas operates in subsequent proceedings once the *res judicata* status of the judgment has been established. But it has also been heralded that it is not easy to ascertain whether the *res judicata* status and preclusive effects of a foreign judgment are affirmed by the process of foreign judgment recognition in England. Not least amongst the difficulties is the fact that a party who wishes to assert the preclusive effect of a foreign judgment in subsequent proceedings in England must bear in mind the identity of the foreign court, for it is this factor which determines the applicable recognition rules and, in certain cases, may indicate the law that governs the operation of the preclusive pleas. Hence the first questions a party must consider are:

-- Will a judgment from a court outside western Europe be respected in England as a *res judicata* and thus be accorded preclusive effects? This will depend on the doctrine of *res judicata* at common law, as reflected in the common law rules of recognition, or those rules as codified by the *Administration of Justice Act 1920* ("the 1920 Act") or the *Foreign Judgments (Reciprocal Enforcement) Act 1933* ("the 1933 Act").

-- Will a judgment in a civil and commercial matter from a court within western Europe be respected in England as a *res judicata* and thus be accorded preclusive effects? This will depend on the rules of the Brussels or Lugano Convention, and whether those rules require an English court to adopt the preclusive effects of the judgment according to the law of the rendering court or treat the judgment as if it were an English judgment for preclusive purposes, and thus subject to the doctrine of *res judicata* at common law.

Not surprisingly, given these questions, this thesis will consider the preclusive effects of a foreign judgment that has been recognised *either* according to the rules of common law (including the related statutory schemes) *or* according to the rules of the Brussels and Lugano Conventions as adopted within the United Kingdom by the 1982 Act. What is soon apparent is that each recognition scheme facilitates the attribution of preclusive effects in different ways and with varying degrees of efficiency and success.

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[2] (1843) 3 Hare 100

The common law scheme

The common law scheme, for example, is archetypal in recognising a foreign judgment as a *res judicata* precisely because the recognition rules and the criteria which define a *res judicata* at common law are ostensibly one and the same. But for as long as the common law has been recognising the conclusive effect of foreign judgments in this way, it has also maintained the illogical non-merger rule which denies that a foreign judgment merges with its underlying cause of action. Thus, whilst a foreign judgment at common law can sustain a plea of cause of action estoppel where a party contradicts the foreign decision as to its existence, such a judgment is unable to sustain a plea of former recovery. To remedy this defect, and prevent a successful party from reasserting the same cause of action as that upon which they recovered judgment abroad, Parliament enacted section 34 of the 1982 Act.

It might be said, therefore, that a foreign judgment recognised at common law does not generate cause of action preclusive effects in as clear a fashion as is the case under the Convention scheme. And yet, because the rules of common law accord the foreign judgment the same preclusive effect as an English judgment, issue estoppel and abuse of process are more readily adaptable to foreign judgments recognised at common law than to foreign judgments recognised under the Convention scheme. Even so, at common law, recent developments require us to consider carefully the rules governing issue preclusion, and, in particular, whether an issue estoppel arises from a foreign judgment that was interlocutory rather than final, or where the rights in question were procedural and not substantive.

Likewise, abuse of process reasoning has been in increasing modern use to preclude subsequent proceedings in England. Typically, these arguments rely upon the *Henderson* rule which broadly states that it is an abuse of process to raise subject matter in subsequent proceedings if it could have been raised and adjudicated in earlier proceedings. However, uncertainty as to the proper nature of this rule has given rise to confusion and misapplication which, in turn, have yielded a hybrid plea, wider in scope, and seemingly untrammelled by judicial constraints. Untangling these complexities is the prelude to an examination of whether abuse of process ought extend to foreign judgments at all.

The Convention scheme

Where the judgment has been recognised under the Convention scheme, however, procuring these preclusive effects in subsequent proceedings in England may not simply be a matter of applying the common law. Indeed, the Convention scheme plays to different strengths. It is particularly effective in recognising a judgment for the purposes of cause of action preclusion. Without the need for a doctrine of merger, it accords full faith and credit to its judgments, which makes cause of action preclusion easy. A judgment upon a cause of action - if it is recognisable in the adjudicating court as a *res judicata* - will automatically preclude contradiction or reassertion of the same claim throughout all the Contracting states.

However, the Convention scheme gives little guidance about the issue preclusive effects of its judgments, and the question arises: Must an English recognising court give a

Convention judgment the same issue preclusive effect as the judgment would have before the adjudicating court in the Contracting state and/or can the English court apply its own law of issue estoppel?

Similarly, with the more discretionary abuse of process plea: Can the English court forestall its own proceedings as an abuse of process should that plea be sought by reference to the subject matter adjudged in earlier proceedings in another Contracting state, or must reference be made to the abuse of process rules of that State? Here, too, the approach to be followed where the judgment is recognised under the Convention scheme is far from certain, and it is these more difficult problems which this thesis also sets out to solve.

***

The over-arching theme, however, is that foreign judgments are not solely instruments to be recognised for the purposes of enforcing money obligations. An essential part of their character is their preclusive effect. A clearer understanding of this characteristic will enable litigants to utilise better the foreign judgment, and may instil the importance of procuring a favourable judgment abroad given the tactical preclusive use to which the foreign judgment might be put in subsequent proceedings in England.

CHAPTER TWO

CAUSE OF ACTION PRECLUSION BY A FOREIGN JUDGMENT RECOGNISED AT COMMON LAW

This chapter is divided into five parts:

PART 1 contrasts the two *res judicata* pleas available in subsequent proceedings when a foreign judgment has adjudicated an entire cause of action. Cause of action estoppel is the plea that precludes contradiction of the judicial declaration as to the existence or non-existence of the cause of action. Former recovery - furnished by section 34 of the 1982 Act - is the plea that prevents the party in whose favour the foreign judgment from reasserting the same cause of action in order to obtain further relief.

PART 2 examines the rules by which the foreign judgment might be recognised as a *res judicata* at common law, or according to the related recognition statutes.

PART 3 examines the requirement - common to both pleas - that the cause of action in the subsequent proceedings must be identical to that determined by the foreign judgment.

PART 4 considers the rules that settle who or what can enjoy the benefit, or suffer the burden, of cause of action preclusion. Again, both the estoppel plea and section 34 require that the same parties, or their privies, be involved in both the earlier foreign, and subsequent English, proceedings.

PART 5 illustrates the law as expounded in this chapter by reference to examples.

PART 1 - PREVENTING REASSERTION OR PRECLUDING CONTRADICTION OF SAME CAUSE OF ACTION

1. Cause of action preclusion: introduction

At common law a *res judicata* is a judicial decision, pronounced by a court or tribunal having jurisdiction over the subject matter and the parties, which disposes finally and conclusively of the matters in controversy, such that, other than on appeal, that subject matter cannot be relitigated between the same parties or their privies[1]. When an entire cause of action or claim is rendered *res judicata* in this way, the judgment can have a two-fold preclusive effect in subsequent proceedings involving the same parties or privies: it can prevent contradiction, or it can prevent reassertion.

In cases of contradiction, cause of action estoppel prevents a party or privy from contradicting the earlier declaration as to the existence or non-existence of the cause of action. *Every* judgment that finally and conclusively determines a cause of action can give rise to this effect. Indeed, cause of action estoppel is one of two estoppel *per rem judicatam* pleas aimed at preventing the contradiction of subject matter rendered *res judicata*, the other is issue estoppel.

In cases of reassertion, a judgment that has granted recovery upon a claim may provide the foundation for a plea of former recovery. This plea precludes the successful claimant from afterwards recovering a second judgment for the same relief on the same cause of action in subsequent proceedings between the same parties. Upon a *domestic* judgment at common law, the former recovery plea operates because the judgment extinguishes the cause of action[2]. In other words: "the very right or cause of action claimed or put in suit has in the first proceedings passed into judgment, so that it merged and has no longer an independent existence"[3]. However, the doctrine of merger does *not* apply where the judgment is *foreign*, with the result that a cause of action adjudged abroad is not extinguished at common law[4].

Indeed, at common law, the non-merger rule allows a party to sue again in England upon the same cause of action notwithstanding a judgment recovered abroad in respect of the same claim. This non-merger rule has *not* been expressly abrogated, but nowadays a party with a foreign judgment in its favour *is* (in all but exceptional circumstances) prevented from reasserting the cause of action by the former recovery plea enacted by section 34 of the 1982 Act.

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[1] Handley, K.R. Spencer Bower, Turner and Handley on The Doctrine of *Res Judicata*, 3rd ed, Butterworths: London, 1996 (hereafter "SBTH"), p1

[2] *King v Hoare* (1844) 13 M&W 494

[3] *Blair v Curran* (1939) 62 CLR 464, 531 (Dixon J)

[4] *Barber v Lamb* (1860) 8 CBNS 95; *Taylor v Hollard* [1902] 1 KB 676

Even so, whilst the non-merger rule and the consequent need for statutory intervention suggest that the cause of action preclusive effect of a foreign judgment is not fully respected by the common law[5], it is important to be clear that the failure of a foreign judgment to merge the underlying cause of action is no reason to suppose that such judgments are incapable at common law of precluding *contradiction* by cause of action estoppel. As Lord Hodson stated in *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)*[6]:

> It seems to me that this argument does not logically involve that there can be no estoppel in the case of a foreign judgment. Indeed, the cases are consistent in admitting that there may be an estoppel notwithstanding the absence of merger. If the fact that the cause of action does not merge prevents the estoppel where issue estoppel is concerned, it must similarly, one would suppose, do so where cause of action is in question. No one has suggested that the latter contention is sound.

Moreover, if we appreciate properly the distinction between the plea that prevents reassertion after recovery (supplied, in the foreign context, by section 34) and the plea that precludes contradiction (cause of action estoppel) we will observe[7]:

> it is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery itself in an action ... is only a bar to the taking of recovery of damages for the same injury, but the estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact, which, having once been distinctly put in issue by them ... has been, on such issue jointed, solemnly decided against them

This reflects an important distinction in the theory of judgments. According to such theory, a judgment comprises two components[8]: the "formal order" and the "reasons for judgment".

The formal order is what grants or refuses the relief or remedy sought. Except by inference, this component says nothing about the questions of law or findings of fact. It is simply that part of the decision which puts an end to the action. In domestic judgments it does this metaphysically by "merging" the cause of action "into" the judgment. In foreign judgments, whilst not "extinguishing" the cause of action, the formal order still evinces a new right or obligation[9]. Nonetheless, in all judgments, it is the formal order alone that is relevant to former recovery, and it is upon this that the plea rests.

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[5] Cf. Brussels and Lugano Conventions, under which a judgment precludes contradiction (cause of action estoppel: see *Berkeley Administration Inc v McClelland* [1995] ILPr 20) *and* reassertion (former recover: see *De Wolf v Cox* [1976] ECR 1759). See Chapter Five.

[6] [1967] 1 AC 853, 927-928 (hereafter "*Carl Zeiss (No 2)*")

[7] *Outram v Morewood* (1803) 3 East 346, 354 (Lord Ellenborough CJ)

[8] 3 Blackstone Commentaries (14th ed), 398

[9] The doctrine of obligation provides the theoretical basis for enforcement of foreign judgments at common law: see *Russell v Smyth* (1842) 9 M&W 810; *Williams v Jones* (1845) 13 M&W 628; *Godard v Gray* (1870) 6 QB 139; *Schibsby v Westenholz* (1870) 6 QB 155. However, this basis is unsatisfactory where recognition is purely for preclusive purposes because the common law rules (cf. section 8(1), 1933 Act) are ill-adapted to enforce non-monetary judgments: see White, M. (1982) 9 Syd L Rev 630. In respect of intra-UK judgments there is now statutory provision for money and non-money judgments: see section 18 and Schedules 6 and 7, 1982 Act.

The reasons for judgment, by contrast, convey - expressly or implicitly - the opinion of the court upon all points of law or matters of fact that were distinctly put in issue. These are the "solemnly decided"[10] matters which must not be contradicted in subsequent proceedings. It is upon this component of the judgment that the pleas of estoppel *per rem judicatam* depend (whether cause of action or issue estoppel)

If the reasons for judgment are explicit, establishing cause of action estoppel is relatively easy. But if the particular question of which it is desired to found the plea is not the subject of an express declaration or finding[11], or if the decision merely comprises a formal order, establishing the identity of the subject matter may well give rise to "questions of considerable difficulty and nicety"[12]. We will see that such difficulties are more likely to arise where issue estoppel is concerned, since "it may not be easy to be sure that a particular issue has been decided or that its decision was a basis of the foreign judgment and not merely collateral or obiter"[13]. Difficulties also emerge if the cause of action was rendered *res judicata* by a default judgment, for "a much more restricted operation must be given to any estoppel arising from a default judgment"[14]. But in most ordinary cases of cause of action estoppel, a conclusion as to the existence (or non-existence) of the cause of action - if it is not expressed by the reasons for judgment - can at least be inferred from the formal order, because the formal order of any judgment must necessarily affirm or deny the existence of at least *a* cause of action if it grants or refuses relief.

Even so, it is this relationship between the formal order and the reasons for judgment which can give rise to misconceptions about foreign judgment cause of action estoppel[15]:

> The distinction between cause of action estoppel and issue estoppel on the one hand [that is, the pleas that prevent contradiction], and the principle of merger in judgment on the other hand [that is, the plea that prevents reassertion where a judgment has been recovered in England], has been of great importance where the judgment in question is the judgment of a foreign court in the sense of a non-English court. This is because, whereas it has been recognised that the judgment of a non-English court may give rise to a cause of action estoppel where the judgment is in favour of the defendant, and more recently to an issue estoppel, nevertheless such a judgment, in favour of the plaintiff, did not at common law constitute a bar against proceedings in England founded upon the same cause of action. This was because the principle of merger in judgment did not apply in the case of a non-English judgment.

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[10] *Outram v Morewood* (1803) 3 East 346, 354 (Lord Ellenborough CJ)

[11] Or is ambiguous such that no estoppel could be established: *Bernardi v Motteux* (1781) 2 Doug KB 575; *Dalgleish v Hodgson* (1831) 3 Bing 495; *Harris v Taylor* [1915] 2 KB 580

[12] *Re Koenigsberg, Public Trustee v Koenigsberg* [1949] Ch 348, 363

[13] *Carl Zeiss (No 2)* [1967] AC 853, 918 (Lord Reid)

[14] *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993; *New Brunswick Rail Co Ltd v British and French Trust Corporation Ltd* [1939] AC 1. Greater restrictions apply where an issue estoppel is sought upon a foreign default judgment: see Chapter Three; and likewise where the *Henderson* rule is pleaded: see Chapter Four.

[15] *Republic of India and another v India Steamship Co Ltd* [1993] AC 410, 417 (Lord Goff of Chieveley) (hereafter "*The Indian Grace*")

Lord Goff is correct to the extent that the non-merger rule at common law deprives the unsuccessful party of being able to plead his opponent's former recovery[16]. But if in subsequent proceedings it is not reassertion but contradiction which describes the stance of the plaintiff's action[17], notwithstanding a foreign judgment in his favour, surely cause of action estoppel can be pleaded on the basis that *all* parties and privies are bound by - and must not contradict - the *res judicata*? This requires us to examine more closely cause of action estoppel and the notion of contradiction.

2. Precluding contradiction: cause of action estoppel

Cause of action estoppel is the simplest preclusive plea. We have seen it is a plea that prevents a party in subsequent litigation from asserting or denying the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties or their privies[18].

To establish the plea, a party must - first and foremost - prove the *res judicata* status of the judgment[19], and then establish that the same cause of action as was determined by the earlier judgment is now the subject of subsequent proceedings between the same parties or privies as are bound by the judgment. In other words, cause of action estoppel presupposes the earlier decision has rendered the same cause of action *res judicata,* and it is *this* determination - final and conclusive on the merits - that must not be contradicted in subsequent proceedings[20].

It is beyond doubt that the plea is available in the foreign context. Thus, where a claimant, having litigated a cause of action abroad and lost, attempts to litigate afresh the same claim in England, the defendant may rely on the foreign judgment in its favour to estop

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[16] Although the equitable principle against double satisfaction applies to a foreign judgment: see *Barber v Lamb* (1860) 8 CBNS 95; *Kohnke v Karger* [1951] 2 KB 670. Where the non-merger rule permits reassertion, and satisfaction has *not* been obtained, the plaintiff can elect either to affirm the foreign judgment *or* sue on the original cause of action: *Taylor v Hollard* [1902] 1 KB 676.

[17] Suppose plaintiff had won on some points but lost on others, but maintains the judgment concluded *other* than what it did. See *Vervaeke v Smith* [1983] 1 AC 145, where plaintiff contradicted an earlier judgment in her favour.

[18] *Thoday v Thoday* [1964] P 181, 197 (Diplock LJ). This describes cause of action estoppel *inter partes*. Where the decision is *in rem* the estoppel operates against the whole world to prevent contradiction.

[19] *Morrison Rose & Partners v Hillman* [1961] 2 QB 266; Part Two of this Chapter.

[20] Estoppel *per rem judicatam* can be met by estoppel by representation, and this gives rise to a genuine cross-estoppel. Thus, A having pleaded cause of action estoppel against B, B replies by alleging and proving A's representation not to rely on the *res judicata.* B does not deny that he is estopped, but insists that A is estopped from saying so. This statement of the common law doctrine of "cross-estoppel" was approved in *The Indian Grace* [1993] AC 410, 422 and their Lordships extended a similar doctrine to the section 34 plea.

the claimant from again litigating that which has been disposed[21]. The principal authority is *Ricardo v Garcias*[22] in which Lord Campbell held that a French judgment[23]:

> might be pleaded [by the defendant] as *res judicata* ... the foreign Tribunal has clearly jurisdiction over the matter, and both parties having been regularly brought before the foreign Tribunal, and that Tribunal having adjudged between them, I think that such a judgment would be a bar to a subsequent suit in this country for the same cause ... the matters and things now in issue are the same as those which were in issue and were determined in the foreign court.

The case illustrates the first of two ways in which a successful party might use a foreign *res judicata* to preclude contradiction by cause of action estoppel. This first method is to plead the judgment as a defence (or counter-claim) to any claim (or defence) which challenges the correctness of the earlier decision, and in this way the estoppel is used defensively, that is in response to the contradiction. This manifests use of the foreign *res judicata* as an estoppel in the strict sense of that word; that is, the judgment estops the further flow of litigation like "a bung or cork"[24].

The second way to enliven a cause of action estoppel plea is to bring an action on the foreign judgment[25] in anticipation of contradiction or denial by the unsuccessful party. Apparently there is some reluctance to apply the term "cause of action estoppel" in cases such as this[26]. But there is no reason to refer to cause of action estoppel only in cases where it is raised as a defence, and disclaim use of the term in cases where an action is brought on the judgment to thwart or stymie the unsuccessful party. In the latter case the preclusive plea is nonetheless cause of action estoppel, even though it *anticipates* rather than *responds to* contradiction.

Of course, usually an action on the judgment is brought to enforce a monetary obligation[27]. But, again, there is no requirement that a party with a judgment in their favour *must* enforce (or have an enforceable[28]) judgment[29]. Rather, if a *res judicata* lies at

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[21] Section 34 is *not* applicable here because it only precludes fresh proceedings by the *successful* party that has recovered judgment.

[22] (1845) 12 Cl & F 368

[23] *ibid*, 401

[24] *McIlkenny v Chief Constable of the West Midlands* [1980] 1 QB 283, 317 (Lord Denning MR): "For the word 'estoppel' only means stopped ... It was brought over by the Normans. They used the old French 'estoupail'. That meant a bung or cork by which you stopped something coming out."

[25] To enforce the obligation *indebitatus assumpsit*: see fn9.

[26] SBTH, p10

[27] In addition to recognition, the judgment must be for a fixed sum, other than a tax, penalty or multiple damages amount: *Sadler v Robins* (1808) 1 Camp 253; *USA v Inkley* [1989] QB 225; *Raulin v Fischer* [1911] 2 KB 93; *Protection of Trading Interests Act 1980*, section 5

[28] Cf. Brussels and Lugano Conventions where enforceability is an important criterion: see Chapter Five.

[29] Cf. section 8, 1933 Act which secures the "general [ie. preclusive] effect" of judgments whether or not they are enforceable under that Act: see Chapter Two, Part Two.

the foundation of the action it will prevent the unsuccessful party from reiterating defences or claims that have already been adjudicated, and from contradicting the existence of the cause of action upon which recovery was granted. This is illustrated by *Hamilton v Dutch East India Co*[30], where the foreign judgment at the foundation of the action[31]:

> having been judged and determined by the Courts of Malacca and Batavia ... could not be reviewed by the Courts of Admiralty of Scotland which has no jurisdiction over these Courts, and that this plea or exception (of *res judicata*) is, by the law of nations, available in all Courts, it being an established maxim *quod res judicata pro veritate habetur*

This reasoning also prevents a successful party from contradicting his own judgment should that party, for whatever reason, wish to *deny* the existence of the claim adjudged in his favour[32]. Cause of action estoppel prevents *any* party from asserting *or* denying the declaration as to the existence or non-existence of a cause of action.

Recently, in *Murthy v Sivasjothi*[33] , the Court of Appeal acknowledged that a defendant who accedes to the jurisdiction of a foreign court can be taken to have submitted to its jurisdiction in respect of all claims (or counter-claims) arising out of the same subject matter, and to related claims, whether made by a party originally claiming against him or by another party[34]. By analogy, this decision may support the view that an action upon a judgment could be used to marshal cause of action estoppel to preclude a party from contradicting the existence of all claims that arise out of the subject matter at the foundation of the *res judicata* upon which the action was brought. However, we will consider further the meaning of same cause of action in Part Three of this chapter.

In the same way, claim preclusion may preclude a successful party, who has recovered a mixed judgment[35], from contradicting the points that he lost; for where a judgment is pleaded by way of estoppel to an entire cause of action, rather than a single matter in issue, it amounts to an allegation that *all* of the legal rights and obligations of the parties are concluded by the earlier judgment. Thus it was held in *Hills v Co-operative Wholesale*

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30 [1732] 8 Bro PC 264

31 *ibid*, 268-269

32 See fn17

33 [1999] 1 WLR 467. This involved enforcement of a default judgment where the defendant argued he had not submitted to the claims determined by default. It was held the defendant had submitted because he had previously acceded to jurisdiction by advancing his own claim which derived from the same underlying subject matter.

34 Provided the other party was a party to the earlier action, albeit in respect of separate claims related to the same underlying subject matter.

35 Cf. *Parsons Ltd v Uttley Ingham & Co* [1978] 1 QB 791 as an example of a mixed judgment. In that case, which is authority on remoteness of damages in contract, the claim was brought in contract alleging the death of pigs was caused by mouldy food resulting from a failure to install properly a hopper. Suppose a foreign court awarded damages for the death of the pigs, but not damages for economic loss. What preclusive plea could be used to preclude the plaintiff from claiming economic loss in subsequent English proceedings? In one sense this may be reassertion of the same cause of action; in another sense this may amount to contradiction.

Society Ltd[36] that a person who has once recovered judgment is *estopped* from averring that he ought to recover any further sums for the same cause of action. Admittedly, however, this example blurs the distinction between a party who contradicts a judgment, and a party who attempts simply to procure *further recovery* upon the same cause of action: the applicable plea in the latter case is not one that precludes contradiction but one that prevents reassertion[37]. And in the case of foreign judgments, that plea is supplied by section 34.

3. Preventing reassertion: section 34

If cause of action estoppel is the simplest preclusive plea, the plea that prevents reassertion of the same cause of action in subsequent proceedings in England for the same relief is a little more complex. The principal confusion is caused by the "illogical survival"[38] of the non-merger rule.

As we have seen[39], a foreign judgment *at common law* does not merge the cause of action, and so does not operate as a bar to further recovery. Rather, a successful party may elect to sue again in England for further relief upon the same cause of action[40], provided the foreign judgment remains unsatisfied[41]. Moreover, although the law of the foreign court might consider its judgment has extinguished the cause of action, this does not decide the question for an English court[42], which indicates that the preclusive effect of the foreign judgment at common law, insofar as cause of action preclusion is concerned, is a matter for English law.

But the common law rules must now be read in light of section 34 of the 1982 Act[43]:

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

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[36] [1940] 2 KB 435

[37] See fn21

[38] *Carl Zeiss (No 2)* [1967] 1 AC 853, 966 (Lord Wilberforce). The rule is illogical given the evolution that saw foreign judgments accepted as conclusive as English judgments: see fn19.

[39] See fn4.

[40] But if the successful party elects to bring an action on the foreign judgment for enforcement he waives his right to proceed afresh upon the same cause of action: *Taylor v Hollard* [1902] 1 KB 676, 681 (Jelf J)

[41] See fn16

[42] *Bank of Australasia v Harding* (1850) 9 CB 661; *Russell v Waterford and Limerick Railway Co Ltd* (1885) 16 LR Ir 314; *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502

[43] Section 34 came into force on 24 August 1982.

Section 34 was widely thought to abolish the non-merger rule and so provide a former recovery plea to prevent reassertion and operate alongside the existing rules of *res judicata*[44]. The view was entirely reasonable given the deliberations in Parliament[45], and it was supported by Potter J in *Black v Yates*[46]. However, these perceptions changed with *The Indian Grace* litigation.

In that case, a cargo vessel *The Indian Grace* was carrying munitions from Sweden to the port of Cochin in India when a fire broke out in her hold. Fifty-one shells were jettisoned *en route*, but on inspection upon arrival at Cochin it appeared that the cargo as a whole - valued at £2.6 million - was ruined. The ship-owners were notified that a claim for the full value of the cargo would be made; but, even so, the plaintiffs first commenced proceedings in Cochin in respect of the 51 shells. A year later, but before judgment in Cochin, a writ *in rem* was served at Middlesborough claiming damages of £2.6 million. When judgment was given at Cochin, the ship-owner sought to defend the English proceedings by relying upon the preclusive effect of the Cochin judgment: section 34 supplied a plea against reassertion; the rule in *Henderson v Henderson*[47] supplied a plea of abuse of process. (It should be noted that cause of action estoppel was neither pleaded nor maintainable because it was not alleged the subsequent proceedings involved contradiction by the plaintiffs' of the Cochin judgment).

The litigation involved six separate decisions, including twice to the House of Lords, and ultimately the plaintiffs were precluded by section 34. However, for present purposes we will consider the *first* House of Lords decision[48]. On this occasion their Lordships concluded section 34 did *not* expressly abrogate the non-merger rule. Nor did it oust the jurisdiction of the English courts, as the plea could be avoided in exceptional

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[44] Collins, L. The Civil Jurisdiction and Judgments Act 1982, London: Butterworths, 1983, p145; O'Malley, S. and Layton A., European Civil Practice, Sweet & Maxwell: London, 1989, pp1036-1037; Kaye, Peter Civil Jurisdiction and Enforcement of Judgments, Professional Books Ltd: Abingdon, 1987, pp1403-1404; Dicey and Morris on the Conflict of Laws, 12th ed, Sweet & Maxwell: London, 1993 (hereafter "Dicey and Morris"), p 431; North, P.M. and Fawcett, J.J. Cheshire and North Private International Law. 11th ed. London: Butterworths, 1987 (hereafter "Cheshire and North"), p347

[45] House of Commons Standing Committee, 19 April 1982, column 17: "The so-called 'non-merger rule' has long been the subject of criticism in this country ... *The clause as it stands would abrogate the rule* but does not expressly state the effect of the abrogation. *The purpose of the revised clause [that which became section 34] is to put the manner beyond doubt* by barring the introduction of fresh proceedings in this country on a cause of action which has resulted in a foreign judgment which is enforceable here."; House of Lords Debates, Volume 432, columns 178-179: "The clause prevents a party who has obtained a foreign judgment from starting a fresh action in England and Wales or Northern Ireland. Provided the judgment is entitled to recognition, his remedy is to enforce the judgment itself."

[46] [1992] 1 QB 526, 531 (Potter J): "What is aimed at by the section, in my view, is an extension of the English doctrine of merger to the judgments of all overseas courts of competent jurisdiction which are enforceable and entitled to recognition in this country".

[47] (1843) 3 Hare 100

[48] [1993] AC 410

circumstances by a counter-plea of waiver, estoppel or agreement[49]. Rather, section 34 created a simple and effective statutory plea against reassertion, which[50]:

> can appropriately be read as providing *no more than* a bar against proceedings by the plaintiff rather than excluding the jurisdiction of the court. [emphasis added]

What is novel about this interpretation is that section 34 operates to prevent reassertion *not* by abolishing the illogical non-merger/merger distinction that had existed between foreign and English judgments at common law, but by reinforcing it; for the plea merely precludes further recovery of the *remedy* and does not extinguish the *right* underlying the cause of action. Thus the House of Lords created a new anomaly where a more vigorous court might have reviewed the underlying common law principle.

Ironically, too, section 34 was described as "*no more than* a bar against proceedings", yet their Lordships interpreted the provision such that it could *also* be the subject of waiver or estoppel or contrary agreement[51]. This construction followed because the formula in section 34 does not have the effect of ousting the jurisdiction of the court but must be construed as meaning: "No proceedings may be brought *unless*"[52]. Thus it was held[53]:

> that in a case such as this the general rule of public policy enshrined in the principle of *res judicata* is subject to a particular exception which enables practical justice to be done in rare cases, without any harm being done to the rule of public policy.

However, this means that where section 34 is the subject of waiver, estoppel or contrary agreement, a successful plaintiff *can* reassert the same cause of action notwithstanding the *res judicata* status of the foreign judgment[54]. In these exceptional cases section 34 enables the *res judicata* to operate as a defeasible bar, obliging the court to decide whether a case is one in which no proceedings may be brought, or one in which the unsuccessful party has abandoned his shield. Such an analysis is unnecessary where the doctrine of merger applies to domestic judgments because a plea of waiver or estoppel can not prevent the merger of a cause of action[55]. Hence the result is that foreign judgments subject to section

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[49] It was alleged there existed an agreement between the parties that the English courts would have jurisdiction in respect of that part of the claim involving the damaged cargo.

[50] *The Indian Grace* [1993] AC 410, 424 (Lord Goff of Chieveley)

[51] A further dimension was added to the plea by the House of Lords in their second decision, [1998] AC 878: "No proceedings may be brought" means "brought *or continued*": see fns64,66.

[52] Following *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850: "any provision ousting the jurisdiction of the court must be construed strictly."

[53] *ibid*, 424; cf. Collins L, "Illogical survivals and astonishing results" (1992) 108 LQR 393.

[54] Arguably if finality in litigation is genuinely of public interest, no-one should be empowered to give it up by waiver, estoppel or contrary agreement. However, Lord Goff was at pains to show the exception as "particular" and operative only in "rare case".

[55] *The Indian Grace* [1993] AC 410, 423; see also *Arnold v National Westminster Bank plc* [1990] Ch 573: held the doctrine of merger upon domestic judgments is inflexible and there is no exception for special circumstances; cf. *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502, 503 (Brennan J): "the doctrine [of merger] does not admit of any exception so long as the first judgment stands". But, in England, a cross-estoppel can answer cause of action estoppel: see fn20.

34 are treated differently from domestic judgments; which, again, suggests that recognition at common law is not a process that fully respects the foreign decision as conclusive as an English *res judicata*[56].

On the other hand, there is no policy reason[57] why the plea against reassertion of a cause of action should be applied rigidly, especially if the facts relating to the foreign judgment are less than clear[58]; although policy would seem to require that a party seeking to *dissuade* the court from applying section 34 should bear a heavy burden.

But all this causes one to speculate about the real policy intention of Parliament; and although the argument in *The Indian Grace* was concluded before the decision in *Pepper v Hart*[59], Davenport has suggested[60]:

> If the House of Lords in *The Indian Grace* had been able to refer to [the parliamentary debates] it is not difficult to see that the argument could have been confidently advanced that the section was intended only to prevent a new action being brought here in the identical dispute which was the subject matter of the foreign judgment. How much the ministers or the draftsman understood about the doctrine of merger of judgments is unknown but that which was explained to Parliament fell far short of a full explanation if the section were intended to mean what the House of Lords said it meant.

What emerges, however, is that section 34 provides a plea against reassertion regardless of whether the section bars the remedy or the right. Accordingly, a plaintiff with a foreign judgment in his favour is allowed only one bite at the cherry, and will be prevented from bringing proceedings in England, other than in those circumstances that admit the exception provided by the House of Lords[61].

In order for the section to apply in the unexceptional cases, three conditions must be satisfied:

(a) the proceedings must be *brought* on the same cause of action as that "in respect of which a judgment has been given";

(b) the proceedings must be between the same parties and their privies; and

(c) the foreign judgment must be "enforceable or entitled to recognition in England"[62].

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[56] Cf. Article 26, Brussels Convention: *de Wolf v Cox* [1976] ECR 1759.

[57] Cf. fn54; see also Chapter Four (abuse of process)

[58] Cf. the special caution required for foreign judgment issue estoppel: *Carl Zeiss (No 2)* [1967] 1 AC 853; *Desert Sun Loan Corp v Hill* [1996] 2 All ER 847

[59] [1993] AC 593

[60] Davenport, B. J. "Injustice just avoided" (1994) 110 LQR 25, 28; Jackson D.C., Enforcement of Maritime Claims, 2nd ed., LLP: London, 1996, p609

[61] Eg. if the parties agree one claim should be determined by the foreign court, and another in England. This was alleged in *The Indian Grace* and a finding made to that effect by Clarke J, however the Court of Appeal reversed this finding on appeal: [1996] 2 Lloyd's Rep 12.

[62] Thus, unless the judgment qualifies for recognition as a *res judicata* according to the common law rules -

These criteria reflect the generic requirements for all preclusive pleas and are considered in greater detail in the remaining Parts of this Chapter. However, the requirement that the proceedings must be *brought* bears an interpretation which is unique to cases involving the section 34 plea, and it is convenient to consider this now.

When the *Indian Grace* litigation came before the House of Lords on the *second* occasion[63], Lord Steyn considered the argument that the English action *in rem* was not "brought" by the plaintiffs *after* the judgment in Cochin but was "continued". His Lordship held[64]:

> where proceedings are continued one can quite naturally describe those proceedings as brought. That construction also gives a sensible and purposive meaning to section 34.

This conclusion has been criticised. Not only does it cause confusion[65], but it[66]:

> has the effect of turning section 34 into a mechanism for controlling *lis alibi pendens*, and not simply for enhancing the effect in England of a foreign judgment.

Indeed, Briggs suggests that section 34 ought to have been limited so that the date of institution of proceedings be used to ask whether there had been a judgment rendered by a foreign court that is capable of preclusive effect according to section 34. Only at that point in time are the limits of this reassertion/former recovery plea clearly to be found[67].

But there is merit, also, in that view which regards the first *res judicata* in time as conclusive of any unresolved *lis alibi pendens* contest[68]. That is, a *res judicata* should immediately be capable of founding a preclusive plea, including a plea of further recovery, irrespective of any *lis* still pending, including a *lis* commenced earlier in time. If the parties have submitted the same litigation to a foreign court *and* an English court, and one of these proceedings is concluded by a final and conclusive judicial decision, it is reasonable that this decision should take immediate preclusive effect if it can as between

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which is a prelude to enforcement in any case - it will *not* preclude reassertion of the same cause of action: see Chapter Two, Part Two.

63 [1998] AC 878

64 *ibid*, 912

65 Eg. suppose foreign proceedings brought after English proceedings come to judgment more quickly (not unlikely if the foreign court gives summary judgment or judgment in default). Will this mean the English proceedings are to be aborted, on the ground that they may not be "continued" in the face of the foreign judgment? Similarly, if the English judgment is rendered first but is under appeal when the foreign judgment is rendered, would that stymie the English action on the ground that it may not be continued?

66 Briggs, A. "Foreign judgments and *res judicata*" (1997) 68 BYBIL 355, 356

67 *ibid* 357: "Even if the English approach to finality in litigation is desirable in principle, it is nevertheless only an English approach. Caution, rather than zeal, should accompany its intrusion into the custom and practice of litigation which began in foreign courts".

68 But query how a *lis alibi pendens* rule can be fashioned out of section 34, given that *lis alibi pendens* prevents concurrent actions, neither of which has ended in judgment, whilst section 34 requires a *res judicata* and not merely a *lis alibi pendens* for its operation: see *The Abidin Daver* [1984] 1 AC 398, 423 (Lord Brandon of Oakbrook).

those parties as and when rendered, and irrespective of the litigation still pending[69]. Certainly if there are conflicting foreign judgments, each pronounced by a court of competent jurisdiction, the earlier judgment is recognised and given effect to the exclusion of the latter judgment[70]. The contest between a foreign *res judicata* and an English *lis pendens* (or *vice-versa*) should be resolved likewise. This, at least, is how the problem is resolved in the domestic law where the plea is estoppel *per rem judicatam*[71].

4. Summary of requirements for the plea of contradiction or reassertion

So far we have noted important differences between cause of action estoppel and the statutory plea of former recovery. However, the fact that both pleas generate preclusive effects where the foreign judgment has rendered a cause of action *res judicata* means these two pleas share the most important requirements in common. Thus, in each case, the preclusive effect is secured if the following requirements are met:

(a) the foreign judgment must be verified as a *res judicata* according to the common law rules of recognition;

(b) the cause of action advanced in the subsequent (F2) proceedings in England must be the same as that adjudicated in the foreign (F1) proceedings;

(c) the parties to the F2 proceedings must be the same as those who were party or otherwise privy to the F1 proceedings.

In the remaining Parts of this Chapter we will consider these requirements in the context of cause of action preclusion generally. However, because these requirements also provide the foundation for issue estoppel and abuse of process, the ensuing discussion will *also* be relevant to the discussion in Chapters Three and Four.

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[69] Any concern that this unbridles the race to judgment should be used to focus consideration upon the suggestion advanced below that a foreign judgment should only be recognised as a *res judicata* for preclusive purposes if it emanates from a forum that was the most appropriate for the hearing of the dispute: see fn115.

[70] *Showlag v Mansour* [1994] 2 All ER 129

[71] *Morrison Rose & Partners v Hillman* [1961] 2 QB 266. Prior to this judgment a plea of *res judicata* could not be supported unless the earlier judgment had been given before the commencement of proceedings in the second action: see *The Delta* (1876) PD 393; *Houstoun v Marquis of Sligo* (1885) 29 Ch D 448.

PART 2 - VERIFYING THE STATUS OF THE FOREIGN JUDGMENT AS A RES JUDICATA*: RECOGNITION ACCORDING TO THE COMMON LAW RULES OR RELATED STATUTORY SCHEMES*

1. Recognition at common law

In the previous Part we introduced the *res judicata* as a final and conclusive judicial decision on the merits of a dispute, where that adjudication is by a judicial tribunal that has competent jurisdiction over the cause and the parties. We also saw that establishing the *res judicata* status of a *foreign* judgment is essential if it is sought to preclude contradiction or reassertion of the same cause of action in subsequent proceedings in England[72]. However, in all cases, the *res judicata* status of a foreign decision in England presupposes that the judgment has been recognised (or registered[73]). And if recognition entails according conclusive effect to a foreign judgment *without* the recognising court investigating the merits of the judgment, then recognition must mean respecting the foreign judgment as a *res judicata.*

At common law, verifying the status of a foreign judgment as a *res judicata* is accomplished by recognising the judgment according to the same criteria that define a *res judicata* in English domestic law[74]. Certainly a close similarity is apparent when we compare the *res judicata* criteria with the requirements that determine whether a foreign judgment can be recognised for preclusive purposes at common law:

(a) the foreign court must possess jurisdictional competence in the international sense over the action *in personam* or the action *in rem*; and

(b) the judicial decision must be final and conclusive, having determined the dispute on the merits.

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[72] SBTH, p36: "Any foreign decision, if it is to have the same effect by way of estoppel as an English decision, must possess the same characteristics. Whenever any of the required elements has been wanting, the foreign decision has been held inefficacious for purposes of *res judicata*"; see, for example: *Price v Dewhurst* (1835) 4 My&Cr 76; *Fracis, Times & Co v Carr* (1900) 82 LT 698, 701-702; *Carl Zeiss (No 2)* [1967] 1 AC 853.

[73] Ie. under the 1920 or the 1933 Act.

[74] In this way the common law recognition scheme treats foreign judgments as conclusive as English ones: see *Tarleton v Tarleton* (1815) 4 M&S 20; *Martin v Nicolls* (1830) 3 Sim 458; *Bowles v Orr* (1835) 1 Y&C Ex 464; *Bank of Australasia v Nias* (1851) 16 QB 717; *Reimers v Druce* (1857) 26 LJ Ch 196; *Godard v Gray* (1870) LR 6 QB 139, 150; *Ellis v M'Henry* (1871) LR 6 CP 228, 238; *Grant v Easton* (1883) 13 QBD 302; *Pemberton v Hughes* [1899] 1 Ch 781, 793-794; *Carl Zeiss (No 2)* [1967] 1 AC 853, 917-918. The statutory registration schemes mirror the common law scheme in treating foreign judgments, once registered, as English judgments. However, by subjecting the foreign judgment, at a distinct recognition stage, to a set of criteria intended to accord the judgment legal effect, the common law and related schemes differ from the approach adopted by the Brussels and Lugano Conventions, which avoid a criterion-laden recognition stage and thus place less emphasis on the status of the judgment as a *res judicata*: see Chapter Five.

However, in order to conclude that recognition at common law means respecting the foreign judgment as a *res judicata*, we must consider these two requirements in further detail.

(a) "Jurisdiction" as understood for *res judicata* and for recognition purposes

Under the process of recognition at common law, jurisdictional competence is reviewed *solely* by reference to the English private international law notion of "jurisdiction in the international sense"[75]. That is, the English court decides whether the foreign court was competent; and once it is established that the foreign court possessed jurisdiction in the international sense, the judgment will not be denied recognition even where the foreign court made an error of fact or law[76].

However, given that a *res judicata* must emanate from a court that possessed internal jurisdiction over the parties and the subject matter[77], the question arises: Does jurisdiction in the international sense satisfy the *res judicata* requirement as to jurisdiction, or must there be a further review of jurisdiction post-recognition so that the judgment can qualify as a *res judicata*?[78] This question has arisen in a number of recognition cases where the foreign court lacked internal competence. Thus, in *Papadopoulos v Papadopoulos*[79] a Cypriot decree of nullity for which recognition was sought in England was held ineffective because the law of Cyprus did not empower the court to declare a marriage null and void. Likewise in *Adams v Adams*[80], recognition of a divorce decree was refused because it had not been pronounced by a competent and properly constituted judicial tribunal. And in *Tracomin SA v Sudan Oil Seeds Co Ltd*[81] the court thought it was required to verify the internal jurisdiction of the foreign court before according preclusive effect to the foreign judgment[82]:

> The doctrine [of *res judicata*] does not apply unless the Swiss courts had jurisdiction to determine the issue, *both by their own law and in the eyes of English law*. The two aspects of this question are not, of course, coextensive. [emphasis added]

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[75] *Adams v Cape Industries plc* [1990] Ch 433, 550. The essential questions being: Did the foreign court in an action *in personam* have jurisdiction over the defendant? *or* Was the *situs* of the persons, things or property in an action *in rem* within the jurisdiction of the foreign court?

[76] *Godard v Gray* (1870) LR 6 QB 288

[77] *Eastwood and Holt v Studer* (1926) 31 Com Cas 251; SBTH pp59-60

[78] Cf. section 9(2)(a), 1920 Act, which denies registration of a judgment if the original court acted without jurisdiction. Nonetheless, Halsbury cites as authority for jurisdictional competence for *res judicata* purposes the same cases which support the requirement of jurisdiction in the international sense: Halsbury's Laws of England, volume 8(1), 4th ed (reissue), Butterworths: London, 1996, §1007, p729.

[79] [1930] P 55

[80] [1971] P 188

[81] [1983] 1 All ER 404

[82] *ibid*, 410 (Staughton J)

Nonetheless, the suggestion in these cases that a foreign judgment should *also* be valid according to the internal law of the court which delivered it, in order to have preclusive effect, contradicts the decision in *Pemberton v Hughes*[83] . This reinforces the principle that a foreign judgment must be treated *and acted upon* as final, notwithstanding any irregularity of procedure under the law of the foreign court, provided the foreign court had jurisdiction *in the international sense* and the proceedings did not offend against English views of substantial justice.

In that case[84], Lindley LJ was clearly aware of the paradox in holding that a foreign judgment should be regarded with more respect in England than in the country in which it was pronounced, yet his Lordship insisted[85]:

> this paradox disappears when the principles on which English Courts act in regarding or disregarding foreign judgments are borne in mind. If a judgment is pronounced by a foreign Court over persons within its jurisdiction and in a matter with which it is competent to deal, English Courts never investigate the propriety of the proceedings in the foreign Court, unless they offend against English views of substantial justice. Where no substantial justice, according to English notions, is offended, all that English Courts look to is the finality of the judgment and the jurisdiction of the Court, in this sense and to this extent - namely, *its competence to entertain the sort of case which it did deal with, and its competence to require the defendant to appear before it.* If the Court had jurisdiction in this sense and to this extent, the Courts of this country never inquire whether the jurisdiction has been properly or improperly exercised, provided always that no substantial injustice, according to English notions, has been committed.

Likewise in *Adams v Cape Industries plc*[86] the Court of Appeal accepted that no specific assertion need be made that the foreign court was competent in terms of the foreign law, because whether the foreign court was competent thereby was irrelevant[87]. However, the plaintiff seeking to enforce a foreign judgment has the legal burden to prove that the foreign court was competent in the sense recognised by English law to assume jurisdiction, even though the evidentiary burden might shift at trial.

We now consider the English private international law rules governing jurisdiction for recognition/*res judicata* purposes.

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[83] [1899] 1 Ch 781

[84] A decree for divorce had been pronounced by a proper court in Florida where the parties to the action were domiciled, but it was alleged that service of initiating process had been irregular. The irregularity was ignored by the English court in an action commenced by the former wife in which she sought to rely on the validity of the Florida divorce decree.

[85] *ibid*, 791

[86] [1990] Ch 433, 450

[87] It would seem desirable to encourage a defendant to question whether the foreign court is mistaken as to its own jurisdiction and law in the courts of the country where the judgment was obtained. See the discussion about "legitimate expectations": *Adams v Cape Industries, ibid*, 781-783.

(i) The rules for jurisdiction in rem *in the international sense*

Since it is rare for foreign judgments *in rem* to be recognised *other than* for world-wide preclusive effect[88], the *in rem* rules are well attuned for *res judicata* purposes.

The general rule is that the *situs* of property within the foreign jurisdiction establishes the jurisdictional competence of the foreign court at common law[89]. Thus a foreign judgment that adjudicates in respect of immovable property situated beyond the territory of the foreign state will not be recognised[90]; although the *situs* rule is not so exclusive where the judgment relates to movables[91].

Decrees relating to the status of persons also operate *in rem*[92] but the jurisdictional rules relating to foreign judgments of this nature are complex. For example, the validity of a foreign[93] divorce, nullity or legal separation decree depends on whether such a decree has been obtained by means of judicial or other proceedings[94], and is also conditioned by certain specified grounds on which recognition may be refused[95]. Thus the jurisdictional rule enacted for these types of *in rem* decrees requires *inter alia* that: the divorce, nullity or legal separation be effective under the law of the country in which it was obtained[96]; that all parts of the proceedings have taken place within that country[97]; and that either party to the marriage was habitually resident[98] in the country in which the divorce,

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[88] It is rare for a foreign judgment *in rem* to require enforcement, as opposed to recognition, in England: see Dicey and Morris, pp495-496.

[89] 1933 Act, sections 4(2)(b) and 4(3)(a).

[90] *Boyse v Colclough* (1854) 1 K&J 124; *Re Hoyles* [1911] 1 Ch 179, 185-186; *Nelson v Bridport* (1846) 8 Beav 547; *Re Piercy* [1895] 1 Ch 83; *Re Stirling* [1908] 2 Ch 344; *Re Ross* [1930] 1 Ch 377; *Re Duke of Wellington* [1948] Ch 118. *Duke v Andler* [1932] 4 DLR 529 is Commonwealth authority that the forum will not allow enforcement, whether directly or indirectly, of a foreign judgment affecting land situate locally. See also *Raeburn v Raeburn* High Court of Antigua and Barbuda, 20 March 1997 (unreported) applying *Duke v Andler* and refusing recognition to an *English in personam* judgment purporting to affect title to land situate in Antigua: see Anderson, Winston "Foreign orders and local land: the Caribbean gets its own version of *Duke v Andler*" (1999) 48 ICLQ 167, 175

[91] Eg. a foreign court has jurisdiction in the international sense to determine the succession to all movables of a testator or intestate dying domiciled in such country wherever locally situate: *Re Aganoor's Trusts* (1895) 64 LJ Ch 521

[92] *Salvesen v Administrator of Austrian Property* [1927] AC 641

[93] Ie. obtained outside British Islands: *Family Law Act 1986*, section 45.

[94] *Family Law Act 1986*, section 54(1). More limited grounds for recognition apply to divorces, annulments and separations obtained otherwise than by "proceedings". The precise scope of "proceedings" in this context remains unclear: see Dicey and Morris, pp742-744.

[95] *Family Law Act 1986*, section 51

[96] *Family Law Act 1986*, section 46(1)(a)

[97] *R v Secretary of State for the Home Department, ex p Fatima* [1986] AC 527, decided under the *Recognition of Divorces and Legal Separations Act 1971* (repealed); *Berkovits v Grinberg (A-G intervening)* [1995] Fam 142

[98] *Kapur v Kapur* [1984] FLR 920

annulment or legal separation was obtained, or was domiciled in that country[99], or was a national of that country[100] as at the date of the commencement of the proceedings[101]. A foreign decree of presumption of death and dissolution of marriage will be recognised[102] in England if the petitioner in the foreign court was domiciled in that foreign country on the date when the proceedings were begun, or was habitually resident there throughout the period of one year ending with that date[103].

(ii) The rules for jurisdiction in personam *in the international sense*

Like the rules *in rem*, the jurisdictional rules *in personam* are also well known. In essence, these rules are premised *either* upon the presence of the defendant in the foreign jurisdiction *or* submission by the defendant[104].

Presence[105] of a defendant within the jurisdictional territory of the foreign court requires actual - if fleeting[106] - presence within the foreign state so as to make service effective, commencement of proceedings being the date of service of process on the defendant rather than the date when the process issued[107]. If the defendant is a company, its presence or residence has to be assessed in a manner which takes account of its being a legal and, therefore, imaginary person and not a natural one. Thus the courts have held a corporation is present or resident when it carries on business at a definite and reasonably permanent place[108].

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[99] A party is treated as domiciled in a country for this purpose if domiciled there either according to the law of that country or according to the law of England and Wales: *Family Law Act 1986*, section 46(5).

[100] *Family Law Act 1986,* section 46(1)(b); section 49 deals with the application of these rules in federal or composite states.

[101] *Family Law Act 1986,* section 46(3)(a). Where in the case of an overseas annulment, the proceedings were commenced after the death of either party to the marriage, the relevant date in relation to that party is the date of death: section 46(4).

[102] The assumption is that, to be recognised in England, such a decree must have (or have had) consequential effects in the law of the foreign country where the decree was granted: *Re Schulhof's Goods, Re Wolf's Goods* [1948] P 66; *Re Spenceley's Goods* [1892] P 255; *Re Dowd's Goods* [1948] P 256

[103] *Szemik v Gryla (otherwise Szemik) and Gryla* (1965) 109 Sol Jo 175

[104] The bases of jurisdiction elaborated in *Rousillon v Rousillon* (1880) 14 ChD 351, 371 and *Emanuel v Symon* [1908] 1 KB 302, 309 can be reduced to presence *or* submission; it is no longer contended that nationality will suffice: *Blohn v Desser* [1962] 2 QB 116; *Rossano v Manufacturer Life Insurance Co Ltd* [1963] 2 QB 552; *Vogel v R and A Kohnstamm Ltd* [1973] QB 133; cf. *Indyka v Indyka* [1969] 1 AC 33

[105] Most writers favour residence, but in *Adams v Cape Industries plc* [1990] Ch 433 the court was of the view, without deciding the point, that presence was the test.

[106] *Carrick v Hancock* (1895) 12 TLR 59, 60

[107] *Adams v. Cape Industries plc* [1990] Ch 433, 518

[108] *Littauer Glove Corporation v Millington* (1928) 44 TLR 746; *Sfeir v National Insurance Co of New Zealand Ltd* [1960] 1 Ll R 330 (a case under the 1920 Act); *Vogel v RA Kohnstamm Ltd* [1973] 1 QB 133; *Adams v Cape Industries plc* [1990] Ch 433; cf. 1920 Act, section 9(2)(b), and 1933 Act, section 4(2)(a)(iv) (the 1933 Act is more stringent in that it requires *principal* place of business and not merely *any* place of business in the foreign country)

The rules governing submission encompass three categories. If the defendant was a counter-claimant in the foreign proceedings and judgment was given against him he is taken to have submitted in respect of that claim[109]. Similarly, a defendant will have submitted by virtue of an express or implied agreement to submit[110]. And, if a defendant has made a voluntary appearance in the proceedings and has argued the merits of the case, he thereby submits to the jurisdiction[111], although an appearance solely to contest the jurisdiction of the court[112], to seek a stay on jurisdictional grounds[113], or to protect property threatened with seizure[114] will not amount to submission.

However, the possibility of a more radical approach to these jurisdictional rules - and one which certainly departs from the orthodox rules thus far discussed - is suggested by *forum non conveniens* principles. Thus it is suggested - albeit cautiously - that the *res judicata* requirement as to jurisdiction should also consider whether the plaintiff commenced proceedings in the most appropriate forum. Indeed, since we now claim and retain jurisdiction on *forum non conveniens* grounds[115]:

> we should in like manner adapt our view of what constitutes jurisdiction "in the international sense" when we are called upon to recognise a foreign judgment. That is, we should recognise judgments of a forum to whose jurisdiction the defendant submitted, or which was in any event the natural forum for the action to be prosecuted in.

Thus, whilst the availability, nature and extent of the preclusive pleas may be matters for English law as the *lex fori*[116], it is suggested a foreign judgment should not be denied preclusive effect in England if it has been rendered by a court that was the natural forum for the resolution of the dispute or, indeed, was not a court which was *forum non conveniens*. Moreover, by incorporating a principle within the common law recognition/*res judicata* rules that mirrors the doctrine of *forum non conveniens*, an English court could better orient itself so as to consider the preclusive laws of the natural forum and thus assess whether to apply the preclusive laws of the adjudicating court[117].

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[109] *Schibsby v Westenholz* (1870) LR 6 QB 155, 161; *General Steam Navigation Co v Guillou* (1843) 11 M & W 877, 894; *Emanuel v Symon* [1908] 1 KB 302, 309; cf. *Novelli v Rossi* (1831) 2 B & Ad 757; 1933 Act, section 4(2)(a)(ii)

[110] *SA Consortium General Textiles v Sun & Sand Agencies Ltd* [1978] QB 279; *Copin v Adamson* (1874) LR 9 Ex 345; *Emanuel v Symon* [1908] 1 KB 302 cf. *Blohn v Desser* [1962] 2 QB 116; *Vogel v Kohnstamm* [1973] QB 133; *Akai v PIC* (1998) 2 Lloyds Rep 907. See, also, section 4(2)(a)(iii), 1933 Act.

[111] *Boissière v Brockner* (1889) 6 TLR 85; *SA Consortium General Textiles v Sun & Sand Agencies Ltd* [1978] QB 279; *Adams v Cape Industries plc* [1990] Ch 433, 461; *Murthy v Sivasjothi* [1999] 1 WLR 467

[112] Section 33(1)(a), 1982 Act; cf. *Harris v Taylor* [1914] 3 KB 145

[113] Section 33(1)(b), 1982 Act

[114] Section 33(1)(c), 1982 Act

[115] Briggs, A. "Which foreign judgments should we recognise today?" (1987) 36 ICLQ 240

[116] See fn121

[117] Eg. *Henderson* abuse of process would make better sense if conditioned by natural forum analysis because the plea involves assessing whether the subject matter in the subsequent proceedings in England properly belonged to the "subject of litigation and adjudication" before the foreign court: see Chapter Four.

In this way, too, the common law recognition process might avoid one of the charges that can currently be made against it, namely: that recognition at common law according to its *a priori* criteria predestines English law as the law governing the availability, nature and extent of the applicable preclusive pleas. In other words, given the stated aim of common law recognition[118], the English court is disposed to confer the same preclusive effects upon the foreign judgment as it confers upon its own *res judicata* - that is, equalise the preclusive effects - rather than extend to the foreign judgment in England the preclusive effects it has according to the law of the *foreign* court[119].

This may mean, for example, that issue estoppel is not held to arise from a foreign judgment according to English law because there was not strict mutuality of parties as required by English law, even though the preclusive laws of the foreign court might not insist on strict mutuality but would allow issue preclusion against a party if that party had previously suffered judgment against him on that issue[120].

Indeed, a doctrine of extension of effects would permit the English court to allow preclusion according to the foreign law even though a like English judgment would not have that effect; and the principle of *forum non conveniens* provides a useful mechanism, at any rate, to consider all factors appropriate to the resolution of the dispute in the foreign forum, including that court's preclusive laws. Nonetheless, the doctrine of equalisation of effects remains justified in England by the view that the rules of *res judicata* are procedural and evidentiary and hence part of the law of the recognising court that governs as the *lex fori*[121].

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However, there is another, more basic charge that can be made against the common law recognition scheme: Does it consider whether the foreign judgment might be *res judicata* according to the law of the foreign court? We can allay this concern by considering the requirements that the foreign *res judicata* must be "final and conclusive" and "on the merits".

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[118] See fn74.

[119] The "doctrine of extension of effects" (which necessitates the proof and application in England of the preclusive laws of the foreign court) and the "doctrine of equalisation of effects" (which involves the English court according the foreign judgment the same preclusive effects an English court would accord its own judgments) will be encountered again, especially in Chapter Five.

[120] See Chapter Two, Part Four.

[121] *Low v Bouverie* [1891] 3 Ch 82, 105 (Bowen LJ); *Carl Zeiss (No 2)* [1967] 1 AC 853, 919 (Lord Reid); 933 (Lord Guest); *Vervaeke v Smith* [1983] 1 AC 145, 161-162 (Lord Simon of Glaisdale); cf. *Mills v Cooper* [1967] 2 QB 459, 468 (Diplock LJ). Arguably the general *res judicata* principle can be "better described as a rule of substantive law than as a rule of evidence, but why describe it as either?": see Cross and Tapper on Evidence, 9th ed, Butterworths: London, 1999, p108. However, in *The Indian Grace* [1993] AC 410, 422 it was said "the principle of estoppel *per rem judicatam* is not more than a rule of evidence" (Lord Goff of Chieveley), and this was in response to a submission that the *Henderson* rule ought only apply if it could be shown that preclusion of this nature existed according to the law of the Cochin court.

(b) "Final and conclusive" and "on the merits" as understood for *res judicata* and for recognition purposes at common law

(i) "Final and conclusive"

It is not difficult to show that both the recognition process and the *res judicata* criteria contemplate the same attribute when insisting that a foreign judgment be "final and conclusive".

In the general context of foreign judgment recognition, "final and conclusive" expresses the condition that the subject matter has been raised and controverted before the earlier tribunal and cannot be re-opened in the same court by further proceedings[122]. In some cases, whether a defendant has exhausted all available defences is a test of this[123]. In other cases, absence of finality is attested by the interim[124] or variable[125] nature of the judgment. In yet other cases, if the decision is a money judgment relied upon as the foundation of an action on the judgment for the purposes of enforcement, then a stricter (or more specific) test of finality applies[126]: the judgment must finally declare liability for an ascertained amount so that nothing has to be determined to fix the amount recoverable and render the judgment effective and capable of execution[127]. In any case, however, the mere fact that a foreign judgment can be made the subject of appeal to a higher court has

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[122] Foreign consent judgments are final and conclusive: *Cohen v Jonesco* [1926] 1 KB 119; and foreign default judgments are, too, even though they can be set aside by the rendering court: *Vanquelin v. Bouard* (1863) 15 CBNS 341; *Boyle v Victoria Yukon Trading Co* (1902) 9 BCR 213; *Re Dooney* [1993] 2 Qd R 362, 365. If the default judgment may be set aside within a certain period, whilever that period has not expired the judgment will not be considered final because it will not be final in the rendering court: *Jeannot v Fuerst* (1909) 100 LT 816. Similarly, if the judgment can only be set aside upon cause being shown by the defendant, the judgment should be treated as final unless and until this actually occurs: *Re South American and Mexican Co, ex parte Bank of England* [1895] 1 Ch 37; *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993, 1010

[123] *Blohn v. Desser* [1962] 2 QB 116

[124] Eg. CPR 25 for rules as to interim injunctions, interim declarations, search and seizure orders, and freezing injunctions. CPR 25.2 suggests an interim remedy operates in the period between commencement of proceedings and final judgment, taking effect for the duration of that period and no longer. Such an order is unlikely to be final and conclusive for *res judicata* purposes: see *Carl Zeiss Stiftung v Rayner & Keeler (No 3)* [1970] 1 Ch 506, 539 (Buckley J): "Many interlocutory orders, [eg] an interim injunction limited to take effect only until judgment or further order, clearly involve no final decision of any issue between the parties either expressly or ... by implication".

[125] Eg. interlocutory orders for payment of money into court: *Paul v. Roy* (1852) 15 Beav 433; orders for payment of costs to one party on the undertaking by that party to repay them in the event of failing upon appeal: *Patrick v Shedden* (1853) 2 E&B 14; maintenance/similar orders for periodic payments: *Harrop v Harrop* [1920] 3 KB 386; *Re Macartney, Macfarlane v Macartney* [1921] 1 Ch 522. If the order, though variable in respect of future payments, is invariable as to arrears then an action may be brought for recovery of arrears: *Beatty v Beatty* [1924] 1 KB 807. If the court retains the power to vary only the damages amount, the judgment is final as to liability, but not as to quantum.

[126] *Sadler v Robins* (1808) 1 Camp 253; *Hall v Odber* (1809) 11 East 118, 123; *Henley v Soper* (1828) 8 B&C 16; *Henderson v Henderson* (1844) 6 QB 288; *Hutchinson v Gillespie* (1856) 11 Exch 798, 815-816; *Beatty v Beatty* [1924] 1 KB 807

[127] However, the calculation of post-judgment interest does not require *judicial* determination: *Beatty v Beatty* [1924] 1 KB 807. Interim payments are also enforceable per section 1(2), 1933 Act.

no bearing on whether it is final and conclusive[128]. Moreover, all of these are variations upon the theme expressed in the leading authority as to finality: *Nouvion v Freeman*[129].

In that case, the vendor of land in Seville brought an action in Spain against the purchaser, obtaining a "remate" judgment for a large sum of money. Spanish law then envisaged two types of proceedings: executive (or summary) proceedings, and plenary (or ordinary) proceedings. Here the proceedings had been executive, in which the judge - upon proof of a *prima facie* case and without notice to the defendant - had made an order for the attachment of the defendant's property. However, once notice of the attachment was given, the defences open to the defendant in the executive action were limited, and in particular it was no defence to deny the validity of the underlying transaction. Only in subsequent plenary proceedings *before the same judge* could all defences known to the law be raised.

The House of Lords held the remate judgment was not final and conclusive, since it could be avoided in subsequent "plenary" proceedings *before the same adjudicating court.* What is required is "a decision which exhausts the merits of the controversy between the parties"[130] and completely determines their rights and liabilities. Lord Herschell observed[131]:

> it must be shown that, *in the court by which it was pronounced,* [the judgment] conclusively, finally, and forever established the existence of the debt of which it is sought to be made conclusive evidence in this country, *so as to make it res judicata between the parties.* If it is not conclusive in the same Court which pronounced it ... then I do not think that a judgment which is of that character can be regarded as finally and conclusively evidencing the debt. [emphasis added]

This interpretation was endorsed by Lord Reid in *Carl Zeiss (No 2)*[132], who was not surprised the House of Lords in *Nouvion v Freeman* unanimously refused to recognise the judgment in England because - simply - the judgment "was not *res judicata* in Spain"[133].

However, the coincidence of these two cases is significant because in *Carl Zeiss (No 2)* their Lordships were considering the "final and conclusive" requirement *for the purposes of res judicata.* By adopting the *Nouvion* test, they made it clear that the process of recognition *also* fulfils the *res judicata* finality requirement for foreign judgments.

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[128] If the foreign decision is appealable, the English Court may enforce it subject to conditions that save the interests of those appealing: *Scott v Pilkington* (1862) 2 B&S 11; *Nouvion v Freeman* (1889) 15 App Cas 1, 13; *The Varna (No 2)* [1994] 2 Lloyd's Rep 41; *Ascot Commodities NV v Northern Pacific Shipping, The Irini A (No 2)* [1999] 1 Lloyd's Rep 189; *Colt Industries Inc v Sarlie (No 2)* [1966] 1 WLR 1287, 1293; sections 1(3) and 5(1), 1933 Act; cf. Article 30, Brussels and Lugano Conventions. Note under section9(2)(e), 1920 Act a judgment shall not be registered if an appeal is pending or intended to be brought.

[129] (1889) 15 AC 1

[130] *ibid,* 12 (Lord Watson)

[131] *ibid,* 9

[132] [1967] 1 AC 853

[133] *ibid,* 917

More importantly, their Lordships made it clear the finality criterion is assessed by reference to the *foreign* law and not the English law, as it would "verge on absurdity"[134], "be unacceptable"[135], or "be illogical"[136] to accord a foreign judgment a more conclusive force in England than it has in the original country. Adopting the foreign law to govern the finality of the judgment, rather than leaving this to English law as the *lex fori*, was also an acknowledgement that the *lex fori* "ought to be developed in a manner consistent with good sense"[137]. To this, Lord Reid added[138]:

> we should have to be satisfied [for *res judicata* purposes] that the issues in question cannot be relitigated in the foreign country. In other words, it would have to be proved in this case that the courts of the German Federal Republic would not allow the re-opening in any new case between the same parties of the issues decided by the [German] Supreme Court in 1960, which are now said to found an estoppel

Accordingly, a foreign judgment will not operate as a *res judicata* in England *unless* it is a *res judicata* before the foreign court according to the foreign law. It is for the party setting up the foreign decision to prove this[139], and they cannot rely on the presumption that foreign law is the same as English law because there is no English law as to the finality of a foreign judgment in its country of origin[140].

Thus, where cause of action preclusion is sought, finality is tested by asking: If another action were commenced between the same parties in the country from whence the foreign judgment, would the party bringing that action be precluded by reason of the previous judgment?

(ii) "On the merits"

A foreign court must have rendered the judgment "on the merits" if it is to have preclusive effect in England[141]. The content of the requirement has been defined (both negatively and positively) by Lord Brandon of Oakbrook in *The Sennar (No 2)*[142]:

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134 *ibid*, 919 (Lord Reid)

135 *ibid*, 970 (Lord Wilberforce)

136 *ibid*, 936 (Lord Guest)

137 *ibid*

138 *ibid*, 919

139 *Carl Zeiss (No 2)* [1967] 1 AC 853, 918 (Lord Reid); 970 (Lord Wilberforce)

140 In practice, finality may be established by producing an instrument final on its face: *Nouvion v Freeman* (1889) 15 AC 1; *Carl Zeiss (No 2)* [1967] 1 AC 853. It is then for the opponent, if he likes, to disprove finality under the foreign law.

141 SBTH, p84. 'On the merits' has a different meaning in the context of an appearance before a foreign court to protest jurisdiction: see section 33, 1982 Act; cf. *Henry v Geopresco International Ltd* [1976] QB 726, 749 (Roskill LJ)

142 [1985] 1 WLR 490, 499; cf. 494 (Lord Denning): "What [on the merits] means in the context of judgments delivered by courts of justice is that the court has held that it has jurisdiction to *adjudicate* upon an issue raised in the cause of action to which the particular set of facts give rise". Note the importance of *adjudication*,

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

The formulation is relatively straightforward where the foreign decision has examined a cause of action on the merits. Indeed, in proceedings primarily for enforcement (the foreign judgment having necessarily determined, if not merged, the cause of action) the merits requirement will be satisfied if the foreign judgment has ordered the payment of a definite and ascertained sum of money[143].

Similarly, in cases of recognition for preclusive purposes of a judgment upon a cause of action, *Carl Zeiss (No 2)*[144] makes it clear that the merits of a cause of action, as stated in the statement of claim, will be finally disposed if and when that cause of action cannot be raised again in the foreign forum.

Thus in cases involving cause of action preclusion, what is required is more than a procedural determination. The judgment must determine the existence (or non-existence) of the cause of action - that is, the existence (or non-existence) of the plaintiff's right - rather than simply bar the remedy. Moreover, whilst the law does not make this clear, it seems obvious that an English court will be guided by whether the foreign court would consider that its own decision was "on the merits"[145]. But this is *not* the finality requirement[146]; and thus whether a foreign judgment is "on the merits" is to be assessed by the English court according to an objective and qualitative assessment of the foreign judgment by reference to Lord Brandon's formulation in *The Sennar (No 2)*[147].

In this regard it should be noted that the following English authorities exemplify or qualify the "on the merits" requirement: dismissals for want of prosecution where based on procedural defaults are not decisions "on the merits"[148]; likewise a dismissal for failure to comply with an order for discovery is not a decision on the merits[149]; nor is an order

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as opposed to dismissing the matter procedurally.

[143] *Sadler v Robins* (1808) 1 Camp 253

[144] [1967] 1 AC 853, 919 (Lord Reid); 969-970 (Lord Wilberforce)

[145] In *Black-Clawson International Ltd v Papierwerke Waldhof* [1975] AC 591, expert evidence indicated the German decision dismissing the suit did not affect the existence of the plaintiff's right. Likewise, in *The Sennar (No 2)*, Lord Brandon concluded, by reference to evidence of Dutch law, that "the decision of the Dutch Court of Appeal in the present case was a decision on the merits for the purposes of the application of ... issue estoppel": *ibid*, 499.

[146] SBTH, p84: "The requirement that a judicial decision must be 'on the merits' ... is a separate requirement [that] has commonly arisen in relation to the recognition of foreign judgments"

[147] See *Ascot Commodities NV v Northern Pacific Shipping, The Irini A (No 2)* [1999] 1 Lloyd's Rep 189, 193-194: "The [Lomé] Court obviously *did* go through the process envisaged by Lord Brandon [in *The Sennar (No 2)*]. The fact that it may not have done so in the way an English Court would have done, still less that an English Court might have reached a different conclusion, is not to the point".

[148] *Pople v Evans* [1969] 2 Ch 255; *Hart v Hall & Pickles Ltd* [1969] 1 QB 405; *Birkett v James* [1978] AC 297

[149] *Baines v State Bank* [1985] 2 NSWLR 729

for summary dismissal where the statement of claim failed to disclose a cause of action[150]. Allowance must also be made for statutes which characterise legal questions as substantive rather than procedural[151]. Similarly, whilst the issue of jurisdiction can be *res judicata* for issue estoppel purposes by reason of being an issue determined "on the merits"[152], there is authority to suggest that dismissals for want of jurisdiction are not themselves decisions on the *cause of action* thus dismissed[153]. The Privy Council has held, albeit in the context of an Indian statute establishing a foreign judgment recognition and enforcement scheme, that a default judgment for the plaintiff was not a decision on the merits[154], but this is of doubtful authority in the light of subsequent decisions[155].

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We now consider two statutory schemes for the *registration* of foreign judgments. Although there are important differences, in substance the criteria in both schemes are broadly similar to the common law recognition rules, and hence the common law *res judicata* rules. The conclusions, therefore, are largely the same: the process of recognition (or registration, as it is under the statutory schemes) determines the status of the foreign judgment as a *res judicata* and, once it is registered, enables preclusive effect to be accorded *as if it were an English judgment*[156].

2. Recognition by registration under the common law-based statutory schemes

(a) Registration of judgments under the *Administration of Justice Act 1920*

The 1920 Act establishes a scheme for the enforcement in the United Kingdom of certain judgments[157] from colonial and Commonwealth countries to which Part II of the Act extends[158]. Upon application by the foreign judgment creditor[159], the court[160] may order

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150 *Rogers v Legal Services Commission* (1995) 64 SASR 572

151 In *Black-Clawson International Ltd v Papierwerke Waldhof* [1975] AC 591, the House of Lords held that a German judgment upholding a limitation defence in an action on bills of exchange was not final on the merits and hence proceedings in England, where a longer limitation period was available, were not barred. The House followed *Harris v Quine* (1869) LR 4 QB 653, since overturned by *Foreign Limitation Periods Act 1984*, section 3. This provision treats a foreign limitation period as substantive (and not procedural) matter and hence capable of rendering a judgment conclusive on the merits.

152 *The Sennar (No 2)* [1985] 1 WLR 490

153 *Hines v Birkbeck College (No 2)* [1992] Ch 33

154 *Keymer v P Viswanath Reddi* (1916) LR 44 Ind App 6; *Oppenheim v Haneef* [1922] 1 AC 482

155 *New Brunswick Rail Co Ltd v British and French Trust Corporation Ltd* [1939] AC 1; *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993

156 1920 Act, section 9(3)(a); 1933 Act, section 2(2)

157 Ie. money judgments in civil proceedings, including an arbitral award if enforceable as a judgment in place where made: section 12(1)

158 Section 14(1)

registration if, in its discretion[161], it is "just and convenient that the judgment should be enforced in the United Kingdom"[162].

The court's assessment of what is "just and convenient" is ordained by section 9(2) which broadly, although not precisely, follows the common law[163]. But where the Act does not expressly reproduce the common law rule, it may nevertheless be interpreted in conformity with those rules by virtue of the court's assessment of whether it is "just and convenient" to register the judgment[164]. The requirements at common law that the judgment be final and conclusive and on the merits are an example of this, for the 1920 Act does not expressly reproduce these rules[165], yet the discretion whether to register a judgment will doubtless involve a consideration of these aspects.

However, as noted already, the scheme only provides for the registration *for enforcement* of money judgments. If it is sought to rely upon a judgment *solely* for preclusive purposes, recognition must be sought at common law. There may be some latitude if registration is ordered for enforcement purposes and preclusive effects are thereafter sought, because section 9(3)(a) requires the judgment have the same force and effect as an English judgment. But the common law is clearly not supplanted by this scheme when it is sought to give merely *preclusive* effect to a foreign judgment in subsequent proceedings in England, thus little more needs be said.

(b) Registration of judgments under the *Foreign Judgments (Reciprocal Enforcement) Act 1933*

The 1933 Act provides minimum rules for the registration, in the United Kingdom, of money judgments[166] delivered by recognised[167] courts[168] of those countries[169] to which

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[159] The application must be made within 12 months of judgment, although this may be extended by the court. Registration may be obtained *ex parte*; but notice of registration must be served upon the judgment-debtor: section 9(4)(a), who may then apply to have registration set aside: section 9(4)(b). A judgment-creditor can elect to bring an action at common law on the judgment itself, rather than use the registration mechanism: *Yukon Consolidated Gold Corporation v Clarke* [1938] 2 KB 241, otherwise section 34, 1982 Act applies.

[160] High Court in England, or Court of Session in Scotland

[161] Cf. section 2(1), 1933 Act; Article 26, Brussels and Lugano Conventions

[162] Section 9(1)

[163] Section 9(2)(a) stipulates the judgment shall not be registered if the court acted without jurisdiction; section 9(2)(b) then sets out - more or less exactly - the common law jurisdictional rules and provides that a judgment shall not be registered if these are contravened.

[164] Briggs, A. and Rees, P. Civil Jurisdiction and Judgments, 2nd ed, LLP: London, 1997 (hereafter "Briggs and Rees"), p363

[165] Cf. 1933 Act, which elevates the requirements "final and conclusive" and "on the merits", making them minimum pre-requisites for registration: section 1. Also the 1920 Act stipulates a judgment can not be registered if an appeal is pending or is intended to be brought: section 9(2)(e): see fn128.

[166] Ie. judgments/orders of courts in any civil proceedings, or criminal proceedings where the judgment sum involves compensation or damages: section 11(1). Section 10A extends relevant provisions of the Act to arbitral awards.

Part I of the Act has been extended by an Order in Council. It is similar to the 1920 Act in that both are justified, not by the doctrine of obligation[170], but by the principle of reciprocity. However, it differs from the 1920 Act in two important respects.

Firstly, section 2(1) provides that the court "shall, subject to proof of the prescribed matters and to the other provisions of this Act, order the judgment to be registered". Thus, there is no "just and convenient" discretion similar to section 9(1) of the 1920 Act.

Secondly, whereas the 1920 Act facilitates reciprocal enforcement by registration but not preclusive effects, section 8 of the 1933 Act makes provision (albeit awkwardly) for the preclusive or "general"[171] effect of all judgments, including unenforceable judgments that cannot be registered for enforcement under Part I of the Act. Thus, section 8(1) expresses cause of action estoppel, and section 8(3) issue estoppel[172]. The gist of both provisions is contained in section 8(1):

> Subject to the provisions of this section, a judgment to which Part I of this Act applies or would have applied if a sum of money had been payable thereunder, whether it can be registered or not, and whether, if it can be registered, it is registered or not, shall be recognised in any court in the United Kingdom as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied on by way of defence or counterclaim in any such proceedings.

This tortuous drafting attempts to link recognition for general, or preclusive, purposes to the relevant[173] rules in Part I which underscore registration for enforcement purposes. Accordingly, to verify the *res judicata* status of a judgment requires us to draw on those registration criteria in Part I which reflect the common law rules for recognition/*res judicata*, and interpret them where they might secure "general" preclusive effects as these are known at common law. This implies the common law rules of *res judicata* necessarily emerge as the criteria by which to verify the *res judicata* status of judgments under the Act, unless there are express provisions to the contrary in Part I or provisions that are inapplicable[174]. This, in turn, suggests the 1933 Act (like the 1920 Act) shares the common law objective that recognition/registration is a process that affirms the foreign judgment as *res judicata*, a conclusion reinforced by section 2(2) of the 1933 Act, which

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[167] As specified in the individual treaty: section 1(1). If a judgment is *not* from a recognised court/tribunal then it may be enforced and/or recognised according to the common law rules.

[168] "Court", except in section 10 of the Act, includes a tribunal: section 11(1).

[169] As listed in the Supreme Court Practice, including Commonwealth and non-European countries as well as some European countries (where not superseded by the Brussels or Lugano Convention, Article 55)

[170] Cf. recognition and enforcement at common law, which rest on theories of obligation.

[171] This is the statutory heading given to section 8.

[172] Section 34, 1982 Act applies to judgments to which the 1933 Act applies, but it is not clear whether section 8 extends the abuse of process plea discussed in Chapter Four.

[173] An example of an *irrelevant* criterion in Part I - where the judgment of which preclusive effect only is sought is a non-money judgment - is section 1(2)(b), which provides that "there must be payable under the judgment a sum of money".

[174] See fn173.

stipulates that a foreign judgment once registered shall have the same force and effect as if it had been a judgment of the English court.

Therefore, it is no surprise that the rules of jurisdictional competence under section 4(2) of the Act follow the common law[175], except that residence (or principal place of business for corporate defendants[176]) replaces presence[177]. Similarly, the requirements "final and conclusive" and "on the merits" have parallel provisions, indeed they are the minimum conditions[178] for enforcement by registration[179] and/or for preclusive purposes when read in light of section 8.

As to "finality": section 1(2)[180] requires that the judgment *either* be final and conclusive between the parties, *or* be a judgment that has imposed an enforceable obligation to make interim payments to the judgment creditor. A judgment shall be final and conclusive notwithstanding an appeal, or that an appeal may be pending, in the courts of the rendering country[181].

As to "on the merits": if *enforcement* effects are sought in addition to preclusive effects this requirement is tested by the provision that the judgment be for a sum of money[182], other than a tax, fine or penalty[183]. But how does the Act verify the requirement "on the merits" where the judgment is *not* registerable under Part I but relies on section 8 for its preclusive effect? This was the question before the House of Lords in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG*[184].

In that case, the plaintiffs (an English company) became holders of two bills of exchange accepted by the predecessors of the defendants (a West German company, without

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175 See *SA Consortium General Textiles v Sun and Sand Agencies Ltd* [1978] QB 279. They are exclusive: no other ground of jurisdiction will render a foreign judgment registerable under the Act: *Société Co-operative Sidmetal v Titan International Ltd* [1966] 1 QB 828; *Coast Lines Ltd v Hudig and Veder Chartering NV* [1972] 2 QB 34, 45.

176 "Residence" in the case of corporations is not merely a requirement of carrying on business (as it is at common law or under the 1920 Act) but rather that the *principal* place of business be in the foreign country: cf. fn108.

177 See, also, section 4(2)(a)(v) for additional jurisdictional basis where defendant has office or place of business in the foreign country.

178 Section 2(1)

179 Provided judgment has not been satisfied: section 2(1)(a); and provided judgment is capable of enforcement by execution in the country of the original court: section 2(1)(b). These provisions, and registration generally, are not necessary if preclusive effect only is sought under section 8.

180 Section 1(2) is also subject to section 1(2A) which denies registration to judgments in certain circumstances.

181 Section 1(3)

182 Section 1(2)(b)

183 A judgment is also not to be registered if it is one for multiple damages to which section 5, *Protection of Trading Interests Act 1980* applies.

184 [1975] AC 591

assets in England). Just within the English period of limitation, the plaintiffs commenced proceedings in England and Germany on two of the bills that had been dishonoured. The German period of limitation had expired, so the German court dismissed the action. The effect under German law was to bar the remedy but not extinguish the right. Since the judgment was not registerable under the Act because it fell outside section 1(2)(b), the defendant in the English proceedings sought recognition for preclusive purposes under section 8(1). The question arose whether section 8(1) implied the common law requirement that the judgment be "on the merits".

A majority of their Lordships held that section 8(1) gave preclusive force to judgments in favour of a defendant dismissing a plaintiff's claim *only if the cause of action was adjudicated on the merits as this is understood at common law*. The West German judgment was in the defendant's favour simply because the remedy was time-barred: the West German court had *not* adjudicated on the question whether the plaintiff had a right of action or whether that had been extinguished. At the time, English law considered such judgments to be procedural and therefore not "on the merits"[185]. Hence the foreign judgment did not preclude the action in England[186]. Nonetheless, the majority correctly discerned that section 8(1) necessitates recourse to the common law "on the merits" criterion in cases where the "merits" requirement in section 1(2)(b) cannot be applied, for only in this way can judgments, apart from those registrable under Part I, be accorded preclusive effects under section 8(1).

Generally, however, it is clear that registration under the 1933 Act ensures the ready procurement of preclusive effects from a foreign judgment in subsequent English proceedings. Once *registered* and thus verified as a *res judicata*, it is treated as if it were an English judgment, with the result that the preclusive pleas available in English law can be founded *in the same way* as domestic judgments.

But in *all* cases of recognition or registration merely verifying *res judicata* status does not suffice to establish cause of action preclusion, nor other preclusive pleas. It is also necessary to show that the subject matter in both the foreign and subsequent proceedings is the same, and that the parties are the same. We will now consider these criteria.

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185 On this point, the House followed *Harris v Quine* (1869) LR 4 QB 653, since overturned by section 3, *Foreign Limitation Periods Act 1984*.

186 Cf. *Foreign Limitation Periods Act 1984*, section 3

PART 3 - IDENTITY OF SUBJECT MATTER: THE SAME CAUSE OF ACTION

1. The subject matter for cause of action estoppel

The generic label "estoppel" covers an array of rules spanning various categories[187], but it is fundamental to all categories that there be two statements exhibiting an essential contradiction. Where the earlier "statement" is a *res judicata*[188], the plea of estoppel *per rem judicatam* can be raised if the case set up in subsequent proceedings contradicts the determinative part of the *res judicata*, as contained in the reasons for judgment or implied by the formal order[189]. This discrepancy will *only* occur if the two statements relate to *the same* subject matter.

It follows that the subject matter for a cause of action estoppel is nothing other than the determination as to the existence of the cause of action. If it was determined not to exist, and the unsuccessful plaintiff subsequently asserts that it does, then the defendant - in setting up cause of action estoppel - must establish that the plaintiff is seeking to re-agitate *the same cause of action* in spite of the earlier, final *res judicata* between them[190]. Likewise, if the plaintiff recovers upon the cause of action, the unsuccessful defendant can be estopped from contradicting that conclusion by the plaintiff bringing an action on the judgment. Such an action, of itself, manifests that the subject matter is the same. However, if the successful plaintiff attempts to reassert the same cause of action, then (as we have seen) the plea is not one of contradiction but former recovery[191].

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[187] *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394, 409 (Mason CJ)

[188] Even where the foreign judgment does not exist at the time of pleading it is sufficient to plead pendency of the action, and the judgment may be given in evidence at the trial: *House of Spring Gardens v Waite* [1991] 1 QB 241, 254

[189] However, if there is no preceding pleading which contradicts the *res judicata* there is no call for a plea of estoppel. For example, if the earlier *res judicata* declares that A has title to Blackacre, if B in an action relating to Blackacre has pleaded that he, B, "is in possession of the premises by himself or his tenants", there is nothing on the record which attacks A's title as declared by the *res judicata.* However, if B pleaded that "A is not possessed of the premises", this preceding pleading contradicts the *res judicata* for it is an assertion that title is not in A.

[190] The onus on the party to establish identity of subject matter is strict: see *Behrens v Sieveking* (1837) 2 My&Cr 602; *Moss v Anglo-Egyptian Navigation Co* (1865) 1 Ch App 108; *Robinson v Robinson* (1877) 2 PD 75; *Ripley v Arthur & Co* (1902) 86 LT 735 - all cases in which a failure to aver that the subject matter was the same meant that the case of estoppel *per rem judicatam* was not made out.

[191] See also *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502, 505 (Deane, Toohey, Gaudron JJ): "Although the defence in the second action uses the language of estoppel, it is apparent that what the appellant relies upon is *res judicata*" [by which their Honours understand the plea of former recovery]; *Jackson v Goldsmith* (1950) 81 CLR 446, 466 (Fullagher J): "Where judgment has been entered in that action, no other proceedings can thereafter be maintained on the same cause of action. This rule is not, to my mind, correctly classified under the heading of estoppel at all".

2. The subject matter for a plea of former recovery

A plea of former recovery operates upon the formal order of a *res judicata*, and is established by proof that the party against whom the plea is set up was granted relief or remedy in previous litigation as plaintiff (or counter-claimant) by a judgment recovered on the same cause of action upon which further recovery is now sought[192]. More especially, where the plea of former recovery is founded upon a foreign judgment by virtue of section 34, the subject matter requirement has been held to mean *the same cause of action* as entitled one person to *a remedy* against another[193].

However, it is this additional component - the remedy or relief obtained upon the cause of action - which complicates the subject matter assessment necessary for pleas of former recovery. Cause of action estoppel is concerned simply with contradiction in the subsequent proceedings (F2) of the existence or otherwise of the same cause of action as adjudged by the earlier, foreign court (F1). There is no contradiction if a comparison between the proceedings at F1 and F2 reveals two distinct causes of action. However, a plea of former recovery must be alert - not just to the question whether there are, in fact, *two* distinct causes of action - but also to the possibility of *alternative remedies* arising from *one* cause of action; for recovery in respect of one type of relief or remedy will preclude subsequent further recovery on other remedies that might be available upon the same cause of action against the same defendant[194]. For a similar reason it is said that a plaintiff is not permitted to bring a second action for damages not recovered in the first, hence damages must be assessed once to cover both past and future damage[195].

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[192] SBTH p227-228. The plea fails if recovery of relief by that party in the former proceedings is not shown: *Seddon v Tutop* (1796) 6 Term Rep 607 (former recovery not proved); *Edevain v Cohen* (1889) 43 Ch D 187 (former recovery not pleaded). At common law, the burden of establishing identity lies upon the party who sets up the *res judicata*: *Edevain v Cohen* (1889) 43 Ch D 187, 189

[193] *Black v Yates* [1992] 1 QB 526, 543-544 (Potter J). In that case, criminal proceedings were brought in Spain against a driver following a fatal road accident in which B was killed. The widow of B intervened, as permitted by Spanish law, and was awarded substantial compensation. Her subsequent proceedings in England under the *Fatal Accidents Act* were met by a plea of former recovery, based on section 34. The plea was upheld because the Spanish and English proceedings were in respect of the same cause of action, despite the differences in procedure.

[194] Therefore the plaintiff must elect: see *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1. The plaintiff had alternative remedies in tort for conversion of its cheque and in restitution for money had and received. It was held, *ibid,* 28; 30 (Lord Atkin): "[the plaintiff] was restricted to one of the two remedies ... Having recovered in contract ... [the plaintiff] cannot ... recover in tort. *Transit in rem judicatam* .... [moreover] on a question of alternative remedies no question of election arises until one or other claim has been brought to judgment. Up to that stage the plaintiff may pursue both remedies together, or pursuing one may amend and pursue the other: but he can take judgment only for the one and his cause of action on both of them will be merged in the one". It is implicit that section 34 operates in alternative remedy cases in a similar way, so that a judgment granting relief upon a cause of action precludes that party in whose favour the judgment was given from bringing further proceedings on the same cause of action in respect of an alternative relief.

[195] Likewise if, on two separate causes of action, the same *damages* are claimed, judgment recovered on one - but not satisfied - will not bar an action on the other. Thus the plea of former recovery provided by section 34 is not applicable; but the second action may be barred under the rules of abuse of process, in particular the rule in *Henderson v Henderson* (1843) 3 Hare 100: see Chapter Four. If there is no preclusion by abuse of process, and the plaintiff obtains consecutive judgments on the two separate causes of action in respect of the same damage, he must give credit to the extent that either judgment is satisfied. *A fortiori* there is no bar if the same damages are claimed against different defendants, but again credit must be given.

Thus, if the same facts give rise to *two* distinct causes of action, recovery on one will have no bearing on the other[196], so two actions can be brought[197]. If there is one cause of action but alternative remedies, then the plaintiff is faced with an election[198]. If, however, there is one, inseparable cause of action and subsequent proceedings have been brought because the demands for recovery have been split, then - unless it falls within the exception discussed earlier[199] - a plea of former recovery will be sustained[200]. In other words, where a plaintiff claims only part of an entire sum or property emanating from a single cause of action, the judgment is a bar to any action for the balance[201].

It is submitted that these rules, developed in the context of former recovery arising from domestic judgments[202], are implicitly extended to foreign judgments within the purview of section 34 by the decisions in *The Indian Grace* litigation[203].

Generally, however, the subject matter enquiry necessary for *both* cause of action estoppel *and* the plea of former recovery under section 34 begins with the same question: Is the cause of action in the subsequent proceedings distinct from the cause of action the subject of litigation in the foreign proceedings?

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[196] *Brunsden v Humphrey* (1884) 14 QBD 141, 146

[197] But does that mean they can be brought separately? That is, can a plaintiff reserve the other cause of action for further proceedings without being barred by former recovery? In *Brunsden v Humphrey* (1884) 14 QBD 141, 151 it was said: "There is no positive law ... against splitting demands which are essentially separable" but reference was also made (*ibid*, 147, 148, 151) to the inherent jurisdiction of the court to prevent or deal with abuse of process; and in *Talbot v Berkshire County Council* [1994] QB 290 it was said that if the rule in *Henderson v Henderson* had been cited in *Brunsden v Humphrey* the decision might have been different. However, it is not clear that the *Henderson* rule does prevent separate actions being brought on separate causes of action arising out of the same facts: see Chapter Four.

[198] See fn194.

[199] That is, as to waiver, estoppel or contrary agreement *vis-à-vis* section 34. In respect of domestic judgments, the plea of former recovery is absolute and admits of no exceptions.

[200] *The Indian Grace* [1993] AC 411

[201] *ibid*. The recovery will bar further recovery even for unforeseen damage, but not for fresh acts of the same character, such as a continuing trespass or nuisance; for there "the distinction is between an action for damages consequential upon an injury for which the plaintiff has already recovered a judgment ... and an action for a continuing injury": see *Holmes v Wilson* (1839) 10 Ad&El 503.

[202] *Lord Bagot v Williams* (1824) 3 B&C 235; *Russell & Sons v Waterford and Limerick Railway Co* (1885) 16 LR Ir 314; *Sanders v Hamilton* (1907) 96 LT 679; *Furness, Withy & Co Ltd v J & E Hall Ltd* (1900) 25 TLR 233; *Derrick v Williams* [1939] 2 All ER 559. In Australia the leading case is *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502: a settlement was lodged and judgment entered by consent in favour of the plaintiff, the Deputy Commissioner of Taxation, in the sum of $25,557.92. A correct addition of the sums set out in the writ was $255,579.20. A subsequent claim for the difference was precluded: *ibid*, 509 (Deane, Toohey, Gaudron JJ): "The point of the present appeal is that the respondent brought an action against the appellant and recovered judgment against him. He obtained a judgment of the court in which the cause of action upon which he relied merged, thereby destroying its independent existence so long as that judgment stood. And so long as that judgment stands, it is not competent for the respondent to bring further proceedings in respect of the same cause of action".

[203] See the observations from the (first) Court of Appeal decision, [1992] 1 Lloyd's Rep 124,133 (Leggatt LJ); 133-134 (Glidewell LJ)

3. The same cause of action

A cause of action is simply a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person[204]. This definition derives from *Cooke v Gill*[205] where cause of action was defined as every material fact that must be proved to entitle a plaintiff to succeed and every fact which the defendant would have a right to traverse[206]. Lord Esher in *Read v Brown*[207] qualified this by stating that a cause of action comprises every such fact, but not every piece of evidence; but in a New Zealand decision, it has been said the term means[208]:

> all the facts and circumstances necessary to give rise to a right to relief in law or equity. The same facts and circumstances may give rise to a right to relief under more than one principle of law or equity and in such cases the causes of action are different, but if the same relief is claimed under two or more such causes of action they are alternative causes of action.

In cases of cause of action preclusion[209], this latter definition is useful for the purposes of establishing - as a matter of *English* law[210] - the identity of a cause of action[211]. Clearly what is relevant is "the subject matter or grievance founding the action, [and] not merely the technical cause of action"[212].

Arguably that which is most pertinent to the subject matter or grievance is the right infringed in the plaintiff as a consequence of the incident or act of the defendant[213]. However, cause of action has also been defined with emphasis on "the act on the part of the defendant which gives the plaintiff his cause of complaint"[214]. This emphasis

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[204] *Letang v Cooper* [1965] 1 QB 232, 242-243 (Diplock LJ)

[205] (1873) LR 8 LP 107

[206] *ibid*, 116 (Brett J)

[207] (1888) 22 QBD 128, 131

[208] *Papps v Mahon* [1966] NZLR 288, 292 (Wilson J)

[209] Whether contradiction or reassertion preclusive pleas.

[210] Indeed, it is crucial to note that the question of identity is to be determined by English law, it being irrelevant whether or not the cause of action would be regarded as identical by the domestic law of the foreign country: see *The Indian Grace* [1992] 1 Lloyd's Rep 124

[211] However, else it be thought that the meaning of cause of action in the law of preclusion is straight-forward: see *Port of Melbourne Authority v Anshun* (1981) 147 CLR 589, 611 (Brennan J): "There is an imprecision in the meaning of the term cause of action, which is sometimes used to mean the facts which support a right to judgment; sometimes to mean a right which has been infringed; and sometimes to mean the substance of an action as distinct from its form. Imprecision in the meaning of cause of action tends to uncertainty in defining the ambit of the rule that a judgment bars subsequent proceedings between the same parties on the same cause of action ... whether [that rule] be termed *res judicata*, or cause of action estoppel, or judgment recovered."

[212] *O'Keefe v Walsh* [1903] 2 IR 681, 718

[213] See *Brunsden v Humphrey* (1884) 14 QBD 141; fn228

[214] *Jackson v Spittall* (1870) LR 5 CP 542; *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458

appealed to Lord Goff of Chieveley in *The Indian Grace*[215], the decision which clarifies the meaning of identity of cause of action for contract cases[216]. Thus, in contract cases, although the factual situation might give rise to more than one breach of a single contract[217], it is unrealistic to treat separate breaches as separate causes of action where they are really *particulars* of one breach. Hence[218]:

> it is necessary to identify the *relevant* breach of contract; and if it transpires that the cause of action in the first action is a breach of contract which is the same breach of contract which constitutes the cause of action in the second, then the principle of *res judicata* applies, and the plaintiff cannot escape from the conclusion by pleading in the second action particulars of damage which were not pleaded in the first. [emphasis added]

The relevant breach in *The Indian Grace* litigation "was referred to compendiously by the plaintiffs in the Cochin action as 'negligence'"[219]. This, together with the fact there was only one contract covering all relevant duties[220], and that only a single incident (the fire in the hold) was the cause of the loss and damage, meant "the factual basis relied upon by the plaintiffs as giving rise to the two breaches is the same"[221]. Thus section 34 applied.

The decision followed *Conquer v Boot*[222], where the relevant breach of contract was a breach of promise by the defendant to complete a bungalow for the plaintiff, and where it was held[223]:

> The test whether a previous action is a bar is not whether the damages sought to be recovered are different, but whether the cause of action is the same.

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[215] *The Indian Grace* [1993] AC 410, 421 (Lord Goff of Chieveley)

[216] Before the House of Lords on this occasion, the plaintiffs' argued there was no identity between the causes of action in the two sets of proceedings because the English proceedings were for damage to cargo, whilst the Cochin proceedings in which judgment had been recovered merely involved an action for short delivery. Moreover, the factual conditions needed to substantiate each claim was different in each case: the minimum facts necessary to prove in an action for damage to cargo are: (i) the condition if the goods on shipment and (ii) their damaged condition on delivery; whereas to prove short delivery, the facts that one must prove are: (i) the quantity of the goods shipped and (ii) the lesser quantity delivered. Thus section 34 did not apply. Indeed, the plaintiffs submitted that the section 34 plea had been confused with the rule in *Henderson v Henderson* (1843) 3 Hare 100, under which a point which could and should have been but was not raised in certain proceedings is precluded in subsequent proceedings in which the same issue arises. But even this plea could be defeated, the plaintiffs' submitted, since the rule in *Henderson v Henderson* does not apply in special circumstances, and arguments were available to the plaintiffs to prove that these circumstances fell within that exception.

[217] Eg. *The Indian Grace* where the plaintiff alleged (i) short delivery through loss and (ii) delivery in a damaged condition.

[218] *The Indian Grace* [1993] AC 410, 420 (Lord Goff of Chieveley)

[219] *ibid*, 421

[220] The cargo was shipped under a contract of carriage which provided for the defendant shipowners' obligations both as to the seaworthiness of the vessel and the care of the cargo.

[221] *ibid*

[222] [1928] 2 KB 336

[223] [1928] 2 KB 336, 344-345; 346

But in *Lawlor v Gray*[224], cause of action estoppel was not upheld because a claim in debt arising under a contract was *different* from a claim for damages for breach of contract. This was especially clear since the subject of litigation arising under the writ, the factual situation, gave rise to a claim for a breach of contract that had never been the subject of litigation in any of the previous actions.

However, contract cases differ from even a simple action in tort. In contract cases, proof of damage is not necessary to establish the cause of action. But damages are of the essence in tort, in that damages must be proved to establish the cause of action. This means, in tort cases[225], it is possible to segregate different causes of action by reference to different heads of damage.

It is clear, at least, that separate and successive tortious wrongs each constitute a separate cause of action[226]. But a plaintiff may also sue in respect of different rights or interests, though the factual situation be the same, since each suit represents a separate cause of action. Thus recovery on one will *not* preclude recovery on the other. The leading authority for this proposition is *Brunsden v Humphrey*[227].

In that case, damage to the plaintiff's carriage and injury to the person of the plaintiff, although occasioned by one and the same wrongful act, were infringements of different rights, and gave rise to distinct causes of action[228]. Because the case involved the principles of *res judicata*[229], the majority[230] were mindful that[231]:

> the question is not whether the sum demanded *might have been* recovered in the former action, the only enquiry is whether the same cause of action *has been* litigated and *considered* in the former action. [original emphasis]

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224 [1984] 3 All ER 345

225 Or where the same facts give rise to claims in contract and tort.

226 *Berezovsky v Forbes Inc* [1999] ILPr 358, in which libellous statements published in more than one jurisdiction gave rise to separate actions in the various States in which the libel was published. See also: *Schapira v Ahronson* [1998] ILPr 587; *Duke of Brunswick* (1848) 2 Car & Kir 683; *Wadsworth v Bentley* (1853) 23 LJQB 3; cf. *Shevill v Presse Alliance SA* [1995] ECR I-415. So, too, damages for pollution was no bar to an action for other acts of pollution of the same river: *Freshwater v Bulmer Rayon Co Ltd* [1933] Ch 162; cf. *Bier v Mines de Potasse d'Alsace* [1976] ECR 1735.

227 (1884) 14 QBD 141

228 *ibid*, 148-149 (Bowen LJ): "everyone in this country has an absolute right to security for his person .. [and] everybody has a further right to have his enjoyment of his goods and chattels unmeddled with by others". Thus it was held that an earlier action by the plaintiff for the former right constituted no bar to a subsequent action for the latter right. Cf. the dissent of Lord Coleridge CJ, *ibid*, 152-153: "[it is absurd] to hold that a man cannot bring two actions, if he is injured in his arm and in his leg, but can bring two, if besides his arm and leg being injured his trousers which contain his leg, and his coat-sleeve which contains his arm, have been torn".

229 Cf. *Letang v Cooper* [1965] 1 QB 232, where the meaning of the term 'cause of action' was relevant in the context of a case involving the limitation of actions.

230 Brett MR; Bowen LJ

231 (1884) 14 QBD 141, 147-148 citing *Seldon v Tutop* 6 TR 607

Accordingly[232]:

> the principal consideration is whether it be *precisely* the same cause of action in both [proceedings], appearing by proper averments in a plea, or by proper facts stated in a special verdict, or a special case. *And one great criterion of this identity is that the same evidence will maintain both actions.* [emphasis added]

This evidence, in turn, is to be elicited by asking[233]:

> [W]hat is the *gist* of such an action on the case for negligence? .... it is sufficient to say that the gist of an action for negligence seems to me to be the harm to person or property negligently perpetrated. .... According to the popular use of language, the defendant's servant has done one act and one only, the driving of the one vehicle negligently against the other ... [but] two separate kinds of injury were in fact inflicted, and two wrongs done. The mere negligent driving in itself, if accompanied by no injury to the plaintiff, was not actionable at all, for it was not a wrongful act at all till a wrong arose out of the damage which it cause. One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong arose as soon as the driving also caused injury. Both causes of action, in one sense, may be said to be founded upon one act of the defendant's servant, but they are not on that account identical causes of action. The wrong consists in the damage done without lawful excuse, not the act or driving, which (if no damage had ensued) would be legally unimportant.

Likewise, Brett MR applied the "same evidence" test to the facts[234]:

> In the action brought in the county court, in order to support the plaintiff's case, it would be necessary to give evidence of the damage done to the plaintiff's vehicle. In the present action it would be necessary to give evidence of the bodily injury occasioned to the plaintiff, and to the sufferings which he has undergone, and for this purpose to call medical witnesses. This one test shows that the causes of action as to the damage done to the plaintiff's car, and as to the injury occasioned to the plaintiff's person, are distinct. Therefore we are not now called upon to apply a legal maxim [the doctrine of *res judicata*], the application of which ought not to be stretched. ... Two actions may be brought in respect of the same facts, where those facts give rise to two causes of action.

Critics of the decision[235] argue that different types of injury and damage suffered go to damages and not to liability; that there is an essential distinction between a cause of action and a head of damage; that technicalities about descriptions based on old forms of action, no matter how convenient such labels might continue to be, are not to be encouraged[236]; and that, on principle, two actions ought *not* to lie in respect of injuries and damage arising out of a single factual situation- in this case, a single accident.

But by avoiding the broader formulation of "cause of action", which concentrates on the factual situation and the act of the defendant, and focusing on the facts which support a plaintiff's right to judgment, the same evidence test achieves greater precision; for the gist

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232 *ibid*, 147 citing *Kitchen v Campbell* 2 W Bl 827

233 *ibid*, 149; 150-151 (Bowen LJ)

234 *ibid*, 146

235 Samuels, Alec "Suing twice on the same accident: the rule in *Brunsden v Humphrey*" (1968) 31 MLR 453

236 "Cause of action" should not be limited by the old forms of action abolished by the *Judicature Act 1873*. Nonetheless, it has remained convenient to use the names of the old forms of action to categorise the various factual situations which entitle one person to obtain from the court a remedy from another.

of an action in tort is not simply the relevant breach caused by a single act, but is identified by reference to the rights injured or the damage suffered[237]. Moreover, if the cause of action is taken to mean the right(s) infringed in the plaintiff, the subject matter of the preclusive pleas can be more precisely identified, because such pleas[238]:

> [will] not preclude litigation seeking a remedy to which a party is entitled *in virtue of a different right* from that which was first put in suit *provided that the facts which support the right sued upon in the second action are not the same facts as those supporting the right which passed into the first judgment.* [emphasis added]

It follows that where the *same* right or interest is involved in both proceedings, and the factual situation is also the same, the second action will be precluded: by cause of action estoppel (if there is contradiction) or by section 34 (if there is reassertion). Thus, for example, the same right or interest, and therefore the same cause of action, was thus involved in *Black v Yates*[239]. As permitted by Spanish law the plaintiff intervened in Spanish criminal proceedings and recovered compensation as a "successor of the deceased"[240]. She subsequently commenced an action in England under the *Fatal Accidents Act 1976* to vindicate the same right. Section 34 applied.

However, if a plaintiff has separate causes of action as distinct from several remedies for one cause of action, he is under no duty to join them all in the one proceeding[241], subject only to the rule that it may be an abuse of process subsequently to raise a cause of action that could and should have been litigated in the first proceedings[242].

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237 This has been recently affirmed in Canada: *Canada v Maritime Group (Canada) Inc* [1995] 3 FC 124, 129 (Marceau JA)

238 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, 611 (Brennan J)

239 [1992] 1 QB 526

240 The action against the defendant was brought because the plaintiff was widowed by the death of her husband in a motorcycle accident in Spain.

241 *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, 27-28

242 See Chapter Four.

PART 4 - IDENTITY OF PARTIES AND PRIVIES

1. Introduction

The rules that settle who or what can enjoy the benefit, or suffer the burden, of a *res judicata* vary according to whether the plea is based upon a judgment *in personam* or a judgment *in rem*.

On the one hand, judgments *in personam* determine the rights and liabilities of the parties *inter se*, and this means we must consider the doctrines of privity and mutuality, and the various categories of "parties", "deemed parties" and "privies". By contrast, judgments *in rem* involve determinations as to the status of a person or thing and operate conclusively against "the whole world". Thus the rules that allocate the benefit or burden of a conclusive determination *in rem* are somewhat broader.

Generally, however, the rules as to parties and privies that have developed in the domestic law of preclusion apply equally to foreign judgments[243]. There is no indication in the authorities that anything other than English law as to parties and privies applies[244].

2. Judgments *in personam*

(a) The doctrines of privity and mutuality

The preclusive effect of a foreign judgment *in personam* in subsequent proceedings in England is limited according to the doctrines of privity[245] and mutuality.

The doctrine of *privity* says that the only persons who can take advantage of the preclusive effects of a judgment, or be bound by it, are the parties or privies to the proceedings from whence the judgment derived. No third person can take advantage of it or be bound by it[246].

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[243] *Shedden v AG* (1860) 30 LJPM&A 217, 229-230; *Cammell v* Sewell (1860) 5 H&N 728; *Simpson v Fogo* (1863) 1 Hem & M 195, 224. The estoppel failed for lack of privity in *Carl Zeiss (No 2)* [1967] 1 AC 853, 909-910, 919 (Lord Reid); 928-929 (Lord Hodson); 935-937 (Lord Guest); 942-943, 945-946 (Lord Upjohn); 968-969 (Lord Wilberforce)

[244] None of the cases cited in fn243 specifically address the question whether the requirement 'the same parties' is to be considered according to English law or foreign law. Instead, this is assumed. However, consider, for example, if A sues B in Ruritania, and then, subsequently, A sues B's insurer in England. Which law applies if B's insurer would be regarded as 'the same party' as B under Ruritanian law, but not the same party as B according to English law? It seems - as was the case with identity of subject matter - that the answer will be provided by English common law principles: see *The Indian Grace* [1992] 1 Lloyd's Rep 124; implicitly, also, in the rejection of the non-mutuality rules - which exist, for example, under US law - in cases such as *Carl Zeiss (No 2)* [1967] 1 AC 853) and *Hunter v Chief Constable of the West Midlands* [1982] AC 529.

[245] Not to be confused with privies.

[246] Although the *Contracts (Rights of Third Parties) Bill 1999*, to the extent that it alters the doctrine of privity of contract, may affect the rules that govern whether a third party is privy to any subsequent litigation arising under a contract. See, for example, proposed section 5: "Where under section 1 a term of a contract is enforceable

Accordingly, the doctrine of privity conveys the essential "identity" requirement that the parties in both proceedings must be the same, or privies of those in the first. The onus is on the person asserting preclusion to establish that the parties are in community or privity. That is, either the exact same parties are involved in both proceedings (actual or physical identity being a question of fact[247]), or a party in the subsequent proceedings is a "privy" and can therefore claim a title, right or interest by virtue of a title, right or interest in a party in the earlier proceedings. These rules are also reflected in section 34.

However, at least in cases of preclusion by estoppel *per rem judicatam*[248], privity is not enough. The estoppel must be *mutual*[249] so that the same parties and privies are bound by it and can take advantage of it[250]. In other words, *each* party in the *subsequent* proceedings must have been party or privy to the earlier proceedings, and must claim or defend in the subsequent proceedings in the same right as they, or those to whom they are privy, claimed or defended in the earlier[251]. Thus[252]:

> It unquestionably is not the general rule of law that a judgment obtained by A against B is conclusive in an action by B against C ... a judgment *inter partes* is conclusive only between the parties and those claiming under them.

The justifications for this insistence upon mutuality as a requirement in English law usually centre about the concept of fairness- for example, it is unfair to allow a person to reap the benefits of a judgment to which he was not a party or privy. However, in the United States[253], the doctrine of mutuality has been rejected altogether[254]. Instead[255]:

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by a third party, and the promisee has recovered from the promisor a sum in respect of: (a) the third party's loss in respect of the term or; (b) the expense to the promisee of making good to the third party the default of the promisor, then, in any proceedings brought in reliance on that section by the third party, the court or arbitral tribunal shall reduce any awards to the third party to such extent as it thinks appropriate to take account of the sum recovered by the promisee".

247 *Russell v Smyth* (1842) 9 M&W 810

248 Mutuality is inapplicable to a plea of former recovery (since only the successful party has recovered, and so only the successful party can be barred from further recovery); and, it is suggested, the pleas of abuse of process are also not constrained by the mutuality requirement.

249 Sir Edward Coke, referring to estoppels generally, thought "every estoppel ought to be reciprocall, that is, to binde both parties; and this is the reason, that regularly a stranger shall neither take advantage, nor be bound by the estoppel": see Commentary on Littleton, 19th ed, 1832, Vol II, s667, p352a. However, the width of this proposition has been criticised, and it is no longer true that *all* estoppels must be mutual, for mutuality does not apply to estoppel by representation nor promissory estoppel: *McIlkenny v Chief Constable of the West Midlands* [1980] 1 QB 283, 328 (Goff LJ).

250 *Petrie v Nuttall* (1856) 11 Exch 569, 575-576; although, *ibid*, 576-577 (Martin B) the consequences of the mutuality doctrine were castigated as "absurd".

251 *Shedden v A-G* (1860) 30 LJPM&A 217, 228; *Petrie v. Nuttall* (1856) 11 Exch 569, 575-576.

252 *Gray v Lewis* (1873) 8 Ch App 1035, 1059-1060 (Mellish LJ). See, also, American Restatement (Second): Judgments, section 93, sub-paragraph 15: "A and B are passengers in a car driven by C which collides with a car driven by D. A brings an action against D and obtains judgment on the ground that D was negligent. This finding is not *res judicata* in a subsequent proceeding brought by B against D".

253 See, for example: *Bernhard v Bank of America* 19 Cal 2d 807 (1942); *Blonder-Tongue Laboratories Inc v University of Illinois Foundation* 402 US 313 (1971); *Manzoli v ICR* 904 F 2d 101 (1990)

254 Although it can be said that notions of "fairness" are imported at an earlier stage when due process is required; so "fairness" at the judgment stage (when preclusive effects are being secured) can more easily be

> [t]hey take a distinction between a decision *in favour* of a man and a decision *against* him. If a decision has been given *against* a man on the identical issue arising in previous proceedings - and he had full and fair opportunity of defending himself in it - then he is estopped from contesting it again in subsequent proceedings. Not only is he estopped but so are those in privity with him. But there is no corresponding estoppel on the person in whose favour it operates.

Were the US non-mutuality rule adopted in England the judgment against B in the example above *would* preclude B from contradicting the previous judgment although the estoppel is raised by C in subsequent proceedings, and C was not a party nor a privy to the proceedings between A and B. Non-mutuality subscribes, therefore, to the view that there is no reason for prohibiting a non-party from estopping a plaintiff who has lost the exact same issue in a prior suit[256]. In the words of Jeremy Bentham[257]:

> There is reason for saying that a man shall not lose his cause in consequence of the verdict given in a former proceeding to which he was not a party; but there is no reason whatever for saying that he shall not lose his cause in consequence of the verdict in a proceeding to which he *was* a party, merely because his adversary was not. It is right enough that a verdict obtained by A against B should not bar the claim of a third party C; but that it should not be evidence in favour of C against B, seems the very height of absurdity.

We will see in Chapter Three that non-mutuality in the US provides the foundation for the plea of collateral estoppel[258]. However, in England the House of Lords in *Hunter v Chief Constable of the West Midlands*[259] were neither persuaded by Bentham's argument, nor the American authorities, so the doctrine of mutuality remains[260].

The rejection of the "American authorities" in *Carl Zeiss (No 2)*[261] is also significant in that it suggests an English court would apply English rules of parties/privies if a *foreign* judgment from the US were relied upon for preclusive purposes in England. The same might be said of foreign judgments generally. Therefore, we must consider the meaning of "parties", "deemed parties", and "privies" according to English law rather than the foreign

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disposed. A similar approach animates the Brussels and Lugano Conventions, which focus on direct rules of jurisdiction: see Chapter Five.

255 *McIlkenny v Chief Constable of the West Midlands* [1980] QB 283, 318 (Lord Denning)

256 *Blonder-Tongue Laboratories Inc v University of Illinois Foundation* 402 US 313 (1971): "the uncritical acceptance of the principle of mutuality ... is today out of place"; cf. *United States v United Airlines Inc* 216 F Supp 709 (1962): "the rule of non-mutuality is not a general one but a limited one to be determined from the facts and circumstances in each case whether or not it should be applied".

257 Bowring (ed), Jeremy Bentham's Works, (1843) Vol. VII, Book VI, p171

258 But it seems that mutuality is still a requirement where claim preclusion is pleaded.

259 [1982] AC 529; cf. *McIlkenny v Chief Constable of the West Midlands* [1980] 1 QB 283 (Lord Denning MR)

260 *Ramsay v Pigram* (1968) 118 CLR 271, 282-283 (McTiernan J): "No substantial reason has been advanced for departing from the well-established principle that no one can take advantage of a judgment unless he would also have been concluded by the judgment had it gone against him"

261 [1967] AC 853, 912 (Lord Reid); 928 (Lord Hodson); 937 (Lord Guest); 945 (Lord Upjohn); cf. 969 (Lord Wilberforce)

law[262]. We will then consider the problem that arises where a class action is brought in a foreign forum.

(b) "Parties"

In most cases, the identity of the parties in former and subsequent proceedings is a straight-forward assessment: Are the same parties named on the respective records?[263] The onus is on the party asserting the estoppel to establish identity of party[264], with any question of physical identity being a question of fact[265].

Once identity is established[266]:

> [i]t makes no difference ... that in the first proceedings the party was a plaintiff, claimant or petitioner, or even in some circumstances a co-defendant and in the subsequent proceedings is attempting to controvert the decision by action or claim, counterclaim, set-off, or any other form of claim or affirmative defence.

The important proviso, however, is that the parties to the subsequent litigation must claim or defend in the same right as they represented in the former proceedings; for a party who litigates in a different capacity or in different rights is in law a separate person[267]. In this respect, English law reflects the Roman law[268]:

> It is part of the Roman doctrine of *res judicata*, as it is of the English, that this identity of parties must be not only physical, but jural, so that two distinct persons physically may have one and the same character, or *persona*, whilst one and the same person in a physical sense may, if litigating in two different capacities, constitute two distinct *personae*.

However, at present, English law does not distinguish between a party litigating in its own capacity, and the same party litigating in the common interest of his insurer and himself[269]. This may change if the recent decision of the ECJ in *Drouot Assurances SA v Consolidated Metallurgical Industries*[270] is considered persuasive.

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262 See fn244.

263 *Carl Zeiss (No 2)* [1967] AC 853, 936-937 (Lord Guest): "It is only, as I understand it, from the form of procedure chosen by the respondents [ie. the summons against the solicitors] that Messrs Courts [the solicitors] have been made parties to these proceedings".

264 *Carl Zeiss (No 2)* [1967] AC 853

265 *Russell v Smyth* (1842) 9 M&W 810

266 SBTH, p118

267 *Bainbrigge v Baddeley* (1847) 2 Ph 705; *Marginson v Blackburn Borough Council* [1939] 2 KB 426

268 SBTH, p272. Examples include an executor, administrator, trustee, receiver and a person in an official capacity.

269 *Wall v Radford* [1991] 2 All ER 741; *Talbot v Berkshire County Council* [1994] QB 290; cf. *Gleeson v J Wippel & Co Ltd* [1977] 1 WLR 510

270 [1999] QB 497. See the article on *Drouot* by Peel, W. E. in 1999 Yearbook of European Law (forthcoming)

In that case, a barge sank in internal waters in The Netherlands. The hull insurer (Drouot Assurances SA) refloated the barge at its own expense. Meanwhile, the cargo owner and its insurer brought proceedings in the Netherlands against the owners and master of the barge, claiming a negative declaration that they were not liable to contribute to the general average and for other relief. Drouot then brought proceedings in France against the cargo owner and its insurer for a general average contribution. It was met with a plea of *lis alibi pendens* under Article 21 of the Brussels Convention; the issue being whether the French proceedings were between 'the same parties', and thus whether the barge owner and its hull insurer should be treated as the same party.

The Court of Justice held that the parties in both proceedings were not the same because the interests of the hull insurer were not "identical to and indissociable from those of its insured"[271]. This conclusion was based on the following reasoning[272]:

> there may be such a degree of identity between the interests of an insurer and those of its insured that a judgment delivered against one of them would have the force of *res judicata* as against the other. That would be the case, *inter alia*, where an insurer, by virtue of its right of subrogation, brings or defends an action in the name of its insured, without the latter being in a position to influence the proceedings. ... On the other hand, application of article 21 cannot have the effect of precluding the insurer and its insured, where their interests diverge, from asserting their respective interests ... as against the other parties concerned.

In light of this decision, the suggestion has been made that the English courts ought to re-examine the principle that an insured is bound if proceedings conducted by his insurer result in a *res judicata*[273]. Some support for such a change may also come from the lines of authority that support the notion of deemed parties, which emphasise the importance of looking to see who in reality is behind the action[274].

(c) "Deemed parties"

The definition of "parties" is given greater dimension by the suggestion that certain entities can be *deemed* to be parties for preclusive purposes. Entities typically deemed as parties include: those who intervene and take part in the proceedings[275]; those who insist on being added as a party and obtain an order to this effect; those, such as a principal or employer, who direct another, such as a servant or agent, to pursue litigation on their

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271 *ibid*, 514

272 *ibid*

273 Handley, K. R. "*Res Judicata* in the European Court" (unpublished manuscript). See, also, *Turner v Grovit* [1999] 3 All ER 616, 630-631 (Laws LJ): "there is jurisprudence of the Court of Justice to show that the issue of identity of parties, in the context of Article 21, is to be regarded pragmatically, just as is that of cause of action ... *Drouot*..."

274 See, also: *Gleeson v J Wippel & Co Ltd* [1977] 1 WLR 510, 516 (Megarry VC): "A [party] ought to be able to put his own [case] in his own way and to call his own evidence. He ought not to be concluded by the failure of the [case] and evidence adduced by another ... in other proceedings unless ... a decision ... in them ... [was] in substance a decision against him".

275 *Tebbutt v Haynes* [1981] 2 All ER 238

behalf[276]; and those who have an interest in the dispute and a right to intervene, but who stand by and allow the litigation to be conducted by others[277]. This latter category includes not only joint tortfeasors[278], but also a person in a probate case with such an interest[279]; a person with an interest in land who allows another with the same interest to fight the litigation[280]; and possibly an unproved creditor aware of a bankruptcy[281].

A deemed party is also different from a privy. The former is deemed a party in its own right; the latter acquires privity through the right, title or interest of *another* party. It was by deeming that Lord Wilberforce in *Carl Zeiss (No 2)*[282] identified the parties in that action to be the same, in circumstances where the formal test of identity on the record did not yield a solution[283]:

> In my opinion, one must look to see *who in reality is behind the action*: and the reality is that a body of persons, namely, the Council of Gera, is seeking in these proceedings, precisely as in Germany they sought, to set the Carl-Zeiss-Stiftung as plaintiff in motion before the court. [emphasis added]

However, the majority on this point in *Carl Zeiss (No 2)*[284] reached a different conclusion. There was no identity between the parties in the proceedings in West Germany and in England, since the solicitors maintaining the English action had no connection with or interest in the German litigation and could not be estopped from defending themselves in England by showing that they had authority to act.

(d) "Privies"

A "privy" is one upon whom all the rights and obligations of any legal entity devolve, including the right to the benefit of, or the obligation to be bound by, a *res judicata*. Thus the essential nature of a privy is as one who claims a title or right under, through, or on behalf of, a party bound[285].

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[276] *Carl Zeiss (No 2)* [1967] AC 853, fn283

[277] *House of Spring Gardens v Waite* [1991] 1 QB 241; fn305

[278] *ibid*

[279] See fn307

[280] *Nana Ofori Atta II v Nana Abu Bonsra II* [1958] AC 95

[281] *John v Mendoza* [1939] 1 KB 141; cf. *More v More* [1962] Ch 424

[282] [1967] 1 AC 853

[283] *ibid*, 968-969

[284] *ibid*, 911 (Lord Reid); 929 (Lord Hodson); 937 (Lord Guest); 946 (Lord Upjohn)

[285] *Carl Zeiss (No 2)* [1967] 1 AC 853, 910; *Ramsay v. Pigram* (1968) 118 CLR 271; cf. *Shiels v Blakeley* (1986) 2 NZLR 262, 268: "there must be shown such union or nexus, such a community or mutuality of interest, such an identity between a party to the first proceeding and the person claimed to be estopped in the subsequent proceeding, that to estop the latter will produce a fair and just result having regard to the purpose of the doctrine of estoppel and its effect on the party estopped".

In the same way as for parties, the contention seems to be that it is English law that determines whether the party before the English court is such that it would be bound as a privy[286]. However, there are few decisions on this point in England (a fact observed by Lord Guest in *Carl Zeiss (No 2)*[287]); and it is not altogether clear why, if a foreign court would regard X as a privy (or bound in the same general way, even if using different language to get there), an English court ought not follow the foreign law. Nonetheless, there are three categories of privy according to English law: "blood, title or interest"[288]. Privies in blood include ancestors and heirs[289]; privies in title include any person who succeeds to the rights or liabilities of the party upon death[290], or insolvency[291]; and privies in interest or estate[292] must have some kind of interest, legal or beneficial, in the previous litigation or its subject matter[293].

It is inevitable that privity of interest is the most difficult category to define, for it is not easy to detect from the authorities what it is that amounts to a sufficient interest[294]. There must be an examination of the parties' interest, as well as the existence of a sufficient degree of identification between the parties, before it is just to hold that a decision in respect of one party should be binding in proceedings to which another is party. Moreover, the interest in the previous litigation or its subject matter must be legal or beneficial: a mere curiosity or concern in the litigation or some interest in the outcome is not sufficient. Thus, in *Gleeson v J Wippell & Co*[295], Megarry VC said "an agreement to indemnify creates no privity"[296]; and it is suggested the same is true of a person who has given financial assistance to a party. Similarly, in *Bain v Cooper*[297], Parke B referred to the categories of privies and added[298]:

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[286] *House of Spring Gardens v Waite* [1991] 1 QB 241

[287] [1967] 1 AC 853, 936

[288] Coke, Sir Edward, Commentary on Littleton, 19th ed, 1832, Vol II, s667, p352b. See, also *Carl Zeiss (No 2)* [1967] 1 AC 853, 910 (Lord Reid); 936 (Lord Guest)

[289] *Dundas v Waddell* (1880) 5 AC 249; *Weeks v Birch* (1893) 69 LT 759

[290] Eg. an executor or administrator, beneficiary, devisee, legatee: *Douglas v Forrest* (1828) 4 Bing 686; *Don v Lippman* (1837) 5 Cl & Fin 1; *Holland v Clark* (1842) 1 Y & C Ch Cas 151; *Reimers v Druce* (1857) 26 LJ Ch 196; *Ennis v Rochford* (1884) 14 LR Ir 285

[291] Eg. a trustee in bankruptcy/liquidator: *Douglas v Forrest* (1828) 4 Bing 686; *Re South American and Mexican Co* [1895] 1 Ch 37

[292] *R v Blakemore* (1852) 21 LJMC 60 (privy in estate); *Re Allsop and Joy's contract* (1889) 61 LT 213 (successor in title); *North Eastern Railway Co v Dalton Overseers* [1898] 2 QB 66 (successors of highway authority); *O'Connor v O'Connor* [1916] 2 IR 148 (successors in title); *Jones v Lewis* [1919] 1 KB 328 (successors in office)

[293] *Carl Zeiss (No 2)* [1967] 1 AC 853, 910 (Lord Reid)

[294] *House of Spring Gardens Ltd v Waite* [1991] 2 QB 241, 252 (Stuart-Smith LJ)

[295] [1977] 1 WLR 510

[296] *ibid*, 515

[297] (1841) 8 M&W 751

> in all these cases there is a privity between the parties, which constitutes an identity of person. But that is not so in the present case, where the parties are only in the relation of principal and surety, and there is no privity of interest between them, since they surety contracts with the creditor: they are not one person in law, and are not jointly liable to the plaintiff.

However, it is established that there is privity of interest where a trustee sues for the benefit of the beneficiary: the *res judicata* binding the beneficiary also binds the trustee[299]. Similarly, if a person acts on a decision in litigation and claims under the party entitled to it, they are a privy[300]. Employers, too, may be privies of employees who bring or defend proceedings at the request or with the authority of the employer[301]. But a mere relationship of principal and agent is not enough if the relationship is not binding on the party sought to be estopped[302]; although in *Carl Zeiss (No 2)*[303], Lord Reid contemplated extending the category of privity of interest such that a person employed to infringe the right established by an earlier decision will be in privity. Thus his Lordship stated[304]:

> There does, however, seem to me to be a possible extension of the doctrine of privity as commonly understood. A party against whom a previous decision was pronounced may employ a servant or engage a third party to do something which infringes the right established in the earlier litigation and so raise the whole matter again in his interest. Then, if the other party to the earlier litigation brings an action against the servant or agent, the real defendant could be said to be the employer, who alone has the real interest, and it might well be thought unjust if he could vex his opponent by re-litigating the original question by means of the device of putting forward his servant.

The decision in *House of Spring Gardens v Waite*[305] also appears to extend the category of privity of interest. In that case, Stuart-Smith LJ was prepared to invoke "justice and common sense"[306], rather than technical principles of estoppel, to preclude the third defendant (not a party to an earlier fraud challenge) from alleging the judgment was obtained by fraud. In one sense this was achieved by deeming the third defendant, for his Lordship adopted a rule that originated in probate cases[307] to the effect that those with an interest in a dispute and a right to intervene, but who stand by and allow the litigation to

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298 *ibid*, 754

299 *Churchill & Sim v Goddard* [1937] 1 KB 92, 103; *Gleeson v J Wippell & Co* [1977] 1 WLR 510, 515

300 Although there is a wider principle of estoppel that applies if a person is aware of a decision, and takes the benefit of that decision; such conduct will estop that person from reopening the question: see *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993, 1018 (Viscount Radcliffe)

301 *Re Walton* (1873) 28 LT 12; *Kinnersley v Orpe* (1780) 2 Dougl KB 517

302 *Pople v Evans* [1969] 2 Ch 255

303 [1967] 1 AC 853

304 *ibid*, 911 (Lord Reid); cf.948 (Lord Upjohn)

305 [1991] 1 QB 241

306 *ibid*, 253

307 *Re Langton* [1964] P 163, 169; *Re Lart* [1896] 2 Ch 788, 794: where privy was "content to stand by and see his battle fought by someone else"; *Osborne v Smith* (1960) 105 CLR 153

be conducted by others, will be deemed to be a party. However, the third defendant was a joint tortfeasor with the first and second defendants, and the judgment against them *all* was joint and several. This justified the conclusion that the decision against the first and second defendants also bound the third as a privy[308].

Nonetheless, though the doctrine of privity may be susceptible of extension, it has been strongly suggested there is no basis for extending privity of interest to include cases where the interest is merely a financial right or interest in the previous action[309].

(e) "Multiple parties"

Some consideration must also be given to the preclusive effect in England of a foreign decision in a class action. The class action is a procedural device which enables complex litigation in which a representative brings the action against the defendant on behalf of a large number of other class members[310]. Typically such an action (at least in the US where, of jurisdictions foreign to England, they predominate[311]) presupposes: (i) that the class is so numerous that joinder of all members is impracticable; (ii) that questions of law or fact common to the class predominate over any questions affecting individual members; (iii) that the claims or defences of the representative parties are typical of the claims or defences of the class; and (iv) that there is a representative who will fairly and adequately protect the interests of the class members. Where these conditions favour a class action, there may be important benefits in bringing it[312]:

> The class action has proved to be a tool which promotes settlement. Not only does it allow plaintiffs to unite and thus improve their bargaining position but it also allows defendants to dispose of the claims of all members of a class, thereby avoiding the risk and inconvenience of dealing with large numbers of suits brought in a variety of jurisdictions.

However, being certain of the preclusive effect of a foreign adjudication in a class action will be crucial in so far as there might be class members resident in England and/or a defendant capable of being sued afresh here. Indeed, whether a foreign adjudication will be preclusive not only influences the decision of a potential class member in England

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308 Even though *Civil Liability (Contribution) Act 1978*, section 3 permits successive actions against joint tortfeasors, which arguably removes any basis for holding that they were privies: see *Bigelow v Old Dominion Copper Co* 225 US 111 (1912), 131: "There is no privity between joint wrongdoers because all are jointly and severally liable".

309 *Effem Foods Pty Ltd v Trawl Industries of Australia Pty Ltd* (1993) 43 FCR 510

310 The procedural rules covering representative proceedings *commenced in England* (cf. class actions commenced abroad) are contained in RSC Order 15, rule 12. These provisions survive the new Civil Procedure Rules (per CPR 50) and thus remain in force. RSC O15 r12(3) provides: "A judgment or order given in proceedings under this rule shall be binding on all the persons as representing whom the claimants sue or, as the case may be, the defendants are sued, but shall not be enforced against any person not a party to the proceedings except with the permission of the court". It was held in *Moon v Atherton* [1972] 2 QB 435, 441 that every person represented in a representative action under Order 15, though not named on the record, is a party to the action and is bound by the result.

311 Hence, see Rule 23 of the US Federal Rules of Civil Procedure.

312 Dixon, John C.L. "The *res judicata* effect in England of a US class action settlement" [1997] 46 ICLQ 134, 135

whether to become a class member, but can also influence the structure of the action in the foreign forum[313]:

> For instance, in *Bersch v Drexel Firestones Inc*, the 'dubious binding effect' of a defendants' judgment on absent foreign plaintiffs was a significant factor in the court's decision to exclude from the action all persons who were not resident or citizens of the United States. In *In re Silicone Gel Breast Implant Products Liability Litigation* the court found that many foreign plaintiffs wanted to be in the class (notwithstanding that many thought the terms unfair to foreign plaintiffs). Owing to the uncertainty of their position, foreign claimants were afforded a guaranteed second right to opt out of the class action after the amounts payable to them were determined. In addition, some foreign claimants, who might otherwise have been excluded, were given the right to opt into the settlement.

Hence, suppose a defendant is sued in a class action in the United States and judgment is given but there are absent class members in England. The defendant will obviously want the judgment to be the end of the matter; it will not want a judgment of "dubious binding effect". But if the defendant is also amenable to English jurisdiction, and a claimant in England can exploit ambiguity as to whether it was a class member bound by the decision, then the judgment may, indeed, be "dubious".

Campos v Kentucky and Indiana Terminal Railroad Co[314] is the only English case to have considered this issue of the preclusive effect of a US class action judgment, and even in this case the observations are *obiter* because C's claim, as a bondholder seeking the gold value of bonds issued by the defendant, failed on other grounds. Nonetheless, the defendant had relied upon a decision of the US District Court of New York, in a class action brought by L on behalf of himself *and other bondholders similarly situated* against the defendant. The US court had upheld the same contention that the defendant was making in the English proceedings brought by C. However, the English court indicated that it would *not* have accorded preclusive effect to that judgment, and so C would *not* have been precluded[315]:

> English private international law does not permit a foreign judgment [in such actions] to give rise to a plea of *res judicata* in the English courts unless the party alleged to be bound had been served with the process which led to the foreign judgment.

If nothing else, the case suggests the importance of a "multiple parties" criterion to test whether an "alleged" class member should be bound by a foreign class action judgment[316]. Indeed, it is not clear how the existing criteria assist: jurisdiction in the international sense

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313 *ibid*, 134-135

314 [1962] 2 Lloyd's Rep 459

315 *ibid*, 473 (McNair J)

316 Indeed, it may not be just simply to accept the foreign law in this regard. Consider, for example, the US law that would have applied, *ex hypothesi*, in *Campos v Kentucky and Indiana Terminal Railroad Co* [1962] 2 Lloyd's Rep 459; *ibid*, 472: "[the US law states] ... 'A true class action properly brought under this [ie. the US] rule is binding upon and gives rise to a plea of *res judicata* against all members of the class *whether or not they took part in the action and whether or not they were served with notice of the action or whether or not they had knowledge of the proceedings.*' ..." (!)

emphasises jurisdiction over the *defendant*[317]; the parties requirement emphasises mutuality and privity.

The trend in the common law world has been that all members of the class whom a party purports to represent will be deemed parties and thus bound by an order of the court, provided the representative party has acted *bona fides* in the interests of the class[318]. However, it is suggested in the interests of natural justice that an English court should be satisfied: (i) that the plaintiff in the subsequent proceedings had notice of the class action and had the chance to withdraw or object; and (ii) that the foreign court, acting under an obligation to protect absent class members, held a hearing, considered the evidence and made a ruling as to membership. When these "multiple parties" criteria are added to those which already define the circumstances for according preclusive effect to a foreign *res judicata* - that is, where the foreign determination is a final judgment of a court of competent jurisdiction which disposes of the rights of the parties - it is suggested we can more safely conclude that a given foreign class action determination should support a preclusive plea in England[319].

3. Judgments *in rem*

Whilst a judgment *in rem* affects and binds the immediate parties to it (indeed all persons who may be interested in the *res*), such a judgment nonetheless has for its primary object the determination of the title to property or status of a person, property or thing and, more particularly, the jural relation of the person or thing to the world generally[320].

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317 Indeed, "jurisdiction in the international sense" does not refer to the situation where the foreign claimant may claim not to have submitted to the jurisdiction because in ordinary litigation it is assumed that the claimant has voluntarily submitted to the court's jurisdiction. But if a claimant in subsequent proceedings in England disavows membership of a class action to which the defendant alleges him to have been a member, the English court - in order to follow its own *res judicata* criteria in these cases - will need to establish some basis for holding that the claimant is or is not bound.

318 *Wytcherley v Andrews* (1871) LR 2 P&D 327; *Cox v Dublin City Distillery Co (No 3)* [1917] 1 IR 203: the second debenture holders were estopped by a foreign decision from disputing that D was entitled to a lien on the debentures, the class having been represented by the trustee who had requested the liquidator to fight the second debenture holders' battle; cf. *Cox v Dublin City Distillery Co (No 2)* [1915] 1 IR 345: strangers not entitled to estoppel from what was neither a test nor "representative" action. In Canada: see *Naken v General Motors of Canada Ltd* (1983) 144 DLR (3d) 385. In Australia: see *Carnie v Esanda Finance Corporation* (1995) 183 CLR 398, 423-424

319 *Group Action Afrika v Cape plc* Queen's Bench, 30 July 1999 (unreported) also illustrates how complex this type of litigation is, and also how unsettled the principles. Indeed, the underlying logic of the decision hints at the applicability of preclusive pleas (mainly abuse of process) and the application of *forum non conveniens* principles in the recognition context. That case was initially brought in England against Cape plc, by five South African nationals. Their claims were in respect of asbestos-related diseases resulting, it was alleged, from exposure whilst working as employees for South African subsidiaries of Cape plc. At first instance, the defendant obtained a stay on *forum non conveniens* grounds, but the stay was lifted by the Court of Appeal. Then, in January 1999, the solicitors for the claimants issued a writ on behalf of a further 1539 claimants. In response, the defendants re-applied for a stay on *forum non conveniens* grounds and the present judgment granted that stay in light of the changed circumstances; not least the fact that the solicitors mounting the action knew all along that this action was a group action but did not indicate until January 1999 the number of claimants and whether the case is likely to be run as a group action. Buckley J observed (p39, transcript): "once the court is called upon *to determine issues* or ... becomes involved in the manage of a case at an early stage [which reflects the ethos of the new CPR], it must be fully informed about the litigation. This has not happened here and I cannot condone it."

320 *Minna Craig SS Co v Chartered Mercantile Bank* [1897] 1 QB 460. Cf. judgments *in personam* which determine the jural relation of persons to one another. Thus, the designation of a proceeding as *in rem* relates to

Provided the court had jurisdiction over the *res*[321], the judgment *in rem* will be conclusive against all the world in respect of the questions of title or status (of those persons or that property) so determined[322], and will bind "the whole world" even though the facts on which it necessarily proceeds are not established against all the world.

Accordingly, all persons[323] - parties, privies, strangers or non-parties - are estopped from controverting that which the duly recognised foreign judgment *in rem* has determined. This means the *in personam* rules as to parties and privies are not relevant to judgments *in rem*, for the whole world is a party to such decisions[324]. Rather, there are separate and specific rules pertaining to foreign decisions which determine (a) the status of a person and (b) the status of a thing. We deal briefly with each below.

However, the difficulty with *in rem* judgments is determining whether, and in what cases, an *in rem* judgment is binding for preclusive purposes. Certainly - regardless the nature of the judgment - all other conditions for a valid *res judicata* must be satisfied if it is sought to establish a preclusive plea against a stranger, as opposed to a party or privy. Thus, in *Ballantyne v Mackinnon*[325] it was said[326]:

> as to a judgment being only conclusive as to the point decided, there is no distinction between a judgment *in rem*, and a judgment *in personam*, except that, in the one, 'the point' adjudicated upon (which in a judgment *in rem* is always as to the status of the *res*) is conclusive against all the world as to that status, whereas, in the other, 'the point', whatever it may be which is adjudicated upon, ... is only evidence between parties or privies.

However, it is especially important that the 'point' the subject of the preclusive plea be essential to the judgment and ascertainable without ambiguity[327]. Where a finding is not

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the effect of the judgment, not the adversarial character of the action; whereas it is this latter quality which characterises judgments *inter partes* or *in personam.*

321 Which means the *res*, if property must be situated (*Castrique v Imire* (1870) LR 4 HL 414, 435) or the person affected must be domiciled (*Shaw v Gould* (1868) LR 3 HL 55; *Bonaparte v Bonaparte* [1892] P 402) within the jurisdiction of the rendering state.

322 *Lazarus-Barlow v Regent Estates Co Ltd* [1949] 2 KB 465

323 Even those receiving no notice of the proceedings. But a judgment *in rem* cannot be obtained by consent of the parties. An *in rem* matter if litigated will only have force *in personam* if litigation is short-circuited in this way: see *Ritchie v Malcolm* [1902] 2 IR 403; *Jenkins v Robertson* (1867) LR 1 Sc&Div 117.

324 *Bernardi v Motteux* (1781) 2 Doug KB 575, 580 (Lord Mansfield): "all the world are parties to a sentence of a court of admiralty".

325 [1896] 2 QB 455. The case involved a judgment of the Admiralty Court in a salvage action; and, in that case, salvage services were admitted and money was paid into court, but the judgment *in rem* concluded nothing more than the amount of the award and the existence of a lien for it, at least against strangers. Accordingly, the judgment was not conclusive in an action by the owners of the salvaged vessel against underwriters that the loss was due to sea perils.

326 *ibid*, 462

327 *Hobbs v Henning* (1865) 17 CBNS 791, 824; *Dalgleish v Hodgson* (1831) 3 Bing 495, 504; *R v Hartington Middle Quarter Inhabitants* (1855) 4 E&B 780

necessarily involved in the decision, or is indefinitely or ambiguously expressed, the world is not estopped, even if the parties may be bound[328].

It is also now the case that proceedings *in rem* against a ship are judicially indistinct from proceedings *in personam* against an individual interested in that ship[329]. In the final decision of *The Indian Grace* litigation[330], the House of Lords rejected the argument of the plaintiffs to the effect that the plea of former recovery provided by section 34 did not operate because the English Admiralty action *in rem* was not in respect of "the same parties", given that the Cochin proceedings had been *in personam*. This conclusion was reached by a fundamental re-interpretation of the Admiralty action *in rem* to the effect that, apart from a reservation for the "separate and complex subject" of maritime liens, the action instituted by the arrest and service of a writ on a vessel was to be seen as an action brought against individuals, and not against a ship. However, the decision aligns the common law with similar rules under the Brussels and Lugano Conventions[331].

(a) Foreign *in rem* judgment: status of a person

The foreign judgment as to the status of a person that purports to operate *in rem* in England will, necessarily, be a decision intended as having extra-territorial effect in order for it to be conclusive. This means the decision must not only operate *in rem* within the jurisdiction of the rendering state (which is a question of fact[332]) but must determine status so as to conclude the world[333]. A foreign decision which does not determine the status of a person in the international sense, or which does not establish, or entirely alter, such status, is not operative *in rem* in England[334].

We have already discussed the rules relating to the recognition of foreign judgments in respect of the most important foreign decisions determining status of persons[335]: those relating to marriage, nullity and divorce. Subject to recognition practice, foreign decisions of this nature are conclusive in England[336]. So too are those decisions that determine the

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328 *Concha v Concha* (1886) 11 App Cas 541; *Bernardi v Motteux* (1781) 2 Doug KB 575

329 Although the doctrinal accuracy of this new re-interpretation is hotly contested at the Admiralty Bar: see Briggs, A. "Foreign judgments and *res judicata*" (1997) 68 BYBIL 355, 355

330 [1998] AC 878

331 To the extent that an action *in personam* and an Admiralty action *in rem* are between the same parties for the purposes of Article 21: *The Tatry* [1994] ECR I-5439.

332 *Castrique v Imrie* (1870) LR 4 HL 414, 429-430

333 International treaties and conventions assist here (eg. matrimonial matters, rights of the child).

334 *Worms v De Valdor* (1880) 49 LJ Ch 261; *Re Selot's Trust* [1902] 1 Ch 488; *Re Langley's Settlement Trusts* [1962] Ch 541

335 Notwithstanding this importance, the scope of this thesis is principally focused on civil and commercial matters.

336 As to decrees of divorce: see *Pemberton v Hughes* [1899] 1 Ch 781, 793; *Bater v Bater* [1906] P 209, 228. As to decrees of nullity: see *Salvesen v Administrator of Austrian Property* [1927] AC 641, 662 (Lord

legitimacy (or otherwise) of a person domiciled in a foreign state; the rights of inheritance of an illegitimate child domiciled in a foreign state[337]; or foreign declarations as to the paternity of an illegitimate child[338].

(b) Foreign *in rem* judgment: status of a thing

If the foreign judgment is determinative of the status of a thing, it will operate as a conclusive *in rem* judgment in England as if it were an English judgment. The rules are well-known, having been enumerated in the leading authority, *Castrique v Imrie*[339]:

> the inquiry is, first, whether the subject-matter was ... within the lawful control of the State under the authority of which the court sits; and, secondly, whether the sovereign authority of that State has conferred on the court jurisdiction to decide as to the disposition of the thing, and the court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world.

An important group of cases are decisions *in rem* of foreign admiralty courts where the "thing" is a vessel. In their ordinary capacity, such courts render conclusive judgments, for they have a rightful jurisdiction founded on the actual or constructive possession of a vessel. This is also the case when such courts render judgments in prize (that is, when constituted to decide questions of maritime capture)[340]. It remains, though, that the foreign prize decision can only found an estoppel *per rem judicatam* if the requirements for the estoppel are established - in particular jurisdiction[341].

Dunedin); 652-653 (Lord Haldane)

337 *Doglioni v Crispin* (1866) LR 1 HL 301, 311; 314; 315; *Re Trufort* (1887) 36 Ch D 600, 609-611

338 *Re Macartney* [1921] 1 Ch 522, 532

339 (1870) LR 4 HL 414, 429

340 *Castrique v Behrens* (1861) 3 E&E 709, 722; *Minna Craig SS Co v Chartered Mercantile Bank* [1897] 1 QB 460; *Castrique v Imrie* (1870) LR 4 HL 414; *Simpson v Fogo* (1863) 1 Hem & M 195, 224; 243.

341 *Donaldson v Thompson* (1808) 1 Camp 429, 431-432: there was no estoppel because the foreign tribunal had operated within a neutral state.

PART 5 - CONCLUSION AND EXAMPLES OF CAUSE OF ACTION PRECLUSION BY FOREIGN JUDGMENT

We have now considered the requirements necessary to generate cause of action preclusive effects in subsequent proceedings in England by reason of a foreign judgment. The possible effects are two-fold: either to prevent the contradiction in subsequent proceedings of the cause of action, the existence of which has been determined (cause of action estoppel); or to preclude a party from reasserting the same cause of action in subsequent proceedings, having already recovered a foreign judgment thereon (section 34).

In either case, it is necessary to establish the foreign judgment as a *res judicata*; and, at common law, this process is simplified because recognition/registration uses criteria that correspond with the requirements that define a *res judicata.* A judgment recognised/registered is necessarily a *res judicata.* However, in affirming this status, the common law assesses the jurisdictional competence of the foreign court according to its own rules (jurisdiction in the international sense), and whether the foreign judgment is "on the merits" is an assessment that is also made according to English law. Deference to the foreign law is only made to ensure whether the judgment is final and conclusive.

The cause of action preclusive pleas also depend for their establishment upon an identity between the foreign and English proceedings: each must involve the same cause of action (and, in the case of section 34, an attempt to secure further recovery thereon) and the same parties or their privies. Because both criteria - subject matter and parties - require the English court to check that there is identity, it is English law which has been applied.

The interplay between these requirements is illustrated by the following examples and summary table.

Summary of applicable law - cause of action preclusion

Judgment recognised at common law	**Whether determined by English law?**	**Whether determined by foreign law?**
RECOGNITION / *RES JUDICATA* CRITERIA: -- jurisdiction	√ - English private international law rules apply; that is, jurisdiction in the international sense	x - not relevant ? - query possible role of natural forum
-- final and conclusive	x	√ - determined according to foreign law: judgment must be *res judicata* before the foreign court
-- on the merits	√ - determined according to English law criterion	? - query whether English court can look to whether *foreign* court would regard its judgment as being rendered on the merits
SUBJECT MATTER CRITERION: -- ie. same cause of action	√ - determined according to English law concept of what is/is not the same cause of action	? - query whether English court should not refer to foreign law
PARTIES/PRIVIES CRITERION:	√ - determined according to English law requirements of mutuality and privity and law as to parties and privies	? - query why English court should not refer to foreign law

Illustrations - cause of action preclusion

1. CAUSE OF ACTION ESTOPPEL: unsuccessful foreign plaintiff; defendant pleads foreign judgment as a bar

(a) G sues R in Francophonia for an account of profits. The Francophonian court clearly has jurisdiction over the subject matter and parties. The court dismisses G's claim. G commences proceedings in England against R upon the same cause of action, alleging that the proceedings and the judgment of the Francophonian court were contrary to justice and not final and conclusive. R pleads the foreign judgment before the English court. No defence to recognition is upheld and it is recognised according to the common law, thus affirming its *res judicata* status because: *English* jurisdictional rules (jurisdiction in the international sense) affirm that R, as defendant, was properly before the Francophonian court; *Francophonian* law informs that the judgment of its court is final and conclusive, in that the subject matter can not be raised again in the same (foreign) court; and, according to the *English* notion of "on the merits" the foreign court reached its conclusion as to G's claim after establishing the facts and applying legal principles to them. To uphold R's plea of cause of action estoppel, the English court must now assess whether the claim which G has brought before the English court is the same as that which was brought in Francophonia, and that G and R are, indeed, the same parties acting in the same right as they acted in Francophonia. If these criteria are met, G will be precluded by a cause of action estoppel; in which event R will have relied upon the preclusive effect of the judgment as a bar or defence. Note that R cannot plead section 34: that plea would only preclude G from *reasserting* a claim upon which G had recovered a foreign judgment in his favour - and G lost abroad. Thus it is said that G's proceedings in England are a *contradiction* of the foreign judgment, which has determined that G has no cause of action.

(b) Same facts as above, except: it is alleged that, though R was properly before the foreign court according to English rules of jurisdiction in the international sense, nonetheless the Francophonian court lacked internal competence. Orthodox principles suggest that this does not affect whether the foreign judgment can be recognised: the only relevant rule is the English conflict of laws rules governing jurisdiction in the international sense. But query whether G could raise the argument that the Francophonian judgment would not be *res judicata* in Francophonia because the Francophonian law's *res judicata* requirement as to jurisdiction would not be met. Perhaps G's point would be taken when the English court turns to consider the requirement "final and conclusive", for then G could argue the foreign judgment lacks finality on account of the foreign court lacking jurisdiction. Alternatively, if Francophonia was an inappropriate forum for the resolution of the dispute, is it plausible to suggest that G could argue that the judgment should not have preclusive effect? Surely such an argument could not be sustained here, since G (the unsuccessful *plaintiff*) elected to sue in Francophonia. But if the judgment went *against R*, and Francophonia was not the natural forum (and suppose the Francophonian court did not provide an opportunity for R to seek a stay on such grounds), should an English court temper the preclusive effect of such a judgment against R?

(c) Same facts as (a) above, except: it is alleged that, according to Francophonian law, the judgment was of a provisional nature. That suffices to deny the judgment preclusive effect in England. Hence G could sue R again in England because a foreign judgment must be *res judicata* before the foreign court if it is to give rise to preclusive consequences in England. If, alternatively, it was alleged that G's claim before the Francophonian court was dismissed because G failed to comply with a court order for discovery, or because G's claim form in the foreign court failed to disclose a proper claim, would such a judgment be "on the merits" as would preclude G from commencing in England? Even if in Francophonia, such procedural defaults by G would preclude G from further proceedings in Francophonia, it seems that it is for the English court to determine whether the foreign judgment is "on the merits" according to *its* law - and, in England, such procedural defaults do not amount to decisions "on the merits". Suppose, the Francophonian court dismissed G's claim as time-barred: again, it is English law (in particular, that supplied by the Foreign Limitation Periods Act 1984, section 3) which requires the English court to treat the judgment as substantive, and thus on the merits - regardless of whether the foreign court regards such decisions as substantive.

(d) Same facts as (a) above, except: G sues X in England (R having deceased) where X has succeeded to the rights of R's estate as beneficiary thereof. X could plead the Francophonian judgment as a privy in title to the foreign judgment as between G and R, although X was not himself party to their proceedings.

(e) Same facts as (a) above, except: G sues R in England for breach of contract. The Francophonian judgment for an account involves a different cause of action: it has no cause of action preclusive effect, although it may have issue preclusive effect (see Chapter Three).

2. CAUSE OF ACTION ESTOPPEL: successful foreign plaintiff precludes defendant by bringing action on judgment

(a) X sues Y in Ruritania for breach of contract. After a full hearing, the judgment of the Ruritanian court is simply a formal order awarding $10,000 damages to X. X brings an action on the judgment for enforcement in England. Y alleges, *inter alia*, that there was no breach of contract. If according to English notions of jurisdiction in the international sense the Ruritanian court had jurisdiction, and if according to Ruritanian law the formal order represents the final and conclusive adjudication of the subject matter, and if the English court is satisfied that the Ruritanian court reached its decision on the merits, then recognition for enforcement purposes will also secure the *res judicata* status of the Ruritanian judgment, and Y will be precluded by cause of action estoppel from contradicting the conclusion that there *was* a breach of contract, the existence of X's claim in contract can be inferred from the formal order that awards damages.

(b) Same facts as above, except: the Ruritanian court awards damages for (i) contractual loss sustained by the breach ($10,000), but not for (ii) economic loss. X sues Y in England on the judgment for (i) and also claims (ii). Y alleges that there was no breach of contract. The judgment on (i) precludes Y from denying the existence of the breach, and X would be entitled to enforce the judgment debt in respect of (i). But Y would be able to plead section 34 in respect of (ii) for X is suing afresh on the same cause of action, X having already obtained a foreign judgment thereon in his favour. Y's section 34 plea is one of reassertion (former recovery) and not contradiction (cause of action estoppel).

(c) Same facts as (a) above, except: the Ruritanian court orders that Y should pay X $10,000 after first deducting X's costs, to be taxed by the proper officer. The costs have not been taxed. The judgment is not for a fixed sum, so it cannot be enforced; although if liability has been separately determined query whether it would be final for purposes of *res judicata* and binding on the parties until the taxation, even if it would not support an action on the judgment for enforcement in England until after taxation was completed. Thus, query whether it could be relied upon solely for preclusive purposes even whilst not taxed.

3. CAUSE OF ACTION ESTOPPEL: foreign declaration of non-liability

X commences proceedings in England against Y for breach of contract. Meanwhile (and before judgment in England), Y obtains a declaration from the Francophonian court that (Y) is under no obligation to X and that there is no contract. Y returns to the English proceedings and seeks recognition of the foreign declaration of non-liability. Assuming the foreign declaration is in respect of the same contractual obligation the existence of which X is asserting in England, the English court will need to be satisfied as to the following if it is to accord preclusive effect to the Francophonian declaratory judgment: (i) was X subject to the jurisdiction of the Francophonian court in the international sense; (ii) is the Francophonian declaration final and conclusive according to Francophonian law; (iii) would the English court regard the Francophonian declaration as "on the merits". Note Y can only rely on the foreign declaration as a bar: Y cannot bring an action on that declaration.

4. CAUSE OF ACTION ESTOPPEL: judgment *in rem*

(a) P sues D in Ruritania for maintenance and recovers a fixed and final judgment. In subsequent proceedings in England, P alleges that there was never a marriage between P and D. By proving that the Ruritanian judgment is a *res judicata*, D can estop P from contradicting the foreign judgment that P had previously recovered, for the existence of a

marriage was necessarily decided by the Ruritanian court in reaching its decision to award maintenance.

(b) X agrees with Y in Ruritania to sell to Y land in England, and the land is conveyed according to English law. X sues Y in Ruritania to set aside the conveyance, alleging fraud by Y. The Ruritanian court orders Y to reconvey the land to X and, upon Y's refusal, purports to reconvey in Y's name. X sues Y in England: X cannot rely on the Ruritanian judgment for preclusive effect in England because an English court will not recognise the judgment: the Ruritanian judgment has no effect *in rem* as the land is not situated within Ruritania.

5. CAUSE OF ACTION ESTOPPEL: general

(a) P sues D in Ruritania and recovers judgment. D appeals in Ruritania. Whilst the appeal is pending, D commences proceedings in England that contradict P's judgment. P may plead cause of action estoppel in respect of the Ruritanian judgment at first instance, notwithstanding the appeal, since the pendency of the appeal does not affect the finality of the judgment at first instance. However, an English court may stay its proceedings until the outcome of the appeal.

(b) P sues D in Ruritania, but the action is dismissed for want of prosecution. The judgment, not being on the merits, will not preclude P from suing in England in respect of the same cause of action.

(c) P recovers a judgment in Israel. It is not registerable under Part I of the 1933 Act since it is a non-money judgment and thus unenforceable; yet P can rely on section 8(1) to plead cause of action estoppel should D attempt to contradict the judgment in subsequent proceedings in England. The common law principles will apply.

(d) P obtains a judgment against B in Ruritania. B sues C in England. C relies on the Ruritanian judgment to preclude B from denying the existence of the cause of action adjudged in Ruritania. Unless C is a privy of P, C cannot rely upon the preclusive effect of P's judgment in Ruritania; for English notions of parties and privies govern the preclusive effect of foreign judgments, and English law requires privity and mutuality. But suppose the law of Ruritania does not require mutuality, such that a judgment against B could be relied upon for collateral preclusive purposes by others in Ruritania? Query whether English law ought consider the preclusive effect of the foreign judgment under the foreign law here.

(e) A and B are passengers in a car driven by C which collides with a car driven by D. A brings an action in Francophonia against D and obtains judgment on the ground that D was negligent. Subsequent proceedings in England are brought by B against D. B's cause of action is separate from A's: A's judgment is of no preclusive value to B.

6. FORMER RECOVERY: section 34

(a) M brings an action in Ruritania against N, a resident thereof, and recovers judgment for $1m. Only part of the judgment is paid by N. Therefore, M brings proceedings in England against N for the same claim. Because the Ruritanian judgment is enforceable in England, M will be precluded by section 34 from bringing the proceedings in respect of this same claim, since M has already obtained judgment in his favour. M's only remedy is to enforce the balance of the Ruritanian judgment.

(b) D agrees to deliver goods to P. By the negligence of D, 10% of P's goods are destroyed (and therefore not delivered under the contract) and the remaining 90%, though delivered under the same contract, are damaged. P sues D in Ruritania in respect of the non-delivered goods, P and D both agreeing that litigation in respect of the delivered but damaged goods will be the subject of separate proceedings in England. Judgment is rendered by the Ruritanian court in respect of the Ruritanian action, prior to the conclusion the action in England. Then, in England, D attempts to prevent the continuance of the English proceedings relying on the Ruritanian judgment and section 34. The plea will not be upheld if it can be established that P and D agreed to split the

cause of action in this way, and thus to disapply the operation of section 34 by contrary agreement.

(c) D negligently injures P and damages P's car in a motor accident in Ruritania. P sues D in Ruritania in respect of damage to P's motor vehicle and recovers damages. P later sues D in England in respect of the injuries P sustained. Section 34 will not be available to D since the causes of action are different: P is suing in respect of different rights. However, if P sues in England in respect of further damage to the motor vehicle, discovered since the Ruritanian litigation, but arising from the same negligence of D, section 34 would be an available plea. Note, however, that issue estoppel or abuse of process pleas may be raised (see Chapters Three and Four)

(d) P sues D in Ruritania in respect of a motor accident in which P's husband is killed. The Ruritanian court awards compensation to P under local statute. Subsequently, P sues D in England claiming compensation under an English statute. Section 34 is an available plea: though the law is different, the underlying claim is the same; and judgment having been recovered by P in P's favour in Ruritania in respect of the same cause of action, P may not bring (further) proceedings in England.

(e) Through the negligence of D, P is injured in a car accident and his car is damaged. P negotiates with D's insurers who agree to pay damages (assessed at £1000) except for the first £100. P sues D in Ruritania and obtains judgment against D for £100. D's insurers become insolvent before making any payment. P subsequently sues D in England for £900. Section 34 may well operate; although D may be considered a privy to the agreement between P and D's insurers, and this may justify the disapplication of section 34.

(f) P sues D in Ruritania alleging defamation, D having published a defamatory article on Monday, and obtains judgment in his favour. D publishes the same article on Friday in respect of which P sues D in England, again alleging defamation. The English action will not be precluded by the Ruritanian judgment because the two are separate causes of action. However, suppose D publishes the article on Friday only, and P sues D for breach of privacy in Ruritania, obtaining a judgment in his favour. Will P be precluded from suing D *for defamation* in England in respect of that same publication? Section 34 may prohibit P from bringing defamation proceedings in England notwithstanding that P has recovered a judgment for breach of privacy since the underlying facts are the same. However, England does not recognise a right to privacy ... Even so, it may be that an English court will conclude that P only had one right to recovery in respect of that publication, and that such recovery has already been obtained by P in Ruritania.

CHAPTER THREE

ISSUE PRECLUSION BY A FOREIGN JUDGMENT RECOGNISED AT COMMON LAW

1. Issue preclusion

Issue preclusion - which may be brought about by recognising the judgment at common law and pleading issue estoppel thereon - prevents a party or privy in subsequent proceedings from contradicting an issue that has already been distinctly raised and decided between the same parties or privies. This is because[1]:

> [a] judicial determination directly involving an issue of fact or of law disposes once and for all of the issue, so that it cannot be raised [again] between the same parties. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification for its conclusion, whether that conclusion is that a money sum be recovered or that the doing of an act be commenced or restrained or that rights be declared.

The rationale is similar to cause of action estoppel: "it is unjust and unreasonable to permit the same issue to be litigated afresh"[2]. But, unlike the cause of action "species"[3] of estoppel, "what is relied on here is not the mere fact of a judgment and not a decision on the substantive 'cause of action' or claim [but] a decision on a particular issue"[4].

A particular issue might be decided on a separate occasion, as a free-standing issue independent from the main substantive proceedings on a cause of action. An example would be an issue determined at an interlocutory stage on a jurisdictional or procedural matter. It is nonetheless preclusive as an issue estoppel, provided the decision has, indeed, rendered the subject matter *res judicata.*

More often, however, a particular issue (or issues) will be rendered *res judicata* as part of a final and conclusive decision on a cause of action[5]:

> There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a

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[1] *Blair v Curran* (1939) 62 CLR 464, 531-533 (Dixon J)

[2] *New Brunswick Rail Co Ltd v British and French Trust Corporation Ltd* [1939] AC 1, 19-20 (Lord Maugham LC)

[3] *Thoday v Thoday* [1964] P 181, 197 (Diplock LJ)

[4] *Carl Zeiss (No 2)* [1967] 1 AC 853, 963 (Lord Wilberforce)

[5] *Thoday v Thoday* [1964] P 181, 197-198 (Diplock LJ)

> particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another *upon any cause of action which depends upon the fulfilment of the identical condition*, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was. [emphasis added]

In either case we see the essential function of issue estoppel is similar to cause of action estoppel: to preclude the contradiction of matters previously determined. Indeed, both species of estoppel *per rem judicatam* may operate concurrently in particular cases according to the causes of action litigated and the issues arising in each proceeding[6]. But issue estoppel is more sophisticated, and for three reasons: the subject matter is precisely defined, focusing on discrete issues of fact or law, rather than the broad question as to the existence of a cause of action; the plea is now subject to a special circumstances exception[7]; and the sphere of application is wider. Indeed, as to the latter, the subsequent proceedings in which the issue estoppel plea is raised can involve *any* type of proceedings in which the identical issue arises[8]:

> if A sues B to judgment and in the subsequent proceedings between them a plea of issue estoppel is raised, the plea may succeed although the causes of action in the two cases are entirely different. The question will be whether an issue of fact or law which is raised in the later proceedings was an issue of fact or law which was also raised in the earlier proceedings and therein determined.

Thus issue preclusion is particularly effective in the foreign context when there is an issue that is key and common to two different proceedings, perhaps in respect of different causes of action; for an issue determination at F1 can be used to stymie subsequent proceedings at F2 that depend upon the same issue.

The most celebrated of the early English cases on issue estoppel is *The Duchess of Kingston's case*[9] in which the Privy Council referred to a judgment as being conclusive of the same matter "coming incidentally in question in another court for a different purpose"[10]. However, the classic statement of principle is to be found in *R v Hartington Middle Quarter Inhabitants*[11]. In that case, though the causes of action were different, it was held that the former judgment[12]:

> concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision

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6 *Stewart v Todd* (1846) 9 QB 767; *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, 610 (Brennan J)

7 *Arnold v National Westminster Bank plc* [1990] Ch 573; although there are strong reasons for criticising the advent of this exception to issue estoppel.

8 *Jackson v Goldsmith* (1950) 81 CLR 446, 467 (Fullagher J)

9 (1776) 20 St Tr 355

10 *ibid*, 538n

11 (1855) 4 E&B 780

12 *ibid*, 794-795 (Coleridge J)

> itself, though not then directly the point in issue ... [the former judgment is] conclusive evidence not merely of the facts directly decided, but of those facts which are ... necessary steps to the decision [and] so cardinal to it that, without them, it cannot stand

Although identity of subject matter is central to issue estoppel, these authorities make it clear that the requirement that the issue be necessary or legally indispensable to the decision is equally fundamental.

What is also apparent from these early authorities is that issue estoppel is not new[13], even though the term is of comparatively recent origin[14]. It is surprising, therefore, that the common law[15] only extended issue estoppel to foreign judgments with the decision of the House of Lords in *Carl Zeiss (No 2)*[16]. Nonetheless, it will be useful to trace the evolution of foreign judgment issue estoppel, starting with that decision, and then considering two more recent, yet key, decisions: *The Sennar (No 2)*[17] and *Desert Sun Loan Corp v Hill*[18].

But it will also be convenient to be aware at the outset of the requirements which must be satisfied in order to found an issue estoppel upon a foreign judgment:

(a) the foreign judgment must be verified as a *res judicata* according to the common law rules of recognition. The recognition rules - at least as to the jurisdictional competence of the foreign court - follow those which pertain to cause of action preclusion as discussed in Chapter Two, Part Two, although we will observe that the requirements "final and conclusive" and "on the merits" have been adapted by the common law for issue preclusive purposes;

(b) the issue advanced in the subsequent (F2) proceedings in England must be the same as that adjudicated in the foreign (F1) proceedings;

(c) as we have seen, with issue estoppel it is also important to ascertain whether the issue was "necessary and fundamental" to the decision;

(d) the parties to the F2 proceedings must be the same as those who were party or otherwise privy to the F1 proceedings. (Again, this requirement is the same as for cause of action preclusion); and

(e) all the while, we must bear in mind the difficulties that attend issue estoppel in the foreign context.

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[13] [1967] 1 AC 853, 913 (Lord Reid): "Issue estoppel may be a comparatively new phrase, but I think that the law of England - *unlike the law of some other countries* - has always recognised that estoppel *per rem judicatam* includes more than merely cause of action estoppel."

[14] The term was coined in *Hoystead v Federal Taxation Commissioner* (1921) 29 CLR 537, 561 (Higgins J)

[15] More especially since foreign judgment issue estoppel was anticipated by the 1933 Act: see section 8(3).

[16] [1967] 1 AC 853

[17] [1985] 1 WLR 490

[18] [1996] 2 All ER 847

2. The recognition at common law of foreign issue decisions for preclusive purposes

(a) The emergence of foreign judgment issue estoppel and the need for caution: *Carl Zeiss (No 2)*

In *Carl Zeiss (No 2)*[19], proceedings were commenced in West Germany and in England to restrain the passing off of optical instruments under the name "Carl Zeiss Stiftung", an industrial, scientific and charitable foundation ("the foundation").

The action in West Germany was begun by the Council of Gera on behalf of the foundation. Even though the Council itself had no interest in the subject-matter of the action, it maintained that it was required to act to enforce the rights of the foundation. However, the West German court concluded, *inter alia*, that the proper legal representative and administrative body of the foundation for the purposes of the litigation was a body *other* than that which had brought the proceedings.

The action in England was also, supposedly, an action by the foundation; but here suing by their solicitors, who also had no interest in the subject-matter of the action. The Council of Gera was not before the English court. Nonetheless, the issue was whether the solicitors were bringing the English action on account of the Council of Gera or acting on behalf of the foundation. If the latter, the judgment given in the West German court against the Council of Gera on *their* claim to represent the foundation would not raise an issue estoppel *against the solicitors* acting in the English action. However, hoping to stymie the English proceedings, the defendants sought recognition at common law of the West German judgment containing the conclusion upon this issue in order to assert that the proceedings in England were being improperly maintained.

The defendants failed. None of their Lordships thought *all* the requirements for issue estoppel were made out on the particular facts of the case. Whilst all thought there was identity of subject matter in the two proceedings[20], only Lord Upjohn considered in any detail whether this subject matter was necessary and fundamental to the foreign judgment relied upon for the estoppel[21]. Lord Hodson was satisfied the foreign judgment was final and conclusive[22], but Lord Guest, Lord Upjohn and Lord Wilberforce thought finality was not established[23]. Lord Wilberforce concluded there was identity of parties in the two sets of proceedings[24], but the rest of his brethren disagreed: the solicitors bringing the

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[19] [1967] 1 AC 853

[20] Including Lord Reid: [1967] 1 AC 853, 913; 917, contrary to the headnote, *ibid*, 855. See also fn25.

[21] *ibid*, 947-948 (Lord Upjohn)

[22] Albeit by presuming it to be so: see fn35

[23] Lord Reid did not dissent from the opinion of Lord Wilberforce on the question of finality: [1967] 1 AC 853, 919 "But I must rest my judgment that there is here no *res judicata* or estoppel on there being not sufficient identity of parties in the West German proceedings".

[24] Recall that he "deemed" them to be parties: see Chapter Two, Part Four.

action in England were neither parties to the West German proceedings nor in privity with any of the parties to that action.

But despite the result the case is seminal because a majority[25] held there was no reason *in principle* to deny the possibility of issue estoppel based on a foreign judgment, since a foreign judgment is "just as effective as an English judgment"[26]. Moreover, using the language of recognition, Lord Wilberforce said[27]:

> there seems to be no acceptable reason why the recognition of foreign judgments should not extend to the recognition of foreign issue decisions ... [even though] this, in the case of foreign judgments, may involve difficulties and necessitate caution. ... But with these reservations, where after careful examination there appears to have been a full contestation and a clear decision on an issue, it would in my opinion be unfortunate to exclude estoppel by issue decision from the sphere of recognition.

For present purposes the importance of the speeches - particularly those of the majority - lies in the reasons which can be adduced "for being cautious in any particular case"[28]. Indeed, this requirement of special caution is what distinguishes estoppel by foreign issue decision from its operation in the domestic setting.

The first reason for caution appreciates that it may not be easy to establish the identity of the particular issue allegedly decided abroad, let alone ascertain that the issue decision was necessary to the overall judgment. For an English court is not only required to verify the *res judicata* status of the foreign judgment, it must examine the judgment and perhaps the pleadings and evidence before the foreign court in order to ascertain the issue adjudged. However, in the case of courts whose procedures, decision-making techniques and substantive law are not the same as in England, making sense of that which is foreign may be almost impossible. Thus it was said[29] that caution should be exercised before allowing an issue estoppel, so that the court might be fully satisfied as to *both* the identity requirement *and* the requirement that the issue be necessary and fundamental and not merely collateral or *obiter*.

Despite this reservation, the majority thought it better that issue estoppel be cautiously extended to foreign judgments than denied outright[30]. Those in the minority, however,

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[25] [1967] 1 AC 853, 918 (Lord Reid); 927 (Lord Hodson); 966-967 (Lord Wilberforce). Lord Upjohn was *not* in the majority, contrary to the headnote, *ibid*, 855: see *ibid*, 948-949. Lord Guest likewise concluded that a foreign judgment ought not sustain issue estoppel: *ibid*, 937.

[26] *ibid*, 918 (Lord Reid)

[27] *ibid*, 967

[28] *ibid*, 918 (Lord Reid)

[29] *ibid*, 918 (Lord Reid); 926 (Lord Hodson); 967 (Lord Wilberforce)

[30] According to Lord Wilberforce, if there was an explicit statement of the foreign decision, of the reasons for that decision, and of the issue as defined between the parties to it, then "the difficulty should not be too great in ascertaining whether the same issues as were there decided are involved in the present action": *ibid*, 967 (Lord Wilberforce)

thought this reservation was reason enough for denying issue estoppel to foreign judgments altogether- for example, Lord Guest[31]:

> In operating issue estoppel it may be necessary, in order to ascertain what issues have been inferentially or incidentally decided, to look, not only at the judgment, but also at the pleadings and, it may be, at the evidence. We are not familiar in this country with the practice and procedure in foreign countries, and it may be a matter of considerable nicety in certain cases to find out what issues were determined and whether they were incidental or collateral to the main decision.

And Lord Upjohn[32]:

> Questions of authority - and, indeed, the very concept of authority for this purpose - depend so much on matters of procedure in each court ... that it is difficult to apply a judgment in the one case to another under a different jurisprudence.

But is not the task of the conflict of laws precisely to try and reconcile such difficulties? Rather than denying issue estoppel outright, surely the correct approach is that of the majority, who at least recognise that a foreign *res judicata* can in principle be productive of issue estoppel, and who thereby admit it in order that the evolving common law might tackle the difficulties in practice - whilst exercising caution - on a case by case basis.

Even so, there was a second reason for caution; and, again, this acknowledged the difficulties involved in verifying the *res judicata* status and preclusive effect of the foreign judgment at common law, in particular the requirements "final and conclusive" and "on the merits". Lord Reid observed[33]:

> It is clear that there can be no estoppel of this character unless the former judgment was a final judgment on the merits. But what does that mean in connection with issue estoppel? When we are dealing with cause of action estoppel it means that the merits of the cause of action must be finally disposed of so that the matter cannot be raised again in the foreign country. In this connection the case of *Nouvion v Freeman* is important ... When we come to issue estoppel I think that, by parity of reasoning, we should have to be satisfied that the issues in question cannot be relitigated in the foreign country.

Likewise, according to Lord Wilberforce[34]:

> a more serious obstacle to the efficacy of the estoppel is to be found in the requirement that the foreign judgment should be final and conclusive or, as it is sometimes put, conclusive on the merits .... generally it would seem unacceptable to give to a foreign judgment a more conclusive force in this country than it has where it was given.

Thus the question with which their Lordships realised they had to grapple was: How can an English court be sure a foreign court has rendered *the issue* "final and conclusive"? Admittedly, the difficulty may not be so great where the issue in question has been expressly or necessarily determined *as part of a decision upon a cause of action*, because the issue will presumably be rendered "final and conclusive" and "on the merits" along

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31 *ibid*, 938

32 *ibid*, 948-949

33 *ibid*, 918-919

34 *ibid*, 969-970

with the judgment upon the cause of action of which it forms a part. But what of "free-standing" issue determinations that are independent of causes of action: when are these "final and conclusive"? And - if they are non-substantive issues - how can such decisions be "on the merits"? At the time of *Carl Zeiss (No 2)*[35], however, devising general formulae to encompass all such issue decisions was bound to be complex, especially since estoppel by foreign issue decision was a nascent principle. It is little wonder the speeches of their Lordships are less than precise.

Lord Reid, for example, suggests there is finality if it can be proved the foreign court would not allow the re-opening of the "issue decided"[36], but elsewhere in his speech - and without indicating whether this was an additional requirement - his Lordship states: "the earlier *judgment* relied on must have been a final judgment"[37]. Lord Guest, meanwhile, seemed to require *both* issue finality and judgment finality[38]; whereas Lord Hodson - saying nothing of the issue or of "finality"[39] - suggests[40]:

> the *judgment* must be *conclusive* ... in the sense ... that it cannot, although it may be subject to appeal, be varied by the court which made it, as are, for example, some maintenance or alimony orders. [emphasis added]

Lord Wilberforce was also concerned to adapt the meaning of "final and conclusive" so that the criterion might be useful to the recognition of foreign *issue* determinations. But without resolving whether the issue itself must be final, his Lordship recites the *Nouvion v Freeman*[41] rule that applies to causes of action, and states[42]:

> I think that "conclusive" must be taken in the sense that if the Stiftung represented by the Council of Gera were to attempt to commence another action in West Germany against the same defendants as were parties to the previous action they would, by force of the previous judgment, be prevented from proceeding with it.

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35 *ibid*

36 *ibid*, 919

37 *ibid*, 909. Lord Upjohn, *ibid*, 949, merely states the respondents failed to prove that the proceedings in West Germany were "final and conclusive".

38 *ibid*, 936 (Lord Guest): "the judicial decision which is said to create the estoppel [must be] final ... [that is] the decision *upon which the issue* estoppel arises"; cf. *ibid*, 935 (Lord Guest): "*[a]nother* aspect of finality relates to the requirement that the decision relied upon as estoppel must *itself* be *res judicata* in the country in which it was made"

39 He reproves the expression "final and conclusive" as "repetitive": see *ibid*, 926 (Lord Hodson)

40 *ibid*; although, in the end, his Lordship avoided any difficulty presented by the requirement: *ibid*, 927 "For my part, I think it would be legitimate to rely on the assumption commonly made in English courts that in the absence of evidence of foreign law it is taken to be the same as English law and to hold that the judgment relied on for the estoppel is final and conclusive." This must be erroneous: see Chapter Two, Part Two.

41 (1887) 15 App Cas 1

42 [1967] 1 AC 853, 969-970 (Lord Wilberforce)

His Lordship, together with Lord Hodson, who had similar views[43], also thought "it is for the defendant, who sets up the bar, to establish the conclusive character of the judgment"[44]. Lord Reid seemed to disagree, placing the onus on the party wishing to re-open the issue to show that it had not been rendered final and conclusive[45], an interpretation not supported by the authorities[46].

Conspicuously, therefore, their Lordships seemed to provide no clear guidance on the content of the requirement "final and conclusive".

There was similar confusion as to the meaning of "on the merits". Again, ostensibly the question was: How, and by which law, can an English court be sure that *an issue* has been rendered "on the merits"? And yet this requirement was either blurred with the finality requirement[47] so that it added nothing[48]; or linked with the requirement that the issue must be necessary and fundamental to the cause of action[49]. Only Lord Wilberforce ventured an interpretation of "on the merits" that focused on whether the *issue* had been so rendered[50]:

> I cannot accept the argument that, for this purpose, the merits means the merits of the action as stated in the plaintiff's claim. The defendants' contention that the Stiftung's ability to act has been fatally impaired is just as much an argument on the merits: indeed, the issue which group of persons is entitled to control the Stiftung is at the root of the present dispute.

We will hear Lord Wilberforce's approach echo in the decisions in *The Sennar (No 2)*[51] and *Desert Sun Loan Corp v Hill*[52] discussed below.

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[43] *ibid*, 927 (Lord Hodson): "It is for the defendants to show the estoppel and, to prove it, they must establish *as a matter of German law* that the judgment is final and conclusive."

[44] *ibid*, 970 (Lord Wilberforce)

[45] *ibid*, 919 (Lord Reid)

[46] *Behrens v Sieveking* (1837) 2 Myl & Cr 602

[47] *Carl Zeiss (No 2)* [1967] 1 AC 853, 927 (Lord Hodson): "One asks, about what is the judgment to be final and conclusive? The answer is that it must be on the merits and not only as to some interlocutory matter not affecting the merits". See also *ibid*, 918-919 (Lord Reid); and 935-936 (Lord Guest), who concluded the issue could not be on the merits because it concerned a preliminary and procedural point relating to the capacity of the foundation to sue.

[48] Cf. SBTH, p84: "The requirement that a judicial decision must be 'on the merits' ... is a *separate* requirement that has been clarified since the second [1969] edition"; itself only a few years after *Carl Zeiss (No 2)* [1967] 1 AC 853.

[49] *Carl Zeiss (No 2)* [1967] 1 AC 853, 947 (Lord Upjohn): the issue or *lis* must *not* be "collateral or incidentally cognisable and therefore not the subject of estoppel" but must be relevant to the cause of action.

[50] *ibid*, 969 (Lord Wilberforce)

[51] [1985] 1 WLR 490

[52] [1996] 2 All ER 847

Nonetheless, it is suggested that all this confusion plainly reflects the difficulty that the common law *then* faced in adjusting its recognition scheme - at the time attuned only to the recognition of final determinations on substantive disputes[53] - so that it could *also* accommodate foreign issue determinations for preclusive purposes. Inevitably such tinkering would require case by case adjustment, for in this manner the common law evolves. Thus it will come as no surprise that subsequent decisions have refined these recognition criteria, so that nowadays the common law is less perplexed when recognition of a foreign judgment is sought for issue preclusive purposes[54]. But the boldness of the majority made this possible by seeing beyond the difficulties and accepting issue estoppel upon a foreign judgment.

However, we must still remain mindful of the majority's third reason for being cautious. This related to the practical difficulties which a *defendant* may face in deciding whether to appear in proceedings abroad. Suppose the case abroad is of trifling importance, and would involve the defendant in proving facts which would be expensive and troublesome. Yet the same point may arise if his opponent later raises a much more important claim in England. What is the defendant to do? The subsequent proceedings may never be brought. Even so, must he take the trouble and expense to forestall a *possible* plea of issue estoppel just in case those proceedings are brought?[55] Again, Lord Reid resolved[56]:

> it might be unjust to hold that a litigant here should be estopped from putting forward his case because it was impracticable for him to do so in an earlier case of a trivial character abroad, with the result that the decision in that case went against him. .... It seems to me that there is room for a good deal more thought before we settle the limits of issue estoppel.

Similarly Lord Wilberforce thought[57]:

> it would be right for a court in this country, when faced with a claim of issue estoppel arising out of foreign proceedings, to receive the claim with caution in circumstances where the party against whom the estoppel is raised might not have had occasion to raise the particular issue. The fact that the court can (as I have stated) examine the pleadings, evidence and other material, seems fully consistent with its right to take a broad view of the result of the foreign decision.

But these three reasons notwithstanding, the majority were prepared to recognise that a foreign *res judicata* can in principle be productive of an issue estoppel. None of these difficulties was sufficiently overwhelming in itself to mean that the recognition of foreign

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[53] It is instructive to note that Lord Reid, at least, was aware "that some confusion has been introduced *by applying to issue estoppel without modification rules which have been evolved to deal with cause of action estoppel*": [1967] 1 AC 853, 916. Thus it is Lord Reid who appreciates the importance of modifying "*by parity of reasoning*" the finality and merits requirements when issue estoppel is concerned: *ibid*, 919.

[54] *The Sennar (No 2)* [1985] 1 WLR 490; *Desert Sun Loan Corp v Hill* [1996] 2 All ER 847.

[55] This does not arise in cause of action estoppel: if the cause of action is important, a defendant will incur the expense; if it is not, he will take the chance of winning on some other point.

[56] [1967] 1 AC 853, 918; 917 (Lord Reid) Cf. Lord Hodson, *ibid*, 926: "There may be cases of manifest injustice, that is, in a case, perhaps, when a defendant having a minimal interest in a matter allows a case to go by default, exposing himself to the risk of being bound by the judgment when the issue turns out to be more serious for him."

[57] *ibid*, 967 (Lord Wilberforce)

judgments at common law should not extend to the recognition of issue decisions, even if it has been left to subsequent cases to enlarge the recognition criteria in order to accommodate this extension of principle.

Indeed, since *Carl Zeiss (No 2)* there have been a number of cases in which a foreign judgment has been relied upon to support a plea of issue estoppel[58], and it is now generally accepted that "the same principles of issue estoppel apply in the case of decisions of foreign courts as they do to those of English courts"[59]. However, of these subsequent authorities, the case that marked the next important development in the evolution of the principle was *The Sennar (No 2)*[60].

(b) Issue estoppel upon a foreign jurisdictional issue determination: *The Sennar (No 2)*

In *The Sennar (No 2)*[61], a Dutch court had held that a claim against ship-owners for damages in tort caused by a mis-dated bill of lading could only be brought upon the contract contained in the bill of lading. Since the contract contained an exclusive jurisdiction clause for Khartoum or Port Sudan, and the law of the Sudan was to apply, the Dutch court felt itself bound to decline jurisdiction in respect of the claim.

Successors in title to the Dutch claimants[62] brought an action in England against the same defendants for damages in respect of the same underlying claim. On appeal by the plaintiffs, the House of Lords unanimously held the decision of the Dutch Court of Appeal[63] created issue estoppels[64]:

> upon two issues: *the first* is that the dealers have no claim against the ship-owners for their wrongful act of inserting a false date upon the bill of lading, other than a claim for breach of the contract of carriage; *the second* is that the effect of the jurisdiction clause in the contract of carriage is to make any remedy for breach of that contract enforceable only in a Sudanese court unless the ship-owners elect otherwise.

As to the first, it might have been thought that this created a cause of action estoppel, were it not for the fact that the Dutch court made no substantive determination as to the

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58 *Vervaeke v Smith* [1983] 1 AC 145; *Tracomin SA v Sudan Oil Seeds Co Ltd (No 1)* [1983] 1 WLR 662; *Westfal-Larsen A/S v Ikerigi Compania Naviera SA* [1983] 1 All ER 382; *The Jocelyn* [1984] 2 Lloyd's Rep 569; *The Sennar (No 2)* [1985] 1 WLR 490; *EI du Pont de Nemours v Agnew (No 2)* [1988] 2 Lloyd's Rep 240; *ED & F Mann (Sugar) Ltd v Haryanto (No 2)* [1991] 1 Lloyd's Rep 429; *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241; *Black v Yates* [1992] QB 526; *Desert Sun Loan Corp v Hill* [1996] 2 All ER 847

59 *Desert Sun Loan Corp v Hill* [1996] 2 All ER 847, 862 (Stuart-Smith LJ)

60 [1985] 1 WLR 490

61 *ibid*

62 Which recalls the discussion as to privies in title: see Chapter Two, Part Four.

63 Which, itself, had upheld the decision of the District Court of Rotterdam.

64 *ibid*, 494-495 (Lord Diplock)

existence of that cause of action: all it did was characterise the claim[65]. But, as to the second, it was (so their Lordships held) clearly an issue estoppel, and it meant the plaintiffs were estopped in subsequent proceedings in England from asserting that their claim did not fall within the exclusive jurisdiction clause. Accordingly, just as the Dutch court declined jurisdiction because the claim was subject to the exclusive jurisdiction clause, so too the plaintiffs were precluded by issue estoppel in England[66]; for to permit otherwise would be to contradict the foreign determination upon that jurisdictional issue. Thus the decision makes it plain that an issue estoppel may arise upon a foreign judgment given on the question of whether the foreign court has jurisdiction to hear a particular claim.

In the evolution of foreign judgment issue estoppel, this decision is a turning point because it broadens the range of foreign judgments capable of founding issue estoppel to include decisions as to jurisdiction. It does so, primarily, by allowing for greater flexibility in the meaning of "on the merits". Indeed, it is to be remembered that at the time of *Carl Zeiss (No 2)*[67] it was thought that only issues raised and determined *as part of a cause of action* could be rendered "on the merits", thus excluding procedural and jurisdictional issue decisions from ever being "on the merits". Certainly counsel for the plaintiffs pressed this argument[68]; and it was also a view which Lord Diplock, paradoxically, seemed to share[69]:

> It is often said that the final judgment of the foreign court must be "on the merits". The moral overtones which this expression tends to conjure up may make it misleading. What it means in the context of judgments delivered by courts of justice is that the court has held that it has jurisdiction to adjudicate *on an issue raised in the cause of action* to which the particular set of facts give rise, and that its *judgment on that cause of action* is one that cannot be varied, reopened or set aside by the court that delivered it or any other court of co-ordinate jurisdiction although it may be subject to appeal. [emphasis added]

However, the problem with this definition for issue estoppel purposes is that it is only useful if the issue in question has been expressly or necessarily decided by a foreign judgment *on a cause of action*, but not if the issue is free-standing or determined independently of a cause of action. Lord Brandon of Oakbrook appreciated this problem. His Lordship noted the argument that the judgment of the Dutch court was procedural in nature because it consisted only of a decision that the Dutch court had no jurisdiction to

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65 Yet it would seem that the characterisation of the claim was itself an issue which, having been determined by the Dutch court, could not again be controverted in the English proceedings. Difficult questions seem to arise as to the preclusive effect of foreign characterisations: *ibid*, 494-495 (Lord Diplock), but the fact that it was argued that the cause of action in the Dutch court was not the same as that in the English court made no difference. Thus the House looked at the substance rather than the form in which the action was framed and found that, in substance, the *issue* in both jurisdictions was the same: the application of the exclusive jurisdiction clause whether the action was framed in contract or tort.

66 The English proceedings were stayed.

67 [1967] 1 AC 853, 935 (Lord Guest): "final and conclusive *on the merits* [for issue estoppel purposes requires that] *the cause of action* must be extinguished by the decision which is said to create the estoppel"; 927 (Lord Hodson): "about what is the judgment to be final and conclusive? The answer is that it must be on the merits *and not only as to some interlocutory matter not affecting the merits*".

68 [1985] 1 WLR 490, 494-495 (Lord Diplock)

69 *ibid*, 494

entertain and adjudicate the claim, and thus did not pronounce in any way on the question whether the claim *itself*, or any substantive issue in it, would succeed or fail[70]. But this argument, he thought, was based on a misconception that could only be corrected if greater clarity was given to the expression "on the merits" as used in the context of the doctrine of issue estoppel. Hence his Lordship reinterpreted the term - as we have seen in Chapter Two, Part Two - and concluded[71]:

> If the expression "on the merits" is interpreted in this way, as I am clearly of the opinion that it should be, there can be no doubt whatever that the decision of the Dutch Court of Appeal in the present case was a decision on the merits for the purposes of the application of the doctrine of issue estoppel.

With this decision we see a fine example of the adaptability of the common law recognition requirements. On Lord Brandon's reasoning, the fact that an "issue" involves a question of jurisdiction (or any other procedural question) and is not determined as part of a cause of action no longer means such a decision is not "on the merits"[72]. Indeed, only Lord Brandon's formulation of "on the merits" is wide enough to embrace the full range of foreign issue determinations capable of founding an issue preclusive plea in subsequent proceedings in England. The tactical consequences of this are significant, especially to litigants who wage jurisdictional battles over the venue for litigation. Indeed, now that such issue determinations are "on the merits" they can in principle qualify as *res judicatae*[73], and hence a determination by a foreign court of a jurisdictional issue may well have the effect of driving subsequent litigation to the forum judicially ordained by the former litigation. The tactical advantage gained by procuring a favourable decision as to jurisdiction is precisely that of enabling you to wield the estoppel so as to dislocate other, inconvenient proceedings pursued by an opponent[74].

And what of other jurisdictional issue determinations by foreign courts? Consider, for example, the situation faced by an unsuccessful defendant who, in the foreign court, fails to obtain a stay, the foreign court concluding that the proceedings before it were not vexatious and oppressive. Would an application by the unsuccessful defendant to an

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[70] *ibid*, 499 (Lord Brandon of Oakbrook)

[71] *ibid*

[72] Although a distinction may need to be drawn between a "final decision" on an interlocutory matter and an interlocutory judgment: see fn100.

[73] Assuming the remaining requirements are satisfied.

[74] But those who engage in jurisdictional skirmishes of this sort wield a double-edged sword: the plaintiffs (according to Lord Diplock: *ibid*, 493; cf. *The Tatry* [1994] ECR I-5439, Advocate General Tesauro) had engaged in a blatant example of forum shopping by arresting the ship and commencing in England, and yet it was the plaintiffs who suffered the preclusive effect of the Dutch decision. If the issue had been decided in their favour, the position would have been different; for presumably the plaintiffs could have repelled arguments in England that the proceedings be brought in Sudan. However, compare Lord Diplock's allegation of forum shopping with the 1952 Arrest Convention, which sanctions jurisdiction in relation to certain claims founded by the arrest of a ship, if this arrest takes place: see *The Deichland* [1990] 1 QB 361; but cf. *The Prinsengracht* [1993] 1 Lloyd's Rep 41; *The Anna H* [1995] 1 Lloyd's Rep 11.

English court for an anti-suit injunction be defeated by an issue estoppel raised upon the foreign judgment?[75]

Conversely, what is the extent of issue estoppel where an issue has been determined in proceedings which have been brought in breach of a choice of court clause in favour of England, or in the face of an anti-suit injunction granted by an English court?[76]

This gives rise to the further thought that the increasing currency in foreign judgments for preclusive purposes may, in turn, necessitate anti-preclusive measures - for example: relief similar to the injunction sought in *Du Pont v Agnew (No 2)*[77], which might have been referred to as an "anti-estoppel injunction"[78]; or declarations by the English court that the foreign judgment - actual or anticipated - will not have preclusive effect in subsequent proceedings in England[79].

But, returning to the decision in *The Sennar (No 2)*[80]: it is also worth noting its limitations. The *ratio* of the decision is confined to foreign jurisdictional issue

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[75] In *Greymac Trust v BNA Realty* (1985) 50 CPC 45, a Canadian first instance decision, an application in Ontario to restrain proceedings in Quebec was refused in circumstances where an unsuccessful attempt had already been made to have those proceedings dismissed in Quebec.

[76] The problem was referred to, but not resolved, in *Svendborg v Wansa* [1996] 2 Lloyd's Rep 559, 575 (Clarke J): "There was some debate at the hearing about the extent of the doctrine of issue estoppel, where an issue is determined in proceedings which have been brought in breach of contract; a fortiori where judgment is obtained in the face of an injunction granted by this Court. I have not thought it necessary to discuss those interesting questions at this stage".

[77] [1988] 2 Lloyd's Rep 240; that is, an injunction to *prevent* reliance on the foreign judgment for preclusive purposes in subsequent proceedings (in that case) in England. A similar attempt was made (and failed) in: *ED & F Man (Sugar) Ltd v Haryanto (No 2)* [1991] 1 Lloyd's Rep 429

[78] However, such an injunction was not granted in *Du Pont v Agnew (No 2)*, *ibid*, 249 (Neill LJ): "If Judge O'Brien reaches a final decision in Illinois ... the insurers would be entitled to rely on it elsewhere as having the effect of creating a cause of action estoppel. Moreover, such a decision would have this effect even though Judge O'Brien reached his decision by ... findings that were plainly at variance with English law. In addition his decision might also create issue estoppels on the issues of fact or law which he had to determine in coming to his decision." But Neill LJ gave some clues as to what an English court might do to counter the preclusive effect of a foreign judgment reached errantly: *ibid*, 249: "It may be of course that if in the future the insurers sought to enforce or apply such a decision of Judge O'Brien in England, Du Pont might have some available defence including perhaps a defence of public policy. Thus I can see some force in an argument that an English Court should apply English notions of public policy in determining the enforceability in England of insurance policies which by English rules of private international law are governed by English law". A similar conclusion is reached in *Phillip Alexander Securities & Futures v Bamberger* [1996] CLC 1757, 1788: "It would seem to me *prima facie* that if someone proceeds in breach of, and with notice of, an injunction granted by the English court to obtain judgments abroad, those judgments should not, as a matter of public policy, be recognised in the United Kingdom." The anti-estoppel injunction and the anti-suit injunction could be seen as complementary: the latter may be deployed in a contest as to where to litigate, the former in a contest as to whether preclusive effect should be given the foreign judgment.

[79] Again, the Court of Appeal in *Du Pont v Agnew (No 2)*, *ibid*, refused to make a declaration that would deprive an as yet undelivered foreign judgment preclusive effect in England, even though the English courts had held the foreign court (Illinois) to be *forum non conveniens*: *ibid*, 245 (Dillon LJ): "The present application for a declaration that the insurers will not be entitled to rely on any such judgment as an estoppel is therefore necessarily premature ... to decide any such issue an analysis, and possibly a very close analysis, is necessary of what the decision which is said to have given rise to the estoppel decided and on what grounds. But that is not possible until after the decision has been made and its grounds are known. Again, until the decision of the Illinois Court is available, and the insurers have formulated their plea of estoppel in the English proceedings, it cannot really be known what estoppels are being set up". See, also, *ibid*, 249 (Neill LJ)

[80] [1985] 1 WLR 490

determinations; that is, it is not authority for the wider proposition supporting an issue estoppel where the foreign judgment is interlocutory or on a purely procedural and non-substantive issue. Indeed, even though the speech of Lord Brandon was wide enough to embrace just such a proposition, his judgment cannot be extended that far, because to do so would extend it beyond Lord Diplock's parameters for issue estoppel, and the remaining three members of the House of Lords[81] in *The Sennar (No 2)*[82] agreed with *both* speeches. For this reason, the decision of the Court of Appeal in *Desert Sun Loan Corp v. Hill*[83] is the latest advance in foreign judgment issue estoppel - and, it is suggested, the tactical considerations just discussed will depend on its authority for their effectiveness.

(c) Issue estoppel upon an interlocutory judgment of a foreign court on a procedural/non-substantive issue: *Desert Sun Loan Corp v Hill*

The decision in *Desert Sun Loan Corp v Hill*[84] completes the development begun by Lord Brandon in *The Sennar (No 2)*[85] and makes it plain that a foreign judgment on a procedural or non-substantive issue can support an issue estoppel in subsequent proceedings in England. There must be an express submission of the procedural or jurisdictional issue to the foreign court, and the specific issue at the foundation of the issue estoppel plea must have been raised before and decided by that court. And as with all foreign judgment issue estoppels, but particularly where the judgment is interlocutory and involves procedural issues, there must be caution exercised in relation to the sorts of practical considerations and difficulties identified in *Carl Zeiss (No 2)*[86].

The plaintiff, Desert Sun Loan Corporation, had brought proceedings in Arizona against a property venture partnership for an amount due under a promissory note, and personally against those partners who had guaranteed the loan - including Hill, now resident in England. US attorneys, acting for the partnership and allegedly authorised by G (one of Hill's former partners), accepted service of the proceedings and also appeared for Hill, purporting to do so on his behalf. Hill claimed to know nothing of this. Judgment was obtained and Hill was held liable as guarantor for 19% of the partnership's liability.

Upon learning of the Arizona judgment against him personally, Hill instructed another US attorney to take steps to vacate the Arizona judgment on the basis that he had not authorised G or anyone to instruct attorneys to accept service or to act on his behalf; and that, not having submitted to the jurisdiction, the Arizona court lacked personal jurisdiction over him. However, on the interlocutory motion thus brought, the Arizona

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[81] *ibid*, 493 (Lord Fraser of Tullybelton); 495 (Lord Roskill); 495 (Lord Bridge of Harwich)

[82] [1985] 1 WLR 490

[83] [1996] 2 All ER 847

[84] *ibid*

[85] [1985] 1 WLR 490

[86] [1967] 1 AC 853

court decided[87] Hill *had* voluntarily submitted by authorising the US attorneys to enter an appearance. It is the determination of *this* issue against Hill which is relevant for present purposes; an issue, moreover, involving procedural and *not* substantive rights, and determined by an interlocutory judgment.

Meanwhile, the plaintiff sought to enforce its judgment against Hill in England by way of summary judgment under RSC Order 14[88]. Given leave to defend these proceedings, Hill contended that he had not submitted to the jurisdiction of the Arizona court and that, as a result, the plaintiff's judgment could not be recognised for the purposes of enforcement. But the plaintiff fastened upon the interlocutory judgment given against Hill and argued that Hill was estopped from contradicting this finding; a finding, moreover, which Hill's own motion had prompted[89]. The question that came before the Court of Appeal, therefore, was whether Hill could be and was estopped by this interlocutory judgment from arguing that he had not voluntarily submitted to the jurisdiction of the Arizona court[90]:

> Is there an issue estoppel when the decision of the foreign court was, using the words in their English meanings, interlocutory rather than final, and the rights in question were procedural, not substantive; in other words, when the decision was independent of the 'merits' of the issues which were the subject matter of the foreign litigation?

Although on the facts the estoppel was not made out[91], for present purposes we are interested in the principal conclusion, expressed by Evans LJ and Stuart-Smith LJ, that it was *possible* to have an issue estoppel upon an interlocutory judgment of a foreign court on a procedural or non-substantive issue. There is a separate problem which only Roch LJ properly addressed[92], namely: Had Hill submitted to the jurisdiction of the Arizona court by seeking to vacate the judgment? We will first consider the principal conclusion for which *Desert Sun* is authority, and then we will consider this second problem identified by Roch LJ.

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87 And this was affirmed by the Arizona Court of Appeals.

88 Now see CPR Part 24.

89 Thus the plaintiff maintained that Hill could not resist enforcement of the judgment by arguing the Arizona court lacked jurisdiction because Hill had already argued that procedural issue, by interlocutory motion before the Arizona court, and had lost. That interlocutory issue decision, argued the plaintiffs, provided the foundation for the issue estoppel against Hill.

90 [1996] 2 All ER 847, 855 (Evans LJ)

91 Because it was not sufficiently clear from the interlocutory judgment that the specific and narrower issue which arose for decision in the enforcement proceedings - namely, whether or not Hill had expressly authorised G to instruct US attorneys who were acting on behalf of the partnership to act in the proceedings on his behalf as a personal defendant - had been identified and decided against the defendant in the foreign court: *ibid*, 859-860 (Evans LJ); 861-862 (Roch LJ); 864 (Stuart-Smith LJ)

92 Roch LJ expresses reservations about the principal conclusion but does not expressly disagree that such an estoppel is possible. Nonetheless, he touches upon principles that *may* exclude the application of this type of issue estoppel in this particular field; in particular, where the procedural issue involves a "voluntary submission" under the 1982 Act, section 33: see *ibid*, 862 (Roch LJ); fn109.

The majority concluded that "an issue estoppel could arise from an interlocutory judgment of a foreign court on a procedural, [or] non-substantive, issue"[93]; there being[94]:

> no reason in principle why such an issue should not be decided in a decision on a procedural matter as opposed to the final determination of the cause of action or proceedings. But the decision must be final and conclusive and not provisional or subject to revision.

Thus a foreign interlocutory determination of a procedural issue will have preclusive effect, provided[95]:

> (1) there was express submission of the procedural or jurisdictional issue to the foreign court; (2) the specific issue of fact was raised and decided by the court; and (3) the need for 'caution' recognised by Lord Reid in *Carl Zeiss* is carefully borne in mind.

As with all foreign judgment issue estoppels, this need to exercise caution in each case ought prevent the mechanical application of issue estoppel. But, further echoing *Carl Zeiss (No 2)*[96], Evans LJ appears to redouble that caution by acknowledging that when the foreign judgment concerns procedural, as distinct from substantive issues[97]:

> [p]ractical considerations such as whether the issue was or should have been fully ventilated are likely to be especially relevant ... for this reason I would hesitate long before including issues which might have been, but were not in fact raised or decided by the foreign court (cf. (2) above) ... there is some danger of injustice if an issue estoppel is based, not upon the foreign court's adjudication on a claim or cause of action which is sought to be raised for a second time here, but upon a specific issue which can only be identified within it by a process of 'refining down' ...

In saying this, it is clear that Evans LJ is confining the preclusive effect of a foreign interlocutory determination to issue estoppel: such a judgment is not to sustain a plea of abuse of process based on the rule in *Henderson v Henderson*[98] . It is submitted this is an appropriate precaution, for it reinforces the requirement that at least a procedural or jurisdictional issue should be expressly submitted to and decided by the foreign court in order for it to have preclusive effect in subsequent English proceedings.

However, the principal conclusion rests on two important observations; and in making the observations, the Court of Appeal further clarified the requirements "final and conclusive" and "on the merits" as these apply to foreign judgment issue estoppel.

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[93] *ibid*, 858 (Evans LJ)

[94] *ibid*, 863 (Stuart-Smith LJ)

[95] *ibid*, 858 (Evans LJ)

[96] [1967] 1 AC 853

[97] [1996] 2 All ER 847, 858-859 (Evans LJ)

[98] Stuart-Smith LJ did not share this view: *ibid*, 864. However, it will be argued that Stuart-Smith LJ misunderstands the rule in *Henderson v Henderson* and the plea(s) of abuse of process: see Chapter Four.

Firstly, it was recognised that clear distinctions had to be maintained between: final substantive determinations; final interlocutory rulings[99]; and provisional interlocutory rulings[100]. Accordingly, only final determinations or rulings (whether substantive or interlocutory) satisfy the requirement "final and conclusive" for the purposes of issue estoppel. In other words, an issue determination regardless of its form must represent the foreign court's last word on the subject. This gives a sensible meaning to a requirement that was confused (as we have seen) in *Carl Zeiss (No 2)*[101].

Secondly, as to the requirement "on the merits"[102]:

> the fact that procedural or interlocutory issues do not involve 'causes of action' in the strict sense does not mean that their independent existence cannot be recognised in appropriate circumstances. Their special characteristics have been noticed recently in the *Channel Tunnel Group Ltd. v Balfour Beatty Construction Ltd* ... where Lord Mustill spoke of a 'free-standing item of ancillary relief' ...

In this respect, also, the decision rests on Lord Brandon's formula in *The Sennar (No. 2)*[103] which is not tied to the view that only issues determined as part of a cause of action can be "on the merits"[104]. Thus, the issue in *Desert Sun* could be "on the merits", although it was a "free-standing item" independent of a cause of action and one, moreover, that had been determined by a final interlocutory ruling upon the motion brought by Hill.

However, the larger picture is this: by acknowledging, in principle, the preclusive effect of free-standing issue determinations, the Court of Appeal made possible an even greater range of foreign judgments upon which to establish issue estoppel; and, as Briggs has observed[105]:

> the perception that there is more interlocutory litigation than there used to be, especially upon jurisdictional issues, may mean that these preliminary skirmishes in foreign courts have a greater force and effect outside the immediate context in which they arise.

Indeed, this very possibility appears to have been foreshadowed by Evans LJ[106]:

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[99] Eg. those that fully and finally determine issues raised in the course of proceedings on a cause of action, such as granting leave to defend.

[100] Eg. those that, when made, are expressed to be pending the final determination of the case, such as an interlocutory injunction: see Halsbury's Laws of England, 4th ed, Vol 16, §1518 (p1021) and §1563 (p1055); and *Schlieske v Minister for Immigration and Ethnic Affairs* (1987) 79 ALR 554. See, below, fns128, 129.

[101] [1967] 1 AC 853

[102] [1996] 2 All ER 847, 856 (Evans LJ)

[103] [1985] 1 WLR 490, 499 (Lord Brandon of Oakbrook): see fn71.

[104] Cf. the views of Lord Diplock, *ibid*, 494-494 and the views in *Carl Zeiss (No 2)* [1967] 1 AC 853: see fn69.

[105] Briggs, A. "Foreign judgments and *res judicata*: *Desert Sun Loan Corp v Hill*" (1996) 67 BYBIL 596, 597

[106] [1996] 2 All ER 847, 856 (Evans LJ) cf. *ibid*, 862 (Roch LJ)

> questions of procedure are invariably governed by the *lex fori*, the law of the country in which the court is situated. So the foreign court's decision will have resulted from applying the procedural laws of that country, and it is difficult to conceive of circumstances where the English court might be required to decide the same factual issues in accordance with the foreign rather than the English law. Apart from that possible exception, the decision of the foreign court will be irrelevant to the (procedural) decision required of the English court, and there will be no scope for the application of a rule equivalent to 'cause of action' estoppel. *However, this does not necessarily preclude the application of issue estoppel, if the same factual issue arises here in a procedural context as has been decided in a different context by a foreign court.* [emphasis added]

However, it could be argued[107] that a procedural issue determined according to F1 procedural laws can never be precisely identical with "the same" procedural issue that falls to be determined according to F2 procedural laws[108]. It is reasoning similar to this which marks the minority decision of Roch LJ, and distinguishes it from the decisions of Evans LJ and Stuart-Smith LJ. Moreover, the problem as Roch LJ conceived it - and his analysis of that problem - appears fatal to the principal conclusion that an issue estoppel can arise upon a foreign interlocutory judgment on a procedural issue. What was the problem and how did Roch LJ deal with it?

It is basic to Roch LJ's argument that English law supplies the rules by which to establish the international jurisdiction of a foreign court; establishing jurisdiction being necessary for recognition/enforcement purposes *and* for *res judicata* purposes. Since Hill had neither been present nor resident within the jurisdiction of the Arizona court, jurisdiction could only be established by showing that Hill had submitted, and Hill maintained that he had not. But could it be said that Hill had voluntarily submitted, not to the *earlier* substantive proceedings that went against him by default, but when he instructed an attorney to move the interlocutory motion to have the default judgment vacated? In other words, was the nature of the participation of Hill *qua* applicant in *his interlocutory* proceedings such as to bind him to the finding in those proceedings that he had submitted to the earlier substantive proceedings in which default judgment against him had been recovered by the plaintiffs (being the judgment the plaintiffs were seeking to enforce in England)?

Roch LJ thought that this squarely raised the rules governing voluntary submission as supplied by section 33 of the 1982 Act, and he reasoned, moreover, that it is by *these* rules that the assessment as to voluntary submission must be made[109]:

> [t]o show that there was a voluntary appearance in the proceedings in the eyes of the court of the foreign country whose judgment the English court is being asked to enforce *is not*

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[107] Cf. *The Sennar (No 2)* [1985] 1 WLR 490, in which there was identity of procedural issue as enabled the English court to uphold an issue estoppel.

[108] See fn180. The problem may be overcome, however, if proof of identity of issue involved showing identity between the foreign court's process of law and reasoning and the approach adopted by and English court; or, at least, proof that the question was answered by the foreign court in a manner that would satisfy the English court, as in *The Sennar (No 2)*. In this respect it may be true to say that *Desert Sun* supports the proposition that a foreign court's jurisdictional determination will be conclusive provided it addresses the same type of jurisdictional issue, and in the same way, as proscribed by the English private international law rules. Cf. Brussels and Lugano Conventions, Article 28 (second paragraph).

[109] [1996] 2 All ER 847, 862

> *sufficient*, unless it amounts to a voluntary submission according to *our* rules. [emphasis added]

Thus, applying the words of section 33(1)(a) to the instant case: "[Hill] is not to be regarded as having submitted to the jurisdiction of the court [in the earlier substantive proceedings] by reason only of the fact that he [instigated interlocutory proceedings] ... (a) to contest the jurisdiction of the court". In other words, Roch LJ construed Hill's interlocutory proceedings - although brought to vacate the default judgment - as a challenge to the jurisdiction assumed in the first proceedings and, as such, any resulting decision thereon ought not be taken as concluding the issue of submission. Unfortunately Roch LJ does not give detailed reasons, and it remains arguable whether a party is "contest[ing] the jurisdiction of the court" within the meaning of section 33(1)(a) by asking the court to verify a power of attorney allegedly given to G so that G could instruct attorneys in the original proceedings on Hill's behalf; for only in this way could Hill seek to have the default judgment vacated.

Nonetheless, Roch LJ was clear as to what such an analysis entailed: it *excluded* the application of an issue estoppel in this field based on a foreign court's decision that a defendant had voluntarily submitted to its jurisdiction[110]:

> The reason would be that *it is always for the English court to inquire if there has been a voluntary appearance by the defendant before the foreign court*, as a result of his having acted in a way which would constitute a voluntary appearance here. [emphasis added]

But the *opposite* of this is ostensibly what the majority held to be possible, namely: "that making an application which falls within section 33 leads to an estoppel arising out of the result of the application"[111]. The reasoning of Roch LJ suggests that the majority cannot be correct because it would deprive section 33 of any effect. Even so, it is a shame that section 33 does not contain a sub-section equivalent to section 32(3), which provides:

> In determining whether a judgment given by a court of an overseas country should be recognised or enforced in the United Kingdom, a court in the United Kingdom shall not be bound by any decision of the overseas court relating to any of the matters mentioned in subsection (1) or (2).

Nonetheless, Roch LJ's view is persuasive; and the fact that the majority reach their conclusion without referring to section 33 does weaken their principal conclusion, at least to the extent that it would provide support for an issue estoppel where the procedural question involves the subject matter of non-submission defined by section 33.

Even so, where the procedural issue in a given case is not indebted to the statute in this way, then *Desert Sun Loan Corp v Hill*[112] is the most powerful authority to date that recognises an issue estoppel upon an interlocutory judgment of a foreign court on a procedural/non-substantive issue.

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[110] *ibid.* Also see *Jet Holdings v Patel* [1990] 1 QB 335 (Staughton LJ), fn119.

[111] Briggs, A. "Foreign judgments and *res judicata*: *Desert Sun Loan Corp v Hill*" (1996) 67 BYBIL 596, 598

[112] [1996] 2 All ER 847

3. Summary of requirements for the plea of issue preclusion

Having reviewed the three key authorities which support the recognition at common law of foreign issue decisions for preclusive purposes, it is appropriate to gather some conclusions about the requirements introduced in the beginning of this chapter. These were well summarised by Lord Brandon in *The Sennar (No 2)*[113]:

> in order to create an [issue] estoppel ... three requirements have to be satisfied. The first requirement is that the judgment in the earlier action relied on as creating an estoppel must be (a) of a court of competent jurisdiction, (b) final and conclusive and (c) on the merits. The second requirement is that the parties (or privies) in the earlier action relied on as creating an estoppel, and those in the later action in which that estoppel is raised as a bar, must be the same. The third requirement is that the issue in the later action, in which the estoppel is raised as a bar, must be the same issue as that decided by the judgment in the earlier case.

It should be added that the requirement that the issue must be the same in both proceedings is further qualified by the requirement that the issue be necessary and fundamental to the decision upon which the estoppel is raised. We will also consider, below, the special circumstances exception that has been recently extended to the issue estoppel plea by the House of Lords in *Arnold v National Westminster Bank plc*[114]; and, of course, we must always bear in mind the difficulties that attend issue estoppel in the foreign context, and hence the need for caution[115]. Thus, in the remainder of this Chapter we will consider each of these requirements.

(a) "Competent jurisdiction" as understood for issue preclusive purposes

A foreign judgment that is relied upon in England for issue preclusive purposes must first be recognised according to the common law rules for recognition. It is also by this process that the foreign judgment itself will be verified as a *res judicata*.

One of the criteria for recognising a foreign judgment as a *res judicata* at common law is the requirement that the decision emanate from a court having "competent jurisdiction" over the subject matter and the parties. This requirement was discussed in Chapter Two, Part Two - albeit in the context of cause of action preclusion. Nonetheless, if it is sought to recognise a foreign judgment for issue preclusive purposes, and if such a judgment satisfies the jurisdictional requirement that is discussed in Chapter Two, Part Two then it satisfies the same requirement as is necessary to establish issue preclusion.

However, if the issue the subject of the issue estoppel plea at F2 is *itself* whether the F1 court was of competent jurisdiction, the decision of the majority in *Desert Sun Loan Corp v Hill*[116] supports an estoppel arising out of the submission and adjudication of that

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113 [1985] 1 WLR 490, 499

114 [1991] 2 AC 93

115 *Westfal-Larsen & Co A/S v Ikerigi Compania Naviera SA, The Messiniaki Bergen* [1983] 1 All ER 383 (Bingham J): "In approaching the first of these issues I must bear in mind the need for caution in interpreting the meaning and effect of the decisions of a foreign court".

116 [1996] 2 All ER 847

jurisdictional issue to the foreign court. Indeed, the intriguing thing about that decision is that it suggests the foreign court's own jurisdictional determination can, in certain circumstances, be conclusive of the like requirement that an English court must make *provided* the same type of jurisdictional issue is involved[117]. However, in addition to the argument against this approach[118], note the words of Staughton LJ in *Jet Holdings v Patel*[119]:

> If the foreign court had no jurisdiction in the eyes of English law, any conclusion it may have reached as to its own jurisdiction is of no value. To put it bluntly, if not vulgarly, the foreign court cannot haul itself up by its own bootstraps.

(b) "Final and conclusive" and "on the merits" as understood for issue preclusive purposes

We have argued that the majority in *Carl Zeiss (No 2)*[120] faced the problem of a common law recognition scheme that ostensibly favoured recognition for enforcement or cause of action estoppel purposes. This is not to say that judgments could not be recognised as conclusive as English judgments, as the majority pointed out[121]. But it is to say that the requirements "final and conclusive" and "on the merits" needed "further thought"[122] in order that issue determinations might qualify for recognition. That this was so can be seen in the observations of Evans LJ in *Desert Sun Loan Corp v. Hill*[123]:

> Returning to the requirements that the foreign court's judgment must have been 'final' and 'on the merits', the distinctions usually drawn by the English court [were such] ... that the rule defined in terms of 'a final judgment on the merits' cannot apply when there was no more than an interlocutory decision on a procedural and non-substantive issue.

For this reason it was necessary for the common law to adapt its recognition criteria; and this occurred with the decisions in *The Sennar (No 2)*[124] and *Desert Sun Loan Corp v Hill*[125].

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[117] Cf. Brussels and Lugano Conventions, Article 28 (second paragraph): "In its examination of the grounds of jurisdiction ... the court or authority applied to shall be bound by the findings of fact on which the court of the State of origin based its jurisdiction."

[118] [1996] 2 All ER 847, 861-862 (Roch LJ)

[119] [1990] 1 QB 335

[120] [1967] 1 AC 853

[121] *ibid*, 917 (Lord Reid), 925-926 (Lord Hodson), 934 (Lord Guest), 948 (Lord Upjohn), 966 (Lord Wilberforce)

[122] *ibid*, 917 (Lord Reid)

[123] [1996] 2 All ER 847, 856 (Evans LJ)

[124] [1985] 1 WLR 490

[125] [1996] 2 All ER 847

(i) "Final and conclusive"

Where a foreign judgment renders a *cause of action* final and conclusive, it renders final and conclusive any issue necessary and fundamental to the decision as to the existence of the cause of action. Therefore, where the issue estoppel arises in this way, the test of finality is the same as that discussed in Chapter Two, Part Two: the rule in *Nouvion v Freeman*[126].

But the *Nouvion* test as applied to issues is fairly straight-forward in any case, including those cases involving issue determinations that are independent of causes of action. Applied to issues it simply requires that the English court be satisfied by reference to the *foreign* law that the issue in question cannot be relitigated in the foreign country. Thus, as Lord Reid said in *Carl Zeiss (No 2)*[127]:

> When we come to issue estoppel I think that, *by parity of reasoning*, we should have to be satisfied that the issues in question cannot be relitigated in the foreign country. In other words, it would have to be proved in this case that the courts of the German Federal Republic would not allow the re-opening in any new case between the same parties of the issues decided by the Supreme Court in 1960, which are now said to found an estoppel here

However, confusion in applying the requirement has arisen from the difficulty in determining the precise line of demarcation between an interlocutory and final decree. This is because the instances are not infrequent when decrees, though interlocutory in form and thus technically still under the control of the court until the final substantive decision, are yet considered to be final in their determination of the particular issues in question.

In *Schlieske v Minister for Immigration and Ethnic Affairs*[128], a decision of the Federal Court of Australia, Beaumont J made the following observations[129]:

> [the earlier] decision [of Gummow J] was plainly interlocutory, both as a matter of form and of substance. There being no final decision relied on, there can be no estoppel ... It is true that in some cases what may appear to be an interlocutory decision, is in truth a final one. But, in the present case, the decision of Gummow J was in every sense interlocutory. The matter was brought forward on short notice and on limited evidence and it was clear at the time that a final hearing would be conducted at a later date. Insofar as [it is said] that a decision which is truly "interlocutory" can give rise to a relevant estoppel, I must respectfully disagree.

Similar observations were made by Diplock LJ in *Fidelitas Shipping Co Ltd v V/O Exportchleb*[130], a case in which the issue estoppel arose upon an arbitration award[131]:

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[126] (1889) 15 AC 1

[127] [1967] 1 AC 853, 917

[128] (1987) 79 ALR 554

[129] *ibid*, 576 (Beaumont J)

[130] [1966] 1 QB 630

[131] *ibid* (Diplock LJ)

> Arbitration, like litigation, is concerned only with the legal rights and duties of the parties thereto. It is concerned with facts only in so far as they give rise to legal consequences. The final resolution of a dispute between parties as to their respective rights or duties may involve the determination of a number of different "issues", that is to say, a number of decisions as to the legal consequences of particular facts, each of which decisions constitutes a necessary step in determining what are the legal rights and duties of the parties resulting from the totality of the facts. ... *Where the issue separately determined is not decisive of the suit, the judgment upon that issue is an interlocutory judgment and the suit continues. Yet I take it to be too clear to need citation of authority that the parties to the suit are bound by the determination of the issue. They cannot subsequently in the same suit advance argument or adduce further evidence directed to showing that the issue was wrongly determined.* ... This is but an example of ... "issue estoppel" [and] it operates in subsequent suits between the same parties in which the same issue arises. *A fortiori* it operates in any subsequent proceedings in the same suit in which the issue has been determined. [emphasis added]

These two authorities may be taken to support the view that an issue can be rendered final and conclusive although it be determined by an interlocutory decision; just as the majority in *Desert Sun Loan Corp v Hill*[132] *avoided* concluding that a *foreign* judgment could *not* be final and conclusive if it was interlocutory in nature or otherwise a determination reached independently of a substantive decision. But little guidance was given as to why the conclusion reached in *Desert Sun* was supportable. For this, reference could be made to the decision in *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 3)*[133] which, although concerning the preclusive effect of domestic interlocutory decisions, provides[134]:

> no finding or decision on an interlocutory application ... is final in the relevant sense unless, in consequence of the doctrine of *res judicata*, it is a bar to further litigation of that issue. Possibly the solution of this apparent dilemma may depend upon whether the issue was explicitly raised in the earlier proceedings and the parties ought to be treated as having then put forward all the facts and arguments which they then considered to be relevant to its resolution, so that the issue was fully considered on its merits in a judicial manner. Difficulties of the kind noticed by Lord Reid at p917 [*Carl Zeiss (No 2)*], are likely, I think, to arise in a particularly acute form upon interlocutory proceedings ...

Even so, where the *interlocutory* judgment is foreign, the *Nouvion* test still works here: Has the *issue* been raised and controverted before the foreign tribunal so that it cannot again be re-opened in the same court according to the foreign law? Note, again, that whether the issue is final is a matter of foreign law[135], and must be proved as such by the party relying on the foreign judgment[136].

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132 [1996] 2 All ER 847

133 [1970] Ch 506

134 *ibid*, 542 (Buckley J)

135 *Westfal-Larsen & Co A/S v Ikerigi Compania Naviera SA, The Messiniaki Bergen* [1983] 1 All ER 383 (Bingham J): "The second question, whether the [interlocutory] decision of the district judge [on a procedural issue] had (as a matter of United States law) the finality necessary to support a plea of *res judicata*, I find much more difficult .... I am unable to conclude, in the charterers' favour, that the district judge's decision would in the United States found a plea of *res judicata*".

136 *Tracomin SA v Sudan Oil Seeds Co Ltd* [1983] 1 All ER 404, 413 (Staughton J): "at least four members of the House of Lords [in *Carl Zeiss (No 2)* [1967] 1 AC 853 held that it was for the party relying on the foreign judgment to prove that [the issue determination] was final and conclusive".

(ii) "On the merits"

With the decision in *The Sennar (No. 2)*[137], applying the "on the merits" requirement to foreign issue determinations at common law has also been clarified.

Where the resolution of an issue is necessary and fundamental to the decision upon a cause of action, that issue will have been determined "on the merits" if the cause of action itself has been so rendered. In these cases, the rules discussed in Chapter Two, Part Two will apply, and see particularly the speech of Lord Diplock in *The Sennar (No 2)*[138].

However, the reformulation of the requirement by Lord Brandon of Oakbrook in *The Sennar (No 2)*[139] also enables an English court to assess whether procedural, jurisdictional or other non-substantive issues have been determined "on the merits" by a foreign court. Indeed, as we have seen, his Lordship makes it clear that in order to qualify as a decision on the merits, the determination need not be one which disposes of the substantive claim. Rather, an issue of this sort will have been rendered on the merits if it is apparent to the *English* court that the foreign decision establishes the facts, applies the law and thus adjudicates *that issue* to a conclusion[140]. That issue must also have been expressly submitted to the foreign court for such determination[141].

This is well illustrated by the recent decision in *The Irini A (No 2)*[142]. In that case, charterers sought to rely, for issue estoppel purposes, upon a judgment of a court in Lomé (which is in Togo). It was common ground that all the ingredients for issue estoppel were present with the exception of the requirement that the foreign judgment be a final determination of the issue *on the merits*. As to this, counsel for the head owners of the vessel suggested that it was not obvious from the judgment that the Lomé court had determined the matter in accordance with Lord Brandon's formulation in *The Sennar (No 2)*[143]. But Tuckey J held otherwise[144]:

> The [Lomé] Court obviously did go through the process envisaged by Lord Brandon. .... It established certain facts as proved or not in dispute, it stated what were the relevant principles of law applicable, and [it] expressed a conclusion with regard to applying those principles to the factual situations ... The fact that it may not have done so in the way an English Court would have done, still less that an English Court might have reached a different conclusion, is not to the point. The Togo Court had to decide the matter in accordance with its own procedures. Moreover, in this case it was not invited to decide

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137 [1985] 1 WLR 490

138 [1985] 1 WLR 490, 494

139 *ibid*, 499

140 *ibid*

141 *Desert Sun Loan Corp v Hill* [1996] 2 All ER 847, 858 (Evans LJ)

142 [1999] 1 Lloyd's Rep 189

143 [1985] 1 WLR 490, 499 (Lord Brandon of Oakbrook)

144 [1999] 1 Lloyd's Rep 189, 193-194 (Tuckey J)

> the points in issue other than in accordance with the law of Togo because neither party suggested that English law was different from the law of Togo in any material respect .... So I think that [the charterers] have established all the ingredients for issue estoppel ...

What this most recent case shows, however, is that the common law rules for recognising the *res judicata* status of foreign judgments for preclusive purposes have become sufficiently refined so that an assessment can be made regardless of whether the judgment has determined a substantive cause of action.

(c) "Parties (or privies)" as understood for issue preclusive purposes

The requirements as to parties and their privies for issue preclusive purposes is the same as for cause of action preclusion, and these were discussed in Chapter Two, Part Four.

For comparative purposes, however, it may be useful to survey the rules that obtain in the United States where issue estoppel, known there as collateral estoppel[145], has greater flexibility because the mutuality requirement has been abandoned.

The classic definition of collateral estoppel was given by the US Supreme Court in *Cromwell v County of Sac*[146].

> Where the second action *between the same parties* is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding was rendered .... Only upon such matters is the judgment conclusive in another action. [emphasis added]

Nowadays, however, collateral estoppel is no longer restricted to later suits between the same parties and their privies. Indeed, in 1942, the landmark decision of *Bernhard v Bank of America*[147] abandoned the requirement of mutuality for collateral estoppel; there being no reason to prohibit a non-party from estopping a plaintiff who had lost the same issue in a prior suit, nor for the requirement that the party invoking collateral estoppel had to be bound by the prior adjudication. If a party had lost, and had an opportunity to litigate his claim, he should not have a second chance. Thus collateral estoppel was reformulated to require affirmative answers to three questions[148]:

> Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party *against whom the plea is asserted* a party or in privity with a party to the prior adjudication? [emphasis added]

Non-mutuality was acknowledged in 1971 by the US Supreme Court in *Blonder-Tongue Laboratories Inc v University of Illinois Foundation*[149] where it was held the defensive use of collateral estoppel was permissible in the patent case before the court because[150]:

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[145] See, generally, 41 Missouri L Rev 521 (1976); 120 U of Penn L Rev 147 (1981)

[146] 94 US 351, 352-353 (1876)

[147] 19 Cal 2d 807 (1942)

[148] *ibid*, 813; 895

[149] 402 US 313 (1971). See also *Bruszewski v United States* 181 F 2d 419 (1950); *Manzoli v ICR* 904 F 2d 101

> [t]he uncritical acceptance of the principle of mutuality ... is today out of place. ... Whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue [is questionable].

Now, in over three quarters of the states, and federally, the mutuality rule has been relaxed, at least to the extent that only the party *against* whom the estoppel is invoked needs (but must) be present or represented in the prior action. However, it would seem the doctrine of mutuality still prevents any party from *benefiting* from an estoppel unless that party could also be burdened by it; for, in this sense, mutuality is based on equality of opportunity that would deny to one party an appropriate right or remedy because the corresponding right or remedy is not available to, or appropriate for, his adversary[151]. Thus, the starting point in the application of collateral estoppel is establishing the identity of the parties against whom and for whom the doctrine should apply.

Clearly collateral estoppel applies (subject to the other requirements being satisfied) if the party asserting the estoppel and the party against whom the doctrine is applied are *both* bound by the prior judgment; that is, where the parties in the second suit are the same or privies of the parties in the first suit. However, collateral estoppel may be pleaded in two different ways where the parties are not identical; that is, where a stranger or non-party to the prior suit (and therefore not bound by the prior judgment) attempts to prevent relitigation of an issue in subsequent proceedings by asserting the prior judgment against the party who is bound by it. The two different pleas are: "offensive use" and "defensive use" collateral estoppel.

With "offensive use" collateral estoppel, the stranger or non-party to the first suit is the plaintiff in the second suit who seeks to assert collateral estoppel as a "sword" against the defendant who lost the prior judgment and is bound by the prior judgment[152]. By contrast, "defensive use" collateral estoppel occurs where a defendant who is a stranger or a non-party to the first suit asserts the prior judgment as a "shield" against the plaintiff who was a party to the first suit[153]. Again, though: in both situations, the party who is asserting collateral estoppel is a stranger or non-party to the prior judgment and therefore not bound by the prior judgment[154].

(1990)

[150] 402 US 313 (1971)

[151] 68 Columbia L Rev 1457, 1461 (1968)

[152] Ie. where a losing party in the first suit becomes a defendant in the subsequent suit, plaintiffs who were not parties in the first suit may use collateral estoppel offensively to preclude the former losing party from re-litigating issues or facts that have already been decided against it: *Parklane Hosiery Co v Shore* 439 US 322 (1979). Also note 32 Stan L Rev 655 (1980).

[153] Ie. where a party that has lost an action becomes a plaintiff in a subsequent suit and seeks a re-determination of an issue or fact decided adversely to it in the prior suit, the defendant who was not a party in the first suit may use collateral estoppel defensively against the plaintiff: *Oldham v Pritchett* 599 F 2d 274 (8th Cir, 1979). See, also *Bernhard v Bank of America* 19 Cal 2d 807 (1942); *Blonder-Tongue Laboratories, Inc v University of Illinois Foundation* 402 US 313 (1971).

[154] *Bigelow v Old Dominion Copper Mining & Smelter Co* 225 US 111, 126 (1912) But in those states adhering to the doctrine of mutuality, neither offensive nor defensive collateral estoppel would apply since the party asserting collateral estoppel is himself not bound by the prior judgment: see 41 Missouri L Rev 521 (1976).

In any case, we have seen in Chapter Two, Part Four that the English approach is to prefer the doctrine of mutuality in respect of all pleas of preclusion, including issue estoppel. Lord Denning MR attempted to change this[155], but was reversed by the House of Lords[156]. Perhaps, with impending changes to the rights of third parties in contract[157], similar changes could be contemplated in this areas of the law so that a party against whom a decision has gone operates as an estoppel in subsequent proceedings regardless of mutuality.

(d) "Same issue" as understood for issue preclusive purposes

Where a foreign judgment is recognised at common law as a *res judicata* and thence relied upon for the purposes of issue estoppel, the plea will prevent contradiction of the issue in question *provided*:

(i) the same issue is controverted in the subsequent proceedings in England as was determined by the foreign judgment; and

(ii) the determination by the foreign court of that issue was necessary and fundamental to that court's decision, and not incidental or collateral.

(i) Identity of subject matter: the same issue

The essential foundation of a plea of issue estoppel must be that the issue or issues raised in the first proceedings, and the issue or issues raised in the second proceedings are identical[158]. It is for the party who seeks to rely on the estoppel to establish this identity.

In *Carl Zeiss (No 2)*[159], Lord Reid illustrated the identity of issue requirement by reference to the facts in the leading case: *R v Hartington Middle Quarter Inhabitants*[160]. There it was said[161]:

> The question [in the former case] was where two unemancipated children were settled: and it was answered by showing that they were the legitimate issue of William and Esther, that is, that these two were lawfully married, and the children born after, and that William was settled with the now appellants. Strike either of these facts out, and there is no ground for the decision: these facts therefore were necessarily and directly matter of enquiry. The question now is, where is Esther settled: and this is answered by showing the same two facts, the marriage of Esther and William, and the settlement of William, the two facts already decided. The judgments in the two cases therefore rest on the same

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155 *McIlkenny v Chief Constable of the West Midlands* [1980] QB 283, 318

156 *Hunter v Chief Constable of the West Midlands* [1982] AC 529

157 *Contracts (Rights of Third Parties) Bill 1999*

158 *Turner v London Transport* [1977] ICR 952, 964 (Browne LJ)

159 *Carl Zeiss (No 2)* [1967] 1 AC 853, 914

160 (1855) 4 E&B 780

161 *ibid*, 794-795 (Coleridge J)

> foundation; which, having been settled in the first, cannot be, as between the same parties, unsettled in the later.

On similar reasoning, all their Lordships in *Carl Zeiss (No 2)*[162] thought the issue determined by the West German judgment - whether the Council of Gera had authority to give instructions to begin proceedings in the name of the Carl Zeiss Stiftung foundation - was the same issue in the appeal before the House. According to Lord Hodson, the West German judgment left no doubt that the precise issue about which the parties were contending in England was the same[163]; and Lord Guest, too, thought there was "little doubt that the same question was incidentally decided in the West German action as arises in the present summons"[164]. Lord Upjohn and Lord Wilberforce, however, were more investigative: both thought there was an identity of issue because it would be necessary for an English court to rely on precisely the same facts, circumstances and arguments as were relied on in the West German courts[165]; Lord Wilberforce noting in particular[166]:

> that it is permissible to look not merely at the record of the judgment relied on, but at the reasons for it, the pleadings, the evidence and if necessary other material to show what was the issue decided. ... the task of the court in the subsequent proceedings must include that of satisfying itself that the party against whom the estoppel is set up did actually raise the critical issue, or possibly, though I do not think that this point has yet been decided, that he had a fair opportunity, or that he ought, to have raised it.

(His Lordship's final observation alludes to the rule in *Henderson v Henderson*[167]: the applicability of which to foreign issue determinations is discussed in Chapter Four).

Meanwhile, Lord Reid's exposition illustrates why the subject matter did *not* give rise to cause of action estoppel[168]:

> [Another] requirement for *res judicata* is identity of subject matter. As to this, it has become common to distinguish between cause of action estoppel and issue estoppel. There is certainly no cause of action estoppel here. The question before the German court was whether the Council of Gera were the legal representatives of the Stiftung at one date. The question here is whether at a different date the solicitors had the authority to raise this action. An answer, yes or no, to the first question does not necessarily imply a similar answer to the second. What the respondents maintain is that the grounds on which the German court in fact decided the first question are such that we cannot decide this case in favour of the solicitors without disagreeing with at least some of the findings

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[162] [1967] 1 AC 853

[163] [1967] 1 AC 853, 926 (Lord Hodson)

[164] *ibid*, 935 (Lord Guest) It is not clear whether his Lordship is using the term "incidental" to imply that this was the reason the foreign judgment, in the circumstances, did not give rise to an estoppel: see, *ibid*, 938. In any case, his Lordship gave other reasons for concluding there could be not be an estoppel upon a foreign judgment.

[165] *ibid*, 943-944 (Lord Upjohn); 967-968 (Lord Wilberforce)

[166] *ibid*, 965 (Lord Wilberforce)

[167] (1843) 3 Hare 100

[168] *ibid*, 913

> on which the German court based their decision. I think that that is true and the question is whether we are entitled to do that.

We have seen that a majority of their Lordships in *Carl Zeiss (No 2)*[169] thought that foreign judgment issue estoppel was possible *in principle*[170]. With the decision in *The Sennar (No 2)*[171], Lord Diplock was able to proclaim[172]:

> It is far too late, at this stage of the development of the doctrine, to question that issue estoppel can be created by the judgment of a foreign court if that court is recognised in English private international law as being a court of competent jurisdiction. Issue estoppel applies regardless of whether or not an English court would regard the reasoning of the foreign judgment as open to criticism. [In the instant case] the facts appear to me to present a case to which the now well-established doctrine of issue estoppel resulting from a foreign judgment incontestably applies.

In that case it was held that the issue in the Dutch Court of Appeal and, subsequently, in the Admiralty Court had been the same, namely: whether the exclusive jurisdiction clause in the bill of lading applied to the plaintiffs' claim. Lord Brandon described the result as follows[173]:

> The appellants elected to have one good long bite at the cherry before the Dutch courts between 1975 and 1980. They lost before those courts and there is no possible justification for allowing them to harass the respondents by taking a further long bite at the same cherry in the action which they have brought in the Admiralty Court here.

Not so in *Desert Sun Loan Corp v Hill*[174]. Whilst a majority of the Court of Appeal held in principle that an issue estoppel could arise from the foreign interlocutory judgment even though the issue was procedural, nonetheless in the circumstances it was not sufficiently clear from the foreign judgment that the specific and narrower issue of fact which arose for decision in the plaintiffs' enforcement proceedings in England - namely, whether or not the defendant had expressly authorised G to instruct the US attorneys who were acting on behalf of the partnership to act in the proceedings on his behalf as a personal defendant - had been identified and decided against the defendant in the foreign court[175]. Indeed, this conclusion was reached because it appeared that the Arizona court "was prepared to consider the question of authority in a *wider* context than is relevant for present purposes under English law"[176]. Thus the plaintiffs were unable to say that the defendant was barred by the foreign judgment from raising the same issue in the English

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[169] [1967] 1 AC 853

[170] Although, on the facts of the case, the requirements for issue estoppel were not made out: see fn25.

[171] [1985] 1 WLR 490

[172] *ibid*, 493 (Lord Diplock)

[173] *ibid*, 501 (Lord Brandon of Oakbrook)

[174] [1996] 2 All ER 847

[175] *ibid*, 859-860 (Evans LJ); 862 (Stuart-Smith LJ)

[176] *ibid*, 860

enforcement proceedings and thus, rather than summary judgment for the plaintiffs' under RSC Order 14, the defendant was granted leave to defend.

With issue estoppel, it is important to note that it is *not* the requirement that the subject matter of the litigation must be the same, still less that the two proceedings must involve the same cause of action. The proper inquiry is whether precisely the same *issue* is involved in both proceedings[177]. This point was also made by Lord Romer in *New Brunswick Railway Co v British and French Trust Corporation Ltd*[178]:

> It is no doubt true to say that, whenever a question has in substance been decided, or has in substance formed the ratio of, or been fundamental to, the decision in an earlier action between the same parties, each party is estopped from litigating the same question thereafter. *However, this is very different from saying that he may not thereafter litigate, not the same question, but a question that is merely substantially similar to the one that has already been decided.* If, in an action, the question of the construction of a particular document has been in substance decided, each party to the action is estopped from subsequently litigating the same question of construction of that particular document. However, he is not estopped from subsequently litigating the question of construction of another document, even though the second one be substantially identical words, for the documents are two distinct documents, and the questions of their construction are two distinct questions.

However, some thought needs to be given to the meaning of "same issue" when an issue of law is involved. Does it imply that *the same question of law* must be involved?[179] If so: Can an issue of law *ever* be identical if it has been determined by a foreign law that must necessarily be different from the English law?

As we have seen, Roch LJ approaches a problem similar to this in his judgment in *Desert Sun Loan Corp v Hill* [180]; and if Roch LJ's view were generally to prevail there would

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[177] See *Blair v Curran* (1939) 62 CLR 464. In earlier proceedings, a court construed a clause in a will which governed the destination of particular property. In later proceedings, the destination of other property under the same words came in question. Rich and Dixon JJ upheld an issue estoppel, Rich J did so in spite of "the difference in subject matter": *ibid*, 502 (Rich J); Dixon J held that the questions were the same: *ibid*, 531-533 (Dixon J). Starke J, by contrast, could not "assent to the applicability [of issue estoppel] in cases in which the subject matter of litigation was not the same": *ibid*, 510 (Starke J).

[178] [1939] AC 1 (Lord Romer). In that case a default judgment (*ex parte*) had favourably construed wording in a bond document. In later proceedings, the judgment was relied on to prevent contradiction of that construction in a different bond document, although one that was from the same series and in which the wording was identical. The House of Lords held that the legal question was not identical and therefore issue estoppel could not be maintained: the judgment would *only* estop the defendant from relitigating the construction of the bond that had been sued upon. The strict application is explained by the fact that the judgment relied on was a default judgment. Hence, in the case of a foreign default judgment it must be possible to formulate with *complete precision* the issue which was determined in favour of the plaintiff in order to admit the estoppel: see Chapter Four for the application of the *Henderson* rule to foreign default judgments.

[179] In both *Blair v Curran* (1939) 62 CLR 464 and *New Brunswick Railway Co v British and French Trust Corporation Ltd* (1939) AC 1 the relevant issues were issues of law: both cases involved the legal construction of documents. However, in each case, both the former and subsequent proceedings occurred within the one legal system (Australia and England respectively) and were at all times subject to the one law.

[180] [1996] 2 All ER 847, 862 (Roch LJ); fn110. Cf. Evans LJ, who seems to avoid the problem by describing the jurisdictional issue as a factual issue, and thus: "this does not necessarily preclude the application of issue estoppel, *if the same factual issue* arises here in a procedural context as has been decided in a different context by a foreign court": *ibid*, 856 (Evans LJ)

never be an "issue of law" issue estoppel based on a foreign (jurisdictional) issue determination because the (jurisdictional) laws applied would be different[181].

Perhaps, too, this is the problem which Diplock LJ was trying to anticipate when he drew a distinction between "issue estoppel" and "fact estoppel"[182]. In *Carl Zeiss (No 2)*[183] both Lord Upjohn[184] and Lord Wilberforce[185] thought Diplock LJ's distinction did not apply to the facts of the case, although the latter thought it may deserve some further exploration. However, Lord Reid made the following observation which is perhaps useful for present purposes[186]:

> [Diplock LJ in the cases cited] draws a distinction between issue estoppel and fact estoppel which I find difficult to understand. Suppose that as an essential step towards a judgment in an earlier case it was decided (a) that on a particular date A owed B £100 or (b) that on that date A was alive. The first is, or at least probably is, a question of law, the second is a pure question of fact. Are these findings to be treated differently when issue estoppel is pleaded in a later case? Or take marriage - an issue in the earlier case may have been whether there ever was a ceremony (a pure question of fact) or it may have been whether the ceremony created a marriage (a question of law). I cannot think that this would make any difference if in a later case about quite different subject matter the earlier finding for or against marriage was pleaded as creating issue estoppel.

Thus the suggestion here, it seems, is that an "issue of law" issue estoppel may well be effective for preclusive purposes even though the issue of law would be subject to a different legal treatment in the subsequent proceedings; or, indeed, that an "issue of law" issue estoppel is to be treated just like any other issue estoppel. In which case the key thing is whether the relevant findings and questions are the same[187]; or, as Lord Upjohn's speech seems to suggest: whether the facts, circumstances and arguments would be the same[188].

Happily, the law is more definite in respect of a related problem; for it is clear that an estoppel founded on a foreign judgment *cannot* be defeated by proof that the foreign court misinterpreted or misapplied its *own* law[189], or (where this is applied by the foreign

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[181] This assumes recognition for *res judicata* purposes at common law. Under the Conventions, of course, the jurisdictional rules will be the same: see Chapter Five.

[182] See *Thoday v Thoday* [1964] P 181 (Diplock LJ); *Fidelitas Shipping Co Ltd v V O Exportchleb* [1966] 1 QB 630 (Diplock LJ)

[183] [1967] 1 AC 853

[184] *ibid*, 947

[185] *ibid*, 964

[186] *ibid*, 916-917

[187] *ibid*, 913 (Lord Reid)

[188] *ibid*, 943-944

[189] *Scott v Pilkington* (1862) 2 B&S 11; *Vanquelin v Bouard* (1863) 15 CBNS 341

court) *the law of* England[190]. However, it has been held that where the foreign court *ought* to have decided a case according to the law of England, but deliberately ignores doing so for the supposed benefit of the subjects of the foreign state, there is a defiance of international comity that justifies an English court in refusing to recognise the decision[191]. Although reservations were expressed about this decision in *Carl Zeiss (No 2)*[192], it may well have merit as a decision that can assist the judicial development of the anti-estoppel measures suggested above[193].

(ii) "Necessary and fundamental"

It follows from the classic statement of principle in *R v Hartington Middle Quarter Inhabitants*[194] that not every foreign issue determination has preclusive effect in subsequent proceedings in England, not even when the foreign court has expressly determined the same issue in the earlier proceedings. A foreign judgment recognised at common law will only generate issue preclusive effects if the decision could not have been legitimately or rationally pronounced by the tribunal without determining *that particular issue*. In other words, an issue estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification for its conclusion[195]. Matters of fact or law which are subsidiary or collateral are not covered by the estoppel[196]:

> Findings, however deliberate and formal, which concern only evidentiary facts and not ultimate facts forming the very title to rights give rise to no preclusion. Decisions upon matters of law which amount to no more than steps in the process of reasoning tending to establish or support the proposition upon which the rights depend do not estop the parties if the same matters of law arise in subsequent litigation.

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[190] *Godard v Gray* (1870) LR 6 QB 139

[191] *Simpson v Fogo* (1863) 1 Hem & M 195. In that case Page-Wood VC refused to give effect to a judgment of the Supreme Court of Louisiana. There was no question of perversity in the ordinary sense of obstinately or dishonestly shutting one's eyes to what one knows to be right. The Supreme Court had applied what they believed to be their common law, but it was at variance with a generally accepted rule of private international law, which required foreign (in this case, English) law to be applied in the circumstances of the case. Page-Wood VC called this, *ibid*, 247: "a perverse and deliberate refusal to recognise the law of the country by which title has been validly conferred".

[192] [1967] 1 AC 853, 917-918, 922 (Lord Reid); 928 (Lord Hodson); 978 (Lord Wilberforce). Lord Reid stated, *ibid*, 922: "If *Simpson v Fogo* can stand at all it must be limited to cases where the law of the foreign country applied in the foreign judgment is at variance with generally accepted doctrines of private international law."

[193] See fns76-79

[194] (1855) 4 E&B 780; fn12

[195] Cf. the interpretation given to Article 22, Brussels and Lugano Conventions and the term "related action": see *Sarrio SA v Kuwait Investment Authority* [1999] 1 AC 32. The House of Lords reversed the Court of Appeal, in particular the judgment of Evans LJ, which had "defined 'primary' issues as those necessary to establish a 'cause of action', and [which had] distinguished 'secondary' or 'non-essential' issues by reference to the principles of issue estoppel to be found in our common law. However, those who framed Article 22 can hardly be suggested to have had in mind our English concepts of 'cause of action' or 'issue estoppel' when using the phrase 'irreconcilable judgments'": *ibid*, 1148 (Lord Saville)

[196] *Blair v Curran* (1939) 62 CLR 464, 533 (Dixon J)

However, despite the importance of this requirement, of the foreign judgment authorities reviewed in this chapter only in the speech of Lord Upjohn *Carl Zeiss (No 2)*[197] do we see it considered in any detail[198]:

> if [the English solicitors] are debarred from arguing their authority to issue the writ, it is because of an issue estoppel. But I have already shown that this *lis* is not and cannot be an issue in the action at all. It is a matter which would seem ... to be a matter collateral or incidentally cognisable and therefore not the subject of estoppel. No authority has been cited to your Lordships which bears any resemblance to the present case. All the authorities we have examined on issue estoppel have been cases where the earlier action dealt with issues or points which, however inferentially or incidentally, arose in the course of trying the substance of the issues between the parties to the action; not with a *lis* having nothing to do with those issues, which arises only between the defendant and the solicitor issuing the writ. Ought the principles of issue estoppel to be extended to a case such as this? I can see no reason for doing so ... I would deny to these purely incidental proceedings in the action the doctrine of issue estoppel ... I would regard the doctrine as entirely inappropriate to this form of proceedings.

It is clear from the rest of Lord Upjohn's speech that the absence of a necessary and fundamental *lis* made it needless for his Lordship to consider whether any of the other *res judicata* requirements were satisfied; just as it is clear from his Lordship's hierarchy of questions that he considered this requirement to be the key criterion[199].

Certainly the requirement assumes considerable importance if the particular issue of which it is desired to found the plea is *not* the subject of an express declaration or finding. As was noted in Chapter Two, Part One: "it may not be easy to be sure that a particular issue has been decided or that its decision was a basis of the foreign judgment and not merely collateral or obiter"[200]. And, as in Chapter Two, we can overcome the difficulty by returning to the theory of the judgment. From this, it is suggested, three categories of judicially determined subject matter can be discerned.

The first category ("category A") comprises subject matter which is clearly ascertainable because there is an express judicial declaration on the face of the record as to the questions of law or findings of fact. Of this there will be no difficulty in deciding whether the question previously decided is identical with that which is the subject of later litigation; nor any difficulty in assessing whether the determination was necessary and fundamental.

However, "it is not necessary ... that there should be an express finding in terms"[201]. A foreign judgment may do no more than decree or refuse certain relief and yet *still* necessarily affirm or deny questions of law or findings of fact. Therefore, the second

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197 [1967] 1 AC 853

198 *ibid*, 947-948

199 *ibid*, 942-943 (Lord Upjohn)

200 *ibid*, 918 (Lord Reid). Thus the inferred judicial determination must be reasonably clear: see *Turner v London Transport* [1977] ICR 952, 966 (Lane LJ): "a case of issue estoppel cannot begin to be established unless it can be ascertained with some degree of precision what it was that the dominant judgment decided".

201 *Shoe Machinery Co v Cutlan* [1896] 1 Ch 667, 670-671

category ("category B") relates to that subject matter that must be inferred in circumstances where the subject matter is not expressed in words. It is these category B issues which often give rise to "questions of considerable difficulty and nicety"[202].

Even so, where a question was necessarily decided in an earlier suit, *though not in express terms*, the same question can not be raised again between the parties in a later suit. Thus, in *Hoystead v Commissioner of Taxation*[203], an appeal upon a question of income tax for a previous year had been decided on the basis of an unstated assumption that certain beneficiaries under a will were joint owners. In a subsequent suit in respect of another taxation year, the Commissioner attempted to contradict the assumption. An issue estoppel was upheld in respect of that issue even though it was judicially determined subject matter that fell within (what we have called) category B. The House of Lords held[204]:

> if in any court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding. But the principle also extends to *any point, whether of assumption or admission, which was in substance the ratio of and fundamental to the decision.* [emphasis added]

Similarly, the Court of Appeal observed in *Re Koenigsberg, Public Trustee v Koenigsberg*[205], that the preclusive plea involved in these cases is the application of the doctrine of estoppel *per rem judicatam* "by implication"[206].

There may appear to be a fine line between category B and category C, but the conceptual leap is huge[207]. The subject matter in category C is different from that in the other two categories because it has *not* been raised nor determined, and hence cannot in subsequent proceedings be contradicted nor reasserted. For this reason it falls outside of the ambit of the doctrine of *res judicata* and within the realm of abuse of process. The latter doctrine - as we will see - precludes subject matter which was omitted from the earlier proceedings but which could, and should, have been part of that litigation. Thus the significance of category C subject matter will become apparent when we discuss the *Henderson* rule in Chapter Four. Nonetheless, when discussing the subject matter that forms the basis of the pleas of *res judicata* it is important to avoid founding such a plea on subject matter within category C.

Even so, what is illustrated by these categories is that an issue estoppel can cover subject matter that falls into category A or B; and in the category B cases, especially, the requirement that the issue was necessary and fundamental will be a useful instrument for

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202 *Re Koenigsberg, Public Trustee v Koenigsberg* [1949] Ch 348, 363

203 [1926] AC 155

204 *ibid*, 170 (Lord Shaw)

205 [1949] Ch 348

206 *ibid*, 363 (Evershed LJ)

207 Although the distinction has sometimes been blurred: see *Hoystead v Commissioner of Taxation* [1926] AC 155 and the discussion in Chapter Four.

teasing out the relevant subject matter. Indeed, as to (what we have called) category B subject matter, Slesser LJ said in *Marginson v Blackburn Borough Council*[208]:

> In such a case the question arises, what was the question of law or fact which was decided? And for this purpose, it may be vital in many cases to consider the actual history of the proceedings.

(e) The special circumstances exception: *Arnold v National Westminster Bank plc*

It had been thought that issue estoppel constituted a complete bar to relitigating an issue once it had been decided, but the House of Lords in *Arnold v National Westminster Bank plc*[209] - evincing "a readiness to adopt a less technical approach than has been adopted in the past to this most technical subject"[210] - has recently held that in special circumstances an exception may exist.

The facts of the case were unusual. The plaintiffs had previously suffered an adverse judgment upon a construction of a rent review clause in their lease, but it transpired the judge had construed the lease incorrectly. Nonetheless, as matters stood, the plaintiffs were barred by issue estoppel from re-opening the point in all future rent reviews, with the result that they faced the prospect of wrongly being required to pay 20 per cent more rent throughout the remainder of their lease, costing them several million pounds. All this followed, so they argued, from a decision which they had done everything possible to challenge but against which they were held to have no right of appeal.

The House of Lords were persuaded that the issue estoppel arising from the earlier decision created an injustice to the plaintiff solely by reason of the mistake by the court. Accordingly, their Lordships held that where, as here, further material relevant to the correct determination of subject matter involved in earlier proceedings has become available to a party, that subject matter could be reopened regardless of whether it had already been specifically raised and decided. The further material may relate to the facts or a change in the law. But the exception will not apply if the further material could have been adduced in the earlier proceedings by reasonable diligence.

The decision was supported by reference to comments in *Mills v Cooper*[211] to the effect that an estoppel plea prevents a party from contradicting previously determined issues[212]:

> unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since become available.

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[208] [1939] 2 KB 426

[209] [1991] 2 AC 93

[210] *The Indian Grace* [1993] AC 410, 422 (Lord Goff of Chieveley), referring to *Arnold v National Westminster Bank plc* [1991] 2 AC 93

[211] [1967] 2 QB 459

[212] *ibid*, 468-469 (Diplock LJ)

But the more important reference was to the speech of Wigram VC in *Henderson v Henderson*[213]. As we will see in the following chapter, that case is now considered the principal authority for the plea of abuse of process. But a phrase used by the Vice-Chancellor in his speech in that case may also be understood as meaning that in special circumstances the doctrine of *res judicata* does not, or may not, apply.

The phrase in question begins with the words: "the plea of *res judicata* applies, *except in special cases*"; it then proceeds to distinguish (what we have called) category A and B cases from category C cases. Nonetheless, as counsel for the defendants argued in *Arnold*[214], the reference to this exception had always been understood as referring *only* to cases where the point was not raised and decided - that is, only to the category C cases. Indeed, perhaps this also explains the understanding of Browne-Wilkinson VC in the Court of Appeal in *Arnold*[215] who confessed[216]:

> that, until [counsel for the plaintiffs] made his submissions in this case, I had thought that the doctrine of issue estoppel was an absolute one.

A similar understanding prevails in the High Court of Australia, according to Dawson J in *Chamberlain v Deputy Commissioner of Taxation*[217]:

> I do not understand Wigram VC to have held in *Henderson v Henderson* ... that there is a discretion to deny the application of the doctrine of *res judicata* in special circumstances. A discretion could only exist where the doctrine in its strict sense does not apply but the principle is extended to cover matters which were not raised but could and should have been raised in an earlier action in which judgment is entered. Any discretion arises from the extension of principle. It forms no part of the doctrine of *res judicata* itself.

And also Brennan J, in the same case[218]:

> For reasons which I gave in *Port of Melbourne Authority v Anshun Pty Ltd* ... Wigram VC was not, in my view, advancing any exception to the doctrine but was referring to the equity practice of that time which allowed for the impeaching of the first judgment in special circumstances. As the doctrine of *res judicata* does not admit of any exception so long as the first judgment stands, I do not find it necessary to consider the "special circumstances" exception ...

However, the House of Lords in *Arnold* were not persuaded[219]:

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213 (1843) 3 Hare 100, 115

214 [1991] 2 AC 93, 96-99

215 [1989] Ch 63

216 *ibid*, 67

217 (1988) 164 CLR 502, 512

218 *ibid*, 504; although now see *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) 36 FCR 406: "Save perhaps in the very restricted situation dealt with in *Arnold v National Westminster Bank plc* ... once it is held that a *res judicata* or issue estoppel applies, the Court has no discretion to waive its effect upon the rights of the parties."

219 [1991] 2 AC 93, 112 (Lord Lowry)

> [whilst] there are significant arguments in favour of the proposition that issue estoppel constitutes a complete bar to relitigating a point once it has been decided ... I am now of the opinion that the court can, and in exceptional circumstances should, relax that rule.

Lord Shaw adding[220]:

> One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite effect.

There is no doubt, however, that the special exception modifies issue estoppel. Moreover, since this exception is borrowed from the abuse of process doctrine, it could be said to reflect the "lack of a clear dichotomy between the defence of *res judicata* and similar defences [like abuse of process] based upon estoppel"[221]; or, indeed, the difficulty in drawing the fine line between category C subject matter and categories A and B[222].

Nonetheless, issue estoppel in the *foreign* context is already subject to a quasi-discretion given that the courts must exercise caution before allowing a foreign decision to preclude relitigation of merely an issue[223]. Indeed, this may mean, as Graveson has argued[224]:

> The court's jurisdiction to strike out a plea which raises an issue *already decided elsewhere* is discretionary. This judicial discretion could be particularly useful should the court be faced with two or more contradictory earlier decisions, each inherently capable of operating as estoppel and possibly as counter-estoppels in respect of issues raised in pending litigation. This aspect of procedure is thus not only regarded in an international framework but conditioned by considerations of effective justice.

Nonetheless, it will be important to keep the *Arnold* exception within appropriate limits otherwise the general rule will be undermined at a cost of increased litigation and uncertainty[225].

4. Conclusion and examples of issue preclusion by foreign judgments

We have now considered the requirements necessary for a foreign judgment to found an issue estoppel in subsequent proceedings in England. The process begins, as with all preclusive pleas, by establishing that the foreign judgment is final and conclusive and on the merits and from a court of competent jurisdiction. Then, if the parties/privies in the two proceedings are the same, and the same issue as was necessary and fundamental to the foreign judgment is being contradicted in the subsequent proceedings in England, the

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220 *ibid*, 104

221 *Effem Foods Pty Ltd v Trawl Industries Pty Ltd* (1993) 43 FCR 510

222 See fn207.

223 *Carl Zeiss (No 2)* [1967] 1 AC 853

224 Graveson, R.H., Private International Law, 7th ed, Sweet & Maxwell: London, 1974, p598

225 Cf. *Ascot Commodities NV v Northern Pacific Shopping, The Irini A (No 2)* [1999] 1 Lloyd's Rep 189, 194: "It is common ground following the decision in *Arnold* ... that in special circumstances the Court may prevent the operation of an issue estoppel where to give effect to it would amount to an abuse of process." (Tuckey J)

party wishing to rely on the foreign judgment for issue preclusion may plead it to prevent any contradiction - subject only to the special circumstances exception.

Summary of applicable law - issue preclusion

Judgment recognised at common law	**Whether determined by English law?**	**Whether determined by foreign law?**
RECOGNITION / *RES JUDICATA* CRITERIA: -- jurisdiction	√ - English private international law rules apply; that is, jurisdiction in the international sense	x - not relevant ?- query possible role of natural forum
-- final and conclusive	x	√ - determined according to foreign law
-- on the merits	√ - determined according to English law criterion. Note determinations of issues (eg. jurisdictional or procedural issues) independent of those which comprise the merits of a cause of action can be on the merits where expressly submitted to the court for determination and adjudicated per the formulation in *The Sennar (No 2)*	? - query whether English court can look to whether *foreign* court would regard its judgment as being rendered on the merits
SUBJECT MATTER CRITERION: -- ie. same issue	√ - determined according to English law concepts of what is/is not the same issue and whether that issue is necessary and fundamental to the decision	x
PARTIES/PRIVIES CRITERION:	√ - determined according to English law requirements of mutuality and privity and law as to parties and privies	? - query why English court should not refer to foreign law; note especially that if an *issue* is determined against a party arguably such an issue should bind that party outside of the mutuality requirement (eg. as in the US)

Illustrations - issue preclusion

1. P sues D in Ruritania to enforce a debt owing under a contract and obtains judgment. The Ruritanian court clearly has jurisdiction over the subject matter, and both parties are regularly before the court. In subsequent proceedings in England, brought by P for damages for breach of the same contract, D alleges that the contract was invalid. P pleads issue estoppel, asserting that the Ruritanian judgment necessarily determined the issue of the validity of the contract as a fundamental part of the decision. The plea will be upheld if: (i) the judgment in the Ruritanian action is (a) of a court of competent jurisdiction (according to English rules of jurisdiction in the international sense), (b) final and conclusive (according to Ruritanian law: parity of reasoning with *Nouvion* test requires that the issue cannot again be litigated in Ruritania) and (c) on the merits (according to English law per the formulation in *The Sennar (No 2)*); (ii) the parties (or privies) in the Ruritanian action, and the parties in the subsequent English proceedings are the same; and (iii) the issue in the English proceedings, in respect of which the preclusive effect of the Ruritanian judgment is sought, is the same issue as that decided by the Ruritanian judgment, and necessary and fundamental to that decision.

2. A sues B in Ruritania for conversion. In subsequent proceedings in England, A sues B for money had and received. In the second question there arises the same question of property. Thus, provided the Ruritanian judgment can be recognised in England as a *res judicata*, there is an issue estoppel that precludes B in England from alleging that the goods (or the money produced by the goods) are his, where the earlier Ruritanian judgment has determined the issue that the goods are not B's.

3. P sues D in Ruritania for damages to his motor vehicle arising from D's negligent driving. D counter-claims that P, by his own negligence, contributed to the accident such that the judgment recovered apportions liability 75% D, 25% P. In subsequent proceedings in England, P sues D in respect of personal injuries sustained in the same accident. P will be precluded from denying the issue of contributory negligence.

4. Proceedings are brought by Z of East Teutonia against D in England. D denies the authority of Z's solicitors to bring the proceedings in England by relying on a West Teutonian judgment which has determined (in proceedings between Z and D) that Z was not properly before that (West Teutonian) court. Indeed, the West Teutonian judgment has determined that the body purporting to bring the proceedings in West Teutonia on Z's behalf had no authority to do so. Thus, in England, D maintains that Z's action in England is similarly being maintained without authority. As with all foreign judgments involving issue estoppel, the English court must exercise special caution - and especially so here because the English court is not familiar with modes of procedure in West Teutonia, and it is not clear whether the particular issue has been decided finally and conclusively or that its decision was a basis of the foreign decision and not merely collateral or obiter. More especially, it appears that there is no identity of parties nor identity of interest as privies, since the relevant parties in England on the issue are D and Z's solicitors and not D and Z. For these reasons, the West Teutonian decision does not support the plea of issue estoppel to preclude Z's solicitors from asserting that they are properly maintaining the action.

5. X sues Y in Ruritania. The Ruritanian court decides that the parties have agreed the dispute should be heard exclusively by the Sudanese courts. X then sues Y in England. Although the Ruritanian court has not determined an underlying cause of action, but has only determined a jurisdictional issue, nonetheless that issue determination as to the applicability of the jurisdiction clause will bind A and preclude him from asserting otherwise in England than that the dispute should be heard exclusively by the Sudanese courts. However, this issue preclusive effect can only be secured if the Ruritanian judgment qualifies as a *res judicata* - that is: (a) the presence or submission of Y to the jurisdiction of the Ruritanian court; (b) the issue determined such that, by Ruritanian law, it could not be raised again; (c) the issue determined "on the merits" (to the satisfaction of English law) in the sense that the Ruritanian court must have established certain facts (eg. as to the Sudanese choice of court clause), stated applicable principles of

law, and applied those principles to the facts, expressing thereby a conclusion. Moreover, the issue preclusive effect further requires that the parties and subject matter be identical.

6. P sues D in Australia. D fails to obtain a stay of the Australian proceedings according to the "not inappropriate forum" test by failing to show that the proceedings are vexatious and oppressive. D then applies for an anti-suit injunction from an English court, which requires that D prove that the Australian proceedings are vexatious and oppressive. P relies on the Australian judgment to estop D from proving that the Australian proceedings are vexatious and oppressive. Will such a judgment support the issue estoppel? First consider whether the Australian judgment dismissing the stay application is a *res judicata* - that is: (a) was D amenable to the jurisdiction of the Australian court in the international sense? (b) is the dismissal of a stay application in Australia a final and conclusive decision? (c) is the dismissal of a stay application in Australia a decision which is reached on the merits of *that* issue. Assuming that the same parties are involved in the same capacity, the only other requirement for the judgment to raise an issue estoppel is that it deal with the same issue - and here, it would seem, the English court cannot reach its decision as to an anti-suit injunction without first considering the very issue which the Australian court has already decided. Thus D may be precluded by issue estoppel from obtaining an anti-suit injunction in England by reason of failing to show, in an application for a stay in Australia, that the proceedings were not vexatious and oppressive.

7. P sues a partnership in Ruritania and also sues the partners personally as guarantors, including D who is resident in England. Judgment is obtained and D is held liable for 20% as guarantor. D moves a motion in the Ruritanian court to vacate the Ruritanian judgment alleging that he had not personally submitted to the jurisdiction of the Ruritanian court. The Ruritanian court adjudicates D's motion and concludes that D had voluntarily submitted by authorising an appearance. P seeks to enforce his judgment against D in England by summary judgment and D attempts to resist by arguing that the Ruritanian court did not have personal jurisdiction over him. P relies on the issue preclusive effect of the Ruritanian final interlocutory decision on D's procedural motion, in which - they allege - the issue whether D had submitted to the Ruritanian court was adjudicated. There is no reason in principle why such an issue should not be decided in a decision on a procedural matter as opposed to the final determination of the cause of action, provided that decision is final and conclusive and not provisional or subject to revision and provided, moreover, that: (i) there was an express submission of the procedural or jurisdictional issue to the Ruritanian court; (ii) that specific issue of fact was raised and decided by the Ruritanian court; (iii) the need for caution is carefully borne in mind. However, here the English court is not satisfied that the precise same issue is involved because the Ruritanian court considered the issue of D's supposed voluntary submission in a wider context than is required when an English court is establishing the issue as to whether D has submitted to the jurisdiction of the foreign court in the international sense.

8. X sues Y in Ruritania, and - in dismissing X's claim - the Ruritanian court makes a finding that a particular document had not been sent. In subsequent proceedings in England between X and Y, Y will be able to prevent X from contradicting the Ruritanian issue determination (as to whether or not the document had been sent) if: (i) the jurisdictional competence of the Ruritanian court in the international sense is established; (ii) if, according to Ruritanian law, the issue was finally and conclusively determined; and (iii) if, according to English law, the issue was determined "on the merits". Moreover, the issue estoppel requires that the parties be the same; that the exact same issue as was necessary and fundamental to the foreign judgment arises in the subsequent English proceedings; and that the English court exercise special caution in upholding the plea.

CHAPTER FOUR

SUBSEQUENT PROCEEDINGS IN ENGLAND PRECLUDED AS AN ABUSE OF PROCESS

1. Introduction: *res judicata* pleas contrasted with abuse of process pleas

In Chapters Two and Three we have considered cause of action and issue estoppel, and the former recovery plea enacted by section 34, 1982 Act. These three pleas are classic *res judicata* pleas because it is fundamental to each of them that the very subject matter in controversy must *itself* be rendered *res judicata*, this being evidenced by the reasons for judgment and/or the formal order of the decision. But what of subsequent proceedings in England involving subject matter that has *not* been rendered *res judicata* by the foreign judgment, either expressly or by implication, but which could and should have been so rendered? In this Chapter it will become clear that the doctrine of *res judicata* cannot provide the theoretical foundation for the plea that precludes the litigation of subject matter which could and should have been adjudicated. Rather we must consider a different common law preclusive doctrine, and one which emanates from the inherent jurisdiction of an English court to regulate its own procedure[1]. That doctrine is the doctrine of abuse of process.

In its most general and widest sense, the doctrine of abuse of process advocates that subsequent proceedings should be precluded if it is necessary for a court, exercising its unfettered, inherent discretion, to prevent a misuse of its procedure in the face of unfairness to another party, or to avoid the risk that the administration of justice might be brought into disrepute among right-thinking people[2].

The broad sweep of this doctrine gives the impression that a plea of abuse of process is boundless and all-encompassing. However, the generality and breadth of the English abuse of process doctrine has also given rise to confusion within the law of preclusion at common law, blurring important distinctions and muddling those classic and more precise *res judicata* pleas. Indeed, what might have been a tidy and responsive area of the law, respecting the refined rules and the categories of judicially determined subject matter, now risks being overwhelmed by a doctrine, bent (it seems) on dismantling those distinctions in the belief that judgment preclusion should be "untrammelled by the technicalities of estoppel"[3].

The belief is sincere: the *res judicata* doctrine (as we have seen thus far) *is* technical, requiring proof that subject matter has been *determined*, whereas a plea of abuse of

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[1] Dockray, M.S., "The inherent jurisdiction to regulate civil proceedings" (1997) 113 LQR 120, 125-127

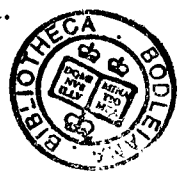
[2] *Hunter v Chief Constable of the West Midlands* [1982] AC 529, 536 (Lord Diplock)

[3] *House of Spring Gardens v Waite* [1991] 1 QB 241, 254 (Stuart-Smith LJ); *Desert Sun Loan Corp v Hill* [1996] 2 All ER 847, 864 (Stuart-Smith LJ)

process is almost wholly discretionary in its content, being the fruit of the court's inherent power to "do justice" in the circumstances[4]. But if abuse of process becomes the preclusive mechanism of choice, the more specific pleas will fall into disuse along with the very reasons why preclusive consequences arise in those circumstances, leaving a court with little by which to explain its perfunctory actions other than abstract and general principles of justice. Already, for example, courts have precluded controversies as an abuse of process where more accurately a plea of *res judicata* should have applied; and, in the same way, it has now become *de rigueur* for parties to plead some form of abuse of process *in any case*, such is the catch-all nature of the abuse of process plea.

However, we are more likely to respect the differences between the doctrine of *res judicata* and the circumstances in which it *is* correct to plead abuse of process if we understand the rule in *Henderson v Henderson*[5]. For it is this well-known rule - originally seen as an extension to the *res judicata* pleas[6], now part of the abuse of process stable[7] - which properly defines when subsequent proceedings in England ought to be precluded as an abuse of process, even although the subject matter at the foundation of the plea has *not* been rendered *res judicata* by the earlier judgment. If preclusion of unadjudicated subject matter is *ever* appropriate on the strength of an earlier *foreign* judgment, then it is this rule which should provide the stepping stone.

Accordingly, it is the *Henderson* rule that will provide the focus for this chapter; but this caveat should be noted: Much of the discussion that follows is drawn from authorities that do not involve foreign judgments, therefore we will consider somewhat later in the chapter the extension of the *Henderson* rule - and the propriety thereof - where the plea is based on a foreign judgment in subsequent proceedings in England.



2. The classic statement of principle: *Henderson v Henderson*

In proceedings before the Supreme Court of Newfoundland, certain sums were alleged due from B to the next of kin of J, who had died intestate. B and J were brothers and had been in partnership, the partnership business having branches in Newfoundland and Bristol. The sums alleged by the next of kin related to moneys owing out of the partnership and to money from the estate of the father of B and J, which latter sum was said to be held by B on trust for J. By cross-claim, B pleaded that the money from the father's estate formed part of the assets of the partnership, that the partnership accounts showed money due to B, and that J's estate was indebted to B for a private debt. However, because B failed to appear to substantiate these claims, an *ex parte* decree was made

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[4] Cf. the overriding objectives of the CPR: CPR 1.1(1): "to deal with cases justly"; and, hence, CPR 3.4(2)(b): "The court may strike out a statement of case if it appears to the court ... (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings".

[5] (1843) 3 Hare 100

[6] And a number of abuse of process cases would also sustain pleas of *res judicata*: *Reichel v Magrath* (1889) 14 App Cas 665; *Greenhalgh v Mallard* [1947] 2 All ER 255; and *Yat Tung Investment Co Ltd v Dao Heng Bank* [1975] AC 581

[7] *Brisbane City Council v A-G for Queensland* [1979] AC 411, 425 (Lord Wilberforce); *Barrow v Bankside Agency Ltd* [1996] 1 WLR 257, 260 (Bingham MR)

against B for the taking of accounts. When B again failed to appear, the master found in favour of the next of kin in respect of the money from the father's estate, but did not take an account of the partnership because B had not produced the books. The Supreme Court then decreed that the master should compute the sum due out of the partnership *pro confesso*. The master made his report, upon which the Supreme Court pronounced its final decree, referring to all the antecedent proceedings in the case, and decreeing that B should pay to J's next of kin the sum of £8883 plus costs of the suit.

Upon this decree, the next of kin commenced enforcement proceedings against B in England, which prompted B to issue a bill in the High Court of Chancery to restrain them. That bill charged[8]:

> that the [Newfoundland] proceedings leading to this decree were irregular, that the decree itself was irregular, that a large balance was due to the Plaintiff [B], and that the decree ought not to be enforced, but ought to be reversed by Her Majesty in Council, on appeal, which the Plaintiff intends to bring. The bill specially alleges, as one ground of irregularity, that the report of the Master ... wholly omitted any notice of the account connected with the partnership, and is confined to the moneys alleged to be due from the Plaintiff, in respect of the estate of William Henderson, the father; and that a large sum of money is due to the Plaintiff on the partnership accounts, as would appear if they were properly taken.

On behalf of the next of kin, who demurred, it was argued[9]:

> that the proceedings on the face of the bill shewed that the decree concluded the whole matter, that I [Wigram VC] could not rehear that decree, and that it was final and conclusive, unless reversed by the Privy Council, the proper appellate tribunal.

It is the judgment of Wigram VC, upholding the demurrer, which contains the statement of principle the basis for (what has become) the *Henderson* abuse of process rule. However, before reaching that statement, it is important to note that Wigram VC appreciated that B was *not* contradicting the existence or verity of the prior foreign decree *per se*. Nor was B denying that the decree was conclusive of that which it decided[10]. Rather, B was insisting that the decree had not concluded the *whole* question between the parties; that the decree had not rendered *his* claims *res judicata*. Accordingly, this was not a case of contradiction in which to invoke cause of action or issue estoppel[11]. Nor was this a case of further recovery. Yet to silence B, what was necessary was a preclusive mechanism to deal with subject matter that had *not* been decided but which - had it been pressed - might have been concluded by the earlier proceedings. Thus Wigram VC states[12]:

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[8] *ibid*, 113 (Wigram VC)

[9] *ibid*

[10] *ibid*, 114

[11] Accordingly, it is difficult to make sense of more recent claims that *Henderson v Henderson* was a case of cause of action estoppel: *Carl Zeiss (No 2)* [1967] 1 AC 853, 916 (Lord Reid), 946 (Lord Upjohn), 966 (Lord Wilberforce); *Charm Maritime v Kyriakou* [1987] 1 Lloyd's Rep 433, 441; fn17.

[12] (1843) 3 Hare 100, 115 (Wigram VC)

> the only question I have now to decide is whether I am to consider the partnership account and the claim of Bethel [B] as having been *likewise* the subject of adjudication by the Supreme Court ... or whether those items ... *which certainly might have been taken in that suit*, are to be considered as excepted out of the operation of the decree. [emphasis added]

It was in deciding *this* question that Wigram VC pronounced what has become the classic statement of principle at the foundation of the rule[13]:

> In trying the question I believe I state the rule of the Court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject matter of litigation in respect of matter which might have been brought forward as part of the subject matter in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special circumstances, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. ... It is plain that litigation would be interminable if such a rule did not prevail. Now, undoubtedly the whole of the case made by this bill might have been adjudicated upon in the suit in Newfoundland, for it was of the very substance of the case there, and *prima facie*, therefore, the whole is settled. The question then is whether the special circumstances appearing upon the face of this bill are sufficient to take the case out of the operation of the general rule. [Wigram VC held that there were no special circumstances to displace this general rule]

Before we derive from this statement, and thence examine, the requirements that constitute this plea, it will be useful to trace the evolution of the rule from a plea of *res judicata* to a plea of abuse of process.

3. The evolution of the *Henderson* abuse of process plea

It has been observed that the rule in *Henderson v Henderson* is part of the doctrine of abuse of process, yet it has often been erroneously referred to as: the "extended" rule of *res judicata*[14]; "wider" cause of action or issue estoppel[15]; or "non-issue"/"non-cause-of-action" estoppel[16]. However, given that the plea - when properly understood - precludes subject matter that has *not* been rendered *res judicata*, it is sensible to *avoid* terminology that suggests that the rule precludes litigation of previously adjudicated subject matter.

Nonetheless, the confusion as to nomenclature has a long history: Wigram VC expressed the rule in *res judicata* terms[17], whilst subsequent early cases either applied the rule

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[13] *ibid*, 114-116

[14] Cf. SBTH, Chapter 26: "The extended doctrine of *res judicata*".

[15] *Divine-Bortey v Brent London Borough Council*, The Times: 20 May 1998 (Simon Brown LJ), where the plea of *res judicata* was said to encompass cause of action estoppel, "strict" issue estoppel, and "wider" issue estoppel, the latter being the rule in *Henderson v Henderson.*

[16] In the United States, "abuse of process" is similar to collateral estoppel; in Australia, the *Henderson* rule is enunciated in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 and called "Anshun estoppel"

[17] Which may explain fn11.

where traditional *res judicata* pleas would have been appropriate[18], or referred to preclusion by abuse of process without associating *Henderson v Henderson* with the doctrine[19]. It was not until *Greenhalgh v Mallard*[20] that the correct relationship between *res judicata* and abuse of process was recognised.

In *Greenhalgh*, a second action for conspiracy to injure by unlawful means was precluded by cause of action estoppel because, *inter alia*, it relied on the same facts, and was ostensibly the same action, as an earlier conspiracy claim rendered *res judicata*. But Somervell LJ also considered whether preclusive consequences would have obtained had the claim in the subsequent proceedings fallen outside the categories of subject matter expressly or inferentially determined by the earlier decision, and within the purview of the *Henderson* rule. As to this his Lordship held[21]:

> *res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but ... covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of process of the court to allow a new proceeding to be started in respect of them.

Although the nomenclature is still not freed from the concept of *res judicata*[22], it was this case that first associated the *Henderson* rule with the doctrine of abuse of process. Not surprisingly, it was this case which was approved by Lord Wilberforce in *Brisbane City Council v Attorney-General for Queensland*[23] when stating[24]:

> [Abuse of process] is the true basis of the doctrine and it ought only to be applied when the facts are such as to amount to an abuse: otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation.

This realisation that the *Henderson* rule is distinct from the *res judicata* pleas is gaining acceptance[25]; and, today, the most accurate references acknowledge that[26]:

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[18] *Reichel v Magrath* (1889) 14 App Cas 665; *Remmington v Scoles* [1897] 2 Ch 1; *Macdougall v Knight* (1890) 25 QBD 1; *Horrocks v Stubbs* (1896) 74 LT 58

[19] *Brunsden v Humphrey* (1884) 14 QBD 141; *Caird v Moss* [1886] 33 ChD 22; *Montgomery v Russell* (1894) 11 TLR 112

[20] [1947] 2 All ER 255

[21] *ibid*, 257

[22] However, in the following year, the rule was invoked without reference to the doctrine of *res judicata*: *Wright v Bennett* [1948] 1 All ER 227.

[23] [1979] AC 411

[24] *ibid*, 425; cf. *Asher v Secretary of State for the Environment* [1974] Ch 208, 222 (Lord Denning MR): "Strictly the matter is not *res judicata*, but the courts have ample power to prevent any abuse of their process"

[25] Cf. *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502, 505 (Deane, Toohey and Gaudron JJ: "In truth *Henderson v Henderson* [is] not concerned with *res judicata* in its strict sense but rather with its implications when an issue is sought to be raised which could and should have been litigated in the earlier proceedings."

[26] *Barrow v. Bankside Agency Ltd* [1996] 1 WLR 257, 260 (Bingham MR); *Talbot v Berkshire County Council* [1994] QB 290, 296; 301; *Lordsvale Finance plc v Bank of Zambia* [1996] QB 752; cf. *David Grant & Co v Westpac Banking Corp* (1995) 184 CLR 265, 279 (Gummow J)

> The rule in *Henderson v Henderson* ... requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of *res judicata* in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed.

However, a recent appraisal examines the evolution of the *Henderson* rule in light of principles and practice[27]. The problem with the rule - it is suggested - is that it is uncertain and particularly difficult to apply: a hybrid concept with unfamiliar ingredients and subjective notions, in which any assessment - whether objective or subjective - involves the court in an undesirable collateral inquiry into "the confidential channels of communication which make up the process of a party's preparation for, and ongoing conduct of, litigation"[28].

Moreover, it is said to be a rule that[29]:

> may be explained in conventional terms of waiver, or perhaps election, or as estoppel by conduct, or as an abuse of process. When Wigram VC said the plea [of *res judicata*] applied, it seems that he really meant to say that the plaintiff was, by his previous conduct, estopped from denying that the plea applied.

In other words, whilst we can categorise the plea as abuse of process - or (erroneously) as extended *res judicata* - there are other routes by which justice can be done in the circumstances. Certainly Spencer Bower - in the first edition of his work - thought *Henderson v Henderson* was authority for estoppel by conduct[30], and there are judicial statements consistent with this approach[31]:

> a litigant may be shown to have acted positively in the face of the court, making an election and procuring from it an order affecting others apart from himself, in such circumstances that the court has no option but to hold him to his conduct and refuse to start again on the basis that he has abandoned.

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[27] Beaumont, Justice B., "Commentary on *Anshun* Today" (1997) 71 ALJ 950

[28] *ibid*, 950

[29] *ibid*, 952

[30] Spencer Bower, George The Doctrine of *Res Judicata*, London, 1924, p95: "Nor can a decision be treated as wanting in finality ... if its apparent imperfection is due to the objecting party's conduct or tacit consent: (s) ... As in *Henderson v Henderson (No 1)* (1843) 3 Hare 100 a partnership action in which the defendant set up, in support of a demurrer to the bill for want of equity - *really by way of estoppel* - the judgment of a colonial court given in his favour, in answer to which the plaintiff argued that the whole of the issues had not been [before] the colonial court."

[31] *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993, 1018 (Viscount Radcliffe); *Rogers v R* (1994) 181 CLR 251, 274-275 (Deane and Gaudron JJ): "Of course, there may be true estoppels which prevent a person from raising an issue bearing on a matter to be judicially determined. An estoppel of that kind may come about because of the way in which proceedings have been conducted with the result that the issue cannot thereafter be raised in those proceedings or on an appeal. And if a party fails to raise an issue although he or she might reasonably have done so, there may well be a true estoppel which precludes that party from it in later proceedings."

In this light, perhaps the *Henderson* rule's evolution from *res judicata* to abuse of process has been unnecessary, since[32]:

> [c]onventional, workable, principles have always been available to meet, and do justice in, the exigencies of any conceivable situation. In principle, as well as for practical reasons, there was simply no need for Wigram VC's apparent judicial activism.

Nonetheless, Beaumont is writing from the Australian perspective; and we have seen, in England, that the *Henderson* rule *is* now characterised in abuse of process terms, so it may be too late to make sense of the rule by reference to other possibilities, such as waiver, election, or estoppel by conduct.

Indeed, it is more important, perhaps, to maintain a clear distinction between judicially *determined* subject matter and subject matter which is the preserve of the *Henderson* rule; that is, subject matter *not* expressly nor implicitly decided, but which properly belongs to that which was. This distinction may have been blurred in *Hoystead v Commissioner of Taxation*[33] to the extent that it cited *Henderson v Henderson* as authority for the proposition that an issue estoppel can be founded upon any point, whether of assumption or admission, which was in substance the *ratio* of and fundamental to the decision[34].

Therefore, the argument of this chapter bears repeating: the *Henderson* rule, properly understood, concerns subject matter that was *not* rendered *res judicata* for the very reason that it was *not* part of the express or implied decision. But the plea may be raised where the issue in question was so clearly part of the subject matter of the earlier proceedings, and so clearly could have been raised, that it would be an abuse of process to allow the new proceedings. We must now consider the requirements that constitute this plea.

4. Requirements for the *Henderson* abuse of process plea

There are four components to the plea outlined in the judgment of Wigram VC[35] which will be examined under the following headings:

(a) subject matter;

(b) jurisdictional competence of the F1 court;

(c) parties and privies; and

(d) the exception in special circumstances.

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[32] Beaumont, Justice B., "Commentary on *Anshun* Today" (1997) 71 ALJ 950, 954

[33] [1926] AC 155

[34] *ibid*, 170

[35] See fn13

(a) The subject matter of the *Henderson* plea

It is an abuse of process to litigate subject matter at F2 that was not part of the judicial determination at F1 but which could and should have been part of the subject of litigation *and* adjudication. Two considerations arise:

(i) the F2 subject matter and its relationship, or degree of relevance, to the F1 subject matter;

(ii) the F1 subject matter, and whether it must have been rendered *res judicata.*

We will consider each in turn.

(i) The relationship of the F2 subject matter to the F1 subject matter

Wigram VC states the parties must exercise reasonable diligence by bringing forward every point which properly belonged to the subject of litigation and adjudication. If the subject matter subsequently raised properly belonged to the earlier subject of litigation and adjudication, it is no excuse that the omission to bring it forward is due to negligence, inadvertence or even accident: the *Henderson* rule will preclude it from being raised, unless special circumstances apply[36].

Even so, ascertaining whether something "properly belonged" to early litigation can be difficult. In *Greenhalgh v Mallard*[37] the court held that the test was whether it would be an abuse of process to raise the subject matter. But this observation is useful only to the extent it identifies abuse of process as the true juridical basis. It tells us little about the substantive content of the rule. This we must crystallise from the authorities.

In *LE Waldwin & Partners v West Sussex County Council*[38], proceedings had been brought in 1958 to establish title to a laneway. Fifteen years later, successors in title brought proceedings asserting a right to maintain a barrier across the laneway. The court held that, although the question of the barrier was not raised in the earlier proceedings, which were concerned to give a decision *in rem*, nonetheless the issue subsequently raised was clearly a matter relevant to the status of the right of way. It "properly belonged" to the earlier litigation. The proceedings were precluded by the *Henderson* rule.

Obviously, if a matter in subsequent proceedings did not exist at the time of the earlier proceedings, the *Henderson* rule can hardly insist that it could and should have been brought[39]. This follows from *Eshelby v Federated European Bank*[40] where the court held

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[36] In *Henderson*, the claim raised in England properly belonged to the suit in Newfoundland because "it was of the very substance of the case there": (1843) 3 Hare, 100 116 (Wigram VC)

[37] [1947] 2 All ER 255

[38] [1975] 3 All ER 604

[39] Although this might not stop a *res judicata* plea from precluding subsequent proceedings at F2 if the newly discovered claim or issue turns out to be identical to the decision at F1: see Chapters Two and Three.

that a writ cannot be amended to include a cause of action that came into existence *after* the writ was issued. However, if an amendment to include a claim would have been possible, so that the subject matter could have been brought to the attention of the earlier court, arguably the *Henderson* rule could apply.

Compare this with the decision in *Re Koenigsberg; Public Trustee v Koenigsberg*[41] where subject matter at F1 was *not* raised and yet an attempt to raise it subsequently did *not* amount to an abuse of process. The case involved annuitants under a will who were respondents to an originating summons brought by trustees in respect of a matter, *x*, but who had not, in the proceedings on that originating summons, challenged the correctness of the law in respect of another matter, *y*. Matter *x* (whether the trustee's income fee fell on the annuities or on the rest of the estate) had nothing to do with matter *y* (whether the annuities were subject to reduction under section 25, *Finance Act 1941*), but it had been assumed that the law in respect of *y* applied to the annuitants in their first case because an existing decision of the Court of Appeal said that it did. But a subsequent House of Lords decision had meant that *y* was ripe for challenge, so the annuitants brought *new* proceedings. Was *y* a point which could and should have been raised by the annuitants at the time of the proceedings in respect of *x*? Does the *Henderson* rule impose a duty on the parties to raise *all* points which *might* appear to emerge upon an examination of the application made and the evidence filed in support of it?

Evershed LJ held[42]:

> where multiplicity would otherwise be likely, there is a duty to raise points so as to prevent it; and I can see also, ... that if the summons raised in effect questions relevant to and in advance of an immediate distribution, then the parties to the summons should plainly raise all points which might affect the actual form of distribution and which it would ... be too late to raise after the distribution has been effected. *But that is not the case here.*

Likewise, Somervell LJ did not consider that they were under any duty to raise the point[43]:

> [W]hen a trustee or anyone takes out an originating summons, he can make quite clear to those whom he has to bring before the court what point or points he wants decided, and it is for the defendant to raise and take points and file evidence which deals with the points which in the originating summons are put before the court for decision. I do not think they [the defendants in such a situation] are called on to raise or deal with other and quite different points.

Thus, just as matter *y* was not *res judicata* by implication (for it was impossible to say that *y* was necessary and fundamental to the order in the first proceedings on matter *x*), so too matter *y* did not fall within the dominion of *Henderson* abuse of process. It was not a matter that could and should have been raised. It was not a matter that properly belonged.

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[40] [1932] 1 KB 254

[41] [1949] 1 Ch 348

[42] *ibid*, 366

[43] *ibid*, 363

We see a similar conclusion in *Public Trustee v Kenwood*[44], a case in which a defendant sought to resist an application for summary judgment on the ground that he had a valid counterclaim for a share in proceeds of an estate. Buckley LJ reasoned that the question[45]:

> in the present case must be whether it is right to regard the claim which the defendant now wants to raise as something which properly belonged to the subject-matter of the account and inquiry directed by the order of March 21, 1962. If it were a matter which can be said properly to have belonged ... then the fact that the defendant, whether it be by inadvertence or accident or as the result of his being unwisely advised or lacking advice, did not raise the point on any of those grounds would be no justification for allowing him to raise it now. ... as he did not then put forward this claim he is now barred from doing so upon the ground that the matter is in fact *res judicata*.

Note that this last point suggests that the litigation *at F1* must be *res judicata* even though the subject matter at F2 will not be thus rendered. Whether this means the F1 proceedings *must* culminate in a *res judicata* is a question we consider below.

We must also consider *Kok Hoong v Leong Cheong Kweng Mines Ltd*[46]. In that case, the appellant brought an action against the respondent for rent under an agreement and obtained judgment by default. Three years later, in an action between the same parties, the appellant claimed further rent under the same agreement. The respondent raised a number of defences, *inter alia*: that the appellant had not complied with the provisions of a moneylenders ordinance which (it was alleged) applied, and so the further rent claimed was not recoverable. To this the appellant alleged the respondents were precluded by the earlier default judgment from raising these defences. However, the Privy Council declined to apply the *Henderson* rule because the previous proceedings had only culminated in a default judgment, and thus lacked the semblance of finality associated with judgments from contested proceedings. Although default judgments were acknowledged as capable of giving rise to estoppels[47], this did not "include" the *Henderson* rule[48]:

> It is true that, in certain contexts, estoppel *per rem judicatam* has been given a very wide operation. The rule laid down by Wigram VC in *Henderson*....was spoken of as "settled law"...in *Hoystead* .... [however] Their Lordships are satisfied that, where a judgment by default comes in question, it would be wrong to apply the full rigour of any principle as widely formulated as that of *Henderson v Henderson*. It may well be doubted whether [Wigram VC] had in mind at all the particular circumstances of a default judgment and whether such a judgment would not naturally fall into his reservation of "special cases" ... [but either way] a much more restricted operation must be given to any estoppel arising from a default judgment.

Three questions arise from this decision. Firstly, can it be inferred that the *Henderson* rule *always* requires a properly contested adjudication of the subject of litigation to which the subject matter of the subsequent proceedings relates? In other words, if (as here) a default judgment is seen as akin to a consent judgment or a settlement, does this suggest

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[44] [1967] 1 WLR 1062

[45] *ibid*, 1067

[46] [1964] AC 993

[47] Although the preclusive effect of *foreign* default judgments has been questioned: Chapters Two and Three.

[48] [1964] AC 993, 1011 (Viscount Radcliffe)

the *Henderson* rule requires the earlier proceedings to culminate in a *res judicata*? Secondly, can we conclude, in the way that it was reasonable to conclude of default judgments, that it would be wrong to plead the *Henderson* rule upon earlier *foreign* proceedings? If *Henderson* abuse of process does not apply to default judgments, is it also unsafe for an English court to shut out subject matter that could and should have been litigated abroad on the evidence of *foreign* proceedings? What is the abuse of the *English* court's process here? Finally, to what is the *Henderson* rule referring when it refers to "a *point* which had not been raised properly belonged to the earlier subject of litigation"? This decision seems to suggest that "points" include defences as well as issues and causes of action, but is that necessarily so? These questions will re-emerge in the discussion below.

Meanwhile, the *Henderson* rule was again considered by the Privy Council in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd*[49], a case involving subsequent litigation of subject matter which had been previously assumed as fundamental before the earlier court. There a bank had recovered judgment upon a counter-claim in proceedings brought by a mortgagor. In the subsequent proceedings against the bank and a subsequent purchaser the mortgagor challenged the validity of the underlying transaction.

On one reading, the mortgagor might have been met by a plea of cause of action estoppel since he was, in substance, contradicting an earlier decision, albeit based on a necessary and fundamental assumption. However, the subsequent proceedings were dismissed as an abuse of process[50], which again illustrates the fine line between *res judicata* and the *Henderson* rule[51]. However, whilst correct, the decision is controversial because Lord Kilbrandon changed the emphasis of the *Henderson* rule[52]:

> it becomes an abuse of process to raise in subsequent proceedings matters which could *and therefore should* have been litigated in earlier proceedings. ... The shutting out of a "subject of litigation" - a power which no court should exercise but after a scrupulous examination of all the circumstances - is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless "special circumstances" are reserved in case justice should be found to require the non-application of the rule. [emphasis added]

However, we must limit this; for the proposition that there is an abuse of process because subject matter could *and therefore should* have been litigated is too broad. It sits uncomfortably with default judgment cases where defendants were entitled to raise defences even though they could have been litigated in earlier proceedings[53]. Moreover,

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[49] [1975] AC 581

[50] Indeed, it was held a defence of *res judicata* was not strictly available "since there has not been ... any formal repudiation of the pleas raised by the appellants .... [accordingly, the subject matter was] clearly a matter necessary and proper to be litigated at the same time with all the other issues": [1975] AC 581, 589-590 (Lord Kilbrandon)

[51] *Hoystead v Commissioner of Taxation* [1926] AC 155 was extensively cited in argument and relied upon in the judgment: see fn33.

[52] [1975] AC 581, 590-591

[53] *Howlett v Tarte* (1861) 10 CBNS 813; *New Brunswick Rail Co Ltd v British and French Trust Corporation*

Lord Kilbrandon relied on the first instance decision in *Re Koenigsberg; Public Trustee v Koenigsberg*[54] to support his proposition, but the Court of Appeal in that case had rejected the view at first instance that it was the duty of the parties "to raise all points which appear to emerge upon an examination of the application made and the evidence filed in support"[55]. Hence, it is not surprising that the retreat from Lord Kilbrandon's formulation was almost immediate[56].

Indeed, in *Brisbane City Council v Attorney-General for Queensland*[57], Lord Wilberforce held that the abuse of process doctrine[58]:

> ought *only* to be applied when the facts are such as to amount to an abuse: otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation.

In that case the city council had proposed to sell the local showground to developers. After earlier proceedings failed to show the council had acted *ultra vires,* a relator action was brought to enforce a charitable trust protecting the land. The council argued the charitable trust could *and therefore should* have been raised in the earlier proceedings, thus relying on Lord Kilbrandon's formulation in *Yat Tung*. But the plea failed. It would have been out of place, and thus hardly an abuse of process[59]:

> to assert the existence of a trust (even assuming that it was known to exist) in the [earlier] proceedings ... And the same is true of the earlier action in the Supreme Court. This, though a relator action, like the present, was in effect a ratepayers' action brought against the authority to restrain an alleged excess of power. The present is an action instigated by two members of the public asserting a right belonging to the public at large. It must be doubtful whether in these circumstances the necessary identity of parties between the two proceedings exists, but in any event it cannot be claimed that to bring the second action after the first has failed involves any abuse of process.

We will consider the identity of parties question below. But what *Brisbane City Council* makes clear is the essential mischief of the abuse of process plea. It is not simply that subject matter *should* be raised if it *could* have been raised. Rather, the raising of the subject matter *in the later proceedings* must itself amount to an abuse of process. This has been considered in the most recent case of *Bradford and Bingley Building Society v Seddon*[60], where it was held that the onus is on the person alleging the abuse of process to establish what it was that made *the further litigation* an abuse.

Ltd [1939] AC 1; *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993

54 [1948] Ch 727; on appeal [1949] Ch 348

55 [1949] Ch 348, 366 (Evershed LJ)

56 *Brisbane City Council v Attorney-General* [1979] AC 411; *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, 601-602 (Gibbs CJ, Mason and Aickin JJ): "in [*Yat Tung*] the principle in *Henderson v Henderson* was taken too far ... [since Lord Kilbrandon's] statement is not supported by authority"

57 [1979] AC 411

58 *ibid*, 425

59 *ibid*

60 The Times, 30 March 1999

But in reaching this point, we return to where we began; for this was the same conclusion observed in *Greenhalgh v Mallard*[61]. To break the circle, it will be useful now to consider the *types* of subject matter subsequently raised at F2 which are contemplated by the rule.

The orthodox view[62] is that the rule is implicated whenever it is shown that the party against whom the decision was pronounced omitted to raise by pleading, evidence, argument or otherwise *some question, or issue, or point* which could have been raised in that party's favour by way of defence or support to his case, without detriment to his position or interests. But does this mean that the rule precludes subsequent proceedings upon causes of action that could have been joined in earlier proceedings to which they "properly belong"? And what of issues or defences that could have been raised?

As to causes of action, the starting point - as mentioned in Chapter Two, Part Three - is the assumption that a plaintiff with separate causes of action is under no duty to join them all in one action[63]. Nonetheless, recent English authorities have caused confusion: some decisions respect the autonomy of a cause of action; others require that all causes of action related to a (more broadly defined) subject of litigation (or factual situation) should be brought together.

Lawlor v Gray[64] illustrates the first group of decisions. There, counsel for the plaintiff insisted the *Henderson* rule only extended to unadjudicated *issues*, and did not apply to causes of action[65]. Counsel for the defendant argued the rule precluded a party from bringing a cause of action that properly belonged to the subject of earlier litigation[66]. Without pronouncing on the limits of the *Henderson* rule, Peter Gibson J stated

> it should always be borne in mind that what is sought by the party claiming the estoppel [sic] is the shutting out of a matter *not previously pronounced on expressly* in the earlier litigation from the determination of the court. ... I cannot see how it could be said to be an abuse of process *not* to have raised the claim for damages for breach of contract in the earlier action. ... I do not see that it is an abuse of process to bring separate proceedings founded on a distinct cause of action in this case .... [emphasis added]

He reached this view by construing "subject of litigation" more narrowly than counsel for the defendant[67]:

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[61] [1947] 2 All ER 255; fn37.

[62] SBTH, p93

[63] *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, 27-28

[64] [1984] 3 All ER 345. In that case, the plaintiff had recovered a judgment for a contractual debt, and then brought subsequent proceedings for damages for breach of the contract. On the *Henderson* point it was held that the subject of the litigation arising under the writ was a claim for damages for breach of contract and that had never been the subject of litigation in any of the previous actions, therefore the *Henderson* rule could not apply. It was also held that there were two separate causes of action, so cause of action estoppel did not apply.

[65] Cf. *Carl Zeiss (No 2)* [1967] 1 AC 857, 916 (Lord Reid); see fn103.

[66] Cf. *Barrow v Bankside Agency Ltd* [1996] 1 WLR 257, where a similar argument (to that of defendant in *Lawlor*) gave way for case management reasons in the context of a group action.

[67] [1984] 3 All ER 345, 352 (Peter Gibson J)

> If one looks for the subject of litigation in the present action, it is the claim for damages for breach of contract; it is readily apparent that this was never the subject of litigation in any of the previous actions. It would not have helped [the plaintiff] to make it part of his case in the previous actions, nor would it have benefited [the defendant] had it been joined with the subject matter of that litigation. ... Of course there may be cases where the court will be intolerant of a plaintiff bringing separate actions in respect of distinct matters which could conveniently have been raised in a single action, but that is not the present case, in view of the fact that the Revenue's claim for interest was made only after the disposal of the Queen's Bench actions. In these circumstances I have no hesitation in rejecting the defence based on estoppel [sic: he means the *Henderson* rule]

Some might regret that the court did not clearly extend the *Henderson* rule to causes of action that "properly belonged" to earlier litigation, especially since the court can always avoid unfairness by applying the special circumstances exception[68]. However, we need only recall that "cause of action" for the purposes of the doctrine of *res judicata* was *not* defined in Chapter Two, Part Three by reference to a single factual situation occasioned by the act of a defendant, but by reference to the rights infringed in the plaintiff. It is submitted a similar meaning should apply to "cause of action" within the doctrine of abuse of process. If "subject of litigation and adjudication" (as used in the *Henderson* rule) were to encompass an entire factual situation, certainly causes of action *as well as* issues would be precluded. But if the *Henderson* rule were to respect the autonomy of causes of action, then its scope (and thus the width of the requirement "subject of litigation and adjudication") would be narrowed to preclude only subject matter relevant to a cause of action that could and should have been litigated.

However, a different view emerges in *Talbot v Berkshire County Council*[69]. In that case the plaintiff in the subsequent proceedings (P) *was* prevented by the *Henderson* rule from litigating a separate and distinct cause of action because it could and should have been litigated in earlier proceedings brought *against* P by B, a passenger who had sustained injuries when the car driven by P struck an expanse of water and hit a tree.

In B's proceedings, the highway authority (D) was joined as a third party so that *P's insurers* could seek contribution from them. But the claim for contribution omitted to include a claim *by P against D* in respect of P's personal injuries. Judgment was eventually given in favour of B and liability was apportioned two-thirds P, one-third D. Later, P brought proceedings against D on P's cause of action, to which D pleaded, *inter alia*, cause of action estoppel[70].

Mann LJ upheld the estoppel "in the wide sense identified by Wigram VC"[71]. But Stuart-Smith LJ appreciated the *non sequitur* involved in pleading *res judicata*[72]:

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[68] And arguably here there *were* special circumstances because the plaintiff did not know the existence of the second cause of action at the time of the earlier proceedings since the Revenue had not communicated it.

[69] [1994] QB 290

[70] D presumably avoided issue estoppel, since this would have entitled P to at least one third of his damages sought.

[71] *ibid*, 301

[72] *ibid*, 296

> [This case] is not a true case of *res judicata* but rather is founded upon the principle of public policy in preventing multiplicity of actions, it being in the public interest that there should be an end to litigation; the court will stay or strike out the subsequent action as an abuse of process: see per Lord Wilberforce in *Brisbane City Council v A-G for Queensland* ...

In other words, his Lordship perceived that cause of action preclusion[73] was inapplicable because P was neither contradicting nor reasserting a cause of action previously determined. More to the point, his Lordship was clear as to the advantages of the *Henderson* rule[74]:

> It is a salutary rule. It avoids unnecessary proceedings involving expense to the other parties and waste of court time which could be available to others; it prevents stale claims being brought long after the event, which is the bane of this type of litigation; it enables the defendant to know the extent of his potential liability in respect of any one event; this is important for insurance companies who have to make provision for claims and it may also affect their conduct of negotiations, their defence and any question of appeal.

However, with respect, there seemed to be little by way of *argument* to show that these proceedings *were* an abuse in the way catalogued. Rather, it seems the rationale guiding the decision was simply that if the subject matter *could* have been raised at F1 *then it should have been raised.* Indeed, when Stuart-Smith LJ purported to apply the rule, he simply asserted[75]:

> [t]here can be no doubt that the plaintiff's personal injury claim could have been brought at the time of [B's] action .... [therefore] the claim should be struck out unless there are special circumstances which make it inequitable to do so. [and there were no special circumstances]

In this respect, the reasoning is similar to Lord Kilbrandon's in *Yat Tung* from which the courts have retreated. It is no surprise that Stuart-Smith LJ approved of that case[76]:

> [i]n *Yat Tung Investment Co Ltd* ... the cause of action in the second action was different from the plaintiff's claim in the first action; but it could have been raised by way of defence and counterclaim to the bank's counterclaim in the first action. It was accordingly not maintainable.

As a result, the proposition that can be derived from *Talbot* is, simply, that the *Henderson* rule *does* preclude a cause of action if it *could* have been dealt with on the first occasion but was not. And the underlying assumption is that there is an abuse of process *whenever* subject matter *could* have been raised. However, if this were mechanically applied there would be no consideration of whether the raising of the subject matter in the subsequent proceedings *actually* amounted to an abuse.

The importance of assessing whether the proceedings *are* an abuse was emphasised in *Barrow v Bankside Agency Ltd*[77], where a plaintiff sought to raise a fresh claim after a

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[73] Chapter Two

[74] *ibid*, 297

[75] *ibid*, 298

[76] *ibid*, 297

group action in which he had been involved had been resolved. The defendant did not argue that the plaintiff's new claim *would* have been decided in the course of the earlier group action - for the group action had involved 3000 claimants! - but the defendant did contend that the plaintiff's claim *could* at least have been raised[78]. The Master of the Rolls pointed out that the true basis of the *Henderson* rule was abuse of process[79] and then continued[80]:

> So it seems right to *begin* by asking whether the procedure adopted by Mr Barrow is an abuse of the process of the court. I do not think it is. Since his portfolio selection claim *would not have been decided before now anyway*, he is not causing there to be two trials when there would have been one. He is not exposing the defendant to an unnecessary series of trials. The defendant is not, in truth, any worse off as matters now stand than if Mr Barrow had made and pleaded this new claim at the outset. [emphasis added]

In a similar vein, Saville LJ stated[81]:

> the principle of *Henderson v Henderson* on which [counsel for the defendant] relies, is not, as I have already indicated, concerned with what should have been *raised* in earlier proceedings, but what should have been *dealt* with in those proceedings. [emphasis added]

But, whereas *Barrow*'s case reveals a more generous approach to the *Henderson* rule by suggesting that there is no abuse of process if the subject matter would not have been *decided* even if it had been raised[82], the suggestion in *Talbot* is that the rule is to be more strictly enforced[83]. Moreover, *Talbot* assumes the *Henderson* rule need not be limited by

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[77] [1996] 1 WLR 257

[78] Cf. *Fennoscandia Ltd v Clarke* Court of Appeal, 18 January 1999 (unreported), where the plaintiff argued that the rule in *Henderson v Henderson* only applies where it is *definite* that the subject matter *would* have been *decided* had it been raised in the earlier action. However, the argument was rejected in that case: it was still an abuse of process in the English proceedings because, by failing to raise the subject matter in the earlier proceedings when it *could* have been raised, the plaintiff deprived the first court of the opportunity to decide it, even if it could not be said that the first court *would* definitely have decided it had it been raised; for the first court (a US Federal court) had a discretion as to what claims it would decide under the principle of pendent jurisdiction discussed in fn83.

[79] See fn26

[80] [1996] 1 WLR 257, 263 (Bingham MR)

[81] *ibid*, 268

[82] It is suggested there is no inconsistency with the decision in *Fennoscandia Ltd v Clarke* Court of Appeal, 18 January 1999 (unreported) as discussed in fn78: the discretion in the first court in that case did not entail the conclusion that the first court *definitely* could not, nor would not, decide the matter had it been raised. In *Barrow*, even if it had been raised it would not have been decided because of the case management procedures involved with the group action.

[83] Reference was made in *Fennoscandia Ltd v Clarke* Court of Appeal, 18 January 1999 (unreported) to a version of the *Henderson* rule which is applied in the American courts, and which is also strictly enforced: see *Maldonado v Flynn* Del Ch 417 A 2d 378 (1980), 383-384: "it is clear that if a plaintiff can present his State claims in a prior federal action by use of pendent jurisdiction and he chooses not to present them in the federal court [choosing only to present his federal claims in the federal court] the doctrine of *res judicata* will bar his later assertion of the same [State] claims in a State court ... The burden is placed upon the plaintiff because he is the only party who can assert or withhold, at will, his various theories of recovery in the District Court. Only he can place the District Court in a position to decide whether to exercise its discretionary pendent jurisdiction. The public policy against claim splitting, therefore, requires that a plaintiff plead all his theories of recovery in a federal court, thus forcing the court to accept or reject the pendent jurisdiction. If a plaintiff splits his claim and saves a theory of recovery for another forum he assumes the risk that he will not be able to present

the view that distinct and separate causes of action ought be brought separately even though they relate to the same factual situation. In Stuart-Smith LJ's view[84]:

> there is no warrant for so limiting it ... Such a limitation would substantially emasculate the rule. Moreover, there is a safeguard to prevent injustice in that the court will not apply the rule in its full rigour if there are special circumstances why it should not do so.

Thus his Lordship emphasises the importance of establishing *all potential liability* "in respect of any one event"[85]. This contrasts with *Brunsden v Humphrey*[86], which his Lordship thought would have been differently decided had the *Henderson* rule been cited in that case.

But this invites us to evaluate the decision in *Talbot* in terms of the authority *we* given *Brunsden v Humphrey*. The view adopted by this thesis does not support an expansive interpretation of the requirement "subject matter of litigation and adjudication" like that assumed in *Talbot.* Indeed, recall that in *Brunsden* the second cause of action *was* permitted even though there was only one factual subject matter of litigation. In other words, the fact that two or more causes of action *could* be litigated at F1 did not mean that they *should* be litigated together - a view which neatly coincides with the rejection of the proposition in *Yat Tung*. All of which is to say that the Court of Appeal in *Talbot* would appear to be running counter to many of the prevailing authorities.

We can also see this from *Public Trustee v Kenwood*[87] in which it was stated[88]:

> The fact that, when an action is brought by A against B, B might in the same proceedings have raised a counterclaim against A relating to some quite different cause of action, but does not do so, will not, I think estop B from pursuing that claim in subsequent litigation. That seems to me to appear clearly from *Caird v Moss*, where a claim for rectification of an agreement was said not to be barred as *res judicata* by litigation upon the agreement itself.

And in *Tanning Research Laboratories Inc v O'Brien*[89], the High Court of Australia has held[90]:

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it in the other forum because the first adjudication will be *res judicata* in all subsequent litigation".

Needless to say, this is a refinement of the *Henderson* rule appropriate to the dual Federal/State jurisdictions, and has also evolved out of the principle of pendent jurisdiction established by the US Supreme Court in *United Mineworkers of America v Gibbs* 86 S Ct 1130 (1966), 1138 (Brennan J): "The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a Plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole. That power need not be exercised in every case in which it is found to exist. It has consistently been recognised that pendent jurisdiction is a doctrine of discretion, not of Plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants ..."

[84] [1994] QB 290, 297-298

[85] *ibid*, 297

[86] (1884) 14 QBD 141

[87] [1967] 1 WLR 1062

[88] *ibid*, 1067 (Buckley LJ)

[89] (1990) 169 CLR 332

> A plaintiff who has an unadjudicated cause of action which can be enforced only in fresh proceedings ... cannot be precluded from taking fresh proceedings merely because he could have and, if you will, should have counterclaimed on that cause of action in a forum chosen by the opposite party in proceedings in which the opposite party sued him. We do not read the majority judgment in *Port of Melbourne Authority v Anshun Pty Ltd* as holding the contrary, except in a case where the relief claimed in the second proceeding is inconsistent with the judgment in the first ...

When we turn to the question whether defences fall under the *Henderson* rule[91], the decision in *Kok Hoong v Leong Cheong Kweng Mines Ltd*[92] gives some support to the notion that a defence that could and should have been made at F1 may be precluded by the *Henderson* rule if it is made the basis of proceedings at F2 and the F1 judgment is sufficiently final. However, the decision of the High Court of Australia in *Port of Melbourne Authority v Anshun Pty Ltd*[93] provides a persuasive explanation of the application of the *Henderson* rule to defences.

In that case the appellant port authority had hired a crane to the respondent on terms that they be indemnified against any claim arising from its use. A workman, who was injured by the negligent operation of the crane, sued both the appellant and the respondent; and - because the appellant did not rely on its contractual indemnity agreement - liability was apportioned 90% to the appellant and 10% to the respondent. Subsequently the appellant brought proceedings on the indemnity, and the question arose whether the defence by way of indemnity "properly belonged" to the earlier action as would preclude the appellant from relying on that defence now.

The majority concluded[94]:

> In this situation we would prefer to say that there will be no estoppel [sic] unless it appears that the matter relied upon as a defence in the second action was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it. Generally speaking, it would be unreasonable not to plead a defence if, having regard to the nature of the plaintiff's claim, and its subject matter it would be expected that the defendant would raise the defence and thereby enable the relevant issues to be determined in the one proceeding. In this respect, we need to recall that there are a variety of circumstances, some referred to in the earlier cases, why a party may justifiably refrain from litigating an issue in one proceeding yet wish to litigate the issue in other proceedings, eg. expense, importance of the particular issue, motives extraneous to the actual litigation, to mention but a few. .... The likelihood that the omission to plead a defence will contribute to the existence of conflicting judgments is obviously [another] important factor to be taken into account in deciding whether the omission to plead can found an estoppel against the assertion of the same matter as a foundation for a cause of action in a second proceeding. By "conflicting" judgments we include judgments which are contradictory, though they may not be pronounced on the same cause of action. It is enough that they appear to declare rights which are inconsistent in respect of the same transaction.

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[90] *ibid*

[91] Including defence applications; that is, subsequent claims that could have been raised as defences in the earlier proceedings.

[92] [1964] AC 993

[93] (1981) 147 CLR 589

[94] *ibid*, 603-604 (Gibbs CJ, Mason and Aickin JJ)

Thus, because the judgment that the appellant sought to obtain was one which would conflict with the earlier judgment, they were precluded from relying on their contractual indemnity.

The foregoing discussion also supports the applicability of the *Henderson* rule, not only to causes of action and defences, but where an *issue* was material to earlier proceedings and could and should have been raised but was not[95]. Indeed, Wigram VC himself refers to "points ... properly belonging to the subject of litigation and adjudication"[96]; and in *Greenhalgh v Mallard*[97], Somervell LJ suggested the *Henderson* rule applied to[98]:

> issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them.

In *Arnold v National Westminster Bank plc*[99] Lord Keith of Kinkel somewhat confusingly suggested[100]:

> Issue estoppel, too, has been extended to cover not only the case where a particular point has been raised and specifically determined in the earlier proceedings, but also that where in the subsequent proceedings it is sought to raise a point which might have been put but was not raised in the earlier.

However, there is a contrary view; for whilst the *Henderson* rule[101]:

> can apply where the parties or the causes of action are different ... [i]t has never been suggested ... that it extends an issue estoppel [sic] to decisions on questions of fact or law which were not fundamental to the earlier decision.

This would be uncontroversial if it removed from the ambit of the rule issues which would have, *ex hypothesi*, failed the "on the merits" test had they been raised; for such issues would not be precluded by issue estoppel on that hypothesis anyway, not being necessary and fundamental. But the view may give credence to excluding issues from the *Henderson* rule altogether. Such a view finds support in *Carl Zeiss (No 2)*[102].

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[95] See *Port of Melbourne Authority v Anshun* (1981) 147 CLR 589, 613-614 (Brennan J): "there have been observations of high authority which draw upon [*Henderson v Henderson*] as authority for the existence of a power to shut out a party from raising in subsequent proceedings an *issue* which was not actually decided in earlier proceedings but which the party could, and should, have raised in those proceedings".

[96] (1843) 3 Hare 100, 115

[97] [1947] 2 All ER 255

[98] *ibid*, 257

[99] [1991] 2 AC 93

[100] *ibid*, 106

[101] Handley, Justice K. R., "*Anshun* Today" (1997) 71 ALJ 934, 934; cf. *Divine-Bortley v Brent London Borough Council* The Times, 20 May 1998

[102] [1967] 1 AC 853

Indeed, in that case, their Lordships were reluctant to preclude issues that were not, but could and should have been, litigated in previous proceedings. Lord Reid recognised a difference between preclusion by issue estoppel where an issue was actually decided, and preclusion by the *Henderson* rule where an issue was *not* decided because the earlier judgment went by default or was founded on an assumption. But his Lordship was concerned[103]:

> that some confusion has been introduced by applying to issue estoppel without modification rules which have been evolved to deal with cause of action estoppel, such as the oft-quoted passage from the judgment of Wigram VC in *Henderson v Henderson.*

Likewise, Lord Wilberforce suggested that issue preclusion depends upon an actual decision, irrespective of whether or not it was raised. Accordingly[104]:

> it would be right for a court in this country, when faced with a claim of issue estoppel arising out of foreign proceedings, *to receive the claim with caution in circumstances where the party against whom the estoppel is raised might not have had occasion to raise the particular issue.* [emphasis added]

Lord Upjohn was also concerned not to extend issue preclusion too far[105]:

> Recently in *Thoday v Thoday* and in *Fidelitas Shipping Co Ltd v V O Exportchleb* the Court of Appeal applied to issue estoppel the full breadth of the observations of Wigram VC in *Henderson v Henderson* ... I should be reluctant to support that view [because] there may be many reasons why a litigant in the earlier litigation has not pressed or may even for good reason have abandoned a particular issue. It may be most unjust to hold him to be precluded from raising that issue in subsequent litigation.

Needless to say, all of these observations appear to contradict the general understanding, discussed above, that the *Henderson* rule *can* preclude the litigation of issues that could and should have been raised before. Perhaps their Lordships' observations are meant to limit the *Henderson* rule from applying where the earlier proceedings were foreign? *Carl Zeiss (No 2)* was, after all, a foreign judgments case.

But even limiting their Lordships' comments to the foreign context is tenuous, for in *Desert Sun Loan Corp v Hill*[106], Evans LJ suggests that[107]:

> the principle of issue estoppel [sic] extends to issues which were not but which might have been raised in the earlier proceedings

He means, of course, extending the *Henderson* rule to *foreign* issue judgments, which is a question that will be considered shortly. Nonetheless, it stands in contrast to the views that would doubt even the general applicability of the *Henderson* rule to issues.

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[103] *ibid*, 916; cf. *Lawlor v Gray* [1984] 3 All ER 345

[104] *ibid*, 967

[105] *ibid*, 947

[106] [1996] 2 All ER 847

[107] *ibid*, 854

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We must now consider whether it is a requirement for the operation of the *Henderson* rule that the earlier proceedings culminate in a final and conclusive *res judicata.*

(ii) The subject matter at F1, and whether it must have been rendered res judicata

As ever, the starting point is Wigram VC, who states in *Henderson v Henderson*[108] that a given matter must have become the subject of litigation in, and of adjudication by, a court of competent jurisdiction; adding (elsewhere) that the previous court is required to form an opinion and pronounce a judgment. Of course, this is not to say that the *Henderson* plea assumes that the subject matter raised in the *subsequent* proceedings must have been rendered *res judicata*, for that would defeat the purpose of the rule and transform it into simply a *res judicata* plea. Nonetheless, by misunderstanding the *Henderson* rule, counsel in *Charm Maritime v Kyriakou*[109]:

> made much play with the suggested illogicality of the learned Judge's holding that there had to have been a final decision "on the merits" to give rise to an estoppel [sic] of a *Henderson v Henderson* type. How could there have been a final decision on the merits, he asked, when Charm had not chosen ever at any time to raise the two new contentions?

However, the implication is clear that whilst the subject matter contemplated by the *Henderson* rule will not have been rendered final and conclusive and on the merits, the subject matter to which it properly belonged must be rendered final and conclusive and on the merits. In other words, unless it can be shown that there has been a final and conclusive decision on the merits *in respect of the subject of litigation at F1* then there can not be an abuse of process plea *in respect of the non-litigated subject matter at F2.*

It was this that seems to have deprived the *Henderson* rule of operation in *Re a debtor (No. 472 of 1950), ex p Swirsky*[110]

> It is true that he failed in his object, but he failed ... not because he was remiss in bringing the matter forward ... [the] matter was raised, in my view, and quite clearly raised, but it was never *adjudicated.* ... [thus he] failed to pursue the other part of his claim to a successful conclusion [emphasis added]

Again, the suggestion can be found in *Public Trustee v Kenwood*[111], where the defendant's counter-claim was correctly precluded by the *Henderson* rule, the preclusion only resulting because the subject matter to which the counter-claim properly belonged had itself been rendered *res judicata* by the F1 adjudication.

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[108] (1843) 3 Hare 100, 115

[109] [1987] 1 Lloyd's Rep 433, 441

[110] [1958] 1 WLR 283, 291-292 (Jenkins LJ)

[111] [1967] 1 WLR 1062

And, returning to *Charm Maritime v Kyriakou*[112], Slade LJ appears to confirm the view that a prior *res judicata* is necessary for the *Henderson* rule - obviously not a judgment upon the subject matter of the plea, but certainly as to the subject of litigation to which it is said properly to belong[113]:

> in every one of those cases [referred to in which the *Henderson v Henderson* principle has been applied] the successful defendant was in a position to point to a judgment which ... was final in nature .... in all these cases there had been an earlier final decision upon which the application of the principle could be based.

However, this assumption that the F1 decision must be a *res judicata* has been recently challenged by the decision in *Johnson v Gore Wood & Co*[114].

In that case, a company controlled by Johnson brought proceedings against Gore Wood & Co, but those proceedings settled before being rendered *res judicata.* Later, Johnson commenced fresh proceedings on his own behalf against Gore Wood & Co, raising claims similar to those the subject of litigation in the first proceedings. Gore Wood & Co pleaded that these second proceedings were an abuse of process, but Johnson argued that a *Henderson* plea was only operative if the earlier proceedings had culminated in a *res judicata* and not a settlement[115].

The court rejected Johnson's argument. The *Henderson* plea in respect of the earlier proceedings would be upheld even though those proceedings had only resulted in a settlement; for the *Henderson* rule existed to secure finality in litigation regardless of whether that finality was achieved by adjudication or by compromise between the parties. Furthermore, the fact that settlement had been reached at a late stage in the proceedings (six weeks into the trial) meant that there had been ample opportunity for Johnson to raise his claim.

However, the decision stretches both the rule as stated by Wigram VC and the assumptions upon which have rested the authorities that have applied that rule; not to mention that only nine months before the Court of Appeal had reached the opposite conclusion in *Dattani v Trio Supermarkets Ltd*[116], also a case involving the preclusive effect of a settlement *vis-à-vis* the *Henderson* rule. The decision in *Johnson* also risks frustrating the drafting of settlement agreements; for it will now be necessary to consider not just the claims actually made in proceedings, but also those which might have been made but which, for reasons related to costs or out of a desire to narrow the issues in dispute between the parties, were not. Finally, the reasoning leads to the conclusion that although Johnson was not *himself* a party to the settlement agreement, he was,

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112 [1987] 1 Lloyd's Rep 433, 441

113 *ibid*, 442

114 Court of Appeal, 12 November 1998 (unreported)

115 This same could not have been argued of a *res judicata* plea, which *can* be based on a settlement agreement: *Kinch v Walcott* [1929] AC 482; *Staffordshire County Council v Barber* [1996] ICR 379

116 [1998] IRLR 240

nonetheless, effectively bound by it in respect of his separate claims, which in turn raises interesting issues relating to privity of contract.

Thus, since it is (or should be) "axiomatic that the court will only strike out a claim as an abuse after most careful consideration"[117] - and bearing in mind, too, that the need for caution pervades this area of the law, especially so where foreign proceedings are in issue - it is suggested that *Johnson* will (or ought only to) have limited application in future. Accordingly, a safer conclusion is to insist that the subject of litigation of the F1 proceedings must be rendered *res judicata* as a pre-condition for the operation of the *Henderson* rule at F2.

The ramifications of this in the case of foreign judgments will be considered below; but it suffices to state for the moment that any application of the *Henderson* rule in subsequent proceedings in England relying upon earlier proceedings in a foreign court will require a foreign *res judicata* recognised as such according to the common law rules of recognition. In this way, too, the English court will at least have evidence before it of what it was that *was* undeniably decided abroad, and this will then provide the basis for the court's assessment whether the subject matter *now* raised could and should have been determined within the scope of *that* foreign judgment.

(b) The jurisdictional competence of the F1 court

By contrast to the requirement as to subject matter, the jurisdictional competence requirement that conditions the *Henderson* rule is without complexity. Wigram VC simply speaks of a court of competent jurisdiction when describing the F1 court before which a given matter becomes the subject of litigation and adjudication. Even in the complicated "settlement" cases discussed in the preceding section, there still must be an F1 court of jurisdictional competence, if only to give judicial imprimatur to the settlement. Thus, in light of our discussion in Chapter Two, Part Two of the jurisdictional requirements that condition the recognition of foreign judgments for preclusive purposes at common law, it is not necessary to re-consider this requirement.

However, one further thought is worth mentioning. In *Carl Zeiss (No 2)*[118] the majority cautioned that a party should not be required to bring forward their whole case before a foreign court if that court were an inappropriate place for practical reasons, including adducing evidence. One can hear sounds that chime with the principles of *forum non conveniens*[119]. In turn, these echo the argument raised earlier[120] that *forum non conveniens* reasoning may well give greater meaning to the preclusive effect of a foreign judgment in subsequent proceedings in England. Such principles, it is suggested, would provide a

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[117] *Manson v Vooght* [1998] TLR 721

[118] [1967] 1 AC 853

[119] *Spiliada v Cansulex* [1987] AC 640

[120] Chapter Two, Part Two; cf. Briggs, A. "Which foreign judgments should we recognise today?" (1987) 36 ICLQ 240, in respect of *forum non conveniens* and the rules for recognising foreign judgments at common law.

particularly useful framework for the application of the *Henderson* rule where foreign proceedings have occurred.

Indeed, could not the application of the *Henderson* rule to English proceedings turn on whether the foreign proceedings *were* the most appropriate for the resolution of the controversy now being raised in England? For if the foreign proceedings were *forum non conveniens*, why would it be an abuse to raise the subject matter in England? It could hardly be said of such subject matter that *it* "properly belonged" if the subject of litigation was adjudicated in an inappropriate forum? Moreover, such an approach would reinforce - as a condition of the abuse of process rule - the relevance of the F2 subject matter to that litigated at F1, as well as take account of what the foreign court might think of subsequent proceedings in England. On this analysis, therefore, subsequent litigation would *only* be an abuse of the English proceedings if the subject matter properly belonged to the "subject of litigation and adjudication" in the foreign proceedings, *provided* those proceedings had been pursued in the natural forum for the dispute. And, conversely, there would be no abuse of English proceedings, although there had been a failure to raise subject matter abroad, if the English court takes the view that it is the natural forum for the litigation and adjudication of that subject matter. Either way, *forum non conveniens* principles would guide the court in the exercise of the special caution which must be shown when recognising the preclusive effect of foreign judgments.

Some support for augmenting the abuse of process plea in this way can be found in the judgment of Sir David Cairns in *Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd*[121]

> [I]t is for him who contends that the retrial of the issue is an abuse of process to show some special reason why it is so. Since the cases in which the retrial of an issue (in the absence of an estoppel) has been disallowed as an abuse of process are so few in number, it would be dangerous to attempt to define fully what are the circumstances which should lead to a finding of abuse of process. *Features tending that way clearly include the fact that the first trial was before the most appropriate tribunal or between the most appropriate parties for determination of the issue*, or that the purpose of the attempt to have it retried is not the genuine purpose of obtaining the relief sought in the second action, but some collateral purpose. [emphasis added]

More generally, however, we can see that natural forum reasoning - like a golden thread - is weaving a tapestry in the conflict of laws out of various and disparate patches. Unfortunately, the handiwork that must be done to reveal the conceptual significance of the natural forum is beyond the scope of this work - in fact, it is a thesis in itself. But it is worth noticing in the following cases how the natural forum is cardinal to the rules concerning the taking of jurisdiction, the recognition of foreign judgments, and the granting of anti-suit injunctions. It is these which hint at the role which the natural forum might also play when it comes to preclusion by abuse of process.

The leading authority, of course, is *Spiliada v Cansulex*[122], the decision which introduced the principle of *forum non conveniens* to English law in the context of applications for a

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[121] [1982] 2 Lloyd's Rep 132, 138 (Sir David Cairns)

[122] [1987] AC 640

stay of proceedings and in cases for serving out of the jurisdiction under RSC Order 11. Although there are differences between the two settings, in both the concept of the natural forum is central; for the English court must identify that forum in which the case could most suitably be tried for the interests of all the parties and for the ends of justice in order to determine either the application for the stay or the question whether the case is a proper one for service out of the jurisdiction. Numerous cases since *Spiliada* have developed these rules, and a related jurisprudence is developing in the United States of America, Canada and Australia[123].

In the realm of foreign judgment recognition it has also been argued[124] that if an English court will not itself exercise jurisdiction unless it is the natural forum for a dispute, then likewise it should not recognise a judgment from a foreign court that was not the natural forum. A similar view animates the decision in *de Savoye v Morguard Investments Ltd*[125] where the Canadian Supreme Court qualified its rules for the recognition of inter-provincial judgments by importing natural forum/*forum non conveniens* considerations. It was held that recognition should be denied a foreign judgment if the court that gave the judgment (in that case, the court of another province) lacked a real and substantial connection to the cause of action. This, of itself, suggests a further question: would a preclusive plea operate at F2 if a defendant raised but lost (or failed to raise) a *forum non conveniens* argument at F1? That is, would a party be precluded from relying upon the reasoning in *Morguard* at the recognition stage because the issue of the natural forum is a key and common element to both the earlier and subsequent proceedings? If so, how is this reconciled with those authorities[126] which suggest that a party ought first apply for a stay of proceedings in the foreign forum before importuning the English court to deny recognition or enjoin such proceedings?

The circumstances in which an English court will grant an anti-suit injunction also involve some consideration of the naturalness of the forum; and a similar role for the natural forum can be found in the anti-suit injunction cases in Australia[127] and Canada[128]. Admittedly in *Société Nationale Industrielle Aerospatiale v Lee Kui Jak*[129], a decision of the Privy Council, Lord Goff of Chieveley stated the role of the natural forum so as not to detract from the more important assessment of whether the foreign proceedings sought to be enjoined were vexatious and oppressive. However, in *Airbus Industrie GIE v*

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123 Whilst there are national variations - eg. in Australia: *Voth v Manildra Flour Mills Pty Ltd* (1991) 171 CLR 538 - the natural forum is nonetheless central.

124 Briggs, A. "Which foreign judgments should we recognise today?" (1987) 36 ICLQ 240

125 [1990] SCR 1077

126 *Amchem Products Inc v Workers' Compensation Board* [1993] 1 SCR 897; cf. *Desert Sun Loan Corp v Hill* [1996] 2 All ER 847, 863 (Stuart Smith LJ): "It is clear that the defendant did his best to challenge the jurisdiction in Arizona, which was the appropriate court in which to contest it."

127 *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345

128 *Amchem Products Inc v Workers' Compensation Board* [1993] 1 SCR 897

129 [1987] AC 871

Patel[130], his Lordship indicated that the concept of the natural forum was still central. In that case, which reiterated the decision in *SNI Aerospatiale*, the House of Lords set aside an anti-suit injunction by stating that it was inconsistent with the principles of comity for an English court to interfere in the jurisdictional aspects of a claim before the courts of a foreign country unless there were a sufficient connection to England to warrant the interference. Such a connection would most likely exist if England were the natural forum for the dispute, and as the instant case was one in which litigation of issues arising out of an aviation accident that had nothing to do with England, it was not for the English courts to interfere.

However, the anti-suit injunction is of further utility to our argument; for there is a certain similarity between the principles of abuse of process and the principles which restrain a party from pursuing proceedings in a foreign court. According to the principles of abuse of process, the English court precludes the litigation of subject matter at F2 because it could/should have been brought in the proceedings at F1 - a forum which, on this analysis, will be the natural forum. According to the principles that govern anti-suit injunction cases, the English court will injunct vexatious and oppressive litigation of subject matter at F1 in circumstances where, almost invariably, the natural forum is England *and it could/should have been brought here*. Seen in this way, abuse of process and anti-suit injunctions might be two sides of the one coin.

In any case, as has been suggested - and as the above authorities make clear - the concept of the natural forum is key to a number of areas within the conflict of laws. With further investigation, the concept may prove useful to the principles that govern the preclusive effects of a foreign judgment in subsequent proceedings in England, and particularly insofar as the *Henderson* abuse of process rule is concerned.

(c) Parties and privies

In considering the requirement governing the *Henderson* rule as to parties and privies, it is useful to assume that it is the same as for the *res judicata* pleas of contradiction and reassertion[131]. This seems clear from such cases as *Brisbane City Council v Attorney-General for Queensland*[132] in which one reason for not upholding the *Henderson* plea was the doubt "whether in these circumstances the necessary identity of parties between the two proceedings exists"[133]. It was also the assumption that guided the decision in *C (a minor) v Hackney London Borough Council*[134].

In the latter case, the *Henderson* rule was not applied to preclude claims brought by C, a dependent child with Down's syndrome, who lived with her mother in a council house. In

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130 [1999] 1 AC 119

131 See Chapter Two, Part Four.

132 [1979] AC 411

133 *ibid*, 426 (Lord Wilberforce)

134 [1996] 1 WLR 789

an earlier action, the mother had sued the council for injuries arising out of the poor condition of the house, but C was not a party to the earlier proceedings. It was held on appeal that a similar action by C was not barred merely because her claim could have been litigated more conveniently at the time of her mother's claim. Simon Brown LJ equated the parties requirement for the *Henderson* rule by referring to the parties requirement for the doctrine *res judicata*[135]:

> If parties litigate a question in a court of competent jurisdiction, and a final decision be given thereon, such parties or those claiming through them cannot afterwards re-open the same question in another court. This restriction does not extend to other persons whose interest is almost identical with that of one of the parties to the first suit if they do not actually claim through such party.

His Lordship then dismissed the argument that a different requirement applied to the *Henderson* rule, enabling its application against strangers - in this case, C[136]:

> this is an impossible argument, one that stretches the bounds of the doctrine [of abuse of process] beyond breaking point.

However, the Court of Appeal in *Bradford and Bingley Building Society v Seddon*[137] suggested that the decision in *C (a minor) v Hackney London Borough Council*[138] did not properly distinguish the pleas of *res judicata* from the *Henderson* plea of abuse of process, suggesting that the latter is free of the strict limits of the *res judicata* doctrine: it operates in cases where there is no cause of action or issue estoppel, and hence is not subject to the same mechanical test. Thus, with abuse of process[139]:

> the task of the court [is] to draw the balance between the competing claims of one party to put his case before the court and of the other not to be unjustly hounded given the earlier history of the matter.

On this reasoning, maybe the Hackney London Borough Council might have been able to show that the subsequent proceedings *were* an abuse of the court's process - perhaps by arguing that C's mother ought reasonably to have known of C's claim. Indeed, this reasoning finds support from the decisions in: *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd*[140] (in which the *Henderson* rule also applied in proceedings involving an additional party); *Ashmore v British Coal Corporation*[141] (where the plaintiff bringing the subsequent proceedings was precluded although she were not a party to the earlier proceedings in which it was said she ought to have raised her claim); and *Asher v*

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[135] *ibid*, 794; citing *Spencer v Williams* (1871) LR 2 P&D 230

[136] *ibid*

[137] [1999] TLR 248

[138] [1996] 1 WLR 789

[139] [1999] TLR 248, 248

[140] [1975] AC 581

[141] [1990] 2 QB 338

Secretary of State for the Environment[142]. In all these cases the *Henderson* rule *was* capable of application although the parties to the proceedings were different from those in earlier proceedings.

Privies, too, can be subject to the rule in *Henderson v Henderson* if they raise subject matter which parties to whom they are privy could have raised in earlier proceedings. This is clear from *LE Waldwin & Partners v West Sussex County Council*[143], the case involving successors in title who were precluded by abuse of process from raising their claim concerning the barrier across the lane because such a matter could and should have been raised by their predecessors in title in the proceedings in 1958.

The recent decision in *Johnson v Gore Wood & Co*[144] also involved a successful plea against a party in subsequent proceedings who was merely privy. The court held that Johnson was a privy of the company in the first proceedings. He was the alter ego of that company and controlled its decisions. A similar conclusion to this, on similar facts, was involved in *MCC Proceedings Inc v Lehman Brothers International*[145], but it was also suggested there that the identity of the parties and privies does not have to correspond exactly for the *Henderson* rule to apply.

Thus, whilst it is helpful to assume that the rules as to parties and privies are the same as those discussed in Chapter Two, Part Four, uncertainty arises when it is sought to extrapolate these rules to the foreign context. If strict mutuality is insisted upon, then all may be well and good. But if it is sought to preclude a party, that could and should have litigated the subject matter, simply on the assumption that the foreign court has rules of joinder that are the equivalent of the English joinder rules, then it will be well to be sure of the validity of that assumption. Indeed, in England the trend has been towards liberalising the rules restraining joinder and encouraging the joinder in the same proceedings of all claims and interested parties, precisely to avoid a multiplicity of proceedings[146]; and thus the *Henderson* rule, in the English context, has evolved to work in concert with this[147]. But if a foreign court does not allow parties to be as easily joined, then the unfairness of an English court in rigidly applying its rules of abuse of process is obvious. What is suggested, therefore, is at least some reference to the position that the party would have been had the foreign court been called upon *ex hypothesi* to preclude the like proceedings according to its law.

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[142] [1974] Ch 208

[143] [1975] 3 All ER 604

[144] Court of Appeal, 12 November 1998

[145] Court of Appeal, 19 December 1997

[146] See CPR 7.3; CPR 17; CPR 19; CPR 20

[147] See CPR 7: "However, a party who fail[s] to join a claim when he might have done so may run the risk that, on limitation grounds or on *res judicata* or issue estoppel grounds, he will be prevented from pursuing it subsequently on separate originating process".

(d) The special circumstances exception

We have seen that the *Henderson* rule applies to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. However, it is also clear that the rule expressed by Wigram VC is subject to an exception in special circumstances[148]. In other words, it is open to the courts to recognise that in special circumstances, an inflexible application of the preclusive plea - whether *Henderson* abuse of process or issue estoppel[149] - may not achieve a just result. Moreover, since the onus is on the party alleging the abuse of process to establish that this is so[150], there can be no obligation on the other party to persuade the court that there are special circumstances[151]. Even so, when might the court exercise its discretion?

Some guidance as to what might - or might not - amount to special circumstances was given by the House of Lords in *Arnold v National Westminster Bank plc*[152]. Thus their Lordships suggest that if the first decision was impeachable on the usual grounds, or was a default judgment, or - as in that case - if relevant material unavailable at the time of the first decision becomes available, then the circumstances might justify disapplying the rule.

Stuart-Smith LJ in *Talbot v Berkshire County Council*[153] also provided clues as to what are special circumstances[154]:

> The mere fact that a party is precluded by the rule from advancing a claim will inevitably involve some injustice to him, if it is or may be a good claim; but that cannot of itself amount to special circumstances, since otherwise the rule would never have any application. The court has to consider why the claim was not brought in the earlier proceedings. The plaintiff may not have known of the claim at that time (see, for example, *Lawlor v Gray* where the claim for interest by the revenue which the plaintiff sought to pass on to the defendant had not been made at the time of the earlier proceedings) or there may have been some agreement between the parties that the claim should be held in abeyance to abide the outcome of the first proceedings; or some representation may have been made to the plaintiff on which he has relied, so that he did not bring the claim earlier. These would be examples of special circumstances, though of

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148 (1843) 3 Hare 100, 115-116

149 In Chapter Three we saw that the special circumstances exception was extended to issue estoppel by the House of Lords in *Arnold v National Westminster Bank plc* [1991] 2 AC 93.

150 *Re a debtor (No. 472 of 1950), ex p. Swirsky* [1958] 1 WLR 283 (Romer LJ); *Bradford and Bingley Building Society v Seddon* The Times, 30 March 1999; cf. the more strict American authorities: see *Maldonado v Flynn* Del Ch 417 A 2d 378 (1980), 383: "When a defendant claims that [the equivalent rule to *Henderson*] bars the subsequent action he must show that all elements ... exist; that the same transaction forms the basis for the prior and subsequent suits; and that the claim for relief could have been properly presented in the prior action. Upon such a showing the plaintiff to prevent dismissal must then show that there was some impediment in the presentation of his entire claim for relief in the prior forum."

151 *Bradford and Bingley Building Society v Seddon* The Times, 30 March 1999

152 [1990] Ch 573

153 [1994] QB 290

154 *ibid*, 299

> course they are not intended to be an exhaustive list. It may not infrequently be the case that the negligence or inadvertence ... will be that of the legal advisers instructed by the party rather than the party himself. But the action or inaction of the agent is that of the principal.

The last sentence echoes Wigram VC in *Henderson* who indicated that "negligence, inadvertence, or even accident" would *not* excuse a party for failing to raise subject matter in the earlier proceedings. This, taken together with Stuart-Smith LJ's first sentence above - that preclusion will involve some injustice to the party - thus provide the main arguments that *defeat* appeals to the special circumstances exception.

Similarly, in the second Court of Appeal decision in *The Indian Grace*[155], it was held that the injustice to the plaintiffs as a result of being precluded from seeking recovery in respect of a large damages sum did not amount to special circumstances as would disapply any preclusive plea. Incompetence - read: "negligence, inadvertence, or even accident" - was the simple reason why the claim had not been brought in the earlier proceedings; and if the result was injustice because there was a large sum at stake, then that was no more than the price that had to be paid to obviate the risk of conflicting decisions and to avoid the need for a party to have to defend more than once against the same issue.

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The *Indian Grace* litigation is a useful point to conclude this discussion of the requirements for a *Henderson* plea, since that case is famously a *foreign* judgments case, and the preclusive effect of such judgments in subsequent proceedings in England is the central concern of this thesis. Thus, since we have examined the *Henderson* rule as it is, we now consider its specific application when advanced on the back of earlier foreign proceedings.

5. *Henderson* abuse of process as the preclusive plea arising from a foreign judgment in subsequent proceedings in England

We have arrived at the central question of this Chapter: Does the *Henderson* rule preclude a party from raising in subsequent English proceedings subject matter that could have been raised in earlier *foreign* proceedings? Or, to paraphrase Wigram VC: Would an English court consider it an abuse of process for parties to open the same subject matter of litigation in respect of matter which might have been brought forward as part of the subject matter *of earlier foreign proceedings*, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case?

It would seem that the short answer is: yes; the *Henderson* abuse of process plea *is* applicable to English proceedings in respect of subject matter that could have been raised in earlier foreign proceedings, in just the same way as when the earlier proceedings were English. Shortly we will consider those "foreign judgment" cases that illustrate this reality, even though it would appear from these cases to be an unquestioned assumption

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[155] [1996] 2 Lloyd's Rep 12, 24 (Staughton LJ)

that the *Henderson* plea *should* apply in the foreign context. That, in a sense, makes the assumption all the more questionable, so we shall examine it now.

(a) Normative considerations: should the rule apply to the foreign context?

The argument *against* the *Henderson* rule operating in English proceedings by reference to earlier foreign proceedings begins by drawing an analogy between foreign judgments and default judgments.

As we have seen[156], the principal authority for the preclusive effect of the latter is the decision in *Kok Hoong v Leong Cheong Kweng Mines Ltd*[157]. There the Privy Council reasoned that, whilst from one point of view a default judgment can be looked upon as only another form of judgment by consent[158]:

> from another [point of view] a judgment by default speaks for nothing but the fact that a defendant *for unascertained reasons, negligence, ignorance or indifference*, has suffered judgment to go against him in a particular suit. [emphasis added]

This lead directly to the conclusion that[159]:

> There is an obvious and, indeed, grave danger in permitting such a judgment to preclude the parties from ever reopening before the court on another occasion, perhaps of a very different significance, whatever issues can be discerned as having been involved in the judgment so obtained by default.

Which, in turn, entailed the further conclusion that[160]:

> where a judgment by default comes in question, it would be wrong to apply the full rigour of any principle as widely formulated as that of *Henderson v Henderson* ...

Noting the explanations in *Kok Hoong* as to the *causes* of judgments by default - "unascertained reasons, negligence, ignorance or indifference" - it is significant that the Privy Council were so candid in stating it would be wrong to extend the *Henderson* rule to these types of decisions. Why this is significant is to be explained by the coincidence of language. Could it not *also* be concluded that default judgments evince a party's "negligence, inadvertence, or even accident, [in] omit[ting] part of their case" in the sense meant by Wigram VC when he used those very words to *justify* the use of the *Henderson* rule? And, if *this* is so, why should default judgments - exemplars of dereliction - be immune from that rule?

The answer lies in something other than simply the *causes* of the default. Barely stated in *Kok Hoong* is the "obvious" view that default judgments are in some way inadequate as

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156 See fn48; and see the like discussion as regards issue estoppel and default judgments in Chapter Three.

157 [1964] AC 993

158 *ibid*, 1010 (Viscount Radcliffe)

159 *ibid*

160 *ibid*, 1011 (Viscount Radcliffe)

res judicatae. They speak of "*nothing* but ...", and hence it cannot be safely assumed the subject matter "adjudicated" by default has been done so definitively, and certainly not in the way that it would have been had there been a proper contested hearing. Therefore, "unadjudicated" subject matter should not be precluded by the *Henderson* rule based upon a default judgment, which must be construed with complete precision[161].

But if this is true of default judgments, can we use the same reasoning when it comes to foreign judgments? Do not similar concerns apply to the circumstances which give rise to a foreign judgment? Indeed, can it not likewise be said of foreign judgments that *an English court* has been *completely* deprived of a contested hearing, having not even exercised its adjudicative function with respect to the decided subject matter, let alone the *related* subject matter. Moreover, how can it be said there has been an abuse of the *English* court's process where a party attempts to litigate subject matter that is not *res judicata* and which is related to subject matter that has not itself been rendered *res judicata* by an English (but by a foreign) court? The English process has not until now been activated, at least in respect of that subject matter[162].

Thus, if "unascertained reasons, negligence, ignorance or indifference" provide an excuse for excepting default judgments from the *Henderson* rule, and if it would be a "grave danger" to preclude parties from subsequently contesting the same or related subject matter when the judgment went by default, why should we not assume that the same sorts of dangers bedevil litigants who wish to litigate subject matter in England but have failed to raise it in earlier proceedings in a foreign court?

It would seem to follow from this reasoning - as well as the observations of Lord Maugham LC in *New Brunswick Railway Co v British and French Trust Corporation Ltd*[163] below - that a judgment that is *both* foreign and has gone by default is even less likely to preclude unadjudicated subject matter by an application of the *Henderson* rule, given that the preclusion of adjudicated subject matter is to be "very carefully limited"; for as Lord Maugham LC says[164]:

> In my view not all estoppels are 'odious'; but the adjective might well be applicable if a defendant, *particularly if he is sued for a small sum in a country distant from his own*, is held to be estopped .... from setting up a defence in a second action because he did not avail himself of the opportunity of setting it up in the first action. In my opinion we are at least justified in holding that an estoppel based on a default judgment must be very carefully limited.

We have also seen[165] in the views expressed by a number of their Lordships in *Carl Zeiss (No 2)*[166] that the *Henderson* rule ought to have no application in respect of issues that

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[161] *New Brunswick Railway Co v British and French Trust Corporation Ltd* [1939] AC 1

[162] And if it has, then *lis alibi pendens* reasoning could be invoked. Where the subject matter has already been decided, then the existing *res judicata* defence to recognition of the foreign judgment at common law would prevent its recognition for preclusive purposes, including abuse of process purposes.

[163] *ibid*

[164] *ibid*, 21

[165] See fn102ff.

were not raised abroad. Recall, in particular, Lord Upjohn[167] who was reluctant to apply to issues in general the full breadth of the *Henderson* rule since it may be most unjust to hold a party precluded from raising those issues in subsequent litigation - not to mention if the circumstances were foreign![168]

Moreover, the cautious deliberation that characterises the speeches of the majority in *Carl Zeiss (No 2)* as they considered the propriety of extending *issue estoppel* to foreign judgments surely bespeaks volumes for the argument that *Henderson* abuse of process should not be extended to foreign judgments[169]. And the fact that caution was redoubled in *Desert Sun Loan Corp v Hill*[170] in respect of issue estoppels upon foreign interlocutory judgments of a procedural/non-substantive nature[171] must similarly rule out a plea of abuse of process in cases involving such issues that might have been raised but were not.

There is, therefore, a strong case to be mounted against allowing the *Henderson* rule to operate in subsequent proceedings in England by reference to earlier foreign proceedings, and regardless of the type of subject matter.

By contrast, the arguments *in favour* of the *Henderson* rule operating in this context are circular, for they would appear to assume what they purport to show. For example, in *Desert Sun Loan Corp v Hill*[172] when Evans LJ simply asserts that "the principle of issue estoppel [sic: it is clear he means the *Henderson* rule] extends to issues which were not, but which might have been, raised in the earlier proceedings"[173]; and little attempt is made to make sense of its application in the light of other principles[174]. Rather, "homespun wisdom"[175] - concerning judicial economy, convenience, fairness to litigants, and comity - is used implicitly to justify precluding a party from raising in England subject matter that could have been raised in the litigation abroad, even though this is subject matter that has *not* been rendered *res judicata.*

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166 [1967] 1 AC 853

167 *ibid*, 947

168 Especially given that Lord Upjohn denied issue estoppel to foreign judgments.

169 Indeed, on this basis, the *Henderson* rule was not extended to issues in the foreign context in *Tracomin SA v Sudan Oil Seeds Co Ltd* [1983] 1 All ER 404; see fn209.

170 [1996] 2 All ER 847

171 See Chapter Three.

172 [1996] 2 All ER 847; cf. *Vervaeke v Smith* [1983] AC 145 and *Zeeland Navigation Company Ltd v Banque Worms* [1995] 1 Lloyd's Rep 251, both cases in which the earlier concluded proceedings were in *England* and the subsequent proceedings had been, or were, in a foreign court. Thus, although these cases consider the *Henderson* rule, they involve the converse of the paradigm examined by this thesis.

173 *ibid*, 854

174 Although see the comment upon the decision in *Godard v Gray* (1870) LR 6 QB 139, at fn206.

175 See fn191.

In any case, the strongest "arguments" in practice for the application of the *Henderson* rule to the foreign context are the various cases which testify as much by accepting it - or applying it - without question. In other words: it happens. We will consider these cases now.

(b) Cases in which earlier *foreign* proceedings have provided the basis for an abuse of process plea in subsequent proceedings in England

We began this chapter by differentiating the *res judicata* pleas from the plea directed at abuse of process: the rule in *Henderson v Henderson.* Implicit in that argument was the fact that the two types of preclusive plea are mutually exclusively, at least if we construe the *Henderson* rule strictly. The foreign judgment cases that have assumed the availability of abuse of process as a preclusive plea either accept that the *Henderson* rule is to be pleaded in the alternative when pleaded in conjunction with one or more of the *res judicata* pleas, or - unfortunately - have given greater rein to abuse of process by invoking it in circumstances where a *res judicata* plea ought to have applied, or even in circumstances where the *Henderson* rule as such has not been offended. We see, therefore, not only acceptance of the appropriateness of the *Henderson* rule in the foreign context, but the emergence - perhaps - of a tendency to deploy abuse of process reasoning in the foreign context in a more generalised way, whenever preclusion is thought necessary.

The *Indian Grace* litigation, however, is a good example of a decision in which the *Henderson* rule was properly understood. Admittedly, the preclusive pleas available on the facts were clear: *either* the claim in England involved the same cause of action as in Cochin, and therefore section 34 would apply unless the defendants were waived or estoppel from relying upon it *or* the cause of action in England was different from the cause of action in Cochin but nonetheless the two could and should have been brought together, in which case the *Henderson* abuse of process rule was the alternative plea. For sure, much of the argument and judicial decision making involved, *inter alia*, questions as to the meaning of same cause of action, whether the statutory plea could be waived, and whether it made a difference that one set of proceedings was *in personam* whilst the other *in rem.* But - insofar as the preclusive pleas were concerned - it was understood that if section 34 applied, it was not logically possible for the *Henderson* rule also to apply.

The only instance where this was *not* appreciated was in the first Court of Appeal decision[176]. Whilst Leggatt LJ correctly treated the *Henderson* plea as an alternative, and not a supplementary, plea (for he concluded that he did not have to consider it having decided that section 34 applied[177]), Glidewell LJ thought that section 34 was a statutory application of the *Henderson* rule to foreign judgments[178]. From what we have been arguing, such a view is erroneous because it equates two quite different, and mutually incompatible, principles: section 34 assumes something akin to former recovery and thus

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[176] [1992] 1 Lloyd's Rep 124

[177] *ibid*, 131

[178] *ibid*, 133-134

requires that the subject matter has been rendered *res judicata*, whereas the *Henderson* rule - whilst recognising that there has been a prior *res judicata* - is deployed to preclude subject matter that *has not* been rendered *res judicata*.

As it happened, this confusion enabled the plaintiffs to argue, before the House of Lords[179], that[180]:

> the Court of Appeal had in truth confused the principle of *res judicata*, under which the same cause of action cannot be litigated twice, with the wider principle in *Henderson v Henderson* under which a point which could and should have been litigated but was not raised in certain proceedings is barred in subsequent proceedings in which the same issue arises.

And because the plaintiffs maintained that section 34 was inapplicable by virtue of the proceedings involving separate causes of action, they further submitted[181]:

> that on the principle in *Henderson v Henderson*, which does not apply in certain special circumstances, arguments were open to them which required investigation and which rendered it inappropriate to strike out their statement of claim in the present case.

(The assumption being that the special circumstances exception *only* applies to the *Henderson* rule, which recalls the suggestion in Chapter Three that the exception has been wrongly extended to issue estoppel by the decision in *Arnold v National Westminster Bank plc*[182])

However, when Lord Goff held that section 34 *did* apply because the same cause of action was involved, it followed that the plaintiffs could no longer avail themselves of the *Henderson* rule, nor the special circumstances exception thereunder, because the rule was correctly "founded on the assumption that section 34 [was] inapplicable"[183]. Thus it was again made clear that the *Henderson* rule necessarily operates in the alternative to a *res judicata* plea.

The only opportunity, in the course of the entire *Indian Grace* litigation, in which the *Henderson* rule was in any sense decisive was when the case was remitted to the Admiralty Court; for there it was held that the defendants *were* estopped from relying upon section 34[184]. In other words, once it was found that section 34 did *not* apply, the assessment to be made was whether this unlitigated subject matter could and should have been brought along with the proceedings in Cochin.

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[179] [1993] AC 410

[180] *ibid*, 419-420 (Lord Goff of Chieveley)

[181] *ibid*

[182] [1991] 2 AC 93

[183] [1993] AC 410, 421

[184] Recall that the House of Lords held that it was open to the plaintiffs to raise the plea of waiver or estoppel and, on that basis, the matter was remitted to the Admiralty judge: [1993] AC 410, 424

Clarke J[185] decided that the plaintiffs *were* justified in bringing their claim notwithstanding that it *prima facie* offended the *Henderson* rule because there were special circumstances[186]. But, as we have seen, the Court of Appeal[187] disagreed with Clarke J on this point[188]; and so did the House of Lords[189]. Moreover, the two appellate courts reversed Clarke J's finding that section 34 had been defeated by estoppel; thus, as Lord Steyn said in the House of Lords[190]:

> In view of my conclusion that section 34 is applicable, and not defeated by estoppel, it is unnecessary to express any view on the separate issue whether the principle in *Henderson v Henderson* applies.

However, Briggs has said that, whilst Lord Steyn may not have had occasion to examine whether the principle in *Henderson* would have been available[191]:

> the tenor of the judgment, if not expressed in the sharply condemnatory language preferred by the Court of Appeal, was that the homespun wisdom of allowing a plaintiff only a single bite at the cherry has gained another supporting pillar. Given that the government of the Republic of India had a claim against the India Steamship Co Ltd in respect of a cargo which arrived damaged in India, it still seems a little harsh to have expected it to look and see as far down the road as was needed to keep on the right side of section 34 of the 1982 Act. It is all very well to make the 'one bite' rule part of domestic English law but it is less clear that it is a principle which should be applied without significant modification to parties whose first trip to court was thousands of miles away and under a system where this principle may well have been inapplicable, or applied to different effect.

This objection is surely all the more grounded since the only considered decision of the attribution of preclusive effects to foreign judgments, *Carl Zeiss (No 2)*[192], was less than enthusiastic about extending the *Henderson* rule to foreign judgments, as we have seen.

Something of this objection may also be applied to the recent Court of Appeal decision in *Fennoscandia Ltd v Clarke*[193], which squarely raises the question of the application of the *Henderson* rule by an English court in respect of earlier foreign proceedings[194].

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185 [1994] 2 Lloyd's Rep 331

186 *ibid*, 357

187 [1996] 2 Lloyd's Rep 12

188 See fn155.

189 [1998] AC 878

190 *ibid*, 916

191 Briggs, A. "Foreign judgments and *res judicata*" (1997) 68 BYBIL 355, 357

192 [1967] 1 AC 853

193 Court of Appeal, 18 January 1999 (unreported)

194 See fns78, 82 and 83. The claimant, C, brought proceedings against F Ltd in England claiming breach of a legal duty allegedly owed by F Ltd to C, having already brought and lost proceedings against F Ltd in Delaware. F Ltd defended the English action by arguing (successfully) that C's claim did not identify a legal duty known to English law but, also, by arguing that (in any case) this was a claim which could and should

On one level the decision is unobjectionable: the claim that was being raised in England was somewhat far-fetched; and it was clear, not only that the claimant could have raised the matter in the previous foreign proceedings, but that under the foreign law the matter could no longer be raised by reason of a rule equivalent to the English *Henderson* rule.

But on another level, the decision is disappointing: it was simply *assumed* that a claim not raised abroad ought in principle be precluded in England under the *Henderson* rule, and thus and so without any reasoned consideration whether the foreign "*Henderson*" rule was a competing law that might have instead been applicable *via* a choice of law analysis. Furthermore, the fact that the foreign procedure insisted (upon threat of preclusion) that *all* claims be raised, but then gave (it seems) no *absolute* assurance that all claims so raised would be adjudicated because of the principle of pendent jurisdiction[195], is surely a fact which ought to have prompted the court to consider whether the foreign "*Henderson*" rule contemplated the same mischief as the English rule. This was precisely the claimant's argument[196]:

> [counsel] concedes that the issues raised in this action could have been raised in Delaware, but he does not accept that if raised those issues would necessarily have been adjudicated upon in that state .... [accordingly] unless it can be shown that the Delaware court would have dealt with the issues now being raised in the original proceedings in Delaware, then in this jurisdiction the rule in *Henderson v Henderson* should not be applied.

But the Court of Appeal dismissed this argument, Kennedy LJ concluding[197]:

> this case is an example of the very mischief which the rule in *Henderson v Henderson* was designed to guard against.

Even so, when compared with the approach of the House of Lords in *Carl Zeiss (No 2)*[198] in respect of the arguably less controversial question of issue estoppel upon foreign judgments[199], the lack of conspicuous caution in *Fennoscandia* is a matter for concern; which recalls Briggs' views on the *Indian Grace*[200]:

> Even if the English approach to finality in litigation is desirable in principle, it is nevertheless only an English approach. Caution, rather than zeal, should accompany its intrusion into the custom and practice of litigation which began in foreign courts.

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have been raised in Delaware.

[195] See fn83. In other words, if the plaintiff had sought to add the present claim to his action in the Federal Court of Delaware, the judge would have had a discretion to decide whether or not to allow him to do so, and might well have refused.

[196] Pages 8 and 12 of transcript at http://www.casetrack.com/ct/casetrack.ns

[197] *ibid*, page 12 and referring to *Barrow v Bankside Agency Ltd* [1996] 1 WLR 257 (see fn78); cf. the suggestion (fn196) that this case might *not* be an example of the very mischief which the *foreign* rule was designed to guard against.

[198] [1967] 1 AC 853

[199] For, at least being a plea of *res judicata*, issue estoppel precludes issues that have been finally and conclusively determined by the foreign judgment.

[200] Briggs, A. "Foreign judgments and *res judicata*" (1997) 68 BYBIL 355, 357

However, one thing that can be said for the decisions in *The Indian Grace* and *Fennoscandia* is that they knew that preclusion by the *Henderson* rule was the relevant approach, even if they did not question its application in the foreign context. The same cannot be said of the decision in *Tracomin SA v Sudan Oil Seeds Co Ltd*[201] in which the *Henderson* rule was confused with issue estoppel.

The case involved a contractual dispute over the sale and shipment of peanuts. Despite an arbitration clause in favour of London, the Swiss buyers commenced proceedings in the Swiss Cantonal Court. The sellers were unsuccessful in their application to stay those proceedings, since the Swiss court - applying Swiss law and not English law, the law which the English court had to apply[202] - held that the arbitration clause was not incorporated in the contract of sale. In the subsequent proceedings in England, the relevant question was whether the foreign judgment had preclusive effect; in other words: Was the issue regarding the incorporation of the arbitration clause an issue that was to be treated as *res judicata* in England because of the Swiss judgment?

The reasoning of Staughton LJ is confusing because the only possible preclusive plea was issue estoppel, yet his Lordship suggested the *Henderson* rule might apply[203]. His decision is further complicated (and contradicted) by reference to the decisions in *Castrique v Imrie*[204] and *Godard v Gray*[205], both of which support the proposition that the decision of a foreign court in accordance with its own law is binding, notwithstanding that an English court would have applied English law[206]. Then finally, to confuse matters further, his Lordship concludes "it is no obstacle to the plea of *res judicata* in this case that the Swiss court applies Swiss law"[207].

It is suggested that little else can drawn from the decision given that the case was decided on another, quite separate ground[208]. Nonetheless, in the midst of the confusion some

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201 [1983] 1 All ER 404

202 We have already touched on the problem of whether there can ever be identity of issue in these cases: see Chapter Three; particularly *Desert Sun Loan Corp v Hill* [1996] 2 All ER 847, 861-862 (Roch LJ)

203 An argument that *might* have made some sense of the *Henderson* rule in this case (although it was not raised) would have been as follows: Since Swiss law *and not English law* was relied on by the parties in the Swiss (F1) court, the sellers were precluded from relying on *English* law in the *English* (F2) court to establish the validity of the arbitration agreement *because* that was itself an issue which could and should have been raised before the Swiss courts. However, this assumes that "issue of law" issue estoppels cannot be maintained: see fn202.

204 (1870) LR 4 HL 414

205 (1870) LR 6 QB 139

206 Arguably these authorities are early variants of the *Henderson* rule: see *Godard v Gray*, *ibid*, 149 (Hannen J): "A defendant who has omitted to produce evidence which was procurable at the trial of a cause cannot have a rehearing on that account...we do not permit the defendant to plead any facts which might have been pleaded in the original action."

207 [1983] 1 All ER 404, 415

208 Section 33, 1982 Act

consideration was given to whether the *Henderson* rule ought apply to foreign judgments[209]:

> The question ... was considered in the *Carl Zeiss* case. All of their Lordships were, I think, to a greater or lesser degree against the application of the doctrine of *Henderson v Henderson* to issue estoppel based on the decision of a foreign court.

This notwithstanding, the tenor of the judgment is that the *Henderson* rule *does* apply in the foreign context, if only to causes of action that could have been raised. Yet it is odd that such a conclusion derives from a case that properly concerned issue estoppel! If anything, therefore, this is another example of the confusion that arises when the *res judicata* pleas are not properly distinguished from the *Henderson* rule; which further exemplifies the need for caution when invoking the preclusive effect of a foreign judgment.

There is, however, yet a further tendency emerging in the foreign cases which is of concern - at least if clarity and purity of doctrine are important. These are the cases in which abuse of process reasoning is deployed in a more generalised way - that is, whenever preclusion is thought necessary - and seemingly without regard to the categories of subject matter which usefully describe the *res judicata* pleas and the *Henderson* rule. In other words, the appeal here is to the court's inherent jurisdiction to stem abuse - rather than to the abuse of process rule characterised by the *Henderson* rule - in circumstances that suggest that the preclusive pleas *should* apply. We can see this illustrated in *House of Spring Gardens v Waite*[210].

In that case, the plaintiffs had recovered judgment for £3m damages in Ireland against *three* defendants. Thereafter, the first and second defendants brought a separate action in Ireland in an attempt to set aside the judgment on grounds of fraud. This action, also, was dismissed. Enforcement proceedings in England were then brought by the plaintiffs; that is, an action on the judgment. In defence to *this* action, all three defendants pleaded that the judgment should be denied recognition and enforcement because it had been procured by fraud.

The first and second defendants were precluded by issue estoppel from again raising the fraud defence: they had already lost on that point in their separate proceedings in Ireland, and the court held that their right under the rule in *Abouloff v Oppenheimer*[211] for a retrial on the merits of an allegation of fraud had thereby been exercised. However, in addition - and unnecessary in the circumstances - Stuart-Smith LJ held that even if the Irish judgment on the fraud point did not create an issue estoppel, it would *in any case* be an abuse of process for the first and second defendant "to relitigate the same issue in the English court on which they failed in Ireland, not least because they themselves chose the forum"[212].

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[209] *ibid*, 414

[210] [1991] 1 QB 241

[211] (1882) 10 QBD 295

[212] [1991] 1 QB 241, 251

We know from our analysis above that this recourse to abuse of process reasoning cannot represent an application of the *Henderson* rule since the subject matter here (the fraud defence) had clearly been raised and adjudicated. And yet, although the *Henderson* rule was neither cited nor relied upon by the Court of Appeal, his Lordship was of the opinion that if the subject matter could not be precluded by issue estoppel[213]:

> *the same result can equally well be reached by this* [abuse of process] *route*, which is untrammelled by the technicalities of estoppel. The categories of abuse of process are not closed: see *Hunter v Chief Constable of the West Midlands Police* ... [emphasis added]

(Note that in *Hunter v Chief Constable of the West Midlands*[214] judicial caution was expressed against "limiting to fixed categories the kinds of circumstances in which abuse of process can arise"[215].)

To his Lordship in *House of Spring Gardens*[216], this sanctioned the invocation of principles of abuse of process beyond the bounds of the *Henderson* rule, and regardless whether the subject matter had been rendered *res judicata* according to the technicalities of any of the other preclusive pleas.

It might be argued, however, that his Lordship was invoking a *wider* abuse of process notion in order to rationalise the preclusion of the *third* defendant; for it should be recalled that the third defendant was not a party to the Irish proceedings on the fraud point, which had been brought by the first and second defendants, and it was also necessary to slam the door on the third defendant in order to avoid a "travesty of justice"[217]:

> Public policy requires that there should be an end to litigation and that a litigant should not be vexed more than once in the same cause.

But how could this be done? Either technical rules - such as identity and mutuality of parties - would have to be followed in order to establish issue estoppel against the third defendant, or some form of abuse of process plea would have to be invented in order to supply the court with the requisite discretion.

We noted in Chapter Two, Part Four that Stuart-Smith LJ creatively deemed there to be identity and mutuality; and, thus, in the absence of any new evidence affecting the issue of fraud, the third defendant was precluded by issue estoppel as a privy to the

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213 *ibid*, 254

214 [1982] AC 529

215 *ibid*, 536 (Lord Diplock); cf. *Walton v Gardiner* (1993) 177 CLR 378, 395: "[abuse of process] extends to *all* those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness .... [P]roceedings before a court should be stayed as an abuse of process if, *notwithstanding that the circumstances do not give rise to an estoppel*, their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate anew a case which had already been disposed of by earlier proceedings."

216 [1991] 1 QB 241

217 *ibid*, 255

proceedings brought by the first and second defendants (never mind that the *third* defendant had not had *his* bite at the *Abouloff* cherry).

But, again, his Lordship held that he did not need to rely on any *res judicata* plea because the circumstances were an abuse of process of the court and contrary to justice and public policy. Moreover, his Lordship avoided the "technicalities" of the *Henderson* abuse of process rule, although well might he have applied the rule. Instead, he appealed to the general abuse of process notion in *Hunter v Chief Constable of the West Midlands*[218] in which Lord Diplock had stated[219]:

> The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the plaintiff which had been made by another court of competent jurisdiction in previous proceedings in which the plaintiff had a full opportunity of contesting the decision in the court by which it was made.

Stuart-Smith LJ also referred to the decision in *Ashmore v British Coal Corporation*[220], a case in which issues of fact were litigated exhaustively in sample cases. From this case, too, his Lordship divined the principle - again, wider than the *Henderson* rule - that[221]:

> it is an abuse of process for a litigant, *who was not one of the sample cases*, to re-litigate all the issues of fact on the same or substantially the same evidence [emphasis added]

Thus it seems from the reference to these cases that Stuart-Smith LJ in *House of Spring Gardens* adopted the view that it did not matter whether the *third* defendant could be precluded by issue estoppel *or* the *Henderson* rule; for the technicalities involved with such pleas would not stand in the way of this wider notion of abuse of process. This conclusion is not surprising: Stuart-Smith LJ has already been identified with that school of thought which emphasises the avoidance of multiplicity of proceedings over finality[222]. But it is a conclusion which hints at a mechanism of preclusion which might be so all-encompassing that it overrides any need to rely on the traditional pleas in the foreign context. In view of *Carl Zeiss (No 2)*[223], such a proposition can not be correct.

Nonetheless, it is a proposition hinted at, also, by the Privy Council in *Owens Bank v Etoile Commerciale*[224]. Again, the case involved the allegation of fraud as a defence to foreign judgment recognition, and in that case their Lordships concluded[225]:

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[218] [1982] AC 529

[219] *ibid*, 541

[220] [1990] 2 QB 338

[221] [1991] 1 QB 241, 255

[222] See fn72.

[223] [1967] 1 AC 853

[224] [1995] 1 WLR 44

[225] *ibid*, 51 (Lord Templeman)

> It is axiomatic that where fraud is alleged full particulars should be given. Where allegations of fraud have been made and determined abroad, summary judgment or striking out in subsequent proceedings are appropriate remedies in the absence of plausible evidence disclosing at least a *prima facie* case of fraud. *No strict rule can be laid down; in every case the court must decide whether justice requires the further investigation of alleged fraud or requires that the plaintiff, having obtained a foreign judgment, shall no longer be frustrated in enforcing that judgment.* [emphasis added]

In *Owens Bank* the wider abuse of process plea was the *sole* basis for dismissing the similarly abusive fraud allegation. Indeed, rather than grapple with complex and difficult conflict of laws rules, this plea was able to provide[226]:

> a much shorter answer to this appeal. Every court of justice has an inherent power to prevent misuse of its process, whether by a plaintiff or a defendant: see *Hunter v Chief Constable of the West Midlands Police* ... This was the alternative ground on which the Court of Appeal decided in the plaintiff's favour in *House of Spring Gardens Ltd v Waite* .... There is nothing in the authorities which precludes a party from obtaining a summary judgment or an order striking out a pleading on the grounds of abuse of process where a fraud is alleged.

Again, it is clear that this is *not Henderson* abuse of process but abuse of process in a wider, more general sense. This also explains why no principles are given; for this is a discretionary application of a plea that comes from the court's inherent power to prevent a misuse of its process. No reasons, it seems, are necessary except that the Court is unimpressed with what the party is trying on.

The most recent "foreign judgments" case in which we see a hint of this wider abuse of process plea is *Desert Sun Loan Corp v Hill*[227]. There Evans LJ states[228]:

> It is well established that apart from issue estoppel the courts have power to prevent any abuse of justice which may be involved in an attempt to litigate matters for a second time. [His Lordship then cites *Owens Bank Ltd v Etoile Commerciale* and *House of Spring Gardens v Waite* and continues] .... *It appears therefore that reliance on the rules governing issue estoppel is unnecessary and superfluous where such an abuse of justice is established.* Conversely, therefore, the cases where issue estoppel will become relevant are those where it cannot be said that there is an abuse of justice. [emphasis added]

The striking thing is that, elsewhere in his judgment, Evans LJ carefully considers whether the doctrine of issue estoppel ought apply to a foreign interlocutory judgment, and yet here, without argument, the hint is given that issues *not even res judicata* may be precluded as an abuse of process, and in circumstances beyond the *Henderson* rule. One wonders what their Lordships in *Carl Zeiss (No 2)* would think of that!

A similar assumption is evident in the judgment of Stuart-Smith LJ who observes, consistently with his views in *House of Spring Gardens* that[229]:

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[226] *ibid*

[227] [1996] 2 All ER 847

[228] *ibid*, 859

[229] *ibid*, 864

> The question of issue estoppel is very closely linked to abuse of process: see *House of Spring Gardens Ltd v Waite* ... and *Owens Bank Ltd v Etoile Commerciale* ... Mr Hill chose to contest the issue of jurisdiction in the Arizona court. He could have waited till the plaintiffs sought to sue on the judgment in this country and then contested the factual issue according to English law on the basis that he had given no express authority to Mr Jury by way of Mr Graham. If, in the course of contesting the jurisdiction of the foreign court in Arizona, *that very question of express authority was clearly decided*, I think it would be an *abuse of process* to permit the defendant to litigate it again here. But, as I have already indicated, I am left in doubt whether it was so decided. [emphasis added]

But why would it not be an issue estoppel if the issue were decided? Why the preference for preclusion by abuse of process plea? The only answer, it seems, is that sometimes issue estoppel is too technical to make out, and these technicalities can frustrate the court's attempt to "do justice". Moreover, note that *this* reference to abuse of process is *not* supported by the *Henderson* rule. Indeed, elsewhere Stuart-Smith LJ refers to the separate operation of that authority in his explanation that[230]:

> if the issue was decided by the Arizona court, it is immaterial that Mr Hill did not adduce all the admissible evidence at this disposal, that the issue was not determined without oral evidence or cross-examination, or that his attorney was at fault in the conduct of the case. *This is well established: see Henderson v Henderson ... and Talbot v Berkshire CC* ... [emphasis added]

Thus, when his Lordship refers to "abuse of process" it is clear that it is not abuse of process in the *Henderson* sense but rather a more general application to overcome technical gaps in the construction of a plea of *res judicata* regardless of whether the claim *was* raised and *was* litigated in previous proceedings.

But what makes the use of *this* broad preclusive plea remarkable is the fact that the decision in *Desert Sun Loan Corp v Hill*[231] involves the foreign judgment paradigm at the centre of this thesis. This, taken together with Stuart-Smith LJ's view of the interrelationship between issue estoppel and abuse of process, suggests that a *failure* to seek procedural relief in the foreign court by first challenging the jurisdiction point before the Arizona court (which Hill did do, to the approval of Stuart-Smith LJ[232]) may provide the basis for invoking abuse of process principles when the procedural point is advanced in England[233]. Little wonder, then, that Briggs has commented upon the majority's abuse of process reasoning in *Desert Sun Loan Corp* as follows[234]:

> This malign doctrine has recently acquired new vitality in the area of estoppel and foreign judgments; it appears to bring out a strain of judicial impatience with a judgment debtor who has the temerity to point out that it is open to him to challenge the conclusive effect of a foreign judgment. It is to be regretted that the careful and tidy lines of the law on recognition of foreign judgments may be overridden by the juggernaut of abuse of process. How soon will it be before it is said to be an abuse of process to plead fraud in opposition to the enforcement of a foreign judgment when this plea has not been taken, or

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230 *ibid*, 863

231 *ibid*

232 *ibid*

233 Cf. *Amchem v Workers' Compensation Board* [1993] 1 SCR 897

234 Briggs, A. "Foreign judgments and *res judicata*: *Desert Sun Loan Corp v Hill*" (1996) 67 BYBIL 596, 599

> no fresh proceedings brought, in the foreign court itself? How soon will it be before it is said to be an abuse of process not to bring a claim which could have been brought in a foreign court which has very wide provision for joinder of causes of action? To the extent that the judgments of the majority lend any support to the operation of this doctrine in its subversion of the law on recognition of judgments, it is to be regretted on this ground as well.

Nonetheless, are we approaching the end of the doctrine of the traditional *res judicata* pleas? This depends, it seems, on how well the technical *res judicata* pleas discussed in the earlier chapters are maintained. The preference for simplicity in the law has been extolled before, and has an alluring appeal: see, for example, Murphy J in *Port of Melbourne Authority v Anshun Pty Ltd*[235]:

> I would prefer not to formulate an exhaustive theory of *res judicata* or issue estoppel in order to determine this case by application of such theory. These notions of *res judicata* and issue estoppel are founded on the necessity, if there is to be an orderly administration of justice, of avoiding re-agitation of issues, and of preventing the raising of issues which could have been and should have been decided in earlier litigation.

However, equally, this is typical of the creeping tendency for the preclusive plea at one end of the continuum (it might be called "wider abuse of process") to encroach upon - and perhaps, ultimately, to wipe away - the preclusive pleas that lie towards, and at, the other end of the continuum (the *Henderson* rule, and then the *res judicata* pleas), replacing certain rules with discretionary justice. Despite its simplicity, therefore, perhaps there is no greater safeguard than a more strict legal framework, even if that means technical pleas that are difficult for modern judges to apply.

6. Conclusion and examples of abuse of process preclusion by foreign judgments

It is difficult to escape the conclusion that the preclusion of subsequent proceedings in England as an abuse of process by reference to earlier foreign proceedings involves much complexity. What is required - at least so far as the *Henderson* rule is concerned - is a clear statement as to its applicability in the foreign context *in any event*, and then an enunciation of the types of subject matter that such a rule precludes.

As to the threshold question - should the abuse of process doctrine apply at *all* in the foreign context - the following are suggested as key considerations.

-- was there an opportunity for the party to raise the subject matter in the foreign proceedings, and - indeed - was the foreign court the most appropriate forum in which to raise that subject matter?

-- would raising the subject matter in subsequent proceedings in England involve a collateral attack on the earlier decision, indeed, would granting the relief in later proceedings give rise to a judgment inconsistent with the relief obtained in the earlier proceedings?

-- moreover, in light of the earlier foreign proceedings and the decision there reached, are the later proceedings without merit?

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[235] (1981) 147 CLR 589, 605-606

There then remains questions concerning the types of subject matter that could and should have been raised in the foreign proceedings. As to this, the most pressing concern is to clarify a test that determines when it is in abuse of process to advance in subsequent proceedings a cause of action that *prima facie* could and should have been brought in the earlier foreign proceedings. On the one hand it is said that different causes of action arising out of the same factual context which have not been adjudicated upon may not be barred in later proceedings as an abuse of process[236]. And yet there are opposing arguments that suggest preclusion should follow if the cause of action is so closely related to the earlier proceedings that it must be said to have properly belonged. Similar confusion vexes the question whether issues should be the subject of the *Henderson* rule: the decisions in *Carl Zeiss (No 2)*[237] and *Desert Sun Loan Corp v Hill*[238] encourage the view that the *Henderson* rule does not apply to issues that were not raised in the foreign context, Evans LJ in *Desert Sun* observing its inappropriateness where interlocutory and procedural issues are concerned. And yet *Desert Sun* is - at the same time - among the authorities that argue for a wider preclusive notion based on abuse of process or abuse of justice.

The *Henderson* rule is also under attack to the extent that recent cases no longer insist that the foreign proceedings render *res judicata* the subject matter that *was* the subject of litigation and adjudication in the earlier proceedings; and less is it being insisted that the parties or privies be the same. This parallels the shift towards a wider rule more in touch with the generic inherent abuse of process that underscores the *Henderson* rule, and which over-rules it at the cost of certainty.

Nonetheless, this wider abuse of process notion is the rallying point for reformation, or even abolition, of the old rules and strict requirements of the *res judicata* pleas. Not surprisingly, it is a cause gaining adherents in foreign judgment cases, but at a time when much remains unsettled so far as the *Henderson* rule is concerned. Yet at least the *Henderson* rule has certainty which the wider plea lacks; for the *Henderson* rule, properly understood, may be raised where the subject matter in question in the subsequent proceedings in England is so clearly part of the subject matter of the earlier proceedings, and so clearly could have been raised, that it would be an abuse of process to allow it to be raised in the English proceedings. Even so, it would seem clear that the battle as to the scope and future development of the laws of preclusion at common law, and their application to the foreign context, will be waged here.

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[236] SBTH, p265

[237] [1967] 1 AC 853

[238] [1996] 2 All ER 847

Summary of applicable law

Questions English court must consider before precluding subsequent proceedings as abuse of process	**Whether determined by English law?**	**Whether determined by foreign law?**
AS REGARDS THE *SUBJECT MATTER* OF THE SUBSEQUENT ENGLISH PROCEEDINGS: (i) Is the English subject matter so clearly part of that which was the subject matter of the foreign proceedings that it could *and should* have been raised in the foreign proceedings?	√ - *Henderson* rule now seen as part of English court's inherent abuse of process jurisdiction, thus requiring assessment by English court according to English notions; the specific *Henderson* "abuse" directs court to consider whether subsequent subject matter "properly belonged" to earlier litigation such that it *could and should* have been raised there; mere fact that *could* have been raised does not entail that it *should* have been raised	x - not relevant (other than to question whether the *Henderson* rule ought to apply in the foreign context anyway!)
AS REGARDS THE *SUBJECT MATTER* OF THE FOREIGN PROCEEDINGS: √ - whilst the subject matter before the English court in subsequent proceedings will not have been rendered *res judicata* by the earlier foreign proceedings it must properly belong to subject matter (as above) which *itself* was the subject of litigation and adjudication in the earlier (foreign) proceedings; in other words, this implies a foreign judgment that qualifies as a *res judicata*; HENCE: (i) Foreign judgment must have rendered subject matter *res judicata* (ii) Foreign court must possess jurisdictional competence in the international sense	x - see foreign law → √ - English jurisdictional rules in the international sense (Chapter Two, Part Two) ... but: →	x - final and conclusive as per *Nouvion* test (Chapter Two, Part Two) ? - but query whether *forum non conveniens* principles could apply here
PARTIES / PRIVIES:	√ - English law (Chapter Two, Part Four) - but: →	? - query why English court should not refer to foreign law and position that the party would have been in had the foreign court been called upon *ex hypothesi* to preclude the like proceedings according to its law
SPECIAL CIRCUMSTANCES EXCEPTION:	√ - English law	x - not relevant

Illustrations - abuse of process

1. X, the next of kin of J (deceased), sues B in Newlandia alleging that certain sums are due on account of a partnership. B submits to the jurisdiction of the Newlandia court. An account of the partnership is rendered, upon which the Newlandia court pronounces a final decree ordering B to pay X £10,000. In proceedings in England to enforce the decree, B alleges, *inter alia*, that the Newlandia decree was reached without taking account of a large sum owed by the partnership to B. X relies on the *res judicata* status of the Newlandia decree to assert that B's allegation in England is an abuse of process because B could and should have raised that matter before the Newlandia court in order that it, too, might have been rendered final and conclusive. The plea will be upheld if the English court is satisfied that there is an abuse of process; that is, if B's subject matter properly belonged to the subject of litigation and adjudication in Newlandia.

2. A sues R in Ruritania for rent under an agreement and obtains judgment. The Ruritanian court clearly has jurisdiction over the subject matter, and both parties are regularly before the court. Some time later, another claim for rent arises as between A and R under the same agreement, and A brings proceedings in England against R. R pleads that the underlying agreement is void because it is truly a bill of sale and does not comply with a moneylending ordinance. A replies by pleading the *Henderson* rule: that is, R is raising a claim that is clearly part of the subject matter of the Ruritanian proceedings, and clearly could have been raised there, that it would be an abuse of process to allow it to be raised in the English proceedings. To uphold this plea, the English court must look at the nature of the subject matter before it and the subject matter that was dealt in Ruritania (as evidenced by a Ruritanian judgment that satisfies the common law requirements as a *res judicata*) and consider whether the English subject matter could and should have been raised in Ruritania.

3. D negligently injures P and damages P's car in a motor accident in Ruritania. P sues D in Ruritania in respect of damage to P's motor vehicle and recovers damages. P later sues D in England in respect of the injuries P sustained. We have seen that section 34 will not be available to D since the causes of action are different: this is not *reassertion* because P is suing in respect of different rights. Likewise, cause of action estoppel is inapplicable: there is no true *contradiction.* But can the *Henderson* rule operate to preclude subsequent proceedings in England? *Talbot v Berkshire CC* suggests that similar (though separate) causes of action arising out of the same factual situation should, if they can, be brought together, and that it is an abuse of process if separate actions, leading to a multiplicity of proceedings, are brought: it is important to establish all liability in respect of any one event. However, *Lawlor v Gray* suggests that it is *not* an abuse of process to bring separate proceedings founded on a distinct cause of action. Thus the question is one of principle: ought the *Henderson* rule preclude causes of action that were not raised but could have been, or should it preclude all subject matter that properly belongs to the subject of litigation and adjudication of the former (here Ruritanian) proceedings, including similar (but separate) causes of action?

4. T and his passenger (B), whilst driving on a road for which the defendant highway authority (D) were responsible, were injured when their vehicle hit a large expanse of water lying on the road, went out of control and hit a tree. In Ruritania, B brought an action against T for her personal injuries. T's solicitors issued a third party notice against D seeking contribution, but did not include a claim for damages in respect of T's personal injuries. T's solicitors did not inform their client that the notice was limited in this respect. D was joined by B as second defendants in the action against T. The Ruritanian court found both D and T liable for B's injuries: one third against D and two thirds against T. In subsequent proceedings in England, T sued D claiming damages for personal injuries. If the decision in *Talbot v Berkshire CC* can be applied to the foreign context, an English court may stay or strike out the subsequent action as an abuse of process; for it was held in that case that the rule applies as well to those cases where points could have been, but were not taken, in relation to separate causes of action. Here, T's claim could and should have been brought at the time of B's action, and could and should have been included in the original third party notice issued against D. There were no special circumstances requiring the court not to apply the rule.

5. H hired machinery to A on terms whereby A indemnified H against any claim arising from the use of the machinery. X, who was injured by the negligent operation of the machinery, sues A and H in Ruritania. H does not rely on its indemnity, and - by judgment of Ruritanian court - H and A are found liable, liability apportioned 90% H and 10% A. In subsequent proceedings in England, H sues A on the indemnity. The English court may apply the *Henderson* rule on the basis that the question of the indemnity "properly belonged" to the earlier action: H could and should have raised the question of the indemnity in Ruritania and the fact that H did not raise it means that it is an abuse of process now to raise it, even though it (as such) is not *res judicata*. Thus H is precluded from relying on a claim now since it would give rise to conflicting or contradictory judgments

6. D agrees to deliver goods to P. By the negligence of D, 10% of P's goods are destroyed (and therefore not delivered under the contract) and the remaining 90%, though delivered under the same contract, are damaged. P sues D in Ruritania in respect of the non-delivered goods and judgment is rendered. Then, in England, D attempts to prevent the continuance of the English proceedings. Section 34 could be pleaded to prevent P recovering upon the same cause of action having already recovered thereon. But an alternative plea is to plead the *Henderson* rule, arguing that the action in England properly belonged to the litigation and adjudication in Ruritania since it involved subject matter that could and should have been brought in the foreign proceedings. Therefore it is an abuse of process in the *Henderson* sense.

7. A, B, C, and D are cargo-holders each with separate bills of lading, and X is the ship-owner. By the negligence of X, the cargoes are damaged by fire. A sues X in Ruritania and establishes a number of issues of fact and law. In subsequent litigation in England B, C and D each attempt to preclude X from contradicting the issues determined against him by A's judgment. Their pleas are not sustained since B, C, and D were neither parties nor privies to the litigation *A v X*. But is it an abuse of process for B, C and D to stand by whilst A litigates what are, effectively, common issues? It may be that the operation of the *English* abuse of process rule here depends on whether B, C and D could be joined in the foreign proceedings - i.e. on the liberality of the joinder rules of the foreign court.

8. P sues D in Ruritania, but they agree that a related claim will be litigated in later proceedings. When P sues D in England on that related claim, the agreement between P and D will amount to a special circumstance that justifies the disapplication of the *Henderson* rule.

9. A claimant, C, brings proceedings against F Ltd in England claiming breach of a legal duty allegedly owed by F Ltd to C, having already brought and lost proceedings against F Ltd in Ruritania. F Ltd defends the English action by arguing that C's claim does not identify a legal duty known to English law but, also, by arguing that (in any case) this was a claim which could and should have been raised in Ruritania. In deciding whether this is an abuse of process, the English court must consider whether the subject matter of the proceedings before it could and should have been brought in the Ruritanian proceedings on account of it properly belonging to the litigation and adjudication there. There must be a *res judicata* from the Ruritanian court; and in assessing that, it is necessary to consider whether the adjudication of the Ruritanian subject matter is final and conclusive. But it is not part of the English law assessment of the *Henderson* rule to consider whether the Ruritanian court has a similar rule to the *Henderson* rule, let alone refer to it, although query why this is not so.

CHAPTER FIVE

THE PRECLUSIVE EFFECT OF A FOREIGN JUDGMENT RECOGNISED UNDER THE BRUSSELS AND LUGANO CONVENTIONS

1. Introduction

In Chapters Two, Three and Four we have examined the preclusive pleas that can be generated by a foreign judgment that has been recognised at common law. Thus we have seen that the correspondence between the common law recognition rules and its *res judicata* criteria has the consequence of predisposing an English court to treat these foreign judgments according to the preclusive rules that an English court applies to its *own* judgments. In other words, rather than apply to the foreign judgment the preclusive effects known to the law of the foreign rendering court, the recognition process at common law inclines an English court to treat the foreign judgment as if the preclusive effects of that judgment were the equal of an English judgment, and thus subject (for the most part[1]) to English law.

However, whatever be the correct preclusive consequences to be attributed to a foreign judgment recognised at common law, it is certainly true that not all foreign civil and commercial judgments are recognised in England according to the common law rules. The recognition scheme synonymous with the Brussels and Lugano Conventions as implemented in the United Kingdom by the 1982 Act accounts for the recognition of civil and commercial judgments within its scope[2] that emanate from the courts and tribunals[3] of States signatories to the Conventions, ostensibly the countries of the European Union and the European Free Trade Association[4].

What is more, we will see the recognition process adopted by the Conventions is different from the common law in that the Convention rules *do not* verify the foreign judgment according to *res judicata* criteria, let alone afford an English recognising court an

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[1] We have seen that some concession is made by English courts to the foreign law in that a foreign judgment will not be recognised as a *res judicata* in English law unless it is *res judicata* according to the law of the foreign court.

[2] As regards material scope: see Article 1, which provides a positive definition ("civil and commercial matters whatever the nature of the court or tribunals": *LTU Lufttransport v Eurocontrol* [1976] ECR 1541) and a number of exceptions (status/capacity of legal persons, matrimonial property rights, wills, succession; bankruptcy/insolvency; social security; arbitration). However, if subject matter concerning the status or legal capacity of natural persons or rights in property arising out of a matrimonial relationship, wills or succession is determined as an incidental issue in a judgment otherwise within the scope of the Convention, that judgment will not for that reason alone be outside the recognition provisions, although its recognition will be subject to Article 27(4).

[3] Article 25, Article VA of Protocol

[4] As regards territorial scope: the Brussels Convention, as amended, operates among the 12 member States of the European Union who were members prior to the accession of Austria, Finland and Sweden. As at 1 August 1999, the Accession Convention of Austria, Finland and Sweden is in force in: Austria, Denmark, Finland, Germany, Italy, Netherlands, Spain, and Sweden. The Lugano Convention operates among the 15 member States of the European Union and those of the European Free Trade Area who are parties to the Convention (Iceland, Norway and Switzerland).

opportunity to control the foreign judgment at the recognition stage. Accordingly, any assessment of the *res judicata* status of the Convention judgment by the English court must be made (if it is to be made by the English court at all) independently of the "process" of recognition under the Convention scheme and, crucially, *after* the obligation to give effect to the Convention judgment has been assumed under Article 26.

This is not to say that recognition under the Conventions fails to respect the foreign judgment as a *res judicata*, nor that all manner of Convention judgments generate preclusive effects *regardless* their status as *res judicatae*. Indeed, it must surely remain a cardinal principle of English law that preclusive effects only follow if the *English* recognising court is satisfied the judgment *is* a *res judicata* capable of generating the preclusive effects sought. But because the Convention scheme appears to sever the link between recognition and *res judicata* verification, an English recognising court may have greater freedom when considering the preclusive effects of the judgment in England, and the source of the law that determines those effects.

It might be trite to add that this compels the conclusion that the Convention scheme - whether intentionally or otherwise - requires an English court to adopt a different approach to preclusion when the foreign judgment has been recognised under the Convention than when recognition has been procured at common law. However, if this be true, it is surprising that little attention has been paid. Those commentators who have touched upon the complexities involved have offered less by way of analysis and more by way of supposition[5]. The typical approach has been to suggest *either* that the recognising State has the right to define within its territory the rules governing the preclusive effects of a judgment recognised under the Convention so that the same effects are conferred on that judgment as are conferred on a corresponding national judgment (which is to argue for the norm that applies at common law, namely: the *equalisation* of effects[6]) *or* that the principle of automatic recognition under the Convention implies that the judgment is accepted with the original effects in the recognising State as it would have in the State in which it was delivered (which is to argue for the *extension* of effects in a manner akin to giving full faith and credit to the judgment[7]). Moreover, in the few

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[5] Lasok, D and Stone, P. A., Conflict of Laws in the European Community, Professional Books Limited: Abingdon, 1987, p289-290; Stone, Peter The Conflict of Laws, Longman Group Ltd: London, 1995, p307; Reimann, Mathias Conflict of Laws in Western Europe: a guide through the jungle, Transnational Publishers Inc: New York, 1995, chapter 7

[6] Collins, L., The Civil Jurisdiction and Judgments Act 1982, London: Butterworths, 1983, p132 at note 2: "Once registered, the judgment of the original court has effect as a judgment of the court in which it is registered: 1982 Act, Schedule 6, para 6".

[7] See, in particular, Lasok, D and Stone, P. A., Conflict of Laws in the European Community, Professional Books Limited: Abingdon, 1987, p290: "It seems clear that recognition under Title III involves giving the recognised judgment the same conclusive effects as it has in the original country. The principle seems necessarily implied in the very concept of recognition, and has been expressly adopted in the United States by the statute implementing the "full-faith-and-credit" clause of the American Constitution. Under English law, an English personal judgment binds the parties and their privies, but not other persons, and is conclusive, not only as to the cause of action determined ... but also as to issues which are necessarily determined by the judgment and are also relevant to other causes of action between the parties or their privies ... But the law of another Member State may differ from English law as to the persons on whom a judgment is binding, or as to the scope of the cause of action which is regarded as determined, or as to the existence or scope of the principle of issue estoppel. It is submitted that Title III requires that, in the case of such differences, the court addressed should apply the law of the original country as to the conclusive effects of the judgment, and not the law which

reported cases regarding the preclusive effect of a Convention judgment in subsequent proceedings in England, the tendency has been to treat the judgment as if it were an English judgment, without considering whether the Conventions mandate otherwise. Thus much thinking is still required before the Convention scheme can be reconciled with the complicated, yet basic, concepts associated with the law of preclusion in England[8].

But it is not easy to find support for any particular approach to preclusion by casually glancing at the Conventions. If anything the general tenor of Title III suggests that *recognition* under the Conventions is primarily directed to *enforcement* rather than *preclusion*[9], since the provisions presuppose enforceability if they presuppose any effect at all[10]. (Now it is true that *enforceability* has the incidental consequence of securing the conditions for cause of action preclusion, but even this preclusive effect is only implicit in Article 26, and in any case no express provision takes account of other preclusive effects, such as issue estoppel or abuse of process, that might be sought in subsequent proceedings.)

Therefore, before we examine the provisions in Title III of the Conventions, let alone consider the preclusive pleas that can be sustained by Convention judgments in subsequent proceedings in England, it seems necessary to examine the basic principles that underlie Convention recognition. This may reveal whether there is anything inherent in the nature and structure of the Convention scheme to indicate the source of the rules to be applied when attributing preclusive effect to a Convention judgment in subsequent proceedings in England.

2. Basic principles of recognition under the Conventions

The fundamental purpose of the Convention scheme has been well explained[11]:

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the country addressed would apply in the case of a similar judgment of one of its own courts".

[8] At least this was predicted by Hartley who warned in a seminal article prior to the accession of the United Kingdom to the Convention that "[a]ccession to the Convention will ... mark the beginning of a new era in which basic concepts will have to be thought out anew": see Hartley, T. C., "The recognition of foreign judgments in England under the Jurisdiction and Judgments Convention", in Lipstein, K. (ed) Harmonisation of Private International Law by the EEC, Institute of Advanced Legal Studies (University of London): London, 1978, p104

[9] Juenger, Friedrich K., "Judicial jurisdiction in the United States and in the European Communities: a comparison" [1984] 82 Mich. LR 1195, 1206: "[the framers of the Brussels Convention] realised the cogency of the principle which the United States Supreme Court had established early on, namely that the *enforcement* of a judgment should hinge primarily on the jurisdiction of the court that rendered it. To assure the congruence of adjudicatory power and judgment recognition ... they defined the appropriate jurisdictional bases as a matter of supranational law". Thus the question is raised: should the *preclusive effect* of a judgment also hinge on those rules? See fn24.

[10] Section 2 of Title III elaborates procedures to be followed when recognition is for *enforcement* purposes, but where recognition is for *preclusive* purposes, the preclusive effects that can (or cannot) be secured within the State addressed are left unstated. Thus, arguably the sole criterion under Title III is enforceability: see *Van Dalfsen v Van Loon* [1992] ILPr 5; and for the suggestion that "enforceability" under the Convention supplies the necessary "final and conclusive" element that defines a *res judicata*, see Hauschild, Winifried M. in Goode, R. M. and Simmonds K. R. (eds), Commercial Operations in Europe, Sijthoff: Leden/Boston, 1978, p65.

[11] Hartley, T. C., "The recognition of foreign judgments in England under the Jurisdiction and Judgments Convention", in Lipstein, K. (ed) Harmonisation of Private International Law by the EEC, Institute of Advanced Legal Studies (University of London): London, 1978, p104

> [its purpose] is to maximise the international recognition of judgments within the Community. This has two aspects: first, as regards substance, it is the aim of the Convention to limit to the very minimum the situations in which a judgment granted by a court in one Community country will be refused recognition in other Community countries; secondly, as regards procedure, the Convention attempts to simplify the formalities as much as possible so that judgments are recognised and enforced with the minimum delay and expense. .... The way the Convention seeks to achieve these aims is to place major restrictions, *particularly in the field of jurisdiction*, on the right of courts within the Community to hear cases where the defendant is domiciled in another Community country. *Having done this, the framers of the Convention felt justified in providing for almost automatic recognition of judgments within the Community.* [emphasis added]

Of special relevance in the context of recognising the preclusive effect of foreign judgments is the allusion to the jurisdictional rules of the Brussels and Lugano Conventions. This allusion underlines an important feature of the Convention scheme[12], namely: that these conventions adopt a double "jurisdiction and judgments" approach, with direct and uniform rules of jurisdiction that are applied by all rendering courts of contracting States, independently of any procedure for recognition and enforcement. In other words, the rules of direct jurisdiction under the Conventions are common and mandatory throughout the Convention territory, and operate at the outset of the case, irrespective of whether recognition or enforcement of the judgment is subsequently sought. Thus, the result of a double convention is at once to modify and harmonise the contracting States' national laws as to jurisdiction, and thereby *reduce* the review function of recognising courts at the recognition stage.

However, this indifference to a review or control function at the recognition stage would appear to support the thesis that recognition for *preclusive* purposes is not the *primary* concern of the Brussels and Lugano Conventions scheme. Indeed, because the aim of a double recognition scheme is quite clearly to remove as much as possible any criteria at the recognition stage so that judgments can be recognised and enforced without delay and expense, it cannot *also* be the case that recognition - as a mechanism designed to verify a judgment for preclusive purposes - has the primacy it would have under a recognition scheme similar to that at common law. This can be seen more clearly if we compare the double recognition scheme paradigm with those recognition schemes that only focus upon indirect rules of recognition at a single recognition stage[13].

Unlike the double convention scheme, single recognition schemes do not purport to govern the assumption of jurisdiction by the court originally seised of the matter. Nonetheless, such schemes *do* provide for the exercise of review or control at the recognition stage, in that the recognising court can refuse recognition if the jurisdiction assumed by the original court - although regular according to the national law of the original court - was exorbitant and/or inconsistent with the standard of jurisdiction

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[12] Cf. the recognition of foreign judgments at common law.

[13] Such schemes include not only the recognition schemes devised by national laws, such as the English common law scheme, but also various treaties providing for recognition and enforcement of judgments, including: bilateral arrangements (such as those facilitated, in England, by the 1920 Act or the 1933 Act; also see Article 55 for a list of bilateral Conventions in force prior to the Convention); and multilateral conventions (for example, the Hague Conference *Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*).

imposed by the given recognition scheme[14]. Importantly, too, an exercise of review or control at the recognition stage provides an opportunity to verify the *res judicata* status of the judgment by adopting recognition criteria which correspond with criteria definitive of a *res judicata*. Indeed, we have seen that just such an opportunity is taken by the common law, which uses the process of recognition to verify and establish the *res judicata* status of the foreign judgment as a prelude to according the judgment enforcement and/or preclusive effects. The implication is, therefore, that securing the *res judicata* or preclusive effect of the judgment (whether or not as a prelude to enforcement) is the underlying policy rationale for foreign judgment recognition according to single recognition schemes, such as the common law[15].

The underlying policy of the Conventions scheme, however, is different[16]:

> In order to facilitate the free circulation of judgments within the Community, and consistent with the application of direct rules of jurisdiction, Articles 5 through 30 set forth uniform rules of recognition based on the rebuttable presumption that all judgments are to be recognised and enforced without requiring special proceedings (Article 26). *The effect of this is eliminating the rendering [sic: it is suggested the author meant 'recognising'] court's national laws on procedural prerequisites to recognition.*

However, the fact that the Brussels and Lugano Conventions obviate the need for review and *res judicata* verification at the recognition stage by establishing a double jurisdiction and judgments scheme, is not to detract from the importance of policy objectives *other* than preclusion. Such advantages are clear from the report of the Working Committee that drafted the original Brussels Convention and which compared the direct and double convention model with that of indirect and single recognition, and concluded[17]:

> Legal certainty is most effectively secured by conventions based on direct jurisdiction since, under them, judgments are given by courts deriving their jurisdiction from the conventions themselves; however, in the case of conventions based on indirect jurisdiction, certain judgments cannot be recognised and enforced abroad unless national rules of jurisdiction coincide with the rules of the convention. Moreover, since it establishes, on the basis of mutual agreement, an autonomous system of international jurisdiction in relations between the Member state, the Convention makes it easier to abandon certain rules of jurisdiction which are generally regarded as exorbitant. Finally, by setting our rules of jurisdiction which may be relied upon as soon as proceedings are begun in the State of origin, the Convention regulates the problem of *lis pendens* and also helps to minimise the conditions governing recognition and enforcement.

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[14] Moreover, the common law can influence jurisdiction in other indirect ways; as through *forum non conveniens* principles governing stays of proceedings in England, and by means of anti-suit injunctions. But sovereignty constraints prevent the common law from stipulating - definitively and directly - which court should adjudicate on the merits of the case.

[15] For an examination of the policy bases underlying foreign judgment recognition see: von Mehren and Trautman "Recognition of foreign adjudications: a survey and suggested approach", 81 Harv L Rev 1601 (1968)

[16] Bartlett, Lee S., "Full faith and credit comes to the Common Market" (1975) 24 ICLQ 44, 56

[17] Report 1979 OJ C59/1 (hereafter "Jenard Report"), p7; see, also, the note to Member States, dated 22 October 1959, cited in Jenard Report, p3.

Likewise, the Hague Conference on Private International Law, which is presently drafting a world-wide jurisdiction and judgments convention, has suggested the following reasons for favouring a double convention that harmonises the rules of direct jurisdiction[18]:

> If we consider the needs of litigants in international litigation, we see that although it is vital to secure for a judgment obtained in any one country effects in one or more other countries, the first priority is to ascertain which court has international jurisdiction to adjudicate initially on the merits of the case. This, we believe, is by far the most important question for litigants. A claimant wants to be able to take action speedily, in a court close to him and whose rules are familiar to him, in order to protect the rights which he enjoys or thinks he ought to enjoy. As for the defendant, he does not want to have to defend the suit in a court far away from the centre of his personal or economic interests, and he wants the court dealing with the case to uphold his right to adversarial proceedings which respect to the fullest the right of defence. In our view, therefore, the issue is much more one of direct jurisdiction than of the recognition and enforcement of judgments.

There is no doubt that the advantages of the direct and double convention paradigm are considerable: litigants *should* be able to predict with a sufficient degree of certainty which court has jurisdiction to adjudicate in a dispute which will arise or has already arisen. But it remains the case that afterwards, too, litigants must benefit from the effects of the judgment *without* having to start again with cumbersome and complex proceedings[19]:

> Establishing jurisdiction over the defendant and choosing the appropriate law are only means to an end: the resolution of the legal dispute through a judgment. If it is final and on the merits, and if it was obtained in a fair proceedings, the judgment should put the matter to rest. In transboundary disputes, especially between parties from different states or nations, it is desirable at least in principle that it put the matter to rest not only in the forum state, but in other jurisdictions as well. ... The recognition of judgments is therefore the keystone of transboundary litigation.

In this respect, therefore, a recognition scheme that provides no mechanism for verifying whether a judgment is "final and on the merits"[20] and no provision as to the preclusive effects of foreign judgments[21], risks undermining the advantages that have presumably been secured. Certainly, when the Convention scheme is contrasted with the common law recognition scheme, it is this difference in attitude towards the *res judicata* status of the

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[18] Kessedjian, Catherine International Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Hague Conference on Private International Law, Preliminary Document No. 7 of April 1997, p4

[19] Reimann, Mathias Conflict of Laws in Western Europe: a guide through the jungle, Transnational Publishers Inc: New York, 1995, p139

[20] Although see fn10.

[21] Linke, Hartmut "Selected Problems Relating to *Lis Alibi Pendens* and the Recognition of Judgments", in Kohler and Tebbens (eds) Civil Jurisdiction and Judgments in Europe: Papers from Proceedings of Colloquium: Luxembourg, 11 & 12 March 1991, Butterworths: London, 1992, p178: "The State in which judgment was given determines the effects which it attributes to its judgments and the State in which recognition is sought decides which effects it will attribute to the foreign judgment within its territory. In this regard, there are two basic models: ... doctrine of equalisation of effects [and] doctrine of extension of effects. *An international treaty should make every effort to specify which of these two basic models it is following. Nothing is stated in the Brussels Convention in express terms*, although Mr Jenard, in the part of his report dealing with Article 26, came out unequivocally in favour of the doctrine of extension."

judgment which is most striking[22], especially if it is thought that to recognise a judgment means to respect it as a *res judicata*[23].

It may be the case, however, that the Brussels and Lugano Conventions answer these objections systemically, that is, by means of the entire process established by the Conventions. According to such an explanation, the preclusive effects of judgments recognised under the Convention scheme ought to be assumed to follow inexorably from the fact that the court first seised has taken jurisdiction according to the direct rules of jurisdiction. In other words, direct jurisdiction is treated as the only vital and preliminary condition to the effects which arise from the resulting judgment. Hence, by according automatic recognition to a judgment that has been rendered under the direct rules of jurisdiction, the effects of that judgment (whether enforcement or preclusive) must be seen as merely the natural extension of the jurisdictional competence of the rendering court.

Something of this has been alluded to by Kessedjian who, referring to the Brussels Convention, suggests[24]:

> It is because the court which has dealt with the merits of the case possesses jurisdiction (usually by virtue of the [Brussels] Convention, failing some mistake on the part of the court seised), that its judgment will, except in limited exceptional cases, take effect on the territory of all the other States Parties.

However, assuming that an English court must be satisfied that the Convention judgment relied on *is* a *res judicata* before it can preclude subsequent litigation in England, this systemic approach begs the question: How *else* do the direct rules and double nature of the Convention assist with the process of ascertaining that the judgment is a *res judicata* and thus capable of generating preclusive effects? It may be true, as Kessedjian observes above, that the *jurisdiction* of the rendering court will be verified by the grounds of direct jurisdiction set out in Title II of the Conventions. But once the original court has determined its right to proceed, there is virtually no opportunity for the recognising court to supervise the basis upon which the original court took jurisdiction *ex post facto* the rendering of the judgment[25], and no opportunity *at all* to verify the other criteria that define a *res judicata*, given that Title III contains no requirement that the judgment be

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[22] Jenard Report, p43: "[The Brussels Convention] system is the opposite of that adopted in numerous conventions, according to which foreign judgments are recognised only if they fulfil a certain number of conditions. Under Article 26 there is a presumption in favour of recognition, which can be rebutted only if one of the grounds for refusal listed in Article 27 is present".

[23] Furthermore, the direct rules of a double recognition scheme mask the different perceptions of the foreign judgment which the vagaries of each national state's recognition rules and practices once reflected; for such rules and practices revealed the perception taken of a foreign judgment by a given legal system and, in particular, the importance of *res judicata* as a condition.

[24] Kessedjian, Catherine International Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Hague Conference on Private International Law, Preliminary Document No. 7 of April 1997, p6

[25] In this respect the Conventions scheme departs from the approach used in the United States for sister-state judgments: see *Milliken v Meyer* 311 US 457 (1940); *McGee v International Life Insurance Co* 355 US 220 (1957); *Hanson v Denckla* 357 US 235 (1958)

final and conclusive or upon the merits[26]. Thus, if the only *res judicata* criterion in any sense systemically "checked" in the course of observing the direct rules and double nature of the Convention scheme is the requirement as to jurisdiction[27], it is difficult to see how the Convention *necessarily* secures for the recognising court in England a judgment that qualifies as a *res judicata*.

Moreover, even if the systemic argument is taken at its full face value, there is at least one powerful objection to according preclusive effects to a Brussels or Lugano Convention judgment simply because the court which has dealt with the merits of the case possessed jurisdiction according to the direct rules of the Convention. This objection derives from the unequal treatment that Article 4 of the Brussels and Lugano Conventions gives to those domiciled in non-contracting states vis-à-vis those domiciled in contracting states. The inequitable nature of Article 4 has been well criticised[28]. But the situation envisaged here is that a defendant domiciled in a non-contracting State may appear bound to suffer the preclusive effects of a Convention judgment, recognised against him automatically in circumstances where the Article 4 jurisdictional basis of that judgment might not otherwise have passed the scrutiny of a jurisdictional requirement required for *res judicata* purposes[29]. The problem is only compounded by the fact that the provisions in Title III do not allow the non-domiciliary who has had jurisdiction asserted against him under Article 4 even the opportunity to challenge jurisdiction at the recognition stage[30]. Thus, for this reason also, there is surely grave danger in assuming that a foreign judgment is to be accorded preclusive effects because of the simple and inexorable fact that the rendering court possessed jurisdiction according to the direct rules of the Convention.

Nonetheless, a systemic approach to the preclusive effects of judgments recognised under the Convention appears to be supported by three more features of the Convention recognition process: jurisdiction is not to be reviewed at the recognition stage[31] (other

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[26] However, to be enforceable in the recognising State the judgment must be enforceable in the original court and must have been served on the party against whom it is to be enforced: see Articles 31 and 41(1). In the case of a periodic penalty payment, the amount must have been finally determined by the original court: see Article 43. See fn10.

[27] Although recall that the question was asked in the context of common law recognition: Does jurisdiction in the international sense satisfy the *res judicata* requirement as to jurisdiction, or must there be further review of jurisdiction post-recognition so that the judgment can qualify as a *res judicata*? See Chapter Two, Part Two.

[28] Briggs and Rees, pp310-311; von Mehren, A. T. "Recognition and enforcement of sister-state judgments: reflections on general theory and current practice in the EEC and the US", 81 Columbia L Rev 1044 (1981), 1060

[29] Indeed, Smit argues that *generally speaking* foreign *in personam* judgments rendered against non-domiciliaries of the foreign forum should not be given binding effect, so the result that the Convention seems to entrench would, on his analysis, be deplorable: see Smit, Hans "International *Res Judicata* and Collateral Estoppel in the United States", 9 UCLA L Rev 44 (1962), 68.

[30] However, a contracting State is allowed by Article 59 to enter into an agreement with a third state that it will not recognise, against persons who are domiciled in that state, judgments in cases where jurisdiction was based on one of the grounds in Article 3, but this is hardly a satisfactory solution: see also fn81.

[31] Article 28. In unexceptional cases, this has the effect of precluding the issue of jurisdiction from being raised again - certainly (in any case) a subsequent court is bound by the findings of fact on which the court of the State of origin based its jurisdiction (Article 28, second paragraph). Cf. jurisdictional issue estoppel at common law: *Desert Sun Loan Corp v Hill* [1996] 2 All ER 847.

than in exceptional circumstances which we will note below[32]); recognition under the Conventions is virtually automatic[33]; and, thirdly, such automatic recognition is extended to *all* judgments within the scope of the Convention[34], regardless of their *res judicata* status, and with the only grounds for refusing to recognise such a judgment being those exceptional grounds specifically set out in the Convention[35].

It should be noted that it is fair to suggest that such judgments take *automatic* effect even though the Conventions do not expressly state that recognition is automatic. Indeed, this much is assumed by Jenard who states there is a rebuttable presumption that "judgments are to be recognised automatically"[36] because recognition[37]:

> does not require a judicial decision in the State in which recognition is sought to enable the party in whose favour the judgment has been given to invoke that judgment against the party concerned.

This notion of automatic recognition is affirmed by the Commission in its recent Proposal for a Council Regulation, 1999 foreshadowing the overhaul of the Conventions. Referring to "Article 33" of the proposed new Convention (to be the equivalent to the present Article 26, and in the same terms), the Commission states[38]:

> This article lays down the principle of automatic recognition. The consequence of this automatic recognition, founded on mutual trust between the member States' judicial authorities, is that the same proceedings cannot be recommenced in another member State.

In addition to the support it provides the "systemic" approach to preclusion, this notion of automatic recognition also reflects a difference in the understanding of "recognition" at common law. Recognition at common law implies an active assessment by the English court, and employing rules to resolve whether conclusive effect should be given the foreign judgment within England's juridical territory. Such rules of recognition were discussed in Chapter Two, Part Two; and we have argued that this represents the most efficient way to vindicate the preclusive effect of a foreign judgment precisely because the recognition rules are coextensive with the criteria used to define a *res judicata* at common

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32 See fn81.

33 Article 26; and see fns36-38.

34 Article 25

35 See fns77-81.

36 Jenard Report, p43

37 *ibid.* See, also, Droz, Georges A.L. Compétence judiciare et effets des judgements dans le marché commun, Libraire Dalloz: Paris, 1972, p273: "Les dispositions de la Convention relatives à la reconnaisance sont fondamentales. En effet, ce sont elles qui permettent de réaliser quant au fond la "circulation des jugements" dans la Communauté. Les règles de procédure instaurées pour l'exécution, si elles favorisent la circulation matérielle du jugement, seront en effet entièrement subordonnées aux règles de fond posées pour la reconnaissance. Il pourra y avoir reconnaissance sans exécution, alors qu'on ne pourra jamais obtenir l'exécution sans reconnaissance."

38 Proposal for a Council Regulation, August 1999

law[39]. But when we turn to the concept of recognition under the Conventions, the underlying meaning is different in a subtle but important respect[40]:

> The recognition of a foreign judgment takes place when the recognising court *accepts as binding* the determination of the rights and duties of the parties contained in the judgment. Enforcement takes place when the court obliges the defendant, if necessary by coercion, to obey the judgment. Consequently, a judgment cannot be enforced unless it is first recognised; but it may be recognised without being enforced. Examples of the latter are recognition for the purposes of set-off; recognition as establishing title to property; and recognition as a defence. [emphasis added]

It is no coincidence that recognition defined in terms of *accepting the judgment as binding* is similar to the systemic explanation of the way in which the Convention scheme secures the preclusive effects of its judgments. Nor is it a surprise to find a definition of "recognition" predicated upon the mutual acceptance of Convention judgments and reflecting "the close relationship between the Member States and their strong mutual confidence in each others' courts"[41]. Arguably what is implicitly, or subliminally, being advanced is the idea that recognition under the Conventions requires Member States to accord Convention judgments "full faith and credit" throughout the Convention territory as such judgments might have by law and usage in the rendering court from which they are taken[42]. Indeed, although there is no express "full-faith-and-credit" clause in the Brussels or Lugano Convention, it is suggested that the key recognition provision in the Conventions scheme - Article 26, paragraph 1 - is a close equivalent[43]. Thus[44]:

> Just as Title III of the Brussels Judgments Convention requires EC Member State courts to recognise and enforce judgments rendered elsewhere in the EC, the Full Faith and Credit clause [of the US Constitution] requires each State to extend recognition and enforcement to judgments rendered in the courts of US sister-States. Given the limited defences available under Title III, it is appropriate that the Brussels accord is also referred to as the "Full Faith & Credit Convention".

However, if *this* latter suggestion holds true - indeed, if it *is* inherent in the concept of recognition under the Convention that it involves *accepting* the foreign judgment as having

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[39] However, re-ignited by this suggestion is one of the criticisms kindled earlier, namely: if recognition rules correspond entirely with a recognising court's *res judicata* conception, then important choices as to the applicable preclusive law are, inevitably, pre-destined. See, further, fn46.

[40] Hartley, T. C., "The recognition of foreign judgments in England under the Jurisdiction and Judgments Convention", in Lipstein, K. (ed) Harmonisation of Private International Law by the EEC, Institute of Advanced Legal Studies (University of London): London, 1978, p105

[41] Lasok, D and Stone, P. A., Conflict of Laws in the European Community, Professional Books Limited: Abingdon, 1987, p295. See, also, Jenard Report: "a convention based on rules of direct jurisdiction as a result of the adoption of common rules of jurisdiction would allow increased harmonisation of laws, provide greater legal certainty, avoid discrimination, and facilitate the 'free movement' of judgments, *which is after all the ultimate objective*".

[42] Adapting the language of the statute that implements the Full Faith and Credit clause of the United States Constitution: 28 US Code §1738.

[43] See fn7. See also Reimann, Mathias Conflict of Laws in Western Europe: a guide through the jungle, Transnational Publishers Inc: New York, 1995, p139-144.

[44] Lookofsky, Joseph M., Transnational Litigation and Commercial Arbitration: a comparative analysis of American, European and International Law, Transnational Juris Publications Inc: Denmark, p534

the same conclusive effects as to causes of action and issues determined, and persons affected, as the judgment has *in the original country under its law* - then we may well have unmasked the approach to preclusion which the Convention scheme conceals but which it nonetheless implicitly requires a recognising court to adopt.

Moreover, if this analysis is valid - and especially when taken together with the observations about the systemic nature of the Convention - then the approach to preclusion suggested is that there ought to be an *extension* of the preclusive laws of the foreign rendering court, thus requiring an English recognising court to apply foreign law and foreign concepts of preclusion according to the doctrine of extension of effects[45]. By contrast, we have seen that if a judgment is recognised according to the common law the assumption is that an English court will *equalise* the preclusive effects of the foreign judgment - that is, the doctrine of equalisation of effects - by applying English concepts of preclusion, and thus treat the judgment for preclusive purposes *as if it were* an English judgment[46]; all on the footing that recognition at common law preordains the application of English concepts of preclusion[47].

But even if this analysis is valid, one can still question whether it *was* the intention of the framers of the Brussels Convention to address the complex laws of preclusion that exist across the community of Member States by *concealing* within the framework of the Convention an approach to preclusion that requires recognising courts to extend rather than equalise the effects of the foreign judgment; let alone whether such an intention is reflected in Article 293 of the Treaty of Rome[48], which provides:

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[45] It is useful to note that, whilst the common law has adopted the doctrine of equalisation of effects in respect of foreign judgments within the United Kingdom, 'equalisation' has also been the basis for according preclusive effects to intra-UK judgments: see the *Judgments Extension Act 1868*, now replaced by the 1982 Act, sections 18 and 19 and schedules 6 and 7.

[46] Something of this was seen in *Fennoscandia Ltd v Clarke* Court of Appeal, 18 January 1999 (unreported), where the English abuse of process rule was applied without considering the applicability of the similar rule in Delaware. Similarly, in *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241, the Court of Appeal took account only of English concepts of privity of interest without considering whether Irish law would have denied the effect given to the relevant Irish judgment by the English court.

[47] It has been suggested that the common law recognition scheme avoids the charge of failing to pay attention to whether the foreign court considers its judgment is *res judicata* because the "finality" criterion addresses this concern; however see fn39.

[48] Not that this has dampened the suggestion that the ultimate aim is a United States of Europe. Thus the spectre has been raised by the argument presently being considered, together with other arguments which suggest that the degree of co-ordination of civil judgment recognition is one manifestation of the extent of integration of member States into a federated union, and thus a "healthy" sign of intra-federation relations. These arguments rest on the idea that the member States of EU and EFTA are "sister states", which itself is a notion (as is full faith and credit) that is borrowed - not insignificantly - from the *United States* of America: see Bartlett, Lee S., "Full faith and credit comes to the Common Market: an analysis of the provisions of the Convention on jurisdiction and enforcement of judgments in civil and commercial matters" (1975) 24 ICLQ 44; von Mehren, Arthur "Recognition and enforcement of sister-state judgments: reflections on general theory and current practice in the European Economic Community and the United States" 81 Columbia LR 1044 (1981); Fletcher, Ian F. Conflict of Laws and European Community Law (with special reference to the Community Conventions on private international law), North-Holland Publishing Co: Amsterdam, 1982, especially pp8, 45, 48-49, 133-138; Brilmayer, Lea "*Res judicata* and multi-state integration" 82 Michigan LR 892 (1984); Hay, Peter "The case for federalising rules of civil jurisdiction in the European Community" 82 Michigan LR 1323 (1984); Lasok, D and Stone, P. A., Conflict of Laws in the European Community, Professional Books Limited: Abingdon, 1987, p289-290; Stone, Peter The Conflict of Laws, Longman Group Ltd: London, 1995, p307; Reimann, Mathias Conflict of Laws in Western Europe: a guide through the jungle, Transnational Publishers Inc: New York, 1995, chapter 7. Indeed, could it be simply a matter of time before the European Court of Justice

> Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals ... the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.

Moreover, the fact that the actual provisions of the Convention are silent on the specific question as to the preclusive effects of Convention judgments ought reinforce the caution that the analysis which has been "unmasked" in this section is speculative[49]. Certainly this silence is in contrast to the Hague Conference on Private International Law, which has sought to make more explicit the scope of preclusive effects within the framework of the world-wide convention that it is drafting[50]:

> Except in the United States, the question is rarely raised of the law applicable to the extent of the effects of foreign judgments. *However, we think this is a very important question, which is too often concealed behind a procedural description of the issues of recognition and enforcement of judgments.* It is in fact standard practice to argue that only the State addressed has the right to define the rules applicable to the recognition and enforcement of foreign judgments on its territory. This is true of the procedure, the conditions for the control of the foreign judgment, and the list of the elements open to control. It will not necessarily be true of the extent of the effects given to foreign judgments. Thus it is said, in some legal systems, that the foreign judgment cannot have more effects in the State addressed than in the State of origin. [51]

In any case, before we consider how an English court *should* attribute preclusive effects to judgments recognised under the Brussels and Lugano Conventions - and whether, indeed, they should proceed according to the doctrine of extension of effects or the doctrine of equalisation of effects (or, perhaps, some combination of the two[52]) - we must consider in more detail the actual recognition provisions contained in the Conventions.

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pronounces upon the preclusive laws that a national court ought apply to a judgment once recognised under the Convention? For arguments *against* 'Europeanising' tendencies such as this: see Hartley, T. C. "The European Court, judicial objectivity and the constitution of the European Union", (1996) 12 LQR 95; and, in particular, Hartley T. C. "Unnecessary Europeanisation under the Brussels Jurisdiction and Judgments Convention: the case of the dissatisfied sub-purchaser" (1993) 18 ECR 506. From the tenor of this latter article, one might suppose the disparate nature of the various national laws of preclusion, and the complexity involved, would argue against efforts to 'Europeanise' the laws of preclusion; given that it would be unlikely that a European rule could be crafted finely enough to take account of differences in areas such as issue estoppel, mutuality of parties, and doctrines of abuse of process.

[49] Indeed, if this were the common law, one might suppose that the law would invoke the need for caution: see *Carl Zeiss (No 2)* [1967] 1 AC 853

[50] Kessedjian, Catherine International Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Hague Conference on Private International Law, Preliminary Document No. 7 of April 1997, p92

[51] However, it should be noted that the Preliminary draft Convention on jurisdiction and the effects of judgments in civil and commercial matters, adopted provisionally on 18 June 1999 by the Special Commission of the Hague Conference on Private International Law, states in its principal recognition provision that: "a judgment rendered in a Contracting State on the basis of a ground of jurisdiction provided for in Articles 3 to 14 - (a) shall be recognised in the State addressed if it has the effect of *res judicata* in the State of origin"; and includes, in addition, a provision that: "The party seeking recognition or applying for enforcement shall produce - ... (b) all documents required to establish that the judgment is *res judicata* in the State of origin or, as the case may be, is enforceable in that State". Thus, suppose a judgment has the effect of *res judicata* in the State of origin, but that State does not attribute issue estoppel or does not require mutuality of parties? What preclusive effects are available in the State addressed if they do recognise issue estoppel or do require mutuality of parties?

[52] Envisaged in this third alternative is something analogous to the old double-actionability choice of law rule in tort: see *Boys v Chaplin* [1971] AC 356. However, Linke suggests that a *res judicata* imported under the Conventions presents the recognising court with a dilemma only as between the two doctrines themselves: see Linke, Hartmut "Selected Problems Relating to *Lis Alibi Pendens* and the Recognition of Judgments", in Kohler and Tebbens (eds) Civil Jurisdiction and Judgments in Europe: Papers from Proceedings of

3. The recognition provisions in Title III of the Conventions

We have suggested that the direct rules of jurisdiction in Title II - which primarily uphold the principle of *actor sequitor forum rei*[53] - enable the Conventions to admit a wide variety of judgments *without* subjecting them to any formal recognition criteria[54]. This purpose is achieved by the provisions in Title III which simplify the procedure by which a Convention judgment can be accepted as binding[55].

The simplified approach to recognition is reinforced by Article 25 which secures recognition for *any* judgment given by a court or tribunal of a Contracting State[56], whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court[57].

In other words, provided the judgment is an original decision[58], and has not been obtained *ex parte* without notice to the defendant[59], then it falls within Article 25 regardless of its form[60] or the kind of procedure applied[61], and notwithstanding that it might be: non-final[62]; order maintenance[63], award costs[64], require a periodic payment by way of a

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Colloquium: Luxembourg, 11 & 12 March 1991, Butterworths: London, 1992, p178: "either the same effects are conferred on the foreign judgment as are conferred on a corresponding national judgment (doctrine of equalisation of effects) or the judgment is accepted with the original effects which it would have in the State in which it was delivered (doctrine of extension of effects)."

[53] Thus, subject to the rules that grant exclusive jurisdiction over matters *in rem* (see Articles 16 and 19), a defendant domiciled in a Contracting State is protected by the domicile principle (Article 2), by the abolition of exorbitant bases of jurisdiction (Article 3), by rules that clearly circumscribe the bases of jurisdiction that derogate from the domicile principle (Sections 2 to 6 of Title II), and by the natural rights protection contained in Article 20. As we have seen, defendants domiciled in non-Contracting States are more vulnerable: a judgment rendered by a court of a Contracting State can be automatically recognised and enforced under the Convention as has been described, but the defendant is without the safeguards contained in Title II and can be subject to the jurisdictional provisions (including exorbitant ones) in the law of that Contracting State (Article 4). For these defendants, the limited grounds contained in Title III are but slender protection.

[54] All that is required of the litigant is the production of an authentic copy of the judgment or, in the case of a default judgment, the original or a certified true copy of the document which establishes that the party in default was served with the document instituting the proceedings or with an equivalent document: Article 46.

[55] Again, provided the judgment falls within the material scope of the Convention: see fn2.

[56] This is intended to cover all courts and tribunals, provided the body in question administers justice in the name of the state (therefore arbitral awards would be excluded) and it must be of a judicial nature (therefore an order of an administrative authority would not be recognised); nonetheless, the judgments of subordinate courts and specialised tribunals (provided they are judicial in nature) would be included: see fn3.

[57] This includes "any judgment", regardless the nationality of the parties or whether they are domiciled within the Community. For the difficulty this poses defendants domiciled in non-Contracting States: see fn53.

[58] And not an order declaring the enforcement of a non-Contracting State judgment (*exequatur* upon *exequatur*), nor an order court declaring the enforcement of an award: see *Owens Bank v Bracco SpA* [1994] ECR I-117; *Marc Rich & Co v SA Impianti* [1991] ECR I-3855

[59] *Denilauler v SNC Couchet Frères* [1980] ECR 1553; *EMI Records v Modern Music Karl-Ulrich Walterbach GmbH* [1992] 1 QB 115

[60] Eg. judgment, court order, writ of execution, decision fixing costs.

[61] Eg. ordinary, preliminary or summary proceedings.

[62] Hence recognition is accorded to interlocutory orders, other than those on the conduct of proceedings: Jenard

penalty[65]; or operate other than by sounding in damages to the tune of a fixed money sum[66].

Indeed, Schlosser attests that Article 25[67]:

> emphasises in terms which could hardly be clearer that every type of judgment given by a court in a Contracting State must be recognised and enforced throughout the rest of the Community. ... [and it reflects the fact that the provisions in Title III] are in general designed to cover only court judgments which either determine or regulate the legal relationships of the parties. An answer to the question whether, and if so which, interlocutory decisions intended to be of procedural assistance fall within the scope of the 1968 Convention cannot be given without further consideration.

As for recognition itself, the key provision is Article 26:

> A judgment given in a Contracting State shall be recognised in the other Contracting States without any special procedure being required.
>
> Any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedures provided for in Sections 2 and 3 of this Title, apply for a decision that the judgment be recognised.
>
> If the outcome of proceedings in a court of a Contracting State depends on the determination of an incidental question of recognition that court shall have jurisdiction over that question.

It is clear, as regards recognition in general, that Article 26 does not require any special procedure[68]. But whilst this principle of automatic recognition is laid down in paragraph one, a distinction is made by paragraphs two and three between the case where an interested party may use the procedure for enforcement to apply for a declaration that

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Report, p42; Report 1979 OJ C59/71 (hereafter "Schlosser Report"), p127 (para187). Likewise, certain provisional, including protective, measures (such as *Mareva* injunctions) may be within the definition of "judgments" in Article 25 provided they were not obtained *ex parte*, but not if they result from proceedings which by their very nature neither allow the defendant to state his case nor give him an opportunity to do so: see *Denilauler SNC v Couchet Frères* [1980] ECR 1553. This is consistent with others provisions in Title III concerned with service and compliance with natural justice (eg. Articles 27(2), 46(2), 47(1)). These form some of the safeguards which are used to justify the liberal recognition and enforcement provisions established by Title III. In any event, recourse to provisional, including protective, measures is available under Article 24.

[63] Other than foreign maintenance orders the recognition of which fall under separate conventions preserved by Article 57, and provided that, if it is a "maintenance order", it is not within Article 1(1): *Van den Boogaard v Laumen* [1997] ECR I-1147

[64] Article 25 expressly includes orders for costs, and this may include *astreinte* orders decreeing a periodic payment by way of penalty for non-compliance with court orders, provided the sum due has been finally determined as required by Article 43. However, it is not clear whether an order requiring provision for security for costs falls within Article 25 or Article 24: see *Bank Mellat v Hellinki* [1983] 3 All ER 428, 434

[65] Enforceable only if the amount of the payment has been finally determined by the courts of the State of origin: Article 43

[66] Cf. the common law and under the 1933 Act, which only enforce foreign money-judgments. Title III, by contrast, provides for the recognition of decrees of specific performance, injunctions or other final or interlocutory orders of a non-money nature.

[67] Schlosser Report, p126 (para184)

[68] See fn36-38.

the judgment is recognised, and the more general case where recognition is incidental to the proceedings.

In those cases where an interested party makes recognition the principal issue and has the question determined according to Article 26, paragraph two, the same procedure as for enforcement is used. But whilst, in such proceedings, the court or tribunal may take into account grounds for refusing recognition if they appear from the judgment or are known to the court, it may not make enquiries to establish whether such grounds exist, as this would not be compatible with the summary nature of the proceedings. Only if further proceedings are instituted by way of appeal lodged pursuant to Article 36 can the court examine whether the requirements for recognition have been satisfied[69]. In either case, it cannot be said that this provides the recognising court with an opportunity to review or control the foreign judgment, still less verify its status as a *res judicata.*

(At this point, it is well to note the special procedure for enforcement laid down by Articles 31-45, given that the application for a declaration that the judgment be recognised uses the same procedure (although, if enforcement is sought, this procedure is obligatory and exclusive: a judgment cannot be enforced by any other means[70]). In essence, the enforcement procedure involves an *ex parte* application to the court for a declaration (or, in the case of enforcement, an enforcement order). If this is granted, the defendant is informed and there lies an appeal *inter partes* under Article 36 (as mentioned above), and then a single further appeal on a point of law only. The advantage of the *ex parte* order is that the applicant can take protective measures against the respondent's assets, but definitive recognition (or enforcement) is delayed until the appeal *inter partes* has become time-barred or has been disposed. There are also provisions as to legal aid at the *ex parte* stage, and for documentary evidence to be produced by the applicant. Again, however, the enforcement procedure provides no opportunity to verify the *res judicata* status of the Convention judgment, other than to ensure its enforceability - which, as we will see, has incidental implications for cause of action preclusion.)

Nonetheless, in most cases of recognition for preclusive (as opposed to enforcement) purposes, recognition of the judgment will simply be an incidental matter as envisaged by Article 26, paragraph three. And - as per Article 26, paragraph one - any court or tribunal that hears the proceedings shall recognise the judgment without any special procedure[71]. This means, according to the Schlosser Report, that[72]:

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69 *ibid*, p127 (para191)

70 *De Wolf v Cox* [1976] ECR 1759. Furthermore, in order for a judgment to be enforced under the Convention, it must first be recognised: see opinion of Advocate General Mayras in *De Wolf* and note by Hartley, T. C. (1977) 2 ECR 146. See also: Hartley T. C., Civil Jurisdiction and Judgments, 1984, p82; Droz, Georges A.L. Compétence judiciare et effets des judgements dans le marché commun, Libraire Dalloz: Paris, 1972, p273

71 This may correspond with the "ambiguous" notion "recognition by operation of law": see the description thereof by Kessedjian, Catherine Synthesis of the work of the Special Commission of Mach 1998 on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Hague Conference on Private International Law, Preliminary Document No. 9 of July 1998, p26: "this expression is used simply to refer to those situations in which no special procedure is required for the recognition of a foreign judgment. Nevertheless, the existence of certain conditions, which are precisely defined in the [Hague] Convention [of 19 October 1996], must be verified before recognition can be granted if there is any challenge thereto. *In this sense, recognition by operation of law simply means that any court of the State addressed that is requested to*

> [e]very court and public authority must take account of judgments which qualify for recognition, and must decide whether the conditions for recognition exist in a particular case, unless this question has already been determined under Article 26, second paragraph. In particular, every court must itself decide whether there is an obligation to grant recognition, if the principal issue in a foreign judgment concerns a question which in the fresh proceedings emerges as a preliminary issue

Unfortunately this says less than it purports to say, for one might have hoped that Schlosser, let alone the Conventions, might have indicated the scope and extent of the preclusive effects, and the applicable law, to be given a Convention judgment upon recognition. Instead these questions remain unaddressed or dealt with only implicitly or systemically. The only observation Schlosser makes is one that provides no solution[73]:

> The effects of a court decision are not altogether uniform under the legal systems obtaining in the Member States of the Community. A judgment delivered in one State as a decision on a procedural issue may, in another State, be treated as a decision on an issue of substance. The same type of judgment may be of varying scope and effect in different countries. In France, a judgment against the principal debtor is also effective against the surety, whereas in the Netherlands and Germany it is not. The Working Party did not consider it to be its task to find a general solution to the problems arising from these differences in the national legal systems.

As an example, suppose a French judgment determines a cause of action such that it could not be raised again in a French court. It is not problematic to conclude, given the basic principles of recognition under the Conventions, that Article 26 requires a recognising court to accord full faith and credit as necessary to preclude further litigation on the same cause of action. But suppose the French court has also determined as part of the judgment an issue, say: the applicable law of the contract, or that a key document was delivered. The decision on that issue, though final and conclusive in the French court, might not operate as an issue estoppel according to French law. But if English law would recognise that issue determination as founding issue estoppel, should the French views of issue estoppel prevail by reason of being given full faith and credit along with the judgment (doctrine of extension of effects), or are preclusive effects that relate to *other than* the entire judgment upon a cause of action to be determined without the Convention, and thus left to national laws? As Schlosser observes in the passage above, these problems were not solved by the Working Party.

However, this problem has been considered at the Hague Conference. Preliminary Document No 7 suggests[74]:

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declare a foreign judgment res judicata *may, without any special procedure, verify the existence of the conditions for recognition of the decision invoked and recognise that decision if those conditions are met.* It will also have to be decided whether review should possibly be made less stringent, apart from the requirement that the decision be executory in nature, which is not necessary for *res judicata*." [emphasis added]

[72] Schlosser Report, p127 (para189)

[73] Schlosser Report, p127-128 (para191). If anything, the tenor of this paragraph would seem to argue against the issue preclusive effect of an interlocutory judgment on a procedural and non-substantive issue, for it suggests that the recognition process of the Convention is aimed at the determination of substantive rights (with the exception of provisional or protective measures): cf. *Desert Sun Loan Corp v Hill* [1996] 2 All ER 847

[74] Kessedjian, Catherine International Jurisdiction and Foreign Judgments in Civil and Commercial Matters. Hague Conference on Private International Law, Preliminary Document No. 7 of April 1997, p94

> [I]t must be possible to admit that the State addressed may give factual effect, title effect, probatory effect or mere recognition to elements in a foreign judgment, by virtue of its own law, even if such effects are not known abroad. Such questions do not bring into question the judgment as such, but only some of its constituent elements, certain aspects of the facts which underlie it, certain arguments which may be useful in the legal reasoning applied by a court which has to adjudicate in another case. It would be a good thing if the [proposed Hague] Convention could take a position on these issues, which are too often ignored and which can give rise to litigation or, at least, if the Explanatory Report states clearly the scope for manoeuvre left to State Parties.

That Preliminary Document then suggests that, upon recognition[75]:

> The extent of the effects of *res judicata* on claims which could have been, but have not been made abroad must depend on the law of the State of origin ... [and] ... Effects with regard to third parties, whether application may be made to vacate judgment or other effects of *res judicata* in respect of persons who are not parties *stricto sensu* to the foreign proceedings, but are represented in practice or by virtue of the law, must be appraised in the light of the law of the State of origin. [[76]]

But such suggestions find no parallel in Title III of the Conventions.

Of the remaining provisions in Title III: Articles 27, 28 and 34 specify a number of exceptions to recognition which relate to public policy[77], lack of due and timely service[78], irreconcilability with another judgment[79], incidental questions concerning certain excluded matters[80], and, in certain exceptional cases only, jurisdiction[81]. Article 29 and Article 34(3) emphasise that under no circumstances may the substance of the judgment be reviewed. And Article 30 deals with appeals in the original country. We have seen already

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[75] *ibid*

[76] Note, however, that the Preliminary draft is yet to clarify fully what law applies in these circumstances: see fn51.

[77] Articles 27(1) and 34(2)

[78] Articles 27(2) and 34(2)

[79] Articles 27(3), 27(5) and 34(2)

[80] Articles 27(4) and 34(2)

[81] Jurisdictional review is prohibited except in three cases; and in the first two exceptional cases, the English court, in reviewing jurisdiction, is bound by the findings of fact on which the original court based its jurisdiction:

(i) where the original action concerned an insurance or consumer contract, or a matter of exclusive jurisdiction, the enforcing court must refuse enforcement if the original court assumed jurisdiction contrary to Articles 7-16 of Title II: see Articles 28(1) and 34(2);

(ii) where the United Kingdom has entered into a convention on recognition and enforcement with a third State (eg. Canada: see SI 1987/486 as amended by SI 1995/2708; or Australia: see SI 1994/1901), and has thereby assumed an obligation not to recognise judgments given in other Contracting States against defendants domiciled or habitually resident in the third State, in cases where the judgment could only be founded on an excessive ground specified in Article 3(2), other than the presence or seizure of property related to the action, the English court must refuse enforcement accordingly: see Articles 28(1), 34(2) and 59; and s9(2) 1982 Act;

(iii) by a transitional provision: see Article 34(3).

that Articles 31-45 establish the procedure for enforcement[82]: this procedure is subject to the same exceptions in Articles 27 and 28 as apply to recognition, with the additional requirement that the judgment must be enforceable in the original country[83].

Of these remaining provisions, it is well to note the following about Articles 27(3) and 27(5).

In Article 27(3), the Convention judgment will not be recognised if it would be irreconcilable with an *existing*[84] English judgment that has rendered the subject matter *res judicata*, and to be irreconcilable in the context of a refusal to recognise, the two judgments must have "mutually exclusive legal consequences"[85].

Similarly, Article 27(5) deprives a Convention judgment of recognition in England in circumstances where it would be irreconcilable with an earlier judgment given in a *non-contracting State* involving the same cause of action and parties, provided that this latter judgment has or will fulfil the conditions necessary for its recognition in England.

However, whilst both provisions deal with the preclusive effects of judgments, neither provision contemplates the paradigm which this thesis is considering; for this thesis is not concerned with a contest between a Convention judgment that is subsequently recognised in England and an existing *res judicata* (whether rendered by an English court or a court of non-contracting State), but with the preclusive effect of a Convention judgment in subsequent *proceedings* in England where the English proceedings have not yet reached a final and conclusive judgment[86].

For a similar reason, it cannot be said that the provisions in Articles 21 and 22 - which appear in Title II, Section 9 and deal, respectively, with *lis alibi pendens* and related actions - *directly* assist the enquiry that an English court must make when attempting to assess the preclusive effect of a Convention judgment; for - again - the paradigm under review by this thesis assumes that any *lis alibi pendens* or related actions contest will necessarily have been resolved, if not by those provisions, then by virtue of the rendering

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[82] Although see: *Deutsche Genossenschaftsbank v Brasserie du Pecheur* [1985] ECR 1981: "The Convention merely regulates the procedure for obtaining an order for the enforcement of foreign enforceable instruments and does not deal with execution itself, which continues to be governed by the domestic law of the court in which execution is sought, so that interested third parties may contest execution by means of the procedures available to them under the law of the State in which execution is levied".

[83] See fn26.

[84] It does not matter that the English judgment was rendered before or after the Convention judgment, provided it has come into existence as a *res judicata* prior to the recognition of the Convention judgment: cf. Article 27(5). Thus, by giving priority to the English judgment, regardless of the order in which the judgments were given, Article 27(3) is similar to the position under traditional English law: see *Vervaeke v Smith* [1983] 1 AC 145.

[85] *Hoffmann v Krieg* [1987] ECR 645. See Byrne, Peter The EEC Convention on Jurisdiction and the Enforcement of Judgments, Round House Press: Dublin, 1990, p121: "[Article 27(3)] does not merely relate to *res judicata* ... it is necessary for the irreconcilability contemplated by Article 27(3) to be determined by reference to the structure of the legal system of the State of enforcement".

[86] A similar study has considered this question from the perspective of the Italian courts: see Miele, Alberto La Cosa Giudicata Straniera, Cedem: Padova, 1989.

of the Convention judgment which has subsequently become the subject of recognition in England[87].

Thus, it would seem that *no* provision in the Conventions directly and expressly addresses the problem of whether recognition entails equalising or extending the preclusive effects of the judgment[88]; let alone how an English court verifies the *res judicata* status of the Convention judgment in order to attribute preclusive effect in subsequent proceedings in England, especially (as to the latter) given that: jurisdictional review is prohibited[89], it matters not that the judgment is final and conclusive[90], and no account is made of the requirement that the judgment be on the merits[91]. It remains, therefore, to attempt to show how an English court might attribute preclusive effects to a Convention judgment so that such a judgment can preclude subsequent proceedings in England.

4. Recognition of a Convention judgment for preclusive purposes

Although establishing the *res judicata* status of a foreign judgment is cardinal to the operation of preclusive pleas in England, it would seem from the above discussion that the Convention recognition scheme is not as solidly founded upon the assumption that to recognise a foreign judgment means to respect that decision as a *res judicata*, in contrast

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[87] However, it could be argued that the meaning of "same cause of action" and "same parties" which is provided by the jurisprudence on Article 21 and/or Article 22 may be of use: see *Gubisch v Palumbo* [1987] ECR 4861; *The Tatry* [1994] ECR I-5439; *Drouot Assurances SA v Consolidated Metallurgical Industries* [1999] QB 497. See, also, the article on *Drouot* by Peel, W. E. in 1999 Yearbook of European Law (forthcoming): "The Convention does, of course, deal with the problems of *res judicata* in Article 27(3) under which recognition will be withheld for a judgment which is irreconcilable with a judgment in the state in which recognition is sought, but the whole point of Article 21 is to deal with this problem at an earlier stage and prevent it being necessary to invoke Article 27(3)."

[88] See fn21.

[89] See fn81.

[90] Indeed, a non-final judgment must be recognised and enforced, although this is subject to the proviso that it cannot have greater force in the recognising country than it has in the rendering country: see Droz, Georges A.L. Compétence judiciare et effets des judgements dans le marché commun, Libraire Dalloz: Paris, 1972, p306.

[91] Hartley, T. C., "The recognition of foreign judgments in England under the Jurisdiction and Judgments Convention", in Lipstein, K. (ed) Harmonisation of Private International Law by the EEC, Institute of Advanced Legal Studies (University of London): London, 1978, p112: "A serious problem is raised by the English doctrine that a foreign judgment will not be recognised, for example as a defence, unless it is 'on the merits' .... It is suggested, therefore, that under the Convention the English court must recognise the foreign judgment as deciding those issues which it purports to decide."

to recognition at common law or under single recognition conventions[92]. Thus Jenard says of the Convention scheme[93]:

> It will immediately be noticed that ... it is not necessary that the foreign judgment should have become *res judicata* .... The words '*res judicata*' which appear in a number of conventions have expressly been omitted, since judgments given in interlocutory proceedings and *ex parte* may be recognised, and these do not always have the force of a *res judicata.*

At the same time, we have also considered the argument that recognition means accepting the decision as binding or according the judgment full faith and credit. Thus, in *De Wolf v Cox*[94] it was suggested a Convention judgment will[95]:

> *automatically* have the force of *res judicata* throughout the territory of the Community, with effect from the date on which judgment was given in the first State [such that] .... the authority of the foreign judgment prevents a *fresh* application concerning the *same* subject-matter being brought by the *same* parties before the courts of another Contracting State. [emphasis added]

Support for this opinion was derived from Droz, in whose name it was stated[96]:

> [t]he Convention establishes the distinction between recognition and enforcement. *Recognition gives the foreign judgment the force of res judicata.* Enforcement consists in giving the foreign judgment enforceability in addition. [emphasis added]

Unfortunately, in addition to this apparent paradox, it is all too clear from the overview of the recognition provisions that the Conventions do not indicate how an English court can be sure that a judgment in a given case is a *res judicata*. Nor does it indicate which law

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[92] Beaumont, Paul R. Anton & Beaumont's Civil Jurisdiction in Scotland, 2nd ed, Sweet & Maxwell: Edinburgh, 1995, p183-184: "The relevant provisions of these [single] conventions generally state that the recognised decision should have in the other State the force of *la chose jugée* or *res judicata*. These words are omitted in Article 26 because ... the Convention applies to interlocutory decisions. It is thought, however, with Droz, that the omission of these words has little practical significance. The recognition of a judgment implies, to borrow the language of section 8(1) of the 1933 Act that it 'shall be recognised as conclusive between the parties thereto in all proceedings founded upon the same cause of action and may be relied on by way of defence or counter-claim in any such proceedings'."

[93] Jenard Report, p44; p43. Cf. the Preliminary draft Convention on jurisdiction and the effects of judgments in civil and commercial matters, adopted provisionally on 18 June 1999 by the Special Commission of the Hague Conference on Private International Law: see fn51. See, also, Droz, Georges A. L. Compétence judiciaire et effets des jugements dans le marché commun, Libraire Dalloz: Paris, 1972, p275, fn2: "Le Rapporteur [Jenard] explique que les mots "autorité de chose jugée" ont été expressément omis étant donné que sont susceptibles d'être reconnues les décisions provisoires et les décisions reconnues en matière de juridiction gracieuse, lesquelles n'ont pas toujours autorité de chose jugée. A vrai dire, il semble qu'il y ait confusion dans l'esprit du Rapporteur entre autorité de chose jugée et force de chose jugée. L'absence de référence à l'autorité de chose jugée peut s'expliquer plus simplement par la généralisation dans les traités bilatéraux et multilatéraux de la notion de reconnaissance qui implique bien cette autorité et qui a de moins en moins besoin d'être précisée."

[94] [1976] ECR 1759

[95] *ibid*, 1772-1773 (Advocate General Mayras)

[96] *ibid*

governs the preclusive effects[97]. Schlosser appears to suggest it is a matter for national law[98]; whilst Jenard would seem to favour the doctrine of extension of effects[99]:

> recognition must have the result of conferring on judgments the authority and effectiveness *accorded to them* in the State in which they were given. [emphasis added]

Nonetheless, at this point it is useful to note an observation made by Hartley when likewise faced with an absence of a general consensus as to the detailed application of a Convention principle (in that case, the concept of a "civil and commercial matter"). He suggested[100]:

> In considering this problem it should be borne in mind that legal concepts do not exist in a vacuum: they exist in order to fulfil a particular function in the legal system of a particular country and their nature is determined not only by logic but also by the historical accidents and practical needs of that system.

The same may be true of the concept of preclusion under the Conventions. Moreover, since - as was noted in Chapter One - the Convention scheme has its own strengths and weaknesses in respect of each of the preclusive pleas in particular, it may be that the appropriate doctrinal response will vary according to the preclusive plea in question. For this reason we will consider each of the categories of preclusion in turn.

(a) Cause of action preclusion

One of the strengths of the Convention scheme is that it does not suffer from the illogical non-merger rule that bedevils foreign judgment cause of action preclusion at common law[101].This removes an unnecessary complication - an "historical accident"[102] - from what is otherwise the simplest type of preclusion. Indeed, because cause of action preclusion simply turns on whether a cause of action has been adjudged to exist (or not exist), a *Convention* judgment to that effect which qualifies for recognition under Article 26 should, quite properly, be capable of founding a plea of cause of action estoppel or former recovery in subsequent proceedings in England without any special procedure.

Thus, in all such cases of cause of action preclusion, a Convention judgment which qualifies for recognition should be given the same authority and effectiveness before the

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97 The suggestion that the Convention *should* make provision has been argued above, but see, particularly, fns21, 50, 74, 75.

98 See fn73.

99 Jenard Report, p43. Jenard's assertion would appear to have been confirmed by the decision in *Hoffmann v Krieg* [1988] ECR 645: see fns103-110.

100 Hartley, T. C., "The recognition of foreign judgments in England under the Jurisdiction and Judgments Convention", in Lipstein, K. (ed) Harmonisation of Private International Law by the EEC, Institute of Advanced Legal Studies (University of London): London, 1978, p106

101 See Chapter Two, Part One

102 See fn100

English court as it has in the State of origin[103]. In other words, the resolution of the existence or otherwise of a cause of action is so fundamental that an English court need not call in aid its own concepts of preclusion to make sense of the judgment, but should with sufficient confidence accept the Convention judgment as binding, in order to facilitate the free movement of judgments. In this respect, the European Court of Justice has confirmed the Jenard assertion[104] that the doctrine of *extension* of effects properly supplies the laws of preclusion, at least in cases where an *enforceable* judgment has thereby rendered a cause of action *res judicata*[105]:

> A foreign judgment which has been recognised by virtue of Article 26 of the Convention must in principle have the same effects in the State in which *enforcement* is sought as it does in the State in which judgments was given. [emphasis added]

This aspect of the decision appears also to be affirmed in *The Tjaskemolen (No 2)*[106] where the English court looked to Dutch law to determine whether the effects of a Dutch order releasing a vessel from arrest was intended to have the effect of operating to prevent its rearrest elsewhere[107].

In particular, these decisions support the view that the recognising State must follow the law of the original country in determining what claims are precluded by the judgment and, indeed, what persons are bound by it[108]. In support of the alternative view, it has been argued[109] that the extension of effects doctrine should be qualified so that a foreign judgment is not given *more* effects in the State where enforcement is sought *than* national judgments of the same type, this parity being achieved at the level of the procedural rules governing execution, which continue to be governed by national law. But the implication of the Court's decision in *Hoffmann* is that such parity can not be achieved by lessening the effects of the foreign judgment below that which it has in the State of origin - in other words, the doctrine of extension. Clearly the point is controversial and it remains to be settled by the European Court[110]; however it is suggested that - if Article 26 obliges

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[103] Although this leaves open whether an foreign issue determination as might found an issue estoppel (not to mention a plea of abuse of process) might not be guided by the doctrine of equalisation. We will discuss this further, below.

[104] See fn99.

[105] *Hoffmann v Krieg* [1988] ECR 645, 671. This principle was also accepted by the German Supreme Court, in the context of a bilateral convention between Germany and Switzerland, in *Re the Enforcement of a Swiss Maintenance Agreement* [1988] ECC 181.

[106] [1997] 2 Lloyd's Rep 476

[107] *ibid*, 478-479 (Clarke J): "On the contrary it is, in my judgment, plain that he was considering only whether to order the release of the vessel from arrest in the proceedings in Holland. It seems to me to be almost inconceivable that he intended that his order should have any effect in any jurisdiction other than his own".

[108] Stone, Peter Civil Jurisdiction and Judgments in Europe, Longman: New York, 1998, p152

[109] Schockweiler, Judge "Reasons for refusing to recognise and enforce a judgment" in Kohler and Tebbens (eds) Civil Jurisdiction and Judgments in Europe: Papers from Proceedings of Colloquium: Luxembourg, 11 & 12 March 1991, Butterworths: London, 1992, p168.

[110] Beaumont, Paul R. Anton & Beaumont's Civil Jurisdiction in Scotland, 2nd ed, Sweet & Maxwell: Edinburgh, 1995, p184.

anything - it is that a court recognise *entire judgments and orders*, whether for enforcement or preclusive purposes, by *extending* the cause of action preclusive (or enforcement) effect which the rendering court has imparted the judgment.

Thus, if we consider the most obvious paradigm case involving cause of action preclusion - namely, where a defendant merely wishes to prevent his opponent from relitigating the same cause of action a second time in England - then, typically the court will be asked to recognise the first judgment under Article 26, and the dismissal of the second claim will follow precisely because it involves either the contradiction or reassertion of the same cause of action.

(i) Cause of action estoppel: contradiction of the same cause of action

If the attempt in subsequent proceedings is to *contradict* the question of the existence of a cause of action already determined by the Convention judgment, the party raising the plea of cause of action estoppel can rely on Article 26 in order that the judgment be recognised as conclusive of that question; all the more since Article 29 provides that under no circumstances may the foreign judgment be reviewed as to substance.

Cause of action estoppel benefits, also, from the Convention provisions governing *lis alibi pendens* in Title II, Section 8[111]. In other words, the authority and jurisprudence on the meaning of "proceedings involving the same cause of action and between the same parties" may also be used to guide the court in those cases when the *lis alibi pendens* becomes a *res judicata* contest[112]. This appears to have been the approach adopted by the Court of Appeal in *Berkeley Administration Inc v McClelland*[113].

There it was held that, in a case where Article 21 would have applied had judgment not been delivered in one Contracting State, recognition of that judgment under Article 26 must mean recognition for cause of action preclusive purposes; all the more since - had Article 21 applied *ex hypothesi* - the proceedings would have been between the same parties and involved the same cause of action and subject matter. Any resulting judgment, therefore, will be binding between all the parties involved and in respect of the same subject matter, as these terms are understood under Article 21[114]. Thus, as Hobhouse LJ said[115]:

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[111] Article 21

[112] Eg. *Drouot Assurances SA v Consolidated Metallurgical Industries* [1999] QB 497 might provide the basis for an autonomous approach to "the same parties" even for *res judicata* purposes: see Handley, K. R. "*Res Judicata* in the European Court" (unpublished manuscript), p1: "The decision of the European Court [in *Drouot*] on Article 21 of the Brussels Convention could also be significant for our law of *res judicata*". In *Drouot* the European Court accepted that the requirement under Article 21 that the parties to both actions must be the same does not eliminate all possibility of identification by virtue of privity (for example, between an insurer and insured). But it emphasised that such identification is possible only when, with regard to the subject-matter of both actions, the interests of the persons in question are identical and indissociable. See article by Peel, W. E. in 1999 Yearbook of European Law (forthcoming).

[113] [1995] ILPr 201

[114] *ibid*, 209 (Dillon LJ)

[115] *ibid*, 221

> Recognition includes, of course, enforcement, but it also includes recognition for the purposes of cause of action estoppel and issue estoppel. I reiterate that in answering the questions whether or not there is a cause of action or issue estoppel raised by the decision of the Tribunal de Commerce in Paris, one should construe the French judgment, if at all possible, as being consistent with the Convention, and not in breach of it.
>
> With regard to cause of action estoppel ... [in the instant case] that [plea] is clearly inappropriate. The proceedings with which we are concerned in London are proceedings which arise out of an undertaking given to the Court, and that is wholly different from anything which the Paris court considered that it was dealing with.

What is *not* clear from this case is whether the English law of cause of action estoppel applied or the French law of cause of action estoppel. But - as was suggested earlier - little turns on this; for the effects of recognition of such a fundamental question - the existence of a cause of action - will be identical whether the doctrine of equalisation or the doctrine of extension applies, especially if the interpretation in such cases remains consonant with Article 21.

Moreover, whilst a judgment that dismisses a cause of action as unfounded ought to be recognised for preclusive purposes[116], it is not clear what ought to be implied from the recognition of a judgment that dismisses an action *without* deciding on the merits, such as a judgment dismissing an action on the ground of lack of jurisdiction or because it is time-barred[117]. Such judgments can hardly be enforced, other than any order for costs. But can it be argued - for example - that the dismissal of an action by an Italian court because it lacked jurisdiction should preclude an English court from subsequently assuming jurisdiction; or that dismissal by a German court because the action is time-barred necessarily prevents fresh proceedings from being initiated in England?[118]

Even so, the observations above - and the decision in *Hoffmann v Krieg*[119] in particular - suggest that the extension of effects doctrine is the correct approach. In other words, an English court should extend cause of action estoppel to a party pleading it in subsequent proceedings in England if that judgment would sustain cause of action estoppel before the court in which it was rendered.

(ii) Former recovery: reassertion of the same cause of action

As regards a plea of former recovery that can arise when a Convention judgment upon a cause of action grants recovery in favour of the plaintiff, the European Court of Justice

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116 Schlosser Report, pp127-128

117 *ibid*

118 In may be that, as to a dismissal for lack of jurisdiction, the English court should recognise and give appropriate effect to the Italian court's grounds for dismissing the action. As to a dismissal by a German court because of a time-bar, if the matter r would not be time-barred in England then arguably it should proceed there (subject to Articles 21 and 22). If, however, the substantive law of Germany falls to be applied by the English court then one supposes - under the doctrine of extension of effects - that an English court must give effect to the German time-bar.

119 [1988] ECR 645; see fns103-110.

has ruled in *De Wolf v Cox*[120] that, under the Conventions, the enforcement procedure specified in Articles 31-45 is exclusive, and a plaintiff who has obtained in one Contracting State a judgment which is enforceable in another Contracting State under these provisions cannot bring an ordinary action in the latter State against the same defendant in respect of the same cause of action[121]. Again, as mentioned above, this reflects the simple acceptance by the recognising/enforcing court of the fact that recovery has been granted by the rendering court upon the cause of action; and it is the acceptance of *this* fact which underlines the preclusive effect preventing reassertion of the same cause of action in the courts of another Contracting State.

Thus, in *De Wolf v Cox*[122], the plaintiff - after obtaining a decree against a Netherlands company in Belgium - brought fresh proceedings for a similar order in the Netherlands because fresh proceedings were less expensive than proceedings for enforcement under the Convention. The European Court of Justice ruled[123]:

> The provisions of the Convention ... prevent a party who has obtained a judgment in his favour in a Contracting State, being a judgment for which an order for enforcement under Article 31 of the Convention may issue in another Contracting State, from making an application to a court in that other Contracting State for a judgment against the other party in the same terms as the judgment delivered in the first State.

Notice, however, that it was only because the judgment was *already* enforceable under the Convention that the judgment had automatic preclusive effects from the moment it was given[124]. In other words, its status as a *res judicata* is implicit in the fact that the judgment is enforceable[125].

Even so, it has been suggested that the decision does *not* properly support the proposition that fresh proceedings may not be brought, contrary to the impression given above, for such did not form the *ratio* of the Court's ruling in that case[126]. This may mean, as Kaye suggests, that the doctrine of extension which the decision implicitly endorses is also inappropriate[127]:

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120 [1976] ECR 1759

121 It is here that the non-merger rule is obviated under the Convention; cf. section 34, 1982 Act, which attempts to abrogate the non-merger rule at common law: see Chapter Two, Part One.

122 [1976] ECR 1759

123 *ibid*, 1768

124 Cheshire and North, p444: "[The principle in *De Wolf*] must apply equally to prevent a plaintiff who has lost his action from obtaining a judgment against the same defendant in new proceedings in a different Contracting State .... "The effect of the decision in *De Wolf* is that [such] a judgment ... creates *what in English law* is regarded as an estoppel from the moment it was given".

125 And for the suggestion that "enforceability" implies as much: see fn10.

126 Kaye, Peter Civil Jurisdiction and Enforcement of Judgments, Professional Books Ltd: Abingdon, 1987 pp1365-1366

127 *ibid*, p1366

> such [an interpretation: the doctrine of extension of effects] would appear to extend beyond the Convention sphere relating to the procedure and principles of recognition and enforcement, into the realm of national procedural law concerning the effects of a foreign judgment, entitled to recognition, upon the merits of the later national case. It is true that s3(1) of the 1982 Act requires any question as to the meaning *or effect* of a Convention provision which is not referred to the European Court of Justice under the 1971 Protocol, to be determined in accordance with the principles laid down by and any relevant decision of the European Court; but would this requirement extend to a European Court decision concerning the effects *of recognition or enforcement* of a foreign judgment, and not merely to the effect *upon* recognition or enforcement, of a Convention provision? In the present view, the former construction would be outside both the Convention sphere and the European Court's jurisdiction and it must instead remain a matter for individual Contracting States to take the appropriate measures in respect of effects of existence of such foreign Contracting State judgments upon institution of fresh proceedings, for purposes of safeguarding Convention unification objectives and preventing divergent judgments from being reached by courts of different Contracting States on the same subject-matter. .... [Accordingly] it is section 34 [of the 1982 Act], not *de Wolf v Cox*, which will be the basis relied upon by a defendant seeking to prevent a plaintiff from bringing fresh proceedings in England on the same cause of action as that which formed the subject-matter of a previous action in the courts of a foreign Contracting (or non-Contracting) State in which the plaintiff obtained judgment against the defendant. [emphasis original]

Kaye is making a complex point[128]; but, essentially, he is suggesting that it is for the English court to apply its own preclusive concepts according to a doctrine of *equalisation* (or some combination of the two doctrines), rather than preclude subsequent proceedings by reference to preclusive laws that have been *extended* from the rendering court. To do the latter is to permit an incursion into national law that is not sanctioned by the Convention.

Whilst - as has been suggested earlier - it is in the nature of cause of action preclusion that the result is the same either way (for the court is dealing with a fundamental question as to the existence of an entire cause of action), Kaye's observation may prove to be especially useful when it comes to issue preclusion and preclusion by abuse of process. These pleas are much more complex, and involve variations in national laws in ways that cause of action preclusion does not. The usefulness of the observation, therefore, lies in the support it gives to arguments that favour the application of a doctrine of equalisation (and not extension) when issue preclusion and abuse of process preclusion arise. We will now consider these questions.

(b) Issue preclusion

The foregoing has implied that it is easier to adopt a full-faith-and-credit analysis involving, thereby, an *extension* of the rendering court's law of preclusive effects when the Convention judgment has determined the existence of an entire cause of action. Certainly, when recognition is for *enforcement* purposes, there is no thought *but* to accept as binding the fact that recovery has been granted, and thus the same ought to be true when recognition is for *cause of action preclusive* purposes. But how might an English court, in subsequent proceedings, give effect to something less than a judgment on an entire cause of action? As Briggs asks[129]:

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[128] It is similar to that made at fn109.

[129] Briggs and Rees, pp326-327

> Suppose that in dismissing a claim brought by the plaintiff, the first court made a finding that a particular document had not been sent. If a separate second action were to be brought, would the defendant be entitled to ask the second court to give effect to and to consider itself bound by this particular aspect of the first court's judgment? Or suppose the first court found that a contract was governed by a particular law. In the second action, would the court be entitled to reach its own conclusion on the governing law, or would it be obliged to follow the conclusion of the first court?

Stone would answer these questions by assuming the doctrine of extension of effects *also* applies to issue determinations[130]:

> Under the EEC Conventions, a recognisable judgment must be given the same effect, as regards issue-estoppel, as it has in the original country (Arts. 26 and 29)

And again[131]:

> It seems inherent in the very concept of recognition that, at least in general, mere recognition must involve giving a foreign judgment the same conclusive effects as to causes of action *and issues determined*, and persons affected, as it has in the original country under its law, and not the same effects as the law of the country addressed would give to a similar judgment given by its own courts.

However, as we have seen, the Convention does not *expressly* support this view. Furthermore, anything that Jenard[132], *Hoffmann*[133] or *De Wolf*[134] might suggest in favour of conferring on the judgment the authority and effectiveness accorded them in the State in which they were given can arguably be confined to cause of action preclusion cases; that is, to cases where there is an enforceable judgment, and therefore - necessarily - a *res judicata* upon a cause of action. All we *can* say of a Convention judgment is that, *if it qualifies for recognition* - that is, if it is recognisable - then the subsequent English court must accord it recognition under Article 26. But this only begs a number of questions.

What does recognition under the Convention mean when it is *issue preclusion* which is being sought in the subsequent English proceedings? And what laws of preclusion can an English court employ in such circumstances? Does the doctrine of extension of effects prevail, thus insisting that the English court grapple with the, perhaps complex, issue preclusive laws that apply in the rendering court? Or is issue preclusion a concept which is left to national laws - as Kaye might suggest - thus enabling the doctrine of equalisation (or a "lowest common denominator effects" doctrine[135]) to govern the English court's choice of preclusive law?

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[130] Stone, P. A. "The recognition and enforcement in England of foreign personal and proprietary judgments", [1983] 1 LMCLQ 1, 26. See also fn7.

[131] Stone, Peter The Conflict of Laws, Longman Group Ltd: London, 1995, p307

[132] See fn99.

[133] [1988] ECR 645

[134] [1976] ECR 1759

[135] See fn52.

Given that commentators like Stone (quoted above) have equated Article 26 with the US full-faith-and-credit clause[136], it might be useful to consider the American jurisprudence on full-faith-and-credit. What quickly becomes apparent is that one should not assume that the preclusive effects of a foreign judgment ought simply reflect the *res judicata* policy of the rendering court (as per the doctrine of *extension* of effects). Indeed, as Peterson has commented, in the US context[137]:

> When the *res judicata* doctrine is projected to the level of sister-state judgments, a number of policies emerge which are unknown to the purely domestic concept. Most of these follow from the regulation of enforcement and recognition as a matter of constitutional law. *Res judicata* and the full faith and credit requirement never have been and never can be identical concepts, for the obvious reason that *res judicata* has a domestic kingdom to rule which the full faith and credit requirement cannot enter .... The implications of this lesson for *res judicata*, if that doctrine is to be projected beyond sister-state to foreign country judgments, are not altogether obvious. *One thing is clear: we ought not to assume without examination that the new policy factors which appeared at the sister-state level automatically carry over into this broader context. A few [US] courts seem to have made this assumption, at least implicitly, by applying full faith and credit rules to foreign judgments. The error of their ways has not passed unnoticed* ... [emphasis added]

More particularly, what is revealed on closer inspection is that not even the US courts assume that cause of action preclusion (or claim preclusion as it is known in the US) is to be treated in the same way as issue preclusion, still less that the full faith and credit principle (that principle which supposedly equates with the recognition principle supplied by Article 26) mandates that the doctrine of extension of effects is to govern issue preclusion in the way that it governs claim preclusion[138]:

> Both the [American] full faith and credit clause and statute require every court to give a sister state judgment *at least the claim preclusive effect* that the judgment would have in the rendering state. Moreover, the principles supporting claim preclusion, namely, finality, uniformity and simplicity, are similar to the policy considerations supporting the full faith and credit doctrine. Whether it is full faith and credit or claim preclusion which requires that a judgment be recognised by a sister state, this effect is necessary for a uniform federal system of government.
>
> [However,] [t]he applicability of the full faith and credit doctrine to questions of *issue preclusion presents different considerations*. While full faith and credit applies to entire claims reduced to judgment, *issue preclusion occupies a much more ambiguous position with respect to full faith and credit.* ....
>
> [I]ssue preclusion is a judicial doctrine aimed at the conservation of judicial and litigant resources, and the rules of issue preclusion, unlike those of claim preclusion, are vested in the discretion of the particular jurisdiction. Although many issue preclusive questions are controlled by the law of judgments in that no lesser effect may be given, *questions concerning whether to give greater effect to a judgment are not so controlled.*

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[136] See, particularly, fn44.

[137] Peterson, Courtland "*Res judicata* and foreign country judgments" 24 Ohio State LJ 291, 302, 304-305 (1963)

[138] Getschow, Gregory S., "If at first you do succeed: recognition of state preclusive laws in subsequent multi-state actions" 35 Villanova LR 253, 262-263; 265. Cf. Casad, Robert C., "Issue preclusion and foreign country judgments: whose law?, 70 Iowa LR 53, 56 (1984): "this ambiguity about the source of the standards to be used in determining the issue preclusion effect of a foreign country judgment is frustrating ... Cases dealing with the issue are in complete conflict".

> A literal reading of the full faith and credit clause indicates that judgments are to receive *exactly* the same effect in a sister state that they would receive in the rendering state. *This interpretation, however, has not been accepted by all courts and commentators.* ....
>
> One interpretation of the statute is that the judgment of a state court "cannot be given a less preclusive effect by [another court] than it would be given in the jurisdiction that rendered it". Conversely, the statutory language suggests that a judgment may, *but need not*, be given more preclusive effect.

In essence, therefore, what the American jurisprudence suggests is that there is no *necessary* reason why a structure that requires full faith and credit for cause of action or claim preclusive purposes should mandate full faith and credit for issue preclusive purposes. Rather, it appears from the American experience that recognising courts are entitled to apply their own local policy as to issue estoppel, perhaps to equalise the effects or find a common "effects" denominator[139]:

> ... full faith and credit applies only to entire judgments. Thus, the full faith and credit clause effectively precludes the relitigation of claims, but it does not apply piecemeal to issue preclusion which is governed instead by individual forum rules. While this minority of courts holds that the law of the rendering state must be applied when faced with claim preclusion, they feel free to apply their own rules to issue preclusion. Other courts following the minority approach apply their own rules of issue preclusion without any discussion of the effect of full faith. [[140]]

Thus, *even if* we were inclined to adopt an analysis of the Conventions' recognition purpose that suggested something akin to full-faith-and-credit, we would still not be obliged to accept that the Conventions mandate the operation to issue determinations of the doctrine of extension of effects.

In any case, even notwithstanding the argument that the clear intention of the framers was to provide for the free movement of judgments along lines akin to full-faith-and-credit, there are counter-arguments that suggest it is *not* the purpose of the Convention to facilitate the issue preclusive effects of Convention judgments[141]; not least the fact that[142]:

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[139] Getschow, Gregory S., "If at first you do succeed: recognition of state preclusive laws in subsequent multi-state actions" 35 Villanova LR 253, 271. See, also: Smit, Hans "International *Res Judicata* and Collateral Estoppel in the United States", 9 UCLA L Rev 44 (1962), 64: "Limited human experience cannot always tailor a costume reasonably fitting the variety of legally relevant incidents. The better approach seems to consider separately the possible *res judicata* and collateral estoppel effects of foreign judgments and to endeavour to make certain rubrications that not only reflect pertinent policy, but also provide guides workable in practice".

[140] In the US, *Clark v Clark* 80 Nev 52 (1969) is an example of those courts holding that full faith and credit applies only to the claim preclusive effect of a judgment. In that case, the defendant asserted issue preclusion as an affirmative defence to the relitigation in Nevada of a domestic relation issue previously decided by a Florida court. The court acknowledged that a final judgment or decree of a sister state acquires constitutional stature pursuant to the full faith and credit clause, but held that full faith and credit was limited to clam preclusion and should not be extended to control issue preclusion. The court found that the plaintiff's claim was not precluded and that the Florida judgment would have no issue preclusive effect upon that action. In *Ditta v City of Clinton* 391 So 2d 627 (1980), the Supreme Court of Mississippi evaluated a prior Louisiana judgment on a particular issue using its own issue preclusion rules without a full faith analysis. The court formulated the issue as whether the previous judgment entitled the defendant to assert issue preclusion although it was not a party in the prior case. The court held that its mutuality rule prevented the defendant from asserting issue preclusion, and thus implicitly held that its rules of issue preclusion prevail over those of a prior rendering forum.

[141] Cf. Fletcher, Ian F. Conflict of Laws and European Community Law (with special reference to the Community Conventions on private international law), North Holland Publishing Co: Amsterdam, 1982, p76: "it is submitted that efforts should be made within the Member States themselves to review their rules of private

> Most countries, outside of the Anglo-American legal tradition, do not treat judgments as precluding the relitigation of just any issue that happens to have been litigated and decided in an earlier action.

Indeed, else it be thought that there is a high degree of similarity insofar as issue preclusive laws are concerned - in contrast to the view that the cause of action preclusion aspect of a Convention *res judicata* is recognised in a near universal sense in all legal systems[143] - note the extensive comparison of the issue preclusion laws in England, the United States, France, Germany and Sweden amongst others[144]. The picture is not one of uniformity.

For this reason - although we have suggested that the doctrine of extension is implicit to the Conventions - it is submitted that the only preclusive "effect" which the Convention recognition scheme intends recognising courts to "extend" into their jurisdictions is the "enforceability" (and thereby, incidentally, the cause of action preclusivity) effect of Convention judgments and not the issue preclusive effects of such judgments.

Thus it becomes necessary to distinguish between those principles which do or may emerge from the Convention and national law principles; and as Briggs argues[145]:

> There is, it seems, nothing to prevent an English court applying its own principles of issue estoppel to conclusions expressed by a court in the course of a judgment which otherwise qualifies for recognition. Issue estoppel is a principle of English evidence or procedure; and as such it operates independently of the Convention. It therefore follows that an English court may apply the doctrine of issue estoppel to statements contained in judgments which otherwise qualify for recognition. ... Accordingly, although the Convention dictates that the judgment is one which is entitled to recognition, and that the adjudicating court was jurisdictionally competent, it must still be shown that the [issue] finding relied on (i) can accurately be characterised as a finding, and (ii) was final in the court which pronounced it, and (iii) was founded on the merits of the point at issue.

Authority - though scarce - seems to favour this view; for when the question of issue estoppel was considered in *Berkeley Administration Inc v McClelland*[146], the Court of

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international law, and to endeavour, so far as it can be accomplished, to ensure that these rules are so applied (*and, if necessary, are so reformulated*) as to maximise the extent to which they produce results in conformity with the principal objectives of the Communities. It is further submitted that this final precept constitutes a basic justification for any attempt, within the limits of its own competence, by a court in a Member State so to reformulate, or to modify, an established rule of the national private international law, as to produce a result which would be basically in conformity with the objectives herein referred to".

[142] *ibid*, p55

[143] Lookofsky, Joseph M., Transnational Litigation and Commercial Arbitration: a comparative analysis of American, European and International Law, Transnational Juris Publications Inc: Denmark, p491: "... at least as regards the effects of judgments rendered within the forum State. [However] [n]ot all jurisdictions extend the concept of *res judicata* to issue preclusion".

[144] Casad, Robert C., "Issue preclusion and foreign country judgments: whose law?, 70 Iowa LR 53, 61-70 (1984)

[145] Briggs and Rees, p327

[146] [1995] ILPr 201. The case is a highly complicated one and concerned sites for Bureaux de Change in Paris. However, for present purposes the question was whether an earlier decision of a French court, recognisable under the Convention, created an issue estoppel such that the defendants were precluded from contending that they were entitled to exemplary and/or aggravated damages for abuse of process in obtaining an injunction in other English proceedings. The French court decided that the defendants in the case before the French court had

Appeal seemed unwittingly to refer to *English* issue estoppel authority as the law by which to determine the possible preclusive effect of the Convention judgment which was recognisable under the Convention in that case. As Hobhouse LJ stated[147]:

> So, I turn at once to the question of issue estoppel. The question which has to be considered here is whether the *same* question is in issue in the English proceedings as has already been determined in the French proceedings. *That is the test laid down in a number of cases, including* Carl Zeiss. [emphasis added]

In other words, the Court referred to the leading English authority on foreign judgment issue estoppel - *Carl Zeiss (No 2)*[148] - without even considering the French law of issue preclusion and whether that law should have applied.

This supports Briggs' view that it is for an English court to apply its *own* rules of issue preclusion to a Convention judgment that has been accepted as binding by the recognising court, *provided* it accords cause of action preclusive effects according to the doctrine of extension implicit in the Convention scheme[149]. The only concession to the foreign court would be ensuring that the issue determination is *res judicata* according to the *Nouvion v Freeman*[150] test, but this is how issue preclusion proceeds at common law.

It also conforms with American jurisprudence[151]:

> our courts should determine the collateral consequences of foreign judgments according to their own best wisdom until some compelling reason for departing from that wisdom is demonstrated to apply to the case at hand.

On this approach, therefore, if issue preclusive effects are to be attributed to a foreign judgment recognised under the Convention by an English court in subsequent proceedings applying *its* own laws of preclusion, then the rules governing the identity of subject matter and identity of parties and privies[152], and the availability of any exception, will be those as discussed in Chapter Three.

Needless to say, the mere fact that a court of a contracting state has expressed a consideration about an issue does not mean it will have the status of a *res judicata.*

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not justified their claim for damages. Hence, the Court of Appeal held that this issue decision precluded the defendants from again contending an entitlement to this type of damages.

147 *ibid*, 221

148 [1967] 1 AC 853

149 Cf. (in the US context) Carrington, Paul D. "Collateral estoppel and foreign judgments" 24 Ohio State LJ 381, 389 (1963): "To accord the judgment less effect in actions which expose the judgment to direct attack would, indeed, be to undo what has been wrought by a sister state. Where, however, the judgment is collateral to the second action, a decision to disregard it in the disposition of the latter does not disturb the finality of the judgment. So long as the disregard accords with the forum's practice in dealing with like judgments of its own, it does not seem excessively insulting to the sister forum".

150 (1889) 15 AC 1

151 Carrington, Paul D., "Collateral estoppel and foreign judgments" 24 Ohio State LJ 381, 391 (1963)

152 Briggs and Rees, p328: "Moreover, the fact that the doctrine is one of English law means that the question of who is to be regarded as estopped by the decision is to be answered by the English doctrine concerning parties and privies, rather than by a principle of community law."

Moreover, whilst the Convention judgment containing the alleged issue in question may be entitled to recognition under Article 26, this also will not necessarily support an issue estoppel; for it would be insufficient for the purposes of issue estoppel if the particular issue could be re-argued in the same court at a later date (such that it were not final in the court which pronounced it), just as it would be insufficient for the purposes of issue estoppel if the first court had disposed of the matter on grounds which did not involve a consideration of the merits of the issue.

(c) Abuse of process

Finally we must consider whether a Convention judgment ought to be able to activate the rule in *Henderson v Henderson*[153]. As we know from Chapter Four, that rule - as it applies in English law - precludes a party from raising in subsequent proceedings subject matter which could and should have been litigated in the earlier litigation.

How might an English court apply the rule to a Convention judgment? Just as the Convention makes no provision for issue preclusion - and, at best, only implicitly provides for cause of action preclusion - so, too, the Convention is silent as to abuse of process. But whereas it might be said that the *res judicata* pleas (cause of action and issue preclusion) inhere in a judgment - for in such cases it is the judgment itself which is recognised as having preclusive effect - the abuse of process plea is different in that it relates to subject matter that (necessarily) has *not* been adjudicated by the judgment. Thus the *Henderson* rule is a preclusive plea only in the sense that the recognising court exercises *its* discretion to prevent its own process from being abused, thereby precluding the party that invoked it[154]. The court does this by making an assessment whether the subject matter before it is such that it could or should have been litigated. In this way, the plea is independent of both the judgment and, *ex fortiori*, the judgment recognising scheme. It reposes entirely in the discretion of the recognising court.

However, whilst this suggests that an English court is not faced with a choice as to whose "abuse of process" laws it should apply - for only the English rule is relevant - nonetheless the argument has been made in Chapter Four whether part of an English court's assessment prior to exercising its discretion ought to involve referring to the rendering court to see if it has a cognate rule and whether, in like circumstances, it would preclude further litigation on related subject matter. An argument along these lines was made in *Fennoscandia Ltd v Clarke*[155].

Recall, in that case, that C brought proceedings in England against F Ltd alleging breach of legal duty, having already brought and lost proceedings against F Ltd in Delaware. F Ltd defended the English action by arguing (successfully) that C's claim did not identify a legal duty known to English law but, also, by arguing that (in any case) this was a claim which could and should have been raised in Delaware.

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[153] (1843) 3 Hare 100

[154] Indeed, we have discussed in Chapter Four why the *Henderson* rule is not a *res judicata* plea.

[155] Court of Appeal, 18 January 1999 (unreported)

Suppose, now, that the facts of that case involved, not the foreign court in Delaware, but a court of a contracting State to the Brussels Convention. In other words the plaintiff, having lost - say, in France - and suffered judgment against him, brings subsequent proceedings on related subject matter in England. Article 22 of the Conventions only operates while the actions are pending: here we no longer have a *lis pendens* but *have* a French judgment. In order to preclude the English proceedings, therefore, the defendant would invoke the French judgment, and under Article 26, recognition would be automatic. But then what? Should the English court consider whether the subject matter before it would, *ex hypothesi*, be precluded were this a subsequent action in France? That would involve considering whether the French courts have an abuse of process doctrine. In any event, might not the English court say - as it did in *Fennoscandia* - that regardless the position before a French court, this is still an abuse of *our* English court's process. But suppose the subject matter - though related - might not have fallen within the jurisdictional competence of the French court, say, by falling outside Article 1? Then, surely, an English court could exercise its discretion and not apply the *Henderson* rule.

There are obviously some complicated issues, but the general point - it is suggested - is clear, namely: that it will not so much be the Convention judgment (or, indeed, any foreign judgment) which directs the operation of the abuse of process doctrine, although fidelity to the *Henderson* rule requires that an assessment be made by reference to the degree of relevance of the F2 subject matter to that F1 judgment. Rather the discretion lies *in the court* - and, thus, necessarily the English court. This means that it wholly remains for the subsequent court to make an assessment according to its abuse of process doctrine: there can hardly be an extension of the abuse that might have been felt by a rendering court *mutatis mutandis* so as to provide the basis for the English court's discretion!

Nonetheless, an assessment as to whether a similar rule operates in the rendering court may be prudent given that Article 22 of the Conventions may reveal a policy that is similar to that served by the *Henderson* rule. Of course, as we have mentioned, Article 22 cases involve two sets of *proceedings*, whereas here we are only faced with a Convention judgment and the question of its (potentially) preclusive effect in subsequent proceedings in England involving related subject matter. Even so, the similarities been these two situations have been noticed by Briggs, who - referring to the speech of Lord Saville in *Sarrio SA v Kuwait Investment Authority*[156] - has commented[157]:

> although Lord Saville did not say so, the judgment could almost have been written with a view to applying not Article 22 but the rule in *Henderson v Henderson* .... nobody reading the judgment [of Lord Saville] will fail to hear the echo of the abuse of process reasoning ... This is not to say that the explanation of what were to be seen as related proceedings [under Article 22] was incorrect, nor that it was incorrectly applied to the facts. But it seems to be a fair reading of the speech of Lord Saville as saying that if actions *could* have been tried together, they *should* have been tried together; and if they were not brought together, the second set should not be allowed to proceed without regard to the first set. The abuse of process reasoning may come to be recognised, in

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[156] [1999] 1 AC 32

[157] Briggs, A. "Related proceedings under the Brussels Convention: *Sarrio SA v Kuwait Investment Authority*" (1997) 68 BYBIL 339, 340-341

> England at least [it not being clear whether this interpretation would be shared in other contracting States] as the intellectual foundation of the third paragraph of Article 22.

Again, it should be noted that it is not clear how the *Henderson* rule is itself relevant to Article 22 cases, precisely because there is not yet a judgment in those cases, only related actions, and the *Henderson* rule presupposes a prior *res judicata*[158]. Nonetheless, the readiness to assume that the principles behind *Henderson v Henderson* have application in the Convention context is itself revealing.

Certainly an English court has resorted to its *inherent* jurisdiction to prevent *other types* of abuse of process within the context of the Convention[159]. And, indeed, beyond the Convention - but still within the context of European judgments - there is evidence of an English court applying the *Henderson* rule in *Coal Authority v HJ Banks and Co Ltd*[160] by reference to a decision of the Commission. There is room, therefore, for an English court to invoke *Henderson* abuse of process in light of a Convention judgment that compels the conclusion that the subsequent proceedings (in respect of which the preclusive effect of the Convention judgment is sought) could and should have been litigated by the earlier foreign court that rendered the Convention judgment. And if this is so, it is suggested that the applicable principles are, in relevant respects, identical to those discussed in Chapter Four.

5. Conclusion and examples of preclusion by Convention judgments

The singular strength of the Convention scheme lies in the efficient way in which it provides for the recognition and enforcement of entire judgments upon causes of action. Unencumbered by outmoded doctrines - such as the non-merger doctrine at common law - a Convention judgment that is *enforceable* in the State in which it was given is entitled to automatic recognition throughout the judicial territory covered by the Brussels and Lugano Conventions. Enforceability in the rendering state thus becomes the touchstone when recognition of the *entire* judgment is sought for the purposes of cause of action preclusion; and the fact that the Conventions seem implicitly to require the automatic extension of cause of action preclusive effects in respects similar to enforcement justifies, perhaps, the comparison with the full faith and credit provision of the US Constitution. For, indeed, we have seen that that clause is understood as operating in order to secure claim preclusion and enforcement effects of sister-state judgments.

However, such a comparison would - at the same time - also serve to reinforce the arguments that issue preclusion ought not be procured under the Conventions by means of the doctrine of extension, but that this type of preclusive effect should be left to

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158 Chapter Four

159 In *Turner v Grovit* [1999] 3 All ER 616, the Court of Appeal found that proceedings had been launched in *another* Brussels Convention jurisdiction for no other purpose than to harass and oppress a party who was already a litigant in England. Thus it had the power, *under its inherent jurisdiction to prevent abuse of process*, to prohibit by anti-suit injunction the plaintiff in the other jurisdiction from continuing the foreign proceedings. That power was not limited to cases where the English court had jurisdiction under Article 21 of the Brussels Convention or possessed exclusive jurisdiction, for example, under Article 17 of the Convention.

160 [1997] EuLR 610

national laws. For not only is it clear from US jurisprudence that questions concerning whether to give issue preclusive effect to a judgment are not, in the US, *necessarily* controlled by the full faith and credit clause, but it can also be argued that the recognition provisions of the Conventions should not *necessarily* require the scope and extent of issue preclusive effects of Convention judgments to be dictated by an (at best) implicit disposition that favours the extension of effects. Moreover, given that the Conventions make no provision as to the scope and extent of the preclusive effects of Convention judgments, and in view of the far greater disparity among Member States as regards the laws of issue preclusion, a doctrine of equalisation of effects (which, is the approach taken by English courts where the judgment is recognised according to the common law rules) is perhaps the most sensible - both in the sense that it avoids (at least in the issue preclusion context) parallel laws, and also avoids adopting an approach that would require proof of the (inevitably complex) issue preclusive laws of other contracting States.

Whether the *Henderson* rule should have application where subsequent proceedings involve litigation of subject matter that is in some way related to the subject matter of a Convention judgment remains a matter of discretion for an English court and, except in a comparative sense, ought not be influenced by recognition scheme of the Convention nor involve the slavish extension of a cognate abuse of process doctrine from the rendering court.

Illustrations - preclusion by a Convention judgment

Contradiction - cause of action estoppel

1. G sues R, a Frenchman, in France for an account of profits. The French court dismisses G's claim. G then commences proceedings in England against R upon the same cause of action. R pleads the French judgment before the English court. It is entitled to automatic recognition under Article 26 of the Convention, and the English court must accord the foreign judgment the same cause of action preclusive effect as it has in France. Thus because the same cause of action has already been determined by the French court, the French judgment precludes G from contradicting the French judgment in the English court. The English court may consider whether the cause of action is the same as if Article 21 had applied *ex hypothesi*, but the key consideration is whether the French judgment operates as a *res judicata* according to French law. If so, the English court is obliged to extend the preclusive effects to England.

2. Same facts as (1) above, except: it is alleged that, according to French law, the judgment was only of a provisional nature, and would not have preclusive effect in France. The judgment *can* be recognised automatically in England under Article 26 in subsequent proceedings in England, but the English court must accord to the judgment the same effect that it has under French law; and since it is not *res judicata* in France it will not preclude the subsequent litigation on the same cause of action in England if the French court did not intend the provisional judgment to have preclusive effects.

3. X sues Y in Germany for breach of contract and the German court awards damages (10,000euro) in favour of X. The German judgment is entitled to automatic recognition in England under Article 26 and is registrable for enforcement purposes. Accordingly, it will preclude Y from alleging that there was no breach of contract, for that would contradict the German judgment.

4. A obtains a final order form a French court ordering X to return a chattel to A. X brings the chattel to England and commences proceedings against A claiming possession. The French order is entitled to automatic recognition in England and will preclude X from contradicting the right to possession as determined by the French court. However, suppose the French order is a provisional one pending trial of the merits in France: the order is nonetheless registrable in England, but insofar as preclusive effects are sought by relying on the order, an English court will accord to it the same preclusive effects as it has under French law. Thus, if it is only provisional in France and, under French law, not *res judicata* but able to be re-investigated in another French court, then it will not be *res judicata* in England.

5. As required by the Brussels Convention, P sues D in a French court which grants judgment in D's favour. In subsequent proceedings in England, P contradicts the French judgment. D raises a plea of cause of action estoppel to preclude P: Article 26 having facilitated the automatic recognition of the French judgment for preclusive purposes. Arguably, the Convention requires the English court to consider the cause of action preclusive effect that the French judgment might have against P had, *ex hypothesi*, the subsequent proceedings been in France.

Reassertion - former recovery

6. W sues C in Belgium and obtains judgment ordering C to pay 5000euro. Because C failed to comply with the judgment, and notwithstanding that it is enforceable in England, W sues C in England on the same cause of action. W is prohibited from reasserting the same cause of action in England because the Belgium judgment must be enforced under the Convention.

7. As required by the Brussels Convention, P sues D in a French court which grants judgment upon the cause of action in P's favour. The French judgment is one for which an order for enforcement under Article 31 may issue in another contracting State. Nonetheless, P intends to commence proceedings in England for recovery upon the same cause of action. However, because D procures the recognition, in England, of the French

judgment under Article 26, P is precluded by that judgment from making an application to the English court for recovery against D in the same terms as the French judgment.

8. D agrees to deliver goods to P. By the negligence of D, 10% of P's goods are destroyed (and therefore not delivered under the contract) and the remaining 90%, though delivered under the same contract, are damaged. P sues D in France in respect of the non-delivered goods. Judgment is rendered by the French court. P then sues D in England in respect of the damaged goods. D attempts to prevent the continuance of the English proceedings relying on the French judgment and arguing that the same cause of action has been adjudged in France and that P is precluded thereby from reasserting it in England. If, according to French law, the French judgment is a final and conclusive *res judicata* upon the cause of action and if, according to French law, the cause of action in England would be regarded as the same as that upon which the French court has granted judgment and that such subsequent proceedings would be precluded, then the French judgment must be recognised as having that preclusive effect in England under Article 26.

Issue estoppel

9. X sues Y in France, and - in dismissing X's claim - the French court makes a finding that a particular document had not been sent. In subsequent proceedings in England between X and Y, Y will be able to procure the automatic recognition of the French judgment under Article 26, but neither Article 26 (nor the Convention) obliges the English court to accord issue preclusive effect other than in accordance with English laws. Accordingly, although the Convention dictates that the judgment is one which is entitled to recognition, and that the adjudicating court was jurisdictionally competent, it must still be shown that the finding relied on (i) was final and conclusive in the French court (according to French law); (ii) was founded on the merits of the issue; and (iii) was necessary and fundamental to the French decision so that it can accurately be characterised as a finding with the status of a judicial conclusion. Thus the issue preclusive effects are accorded by English law to the Convention judgment provided it otherwise qualifies for recognition.

10. Proceedings are brought by Z of West Germany against D in England. D denies the authority of Z's solicitors to bring the proceedings in England by relying on a West German judgment which has determined, *inter alia*, (in proceedings between Z and D) that Z was not properly before that (West Teutonian) court. Under Article 26, that West German judgment is entitled to automatic recognition, but the issue preclusive effect is to be determined by English law rather than West German law. Thus - apart from the jurisdictional competence of the West German court which is dictated by the Convention - in order for the judgment to have issue preclusive effect (i) the judgment must be final and conclusive in the West German court; (ii) the issue must have been rendered "on the merits"; (iii) the issue must have been necessary and fundamental to the decision. As with all foreign judgments involving issue estoppel, the English court must exercise special caution.

11. As required by the Brussels Convention, P sues D in a French court for breach of a contract. The French court grants a provisional *enrefereé* (semi-interlocutory) judgment in D's favour and part of the judgment includes a determination that the place of performance under the contract is France. D relies on that issue determination in subsequent proceedings in England to estop P from contending that the place of performance is other than in France. The judgment is entitled to automatic recognition (Article 26), but the English court applies its own rules of issue estoppel - including the requirement as to caution. Because it is clear from the material before the English court that the views of the French court as to place of performance under the contract were expressed in the context of provisional proceedings and were in no way binding in France on any other court that might deal there with the substantive matters, the English court will not uphold an issue estoppel plea.

12. In proceedings between A and B in Spain, the Spanish court held *inter alia* that a contract was governed by a particular law. In subsequent proceedings between A and B in England involving a cause of action arising from the same contract, the issue preclusive effect of the Spanish judgment will be a matter for English law. Thus, if A wishes to preclude B from contending that the contract was governed by another law, A would

need, first, to recognise the judgment containing the relevant issue determination. This can be done under Article 26 without any special procedure. Then, in order to verify its *res judicata* status, an English court would need to be satisfied of the usual criteria that applies - apart from the jurisdictional competence of the Spanish court which is dictated by the Convention. Thus: (i) is the issue determined final and conclusive in Spain; (ii) was the issue determined on the merits. In any case, the English court is not obliged to accord issue preclusive effect to the judgment: it is required to exercise special caution, as in all cases involving foreign judgment issue estoppel.

Abuse of process

13. As required by the Brussels Convention, P sues D in a French court which grants judgment in D's favour. D relies on the judgment to assert that subsequent proceedings in England are an abuse of process - that is, the subject matter of the subsequent English proceedings could and should have been litigated in France. The Convention judgment is recognised under Article 26, but the application of the abuse of process plea is a matter for the English court. It finds that a similar plea would have obtained in France, but exercises its own discretion according to the *Henderson* rule. It decides the English proceedings are an abuse of process.

CHAPTER SIX

THE PRECLUSIVE EFFECT OF A FOREIGN JUDGMENT IN SUBSEQUENT PROCEEDINGS IN ENGLAND

This thesis has sought to show that a foreign judgment *can* be relied upon for preclusive purposes by parties or privies in subsequent proceedings in England. Indeed, it is clear that an English court will countenance preclusive pleas where founded upon a prior foreign judgment *provided* the foreign judgment can be recognised as a *res judicata.* Inevitably, therefore, the recognition process itself is important, given that recognition is the *sine qua non* for attributing *any* legal effect to a foreign judgment within England - enforcement, preclusive or otherwise. However, the recognition process is especially important to the extent that it either incorporates *res judicata* criteria (as necessary pre-conditions for substantiating a plea) or otherwise predisposes the English court to attribute preclusive effects. The two main schemes for foreign judgment recognition considered in this thesis differently emphasise these approaches to recognition and *res judicata* verification, hence it has been worthwhile to consider each separately to see how the preclusive effects are secured.

The preclusive effects of a foreign judgment where recognition has proceeded at common law

Where the foreign judgment falls to be recognised according to the traditional common law recognition rules we have seen a correspondence (albeit with important modifications) between the recognition requirements and the *res judicata* criteria generic to English law. Clearly, employing criteria at a distinct recognition stage that correspond with criteria definitive of a *res judicata* is an efficient way to verify a foreign judgment, and reflects a policy of recognising judgments *only if* they are capable of preclusive effect in the same way as an English *res judicata.* Once recognised at common law, the judgment is ready for deployment; it provides a ready foundation upon which to argue that the proceedings in England ought to be precluded because the subject matter has been - or could and should have been - rendered *res judicata.* And because the preclusive effects that can then be conferred on the foreign judgment on the strength of such argument are the same as those that an English court would confer on its own judgment (where it has been verified as a *res judicata*), we have been able to affirm the conclusion that recognition at common law exemplifies the doctrine of equalisation of effects.

Even so, the common law recognition rules do not correspond entirely with the English domestic conception of a *res judicata.* Nor should they, because if they did, important choices as to the applicable law would be predestined, and insufficient reference would be had to whether the foreign court would likewise accord preclusive effect to its judgment. Hence the recognition rules referred to in this thesis have shown: that it is the English private international law notion of jurisdiction in the international sense which is used to establish the *res judicata* "jurisdictional competence" criterion rather than either the English or the foreign municipal law; that the requirement that the judgment be "final and conclusive" is transposed to a requirement (in cases involving a foreign judgment) that it must possess finality according to the foreign law; and that, foreign judgments, especially,

must be assessed by the English court to affirm that the subject matter has been rendered "on the merits", given that the English court is not going to investigate again the merits of the dispute.

Nonetheless, the common law approach to recognition *does* at least rely on the premise that foreign judgments should meet a set of criteria that verify *res judicata* status at the recognition stage, and these are well supplied by the existing recognition rules. However, this thesis has also queried whether principles analogous to those associated with the power to grant a stay of proceedings on *forum non conveniens* - or natural forum - grounds could usefully inform the criteria by which foreign judgments are assessed as *res judicatae* at common law. For whilst the prevailing view may be that the availability, nature and extent of the preclusive pleas are matters for the English judgment recognition rules as the *lex fori*, it has been suggested that a foreign judgment should not withhold preclusive pleas if the judgment emanated from the natural forum for the resolution of the dispute. This speculation as to the conceptual significance of the natural forum to the process of establishing the preclusive effects itself suggests that a larger analysis of the natural forum may be useful - given, especially, that its possible conceptual significance to the law of preclusion is shared with other areas within the conflict of laws.

In any case, once recognition is achieved, the focus shifts to those requirements that consider the character of the subject matter of the subsequent proceedings and its identity with (or, in abuse of process cases, degree of relevance to) the subject matter of the foreign proceedings, together with those requirements that confirm the identity of the parties or their privies in both the foreign and subsequent English proceedings. What is revealed in this study is that the equalising effect of the common law recognition process disposes the English court to apply its own rules as to the available pleas, and its own rules as to whether the parties are bound by the foreign judgment[1]. This is manifested as follows in each of the preclusive pleas discussed in this thesis.

(i) Cause of action estoppel

This plea operates in circumstances where one party *contradicts* the foreign determination regarding the very existence of the claim, where the judgment in its entirety has established this. The plea can be raised by either party bound by the earlier judgment, and they can deploy the judgment as a bar or bring an action on the judgment to prevent contradiction by their opponent. It is for the English court to assess by its own law whether the cause of action is identical to that determined abroad, just as it is English law which determines whether the parties before the English court ought to be precluded by the foreign judgment according to English law notions of parties and privies.

(ii) Section 34, 1982 Act

This plea, enacted in response to the non-merger rule, prevents *reassertion* of the same cause of action where it is brought or continued in subsequent proceedings in England against the same opponent by the party who recovered an otherwise enforceable foreign

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[1] But it has been mused that there has been little analysis in the cases as to whether or not a reference to foreign law on these matters might be prudent.

judgment in his favour. However, we have seen that section 34 may be the subject of waiver, estoppel or contrary agreement, which means a successful plaintiff can, in exceptional circumstances, reassert the same cause of action notwithstanding the *res judicata* status of the foreign judgment. Nonetheless, again, it is English law which assesses whether the cause of action, and the parties or their privies, are the same.

(iii) Issue estoppel

As with cause of action estoppel, foreign judgments can found issue estoppels to preclude contradiction in subsequent English proceedings of factual or legal issues necessarily resolved by the foreign court - even where the foreign court did not dismiss the whole of the plaintiff's cause of action, or even where the issues in the English proceedings arise on a different cause of action. Furthermore, we have seen from recent cases that a foreign interlocutory judgment on a procedural or non-substantive issue - including a jurisdictional issue - may involve a final decision on the merits of the particular point, and can also give rise to issue estoppel, a development which opens the door to interesting tactical opportunities in transnational litigation (especially where multiple proceedings are continuing in a number of fora[2]). The principles and applicable law as to the identity of the issue and the parties/privies are much the same as for cause of action estoppel. Thus, whether findings are made against the plaintiff or the defendant in the foreign court, if the court was competent and the issue was adjudged final and conclusive and on the merits, the foreign judgment (if recognised as a *res judicata*) can generate the issue preclusive effect against the party who contradicts the foreign judgment on that point. But a number of reasons point to a need for special caution when upholding an issue estoppel upon a foreign judgment: the difficulty in ascertaining whether an issue has been rendered final and conclusive, or, indeed, exactly what it is the foreign court has decided; whether the foreign court was competent to determine the issue against the defendant; and whether it would be inappropriate to preclude a defendant from litigating a larger claim because a smaller (but key) issue has been decided by the foreign court which the defendant allowed to go by default rather than expend time and effort fighting abroad.

(iv) Abuse of process

This thesis has also considered the extent to which a foreign judgment recognised at common law as a *res judicata* is capable of precluding matters which could and should have been adjudicated by the foreign court, but which were not so determined. Our study required a distillation of the requirements that constitute the *Henderson* rule where the former proceedings were in England because it was observed that the plea properly derives from the inherent jurisdiction of an *English* court to protect its process and procedures from further litigation that properly belonged to earlier proceedings. In other words, this preclusive effect is not something which inheres in the *res judicata* itself. But the extension of the *Henderson* rule to foreign judgments is problematic, given that in recent "foreign judgments" cases the rule has been relied upon for preclusive effect without question and despite concerns about its operation in this context expressed in

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[2] See, particularly, Illustration 6, p101, *supra*.

earlier, higher authorities. At the same time, there is emerging a preference for the more general, inherent abuse of process doctrine - wider in scope than either the *Henderson* rule or the *res judicata* pleas. The result, perhaps inevitably, is uncertainty and confusion - to which this thesis has responded by promoting adherence to the certain, if technical, rules, rather than by promoting faith in rules that are more discretionary. Nonetheless, it reflects[3]:

> [the] fierce debate raging in many common law jurisdictions as to the scope and future development of *res judicata*. The battle lines have been drawn between those who seek to cling to the traditional strict requirements of the doctrine and those who want to reform or even abolish the old rules.

Meanwhile, a different battle must be waged in respect of the preclusive effect to accord a foreign judgment recognised in England under the Brussels and Lugano Conventions.

The preclusive effects of a foreign judgment where recognition has proceeded under the Brussels and Lugano Conventions

In the penultimate Chapter of this thesis, we have considered whether the preclusive pleas known to English common law are also available when the judgment has been recognised according to the rules of the Brussels and Lugano Conventions. The key consideration was, also, whether the *process* by which Convention judgments are recognised alters the availability and extent of those pleas, given that the Conventions avoid a criterion-laden recognition stage, and place less emphasis on the status of the judgment as a *res judicata*.

The surprising observation was that the Conventions have not expressly provided for the preclusive consequences of recognition, let alone specified whether recognition implies the doctrine of equalisation of effects or the doctrine of extension of effects. Thus it is suggested a multi-national recognition scheme such as the Brussels and Lugano Conventions - or indeed the proposed world-wide jurisdiction and judgments convention currently being finalised by the Hague Conference - should make every effort to specify which of these doctrines determines the preclusive effects of a judgment in subsequent proceedings in respect of the various types of preclusive pleas[4]. Nonetheless, the absence of such a direction, together with the fact that the Brussels and Lugano Conventions, by virtue of their double nature, facilitate automatic recognition for all judgments, has not dissuaded some from arguing that, systemically, the Conventions require that something akin to full-faith-and-credit be accorded Convention judgments upon recognition. Of course, consistent with such an idea - perhaps lurking in its shadow - is the notion that Convention judgments are less like foreign judgments and more like "sister state" judgments, which, in turn, supposes that the Conventions provide an integrated jurisdiction and judgments regime. It seems scarcely necessary to add the perhaps alarming thought that an integrated system which provides full-faith-and-credit to

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[3] McDermott, Paul A. *Res Judicata* and Double Jeopardy, Butterworths Ireland Ltd: Dublin, 1999, p. vii-viii

[4] Indeed, it would also be useful if such schemes could indicate whether only the parties to a prior suit can plead the preclusive effect of the judgment facilitated by the scheme, or whether the judgment can also affect the rights of third parties. Where possible in this thesis, some attempt has been made to compare how rules as to parties/privies operate without the constraints of a mutuality requirement, as in the United States.

judgments (and preclusive laws?) is a key corner-stone to any federation of sister-states! It might be that this explains the enthusiasm which *some* have for drawing parallels with recognition under the Conventions and the full-faith-and-credit clause of the *United States* Constitution.

What has been considered in this thesis, however, is whether a full-faith-and-credit approach to recognition is convenient for the application of preclusive pleas based upon a Convention judgment when relied upon in subsequent proceedings in England. Indeed, how far should we take the full-faith-and-credit approach, given that it would ask a recognising court to attune itself to the preclusive effects which the foreign judgment is capable of producing according to the laws of the rendering court? In other words, is it sensible to adopt a doctrine of *extension* of effects given the framework of the Conventions, and given the "historical accidents and practical needs"[5] of the *English* legal system - in particular, the fact that preclusive effects in England are ostensibly *equalised* when recognition proceeds at common law.

We have argued in this thesis that it *would* be sensible to accredit with full faith the cause of action preclusive effect of a Convention judgment, both as to contradiction and reassertion, if by that is understood an entire judgment that has rendered a cause of action enforceable under the Convention; for the *res judicata* doctrine as manifested upon an entire judgment is "a clear example of a general principle of law recognised by civilised nations"[6], and Article 26 clearly intends recognition of a judgment to prevent the re-litigation of a cause of action that has been determined. Thus, if the law of the rendering court says that this is the effect of its judgment, then subsequent proceedings in England upon the same cause of action ought to be dismissed on the strength of the judgment *via* the extension of the rendering court's cause of action preclusive laws.

However, we have also argued that the principles of issue estoppel and abuse of process ought operate independently of the Conventions, even if the Conventions (arguably) require full-faith-and-credit. This is because Article 26 does not seem to oblige a court to give any, or any particular, effect to something less than an entire judgment upon a cause of action, still less does a full-faith-and-credit analysis (as this clause operates in the United States) compel the extension of preclusive effects other than the "claim preclusive" effect of an entire cause of action judgment. Moreover, it would compromise the efficiency of the English legal system were an English court in subsequent proceedings required to apply the issue preclusive laws of the rendering court where a Convention judgment was involved, given the disparity in issue preclusive laws across contracting states. Thus, in cases involving the issue preclusive effects, or the abuse of process plea, derived from a Convention judgment, the applicable pleas and principles ought to be those available in English law.

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[5] Hartley, T. C., "The recognition of foreign judgments in England under the Jurisdiction and Judgments Convention", in Lipstein, K. (ed) Harmonisation of Private International Law by the EEC, Institute of Advanced Legal Studies (University of London): London, 1978, p106

[6] *South West Africa* case (1966) ICJR 4, 240 (Koretsky J)

Concluding remarks

In any case, this thesis has sought to elaborate the basic concepts and theoretical justifications that lie at the foundation of the preclusive pleas, and thus show how these pleas can be applied where a foreign judgment is relied upon in subsequent proceedings in England. The belief is that a proper understanding of these laws will increasingly prove useful, given that parties in modern day transnational litigation may increasingly seek foreign determinations precisely so as to render subject matter *res judicata* and thereby establish the basis for an argument that like or similar proceedings in England ought be precluded. The advent of jurisdictional issue estoppels is particularly significant in this regard. However, a further reason for understanding the preclusive effects of a foreign judgment is so that measures can be developed to inhibit foreign judgment preclusive effects, in appropriate circumstances, where such effects have been obtained pre-emptively[7]. Either way, the preclusive effects of foreign judgments in subsequent proceedings in England are of strategic importance to modern day transnational litigation.

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[7] See, in particular: *Du Pont v Agnew (No 2)* [1988] 2 Lloyd's Rep 240; *Phillip Alexander Securities v Bamberger* [1996] CLC 1757

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