Finality of Litigation

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Preclusion and Foreign Judgments in English and Dutch Law, and a Suggested Approach

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HR 14 November 1924, NJ 1925, 91, W 11301 (Kühne/Platt (Bontmantel))

HR 7 May 1926, NJ 1926, 1057 (Van Wijngaarden/Handelsvereeniging Holland-Bombay)

HR 17 February 1927, NJ 1927, 391

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HR 20 June 1930, NJ 1930, 1217 mnt PS (Philips/Tasseron)

HR 24 June 1932, NJ 1932, 1262, W 12487 mnt SB (NV Burgers and Co's Bank/Van Asch van Wijk qq (Hongaarse hypotheek))

HR 30 June 1932, NJ 1932, 1410

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HR 19 May 1961, NJ 1961, 534

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HR 12 June 1970, NJ 1970, 375 (Van Houtem/Aussems)

HR 4 March 1974, NJ 1975, 241 mnt ThW van Veen

HR 16 May 1975, NJ 1976, 465 mnt WH Heemskerk (Du Crocq/Van Tuijn)

HR 11 November 1977, NJ 1978, 503 (Engelen/Smeets)

HR 27 April 1979, NJ 1980, 169 mnt WH Heemskerk (Tepea BV/Wilkes)

HR 22 May 1981, NJ 1983, 609

HR 8 July 1981, NJ 1983, 229 mnt WH Heemskerk

HR 16 October 1981, NJ 1982, 123

HR 8 October 1982, NJ 1984, 58 mnt WH Heemskerk (Cooijmans BV/Raadschelders)

HR 20 November 1982, NJ 1982, 469 mnt CJH Brunner

HR 24 December 1982, NJ 1983, 370 (Schoonbrood/Schoonbrood)

HR 27 May 1983, NJ 1983, 600 (Leutscher/Van Tuijn (No 1))

HR 1 July 1983, NJ 1984, 360 mnt M van der Scheltema (Staat/LSV)

HR 20 January 1984, NJ 1987, 295 (Leutscher/Van Tuyn (No 2))

HR 4 May 1984, NJ 1985, 3 mnt WH Heemskerk (Van der Meer/Siller)

HR 28 September 1984, NJ 1985, 83 mnt WH Heemskerk

HR 26 October 1984, NJ 1985, 134

HR 26 June 1985, NJ 1986, 307 mnt JMM Maeijer (NV GKN/Stichting SOBIS)

HR 15 May 1987, NJ 1988, 164 mnt WH Heemskerk (Van Huffel/Van den Hoek)

HR 14 October 1988, NJ 1989, 413 mnt JBM Vranken (Wijnberg/Westland/Utrecht Hypotheekbank NV)

HR 28 October 1988, NJ 1989, 83 (Bakridi/HBN BV)

HR 4 November 1988, NJ 1990, 210

HR 16 December 1988, NJ 1989, 180 (Haaland/Staat)

HR 27 January 1989, NJ 1989, 588 mnt WH Heemskerk (Jamin/Geels)

HR 14 April 1989, NJ 1989, 839 mnt JBM Vranken

HR 23 June 1989, NJ 1990, 381 (Van den Bogert/Koolen)

HR 22 December 1989, NJ 1990, 704

HR 6 April 1990, NJ 1990, 516

HR 4 May 1990, NJ 1990, 677 mnt PA Stein (Stichting De Thuishaven/erfgenamen Van Zaanen-Pols)

HR 2 November 1990, NJ 1991, 800 mnt HJ Snijders [3.2] (Images BV/Van Delft)

HR 7 June 1991, NJ 1991, 577

HR 13 September 1991, NJ 1991, 767 (Dreesmann/Vede BV)

HR 24 January 1992, NJ 1992, 280

HR 20 March 1992, NJ 1992, 725 mnt PA Stein

HR 24 April 1992, NJ 1992, 461 (Carreau Gaschereau/Sunresorts NV)

HR 27 November 1992, NJ 1993, 570 mnt HJ Snijders (Aegon Schadeverzekering NV/Ontvanger der rijksbelastingen)

HR 26 March 1993, NJ 1993, 489 mnt PA Stein

HR 8 October 1993, NJ 1994, 508 mnt HJ Snijders (Dogan/Staat)

HR 22 October 1993, NJ 1994, 374 mnt HE Ras

HR 19 November 1993, NJ 1994, 175 (Van Raalte/SH Beheer BV)

HR 13 December 1993, NJ 1994, 348 (Esmil/Enka)

HR 17 December 1993, NJ 1994, 350 mnt JC Schultsz (Esmil/PGSP)

HR 14 January 1994, NJ 1994, 403 (Voogdijraad Sint Maarten)

HR 16 September 1994, NJ 1995, 75

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HR 17 November 1995, NJ 1996, 283 (Siegers/Citco Bank Antilles NV)

HR 19 January 1996, NJ 1996, 709 mnt HJ Snijders

HR 26 January 1996, NJ 1997, 258 mnt ThM de Boer

HR 21 June 1996, NJ 1997, 470 mnt HJ Snijders

HR 21 March 1997, NJ 1997, 380 (Stichting Informatica Drenthe Opleidingen)

HR 2 May 1997, NJ 1997, 662 mnt JMM Maeijer (Kip/De Coöperatieve Raiffeisen-Boerenleenbank Winterswijk BA)

HR 7 November 1997, NJ 1998, 268 mnt JMM Maeijer (Philips Electronics NV/VEB)

HR 27 February 1998, NJ 1998, 764 mnt MM Mendel (Europeesche Verzekering Maatschappij NV/OHRA Ziektekostenverzekering NV)

HR 9 October 1998, NJ 1998, 853 (Van Aalten/VU (Jeffrey))

HR 30 October 1998, NJ 1999, 83 (Van Gasteren/Beemster)

HR 13 November 1998, NJ 1999, 173 (Postbank NV/Huijbregts)

HR 11 February 2000, ECLI:NL:HR:2000:AA4767, NJ 2000, 259, RvdW 2000, 49, FJR 2000, 40 mnt IJ Pieters, PW 2000, 21196

HR 19 May 2000, ECLI:NL:HR:2000:AA5870, NJ 2001, 407 mnt HJ Snijders, RvdW 2000, 134, JB 2000, 267 mnt Red (Staat/Vereniging Nederlandse Vakbond Varkenshouders)

HR 13 October 2000, ECLI:NL:HR:2000:AA7481, NJ 2001, 210 (Vonck/Nedgoed BV)

HR 23 March 2001, ECLI:NL:HR:2001:AB0694, NJ 2003, 716, JOR 2001, 120 mnt ThAL Kliebisch (ABN AMRO Bank NV/Nederlandsche Trustmaatschappij BV)

HR 29 June 2001, ECLI:NL:HR:2001:AB2388, JOR 2001, 169, TVI 2001, 197 mnt GW

HR 23 November 2001, ECLI:NL:HR:2001:AD5323

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HR 5 April 2002, ECLI:NL:HR:2002:AD9145, NJ 2004, 170 mnt P Vlas, RvdW 2002, 65

HR 14 June 2002, ECLI:NL:HR:2002:AE0629, NJ 2003, 689 mnt HJ Snijders, RvdW 2002, 99 (Nederlandse Vakbond van Varkenshouders/Staat)

HR 13 December 2002, ECLI:NL:HR:2002:AE9261, NJ 2004, 212 mnt HJ Snijders, RvdW 2003, 1, JOR 2003, 32 mnt JM Blanco Fernández, JBPr 2003, 25 mnt VL van den Berg, ONDR 2003, 11 mnt L Timmerman (Hitz/Theunissen)

HR 4 April 2003, ECLI:NL:HR:2003:AF2828, NJ 2003, 417, RvdW 2003, 68

HR 24 October 2003, ECLI:NL:HR:2003:AM2625, NJ 2004, 558 mnt HJ Snijders, RvdW 2003, 165 (Kollöffel/Haan)

HR 21 November 2003, ECLI:NL:HR:2003:AJ0498, NJ 2004, 130 (Hermans/Fortis Bank NV)

HR 5 December 2003, ECLI:NL:HR:2003:AJ3242, NJ 2004, 76, RvdW 2003, 190, JBPr 2004, 18 mnt MAJG Janssen

HR 16 January 2004, ECLI:NL:HR:2004:AM2358, NJ 2004, 318, JBPr 2004, 33 mnt HW Wiersma

HR 12 March 2004, ECLI:NL:HR:2004:AO1332, NJ 2004, 284 mnt P Vlas, RvdW 2004, 47, JBPr 2004, 44 mnt M Freudenthal (IDAT)

HR 28 May 2004, ECLI:NL:HR:2004:AO4015, NJ 2004, 475 mnt SFM Wortmann, RvdW 2004, 77, EB 2004, 66

HR 24 September 2004, ECLI:NL:HR:2004:AP6874, NJ 2006, 200, RvdW 2004, 109 (Dryade/Staat)

HR 22 October 2004, ECLI:NL:HR:2004:AP1435, J 2006, 202 mnt HJ Snijders, RvdW 2004, 120, JBPr 2005, 5 mnt A Knigge and LC Dufour (Brink/ABN AMRO Bank NV)

HR 21 April 2006, ECLI:NL:HR:2006:AU9734, NJ 2006, 269, RvdW 2006, 417, RFR 2006, 72, FJR 2006, 94 mnt IJ Pieters

HR 10 November 2006, ECLI:NL:HR:2006:AY4033, NJ 2007, 561 mnt HJ Snijders, RvdW 2006, 1055, JOR 2007, 5 mnt P Sanders, JBPr 2007, 32 mnt BA Boersma, RON 2007, 3, JRV 2007, 68

HR 23 March 2007, ECLI:NL:HR:2007:AZ5441, NJ 2007, 177, RvdW 2007, 339 (De Bruin/AM Wonen BV)

HR 25 May 2007, ECLI:NL:HR:2007:BA0902, NJ 2007, 518 mnt SFM Wortmann, RvdW 2007, 502, JPF 2007, 113

HR 15 June 2007, ECLI:NL:HR:2007:BA1522, NJ 2008, 153 mnt HJ Snijders, RvdW 2007, 583

HR 29 June 2007, ECLI:NL:HR:2007:BA3516, NJ 2007, 353, RvdW 2007, 638 (Waterschap Regge en Dinkel/Milieutech Beheer BV)

HR 23 November 2007, ECLI:NL:HR:2007:BB3733, NJ 2008, 552, RvdW 2007, 996, JM 2008, 20 mnt Bos, JBPr 2008, 40 mnt D Roffel (Ploum/Smeets)

HR 25 april 2008, ECLI:NL:HR:2008:BC2800, NJ 2008, 553 mnt HJ Snijders, RvdW 2008, 481, JB 2008, 122, AB 2008, 259 mnt R Ortlep (De Vries/Gemeente Voorst)

HR 11 July 2008, ECLI:NL:HR:2008:BC9766, NJ 2008, 417, RvdW 2008, 736, IER 2008, 68 mnt ChG (Diesel SPA/MAKRO)

HR 19 December 2008, ECLI:NL:HR:2008:BG3573, NJ 2009, 456 mnt ThM de Boer, RvdW 2009, 85, JOR 2009, 94 mnt PM Veder, ONDR 2009, 76 mnt MA Broeders, NJB 2009, 140 (Yukos Finance BV/Rebgun)

HR 19 June 2009, ECLI:NL:HR:2009:BH7843, NJ 2009, 291, RvdW 2009, 769, NJB 2009, 1270

HR 26 June 2009, ECLI:NL:HR:2009:BI2042, RvdW 2009, 811, NJB 2009, 1348

HR 19 February 2010, ECLI:NL:HR:2010:BK4476, NJ 2011, 121 mnt PCE van Wijmen, RvdW 2010, 325 (CHIP(S)HOL III BV/NV Luchthaven Schiphol (No 1))

HR 19 March 2010, ECLI:NL:HR:2010:BK8146, NJ 2010, 172, RvdW 2010, 435, NJB 2010, 737, JBPr 2010, 42 mnt HLG Wieten (CHIP(S)HOL III BV/Staat)

HR 17 December 2010, ECLI:NL:PHR:2010:BO1806, NJ 2012, 58, RvdW 2011, 5, NJB 2011, 48, JBPr 2011, 19 mnt FJH Hovens

HR 24 December 2010, ECLI:NL:HR:2010:BO2882, NJ 2011, 16, RvdW 2011, 38, NJB 2011, 111 (CHIP(S)HOL III BV/NV Luchthaven Schiphol (No2))

HR 7 January 2011, ECLI:NL:HR:2011:BP0015, NJ 2011, 304 mnt HB Krans, RvdW 2011, 118, NJB 2011, 124, JOR 2011, 134, JBPr 2011, 20 mnt G van Rijssen (Yukos International UK BV/OOO Promneftstroy)

HR 1 April 2011, ECLI:NL:HR:2011:BP1474, RvdW 2011, 471, NJB 2011, 807

HR 27 May 2011, ECLI:NL:HR:2011:BP8693, NJ 2012, 625 mnt HJ Snijders, RvdW 2011, 678, JOR 2011, 275, JBPr 2012, 3 mnt FJH Hovens, NJB 2011, 1180 (Van Dooren/VECO Lasconstructies VOF)

HR 30 March 2012, ECLI:NL:HR:2012:BU3160, NJ 2012, 582 mnt HB Krans, RvdW 2012, 494, NJB 2012, 896, JBPr 2012, 41

HR 30 March 2012, ECLI:NL:HR:2012:BU8514, NJ 2012, 583 mnt HB Krans, RvdW 2012, 497, NJB 2012, 904, RAR 2012, 85, JBPr 2012, 42 mnt GCC Lewin (Krediet Specialist Nederland BV)

HR 5 January 1866, W 2765, AG Gregory (Musch/Gilman)

HR 17 December 1976, NJ 1977, 241 mnt GJ Scholten, AG Ten Kate (Bunde/Erckens)

HR 27 May 1983, NJ 1983, 600, AG Biegman-Hartogh (Leutscher/Van Tuijn (No 1))

HR 4 May 1984, NJ 1985, 3 mnt WH Heemskerk, AG Ten Kate (Van der Meer/Siller)

HR 11 October 1985, NJ 1986, 40, AG Leijten (Omega Schoenen BV/Monisima BV)

HR 15 May 1987, NJ 1988, 164 mnt WH Heemskerk, AG Ten Kate (Van Huffel/Van den Hoek)

HR 13 September 1991, NJ 1991, 767, AG Asser (Dreesmann/Vede BV)

HR 19 november 1993, NJ 1994, 175, AG Asser (Van Raalte/SH Beheer BV)

HR 14 January 1994, NJ 1994, 403, AG Strikwerda (Voogdijraad Sint Maarten)

HR 20 February 1998, NJ 1998, 510, RvdW 1998, 60, AG Strikwerda (Seip/Van Ginneken)

HR 9 October 1998, NJ 1998, 853, AG Langemeijer (Van Aalten/VU (Jeffrey))

HR 16 February 2001, ECLI:NL:PHR:2001:AB0025, NJ 2001, 236, AG Wesseling-van Gent

HR 5 April 2002, ECLI:NL:HR:2002:AD9145, NJ 2004, 170 mnt P Vlas, RvdW 2002, 65, AG Strikwerda

HR 20 December 2002, ECLI:NL:PHR:2002:AF0203, NJ 2003, 230, AG Wesseling-van Gent (Nederlandse Antillen)

HR 6 February 2004, ECLI:NL:PHR:2004:AN8908, NJ 2004, 250 mnt SW, RvdW 2004, 29, De Vries Lentsch-Kostense

HR 24 September 2004, ECLI:NL:HR:2004:AP6874, NJ 2006, 200, RvdW 2004, 109, AG Huydecoper (Dryade/Staat)

HR 26 November 2004, ECLI:NL:PHR:2004:AP9665, NJ 2005, 41, AG Wesseling-van Gent

HR 4 February 2005, ECLI:NL:HR:2005:AR4483, NJ 2005, 362 mnt PvS, RvdW 2005, 24, JOR 2005, 106 mnt A van Hees, AG Timmerman (United Pan-Europe Communications NV/Europe Movieco Partners Limited)

HR 20 January 2006, ECLI:NL:HR:2006:AT6013, NJ 2008, 461, JAR 2006, 50, RvdW 2006, 104, VR 2006, 157, SES 2007, 118, RAR 2006, 49, JA 2006, 59 mnt FT Oldenhuis, AG Langemeijer (Hooge Huys Schadeverzekeringen NV)

HR 22 September 2006, ECLI:NL:PHR:2006:AX9705, NJ 2007, 188, RvdW 2006, 875, JBPr 2007, 56 mnt FJH Hovens, AG Wesseling-van Gent (Aruba/New Millenium Telecom Services NV)

HR 11 July 2008, ECLI:NL:HR:2008:BC9766, NJ 2008, 417, RvdW 2008, 736, IER 2008, 68 mnt ChG, AG Verkade (Diesel SPA/MAKRO)

HR 10 April 2009, ECLI:NL:PHR:2009:BH2465, NJ 2009, 183, RvdW 2009, 515, JBPr 2009, 25 mnt IPM van den Nieuwendijk, NJB 2009, 814, AG Verkade

HR 4 December 2009, ECLI:NL:HR:2009:BJ7834, NJ 2011, 131 mnt JBM Vranken, RvdW 2009, 1406, JBPr 2010, 6 mnt RPJL Tjittes, NJB 2009, 2258, JOR 2010, 175, AG Huydecoper (ASB Greenworld BV/Stichting Nederlands Arbitrage Instituut)

HR 19 February 2010, ECLI:NL:PHR:2010:BK9031, NJ 2010, 131, RvdW 2010, 364, NS 2010, 99, AG Aben

HR 26 November 2010, ECLI:NL:PHR:2010:BN8533, NJ 2011, 55 mnt P van Schilfgaarde, RvdW 2010, 1400, NJB 2010, 2237, JOR 2011, 7 mnt RGJ de Haan, RON 2011, 9, AG Timmerman

HR 24 December 2010, ECLI:NL:PHR:2010:BO2882, NJ 2011, 16, RvdW 2011, 38, NJB 2011, 111, AG Wesseling-van Gent (CHIP(S)HOL III BV/NV Luchthaven Schiphol (NO 2))

HR 24 March 2011, ECLI:NL:PHR:2011:BQ0540, NTFR 2011, 2630 mnt Lubbers, BNB 2011, 300, FED 2012, 82 mnt E Poelmann, AG IJzerman

Hof Amsterdam 24 April 1914, NJ 1915, 789

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Hof 's-Gravenhage 4 April 1985 (in AG Ten Kate in HR 15 May 1987, NJ 1988, 164)

Hof Amsterdam 15 March 1990, KG 1990, 137

Hof 's-Hertogenbosch 17 November 1993, NJ 1994, 493 (Quickprime Finance Ltd/Limbutex BV)

Hof Leeuwarden 18 June 2003, ECLI:NL:GHLEE:2003:AO3499, NJ 2004, 90

Hof Arnhem 3 November 2004, ECLI:NL:GHARN:2004:AR6520, NTFR 2004, 1801

Hof 's-Gravenhage 24 March 2005, ECLI:NL:GHSGR:2005:AT4660 (Marketing Displays International Inc)

Hof 's-Hertogenbosch 1 November 2005, ECLI:NL:GHSHE:2005:AV0367

Hof Amsterdam 9 February 2006, ECLI:NL:GHAMS:2006:AX0095, NJF 2006, 328

Hof Amsterdam 1 June 2006, ECLI:NL:GHAMS:2006:AX6440, NJ 2006, 461, JA 2006, 88 (DES)

Hof Leeuwarden 18 October 2006, ECLI:NL:GHLEE:2006:AZ0547 (Beckering's Exploitatiemaatschappij BV)

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Introduction

Courts have long recognised the need for 'finality of litigation'—the principle that in the private and public interest in legal certainty and a proper administration of justice there should be an end to litigation, and that matters conclusively determined by a court of competent jurisdiction should not, save for exceptional circumstances, be reopened.

The need for finality of litigation extends beyond borders; as one English judge put it, "[i]t would be impossible to carry on the business of the world if Courts refused to act upon what had been done by other Courts of competent jurisdiction".[1] A well-known commentator noted similarly that "[t]o retry cases which have been authoritatively decided violates fundamental tenets of judicial economy. … Such duplication is not only wasteful; it punishes private litigants and exacts a toll from international commerce." [2] He conceded, however, that "while that principle is universal, state and national borders diminish its efficacy."[3]

By reference to English and Dutch law, this thesis examines finality of litigation within and between jurisdictions. The aim is three-fold: first, clarify how legal systems implement finality of litigation, a process known as 'preclusion'; second, decipher the problem of preclusion between jurisdictions, by distinguishing questions of a foreign judgment's local validity, or 'recognition', from those concerned with a foreign judgment's (preclusive) effects; and, finally, suggest an approach for the resolution of preclusion issues arising in respect of foreign judgments.

A. The Problem

Finality of litigation is a 'principle' of law in the sense that finality of litigation is a value that, though not a rule of law, provides the rationale for rules of law ('rules of preclusion' or 'preclusion law').[4] The principle is 'general' in that most if not all legal systems based on the rule of law—municipal, international and supranational systems alike—recognise the value of finality of litigation.[5] Consequently, though not a general principle of international law,[6] finality of litigation is certainly a principle

[1] *Davidson's Settlement Trusts, Re* (1872-73) LR 15 Eq 383, 386 (James LJ). See FT Piggott, *Foreign judgments: their effects in the English Court* (Stevens and Sons, London 1879) 28.
[2] FK Juenger, 'The Recognition of Money Judgments in Civil and Commercial Matters' (1988) 36 The American Journal of Comparative Law 1, 4.
[3] ibid.
[4] Gerald Fitzmaurice, 'The general principles of international law considered from the standpoint of the rule of law' (1957) Recueil des cours 1, 7.
[5] See text to n 48. cf *Pious Fund of the Californias (USA v Mexico, 1902)* George Grafton Wilson, *The Hague Arbitration Cases* (Ginn, Boston & London 1915) 2 ("this rule applies not only to judgments of tribunals created by the State, but equally to arbitral awards rendered within the limits of the jurisdiction established by compromise; considering that this same principle should, for an even stronger reason, be applied to international arbitration….").
[6] cf George Schwarzenberger, 'The fundamental principles of international law' (1955) 87 Recueil des cours 191, 205. But see Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stephens & Sons, London 1953) 336ff, who refers, for instance, to *Interpretation of*

common to legal systems, recognised "internationally as nationally" as the ICJ put it in the *Genocide case*,[7] and—in that limited sense—a general principle of law. Thus the CJEU in *Kapferer* reiterated "the importance, both for the Community legal order and national legal systems, of the principle of res judicata".[8]

Nevertheless, despite the general recognition of the principle, significant divergencies, or 'conflicts', exist between the rules of law through which legal systems implement finality of litigation. The failure to resolve conflicts of preclusion laws is liable to cause significant inefficiency and injustice: inefficiency results from uncertainty as to the risk of relitigation abroad; injustice arises from a failure to impose finality of litigation after the rendition of justice, or from imposition of finality absent a prior, adequate opportunity to litigate.[9] The latter concern is most acute among legal systems that share fundamental rules of justice, like Art 6(1) of the European Convention on Human Rights and Fundamental Freedoms[10] ('ECHR'); this provision can be violated by a Contracting State's failure to impose finality,[11] but also by the imposition of finality in circumstances where a party had no prior, adequate opportunity to litigate[12].[13] The concern is the more salient in the relations between

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Judgments Nos 7 and 8 (Germany v Poland) [1927] PCIJ Rep Series A No 13, 27 (Anzilotti, dissenting) ("It appears to me that if there be a case in which it is legitimate to have recourse, in the absence of conventions and custom, to 'the general principles of law recognised by civilised nations,' mentioned in No. 3 of Article 38 of the Statute, that case is assuredly the present one. Not without reason was the binding effect of *res judicata* expressly mentioned by the Committee of Jurists entrusted with the preparation of a plan for the establishment of a Permanent Court of International Justice, amongst the principles included in the abovementioned Article (Minutes, p.335).").

[7] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ('*Genocide Case*') (Judgment) [2007] ICJ 43 [116].

[8] Case C-234/04 *Rosmarie Kapferer v Schlank & Schick GmbH* ('*Kapferer*') [2006] ECR I-2585 [20].

[9] cf AT von Mehren and DT Trautman, 'Recognition of Foreign Adjudications: A Survey and A Suggested Approach' (1968) 81 Harvard Law Review 1601, 1603.

[10] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

[11] See *Roşca v Moldova* App No 6267/02 [25] (ECtHR, 22 March 2005) ("it is the State's *responsibility* to organise the legal system in such a way as to identify related proceedings and where necessary to join them or prohibit further institution of new proceedings related to the same matter, in order to circumvent reviewing final adjudications treated as an appeal in disguise, in the ambit of parallel sets of proceedings ….") (emphasis added). See further text to Chapter 6 n 114 and, specifically, n 122.

[12] See, in this specific context, *Ferenčíková v Slovakia* App No 39912/09 (ECtHR, 25 September 2012) [50] ("the right to a fair hearing, as guaranteed by Article 6 § 1 of the Convention, must be construed in the light of the principle of the rule of law, which requires that all litigants should have an effective judicial remedy enabling them to assert their civil rights …. In this way the right to a fair hearing embodies the 'right to court', one aspect of which is the right of access, that is the right to institute proceedings before courts in civil matters …. In other words, everyone has the right to have any claim relating to his civil rights and obligations brought before a court or tribunal ….'). cf *Johnson v Gore Wood & Co* [2002] 2 AC 1, 58, [2001] 2 WLR 72, [2001] 1 All ER 481, [2001] CPLR 49, [2001] BCC 820, [2001] 1 BCLC 313, [2001] PNLR 18, (2001) 98(1) LSG 24, (2001) 98(8) LSG 46, (2000) 150 NLJ 1889, (2001) 145 SJLB 29 (Lord Millett) ("It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is prima facie a denial of the citizen's right of access to the court ….'). See further text to Chapter 6 n 114 and, specifically, n 129.

[13] See JJ Fawcett, 'The Impact of Article 6(1) of the ECHR on Private International Law' (2007) 56 International and Comparative Law Quarterly 1ff. For instance, though English courts apply a strong presumption that the procedures of other Convention States comply with Art 6(1), they will refuse recognition of foreign judgments that negate the principle of legal certainty, which the provision made part of the common heritage of the Contracting States. See *Maronier v Larmer* [2002] EWCA Civ 774, [2003] QB 620, [2002] 3 WLR 1060, [2003] 3 All ER 848, [2003] 1 All ER (Comm) 225, [2002] CLC

states that share a common area of justice, such as European Union ('EU') Member States.

Private international law fails to adequately address these concerns. The problem is two-fold. In the first place, as Von Savigny pointed out in *System des heutigen Römischen Rechts*, "two questions, in themselves different, though related, have to be answered": first, "whether a judgment, once pronounced, is to be recognised elsewhere, even in another country", and second, "the effects of a valid judgment", which "can diverge between the laws of different countries."[14] But, he rightly observed: "Most of our authors attend only to the first question".[15] More recently, Kessedjian reminded of this gap in clear distinction of the two questions:

> 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.[16]

The Hartley/Dogauchi Report on the 2005 Hague Choice of Court Convention is symptomatic of this concealment of the question of effects behind the question of recognition; the failure to distinguish between the recognition of a foreign judgment

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1281, [2002] ILPr 39, (2002) 99(28) LSG 30, (2002) 146 SJLB 161. See further *Merchant International Co Ltd v Natsionalna Aktsionerna Kompaniya Naftogaz Ukrayiny* [2012] EWCA Civ 196, [2012] 1 WLR 3036, [2012] 2 All ER (Comm) 1, [2012] CP Rep 25, [2012] 1 CLC 396. The Court of Appeal refused to recognise a foreign judgment for disregarding all findings of a prior final and conclusive judgment, without an assessment whether there had been newly discovered circumstances of a decisive nature which could not have been ascertained with due diligence during the original proceedings. In that case, Toulson LJ rightly noted in this regard, at [64], that "[t]he development of human rights law has raised a number of fresh questions in relation to private international law, and the process of absorption of human rights law into private international law is far from complete."

[14] FC von Savigny, *System des heutigen Römischen Rechts Bd. 8* (Wissenschaftl Buchges, Darmstadt 1849) §373 ("Es muß jedoch bemerkt werden, daß hier eigentlich zwei, wenngleich verwandte, dennoch an sich verschiedene Fragen zu entscheiden sind, deren Sinn am anschaulichsten werden wird, wenn ich sie sogleich auf den wichtigsten Fall der Anwendung, das rechtskräftige Urteil, beziehe. Die erste, allerdings wichtigste, Frage is die, ob überhaupt das ausgesprochene rechtskräftiges Urteil auch anderwärts, selbst in einem anderen Lande, anzuerkennen ist. Die zweite Frage betrift die Modalitäten in den Bedingungen und Wirkungen des rechtskräftigen Urteils, die in den Gesetzen verschiedener Länder verschieden bestimmt sein können. Unsere Schriftsteller denken meist nur an die erste Frage.") (Translation by the author) (emphasis added). cf William Guthrie, *The conflict of laws, and the limits of their operation in respect of place and time* (T & T Clark, Edinburgh 1869) 185.

[15] ibid.

[16] Catherine Kessedjian, 'international jurisdiction and foreign judgments in civil and commercial matters' (1997) Hague Conference on Private International Law, Prel Doc No 7 [169] <www.hcch.net/upload/wop/jdgm_pd7.pdf> accessed 1 June 2013. cf Catherine Kessedjian, *La reconnaissance et l'exécution des jugements dans le droit interétatique et international des États-Unis d'Amérique* (PhD Thesis, Univ Paris 1 1986) 374 ("In reality, the perception of this problem depends principally on the answer to the following question: the foreign judgment, does it incorporate the rules of res judicata of the court in which it was rendered? If the answer is no, the problem of the effects to be accorded the foreign judgment can be qualified as a choice of law problem and the law of the recognising state. ... But it is certainly possible to subsume the judgment and to consider that it incorporates the theory of res judicata of the legal system in which it was rendered.") (« En réalité, la conception que l'on se fait de ce problème dépend très étroitement de la réponse que l'on donne à la question suivante: le jugement étranger incorpore-t-il les règles de l'autorité de chose jugée de la juridiction dans laquelle il a été rendu? Si l'on répond par la négative, le problème des effets à donner au jugement étranger peut faire l'objet d'un problématique de type conflictualiste et un certaine place peut être laissée à l'éventuelle application de la loi de l'Etat requis. … Mais il est certainement possible de subsumer le jugement et de considérer qu'il incorpore la théorie de l'autorité de chose jugée du système juridique dans lequel il a été rendu. »).

and the attribution of legal consequences ('effects') to a judgment amenable to recognition. Regarding Art 10 of the Convention entitled ("preliminary questions"), the report comments as follows under the heading "Estoppel and foreign judgments":

> Often a court has to rule on various questions of fact or law as preliminary matters before it can rule on the plaintiff's claim. For example, in actions under a patent-licensing agreement, it might have to rule on whether the patent is valid. This is a ruling on a preliminary question. It paves the way for the final judgment, which will be that the defendant is, or is not, liable to pay damages to the plaintiff. Clearly, the court addressed has to recognise this final judgment and, if the payment of money is ordered (e.g. a licensing fee or damages), to enforce it (in so far as it was rendered under a choice of court agreement covered by the Convention); *but is it required by the Convention to recognise the ruling on the preliminary question?*
>
> In civil-law States, a judgment normally has effect only as regards the final order – the dispositif in France and its equivalents in other legal systems, for example, the Tenor or Spruch in Germany and Austria. In the common-law world, on the other hand, the doctrine known variously as issue estoppel, collateral estoppel or issue preclusion requires a court in certain circumstances to recognise rulings on preliminary questions given in an earlier judgment. This can apply both where the original judgment was given by a court in the same State and where it was given by a court in another State. However, *the Convention never requires the recognition or enforcement of such rulings, though it does not preclude Contracting States from recognising them under their own law.*[17]

In doctrine too, the failure to distinguish local validity from a foreign judgment's (preclusive) effects implies that the problem of recognition of foreign judgments is conflated: some authors define 'recognition' as the local extension of a foreign judgment's effects ('*extension of effects*');[18] others view recognition as a process by

[17] Trevor Hartley and Masato Dogauchi, 'Explanatory Report to the Convention of 30 June 2005 on Choice of Court Agreements' (2007) Hague Conference on Private International Law [194]-[195] <www.hcch.net/upload/expl37e.pdf> accessed at 1 July 2013.

[18] See Arthur Nussbaum, 'Jurisdiction and foreign judgments' (1941) 41 Columbia Law Review 221, 222 ("[r]ecognition of a foreign judgment means essentially extension of the res judicata effect of the judgment over the territory of the state 'applied to'"); RA Schütze, *Die Anerkennung und Vollstreckung ausländischer Zivilurteile in der Bundesrepublik Deutschland als verfahrensrechtliches Problem* (PhD thesis, Bonn 1960) 3-4 ("die Erstreckung der Wirkungen der erststaatlichen Entscheidung auf den Zweitstaat"); Dieter Martiny, 'Anerkennung ausländischer Entscheidungen nach autonomen Recht' in Dieter Martiny, JP Waehler and MK Wolff (eds), *Handbuch des Internationalen Zivilverfahrensrechts: Band III/1* (Mohr Siebeck, Tübingen 1984) [68] ("Einen fremden Rechtsakt anzuerkennen heiβt, ihm im Inland (positive oder negative) Rechtswirkungen zuzuerkennen, ihm als verbindlich hinzunehmen und nicht mehr in Frage zu stellen."); Kessedjian (n 16) 374-75; Peter Gottwald, 'Grundfragen der Anerkennung und Vollstreckung ausländischer Entscheidungen in Zivilsachen' (1990) 103 Zeitschrift für Zivilprozeß 257, 261 ("Im streitigen Zivilprozeβ lassen sich mit der Lehre von der Wirkungerstreckung auch die Probleme der rein processualen Rechtskraft- bzw. Präjlusionswirkung ausländischer Entscheidungen sachgerecht lösen. Auch diese Wirkungen werden mit der Anerkennung im gleicher Weise wie im Entscheidungsstaat beachtlich."); Hartmut Linke, 'Lis alibi pendens and recognition of foreign judgments' in Harry Duintjer Tebbens, Thomas Kennedy and Christian Kohler (eds), *Civil jurisdiction and judgments in Europe: proceedings of the colloquium on the interpretation of the Brussels Convention by the Court of Justive considered in the context of the European judicial area. Luxembourg, 11 and 12 March 1991* (Butterworths, London 1992) 171, 177-79; Hague Conference on Private International Law, 'Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters Adopted by The Special Commission and Report by Peter Nygh and Fausto Pocar' (2000) Prel Doc No 11, 102 ("Recognition is given to a judgment 'when it is given the same effect that it has in the state where it was rendered with respect to the parties, the subject matter of the

which a foreign judgment is accorded the same effects as a comparable local judgment (‘*equalisation of effects*’);[19] and a final group describes recognition as the amalgamation of the effects a foreign judgment has in the State of rendition and those of a comparable local judgment (‘*combination of effects*’).[20] Along these lines, Von Mehren, for instance, describes recognition as “the question of the effect to be accorded locally to adjudications of the juridical institutions of other societies”.[21] On this view, the preclusive effect accorded a foreign judgment indicates its degree of recognition; an American court that attributes a German judgment the same preclusive effect as an American judgment, for example, accords the foreign judgment in question “very broad recognition”.[22] As a result, the problem of foreign judgment recognition is obscured, and a lingering conflicts of laws problem is overlooked.[23]

In the second place, even if questions of a foreign judgment’s local validity and preclusive effects are distinguished, the conflicts of preclusion laws problem that is consequently exposed currently lacks a proper choice of law approach.[24] As Szászy observed in *The basic connecting factor in international cases in the domain of civil procedure*, “the conception prevailing in the science of the international law of civil procedure considers the application of the *lex fori* as the basic rule and the application of the foreign law as a more or less insignificant, unimportant exception.”[25] Because preclusion is a procedural effect, the dogma of the *lex fori* implies that forum law governs, not because this law is thought to be on balance the proper law of

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action and the issues involved’”); Reinhold Geimer and RA Schütze, *Europäisches Zivilverfahrensrecht* (2nd ed Beck, München 2004) 509 (“Recognition … means … local extension of the effects a foreign judgment has according to the law of its State of rendition. The significance of the foreign judgment thus established in the State addressed for the local courts and authorities is called recognition. Recognition in other words equals local extension of effects.”) (“Anerkennung … bedeutet … Erstreckung der Wirkungen eines ausländischen Urteils auf das Inland, welche diesem nach dem Recht des Urteilstaates zukommen. Die dadurch begründete Beachtlichkeit der ausländischen Entscheidung im Zweitstaat für die dortigen Gerichte und Behörden nennt man Anerkennung. Anerkennung ist also Wirkungerstreckung auf das Inland.”); Alexander Layton and Hugh Mercer, *European Civil Practice* (2nd ed Sweet & Maxwell, London 2004) 845; and Hélène Gaudemet-Tallon, *Compétence et exécution des jugements en Europe: règlement n° 44-2001: conventions de Bruxelles et de Lugano* (3rd ed LGDJ, Paris 2002) 281-82 (the extension of effects-approach implies that the recognising state “accepts the foreign judgment along with the effects which it is has in the rendering state”) (“[O]n accepte la décision étrangère avec les effets dont elle jouit dans l’État d’origine”).

[19] See, eg, IH Hijmans, ‘Welke kracht behoort te worden toegekend aan beslissingen in burgerlijke en handelszaken van den buitenlandschen rechter (scheidslieden daaronder niet begrepen)?’ in *Handelingen der Nederlandsche Juristen-Vereniging* (Belinfant, The Hague 1929) 58-9; and AT von Mehren and DT Trautman, *The Law of Multistate Problems* (Little, Brown and Company, Boston 1965) 843-44 847 (cf Von Mehren and Trautman (n 9) 1681); and D Holleaux, J Foyer and G de la Pradelle, Droit international privé (Masson, Paris 1987) 421.

[20] GA Droz, *La compétence judiciaire et l’effet des jugements dans la Communauté économique européenne selon la Convention de Bruxelles du 27 septembre 1968* (Dalloz, Paris 1972) 280 (contending that the effects of a recognised foreign judgment should extend neither beyond those attributed in the State of origin nor beyond those attributed in the State of recognition).

[21] AT von Mehren, ‘Recognition and enforcement of foreign judgments: general theory and the role of jurisdictional requirements’ (1980) 167 Recueil des Cours 9, 19.

[22] Von Mehren and Trautman (n 19) 843-44.

[23] cf Rhonda Wasserman, ‘Transnational Class Actions and Interjurisdictional Preclusion’ (2010) University of Pittsburgh Legal Studies Research Paper Series, Working Paper No 2010-04, 3 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1554472> accessed 1 July 2013.

[24] cf PR Barnett, *Res Judicata, Estoppel, and Foreign Judgments* (OUP, Oxford 2001) [2.12].

[25] Stephen Szászy, ‘The Basic Connecting Factor in International Cases in the Domain of Civil Procedure’ (1966) 15 International and Comparative Law Quarterly 436.

preclusion, but because issues of preclusion are excluded from choice of law-analysis. This categorical exclusion of choice of law-analysis for issues characterised as procedural has been compellingly rejected; the same applies for the theoretical soundness of the age-old exception to the *lex fori* principle for *decisoria litis* (procedural issues that directly influence the court's decision on the merits, which are deemed to be governed by the *lex causae*, or proper law) as distinct from *ordinatoria litis.* The objective of private international law—the resolution of conflicts of laws—holds equally true for issues of preclusion. The general principle of legal certainty further mandates the harmonisation of choice of law-results, so as to ensure that issues are subject to a single governing law, thereby ensuring the stability of legal relations.

1. The problem illustrated

An illustration further clarifies the problem. Consider these facts: a claim is filed in an English court for the enforcement of a number of Russian arbitral awards. In reply, the defendant invokes a number of Russian judgments that annuled the awards. However, the claimant asserts that these judgments were the product of a partial and dependent judiciary and should therefore be refused recognition in England and Wales on grounds of public policy. The defendant denies this fact, but the claimant invokes a Dutch judgment that established the alleged partiality and dependency in prior (successful) enforcement proceedings between the parties concerning the same arbitral awards. According to the claimant, this judgment *precludes* relitigation of the question of partiality and dependence in the English proceedings.

These facts derive from *Yukos Capital Sarl v OJSC Rosneft Oil Co*,[26] a recent case in which the English High Court was called upon to determine the preclusive effect of a judgment of the Amsterdam Court of Appeal. According to the court, the Dutch judgment had preclusive effect as a matter of English law. Further, based on expert evidence of Dutch preclusion law, the court concluded that the judgment would also be preclusive in The Netherlands.

The court erred on both counts, demonstrating the general complexity of preclusion law.[27] As far as English preclusion law is concerned, in particular the rule of 'issue estoppel', which forms part of the English doctrine of res judicata and requires identity of the issues, the court reasoned that the issue in the English and Dutch proceedings was the same, namely, the disputed partiality and dependency of the Russian judiciary. However, on the basis of an intricate albeit correct distinction between issues and (mere) questions of fact, the Court of Appeal reversed the High Court judgment, because the issue in the English proceedings was different—namely, whether English as opposed to Dutch public policy excluded recognition of the

[26] [2011] EWHC 1461 (Comm), [2012] 1 All ER (Comm) 479, [2011] 2 Lloyd's Rep 443, [2011] 2 CLC 129, [2011] Arb LR 39, (2011) 108(26) LSG 17, revd [2012] EWCA Civ 855, [2013] 1 All ER 223, [2013] 1 All ER (Comm) 327, [2012] 2 Lloyd's Rep 208, [2012] 2 CLC 549, 143 Con LR 1 ('*Yukos English High Court*').

[27] See respectively text to Chapter 1 n 415ff and Chapter 2 n 482. See JB van de Velden, 'The 'Cautious Lex Fori' Approach to Foreign Judgments and Preclusion' (2012) 61 ICLQ 519.

Russian annulment judgments—notwithstanding that the factual question of partiality and dependency in relation to both issues was the same.[28]

The case also illustrates the challenge of a proper characterisation of the problem of preclusion by foreign judgments; the High Court, in considering the preclusive effect, if any, to be attributed the Dutch judgment, framed the question as asking whether the court should "*recognise*" the judgment.[29] Accordingly, the court conflated the questions of recognition and preclusion. Also on appeal, the parties proceeded on the assumption that "because the application of the estoppel must work justice rather than injustice, the court had a discretion to refuse to give effect to a foreign judgment if there were special circumstances making it unjust to *recognise* the decision".[30] As noted, the Court of Appeal concluded that the requirements of English law for an issue estoppel based on the Dutch judgment were not satisfied, but no right mind would suggest that the court *thereby* refused the Dutch judgment recognition. Instead, more carefully and, more appropriately, the Court of Appeal simply held that "[the defendant is] not issue estopped from contradicting in England [the claimt's] assertion that the Russian courts' decisions… were partial and dependent."[31]

Finally, the decision demonstraties the lack of choice of law-analysis of issues of preclusion that arise in respect of foreign judgments; the court's decision to apply *English* preclusion law to the Dutch judgment is consistent with *Carl Zeiss Stiftung v Rayner & Keeler Ltd*, where Lord Reid held that "estoppel is a matter for the *lex fori*",[32] which observation echoes the old English precedent that issues classified as "procedure" have reference only to the *lex fori.*[33] Indeed, the English approach is, as Moore-Bick LJ explained in *Maher v Groupama Grand Est*, that "[f]or the purposes of resolving problems in the conflicts of laws English law recognises a distinction between substantive rules of law, which are governed by the *lex causae*, and procedural rules, which are governed by the *lex fori*."[34] Whereas the *lex causae* can be English law or foreign law as appropriate in the circumstances, the *lex fori* is invariably English law, excluding the applicability of foreign law. In other words, choice of law-analysis is limited to substantive issues, and excluded for procedural issues, including preclusion.

B. Methodological Approach

This thesis proceeds in three parts. Part I on finality of litigation examines the principle of finality of litigation as implemented in English and Dutch law. Chapter 1 looks at English law. Chapter 2 considers Dutch law. The goal has been to analyse the

[28] [2012] EWCA Civ 855, [2013] 1 All ER 223, [2013] 1 All ER (Comm) 327, [2012] 2 Lloyd's Rep 208, [2012] 2 CLC 549, 143 Con LR 1 [156]ff (Rix LJ read the judgment of the Court to which Longmore and Davis LLJ contributed) ('*Yukos English Court of Appeal*').
[29] *Yukos English High Court* (n 26) [49].
[30] ibid [147].
[31] ibid [157].
[32] [1967] 1 AC 853, 919, [1966] 3 WLR 125, [1966] 2 All ER 536, [1967] RPC 497, (1966) 110 SJ 425.
[33] See, eg, *Ruckmaboye v Lulloobhoy Mottichund, Her Highness* (1852) V Moore Indian Appeals 234, 18 ER 884.
[34] [2009] EWCA Civ 1191, [2010] 1 WLR 1564, [2010] 2 All ER 455, [2010] 2 All ER (Comm) 843, [2009] 2 CLC 852, [2010] RTR 10, [2010] Lloyd's Rep IR 543 [8].

law *as is—de lege lata*. Nonetheless, preclusion law is a complex and evolving area of the law, with various problematic aspects and unanswered questions; indeed, at times it seems courts and legislator take special effort to cover this legal Pompeï under a layer of ashes of empty expressions.[35] In response, on points where the law is either unclear or unsettled, probable answers are uncovered that may inform further development of the law.

This part applies a *functional* approach. Gottwald describes this approach as "comparing social problems, their solution and how these solutions operate."[36] Hence, rather than mere "microcomparison" of pre-selected *rules* of law,[37] the analysis is framed at the level of *principle*, considering that rules of preclusion are not "mere technical and value-empty tools", as Kerameus puts it, but reflect "a set of fundamental approaches to, and expectations from, adjudication as a complicated and refined mechanism in the service of remedying social evils."[38] The approach is, in other words, *principle*-oriented; starting from the fact that most legal systems recognise finality of litigation in principle, this part inquires into how legal systems implement that principle in practice.

By contrast, other recent studies on finality of litigation tend to be *rule*-oriented.[39] These studies vary widely in scope. Some authors restrict their analysis to part of what is conventionally known as "res judicata doctrine", for instance, "claim preclusion" or "issue preclusion".[40] Other authors adopt a wider approach and consider both claim preclusion and issue preclusion.[41] A final group expands the scope of analysis to "extended doctrines of res judicata based on abuse of process", in addition to the res judicata doctrine.[42] These variations in scope of analysis can be attributed to the fact that the responsible researchers are rooted in different legal systems, with varying perspectives regarding identical problems.

Part II on finality of litigation between jurisdictions demarcates two distinct problems. First, the problem of foreigness of judgments; the problem that general international law limits the sphere of validity of judgments by excluding from that sphere the territory of other States. Despite this limitation under international law, States in the exercise of their territorial sovereignty tend to grant local validity to foreign judgments through a process known in the field private international law as foreign judgment 'recognition'. Chapter 3 examines the recognition of foreign

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[35] cf JLA Visser, *Procesgelding van civiele uitspraken: gezag van gewijsde* (H.J. Smit, Utrecht 1952) 3.
[36] Peter Gottwald, 'Comparative Civil Procedure' (2005) Ritsumeikan Law Review 23, 25-26 (emphasis added).
[37] ibid 32.
[38] KD Kerameus, 'Procedural Harmonization in Europe' (1995) 43 The American Journal of Comparative Law 401, 405.
[39] See, eg, Sophia Sepperer, *Der Rechtskrafteinwand in den Mitgliedstaaten der EuGVO* (Mohr Siebeck, Tübingen 2010).
[40] ibid.
[41] See, eg, Hélène Péroz, *La réception des jugements étrangers dans l'ordre juridique français* (LGDJ, Paris 2005) 113ff. cf Kazuhiro Koshiyama, *Rechtskraftwirkungen und urteilsanerkennung nach amerikanischem, deutschem und japanischem Recht* (Mohr Siebeck, 1996); and JD Brummett Jr, 'The Preclusive Effect of Foreign Country Judgments in the United States and Federal Choice of Law: The Role of the Erie Doctrine Reassessed' (1988) 33 New York Law School Law Review 83, 91ff.
[42] Barnett (n 24). cf AAS Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (2nd ed Sweet & Maxwell, London 2006) 931 ("The principle of finality demands that a judgment disposing of a dispute should leave no room for further litigation of the same subject matter. … However, although this idea is straightforward, its practical manifestations are far from simple, not least because English law employs three different doctrines for implementing it.").

judgments in English and Dutch law, and clarifies the meaning and rationale of this process, which takes various forms, depending on the private international law of the State addressed.

Second, the problem entitled 'conflicts of preclusion laws'; the problem resulting from the fact that preclusive effects are not vested in a judgment but attributed by (preclusion) law, while preclusion laws tend to vary significantly between legal systems. Hence, if a court applies domestic preclusion law to a foreign judgment, the judgment's preclusive effect in the forum addressed may turn out diffently than the preclusive effect that is attributed in the rendering jurisdiction. Chapter 4 compares how legal systems, specifically Dutch and English law, resolve issues of preclusion arising in respect of foreign judgments.

Part III, finally, puts forward a choice of law approach for resolving conflicts of preclusion laws, after assessing, with a focus on the situation in Europe which comprises the English and Dutch legal systems, whether and, if so, to what extent the problem of conflicts of preclusion laws has been superseded by the harmonisation of preclusion laws. Chapter 5 evaluates the process of harmonisation of preclusion laws in Europe. Chapter 6 proposes a choice of law approach for resolving remaining conflicts of preclusion laws.

1. Scope

Prior research of a wider scope—including France, Germany, Romania, Spain, Sweden, Switzerland, and the United States (New York)—[43] suggested two things: first, preclusion laws vary and, second, private international law doctrine conflates the distinct problems of foreign judgment recognition and preclusion by foreign judgments. The scope of this thesis is restricted to the analysis of English and Dutch law, and so addresses the need for more detailed analysis into how legal systems with historically diverging, common and civil law cultures implement finality of litigation.

The focus of analysis is on *preclusive* effects of *judgments* in *civil and commercial matters*. Criminal judgments and arbitral awards then are excluded. The same applies for the effect of records of judgment as a means of evidence to prove certain facts. The scope of analysis is further limited to the impact of judgments on '*litigation*'—the process by which claims, defences and issues are raised between two or more parties with a view to their adjudication by a court or tribunal—so as to exclude consideration of judgments' significance for the substance of rights and obligations, the status of persons or property, or as legal precedent.

Finally, in formulating a suggested approach, this thesis takes account of the fact that the English and Dutch legal systems under consideration form part of a wider legal context. This context includes the so-called 'Brussels and Lugano Regime'—a detailed set of multilateral agreements and supranational measures on jurisdiction and the recognition and enforcement of judgments that binds EU Member States and the Member States of the European Free Trade Association ('EFTA').[44] Moreover, the relevant legal context includes the EU Treaties as well as the ECHR.

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[43] British Institute of International and Comparative Law, 'The Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, Res Judicata and Abuse of Process' (2006) <www.biicl.org/files/4608_comparative_report_-_jls_2006_fpc_21_-_final.pdf> accessed 1 June 2013.

[44] The 'Brussels and Lugano Regime' consists of: (1) 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Brussels Convention) (signed 27 September

C. Terms and Definitions

1. What is finality of litigation?

When it comes to defining a principle of law, one can always dig deeper; the principle of finallity of litigation stems more fundamentally from the need for legal certainty, and ultimately, the rule of law.[45] Along these lines, the ECtHR in

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1968, entered into force 1 February 1973) [1972] OJ L299/32 (as amended, see the consolidated version [1998] OJ C27/1); (2) Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Lugano Convention) (adopted 16 September 1988, entered into force 1 January 1992) [1988] OJ L319/9; (3) Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I Regulation) [2001] OJ L12/1 (as amended, see for a consolidated verson <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2001R0044:20120314:EN:PDF> accessed 2 May 2013); and (4) Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Revised Lugano Convention) (adopted on 30 October 2007, entered into force 1 January 2010) [2010] OJ L140/1.

In accordance with Protocol (No 21) on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice [2012] OJ C 326/295, Art 1, the United Kingdom and Ireland Subject to Article 3, the United Kingdom and Ireland do not take part in the adoption by the Council of proposed measures pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union. However, pursuant to Art 3(1) of the Protocol, the United Kingdom or Ireland may notify the President of the Council in writing, within three months after a proposal or initiative has been presented to the Council pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union, that it wishes to take part in the adoption and application of any such proposed measure, whereupon that State shall be entitled to do so. The United Kingdom and Ireland, in accordance with Art 3 of the protocol took part in the adoption and application of the Brussels I Regulation. Furthermore, in accordance with the same provision, the United Kingdom and Ireland have notified their wish to take part in the adoption and application of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Brussels I Regulation (recast)) [2012] OJ L 351/1.

Under Protocol (No 22) on the position of Denmark [2012] C326/299, Denmark does not take part in the adoption by the Council of proposed measures pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union. However, Denmark and the EU concluded a separate agreement on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2005] OJ L299/62, in recognition of the unsatisfactory legal situation arising from differences in applicable rules on jurisdiction, recognition and enforcement of judgments within the Union. By virtue of the agreement, Art 1, the provisions of the Brussels I Regulation and its implementing measures apply to the relations between the Union and Denmark, the objective of the Contracting Parties to arrive at a uniform application and interpretation of the provisions of the Brussels I Regulation and its implementing measures in all Member States (see Art 1(2) of the agreement). Nevertheless, under Art 3(1), Denmark does not take part in the adoption of amendments to the Brussels I Regulation and no such amendments are binding upon or applicable in Denmark, though Denmark can, whenever amendments to the regulation are adopted notify the Commission of its decision whether or not to implement the content of such amendments (Art 3(2) of the agreement). Notification shall be given at the time of the adoption of the amendments or within 30 days thereafter; indeed, by letter of 20 December 2012 (see [2013] OJ L79/4), Denmark notified the Commission of its decision to implement the contents of the Brussels I Regulation (recast).

[45] cf AAS Zuckerman, 'Finality of Litigation – Setting Aside a Final Judgment' (2008) 27(2) CJQ 151 ("[Finality of litigation] is an inseparable feature of the rule of law. The law cannot govern unless the rights it establishes are certain. And rights can be certain only if they are reasonably well defined and understood, reasonably well enforced, and reasonably stable. The rule of law can be degraded as much by the vulnerability of rights to repeated challenges in the courts as by the state's failure to impose its authority and protect rights. In either case the possessor of rights would be unsure that they will yield the expected benefits.").

Brumărescu v Romania, in holding that Art 6(1) ECHR guarantees finality of litigation, held that: "One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, inter alia, that where the courts have finally determined an issue, their ruling should not be called into question."[46] Also the ICJ in the abovementioned *Genocide case* observed on the basis for the principle that "the stability of legal relations requires that litigation come to an end",[47] and the CJEU in *Kapferer*[48] reiterated similarly that the principle serves the purpose of ensuring "stability of the law and legal relations and the sound administration of justice."[49]

Nevertheless, as Schwarzenberger explained in his treatise on fundamental principles, albeit principles of international law, defining a principle involves avoiding the Scylla of unnecessary plurality of principles and the Charybdis of overformalisation.[50] Against the background of the fundamental principles of legal certainty and the rule of law, application of three criteria developed by Schwarzenberger explains why the principle of finality of litigation offers a valid framework for (comparative) analysis. First, in light of the public and private interests affected by endless litigation, finality of litigation is especially significant for civil justice. Second, finality of litigation constitutes the rationale for a range of rules of law that fall naturally under its heading. Lastly, finality of litigation is a need so typical of any civil justice system that it forms an essential part of any known system of procedural law; at any rate, the principle is so characteristic of existing procedural law that if it were ignored, there would be a danger of losing sight of an essential feature of modern procedural law.

a. The implicated public and private interests

A lack of finality of litigation undermines the rule of law and causes injustice to individuals. In other words, finality of litigation is a matter of public and prive concern, as reflected in the Latin maxims *interest rei publicae ut finis sit litium* ('it is in the public interest that there be an end to litigation') and *nemo debet bis vexari pro una et eadem causa* ('a person should not be troubled twice for the same reason') which are frequently used in this context,[51] or to use the words of Lord Blackburn in *Lockyer v Ferryman*, who referred to "two grounds—the one public policy, that it is the interest of the State that there should be an end of litigation, and the other, the hardship on the individual, that he should be vexed twice for the same cause."[52]

As a general matter, legal systems that fail to impose finality of litigation harm the private interest in legal certainty and stability, and risk imposing substantial financial and other burdens by opening the door to repetitive, unnecessary, and even vexatious litigation, as individuals are forced to (re)litigate matters adjudicated upon in an earlier set of proceedings or which could have been. Moreover, as a matter of

[46] (2001) 33 EHRR 35 [61].
[47] ibid [116].
[48] *Kapferer* (n 8).
[49] ibid [20].
[50] Schwarzenberger (n 6) 204.
[51] See, eg, *Arthur JS Hall & Co v Simons* [2002] 1 AC 615, 701 [2000] 3 WLR 543, [2000] 3 All ER 673, [2000] BLR 407, [2000] ECC 487, [2000] 2 FLR 545, [2000] 2 FCR 673, [2001] PNLR 6, [2000] Fam Law 806, [2000] EG 99 (CS), (2000) 97(32) LSG 38, (2000) 150 NLJ 1147, (2000) 144 SJLB 238, [2000] NPC 87 (Lord Hoffmann).
[52] (1877) 2 App Cas 519, 530, (1877) 4 R (HL) 32.

public concern, a legal order risks the creation of conflicting judgments contrary to the need for legal certainty and stability,[53] and litigation consumes scarce resources, while the aim of a civil justice[54] system is to efficiently resolve disputes, not to give disappointed litigants another bite at the cherry, or to be an instrument of vexation for malevolent or careless litigants.

b. The balance struck between correctness and repose

The imposition of finality of litigation reflects the balance each functioning legal system strikes between ideal and practicable justice, or, as Von Mehren put it, "the conflicting principles of correctness and repose."[55] At the end of the day, the scale inevitably tips in favour of practicable justice, and thus finality of litigation; Lord Wilberforce in *The Ampthill Peerage* explained why: "Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book."[56]

Then again, despite the unavoidability of compromise in favour of finality of litigation, as Von Mehren rightly points out, "a tension persists between the two principles [i.e. correctness and repose] and no solution can ever be entirely stable nor demonstrably correct."[57] Consequently, it is equally unavoidable that legal systems' solutions change and develop over time, and differ among themselves. Moreover, even if the need for compromise is evident, the substance of the comprise in a particular legal system is a function of multiple variable factors that influence the precise balance struck in a particular case, as well as the subject matter of a case (e.g. the need for finality of litigation in commercial matters is felt differently than in criminal, and again differently in family law matters).[58]

2. Preclusion law

Preclusion law comprises any rule of law that imposes finality of litigation. Unsurprisingly, preclusion law and 'res judicata' ('the matter adjudicated') closely correlate. In fact, some courts, including the ICJ and ECJ, only refer to "the principle

[53] Hans Kelsen, *Pure Theory of Law* (University of California Press, Berkely 1967) 205.
[54] On this term, see JIH Jacob, *The Fabric of English Justice* (Stevens & Sons, London 1987) 2 ("In England, we have increasingly been using the expression 'civil justice' in place of 'civil procedure' to describe the entire system of the administration of justice in civil matters. In this sense, the ambit of civil justice is wide and far-reaching and its bounds have not been fully chartered; it encompasses the whole area of what is comprised in civil procedural law.").
[55] Von Mehren (n 21) 21-22.
[56] [1977] AC 547, 596, [1976] 2 WLR 777.
[57] Von Mehren (n 55) 22.
[58] ibid 22-23, who identified the following seven: (1) initiation of, or participation in, the process from which the prior adjudication resulted by the party who now invokes the correctness principle; (2) availability to that party (especially when utilized) of opportunities to challenge the adjudication; (3) the fact that no forum from which review might be sought has institutional qualities significantly superior to those of the instance whose adjudication is challenged; (4) the fact that the other party is not in some special sense (e.g. through his fraud) responsible for the alleged miscarriage of justice; (5) the view that the issue adjudicated is not one of exceptional importance to the challenging party or to society; (6) the fact or likelihood, especially if reasonable, on the challenged adjudication by the other party or third parties; (7) the cost to the parties and society of each additional step or procedure designed to vindicate the principle of correctness.

of res judicata", not the principle of finality of litigation.[59] The same tendency exists in municipal courts; for instance, Lord Bingham in *Director General of Fair Trading v First National Bank* noted that the English doctrine of 'merger *in rem judicatam*', which bars a successful claimant from reasserting his cause of action after recovering judgment, is "a conventional application of the principle of res judicata".[60]

However, whereas preclusion law certainly encompasses the res judicata doctrine as perhaps its most visible exponent, the principle of finality of litigation is an abstraction from rules of law of a wider scope, including rules of law that preclude (re)litigation of matters which are not strictly res judicata.[61]

English law effects finality of litigation through a complex system comprising a variety of doctrines and rules,[62] including a limitation on the jurisdiction of a court within the same case to reopen matters after the rendition of a final judgment,[63] the res judicata doctrine (comprising the doctrines of merger *in rem judicatam*[64] and estoppel *per rem judicatam*[65]), and the prohibition of abuse of process[66] (including instances of relitigation-abuse,[67] *Henderson v Henderson*-abuse[68] and collateral attack-abuse[69]). As Lord Millett in *Johnson v Gore Wood & Co* pointed out, "these various defences are *all* designed to serve the same purpose: to bring finality to litigation and avoid the oppression of subjecting a defendant unnecessarily to successive actions."[70]

In Dutch law, the traditional res judicata doctrine—codified in Art 236 of the Civil Procedure Code[71] ('Rv')—is complemented by various statute-based rules and judge-made doctrines, including doctrines on finality within the same case ('*leer van de bindende eindbeslissing*',[72] '*grievenstelsel*',[73] and '*grenzen van de rechtsstrijd na cassatie*'[74]), Art 3:303 of the Civil Code[75] ('BW') on the denial of a right of action absent a sufficient interest to file a claim ('*gebrek aan belang*'),[76] a doctrine that prohibits any court other than the competent appellate or revocation court from deciding on (and effectively bars the parties from challenging) the validity of an

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[59] See *Genocide Case* (n 7) [114]ff.
[60] [2001] UKHL 52, [2002] 1 AC 481, [2001] 3 WLR 1297, [2002] 1 All ER 97, [2001] 2 All ER (Comm) 1000, [2002] 1 Lloyd's Rep 489, [2002] ECC 22, (2001) 151 NLJ 1610 [10] (emphasis added). cf regarding estoppel, *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 AC 273, 289, [1990] 2 WLR 1, [1990] 1 All ER 65, 88 LGR 217, (1990) 2 Admin LR 289, (1990) 59 P & CR 326, [1990] 1 PLR 69 [1990] 13 EG 69, (1990) 154 LG Rev 192, [1989] EG 178 (CS) (Lord Bridge). cf *India v India Steamship Co Ltd (The Indian Endurance and The Indian Grace) (No 1)* [1993] AC 410, 422, [1993] 1 All ER 998, [1994] ILPr 498, [1993] 1 Lloyd's Rep 387, [1993] 2 WLR 461 ('*The Indian Grace (No 1)*')(Lord Goff) (recognising a "common law principle of res judicata").
[61] See, eg, Chapter 1, text to n 477.
[62] See Chapter 1.
[63] ibid text to n 57ff.
[64] ibid text to n 92ff.
[65] ibid text to n 264ff.
[66] ibid text to n 470ff.
[67] ibid text to n 518ff.
[68] ibid text to n 526ff.
[69] ibid text to n 536ff.
[70] *Johnson* (n 12) 59 (emphasis added).
[71] *Wetboek van Burgerlijke Rechtsvordering* (entered into force 1 October 1838) Stb 1828, 33 (as amended). See Chapter 2, text to n 318ff.
[72] See Chapter 2, text to n 77ff.
[73] ibid text to n 110ff.
[74] ibid text to n 143ff.
[75] *Burgerlijk Wetboek* (entered into force 1 January 1992) Stb 1980, 432 (as amended).
[76] See Chapter 1, text to n 160ff.

existing judgment ('*gesloten stelsel van rechtsmiddelen*'),[77] a doctrine that requires a court in interim proceedings to align its decision with a decision in main proceedings ('*afstemmingsregel*'),[78] and Art 3:13 BW on the prohibition of an abuse of right ('*misbruik van recht*') which prohibition Art 3:15 BW extends to procedural law to bar the abuse of process ('*misbruik van procesrecht*')[79].

This is not to say that the association cannot be more exclusive in other legal systems. In many U.S. states,[80] for example, the res judicata doctrine, which broadly includes 'claim preclusion' ('merger' and 'bar')[81] and 'issue preclusion' (or 'collateral estoppel'),[82] tends to have a very wide scope of application, so as to bar not only attempts to relitigate matters which are res judicata, but also matters that were not but could and should have been raised, litigated and determined in prior proceedings (e.g. claims arising from the same transaction and occurrence and compulsory counterclaims), and collateral estoppel in some cases also applies between different parties ('non-mutual estoppel').[83] Still, even in the U.S., the res judicata doctrine seems to be complemented in most states, albeit to a more limited extent, by rules on the finality of judgments, which bar collateral attacks on judgments for reasons other than lack of jurisdiction,[84] fraud, imposition, or mistake.[85]

a. Aspects of preclusion

Broadly speaking, preclusion law regulates the *scope* of preclusive effects attached to a judgment, as well as the *process* of preclusion. First, preclusion law tends to limit the scope of preclusion by reference to what can be precluded, as well as who is

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[77] ibid text to n 224ff.
[78] ibid text to n 275ff.
[79] ibid text to n 568ff.
[80] Preclusion is principally a matter for state law. See Chapter 5, text to n 28ff.
[81] Long known as '*res judicata*'.
[82] *Baker by Thomas v General Motors Corp*, 522 US 222, 233 n5 (1998). cf *San Remo Hotel, LP v City and County of San Francisco, Cal*, 545 US 323, 336 (2005) ("Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.") (quoting *Allen v McCurry*, 449 US 90, 101 (1980)). Also see Restatement (Second) of Judgments (1982) §§ 17–19, 27.
[83] RC Casad and KM Clermont, *Res Judicata: A Handbook on its Theory, Doctrine, and Practice* (Carolina Academic Press, Durham, North Carolina 2001) 9-12.
[84] But see, eg, *Johnson v Muelberger*, 340 US 581, 586 (1951) ("…the requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister State where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the State which rendered the decree.") (citing *Sherrer v Sherrer*, 334 US 343, 351-52 (1948)).
[85] *Johnson v Manhattan Ry Co*, 289 US 479, 495-96 (1933). cf *Kalb v Feuerstein*, 308 US 433, 439 (1940) ("[i]t is generally true that a judgment by a court of competent jurisdiction bears a presumption of regularity and is not thereafter subject to collateral attack."). See also *Popp Telcom v American Sharecom, Inc*, 210 F3d 928, 941 (8th Cir2000) ("An action with an independent purpose and contemplative of another form of relief that depends on the overruling of a prior judgment is a collateral attack. It is well-settled in Minnesota that a facially valid judgment is not subject to collateral attack. When a judgment is alleged to be simply erroneous or attacked on the basis of anomalies unrelated to the court's jurisdiction, collateral attack is not an option. The collateral attack doctrine encourages finality in judgments and justifies reliance on orders of the court.") (internal citations omitted).

affected—limitations of scope sometimes referred to respectively as the 'objective' and 'subjective' aspects of preclusion. To illustrate, the English merger doctrine applies only if a claim is based on a cause of action for which the claimant has previously recovered judgment; the (objective) scope of preclusion is restricted to the identical cause of action that underlies the claim. Another example is that the English estoppel doctrine requires, apart from the identity of the claims or issues in question in the succeeding cases, that the parties involved in the new case are the same as or in privity with those participating in the prior case; the (subjective) scope of preclusion is restricted to the identical parties involved in the new case.

Second, preclusion law controls *how* preclusion operates and to what legal *effect*. For instance, Dutch law expressly prohibits courts from applying the res judicata doctrine of their own motion;[86] in other words, preclusion by virtue of the res judicata doctrine is subject to party autonomy. Moreover, unlike other doctrines of preclusion, the res judicata doctrine has the effect of rendering findings 'conclusive' in that the law precludes their successful contradiction; the res judicata doctrine accordingly offers the party who successfully invokes the doctrine an effective reply to any inconsistent statement of case, by requiring that the court renders a judgment that is consistent with the findings contained in the prior judgment.

b. Factors of preclusion

Preclusion law tends to reflect the features of a civil justice system; procedural law regulates the process of pleading, the scope of a claim, including the ability of a party to add parties or to add or amend claims or defenses, as well as the conduct of litigation, the role of the court in the process of adjudication, and the available means of recourse against a judgment. English procedural law, for example, applies a system of fact-based pleading (i.e. the claimant must plead and, if contested, prove facts that constitute a cause of action), which influences the way in which a court determines the scope of preclusion in a subsequent claim; both cause of action estoppel—a species of estoppel *per rem judicatam*—and merger *in rem judicatam* require that the new claim be based on the same cause of action.

Apart from facts-based pleading, relevant factors of preclusion in English law include the overriding objective of dealing with cases justly (e.g. a party will not be issue estopped if this would cause an injustice) and such features as the adversarial tradition (e.g. an issue need not be expressly determined to be actually decided), as well as active case management by courts, and the flexible parameters of a case, both in terms of the number and amendment of claims and the parties involved (e.g. merger *in rem judicatam* precludes any new claim, regardless the remedy, for the cause of action for which judgment was previously recovered). Another relevant feature is the inherent power of an English court to prevent intentional or inadvertent abuse of process (e.g. a party may not without good reason reserve a cause of action for a rainy day if it can be asserted in a pending claim). The Dutch civil justice system has similar traits, which characteristics explain some of the similarities of English and Dutch preclusion law.

But civil justice systems are not static. Preclusion laws are therefore liable to change as the fundamental features of civil justice develop. The potentially wideranging change is evidenced by the reforms of English civil justice towards the

[86] See Chapter 2, text to n 405ff.

end of the nineteenth century (e.g. from the form of action to facts-based pleading),[87] and, more recently, the adoption of the *Civil Procedure Act 1997*[88] and the *Civil Procedure Rules 1998*,[89] following the review undertaken by Lord Woolf between mid 1994 until July 1996.[90] Much like in England and Wales, the Dutch civil justice system has been the focal point of review since the early 90s, followed by reforms in 2002.[91]

3. Recognition of foreign judgments

The need for foreign judgment 'recognition' derives from the limits that international law imposes on the sphere of validity of a state's legal order, by excluding from that sphere the territory of other states.[92] This restriction extends, beyond laws, also to individual norms—i.e. judgments—which a state enacts through its courts. The basis for recognition is the permissive rule—i.e. the private international law—through which a State incorporates a foreign judgment into its legal order, by conferring it local validity: (a) the force of law between the parties, and (b) the legal status necessary to trigger legal consequences, in particular, execution (to effect justice) and preclusion (to impose finality).[93]

4. Conflicts of preclusion laws

Preclusion involves the question what (preclusive) legal consequences attach to a judgment.[94] The nature of this inquiry does not change in respect of a foreign judgment that through recognition acquired local validity; the complicating factor is that preclusion laws diverge, so that the preclusive effects of a judgment vary as a function of the governing law.[95]

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[87] See FW Maitland, AH Chaytor and WJ Whittaker, *The forms of action at common law* (CUP. Cambridge 1936).
[88] c 12.
[89] SI 1998/3132 (as amended) (CPR Rules).
[90] The basic contours of English civil justice have remained stable over time, in particular the idea that a direct link exists between civil justice, including finality of litigation, and the maintenance of civilised society. See Lord Woolf, 'Access to Justice: Interim Report to the Lord Chancellor on the civil justice system in England and Wales' (1995) Chapter 1 [1] <http://webarchive.nationalarchives.gov.uk/+/www.dca.gov.uk/civil/interim/woolf.htm> accessed 1 June 2013. See further Lord Woolf, 'Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales' (1996) <http://webarchive.nationalarchives.gov.uk/+/www.dca.gov.uk/civil/final/index.htm> accessed 1 June 2013.
[91] See WDH Asser and others, 'Een nieuwe balans: interimrapport Fundamentele herbezinning Nederlands burgerlijk procesrecht' (Boom, The Hague 2003); and 'Uitgebalanceerd: Eindrapport fundamentele herbezinning Nederlands burgerlijk procesrecht' (Boom, The Hague 2006).
[92] See Part II, Introduction, text to n 1ff.
[93] ibid.
[94] ibid text to n 17ff.
[95] ibid.

Part I. Finality of Litigation—The Principle Implemented

Introduction

Until the CJEU's recent decision in *Gothaer Allgemeine Versicherung AG and Others v Samskip GmbH*,[1] the preclusion laws of EU Member States in civil and commercial matters never became the subject of (such explicit)[2] EU-level harmonisation; in fact, the Court on various occasions stated that "[i]n the absence of Community legislation in this area, the rules implementing the principle of res judicata are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States."[3] Hence, apart from the standard proviso that domestic procedural rules governing claims arising under Union law "must not be less favourable than those governing similar domestic actions (principle of equivalence); nor may they be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by Community law (principle of effectiveness)", preclusion law, including the res judicata doctrine, have remained a matter of municipal law.[4]

Even post-*Gothaer*, English and Dutch preclusion law is unlikely to be harmonised completely; there is no legal basis for the development of an EU civil justice system that controls both cross-border litigation *and* domestic civil litigation without cross-border implications.[5] Nevertheless, the implications of *Gothaer* for interjurisdictional preclusion in the EU are significant, and the development in the EU of a U.S.-style federal judicial branch with 'diversity' and 'federal question'-jurisdiction cannot be excluded. In fact, certain Member State courts already act as 'European Union courts' exercising EU-wide jurisdiction (e.g. 'Community trade mark courts'),[6] and the 2013 Agreement on a Unified Patent Court[7] effectively founded a civil court common to EU Member States[8]. Though development of

[1] Case C-456/11 [2012] ECR I-0000.
[2] See, however, Case 42/76 *Jozef de Wolf v Harry Cox BV* [1976] 1759. See Chapter 5, text to n 57ff.
[3] Case C-2/08 *Amministrazione dell'Economia e delle Finanze and Agenzia delle entrate v Fallimento Olimpiclub Srl* [2009] ECR-I 7501 [24]; and Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* [2009] I-9579 [38].
[4] ibid. But see Case C-119/05 *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA* [2007] ECR I-6199 [63]; and *Olimpiclub* (n 3) [27]ff. See Chapter 5, text to n 4ff.
[5] TFEU, Art 81(1).
[6] Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark [1994] OJ L11/1 (repealed by Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark [2009] OJ L78/1).
[7] Agreement on a Unified Patent Court (adopted 11 January 2013) [2013] OJ C175/1.
[8] The agreement will enter into force on 1 January 2014 or on the first day of the fourth month after the deposit of the thirteenth instrument of ratification or accession in accordance with Art 84, including the three Member States in which the highest number of European patents had effect in the year preceding the year in which the signature of the agreement takes place or on the first day of the fourth month after the date of entry into force of the amendments to Regulation (EU) No 1215/2012 concerning its relationship with the agreement, whichever is the latest. See Agreement, Art 89.

European preclusion law for judgments of those courts may well be likely and, in fact, desirable, this part concerns squarely English and Dutch preclusion law. The inquiry is straightforward: the principle of finality of litigation, how is it implemented in practice in English and Dutch law?

As the following chapters explore in more detail, English law effects finality of litigation through a complex system comprising a variety of doctrines and rules,[9] including a limitation on the jurisdiction of a court within the same case to reopen matters after the rendition of a final judgment;[10] the res judicata doctrine (comprising the doctrines of merger *in rem judicatam*[11] and estoppel *per rem judicatam*[12]); and the prohibition of abuse of process [13] (including instances of relitigation-abuse; [14] *Henderson v Henderson*-abuse;[15] and collateral attack-abuse[16]). As Lord Millett in *Johnson v Gore Wood & Co* pointed out, "these various defences are *all* designed to serve the same purpose: to bring finality to litigation and avoid the oppression of subjecting a defendant unnecessarily to successive actions."[17]

In Dutch law, the traditional res judicata doctrine—codified in Art 236 of the Civil Procedure Code[18] ('Rv')—is complemented by various statute-based rules and judge-made doctrines, including doctrines on finality within the same case ('*leer van de bindende eindbeslissing*';[19] '*grievenstelsel*';[20] and '*grenzen van de rechtsstrijd na cassatie*'[21]); Art 3:303 of the Civil Code[22] ('BW') on the denial of a right of action absent a sufficient interest to file a claim ('*gebrek aan belang*');[23] a doctrine that prohibits any court other than the competent appellate or revocation court from deciding on and effectively bars the parties from challenging the validity of an existing judgment ('*gesloten stelsel van rechtsmiddelen*');[24] a doctrine that requires a court in interim proceedings to align its decision with a decision in main proceedings ('*afstemmingsregel*');[25] and Art 3:13 BW on the prohibition of an abuse of right ('*misbruik van recht*') which prohibition Art 3:15 BW extends to procedural law to bar the abuse of process ('*misbruik van procesrecht*')[26].

[9] See Chapter 1.
[10] ibid text to n 57ff.
[11] ibid text to n 92ff.
[12] ibid text to n 264ff.
[13] ibid text to n 470ff.
[14] ibid text to n 518ff.
[15] ibid text to n 526ff.
[16] ibid text to n 536ff.
[17] *Johnson* (Introduction n 12) 59 (emphasis added).
[18] *Wetboek van Burgerlijke Rechtsvordering* (entered into force 1 October 1838) Stb 1828, 33 (as amended). See Chapter 2, text to n 318ff.
[19] See Chapter 2, text to n 77ff.
[20] ibid text to n 110ff.
[21] ibid text to n 143ff.
[22] *Burgerlijk Wetboek* (entered into force 1 January 1992) Stb 1980, 432 (as amended).
[23] See Chapter 1, text to n 160ff.
[24] ibid text to n 224ff.
[25] ibid text to n 275ff.
[26] ibid text to n 568ff.

Chapter 1. England and Wales

Introduction

It is fair to say that English civil justice has been in a state of flux.[1] Illustrative is the sweeping review undertaken from mid 1994 until July 1996 by Lord Woolf, who produced two reports: an interim report in June 1995 entitled "Access to Justice" and "Access to Justice (Final Report)" in July 1996. [2] The aims of the review (the "Woolf Inquiry") were to identify ways "to improve access to justice and reduce the cost of litigation; to reduce the complexity of the rules and modernise terminology; [and] to remove unnecessary distinctions of practice and procedure."[3]

The inquiry was followed by a period of reforms (the "Woolf Reforms")[4] that culminated in adoption on 27 February 1997 of the *Civil Procedure Act 1997*,[5] which formed the basis for the *Civil Procedure Rules 1998* ('CPR Rules'),[6] which entered into force on 26 April 1999.[7] Most 'Parts' of the CPR are accompanied by a so-called 'Practice Directions', which are made pursuant to statute, and have the same authority as do the CPR themselves. In case of any conflict, the CPR prevail.[8] These rules and directions are the primary source of rules of court for civil litigation in England and Wales today. They govern practice and procedure in the county courts, the High Court and the Civil Division of the Court of Appeal.[9] This 'new procedural code'[10] notwithstanding, English preclusion law remains (for the most part) uncodified; the rules and doctrines that impose finality of litigation continue to derive from a developing, substantial body of case law.[11]

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[1] See, generally, Jacobs (Introduction, n 54). On recent developments see HG Glenn, *Judging Civil Justice* (CUP, Cambridge 2009); DM Dwyer, *The Civil Procedure Rules ten years on* (OUP, Oxford 2009); Zuckerman (Introduction n 42); Neil Andrews, *English Civil Procedure: Fundamentals of the New Civil Justice System* (OUP, Oxford 2003); and JA Jolowicz, *On civil procedure* (CUP, Cambridge 2000).

[2] Lord Woolf, 'Access to Justice: Interim Report to the Lord Chancellor on the civil justice system in England and Wales' (1995) <http://webarchive.nationalarchives.gov.uk/+/www.dca.gov.uk/civil/interim/woolf.htm>; and 'Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales' (1996) <http://webarchive.nationalarchives.gov.uk/+/www.dca.gov.uk/civil/final/index.htm>. See Anthony Clarke, 'The Woolf Reforms: A Singular Event or an Ongoing Process?' in DM Dwyer, *The Civil Procedure Rules ten years on* (OUP, Oxford 2009) 34ff.

[3] Interim Report (n 2) Introduction.

[4] ibid. Also see Neil Andrews, 'A New Civil Procedural Code for England: Party-control "Going, Going, Gone"' (2000) 19 CJQ 2000 19ff.

[5] c 12.

[6] SI 1998/3132.

[7] <www.justice.gov.uk/courts/procedure-rules/civil>. On the functioning of the rules, see D Dwyer, *The Civil Procedure Rules ten years on* (OUP, Oxford 2009).

[8] On the application of the rules and practice directions, see CPR Part 2.

[9] CPR r 2.1(1). For a list of exceptions see CPR r 2.1(2). See Ministry of Justice, 'A Guide to the working practices of the Queen's Bench Division within the Royal Courts of Justice' (2007) <www.justice.gov.uk/downloads/courts/queens-bench/queen-bench-guide.pdf> accessed 24 November 2012.

[10] CPR r 1.1(1).

[11] See, generally, KR Handley, *Spencer Bower, Turner and Handley: Res Judicata* (4th ed Lexis Nexis, London 2009). Also see H Malek and S Phipson (eds), *Phipson on Evidence* (17th ed Sweet & Maxwell, London 2010) Ch 44; *Halsbury's Laws of England* (5th ed Butterworths, London 2009) Vol 12, Ch 22; A Dickinson, 'The Effect in the European Community of Judgments in Civil and Commercial Matters:

Nevertheless, English preclusion law develops against the background of the constitutional mandate of every court exercising jurisdiction in England or Wales, "[to] exercise its jurisdiction in every cause or matter before it as to secure that, as far as possible, all matters in dispute between the parties are completely and finally determined, and all multiplicity of legal proceedings with respect to any of those matters is avoided."[12] This mandate expresses the strong public policy that there should be finality of litigation and that a party should not be twice vexed in the same matter,[13] or, to use two well known maxims, "nemo debet bis vexari pro una et eadem causa and interest reipublicae ut sit finis litium".[14]

This public policy of finality of litigation in the interests of the parties and the public as a whole is reinforced by the CPR's emphasis on efficiency and economy in the conduct of litigation.[15] The overriding objective of the CPR is to enable courts to deal with cases justly,[16] which principle was presented by Lord Woolf as "embodying the principles of equality, economy, proportionality and expedition which are fundamental to an effective contemporary system of justice."[17] The CPR reflect this by providing that dealing with a case 'justly' includes, so far as is practicable: (a) ensuring that the parties are on an equal footing; (b) saving expense; (c) dealing with the case in ways which are proportionate (i.e. (i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party); (d) ensuring that it is dealt with expeditiously and fairly; and (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.[18]

(1) Interest reipublicae ut sit finis litium—Nemo debet bis vexari pro una et eadem causa

"The importance of finality in litigation has been emphasised by generations of common lawyers."[19] The principle was expressed by the maxim "*expedit reipublicæ ut sit finis litium*" from the late 14th through to the late 18th century[20] and from the 17th

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Recognition, Res Judicata and Abuse of Process—National Report for England and Wales' (BIICL, London 2008) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1537154> accessed 1 June 2013; A Zuckerman, *Zuckerman on Civil Procedure: Principles and Practice* (Sweet & Maxwell, London 2006) Ch 22; N Andrews, *English Civil Procedure: Fundamentals of the New Civil Justice System* (OUP, Oxford 2003) Ch 40; and P Barnett, *Res Judicata, Estoppel, and Foreign Judgments* (OUP, Oxford 2001).

[12] Senior Courts Act 1981 (c 54), s 49(2)(b).

[13] *Johnson* (Introduction n 12) 31 (Lord Bingham).

[14] See, eg, *Fraser v HLMAD Ltd* [2006] EWCA Civ 738, [2007] 1 All ER 383, [2006] ICR 1395, [2006] IRLR 687, (2006) 103(26) LSG 29, (2006) 150 SJLB 809 [35] (Moore-Bick LJ). cf *The Attorney General at the Relation of Thomas Ceely v Geo Bagg and John Marsham, Esq* (1658) 145 ER 413, 415, (1658) Hardres 125 ("…if a man have judgment upon a bond, and die, his executors shall not commence a new action upon the same obligation; because transit in rem judicatam, which is a thing of a higher nature, and the reason there given is because else actions and judgments upon one and the same cause of action would be infinite, to the perpetual vexation and charge of the subject which the law avoids. Interest Reipublicæ ut sit finis litium."). See on merger *in rem judicatam*, the text to n 92ff.

[15] *Johnson* (Introduction n 12) 31 (Lord Bingham).

[16] CPR r 1.1(1).

[17] Final Report (n 2) Overview [8].

[18] CPR r 1.1(2).

[19] *Sans Souci Ltd v VRL Services Ltd* [2012] UKPC 6 [23] (Lord Sumption).

[20] *Anonymous* (1382) Jenkins 67. cf *Anonymous* (1562) Jenkins 266; *Smith v Clay* (1767) Ambler 645, 27 ER 419, 421 (Lord Camden) ("'*Expedit reipublicæ ut sit finis litium*' is a maxim that has prevailed in

century until today in the form of the expression "*interest reipublicæ ut sit finis litium*".[21] This maxim denotes the *public* interest in finality, while the *private* interest in not being sued twice for the same cause was recognised in English law at least from the 18th century, in the form of the adage "*nemo debet bis vexari pro eâdem causâ*"[22]. More recently, Lord Simon of Glaisdale in *The Ampthill Peerage* stated as follows the unqualified adherence of the English legal system to the principle of finality generally and specifically finality of litigation:

> As a means of resolution of civil contention litigation is certainly preferable to personal violence. But it is not intrinsically a desirable activity… …[T]he fundamental principle that it is in society's interest that there should be some end to litigation is seen most characteristically in the recognition by our law—by every system of law—of the finality of a judgment. If the judgment has been obtained by fraud or collusion it is considered as a nullity and the law provides machinery whereby its nullity can be so established. If the judgment has been obtained in consequence of some procedural irregularity, it may sometimes be set aside. But such

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this Court in all times without the help of an Act of Parliament….") (time limitation); and *Kitchen, Assignees of Anderson a Bankrupt v Campbell, Esq* (1772) 3 Wilson, KB 304, 305, 95 ER 1069 ("We are of opinion that the plaintiffs having brought trover in this Court in Michaelmas term 1769, against the Sheriff of Surry and the now defendant, to recover the value of the goods of the bankrupt taken in execution, (which action well laid) have made their election, and there being a verdict and judgment upon record in that action against the plaintiffs, they are barred for ever from having the present or any other action: for you shall not bring the same cause of action twice to a final determination; *nemo debet bis vexari*, upon this we found our judgment; and what is meant by the same cause of action is, where the same evidence will support both the actions, although the actions may happen to be grounded on different writs; this is the test to know whether a final determination in a former action is a bar, or not, to a subsequent action; and it runs through all the cases in the books, both in real and personal actions: it was resolved in Ferrer's case, 6 Rep. 7, 'that when one is barred in any action real or personal, by judgment upon demurrer, confession, verdict, &c. he is barred as to that or the like action, of the like nature for the same thing for ever;' for *expedit reipublicæ ut sit finis litiûm*."

[21] See the argument made in *Magdalen College Case* (1615) 11 Coke Reports 66b, 69a, 77 ER 1235. cf *Maskell v Horner* [1915] 3 KB 106 (Rowlatt J); and *Rodriguez v Speyer Bros* [1919] AC 59, 124-25 (Lord Sumner) ("So estoppel by matter of record is a rule of public policy, for *interest rei publicæ ut sit finis litium*, but the only question is whether there is res judicata or not; so 'The King can do no wrong' states a rule of the highest public policy, but leaves nothing to the opinions of the age in the application of it.").

[22] *Hitchin v Campbell* (1772) 2 Blackstone W 827, 831, 96 ER 487 (De Grey CJ) ("But in the present case the action of trover went on to a verdict and judgment, and appears, by the case stated, to have been for the same cause of action. And upon this it is, that the opinion of the Court is founded. The rule of law is, *nemo debet bis vexari pro eâdem causâ*. And in Ferrers' case, 6 Co. 7, Cro. Eliz. 668, it is held, that, where one is barred in any action, real or personal, by judgment or demurrer, confession, verdict, &c., he is barred as to that, or the like action of the like nature, for the same thing, for ever. In personal actions the bar is universal; upon real actions he may have an action of a higher nature. But a bar in one assize, &c. is a bar in every other. Here, by actions of the like nature, must be meant, actions in a similar degree; not merely those which have a similitude of form. All personal actions are of the same degree; therefore each is a perpetual bar."). cf *Kitchen v Campbell* (n 20) 305.

More recently, see *Thrasyvoulou* (Introduction n 60) 289 (Lord Bridge) ("The doctrine of res judicata rests on the twin principles which cannot be better expressed than in terms of the two Latin maxims 'interest reipublicae ut sit finis litium' and '*nemo debet bis vexari pro una et eadem causa*.' These principles are of such fundamental importance that they cannot be confined in their application to litigation in the private law field. They certainly have their place in criminal law. In principle they must apply equally to adjudications in the field of public law. In relation to adjudications subject to a comprehensive self-contained statutory code, the presumption, in my opinion, must be that where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of res judicata applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions.").

> exceptional cases apart, the judgment must be allowed to conclude the matter. That, indeed, is one of society's purposes in substituting the lawsuit for the vendetta.[23]

However, notwithstanding the habitual equal emphasis on the public and private interest, it is suggested that civil litigation implicates first and foremost the private interest, while the public interest is normally engaged only "in so far as the provision of a system of civil dispute resolution and the enforcement of civil rights is a necessary part of a society governed by the rule of law not by superior force."[24] The predominance of the private interest is signaled by the operation of the English res judicata doctrine; both doctrines of merger *in rem judicatam* and estoppel *per rem judicatam*, which are discussed in detail below, are subject to party disposition. Consequently, absent a plea of merger or estoppel by one of the parties, a court is compelled render a second judgment for the same cause of action, or to redetermine the claim or issue of which it is seized, notwithstanding that the matter has already been determined by judgment between the same parties (or their privies).[25]

A court is not then permitted to apply the English res judicata doctrine of its own motion.[26] On balance, then, the public interest in finality gives way in cases where the parties apparently desire another judgment for the same cause of action or to have matters redetermined; for instance, no general rule exists that prevents a party acting in good faith from inviting a court to arrive at a decision inconsistent with that arrived at in a prior case.[27] The public interest trumps only if the attempt is in bad faith and an abuse of process, or otherwise threatens the sound administration of justice.[28]

(2) Aspects of preclusion and outline

The question in this chapter is not whether the principle of finality of litigation forms part of English law, but rather how that principle is implemented in practice.[29] The

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[23] (Introduction n 56) 575-76. His Lordship continued: "A line can thus be drawn closing the account between the contestants. Important though the issues may be, how extensive soever the evidence, whatever the eagerness for further fray, society says, 'We have provided courts in which your rival contentions have been heard. We have provided a code of law by which they have been adjudged. Since judges and juries are fallible human beings, we have provided appellate courts which do their own fallible best to correct error. But in the end you must accept what has been decided. Enough is enough.' and the law echoes: 'res judicata, the matter is adjudged.' The judgment creates an estoppel - which merely means that what has been decided must be taken to be established as a fact, that the decided issue cannot be reopened by those who are bound by the judgment, that the clamouring voices must be stilled, that the bitter waters of civil contention (even though channelled into litigation) must be allowed to subside."

[24] *Arthur JS Hall & Co v Simons* (Introduction n 51) 744 (Lord Hobhouse).

[25] See, respectively, text to n 176ff and n 366ff.

[26] ibid.

[27] *Arthur JS Hall & Co v Simons* (Introduction n 51) 743 (Lord Hobhouse).

[28] See text to n 483ff.

[29] See the recent Supreme Court decision in *Virgin Atlantic Airways Ltd v Premium Aircraft Interiors UK Ltd* [2013] UKSC 46, [2013] 3 WLR 299, [2013] 4 All ER 715, [2013] RPC 29 [17] (Lord Sumption) (distinguishing six aspects of 'res judicata': "Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is 'cause of action estoppel'. It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that

inquiry is, in other words, into the aspects of English preclusion law. In this regard, Moore-Bick LJ in *Fraser v HLMAD Ltd* identified 'cause of action estoppel', 'issue estoppel' and 'abuse of process' as agents of finality of litigation.[30] May LJ in *Manson v Vooght (No 1)* made a similar observation and noted that "these various defences are all designed to serve the same purpose: to bring finality to litigation and avoid the oppression of subjecting a defendant unnecessarily to successive actions."[31] Still, estoppel *per rem judicatam*[32] and abuse of process[33] are not the sole aspects of English preclusion law; other aspects include the doctrine of merger *in rem judicatam*,[34] and the rule on finality of judgments,[35] which play distinct roles in effecting finality.

The first aspect of preclusion, functionally linked to the principle of finality of litigation, is the rule that a perfected judgment exhausts a court's jurisdiction, which protects the finality of judgments and thus precludes the rendering court (and

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where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see Conquer v Boot [1928] 2 KB 336. Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given on it, and the claimant's sole right as being a right on the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as 'of a higher nature' and therefore as superseding the underlying cause of action: see King v Hoare (1844) 13 M & W 494 , 504 (Parke B). … Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: Duchess of Kingston's Case (1776) 20 State Tr 355 . 'Issue estoppel' was the expression devised to describe this principle by Higgins J in Hoysted v Federal Commissioner of Taxation (1921) 29 CLR 537, 561 and adopted by Diplock LJ in Thoday v Thoday [1964] P 181 , 197–198. Fifth, there is the principle first formulated by Wigram V-C in Henderson v Henderson (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."). It is respectfully suggested that (a) only estoppel and merger form part of English res judicata doctrine, and (b) the second and third aspects addressed by Lord Sumption are a problematical description of the meaning and effect of merger (see the text to n 123). Lord Sumption further, at [25], observes that "[r]es judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive." Also this observation is problematical in two respects: first, res judicata concerns the procedural effects of judgments (the doctrine is *not* substantive in nature; suggestions that estoppel is a rule of evidence and that merger is a rule of substance are wrong, see respectively the text to n 347 and the text to n 123) and, second, the purpose underlying res judicata doctrine is to achieve finality of litigation, not to avoid abuse of process, while the purpose of abuse of process doctrine is principally to avoid procedural abuse, though the doctrine acts as an agent of finality when it bars, for instance, abusive attempts at relitigation which are not barred by res judicata doctrine (see the text to n 470) .

[30] (n 14) [35]. cf *Attorney General v Bagg* (n 14) 415 ("…if a man have judgment upon a bond, and die, his executors shall not commence a new action upon the same obligation; because transit in rem judicatam, which is a thing of a higher nature, and the reason there given is because else actions and judgments upon one and the same cause of action would be infinite, to the perpetual vexation and charge of the subject which the law avoids. Interest Reipublicæ ut sit finis litium."). See on merger *in rem judicatam*, text to n 92ff.

[31] [1999] CPLR 133, [1999] BPIR 376, 387.

[32] See text to n 264ff.

[33] See text to n 470ff.

[34] See text to n 92ff.

[35] See text to n 57ff.

thus the parties) from reopening the matter finally and conclusively determined (the court is *functus officio*).[36]

Finality of litigation is further imposed first and foremost by the conventional res judicata doctrine, which looks to the fact that 'a matter has been determined judicially', and comprises two specific doctrines: (1) merger *in rem judicatam*[37] and (2) estoppel *per rem judicatam*[38]. Merger *in rem judicatam* applies where a claimant reasserts a cause of action for which that claimant previously recovered judgment, and basically precludes the recovery of a further judgment for the same cause of action. Estoppel *per rem judicatam* precludes a party from successfully contradicting a final and conclusive judgment of a court of competent jurisdiction on a claim (cause of action estoppel)[39] or issue (issue estoppel)[40].

The res judicata doctrine is supplemented by the abuse of process doctrine, which applies residually and potentially enforces finality of litigation in circumstances where the res judicata doctrine cannot.[41] For instance, a party's attempt to relitigate an issue may be precluded as relitigation abuse, even though the prior judgment on the matter is not final or conclusive, or notwithstanding that the parties involved in a new case are different.[42] Further, the abuse of process doctrine may preclude the litigation of a matter which could and should have been judicially determined in a prior case between the same parties, but was not (*Henderson v Henderson* abuse).[43] Finally, the doctrine may preclude a party's attempt to obtain a judgment on the factual or legal accuracy of a prior judgment (collateral attack on judgments abuse).[44]

In sum, the following aspects of preclusion can be distinguished:

(1) The court *functus officio* (reopening of final judgments);[45]
(2) Merger *in rem judicatam* (reassertion of causes of action);[46]
(3) Estoppel *per rem judicatam* (contradiction of judicial findings on claims or issues);[47]
(4) Abuse of process (relitigation abuse, *Henderson v Henderson* abuse, and collateral attack on judgments abuse).[48]

These aspects of preclusion are addressed in this order in the remainder of this chapter.

(i) Advances in doctrine

Academic analysis of English preclusion law is scarce, especially considering the legal area's practical significance. The most authorititative commentary on the

[36] ibid.
[37] See text to n 92ff.
[38] See text to n 264ff.
[39] See text to n 314ff.
[40] See text to n 319ff.
[41] See text to n 509ff.
[42] See text to n 518ff.
[43] See text to n 526ff.
[44] See text to n 536ff.
[45] See text to n 57ff.
[46] See text to n 92ff.
[47] See text to n 264ff.
[48] See text to n 470ff.

subject, aside from *Halsbury's Laws of England*,[49] *Phipson on Evidence*,[50] and some older works on estoppel,[51] is *Spencer Bower, Turner and Handley on the Doctrine of* Res judicata[52]. Zuckerman's Principles of Practice[53] and Andrews' *English Civil Procedure: Fundamentals of the New Civil Justice System*,[54] and Barnett's Res judicata, *Estoppel, and Foreign Judgments*[55] offer more concise accounts of the law on the topic. The scarcity should not surprise, considering that until recently civil procedure did not enjoy much academic interest; indicative is that Sir Jack Jacob's Hamlyn Lectures on 'The Fabric of English Civil Justice', published in 1987, have been described as "*pioneering* work" prompting a "growing body of high-quality literature on English law of civil procedure".[56]

1.1 The court *functus officio*

The finality of judgments

Judgments take effect from the day when they are given or made, or such later date as a court may specify.[57] But decisive for finality is whether the rendering court retains the power to influence its decision; a judgment is 'final' when it "cannot be varied, re-opened or set aside by the court that delivered it or any other court of co-ordinate Jurisdiction although it may be subject to appeal to a court of higher Jurisdiction".[58] Finality in this sense occurs, not when the judgment is pronounced, but after it is given, when it is perfected by sealing.[59]

(1) The court's jurisdiction exhausted

A final judgment exhausts the jurisdiction of the rendering court pursuant to the principle that the outcome of litigation should be final—the court is '*functus*

[49] (5th ed Butterworths, London 2009) Vol 12, Ch 22.
[50] (17th ed Sweet & Maxwell, London 2010) Ch 44.
[51] See, eg, L Feilding Everest, *Everest and Strode's Law of Estoppel* (Stevens & Sons, London 1923) with further references.
[52] (4th ed Lexis Nexis, London 2009). For a more systematic treatise, see Dickinson (n 11)..
[53] Zuckerman (Introduction n 42) Chapter 22.
[54] Andrews (n 1) Chapter 40.
[55] Barnett (Introduction n 24) Chapter 1.
[56] Jolowicz (n 1) 8.
[57] CPR r 40.7 (except where r 40.10 applies). CPR r 40.2.2 (a) stipulates that every judgment or order must "bear the date on which it is given or made". In accordance with the modern practice in the High Court and the Court of Appeal, judges routinely make available, on a confidential basis, their written judgments to legal advisers in advance of the handing down hearing. At that time the judgment is not being "given or made" within the meaning of CPR r 40.7. See *Prudential Assurance Co Ltd v McBains Cooper* [2000] 1 WLR 2000, [2001] 3 All ER 1014, [2001] CP Rep 19, [2000] CPLR 475, (2000) 97(24) LSG 40, (2000) 150 NLJ 832.
[58] *DSV Silo und Verwaltungsgesellschaft mbH v Owners of the Sennar (The Sennar) (No 2)* [1985] 1 WLR 490, 494, [1985] 2 All ER 104, [1985] 1 Lloyd's Rep 521, (1985) 82 LSG 1863, (1985) 135 NLJ 316, (1985) 129 SJ 248 ('*The Sennar (No 2)*') (Lord Diplock).
[59] CPR r 40.2(2)(b). See *Cripps Ex p Muldoon* [1984] QB 686, 695, [1984] 3 WLR 53, [1984] 2 All ER 705, 82 LGR 439 (CA) (Sir John Donaldson MR). cf *Preston Banking Co v William Allsupp & Sons* [1895] 1 Ch 141, 145 (CA) (Smith LJ).

officio'.[60] Thereafter, the court generally lacks jurisdiction to return to its judgment and alter or contradict its decision by reopening the matter determined; the finality of a judgment signals the end, in a specific case, of a court's judicial authority.[61] For instance, a court is not entitled to entertain an application to reopen the judgment to take account of fresh evidence; a corollary effect is that the unsuccessful party must invoke the evidence in the context of an appeal,[62] and the party's relief lies, not in attempting to persuade the court that rendered the judgment to change its mind, but in challenging the judgment on appeal.[63]

(i) Applicability of the res judicata doctrine

The launching of an appeal (or the possibility of an appeal) does not affect the application of the res judicata doctrine (or abuse of process), and thus the enforcement of finality of litigation; as Moore-Bick LJ said in *Niru Battery Manufacturing Co v Milestone Trading Ltd (No.2)*, "[u]nless and until it is set aside or varied … [the judgment] establishes with complete finality the parties' respective positions in law."[64]

(ii) Slip-rule

Modern English practice rules are designed to ensure the early discovery of errors and to allow for their straightforward repair.[65] In advance of the handing down hearing (i.e., before the judgment is formally given or made) judges routinely make available, on a confidential basis, their written judgments to legal advisers.[66] This practice serves the same purpose of timely identifying mistakes. The court may also require the parties to draw up a draft formal order so that all parties and the court have an opportunity to spot errors. Finally, before a judgment is perfected the court may provide the parties' legal representatives with a draft for a last check.[67]

But, even after a judgment has become final, mistakes of a clerical nature in judgments or orders or errors arising therein from any accidental slip or omission may

[60] *Taylor v Lawrence* [2002] EWCA Civ 90, [2002] 2 All ER 353, [2003] QB 528, [2002] 3 WLR 640, [2002] 2 All ER 353, [2002] CP Rep 29, (2002) 99(12) LSG 35, (2002) 152 NLJ 221, (2002) 146 SJLB 50 [9] (Lord Woolf). cf *Carleton (Earl of Malmesbury) v Strutt & Parker (A Partnership)* [2007] EWHC 2199 (QB), [2007] 42 EG 294 (CS).

[61] Note, 'Non-Appellate Recourse Against Judgments' (2008) 5 CPN 7.

[62] *Taylor v Lawrence* (n 60) [9] (Lord Woolf CJ). cf Zuckerman (Introduction n 42) [22.42].

[63] On the purpose of an appeal, see ibid [46]-[48] ("In giving permission to appeal to this court, this court is primarily concerned with correcting injustice in the particular case to which the application for permission relates. If there is a sufficient prospect of the appeal succeeding permission to appeal will normally be given as a matter of course. In the case of an appeal to the House of Lords it is not enough to show a sufficient prospect of the appeal succeeding. The would-be appellant has to show in addition that the case is of such importance that it justifies the attention of the House of Lords."). Note that the time limit for an appeal begins to run, not from the date on which the judgment or order of the court below was sealed or otherwise perfected, but from the date of the decision of the lower court. See CPR r 52.4(2)(b).

[64] [2004] EWCA Civ 487, [2004] 2 All ER (Comm) 289 [2004] 2 Lloyd's Rep 319, [2004] 1 CLC 882, (2004) 148 SJLB 538 [36].

[65] Zuckerman (Introduction n 42) [22.27].

[66] Within the meaning of CPR r 40.7.

[67] Zuckerman (Introduction n 42) [22.27].

at any time be corrected by the court under the rules of court (the so-called 'slip-rule'),[68] although it is commonly deemed preferable if the court acts beforehand.[69]

(iii) Recall and variation

The court has an inherent jurisdiction to vary its own orders to make the meaning and intention of the court clear.[70] Moreover, before a judgment is perfected, a court preserves the power to recall its judgment for reconsideration and, if necessary, alteration (the so-called '*Barrell* jurisdiction'),[71] but that power will not be exercised unless a strong reason is shown.[72] As observed by Russell LJ in *Re Barrell Enterprises*: "When oral judgment has been given, either in a court of first instance or on appeal, the successful party ought save in most exceptional circumstances to be able to assume that the judgment is a valid and effective one."[73]

Apart from the correction of slips, cases where judgments are varied after delivery typically involve some "most unusual element".[74]

(iv) Reopening final appeals

The CPR—r 52.17 "Reopening of final appeals"—codify significant recent case law on the reopening of final appeals in the High Court and the Court of Appeal. The provision provides that the Court of Appeal or the High Court "will not re-open a final determination of any appeal unless—(a) it is necessary to do so in order to avoid real injustice; (b) the circumstances are exceptional and make it appropriate to re-open the appeal; and (c) there is no alternative effective remedy." This right to reopen a determined appeal reflects a court's "inherent jurisdiction" to address injustice for individuals or to uphold public confidence in the administration of justice, by remedying wrong decisions and by clarifying and developing the law and setting precedents.[75]

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[68] CPR r 40.12 and PD (Judgments and Orders) 4.1ff.
[69] Zuckerman (Introduction n 42) [22.27].
[70] PD (Judgments and Orders) 4.5.
[71] See Andrews (Introduction n 1) [40.62].
[72] *Barrell Enterprises, Re* [1973] 1 WLR 19 (CA). See also *Paulin v Paulin* [2009] EWCA Civ 221, [2010] 1 WLR 1057, [2009] 3 All ER 88, [2009] 2 FLR 354, [2009] 2 FCR 477, [2009] BPIR 572, [2009] Fam Law 567, (2009) 159 NLJ 475. See further Zuckerman (Introduction n 42) [22.43]ff; and Note (n 61) 7.
[73] ibid 23H-24A.
[74] ibid. His Lordship, at 24E-F, added that "[i]t is clearly not permissible for a party to ask for a further hearing merely because he has thought of a possible ground of appeal that he originally overlooked. The discovery of fresh evidence has never been suggested as a ground for reopening the argument before the Court of Appeal. If fresh evidence comes to light, of such a character as to call for further consideration of the issues, the right way to deal with the situation is by applying for leave to appeal to the House of Lords… ".
[75] *Grobbelaar v News Group Newspapers Ltd* [2002] UKHL 40, [2002] 1 WLR 3024, 3037, [2002] 4 All ER 732, [2003] EMLR 1, (2002) 146 SJLB 246 (Lord Bingham), citing JIH Jacob, 'The Inherent Jurisdiction of the Court' (1970) 23 CLP 23 ("…the inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."). cf *Jaffray v The Society of Lloyd's* [2007] EWCA Civ 586 [17]; *Seray-Wurie v Hackney LBC* [2002] EWCA Civ 909, [2003] 1 WLR 257, [2002] 3 All ER 448, [2002] CPR 68, [2002] ACD 87, [2002] 99(33) LSG 21, [2002] 146 SJLB 183 [17] (Brooke LJ); *Taylor v Lawrence* (n 60) [26] and [52] (Lord Woolf); and *Bremer Vulkan Schiffbau und Maschinenfabrik v South*

(2) Finality on appeal

Under the CPR, an appellant or respondent requires *permission* to appeal where the appeal is from a decision of a judge in a county court or the High Court.[76] The application for permission to appeal may be made either to the lower court at the hearing at which the decision to be appealed was made, or to the appeal court in an appeal notice.[77] Permission is given only where the court considers that the appeal would have a real prospect of success, or there is some other compelling reason why the appeal should be heard.[78] An order giving permission may further limit the issues to be heard, and be made subject to conditions.[79]

Given the *adversarial* nature of proceedings, the scope of an appeal and with this the jurisdiction of the court of appeal, are generally restricted by the grounds of appeal, which must identify the respects in which the judgment of the court below is wrong, or unjust because of a serious procedural or other irregularity;[80] accordingly, as Laws LJ observed in *Subesh v Secretary of State for the Home Department*, "the first instance decision is taken to be correct until the contrary is shown", which position reflects that "the appeal process is not merely a re-run second time around of the first instance trial. It is because of the law's acknowledgement of an important public interest, namely that of finality in litigation."[81] To the extent the case is properly within the appellate court's jurisdiction by the grounds for appeal, the appeal court will allow an appeal where the decision of the lower court was wrong, or unjust because of a serious procedural or other irregularity in the proceedings in the lower court.[82]

Within the scope of the appeal as defined by the parties' grounds of appeal, the appeal court has all the powers of the lower court.[83] In particular, the court has power to (a) affirm, set aside or vary any order or judgment made or given by the lower court; (b) refer any claim or issue for determination by the lower court; (c) order a new trial or hearing; (d) make orders for the payment of interest; (e) make a costs order.[84] The CPR do not set out the circumstances in which an appellate court can set aside a trial judge's *findings of fact*; therefore, the appellate court has (theoretically) all the powers to enable it to do so, and to substitute its own findings,

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India Shipping Corpn Ltd [1981] AC 909, 977, [1981] 2 WLR 141, [1981] 2 All ER 289, [1981] 1 Lloyd's Rep 253, [1981] Com LR 19, [1981] ECC 151, (1981) 125 SJ 114 (Lord Diplock).

[76] CPR r 52.3(1).

[77] CPR r 52.3(2).

[78] CPR r 52.3(6).

[79] CPR r 52.3(7).

[80] See CPR PD 52C. See, eg, *Hooper v Secretary of State for Work and Pensions* [2007] EWCA Civ 495 [25] (Dyson LJ) ("What is meant by 'an issue raised by the appeal'? *In addressing this question, it is necessary to keep in mind that, as is common ground, the process before the tribunal is inquisitorial and not adversarial….*") (emphasis added). Unlike in the particular context addressed by Dyson LJ (here the question whether an issue is raised by the appeal depends on whether an issue is clearly apparent from the evidence, and the court is not absolved of the duty to consider relevant issues simply because they have been neglected by the appellant or her legal representatives and that it has a role to identify what issues are at stake on the appeal even if they have not been clearly or expressly articulated by the appellant) in civil litigation, the process is, by contrast, *adversarial*.

[81] [2004] EWCA Civ 56, [2004] Imm AR 112, [2004] INLR 417 [44].

[82] CPR r 52.11(3).

[83] CPR r 52.10(1).

[84] CPR r 52.10(2).

in an appropriate case.[85] Nevertheless, in determining what constitutes "an appropriate case", appellate courts are guided by the need for appellate caution in reversing the trial judge's evaluation of the facts;[86] as Lord Steyn said in *Smith New Court Securities Ltd v Citibank NA*, "if the Court of Appeal is left in doubt as to the correctness of the conclusion, it will not disturb it."[87]

The appeal is as a rule limited to a review of the decision of the lower court (generally, there is no re-hearing).[88] Unless it orders otherwise, the appeal court will not receive oral evidence; or evidence that was not before the lower court.[89] The appeal court may draw any inference of fact which it considers justified on the evidence.[90] At the hearing of the appeal, a party may not rely on a matter not contained in the appeal notice unless the appeal court gives permission.[91]

1.2 Merger *in rem judicatam*

Reassertion of a cause of action by a successful claimant—former recovery

The English civil justice system is based on the principle that any cause of action entails a right of action: *ubi jus ibi remedium* ('where there is a right, there is a remedy').[92] A person who claims on arguable grounds to be entitled to a remedy for a breach of their right therefore has a right to have that claim determined by a court; in other words, a person who alleges to have a cause of action has a right of action.[93]

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[85] *Floyd v John Fairhurst & Co* [2004] EWCA Civ 604, [2004] PNLR 41, (2004) 148 SJLB 661 [49] (Arden LJ).

[86] *Piglowska v Piglowski* [1999] 1 WLR 1360, 1372, [1999] 3 All ER 632, [1999] 2 FLR 763, [1999] 2 FCR 481, [1999] Fam Law 617, (1999) 96(27) LSG 34, (1999) 143 SJLB 190 (Lord Hoffmann). cf *B (A Child) (Care Proceedings: Appeal), Re* [2013] UKSC 33, [2013] 1 WLR 1911, [2013] 3 All ER 929, [2013] 2 FCR 525, [2013] HRLR 29, [2013] Fam Law 946, (2013) 157(24) SJLB 37.

[87] [1997] AC 254, 274, [1996] 3 WLR 1051.

[88] CPR r 52.11(1).

[89] CPR r 52.11(2).

[90] CPR r 52.11(4).

[91] CPR r 52.11(5).

[92] See, eg, *Ashby v White* (1703) 2 Ld Raym 938, 953, (1703) 1 Smith LC 253, 92 ER 126 (Lord Holt) ("If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal."). cf *Western Counties Manure Co v Lawes Chemical Manure Co* (1873-74) LR 9 Ex 218, 222 (Pollock B) ("…where a wrong has actually been suffered by one person in consequence of the conduct of another, one is anxious to uphold as far as possible the maxim 'ubi jus ibi remedium.'"). See also, more recently, *Secretary of State for Environment, Food, and Rural Affairs v Meier & Ors* [2009] UKSC 11, [2009] 1 WLR 2780, [2010] PTSR 321, [2010] 1 All ER 855, [2010] HLR 15, [2010] 2 P & CR 6, [2010] 1 EGLR 169, [2009] 49 EG 70 (CS), (2009) 153(46) SJLB 34, [2010] NPC 3 [25] (Lady Hale); and *General Medical Council v Meadow* [2006] EWCA Civ 1390, [2007] QB 462, [2007] 2 WLR 286, [2007] 1 All ER 1, [2007] ICR 701, [2007] 1 FLR 1398, [2006] 3 FCR 447, [2007] LS Law Medical 1, (2006) 92 BMLR 51, [2007] Fam Law 214, [2006] 44 EG 196 (CS), (2006) 103(43) LSG 28, (2006) 156 NLJ 1686 [108] (Auld LJ). For an early explanation of the principle see William Blackstone, *Commentaries on the laws of England: in four books* (Childs & Peterson, Philadelphia 1860) 21 ("It is a general and indisputable rule that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded.").

[93] *Matthews v Ministry of Defence* [2003] UKHL 4, [2003] 1 AC 1163, [2003] 2 WLR 435, [2003] 1 All ER 689, [2003] ICR 247, [2004] HRLR 2, [2003] UKHRR 453, 14 BHRC 585, [2003] PIQR P24, [2003] ACD 42, (2003) 100(13) LSG 26, (2003) 153 NLJ 261, (2003) 147 SJLB 235 [28] (Lord

Lord Diplock in *South India Shipping* described this right as follows: "[A] constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant."[94] A more recent expression is that *ubi jus ibi remedium* is "the drumbeat of a constant theme",[95] that "courts are anxious to see, if possible, that where a real loss has been caused by a real breach of contract, then there should if at all possible be a real remedy which directs recovery"[96].

Against this background, the doctrine of merger *in rem judicatam* signifies that after the civil justice system has run its course and a claimant has won and recovered a judgment granting a remedy for their cause of action, "he is not entitled to bring another case against the same party seeking a greater remedy for the same cause of action, because it has 'merged in the judgment' and been extinguished."[97] The cause of action "merges in the judgment"—'*transit in rem judicatam*'.[98] What this actually means is that the right of action that the *ubi jus ibi remedium* principle guarantees for a cause of action is expendable; a successful claimant exhausts their right of action for the cause of action for which they obtain a remedy.[99] In other words, the cause of action underlying a successful claim ceases to be 'actionable'.[100] For that reason, a claimant is well-advised to immediately claim all remedies that he is by law entitled to recover, and the whole remedy, because the claimant has only a single bite at the cherry—one opportunity to recover for a cause of action.[101]

(i) The need to claim all available remedies

Hoffmann). This case involved the right of action expressed in terms of human rights, because Art 6(1) ECHR, as set out in Schedule 1 to the Human Rights Act 1998 (c 42), embodies the "right to a court", of which the right of access (ie the right to institute proceedings before a court in civil matters) is one aspect. See *Eskelinen v Finland* (2007) 45 EHRR 43 [37] ("…the dispute over a 'right', which can be said at least on arguable grounds to be recognised under domestic law, must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question.").

[94] *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corpn Ltd* (n 75) 977. cf *Taylor v Lawrence* (n 60) [52]; and *Seray-Wurie v Hackney LBC* (n 75) [17] (Brooke LJ).

[95] *Offer-Hoar v Larkstore Ltd* [2006] EWCA Civ 1079, [2006] 1 WLR 2926, [2007] 1 All ER (Comm) 104, [2006] BLR 345, 109 Con LR 92, [2006] PNLR 37, [2006] 3 EGLR 5, [2006] 42 EG 246, [2006] CILL 2389, [2006] 31 EG 89 (CS), (2006) 103(32) LSG 20, [2006] NPC 96 [85]-[86] (Mummery LJ).

[96] ibid.

[97] *Redcar and Cleveland BC v Bainbridge* [2008] EWCA Civ 885, [2009] ICR 133, [2008] IRLR 776 [223].

[98] *Thoday v Thoday* [1964] P 181, 197-98, [1964] 2 WLR 371, [1964] 1 All ER 341, (1964) 108 SJ 15 (Diplock LJ) ("If the cause of action was determined to exist, i.e., judgment was given upon it, it is said to be merged in the judgment, or, for those who prefer Latin, *transit in rem judicatam.*"). cf *R (on the application of Coke-Wallis) v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1, [2011] 2 AC 146, [2011] 2 WLR 103, [2011] 2 All ER 1, [2011] ICR 224, (2011) 108(5) LSG 18 [26] (Lord Clarke JSC).

[99] cf *Brown v Wootton* (1604) Croke, Jac 73, 79 ER 62, 63 ("…if one hath judgment to recover in trespass against one, and damages are certain, although he be not satisfied, yet he shall not have a new action for this trespass.").

[100] *Anonymous* (1455) Jenkins 69, 145 ER 49, 50 ("If the plaintiff recovers by judgment upon an obligation, he cannot maintain another action on the same obligation as long as the said judgment remains in force, quia transit in rem judicatam."). cf *Preston v Perton* (1599) Cro Eliz 817, 78 ER 1043.

[101] cf *Redcar and Cleveland BC v Bainbridge* (n 97) [220] ("Subject to a right of appeal, a litigant is entitled to one go at his claim, but no more.").

The imperative to claim all available remedies for a cause of action was underlined in *Serrao v Noel*.[102] The claimant in this case alleged that the defendant unlawfully detained their shares. First, the claimant sued for an injunction restraining the defendant from parting with the shares. Subsequently, in new proceedings, the claimant sought damages. However, the court held that the claimant could not recover a second judgment, because the damages now sought could have been claimed and recovered in the prior case, considering that injunction and damages were only different remedies available for the same cause of action. Brett MR explained that: "Even before the Supreme Court of Judicature Acts, 1873, 1875, and still more now [i.e. after the merger of law and equity], no more actions than one can be brought for the same cause of action".[103] Indeed, the concurrent administration of law and equity in accordance with the Senior Courts Act 1981[104] implies that every court exercising jurisdiction in England or Wales;

> … shall give the same effect as hitherto—(a) to all equitable estates, titles, rights, reliefs, defences and counterclaims, and to all equitable duties and liabilities; and (b) subject thereto, to all legal claims and demands and all estates, titles, rights, duties, obligations and liabilities existing by the common law or by any custom or created by any statute, and, subject to the provisions of this or any other Act, shall so exercise its jurisdiction in every cause or matter before it as to secure that, as far as possible, all matters in dispute between the parties are completely and finally determined, and all multiplicity of legal proceedings with respect to any of those matters is avoided.[105]

Conversely, the merger doctrine lacks application "if the parties had no opportunity of obtaining in the former suit the relief sought in the latter".[106] A successful plea of merger therefore requires that the defendant shows that "the plaintiff had an opportunity of recovering, and but for his own fault might have recovered, in the former suit that which he seeks to recover in the second action."[107]

(ii) The need to claim the whole remedy

Apart from the need to claim all available remedies for a cause of action, the claimant should pursue the *whole* remedy, as *Brunsden v Humphrey* iluustrates.[108] In this case the defendant negligently caused damage to a cab driver and his vehicle in the same accident. The cab driver first claimed damages and then sought damages for personal injury. Bowen LJ noted that "if the plaintiff had recovered any damages for injury to his person, he could not have maintained a further action for fresh bodily injuries caused by the same act of negligence, merely because they had been discovered or developed subsequently."[109]

a. The risk of future damage

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[102] (1884-85) LR 15 QBD 549.
[103] ibid 558.
[104] c 54.
[105] s 49(2)(b).
[106] See Dickinson (n 11) 20; and *Halsbury's Laws of England* (n 49) [1157].
[107] *Nelson v Couch* (1863) 15 Common Bench Reports (New Series) 99, 143 ER 721, 724-25 (Willes J).
[108] (1884-85) LR 14 QBD 141.
[109] ibid 148. cf *Darley Main Colliery Co v Mitchell* (1886) LR 11 App Cas 127, 132 (Lord Halsbury) ("No one will think of disputing the proposition that for one cause of action you must recover all damages incident to it by law once and for ever….").

A corollary of the need to claim the whole remedy is that a claimant in an English court may claim for the *risk* that they may suffer further injury in consequence of the cause of action, even though such risk is not independently actionable.[110] Damages are assessed once and for all at the time of the hearing.[111] Uncertain matters may accordingly have to be estimated and taken into account.[112] However, uncertainty about the size of the proverbial cherry does not in itself prevent merger; courts make their best estimate as to events that may happen in the future when the assessment of damages is made.[113]

b. Exclusion of claim splitting

The requirement to claim the whole remedy for a cause of action discourages 'claim splitting': the pursuit of part of a remedy in one case and then, in a later case, the remainder. *Fraser v HLMAD Ltd*[114] provides an example. The dispute involved a claim for unfair dismissal, a statutory cause of action for which the employment tribunal has exclusive jurisdiction,[115] as well as for wrongful dismissal, a breach of a contract of employment for which the civil courts and the employment tribunal have concurrent jurisdiction (though the latter's jurisdiction is limited to £25,000 on the amount of the payment to be ordered)[116]. The claimant expressly reserved the right to initiate High Court proceedings for damages for wrongful dismissal in excess of £25,000 and actually filed a claim. The employment tribunal granted the claim for wrongful dismissal and determined the damage at over £80,000, but limited its award to the capped amount. In view of this judgment, the High Court struck out the claim for damages on grounds of res judicata, following a plea to this end by the defendant. The claimant appealed. But according to Mummery LJ, this was a clear cut case of merger *in rem judicatam*:

> The merger arose from the fact that the cause of action had been the subject of a final judgment of the tribunal. Once it had merged, [the claimant] no longer had any cause of action which he could pursue in the High Court, even for the excess over £25,000. The claim for the excess is not a separate cause of action. The cause of action for wrongful dismissal could not be split into two causes of action, one for damages up to £25,000 and another for the balance. A claim in the High Court for the balance of the loss determined in the tribunal would have to be based on a single indivisible cause of action for wrongful dismissal.[117]

According to His Lordship, the question was whether the claimant could split the *cause of action* (i.e. wrongful dismissal). However, it is respectfully suggested that the real question was whether the claimant could split the *claim* to a remedy (i.e. damages exceeding £80,000) by claiming £25,000 in the employment tribunal and the

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[110] *Grieves v FT Everard & Sons Ltd* [2007] UKHL 39, [2008] 1 AC 281, [2007] 3 WLR 876, [2007] 4 All ER 1047, [2007] ICR 1745, [2008] PIQR P6, [2008] LS Law Medical 1, (2008) 99 BMLR 139, (2007) 104(42) LSG 34, (2007) 157 NLJ 1542, (2007) 151 SJLB 1366 [14] (Lord Hoffmann).
[111] *Curwen v James* [1963] 1 WLR 748, 755 (Lord Pearce).
[112] ibid.
[113] ibid.
[114] (n 14).
[115] ibid [3] (referring to ss 94 and 111(1) of the Employment Rights Act 1996 (c 18)).
[116] ibid [3] (referring to Art 10 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (SI 1994/1623) and ss 3 and 44 of the Employment Tribunals Act 1996 (c 17)).
[117] ibid [29].

balance subsequently in the High Court. His Lordship said 'no', because the cause of action had merged in the judgment recovered in the employment tribunal, so that the claimant no longer had a cause of action to found a claim in the High Court.[118]

In a later case, *Redcar and Cleveland BC v Bainbridge*, Mummery LJ referred to *Fraser* and said that "[the merger] defence is capable of operating harshly".[119] Nevertheless, His Lordship held that the claimant's prejudice was not of a kind of which they could complain, because the defendant's merger plea was legally sound; thus, he offered claimants generally some advice: "confine claims in employment tribunal proceedings to unfair dismissal, unless they are sure that the claimant is willing to limit the total damages claimed for wrongful dismissal to £25,000 or less."[120]

The accuracy of the judgment is questionable; the merger doctrine applies only if the claimant had the opportunity to recover in the former case the remedy claimed in the subsequent case;[121] in this case, however, though damages were available in the employment tribunal, the claimant had no opportunity to recover the *whole* remedy to which they were by law entitled for their cause of action, because the employment tribunal's jurisdiction was limited to £25,000. On these facts, the defendant cannot show that the claimant had in the prior case an opportunity of claiming the whole remedy, and but for their own fault might have recovered, what they sought to recover in the new case.[122] Consequently, the claim should have been allowed.

(1) The meaning of 'merger'

The meaning of the concept of 'merger' is confused.[123] Lord Goff in *India v India Steamship Co Ltd (The Indian Endurance and The Indian Grace) (No.1)*,[124] described the process as follows: "the cause of action, having become merged in the judgment, *ceases to exist*".[125] On this view, merger means that the cause of action necessary to sustain a new claim disappears.[126] *Spencer Bower, Turner and Handley on* Res judicata similarly state that "[i]f the action succeeds the cause of action merges in the judgment and is extinguished. A second action cannot be brought on that cause of action… because there no longer is a cause of action."[127] Others go even further and assert that "[w]here a suit is brought upon a particular cause of action, judgment in favour of the claimant extinguishes all *rights* arising from that cause of action".[128] If this were the true meaning of merger, the doctrine of merger could indeed be best described "as a substantive rule".[129] But the meaning of the concept is different.

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[118] On the meaning of 'merger' see text to n 123ff.
[119] (n 97) [223].
[120] (n 14) [31].
[121] See text to n 106ff. cf, eg, Dickinson (n 11) 20.
[122] *Nelson v Couch* (n 107) 724-25 (Willes J).
[123] See, eg, Dickinson (n 11) 20 ("…[merger] is … best described as a substantive rule".
[124] *The Indian Grace (No 1)* (Introduction n 60).
[125] ibid 417 (emphasis added). cf *Fraser v HLMAD* (n 14) [29] (Mummery LJ) ("Once it had merged, [the claimant] no longer had any cause of action which he could pursue in the High Court").
[126] On the effect of merger see text to n 137ff.
[127] Handley (n 52) [1.04].
[128] Dickinson (n 11) 20.
[129] ibid 19.

(i) The cause of action extinguished?

A 'cause of action' comprises the facts on which a claim is based; facts can be alleged and denied, proved or disproved, (shown at trial and) judicially established or rejected, but facts cannot disappear and cease to exist. As Lord Esher MR in *Coburn v Colledge* put it, a cause of action consists of "*every fact* which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court."[130] Diplock LJ in *Letang v Cooper* described the concept similarly: "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."[131] Hence, 'merger' cannot signify the process by which a cause of action is extinguished; in fact, a judgment that grants a claim judicially establishes the facts underlying the claim and, thus, confirms the existence of the cause of action.

(ii) The cause of action ascertained and recorded

The proposition that merger involves the disappearance of the cause of action underlying a successful claim,[132] has been derived from *King v Hoare.*[133] The case involved the question whether a judgment recovered against one of two joint contractors barred a claim against the other; Parke B held it did, and His Lordship's opinion is regarded until today as "classic exposition of the principle of merger":[134]

> If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, 'transit *in rem judicatam*,'—the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher.[135]

Hence, as a result of the judgment, the cause of action underlying a successful claim becomes a "certainty" and "is changed into matter of record". *King v Hoare* implies that the facts pleaded as cause of action—initially mere party allegations (i.e. as 'uncertainties')—are judicially established as the legal truth (i.e. as 'certainty') *inter partes*.[136]

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[130] [1897] 1 QB 702, 706 (emphasis added). See Andrews (n 1) [40.1].

[131] [1965] 1 QB 232, 242-43, [1964] 3 WLR 573, [1964] 2 All ER 929, [1964] 2 Lloyd's Rep 339, (1964) 108 SJ 519 ("Historically, the means by which the remedy was obtained varied with the nature of the factual situation and causes of action were divided into categories according to the 'form of action' by which the remedy was obtained in the particular kind of factual situation which constituted the cause of action. But that is legal history, not current law.").

[132] *The Indian Grace (No 1)* (Introduction n 60) 410 (Lord Goff) ("The basis of the principle is that the cause of action, having become merged in the judgment, ceases to exist, as is expressed in the Latin maxim *transit in rem judicatam*….").

[133] (1844) 13 M & W 494, 153 ER 206.

[134] See *Balgobin v South West RHA* [2012] UKPC 11, [2013] 1 AC 582, [2012] 3 WLR 698, [2012] 4 All ER 655 [11] (Lord Kerr).

[135] (n 133) 210.

[136] The 'legal truth' does not necessarily coincide with the truth. See, eg, *The Ampthill Peerage* (Introduction n 56) 569 (Lord Wilberforce) ("Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that

(2) The effect of merger

Merger affects the actionability of a cause of action. By way of comparison, the law similarly denies a right of action for a cause of action after the expiry of limitation periods.[137] The Limitation Act 1980[138] lays down time limits for exercising a right of action for a variety of causes of action. A claim in tort, for instance, cannot be brought after the expiration of six years from the date on which the cause of action accrued.[139]

According to Lord Esher MR in *Coburn v Colledge*,[140] a dispute relating to the payment of a solicitor's costs, "[t]he Statute of Limitations itself does not affect the right to payment, but only affects the procedure for enforcing it in the event of dispute or refusal to pay."[141] Similarly, Mummery LJ in *JA Pye (Oxford) Ltd v Graham* said that: "The extinction of the title of the claimant in those circumstances is not a deprivation of possessions … [but] simply a logical and pragmatic consequence of the *barring of his right to bring an action* after the expiration of the limitation period."[142]

Alike the passage of a time limitation, the merger doctrine imposes a bar to a claim for a cause of action. The only distinction is that in case of time limitation the law bars the assertion of a cause of action, while in case of merger the law bars its *re*assertion.

(i) The right of action exhausted

A right of action expires by the passage of time, whereas the successful exercise of a right of action implies the right is used up. According to Parke B in *King v Hoare*, the merger of a cause of action simply implies that "the judgment is a bar to the original cause of action".[143] This judgment was approved in *Kendall v Hamilton*, and Lord Cairns LC, with whom the majority agreed, explained that a successful claimant "exhausted their right of action" and added that this was so, "because the right of action which they pursued could not, after judgment obtained, co-exist with a right of action on the same facts against another person."[144]

Lord Penzance in *Kendall v Hamilton* observed similarly that "when that which was originally only a *right of action* has been advanced into a judgment of a Court of Record, the judgment is a bar to an action brought on the original *cause of*

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sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth (I do not say that this is such a case), and these are cases where the law insists on finality.").

[137] *The Ampthill Peerage* (Introduction n 56) 569 (Lord Wilberforce).

[138] c 58.

[139] Limitation Act 1980 (c 58), s 2.

[140] (n 130).

[141] ibid 706.

[142] [2001] EWCA Civ 117, [2001] Ch 804, 821-22, [2001] 2 WLR 1293, [2001] HRLR 27, (2001) 82 P & CR 23, [2001] 2 EGLR 69, [2001] 18 EG 176, [2001] 7 EG 161 (CS), (2001) 98(8) LSG 44, (2001) 145 SJLB 38, [2001] NPC 29, (2001) 82 P & CR DG1, revd (on other grounds) [2002] UKHL 30, [2003] 1 AC 419, [2002] 3 WLR 221, [2002] 3 All ER 865, [2002] HRLR 34, [2003] 1 P & CR 10, [2002] 28 EG 129 (CS), [2002] NPC 92, [2002] 2 P & CR DG22 (emphasis added).

[143] (n 133) 210.

[144] (1878-79) LR 4 App Cas 504, 515.

action." [145] Their Lordships accepted the argument that: "The original contract liabilities had by the judgment been ascertained and declared—…the cause of action being converted into *rem judicatam* could not be made the subject of a new action."[146]

Admittedly, Lord Blackburn in the same case[147] suggested that "*King v Hoare* proceeded on the ground that the judgment being for the same cause of action, that cause of action was *gone*. *Transivit in rem judicatam".*[148] However, this statement is inaccurate in light of Parke B's aforecited opinion int hat case. Moreover, Lord Blackburn himself said later that: "The Plaintiffs had a right of recourse against Hamilton…. They have destroyed that remedy by taking a judgment against persons who turn out to be insolvent."[149] Hence, his reasoning is that the claimants had a right of action, or "right of recourse", which they "destroyed" by taking judgment, which reasoning broadly alignes with that of Lord Cairns LC and Lord Penzance.

(ii) Summary judgment

A successful plea of merger *in rem judicatam* means that the claimant lacks a right of action on the cause of action asserted and thus has no real prospect of succeeding in the claim.[150] The court seized of the claim may therefore give summary judgment against the claimant,[151] which implies the disposal *without trial* of (part of) the claim[152] and termination of the case unless there is a compelling reason for a trial of the matter to be summarily disposed of[153].[154]

(3) Nature

To invoke merger is to plead res judicata. The doctrine of merger *in rem judicatam* forms part of the res judicata doctrine, along with the doctrine of estoppel *per rem judicatam.*[155] A plea of merger[156] therefore qualifies as a res judicata defence: "a highly technical defence which has the effect, where it applies, of precluding a decision on the merits."[157]

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[145] ibid 526 (emphasis added).
[146] See *Brown v Wootton* (n 99) 63 ("…for the cause of action being against divers, for which damages uncertain are recoverable, and the plaintiff having judgment against one person for damages certain, that which was uncertain before is reduced *in rem judicatam*, and to certainty; which takes away the action against the others: and therefore Popham said, if one hath judgment to recover in trespass against one, and damages are certain, although he be not satisfied, yet he shall not have a new action for this trespass. By the same reason è contra, if one hath cause of action against two, and obtain judgment against one, he shall not have remedy against the other….").
[147] (n 144).
[148] ibid 543 (emphasis added). Lord Penzance offered no definition of 'merger' at all.
[149] ibid 544.
[150] CPR r 24.2(a)(i).
[151] ibid. See also CPR r 24.3(1) and (2) (any type of proceedings, but see CPR r 24.3(a)(i)-(ii) and (b)).
[152] cf PD 24 r 1.2.
[153] CPR r 24.2(b).
[154] Jacob (Introduction n 54) 122 ("[T]here is plainly no need for a trial, and it is clearly in the interest of the parties and the court, as well as the public interest, that the action should be brought to an early end without delay and without the costly and elaborate process for preparing for a trial, the outcome of which can be pre-determined.").
[155] On estoppel *per rem judicatam*, see text to n 264ff.
[156] See, eg, *Edevain v Cohen* (1890) LR 43, (1889) Ch D 187, 189-90 (Cotton LJ).
[157] *The Indian Grace (No 1)* (Introduction n 60) 425 (Lord Goff).

The doctrine, if duly invoked,[158] imposes a bar against a claim for a cause of action for which judgment has previously been recovered.[159] Unlike other doctrines (e.g. abuse of process),[160] the merger doctrine does not go to a court's jurisdiction, so that a court cannot apply the doctrine of its own motion; if a defendant fails to plead merger,[161] the court seized will be compelled to determine the claim notwithstanding that the claim is based on a cause of action for which judgment was previously recovered.[162]

(4) Rationale

The merger doctrine serves the public and private interest in finality of litigation;[163] to illustrate, Parke B in *King v Hoare* said that after a claimant recovers judgment, "it would be *useless* and *vexatious* to subject the defendant to another suit for the purpose of obtaining the same result."[164] Similarly, Lord Blackburn in *Kendall v Hamilton* said that the doctrine imposes a bar "partly on positive decision, and partly on the ground of public policy, that there should be an end of litigation, and that there should not be a vexatious succession of suits for the same cause of action."[165] More recently, Mummery LJ in *Fraser v HLMAD Ltd*[166] confirmed that the merger doctrine pursues "the purpose of bringing finality to legal disputes in the interests of the parties and of the public."[167] However, the operation of the merger doctrine remains subject to party disposition; a court is barred from applying the doctrine of its own motion.[168] In other words, the public interest in finality of litigation gives way in cases where the parties desire a second judgment for the same cause of action. The public interest trumps only if the claim is made in bad faith and an abuse of process, or otherwise threatens the sound administration of justice.[169]

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[158] See text to n 176ff.
[159] (n 133) 210 (Parke B) ("If there be a … cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action.").
[160] See text to n 497ff.
[161] See text to n 176ff.
[162] cf *The Indian Grace (No 1)* (Introduction n 60) 423 (Lord Goff) ("…it is perhaps more difficult for a plea of waiver or estoppel to be effective in a case where the doctrine of merger in judgment applies, since the effect of the merger is that the cause of action ceases to exist; and indeed in Spencer Bower and Turner it is pointed out, at pp. 398-399, that the only instances of estoppel as an affirmative answer to a case of this kind are to be found in cases of waiver or estoppel by omission to plead the former recovery. Even so, *I hesitate to conclude that estoppel or waiver can otherwise have no application in such a case*. However once again your Lordships did not have the benefit of argument on the point; and I will assume, in favour of the defendants that generally a plea of estoppel or waiver will not be effective where the doctrine of merger in judgment applies at common law.") (emphasis added).
[163] See, generally, though with an emphasis on estoppel *per rem judicatam*, *Thrasyvoulou* (Introduction n 60) 289 (Lord Bridge).
[164] (n 133) 210 (emphasis added).
[165] (n 144) 542.
[166] (n 14).
[167] ibid [2].
[168] See text to n 176ff.
[169] See text to n 483ff.

(5) Application

The merger doctrine is said to be "highly technical".[170] However, apart from the general requirements that the judgment relied on must stem from a court of competent jurisdiction and must remain in force,[171] and that the defendant must duly invoke the doctrine,[172] the only condition for application is that the new claim is based on a cause of action for which judgment was previously recovered.[173] In addition to this 'identity of cause of action'-requirement, and in contrast to the doctrine of estoppel *per rem judicatam*,[174] the merger doctrine does not require that the same parties are involved in the new and in the prior case; no 'identity of parties'-requirement applies[175].

(i) Plea of merger *in rem judicatam*

A failure to plead merger implies the loss of the shield of res judicata.[176] The requirement that a defendant plead merger signals that the doctrine does not go to a court's jurisdiction.[177] Consequently, while *merger* of a cause of action occurs automatically upon the recovery of judgment,[178] a court has no power, apart from cases where the reassertion of a cause of action amounts to an abuse of process,[179] to apply the merger doctrine of its own motion.

(ii) Identity of the cause of action

The difficulty of the merger doctrine derives in large part from the complexity of the concept of 'cause of action';[180] a defendant has to prove that the same cause of action is reasserted that previously formed the basis for a successful claim, for which judgment was recovered.[181] Diplock LJ (as he then was) in *Letang v Cooper* defined the concept as follows: "a factual situation the existence of which entitles one person to obtain from the court a remedy against another person".[182] This description echoes Lord Esher MR's classic definition in *Coburn v Colledge*, which describes 'cause of

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[170] *The Indian Grace (No 1)* (Introduction n 60) 424 (Lord Goff).
[171] *Anonymous* (n 100) 50 ("If the plaintiff recovers by judgment upon an obligation, he cannot maintain another action on the same obligation as long as the said judgment *remains in force*, quia transit in rem judicatam.") (emphasis added). The force of a judgment is a precondition for any legal consequence attaching to a judgment. See *Preston v Perton* (n 100).
[172] See text to n 176ff.
[173] (n 108) 147 (Bowen LJ) ("The difficulty in each instance arises upon the application of [the doctrine of merger], how far is the cause which is being litigated afresh the same cause in substance with that which has been the subject of the previous suit."). See text to n 180ff..
[174] See text to n 399ff.
[175] See text to n 240ff.
[176] *Anonymous* (n 100) 50. cf *Preston v Perton* (n 100).
[177] See text to n 155ff.
[178] See text to n 123ff.
[179] See text to n 483ff.
[180] (n 108) 147 (Bowen LJ) ("The difficulty in each instance arises upon the application of this rule, how far is the cause which is being litigated afresh the same cause in substance with that which has been the subject of the previous suit."). cf *Drake v Mitchell and Others* (1803) 102 ER 594, 102 ER 594, (1803) 3 East 251, 258 (Lord Ellenborough) ("I have always understood the principle of transit in rem judicatam to relate only to the particular cause of action in which the judgment is recovered").
[181] *Isaacs & Sons v Salbstein and Another* [1916] 2 KB 139, 149-50 (Swinfen Eady LJ).
[182] (n 131) 242-32. See Andrews (n 1) [40.1].

action' as comprising "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support their right to the judgment of the court"[183].

Brunsden v Humphrey,[184] a case discussed below,[185] illustrates the difficulty. That case featured Coleridge CJ dissenting in strong and graphic terms from the majority's decision that the cause of action in the case was different from the cause of action successfully asserted before, because the claimant alleged the violation of distinct rights.[186] More recently, Lord Goff in *The Indian Grace* acknowledged that "[the majority's view] has not been without its critics, who prefer the dissenting judgment of Lord Coleridge C.J.".[187] For instance, Dickinson warns that strict adherence to *Brunsden v Humphrey* "can give rise to differences in treatment which can be difficult to defend."[188] The author explains that the merger doctrine as construed in *Brunsden v Humphrey* may preclude a successful claimant in a claim in tort for negligence for personal injury from bringing a new claim for additional damages (e.g. where the injury is exacerbated or new personal injury resulting from the same negligence appears after judgment) while the doctrine allows a successful claimant in negligence for property damage to bring another claim for personal injury caused by the same negligence. Under *Brunsden v Humphrey* the new claim in the first secenario reasserts the same cause of action, while the cause of action in the second scenario is distinct.

Undoubtedly, the obligation to recover in a single claim all damages for a cause of action—the "single action rule"[189]—is firmly rooted in the English law. However, the merger doctrine does not bar a new claim for the same negligence if the right violated is different, because the cause of action underlying that claim is different. Nevertheless, English law may still bar the claim as an abuse of process if the claimant could and should have pursued the cause of action as part of the first claim—a form of abuse of process called '*Henderson v Henderson* abuse').[190] *Brunsden v Humphrey* should be assessed against this background, and, as Mann LJ said in *Talbot v Berkshire CC*, if the last option had been raised in *Brunsden v Humphrey*, "Lord Coleridge C.J. might not have found himself in the unfortunate position of having to dissent from Brett M.R. and Bowen L.J.".[191]

For the purpose of illustrating the doctrine's application regarding the requirement that the cause of action asserted is identical to the cause of action for which judgment was previously recovered, several cases are discussed in turn, though this section does not claim to be in any way exhaustive and to describe the whole spectrum (or even a large part) of distinguishable causes of action recognised in English law.

a. One act of negligence, but two rights violated: Brunsden v Humphrey

[183] (n 130) 706 (Lord Esher MR).
[184] (n 108).
[185] See text to n 192ff.
[186] (n 108) 152-53.
[187] *The Indian Grace (No 1)* (Introduction n 60) 420.
[188] Dickinson (n 11) 20.
[189] *Grieves v FT Everard & Sons Ltd* (n 110) [14] (Lord Hoffmann).
[190] See text to n 526ff.
[191] [1994] QB 290, 301, [1993] 3 WLR 708, [1993] 4 All ER 9, [1993] RTR 406, [1993] PIQR P319, (1993) 157 LG Rev 1004, (1993) 143 NLJ 402.

Brunsden v Humphrey[192] clarified that one act of negligence may amount to different causes of action if the *rights* violated as a result of the negligence are different. The defendant's servant was alleged to have negligently caused damage to a cab driver and his vehicle in the same accident. The cab driver recovered a remedy for the damage to his vehicle and then sued for his bodily injury. The question arising was whether the cause of action upon which the new claim was based was in substance the same as that which was the subject of the previous claim.

According to Bowen LJ, if the claimant had recovered damages for injury *to his person*, he could not have maintained another claim for fresh bodily injuries caused by the same act of negligence, even if those injuries had been discovered or developed subsequently,[193] because a claimant has a single '*negligent cause of bodily injury*'-cause of action, and the merger doctrine requires that a claimant recovers by a single action damages for any form of bodily injury caused by the same act of negligence, regardless of whether the injury complained of is present or future, discovered or undiscovered.

However, the actual case involved injuries to person and *property*; the new claim was for injury to property (the cab), not to the person. His Lordship therefore asked "whether, in the case of an accident caused by negligent driving, in which both the *goods* and the *person* of the plaintiff are injured, there is one cause of action only or two causes of action which are severable and distinct."[194] His answer is worth citing fully:

> 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 caused. 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 to the plaintiff's person. 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 of driving, which (if no damage had ensued) would have been legally unimportant.[195]

Negligence *per se*, then, is not a cause of action, since *damage* is an essential element. For that reason, if the damage complained of is different, two distinct causes of action accrue, even though the act of negligence is identical.

The question arises, however, why two distinct bodily injuries (e.g. a broken leg and hidden brain damage) are instances of the 'same damage' and cause of action for purposes of the doctrine of merger, while damage to the person and damage to property caused by the same act of negligence are 'distinct instances of damage' giving rise to separate causes of action. Those instances of damage (i.e. to the person and to property), Bowen LJ reasons, relate to different *rights*:

> This Injury would have been done to the plaintiff in respect of two absolute and independent rights, the distinction between which is inveterate both in the English and the Roman law. Everyone in this country has an absolute right to security for his

[192] (n 108).
[193] ibid 148 (emphasis added).
[194] ibid 150 (emphasis added).
[195] ibid 150-51.

> person. Everybody has further an absolute right to have his enjoyment of his goods and chattels unmeddled with by others.[196]

Brett MR agreed. His Lordship said similarly that the act of negligence in question did not give rise to only one cause of action, but to two, because "[the claimant] was injured in *a distinct right*, and he became entitled to sue for a cause of action distinct from the cause of action in respect of the damage to his goods".[197] Later, in *Serrao v Noel*,[198] he repeated this reasoning: "Where separate rights have been infringed, separate actions may be maintained, because the infringement of separate rights gives rise to separate causes of action: this was elaborately shewn in *Brunsden v Humphrey*".[199] It follows that a claimant may be able to defeat a plea of merger by establishing that a single act or omission infringed two separate rights, or interests protected by the law, and thus gave rise to two distinct causes of action.

The majority approach in *Brunsden v Humphrey* has been criticized. First and foremost, Lord Coleridge CJ described the consequences of the decision as "*so serious*" and "very probably *so oppressive*" as to make his dissent unavoidable.[200] His Lordship conceded that the injury done to the claimant was injury done to him at one and the same moment by one and the same act in respect of *different* rights—i.e. to the person and to goods—but he denied that there was any justification for treating injury to different rights by the same act of negligence as giving rise to distinct, severally actionable causes of action, while characterising different infringements of the same type of right as involving one and the same cause of action;

> … [because] it seems to me a subtlety not warranted by law 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.[201]

According to Lord Coleridge, the rights infringed may have been different, but the act causing the infringements was one and the same—that is, the *negligence* of the defendant's servant. But this point is immaterial, since merger concerns the *cause of action* for which a judgment is recovered,[202] and negligence *without damage* is no cause of action; recently, Lord Hoffmann in *Grieves v FT Everard & Sons Ltd* made this point very clearly: "Some causes of action arise without proof of damage. … But a claim in tort based on negligence is incomplete without proof of damage."[203] Hence, proof of negligence plus bodily injury means that a claimant can recover damages for any bodily injury caused by the negligence, but if the claimant seeks compensation for property damage, mere proof of negligence and bodily injury is *insufficient*, because the damage (i.e. the right affected)—an essential element of the cause of action—is distinct.

The same reasoning applies in case a subsequent claim is for the same negligence but the damage completing the cause of action consists of bodily injury *to another person*; again the right affected is different and, so, the cause of action is

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[196] ibid 148-49.
[197] ibid 145 (emphasis added).
[198] (n 102).
[199] ibid 558.
[200] (n 108) 153.
[201] ibid.
[202] See, eg, *Drake v Mitchell and Others* (n 180) 258 (Lord Ellenborough).
[203] (n 110) [7].

distinct. Nevertheless, as Stuart Smith LJ explained in *Talbot v Berkshire CC*,[204] the majority in *Brunsden v Humphrey* could have dismissed the new claim on a different ground: based on the court's inherent power to prevent an abuse of process, which potentially includes situations where a claimant failed without a valid justification to claim in first the case compensation for both the bodily injury and the property damage arising from the same act of negligence ('*Henderson v Henderson*'-abuse).[205]

As a final point, it should be noted that the mere fact that a claim involves heads of damage, even if different in size and nature, does not mean that the claim is based on more than one cause of action; for instance, in *Stock and Others v London Underground Ltd*,[206] a case on the application of the Limitation Act 1980,[207] not the doctrine of merger, which raised the same issue of identity of causes of action, the claimant sued for compensation for property damage to a recording studio caused by negligent tunneling in 1995 and 1996 for the London tube as well as for loss of profits resulting from the inability to use the studio. Pill LJ allowed the claimant to amend their claim to add the loss of profits on the ground that the amendment did not involve adding a new cause of action.[208] Similarly, Longmore LJ in *Berezovsky v Abramovich* explained that "the addition or substitution of a new loss is by no means necessarily the addition or substitution of a new cause of action."[209] His Lordship gave the example of a case involving a claim for personal injury caused by negligence, where the loss of earnings is but an additional loss consequential upon the personal injury, so that a separate claim for loss of earnings for the same act of negligence involves the same cause of action.[210] Moreover, he added that the mere fact that in a particular case, a loss may be measured by a different law from that already pleaded does not necessarily mean that a claim involves a new cause of action.

b. Intentional vs. unintentional wrongdoing: Paragon Finance

Paragon Finance plc v D B Thakerar & Co[211] demonstrates the need to distinguish causes of action for intentional wrongs from unintentional wrongs, whereas intent is irrelevant in distinguishing contractual causes of action. At the same time, the case confirmed that there may be identity of a cause of action between cases notwithstanding that in one claim facts are presented as an equitable cause of action, while in another claim the same facts are labeled as a cause of action at common law; as Millett LJ reiterated, "a cause of action is defined by its factual ingredients, not by the name ascribed to it. As Juliet observed of the rose, its essential character is not

[204] (n 191). cf *Watkins v Jones Maidment Wilson (A Firm)* [2008] EWCA Civ 134, 118 Con LR 1, [2008] PNLR 23, [2008] 1 EGLR 149, [2008] 10 EG 166 (CS), [2008] NPC 27 [25] (Arden LJ).
[205] See text to n 526ff.
[206] Times, August 13, 1999.
[207] c 58.
[208] Contrast *Steamship Mutual Underwriting Association Ltd v Trollope & Colls (City) Ltd* [1986] 33 BLR 77, 6 Con LR 11, (1986) 2 Const LJ 224 (a claim for breach of duty in relation to the cracking and displacement of walls to a substantial new building was held to involve a different cause of action than the original claim for breach of duty in relation to an air conditioning system).
[209] [2011] EWCA Civ 153, [2011] 1 WLR 2290 [64].
[210] ibid [68].
[211] *Paragon Finance plc v D B Thakerar & Co* [1998] EWCA Civ 1249, [1999] 1 All ER 400, (1998) 95(35) LSG 36, (1998) 142 SJLB 243.

dependent on the name by which it is called."[212] Though the case concerned the problem of claim amendment after the passage of a time limitation, the Court of Appeal clarified generally that a claim involves a different cause of action where a claimant alleges *intentional* wrongdoing by pleading fraud where previously only *unintentional* wrongdoing (i.e. negligence) had been alleged. Millett LJ observed:

> In my judgment, it is incontrovertible that an amendment to make a new allegation of intentional wrongdoing by pleading fraud, conspiracy to defraud, fraudulent breach of trust or intentional breach of fiduciary duty where previously no intentional wrongdoing has been alleged constitutes the introduction of a new cause of action.[213]

According to Millett LJ, a cause of action for which it is material to plead and, if traversed, prove *intent* is distinct from a cause of action in which it is not. Accordingly, if a claimant succeeds in a claim for negligence, the doctrine of merger does not exclude a subsequent claim for fraud, regardless whether the new claim involves the same wrongdoing: "intentional and unintentional wrongdoing give rise to distinct causes of action."[214] In consequence, the claimant will be able to recover additional damages.

His Lordship also made clear that equitable claims for "fraudulent breach of trust" and "intentional breach of fiduciary duty" fundamentally involve the same factual allegations as the common law claims for "fraud" and "conspiracy to defraud", so that in cases where the facts are the same, the causes of action are identical.[215] According to the judge, in the circumstances of the case, "[t]he new claims are not different causes of action (which is historically a common law concept) *but merely the equitable counterparts of the claims at common law*."[216] This shows that the law looks to the cause of action, not the remedy, in deciding whether a claim is time limited, and, by analogy, whether a claim is precluded by the doctrine of merger. Conversely, in a claim for *breach of contract*, neither intent nor dishonesty play a role in distinguishing causes of action. According to Millett LJ, "[d]ishonesty is not a necessary averment in a claim for breach of contract."[217]

On this note it is suggested to briefly consider the application of the doctrine of merger in the context of a contractual dispute, as opposed to claims in tort. For this purpose, the well-known case of *Conquer v Boot*[218] is an appropriate point of departure.

c. Various losses, but one and the same breach of contract: Conquer v Boot

Conquer v Boot[219] established that damage is no element of a breach of contract cause of action, which means that, unlike in respect of *tort* causes of action, the damage resulting from the breach of a particular cause of action for which compensation is recovered is, as a rule, irrelevant for the application of the merger doctrine. Hence,

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[212] ibid 406h.
[213] ibid 406c.
[214] ibid.
[215] ibid.
[216] ibid 407f-g (emphasis added).
[217] ibid (emphasis added).
[218] [1928] 2 KB 336.
[219] ibid.

the narrow approach in *Brunsden v Humphrey*—i.e., negligence causing bodily injury is a distinct cause of action from the same negligence resulting in property damage—is, as Lord Goff said in *The Indian* Grace, "not in any event possible in a *contractual* context, where proof of damage is not necessary to establish the cause of action."[220]

The same reasoning applies to trespass; so, as Lord Hoffmann in *Grieves v FT Everard & Sons Ltd* explained, "[p]roof of the trespass … is enough to found a cause of action",[221] and, "[i]f no actual damage is proved, the claimant is entitled to nominal damages."[222] Hence, the merger doctrine bars a new claim for trespass for which judgment was previously recovered, notwithstanding that the damage sued for is different, because the cause of action is the same.

Conquer v Boot concerned a contract for the construction of a bungalow. The claimant sued for "for breach of contract to complete in a good and workmanlike manner" and recovered damages. Then he filed a new claim for breach of the same contract, adding particulars of damage. The defendant answered pleading res judicata. The Court of Appeal upheld the plea and dismissed the claim. Talbot J reasoned that "[t]he rule of law on which the defendant relies is thus stated by Bowen L.J. in *Brunsden v Humphrey*: 'It is a well settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all".[223] The judge then added that: "There are many authorities … but they all come back to the same test, is the cause of action in the second action the same as that for which the plaintiff had judgment in the first?"[224]

On the facts, Talbot J found that the cause of action underlying the new claim was the same as that sued on in the first, both in "form" and "in substance".[225] The abolition of the old forms of action implied that the form of a claim is irrelevant for purposes of applying the doctrine of merger.[226] In terms of substance, the judge explained there was the required identity of causes of action also, because "[t]here is *one contract* and *one promise* to be performed at one time, although no doubt the defendant may have failed to perform it in one or in many respects."[227] At the same time, he acknowledged that "[t]here may of course be many promises in one contract, the breach of each of which is a separate cause of action."[228]

The doctrine of merger as applied in *Conquer v Boot* has been characterised as a "draconian doctrine".[229] However, while Sankey LJ in the case said that "I do not think that every breach of it - every particular brick or particular room that is faulty - gives rise to a separate cause of action", in the more recent case of *Steamship Mutual Underwriting Association Ltd v Trollope & Colls (City) Ltd*,[230] May LJ warned that if a claimant succeeds against building contractors and architects in respect of defects to a building's central heating system, and then subsequently the brickwork proves to be defective or foundation defects show themselves, and the claimant brings another

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[220] *The Indian Grace (No 1)* (Introduction n 60) 420.
[221] (n 110) [7].
[222] ibid.
[223] [1928] 2 KB 336, 343.
[224] ibid 346.
[225] ibid 344.
[226] See, generally, Maitland (Introduction n 87).
[227] [1928] 2 KB 336, 344.
[228] ibid.
[229] *Purser & Co (Hillingdon) Ltd v Jackson* [1977] QB 166, 174, [1976] 3 WLR 700, [1976] 3 All ER 641, (1976) 242 EG 689, (1976) (1976) 120 SJ 351 (Forbes J).
[230] (n 208).

claim to recover compensation for those further defects, "it is *inconceivable* that they could have been met with a successful plea of res judicata." [231] His Lordship emphasised in this regard that:

> I do not think one can look only to the duty on a party, but one must look also to the nature and extent of the breach relied upon, as well as to the nature and extent of the damage complained of in deciding whether, as a matter of degree, a new cause of action is sought to be relied upon.[232]

Accordingly, the mere fact that one is considering only different defects in the same building does not mean they are "constituents of one and the same cause of action". For that reason, His Lordship concluded that "whether there is a new cause of action in any circumstances is a mixed question of law and fact." This conclusion is supported by the judgment in the final case that merits discussion so far as concerns the application of the doctrine of merger: *Redcar and Cleveland BC v Bainbridge.* [233]

d. Different statutory rights violated: Redcar and Cleveland BC v Bainbridge

Redcar and Cleveland BC v Bainbridge made clear that the breach of statutory terms deemed to form part of or to modify the terms in employment contracts may amount to distinct causes of action to the extent claims have different statutory legal bases involving distinct rights. The case raised inter alia the question of the impact of the doctrine of merger on female employees' right to make equal value pay claims under the *Equal Pay Act 1970* after they succeeded and recovered judgment on claims for arrears of pay for the same period based on work rated as equivalent with men and had received back pay and interest as ordered by the court for those claims. Mummery LJ put the issue this way: "Is the cause of action for equal pay for a particular pay period based on equal value the same as, or different from, the cause of action for equal pay claim for the same pay period based on work rated as equivalent?"[234] If the causes of action were identical, the doctrine of merger would bar the new claims.

Section 1(1) of the 1970 Act, His Lordship explained, "deems an equality clause to be included in every contract under which a woman is employed, if it does not include one."[235] The clause's effect is that the terms of the woman's contract are modified so as not to be less favourable than similar terms in the contract offered a man. The Act, ss 1 and 2, allow a woman employee to file an equal pay claim in three different ways: (1) a 'like work claim' (alleging like work with a male comparator); (2) a 'work rated as equivalent claim' (alleging work rated as equivalent with that of a male comparator); and (3) a 'work of equal value claim' (alleging work of equal value to the work of a male comparator).

In the particular case, the claimants had first succeeded in 'work rated as equivalent'-claims and now sought greater relief for the same period through 'work

[231] ibid 95.
[232] ibid 98.
[233] (n 97).
[234] ibid [217].
[235] ibid [215].

of equal value'-claims. The defendant employer argued that both claims were not based on distinct statutory causes of action for equal pay, but were claims for the same breach of contract; to be precise, for breach of the contractual terms relating to pay in the claimants' contracts of employment modified or included by the equality clause, so there was only one promise in the contracts breached: *the promise to pay*. The defendant added that both claims alleged for the same period the same breach of that single promise to pay, regardless whether the claimants attached different labels to their claims which could not, however, conceal the identity of their underlying cause of action: the breach of the modified contractual term compelling equal pay.

The Court of Appeal rejected this argument. According to the Court, the claimants' right to equal pay was *statutory*, not contractual, because in the absence of the statute, neither the right to equal pay nor the cause of action in case of its breach would exist. Mummery LJ made the point as follows: "The contract agreed upon by the parties contains a promise to *pay*. The parties did not agree upon a promise for *equal pay*. The source of the equal pay obligation is statutory. It is not what the parties themselves have agreed."[236] His Lordship refused to attach any weight to the statutory fiction of deemed modification contractual term or of inclusion of a term in the contract of employment. In reality, the equal pay claims in question were not for breach of contract, but for contravention of a contract term treated as having been modified or included pursuant to the 1970 Act. As a result of this characterisation of the claims, the Court of Appeal distinguished *Conquer v Boot*,[237] which, as noted, involved a claim for breach of a single *contractual* promise. According to the Court, there were three alternative legal bases for an equal pay claim and, thus, potentially three different causes of action for the same period.

The Court of Appeal recognised two limitations in respect of the new claims. First, there is no question of double recovery of arrears of pay, so that the amount of the arrears of pay recovered as a result of putting the equal pay claim in one way will reduce the amount recoverable by putting the claim in a different way.[238] The second limitation is that a successful claimant is not allowed to file a new claim under the same head for the same pay period simply by selecting a different comparator.[239] To found a new cause of action for the same period, the equal pay claim must be under a different head, which normally also involves different comparators.

(iii) No requirement: identity of the parties (or privies)

In addition to the identity of cause of action requirement identified above, some argue that application of the doctrine of merger further depends on the identity of parties (or their privies) between the new case and the prior case.[240] *Spencer, Bower and Handley on* Res judicata, for instance, state that "[t]here can be no bar by former recovery unless the parties in the second action are the same or privies of those in the first".[241] *Isaacs & Sons v Salbstein* is cited in support.[242] But the court in this case said nothing to support the assertion.

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[236] ibid [255] (emphasis added).
[237] See text to n 219ff.
[238] (n 97) [252].
[239] ibid [262].
[240] cf *Halsbury's Laws of England* (n 49) [1157]; and Dickinson (n 11) 21-22.
[241] Handley (n 11) [22.01] ("There can be no bar by former recovery unless the parties in the second action are the same or privies of those in the first.").
[242] *Isaacs & Sons v Salbstein and Another* (n 181).

The claimant, a seller of lemons, sued "Salbstein Brothers" for breach of contract and claimed damages. A judgment granting the claim was given in default of the defendant's appearance, but the judgment debt was never paid, apparently because "Salbstein Brothers" was a non-existing firm. The claimant then sued "H. Salbstein" and his wife "E. Salbstein" for the same breach of contract. The defendants pleaded merger. The question was whether a judgment recovered in default against a person sued in error (i.e. the non-existing firm) barred a later claim against the person liable. The Court of Appeal said no. Swinfen Eady LJ first pointed out that:

> If the defendant Harry Salbstein had shown that the firm of Salbstein Brothers was an existing firm at the material times and that he was a partner in that firm, and that any obligation was only a joint obligation of the partners in the firm, it would have been a complete defence in this action.[243]

A *joint* obligation implies a single cause of action. Conversely, His Lordship explained, the situation is different where an obligation *severally* binds two or more persons; even if those persons are also jointly liable, "a judgment against one is no bar to an action against another."[244] Namely, the judge reasoned, "where the obligations are several…. The *cause of action* is not the same."[245] For the same reason, Swinfen Eady LJ rejected that "an action brought in error against a fictitious person or against a person not under any liability is a bar to an action against the person alleged to be really liable."[246] Accordingly, the merger defence failed because the defendant had not shown that the person sued in the prior case actually existed (and not sued in error) and that they were jointly liable with that person.

a. Why identity of the parties between the prior and future case is irrelevant

A straightforward reason exists for why the identity of parties between the prior and new case is irrelevant for the merger doctrine: Parke B in *King v Hoare* explained that "there is but one cause of action, whether it be against a single person or many."[247] Potentially, various persons can sue or be sued for one and the same cause of action, but there is but one cause of action. The merger of a cause of action occurs by virtue of the recovery of judgment, regardless of who could also have filed a claim for the cause of action (but did not) and who could have been sued for the same cause of action (but was not); merger does not depend on there being (the prospect of) a new claim, let alone a new claim involving the same parties (or their privies). Merger is fundamentally different in this regard from estoppel; merger *in rem judicatam* occurs immediately, upon the rendition of judgment, whereas, an estoppel *per rem judicatam* arises only in a new case.

Viewed from the perspective of two or more different persons jointly liable (not privies), the position is clear: the merger doctrine implies that a cause of action can form the basis for the recovery of judgment only once, irrespective who is or could have been sued for it. However, this is the position at common law, subject to

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[243] ibid 150.
[244] ibid 151.
[245] ibid (emphasis added).
[246] ibid.
[247] (n 133) 210.

statutory intervention; in fact, the *Civil Liability (Contribution) Act 1978*[248] has influenced the position of joint obligors by granting for one and the same cause of action distinct rights of action against all. Section 3 reads: "Judgment recovered against any person liable in respect of any debt or damage shall not be a bar to an action… against any other person who is (apart from any such bar) jointly liable with him in respect of the same debt or damage."

Note that the act does not prevent the merger of the cause of action for which judgment is recovered against one joint obligor, nor does it disapply the doctrine of merger in respect of that person. The successful claimant is certainly barred from suing the same person again for the same cause of action. The act merely grants *separate* rights of action for the same cause of action against all persons jointly liable for the original cause of action, with the effect that exhaustion of a right of action against one joint obligor does not afftect the right of action against another joint obligor. This aspect of the act obviously creates the risk of double recovery, but this risk is addressed by the general rule against claims for double recovery, which a court can strike out as abuse of process.[249]

b. Section 34 Civil Jurisdiction and Judgments Act 1982 contrasted

If indeed, the merger doctrine does not hinge on an identity of parties-requirement, a contrast may be noted with s 34 of the Civil Jurisdiction and Judgments Act 1982,[250] which provision specifically attributes *foreign* judgments a type of preclusive effect that mirrors the effect that the merger doctrine attaches to domestic judgments.[251] However, unlike the merger doctrine, s 34 requires that "the same parties, or their privies" be involved in a new claim for the same cause of action.

According to Lord Goff in *The Indian Grace (No.1)*, s 34 aims to achieve, "the requisite result of giving effect to the policy underlying the principle to res judicata" [252]—that is, finality of litigation. But to achieve this aim in cases where judgment is given abroad, His Lordship added, "there was no need for Parliament to invoke the highly technical doctrine of merger in judgment; *the same practical result* could be achieved by the simple words chosen in the section."[253] Nevertheless, the case of *India v India Steamship Co Ltd (The Indian Endurance and The Indian Grace) (No.2)*[254] illustrates that the inclusion in s 34 of an identity of parties requirement unnecessarily complicated the goal of achieving this intended result.

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[248] c 47, s 3.
[249] *Johnson* (Introduction n 12) 62 (Lord Millett).
[250] c.27. ("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.").
[251] The provision served to address the perceived "anomaly" at common law that the doctrine of merger lacks application to foreign judgments. See *The Indian Grace (No 1)* (Introduction n 60) 417-18. The provision is liable to cause substantial injustice, as demonstrated by *The Indian Grace (No 1)*, by imposing English standards of finality of litigation in circumstances where this is contrary to good sense. See Chapter 4, text to n 41ff.
[252] *The Indian Grace (No 1)* (Introduction n 60) 424.
[253] ibid (emphasis added).
[254] [1998] AC 878, [1997] 3 WLR 818, [1997] 4 All ER 380, [1998] 1 Lloyd's Rep 1, [1997] CLC 1581, [1998] ILPr 511, (1997) 94(43) LSG 29, (1997) 147 NLJ 1581, (1997) 141 SJLB 230.

The case involved a claim by consignees of a cargo of artillery shells carried by ship to India. The claimants first recovered judgment in India against the owners of the ship for short delivery, because a small number of shells had been jettisoned following a fire onboard the ship. The same claimants then filed a new claim in England against a sister ship of the same owners, for total loss of the cargo due to overheating as a result of the fire. The defendant pleaded the Indian judgment and argued that s 34 barred a new claim for the same cause of action between the same parties (or their privies). The claimant responded that the English claim was *in rem* (i.e. against the ship) and, thus, involved other parties than the Indian claim, which was *in personam* against the owners of the ship.

Clarke J held in favour of the claimant on the basis of his conclusion that "an analysis of the authorities shows that the two actions do involve the same cause of action but that historically they have been regarded as being between *different* parties."[255] But the Court of Appeal reversed his judgment on the ground that "section 34 must have been intended… to prevent the same cause of action being tried twice over between those who are, *in reality*, the same parties."[256] The House of Lords agreed. Lord Steyn confessed that given the legalisative objective of s 34, "it would … be wrong to permit an action in rem to proceed despite a foreign judgment in personam obtained on the same cause of action." His Lordship reasoned that developments in the law of admiralty, "stripped away the form and revealed that in substance the owners were parties to the action in rem."[257] Hence, the parties in England were deemed the same as those involved in the Indian claim.

This contentious re-interpretation of Admiralty jurisdiction[258] would have been unnecessary under the doctrine of merger, which looks merely to the cause of action, whether it be against a single person or many, and the question is irrelevant that one claim is *in rem* and another *in personam*; the judgment obtained against ship owners merges the cause of action and can be pleaded in bar against a new claim for the same cause of action, whether it be against the ship owners or the ship. The bar for merger will hold, unless the claimant establishes that in the prior claim they could not have recovered what they seek to recover in the present claim or that in relation to the other defendant the law recognises a separate right of action for the same cause of action. Moreover, the doctrine can be subject to waiver or estoppel and, though the point is controversial, the doctrine can also be subject to an exception in case of special circumstances.

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[255] *India v India Steamship Co Ltd (The Indian Endurance and The Indian Grace) (No 2)* [1994] 2 Lloyd's Rep 331, [1994] CLC 967, 990, revd [1997] 2 WLR 538, 554, [1996] 3 All ER 641, [1996] 2 Lloyd's Rep 12, [1996] CLC 1548, affd [1998] AC 878, [1997] 3 WLR 818, [1997] 4 All ER 380, [1998] 1 Lloyd's Rep 1, [1997] CLC 1581, [1998] ILPr 511, (1997) 94(43) LSG 29, (1997) 147 NLJ 1581, (1997) 141 SJLB 230 (emphasis added).

[256] *India v India Steamship Co Ltd (The Indian Endurance and The Indian Grace) (No 2)* [1997] 2 WLR 538, 554, [1996] 3 All ER 641, [1996] 2 Lloyd's Rep 12, [1996] CLC 1548, affd [1998] AC 878, [1997] 3 WLR 818, [1997] 4 All ER 380, [1998] 1 Lloyd's Rep 1, [1997] CLC 1581, [1998] ILPr 511, (1997) 94(43) LSG 29, (1997) 147 NLJ 1581, (1997) 141 SJLB 230 (emphasis added).

[257] (n 254) 909.

[258] Adrian Briggs, 'Foreign Judgments and Res Judicata' (1997) 68 BYBIL 355.

(6) Exceptions

As regards exceptions, a distinction must be made between exceptions to the merger of a cause of action, on the one hand, and, on the other hand, the application of the merger doctrine.

(i) Merger

Merger, by its very mode of operation, excludes an exception by reason of special circumstances.[259] Nevertheless, a judgment must remain in force to have any legal effect, including the effect of merger; merger can therefore be reversed by a successful challenge of the validity of the judgment.[260]

(ii) The merger doctrine

Unlike merger, nothing in the nature of the merger doctrine prevents it from being subject to an exception in special circumstances.[261] Whereas merger occurs automatically the moment of recovery of judgment for the cause of action, the bar against reassertion of the cause of action arises only when the defendant in the new case actually invokes the merger doctrine, in which case the court should be able to take account of special circumstances that would render a bar unjust, so that the cause of action should exceptionally remain actionable, thus allowing the claimant to pursue a greater remedy. This conclusion is supported by the fact that the doctrine does not go to a court's jurisdiction, and may, for instance, be the subject of waiver or estoppel by the party entitled to invoke it.[262]

Nevertheless, in practice the need for finality of litigation appears to outweigh the courts' willingness to allow a new claim for a cause of action for which judgment was previously recovered to proceed even in exceptional circumstances on the basis that it is fair and just and because the importance of the purity of justice prevails. This trend is visible in relation to the courts' approach to cause of action estoppel which, unlike issue estoppel, has developed as an inflexible bar to new claims concerning the same cause of action. Hence, what Lord Atkin said in *Trade Indemnity Co Ltd v Workington Harbour and Dock Board (No.2)* on cause of action estoppel appears to equally extend to merger doctrine, namely that:

> The result is that the plaintiffs, who appear to have had a good cause of action for a considerable sum of money, fail to obtain it, and on what may appear to be technical grounds. Reluctant, however, as a judge may be to fail to give effect to substantial merits, he has to keep in mind principles established for the protection of litigants from oppressive proceedings. There are solid merits behind the maxim nemo bis vexari debet pro eadem causa.[263]

In other words, the private interest in finality of litigation trumps full justice as far as concerns a cause of action for which judgment has been recovered.

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[259] *Fraser v HLMAD* (n 14) [20].
[260] *Anonymous* (n 100) 50 ("If the plaintiff recovers by judgment upon an obligation, he cannot maintain another action on the same obligation as long as the said judgment *remains in force*, quia transit in rem judicatam.") (emphasis added). cf *Preston v Perton* (n 100).
[261] See *Buckland v Palmer* [1984] 1 WLR 1109.
[262] See text to n 176ff.
[263] [1938] 2 All ER 101, 105-06, (1938) 60 Ll L Rep 209.

1.3 Estoppel *per rem judicatam*

Contradiction of judicial findings

A citizen's right of access to the court implies a full opportunity to litigate a claim or issue that has not previously been adjudicated upon.[264] To deny this opportunity "is prima facie a denial of the citizen's right of access to the court conferred by the common law and guaranteed by Art 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms".[265] Quite another thing is to condone relitigation of a claim or issue that has already been the subject of litigation in, and adjudication by, a court of competent jurisdiction. This is prima facie a denial of a party's right under Art 6 ECHR "to the proper enforcement of any judgment that he obtains".[266]

Estoppel *per rem judicatam* fits in by barring ("estopping") a party from successfully contradicting a court's findings on a claim or issue in the context of another case between the same parties on the same matter—that is, "if in any court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding".[267] The doctrine thus imposes finality of litigation and, thus, legal certainty,[268] which, in turn, stabilises the rights, if any, determined by the judgment-rendering court[269].

The doctrine further eases the apparent tension between the a court's constitutional mandate to completely and finally determine disputes and the adversarial principle that underlies the system of civil litigation. The Senior Courts Act 1981[270] mandates a court "[to] exercise its jurisdiction in every cause or matter before it as to secure that, as far as possible, all matters in dispute between the parties are completely and finally determined, and all multiplicity of legal proceedings with respect to any of those matters is avoided".[271] Conversely, the adversarial system of litigation limits the same mandate by compelling a court to consider only the case actually presented by the parties, discounting any evidence or points that they omit.[272] The estoppel doctrine balances these positions by encouraging the parties to present their whole case when they have the opportunity, when the claim or issue is determined,[273] because subsequently they may be estopped from doing so.

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[264] *Johnson* (Introduction n 12) 58 (Lord Millett).
[265] ibid.
[266] *Powell v Wiltshire* [2004] EWCA Civ 534, [2005] QB 117, [2004] 3 WLR 666, [2004] 3 All ER 235, (2004) 148 SJLB 573 [36] (Arden LJ).
[267] *Hoystead v Commissioner of Taxation* [1926] AC 155, 170, [1925] All ER Rep 62 (Lord Shaw).
[268] *Powell v Wiltshire* (n 266) [36] (Arden LJ).
[269] *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] 2 CLC 340 [15] (Lord Hobhouse of Woodborough).
[270] c 54.
[271] s 49(2)(b).
[272] See, eg, *Allen v Bloomsbury Publishing Plc* [2011] EWCA Civ 943 [17] (Lloyd LJ) ("In our adversarial system of litigation, in a case where each party was professionally represented with plenty of opportunity to formulate and put to the court all points considered to be relevant on a particular point, it seems to me questionable for a judge to be criticised for having failed to take into account a factor which, if relevant, was known or available to all parties and which no party invited him to consider as part of the process of exercising his discretion.").
[273] At the same time there must be a 'claim' or 'issue' giving rise to a '*lis*' with an opponent (who may or may not default, but who has the opportunity to argue the merits), in the sense in which these terms are used in relation to adversarial litigation in courts of law. cf *Jones v Secretary of State for Social*

(i) The need to present the whole case

a. Evidence and points not raised

Parties to litigation are not obliged to present their whole case on a claim or issue. However, the estoppel doctrine encourages them to advance their whole case, by barring them from doing so in a subsequent case if this would contradict existing judicial findings on the claim or issue as determined in the prior case.[274] Sir James Wigram V-C in *Henderson v Henderson* explained the full extent of the imperative that a party presents its whole case as follows:

> The plea of res judicata applies, except in special cases, 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 belongs to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.[275]

An estoppel then bars the parties from raising any point that might have been brought forward in a prior case, but was not, "only because they have, from negligence, inadvertence, or even accident, omitted part of their case."[276] The same applies to new evidence.[277] *Henderson v Henderson* is good authority for this understanding of the implications of an estoppel, even though the case's name is today frequently used to describe a specific type of abuse of process, which involves a party seeking to litigate for the first time a claim or issue which could and should have been litigated in a prior case, but was not.[278]

Henderson v Henderson, as Lord Bingham rightly noted in *Johnson v Gore Wood & Co*,[279] actually concerned the res judicata doctrine, and specifically estoppel *per rem judicatam* ('cause of action estoppel', to be precise, as distinguished from 'issue estoppel')[280]. Along these lines, Handley, the leading authority on the res judicata doctrine said: "The Henderson principle is therefore fundamental to cause of action estoppel rather than ancillary. It defines the effect of such an estoppel."[281] Similarly, Lord Keith in *Arnold v National Westminster Bank Plc* ruled by reference to *Henderson v Henderson*[282] that: "Cause of action estoppel extends also to points which might have been but were not raised and decided in the earlier proceedings for the purpose of establishing or negativing the existence of a cause of action."[283] Finally, Lord Denning in *Fidelitas Shipping Co Ltd v V/O Exportchleb* extended this reasoning also to issue estoppel, by noting that;

Services [1972] AC 944, 1010, [1972] 2 WLR 210, [1972] 1 All ER 145, (1971) 116 SJ 57 (Lord Diplock).

[274] On the precise conditions for an estoppel see text to n 365ff.

[275] [1843-60] All ER Rep 378, 67 ER 313, (1843) 3 Hare 100, 115 (emphasis added).

[276] ibid.

[277] *Mills v Cooper* [1967] 2 QB 459, 469, [1967] 2 WLR 1343, [1967] 2 All ER 100, (1967) 131 JP 349, 65 LGR 275, (1967) 111 SJ 273 (Diplock LJ). But see xxx 1.3(5) for exceptions.

[278] See text to n 526ff.

[279] (Introduction n 12) 30-1.

[280] cf *Naraji v Shelbourne* [2011] EWHC 3298 (QB). See text to n 308ff.

[281] KT Handley, 'A Closer Look at Henderson' (2002) 118 LQR 397, 402.

[282] (n 275).

[283] [1991] 2 AC 93, 104, [1991] 2 WLR 1177, [1991] 3 All ER 41, (1991) 62 P & CR 490,[1991] 2 EGLR 109, [1991] 30 EG 57, [1991] EG 49 (CS), (1991) 135 SJ 574.

> … within one issue, there may be several points available which go to aid one party or the other in his efforts to secure a determination of the issue in his favour. The rule then is that each party must use reasonable diligence to bring forward every point which he thinks would help him. If he omits to raise any particular point, from negligence, inadvertence, or even accident (which would or might have decided the issue in his favour), he may find himself shut out from raising that point again, at any rate in any case where the self-same issue arises in the same or subsequent proceedings.[284]

A proper understanding of estoppel doctrine therefore requires clarification of the meaning of the concept of "point" which is used by Lord Denning and others to define the scope of an estoppel *per rem judicatam*.

1. The meaning of 'point'

The concept of 'point' used for the purpose of defining the scope of an estoppel *per rem judicatam* broadly refers to any argument a party can make to persuade the court to determine a claim or issue in their favour. The argument implied in a point may in nature be either factual or legal. Accordingly, the estoppel bars (1) assertions of fact (including denials), and (2) contentions as to the legal quality of a fact, insofar as such points contradict prior findings on a claim or issue.[285] In respect of the last type of arguments—contentions as to the legal quality of a fact—Lord Shaw said in *Hoysted v Federal Commissioner of Taxation* that;

> Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances.[286]

2. The opportunity to raise points

Though an estoppel *per rem judicatam* applies to any point (or piece of evidence) that a party has from negligence, inadvertence, or even accident, omitted as part of their case, the estoppel doctrine operates only if the party to be estopped has had a full opportunity to present its case, as required under Art 6(1) ECHR set out in Schedule 1 to the *Human Rights Act 1998.*[287] A question is, therefore, "whether a prior opportunity of raising the point now foreclosed by estoppel had in substance arisen and been passed by."[288]

b. Unpleaded claims, defences and issues

Estoppel *per rem judicatam* does not preclude a party from raising a claim, defense, or issue of which they have previously availed themselves. In respect of defences, Willes J in *Howlett v Tarte* expressed this point very clearly: "[N]obody ever heard of a defendant being precluded from setting up a defence in a second action because he

[284] [1966] 1 QB 630, 640, [1965] 2 All ER 4, [1965] 1 Lloyd's Rep 223, [1965] 2 WLR 1059, (1965) 109 SJ 191.
[285] *Hoystead v Commissioner of Taxation* (n 267) 165 (Lord Shaw).
[286] ibid.
[287] c 42.
[288] *Hoystead v Commissioner of Taxation* (n 267) 171 (Lord Shaw).

did not avail himself of the opportunity of setting it up in the first action."[289] Though abuse of process doctrine may preclude the party if the defense could and should have been pleaded in the first case, so that doing it now constitutes an abuse of process ('*Henderson v Henderson*-abuse'),[290] the estoppel doctrine is on these facts irrelevant, because the defense has never actually been adjudicated upon; hence, there is no judicial finding that the pleading raising the defense could contradict.

The relevance of this limitation is illustrated in cases where a judgment is obtained by default. Lord Maugham LC in *New Brunswick Railway Co Ltd* considered whether a default judgment on a small sum can form the basis for an estoppel precluding the defendant from defending a claim for a much larger sum, because "one of the issues in the first action (issues which he never saw, though they were doubtless filed) had decided as a matter of inference his only defence in the second action." [291] His Lordship did not say that the judgment would not be preclusive, but warned nevertheless that "an estoppel based on a default judgment must be very carefully limited",[292] while adding that "[t]he true principle in such a case would seem to be that the defendant is estopped from setting up in a subsequent action a defence which was *necessarily*, and with complete precision, decided by the previous judgment"[293].

(1) The meaning of 'estoppel'

"Estoppel" means 'stopped'.[294] The term, Lord Denning explained in *Hunter v Chief Constable of the West Midlands*, derives from the old French word '*estoupail*' ('a bung or cork by which you stopped something from coming out'), which was introduced by the Normans and widely used in English courts, whose proceedings were conducted in Norman-French.[295] Estoppels have developed over time; today, estoppels exist for various reasons, giving rise to different "species" of estoppel.[296] Applied to judgments 'estoppel' means that a party is stopped from contradicting a court's findings.[297]

(i) The basis for estoppel *per rem judicatam*

[289] (1861) 142 ER 673, 679, (1861) 10 CB NS 813.
[290] See text to n 526ff.
[291] *New Brunswick Railway Co Ltd v British & French Trust Corp Ltd* [1939] AC 1, 21, [1938] 4 All ER 747.
[292] ibid.
[293] ibid (emphasis added).
[294] *Hunter v Chief Constable of the West Midlands* [1980] QB 283, 316-317, affd [1982] AC 529, [1981] 3 WLR 906, [1981] 3 All ER 727, (1981) 125 SJ 829.
[295] ibid.
[296] See John Cartwright, 'Protecting legitimate expectations and estoppel: English law' in B Fauvarque-Cosson (ed), *La confiance légitime et l'estoppel – 17e Congrès international de droit comparé de l'Academie internationale de droit comparé Utrecht, Pays-Bas, 16-22 juillet 2006* (Société de législation comparée 2007) 321ff; and Elizabeth Cooke, *The modern law of estoppel* (OUP, Oxford 2000); and Lancelot Feilding Everest, *Everest and Strode's Law of Estoppel* (3rd ed Stevens and Sons, London 1923). For detailed treatment of particular forms of estoppel, see KR Handley, *Estoppel by Conduct and Election* (Sweet & Maxwell, London 2006); Pierce Feltham, Daniel Hochberg and Tom Leech (eds) *Spencer Bower and Turner, Estoppel by Representation* (4th ed Tottel, London 2003); and Mark Pawlowski, *Proprietary Estoppel* (Sweet & Maxwell, London 1996).
[297] See text to n 330ff.

The most distinctive feature of the estoppel *per rem judicatam* is that the resulting estoppel is *judgment*-based (i.e. founded on a court's findings), whereas all other estoppels are *conduct*-based (i.e. founded on what a party has said, or not said, or done).[298]

a. The role of the record of judgment

Coke's *Commentary upon Littleton* contains no reference to "estoppel *per rem judicatam*", but refers to "estoppel by matter of record",[299] because in his time only judgments of so-called "courts of record"[300] were conclusive, unlike judgments of other courts (including foreign courts), which were merely evidence.[301] By the 19th century,[302] both terms were used interchangeably, and, as Lord Guest said in *Carl Zeiss*, "it is now quite immaterial whether the judicial decision is pronounced by a tribunal which is required to keep a written record of its decisions"[303].

The expression 'estoppel *per rem judicatam*' signals that the estoppel depends on the judgment, rather than the record thereof. The record is merely one of various means of proving what a court actually decided for the purpose of establishing the estoppel.[304] For instance, as Lord Upjohn noted in *Carl Zeiss*, "to see whether it applies, the facts established and reasons given by the judge, his judgment, the pleadings, the evidence and even the history of the matter may be taken into account."[305] Historically, it was said, for instance in *The Duchess of Kingston's Case*,[306] that there is no estoppel, "where the thing averred is consistent with the record."[307]

(ii) Species of estoppel *per rem judicatam*

Estoppel *per rem judicatam* comprises two sub-species habitually called 'cause of action estoppel' and 'issue estoppel'. In modern terminology, Andrews points out,[308] these two concepts correspond respectively to claim preclusion and issue preclusion.[309] Cause of action and issue estoppel have been variously defined and the

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[298] Cooke (n 296) 7.
[299] Thomas Coventry, *A Readable Edition of Coke Upon Littleton* (Saunders and Benning, London 1830) [667]. cf *Basset v Stafford and Others* (1566) 3 Dyer 260, 73 ER 575; and *Bowsse v Cannington* (1610) Cro Jac 244, 79 ER 209.
[300] *Edward Houlditch, John Houlditch, James Houlditch, and Francis Stubbs v The Most Honourable George Augustus Marquess of Donegall* (1834) 2 Cl & F 470, 476-77, 6 ER 1232.
[301] *Herbert v Cook* (1782) 99 ER 560, 564, (1782) 3 Doug KB 101 (Lord Mansfield) ("…the judgment is not the judgment of a Court of Record, and being therefore only evidence, like a foreign judgment, the whole is open."). See also DE Engdahl, 'The Classic Rule of Faith and Credit' (2009) 118 Yale Law Journal 1584, 1596-97.
[302] *R v Hutchings* (1880-81) LR 6 QBD 300, 304 (Lord Selborne LC).
[303] *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (Introduction n 32) 934.
[304] *Marginson v Blackburn BC* [1939] 2 KB 426, 436-37.
[305] *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (Introduction n 32) 946-47.
[306] (1776) 20 St Tr 355, 1 Leach 146, 2 Smith LC 644, 168 ER 175.
[307] ibid (cited in *Howlett v Tarte* (n 289) 676 (Willes J)).
[308] Andrews (n 11) [40.10].
[309] *Thoday v Thoday* (n 98) 197 (Diplock LJ). cf *Black Clawson International Ltd v Papierwerke AG* [1975] AC 591, 619, [1975] 2 WLR 513, [1975] 1 All ER 810, [1975] 2 Lloyd's Rep 11, (1975) 119 SJ 221 (Viscount Dilhorne) ("In *Thoday v Thoday* ... Diplock L.J., as he then was, said that there were two species of estoppel per rem judicatam. The first, which he called 'cause of action estoppel,' was that which prevents a party to an action from asserting or denying, as against the other party, the existence of

terms by which they are identified "are not readily understandable phrases to a non-lawyer".[310] Nevertheless, a distinction is of practical significance, since a cause of action estoppel is an absolute bar, whereas an issue estoppel is subject to an exception in the interest of justice on ground of special circumstances.[311] As a general rule, a 'cause of action estoppel' arises only if the new case concerns the same cause of action[312] and one of the parties contradicts the court's finding on the claim based on that cause of action, whereas an 'issue estoppel' arises where a new case concerns a different cause of action but raises the self-same issue[313] and one of the parties pleads inconsistently with the court's finding on that issue.

a. Cause of action estoppel

The following definition of 'cause of action estoppel' by Diplock LJ in *Thoday v Thoday*[314] is generally accepted: "'cause of action estoppel' is that which prevents a party to an action from asserting or denying, as against the other party, 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."[315]

A recent example of cause of action estoppel is *Cinpres Gas Injection Ltd v Melea Ltd*,[316] a case on the entitlement to a patent for a process useful in the plastics moulding industry. The first claim alleged that the inventor made his invention while working for the claimant (Cinpress), so that the claimant was entitled to the patent under the Patents Act 1977, s 12 (national applications). The claim failed, because the inventor testified that he made the invention later, while working for someone else. The unsuccessful claimant subsequently found out, however, that the inventor (as well as his subsequent employer) had perjured himself. (As the Court of Appeal observed: "Neither deserves the courtesy of a 'Mister.'") Cinpress then filed another claim for entitlement to the same patent. The defendant in this claim was Melea, a foreign company that controlled the company to which the patent application had been assigned in the interim, which was also eventually granted the patent. The claim

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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. The second, which my noble and learned friend called 'issue estoppel,' arises where in previous litigation one of the matters in issue between the parties has already been decided by a competent court"). See further *Arnold v National Westminster Bank plc* (n 283) 105-06 (Lord Keith); *The Indian Grace (No 1)* (Introduction n 60) 416-17 (Lord Goff); and *Fraser v HLMAD* (n 14) [34]ff (Moore-Bick LJ).

[310] *Specialist Group International Ltd v Deakin (No1)* [2001] EWCA Civ 777 [22]–[23] (May LJ).

[311] See text to n 446ff.

[312] *Arnold v National Westminster Bank plc* (n 283) 104 (Lord Keith). cf *Buehler AG v Chronos Richardson Ltd* [1998] 2 All ER 960, [1998] RPC 609, 615, (1998) 21(7) IPD 21076, (1998) 95(16) LSG 25, (1998) 142 SJLB 133 (Aldous LJ).

[313] *Fidelitas Shipping Co Ltd v V/O Exportchleb* (n 284) 640 (Lord Denning).

[314] *Thoday v Thoday* (n 98). See, eg, *Thrasyvoulou* (Introduction n 60) 296 (Lord Bridge).

[315] ibid 197. cf *Arnold v National Westminster Bank plc* (n 283) 104 (Lord Keith) ("Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter"); and *The Indian Grace (No 1)* (Introduction n 60) 416 (Lord Goff). See also *Special Effects Ltd v L'Oreal SA* [2007] EWCA Civ 1, [2007] Bus LR 759, [2007] ETMR 51, [2007] RPC 15, (2007) 151 SJLB 126 [45]ff (Lloyd LJ).

[316] [2008] EWCA Civ 9, [2008] Bus LR 1157, [2008] RPC 17, (2008) 31(8) IPD 31050, (2008) 105(5) LSG 27.

was made under the Patents Act 1977, s 37 (international applications). In response, Melea pleaded cause of action estoppel.

The lower court upheld the plea and dismissed the claim on grounds of res judicata. The Court of Appeal reversed. The Court conceded that both claims involved the same cause of action, because (a) "[sections 12 and 37 of the Patents Act 1977] are in fact concerned with the same cause of action—a claim to entitlement to the grant of the Patent".[317] According to the Court, the judgment in the first case could therefore theoretically form the basis for an estoppel in the second case. (Note, however, that the Court ultimately held that a judgment can form the basis for an estoppel only as long as it remained in force, and the Court held that the fraud by the parties in the first case implied that "the whole judgment is unravelled and should be set aside.")[318]

b. Issue estoppel

The best definition of 'issue estoppel' equally derives from *Thoday v Thoday*.[319] Diplock LJ (as he then was) defined the concept as follows, noting that an issue estoppel implies that "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."[320]

Issues that may be the subject of an estoppel extend beyond the conditions for a cause of action underlying a claim, and may include such matters as the validity of a choice of court agreement determined in relation to a dispute over the court's jurisdiction. In fact, issue estoppels are as varied as the diversity of issues whose determination may be required for the rendition of judgment; for example, Lord Hoffmann in *Carter v Ahsan* said that "an actual decision by a tribunal that it has jurisdiction can estop the parties *per rem judicatam* from asserting the contrary".[321]

While Lord Diplock is often credited with the development of issue estoppel, Lord Reid in *Carl Zeiss* correctly observed that "[i]ssue 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.[322] His Lordship referred in support to the early *The Duchess of Kingston's Case*.[323]

In this case, the Duchess of Kingston was prosecuted for bigamy, but pleaded in defence a judgment of an ecclesiastical court that declared her first marriage invalid. The question therefore arose whether that judgment was conclusive in the new case. De Grey CJ answered this question affirmatively. His Lordship's reasoning starts with the observation that "the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the

[317] ibid [74].
[318] ibid [107].
[319] *Thoday v Thoday* (n 98).
[320] ibid 198.
[321] *Watt (formerly Carter) and others v Ahsan* [2008] 1 AC 696, [2008] 1 All ER 869, [2008] ICR 82, [2008] IRLR 243, [2008] 2 WLR 17, (2007) 157 NLJ 1694, [2007] UKHL 51 [30].
[322] *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (Introduction n 32) 913.
[323] (n 306).

same parties, upon the *same* matter, directly in question in another Court".[324] Obviously, the claim in question in the new case was fundamentally different. But the judge then added that "the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a *different* purpose."[325]

Lord Reid construed this reasoning as follows: "In referring to a judgment being conclusive on the same matter 'coming incidentally in question in another court for a different purpose' the judges were clearly going beyond cause of action estoppel".[326] Indeed, the first situation discussed by De Grey concerns cause of action estoppel. The second contains the roots of issue estoppel. Another, more ancient, example of issue estoppel is the case of *Outram v Morewood*,[327] which involved a claim for trespass against A and B (a married couple) alleging they broke and entered a coal-mine of C and dug out and stole coals. In a prior case the existence of C's right of possession of the coal-mine was determined in favour of C and against A (the wife). On that basis, Lord Ellenborough held that:

> The operation and effect of this finding, if it operate at all as a conclusive bar, must be by way of estoppel. If the wife were bound by this finding, as an estoppel, and precluded from averring the contrary of what was then so found, the husband, in respect of his privity, either in estate, or in law, would be equally bound…. The question then is, is the wife herself estopped by this former finding to aver the contrary?[328]

His Lordship concluded that A was estopped from contradicting the judicial findings in the existing judgment rendered in the previous case between A and C on the existence of C's right of possession of the coal-mine, by filing inconsistent pleadings in the new case. Being A's privy, B was equally bound by that judgment and thus estopped from averring the contrary of the findings contained therein made between A and C.[329]

(2) The effect of an estoppel

The estoppel doctrine bars a party from successfully contradicting of a court's finding on a claim or issue.[330] For instance, in relation to issue estoppel, Lord Diplock said in *Re Vandervell's Trusts (No.1)* that "[t]he only effect of an issue estoppel *per rem judicatam* is to prevent the party estopped from asserting… any claim or defence which would involve his contending that the previous decision on that issue was erroneous or his adducing evidence in support of any such contention."[331] By the same token, the doctrine compels a court to render a consistent judgment.[332] All this

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[324] ibid 645 (emphasis added). cf *R v Hutchings* (n 302) 304 (Lord Selborne LC).
[325] ibid (emphasis added).
[326] *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (Introduction n 32) 914.
[327] *Outram v Morewood Clerk, and Ellen, his Wife* (1803) 102 ER 630, (1803) 3 East 346.
[328] ibid 353.
[329] ibid 366.
[330] ibid 353.
[331] [1971] AC 912, 942, [1970] 3 WLR 452, [1970] 3 All ER 16, 46 TC 341, [1970] TR 129, (1970) 114 SJ 652.
[332] *Crehan v Inntrepreneur Pub Co (CPC)* [2006] UKHL 38, [2007] 1 AC 333, [2006] 3 WLR 148, [2006] 4 All ER 465, [2006] UKCLR 1232, [2007] ECC 2, [2006] Eu LR 1189, [2006] ICR 1344, [2006] 30 EG 103 (CS), (2006) 150 SJLB 983, [2006] NPC 85 [69] (Lord Hoffmann) ("The correct

goes to show that an estoppel precludes a trial and thus that its effect is in nature procedural.[333]

In response to an effective plea of estoppel *per rem judicatam*, a court can do two things. First, the court can strike out the contradicting statement of case. A court can strike out (part of)[334] a statement of case that discloses no reasonable grounds for bringing or defending a claim or for raising an issue[335].[336] This implies that the written material advanced by the precluded party is deleted from the record and may no longer be relied upon by the party stating it,[337] effectively excluding the matter from the process of adjudication.

Second, the court can give summary judgment on the claim or issue in question. A court can further give summary judgment on the claim or issue of which it is seized,[338] if the court considers that the party estopped has no real prospect of succeeding in a claim or issue.[339] Summary judgment generally implies the disposal of the issue or claim without trial,[340] and may sound the termination of the case.[341]

These powers exist to enable a court to deal with cases justly,[342] which under the CPR requires active case management,[343] which, among other things,[344] involves

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position is that, when there is no question of a conflict of decisions in the sense which I have discussed, the decision of the commission is simply evidence properly admissible before the English court which, given the expertise of the commission, may well be regarded by that court as highly persuasive. As a matter of law, however, it is only part of the evidence which the court will take into account. … *Only a rule of law, in the nature of an issue estoppel which obliges him to do so, could produce such a result* and the Court of Appeal accepted that there was no such rule.") (emphasis added). cf *Spirerose Ltd v Transport for London* [2009] UKHL 44, [2009] 1 WLR 1797, [2009] 4 All ER 810, [2009] PTSR 1371, [2009] 3 EGLR 103, [2009] RVR 225, [2010] JPL 762, [2009] NPC 104 [115] (Lord Collins) ("Among the questions for the Court of Appeal was whether the section 18 determination was res judicata or gave rise to an issue estoppel *so as to bind the Tribunal* in determining compensation for diminution in the value of land retained by the plaintiff under the Compulsory Purchase Act 1965, section 7.") (emphasis added).

[333] cf *Dallal v Bank Mellat* [1986] QB 441, 452, [1986] 2 WLR 745, [1986] 1 All ER 239, (1986) 83 LSG 779, (1985) 130 SJ 185 (Hobhouse J).

[334] CPR r 3.4(1).

[335] CPR r 3.4(2)(a).

[336] ibid.

[337] Glossary <www.justice.gov.uk/civil/procrules_fin/contents/backmatter/glossary.htm> accessed 1 December 2012. See CPR r 2.2(1) ("The glossary at the end of these Rules is a guide to the meaning of certain legal expressions used in the Rules, but is not to be taken as giving those expressions any meaning in the Rules which they do not have in the law generally.").

[338] CPR r 24.2(a)(i). Also see CPR r 24.3(1) and (2) (any type of proceedings, but see CPR r 24.3(a)(i)-(ii) and (b)).

[339] ibid.

[340] cf PD 24, r 1.2. But see CPR r 24.2(b).

[341] See Jacob (Introduction n 54) 122 ("…there is plainly no need for a trial, and it is clearly in the interest of the parties and the court, as well as the public interest, that the action should be brought to an early end without delay and without the costly and elaborate process for preparing for a trial, the outcome of which can be pre-determined.").

[342] CPR r 1.1(1). According to CPR r 1.1(2), dealing with a case justly includes, so far as is practicable: "(a) ensuring that the parties are on an equal footing; (b) saving expense; (c) dealing with the case in ways which are proportionate – (i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party; (d) ensuring that it is dealt with expeditiously and fairly; and (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

[343] CPR r 1.4.

[344] Under CPR r 1.4(2), active case management generally involves: "(a) encouraging the parties to co-operate with each other in the conduct of the proceedings; (b) identifying the issues at an early stage; (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of

the responsibility to identify the issues in dispute at an early stage,[345] and to decide promptly which issues need full investigation and trial, while disposing summarily of the others[346].

(3) Nature

In nature, the estoppel doctrine is *procedural*. At any rate the doctrine is not evidentiary; for instance, Diplock LJ in *Mills v Cooper* rejected this characterisation outright: "'issue estoppel' is not a rule of evidence".[347] His Lordship explained that, though an issue estoppel prevents a party from calling evidence in relation to issue, the estoppel excludes *litigation* of the issue, so that the evidence advanced is irrelevant.[348]

A substantive characterisation fails too. *Spencer Bower, Turner and Handley on* Res judicata[349] cite Lord Hobhouse in *Associated Electric*[350] as saying that "[issue estoppel] is a species of the … *rights* given by the award".[351] However, it is respectfully suggested that this citation is imprecise; in realtiy, without suppressing part of his speech, His Lordship said this: "[issue estoppel] is a species of the *enforcement* of the rights given by the award just as much as would be a cause of action estoppel."[352]

According to Lord Hobhouse, then, estoppel *per rem judicatam* is not a *right* per se, but a means to *enforce* the stability of rights which have been judicially determined.[353] 'Enforcement' in this sense denotes 'preclusion', or as Lord Hobhouse put it, when a judicial body has determined an issue, "that decision then binds the parties and neither party can thereafter dispute that decision."[354] Hence, an estoppel *per rem judicatam* serves to enforce the rights determined by a judgment by

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the others; (d) deciding the order in which issues are to be resolved; (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure; (f) helping the parties to settle the whole or part of the case; (g) fixing timetables or otherwise controlling the progress of the case; (h) considering whether the likely benefits of taking a particular step justify the cost of taking it; (i) dealing with as many aspects of the case as it can on the same occasion; (j) dealing with the case without the parties needing to attend at court; (k) making use of technology; and (l) giving directions to ensure that the trial of a case proceeds quickly and efficiently."

[345] CPR r 1.4(2)(b).

[346] CPR r 1.4(2)(c).

[347] (n 277) 469. cf *DPP v Humphrys (Bruce Edward)* [1977] AC 1, 28 (Lord Hailsham of St. Marylebone) ("The questions, therefore, before your Lordships' House are questions relating to issue estoppel and not questions relating to the admissibility of evidence.").

[348] ibid

[349] Handley (Part I, Chapter 1 n 11) [1.07]-[1.09].

[350] *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] UKPC 11, [2003] 1 WLR 1041, [2003] 1 All ER (Comm) 253, [2003] 2 CLC 340, (2003) 100(11) LSG 31, (2003) 147 SJLB 148.

[351] Handley (Part I, Chapter 1 n 11) [1.09] (emphasis in the original).

[352] *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Co of Zurich* (n 350) [15] (emphasis added).

[353] The bar, in turn, can have both substantive and procedural legal consequences; for instance, an issue estoppel regarding the existence of a contract has substantive consequences (ie the party estopped cannot succeed in a claim for breach of that contract), whereas an issue estoppel on jurisdiction has procedural consequences (ie the party estopped cannot contest or aver jurisdiction).

[354] *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Co of Zurich* (n 350) [15] (emphasis added).

preventing the parties bound by that judgment from seeking an inconsistent judgment in later proceedings, by precluding them from disputing the existing court decision.[355]

(4) Rationale

The estoppel *per rem judicatam* doctrine forms part of the overarching the English res judicata doctrine, along with the merger *in rem judicatam* doctrine.[356] In terms of the doctrine's rationale, it should be noted that, whereas, as a rule, an estoppel aims at substantial fairness by giving (limited) effect to non-contractual representations and promises,[357] an estoppel *per rem judicatam* serves to impose finality of litigation:[358] "litigation would be interminable if such a rule did not prevail."[359] In this sense, Lewison LJ said recently in *Spicer v Tuli* that "[i]t is common ground that the principles of estoppel arising out of court proceedings are grounded on the underlying principle that there is a public interest in the finality of litigation, and that a person should not be unjustly harassed by a revival of proceedings which have already been disposed of."[360] Indeed, the inconvenience would be twofold, and harm both the public interest in a sound administration of justice and the private interest of parties in legal certainty on disputed claims and issues.[361]

Nevertheless, as noted elsewhere, the operation of the estoppel doctrine remains subject to party disposition; a court is not permitted to apply the doctrine of its own motion.[362] The public interest in finality of litigation therefore gives way in cases where the parties desire to have matters redetermined, and there is no general rule in English law that bars a party acting in good faith from inviting a court to arrive at a decision inconsistent with that arrived at in another case.[363] The public interest trumps only if the attempt is made in bad faith and thus an abuse of process, or otherwise threatens the sound administration of justice.[364]

(5) Application

Apart from the requirement to plead an estoppel *per rem judicatam*, the remaining requirements for an estoppel relate broadly to the judgment that is invoked, the parties involved, and the claim or issue in question. First, a judgment must obviously remain in force to have any legal effect. This also applies for an estoppel.[365] Moreover, to found an estoppel, the judgment must be (a) final and conclusive; (b) on the merits of the claim or issue; and (c) of a court of competent jurisdiction to determine the claim or issue. Second, the parties involved must be the same as those

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[355] *Hoystead v Commissioner of Taxation* (n 267) 170 (Lord Shaw).
[356] See text to n 92ff.
[357] *Watt (formerly Carter) and others v Ahsan* (n 321) [30] (Lord Hoffmann).
[358] (n 277) 469 ("...there should be finality in litigation.").
[359] (n 275) 115 (Sir Wigram V-C) (emphasis added).
[360] [2012] EWCA Civ 845, [2012] 1 WLR 3088, [2012] HLR 41 [16].
[361] *Fraser v HLMAD* (n 14) [35] (Moore-Bick LJ) ("It has been recognised for centuries that it is neither just nor in the public interest that a person should be allowed to litigate the same issue more than once. The principle is encapsulated in the well known maxims nemo debet bis vexari pro una et eadem causa and interest reipublicae ut sit finis litium.").
[362] ibid.
[363] *Arthur JS Hall & Co v Simons* (Introduction n 51) 743.
[364] See text to 483ff.
[365] *Cinpres Gas Injection Ltd v Melea Ltd* (n 316) [92]ff (Jacob LJ).

bound by the judgment invoked as basis for the estoppel. Third, and finally, the claim or issue in question must be the same as that determined by the judgment relied on.

(i) Plea of estoppel

A failure to plead an estoppel *per rem judicatam* implies the waiver of the estoppel, in which case the court will redetermine the claim or issue, unless the litigation attempt amounts to an abuse of process.[366] The requirement of a estoppel plea is similar to that applicable to the merger doctrine and reflects that the doctrine primarily protects the private interest in finality of litigation,[367] notwithstanding that finality of litigation is also in the public interest; estoppel *per rem judicatam*, in other words, is not a matter of public policy compelling a court to act of its own motion to enforce finality.

(ii) A final and conclusive judgment of a court of competent jurisdiction on the merits of the claim or issue

A valid judgment can only found an estoppel if it is final and conclusive, on the merits of the claim or issue, and given by a court of competent jurisdiction to determine the claim or issue. These requirements are considered in turn.

a. Final and conclusive judgment

A judgment is 'final' for the purpose of founding an estoppel if the judgment put an end to the claim or issue in question, and "cannot be varied, re-opened or set aside by the court that delivered it or any other court of co-ordinate Jurisdiction although it may be subject to appeal to a court of higher Jurisdiction".[368] For instance, an injunction that regulates the parties' conduct pending trial ('interim injunction'), though it puts an end to the claim for an injunction, is not 'final' in the required sense, since an injunction can be set aside by the judgment-rendering court.[369] Similarly, a judgment ordering an interim payment,[370] while putting an end to the application,[371] is not 'final', because the court can make an order to adjust the interim payment[372].

A judgment must further be 'conclusive' to found an estoppel, meaning that the court's findings on the claim or issue are intended as incontrovertible between the same parties (or their privies), regardless that those findings can still be challenged on appeal.[373] The basic understanding of the requirement is that "[the court's findings] cannot thereafter *in that Court* be disputed, and can only be questioned in an appeal to a higher tribunal."[374]

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[366] *The Indian Grace (No 1)* (Introduction n 60) 421-22 (Lord Goff).
[367] See text to n 168ff.
[368] *The Sennar (No 2)* (n 58) 494 (Lord Diplock). cf *Nouvion v Freeman* (1889) 15 App Cas 1, 9 (Lord Herschell). The case concerns foreign judgments, but it is suggested that the court's reasoning applies by analogy to domestic judgments. cf *Buehler AG v Chronos Richardson Ltd* (n 312) 620.
[369] See, eg, CPR r 25.10(b).
[370] CPR r 25.8.
[371] CPR r 25.6.
[372] CPR r 25.8(1).
[373] *Nouvion v Freeman* (1889) 15 App Cas 1, 9 (Lord Herschell).
[374] ibid 10.

Hence, a judgment that remains subject to an appeal can be both final and conclusive and may thus fit the bill and found an estoppel between the same parties (or their privies). According to Moore-Bick LJ in *Niru Battery Manufacturing Co v Milestone Trading Ltd (No.2)*, for instance, "[u]nless and until it is set aside or varied by the Court of Appeal it establishes with complete finality the parties' respective positions in law. This is an elementary principle that provides the foundation for the rule of estoppel by record."[375] Lord Millett in *Strachan v Gleaner Co Ltd*[376] said similarly:

> [O]nce judgment has been given (whether after a contested hearing or in default) for damages to be assessed, the defendant cannot dispute liability at the assessment hearing …. If he wishes to do so, he must appeal or apply to set aside the judgment; while it stands the issue of liability is res judicata.[377]

1. No estoppel on appeal

The estoppel doctrine cannot affect an appeal. Mummery LJ in *Unilin Beheer BV v Berry Floor NV*, for instance, explained that "an appeal is just a continuation of existing proceedings. Res judicata does not get a look in."[378] His Lordship refers to the context of the appeal itself, *not another case*. Jacob LJ said similarly that "unappealed portions could not create an estoppel in respect of any point raised *on appeal*".[379] In the prior case of *Reed Executive Plc v Reed Business Information Ltd*[380] His Lordship put it this way: "[T]he rule as to res judicata can only bite when there has been no appeal. But this is an appeal—so to the extent that any point is raised here it cannot be the subject of an estoppel—this appeal trumps the estoppel."[381] Accordingly, the lower court's decision cannot have a bearing on the decision of the court of appeal, but this clearly does not exclude that the judgment founds an estoppel in another case between the same parties.

This feature of estoppel *per rem judicatam* distinguishes the doctrine from equivalent doctrines in other systems; for instance, the Dutch res judicata doctrine in Art 236 Rv lacks application until a judgment has acquired the status of res judicata, [382] which means that Dutch courts have been forced to develop supplementary doctrines to fill the resulting gaps in and to achieve the desired degree of finality of litigation.

b. On the merits

A judgment must be 'on the merits' to found an estoppel. This requirement must be qualified in two ways. First, a judgment on a *procedural* issue can also be 'on the merits'; a judgment need not be 'substantive' as in determinative of the rights and duties of the parties to found an estoppel. *The 'Sennar' (No. 2)* makes this position

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[375] (n 64) [36].
[376] [2005] UKPC 33, [2005] 1 WLR 3204.
[377] ibid [16]. (Noting, at [21], that "[a] default judgment is one which has not been decided on the merits.") cf *Evans v Bartlam* [1937] AC 473, 480, [1937] 2 All ER 646 (Lord Atkin).
[378] [2007] EWCA Civ 364, [2007] Bus LR 1140, [2008] 1 All ER 156, [2007] FSR 25 [80].
[379] ibid.
[380] [2004] EWCA Civ 159, [2004] ETMR 56, [2004] Info TLR 55, [2004] RPC 40, [2004] Masons CLR 29, (2004) 27(6) IPD 27058, (2004) 148 SJLB 298.
[381] ibid [88].
[382] See Chapter 2, text to n 462ff.

clear. The case involved a Dutch judgment on jurisdiction; the Dutch court had rejected jurisdiction on the ground that the claim was within the scope of a valid exclusive jurisdiction clause for the courts of Sudan. The defendant in subsequent English proceedings invoked the preclusive (issue estoppel) effect of the Dutch judgment. However, the claimant argued that the judgment was not 'on the merits' and could not form the basis for an estoppel, because the judgment "did not pronounce in any way on the question whether the claim itself, or any substantive issue in it, if it were to be entertained and adjudicated on, would succeed or fail."[383] The House of Lords rejected the argument; Lord Brandon of Oakbrook reasoned as follows:

> 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.[384]

Accordingly, His Lordship concluded that "there can be no doubt whatever that the decision … was a decision on the merits for the purposes of the application of the doctrine of issue estoppel."[385]

Second, for a judgment to be 'on the merits' for the purpose of founding an estoppel, the parties must have had a full *opportunity* to advance their case on the claim or issue; the parties need not have actually seized that opportunity. For instance, a default judgment—a judgment rendered without trial or contested hearing, because a defendant has either failed to file an acknowledgment of service or has failed to file a defence—can be 'on the merits', and, as *Strachan v Gleaner Co Ltd*[386] confirms, give rise to an estoppel.[387] Lord Herschell in *Nouvion v Freeman* explained why: a judgment is 'on the merits' if the judgment is given in a court "where according to its established procedure *the whole merits of the case were open*, at all events, to the parties, however much they may have failed to take advantage of them, or may have waived any of their rights".[388] The requirement is not then that a claim or issue must be the subject of a full contestation and a clear decision, but that the matter was *open* to full contestation by the parties and a decision by the court, regardless whether a party took advantage of the opportunity to argue the case at trial.

1. The court's finding must be necessary for the decision

To be conclusive, a court's finding must be necessary to the claim or issue in question. As noted elsewhere, an 'issue' is a question as to the legal consequences of particular facts, the answer of which is a necessary step on the road to the court's final decision, and a 'claim' is the assertion of a right to a remedy for a cause of action which the court has jurisdiction to decide.

Regarding issues, the law differentiates between questions that qualify as 'issue' and those that do not, the does not distinguish between various categories of

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[383] *The Sennar (No 2)* (n 58) 527.
[384] ibid.
[385] ibid.
[386] (n 376) [16], while noting, at [21], that "[a] default judgment is one which has not been decided on the merits." cf *Evans v Bartlam* (n 377) 480 (Lord Atkin).
[387] ibid.
[388] (n 373) 9-10 (emphasis added).

issues (some necessary, others collateral). Hence, the proper test involves asking whether a question is an 'issue' at all, not whether it is a 'necessary issue' or a 'collateral issue'; a finding on a question that qualifies as 'issue' is inherently necessary to the court's final decision. In respect of claims, the finding of a court with competent jurisdiction whether a claim is valid or not is necessary by virtue of the court's constitutional mandate to determine the parties' rights and duties and settle civil disputes.

Accordingly, for the purpose of establishing whether a court's finding was necessary to the court's decision, the proper inquiry involves ascertaining the issue or claim actually submitted to the court's jurisdiction; this process involves an examination of the judgment relied on, the pleadings and possibly the evidence, as well as the governing substantive or procedural law.[389] A relevant factor in this inquiry is the so-called 'appealability-test'—the test whether the party to be estopped from contesting a court's finding could have appealed from that finding;[390] if the party could not have appealed because the finding was unnecessary for the court's final decision, the question is only an incidental matter, collateral to the decision, and the party is not barred.[391] This inquiry, though not decisive,[392] is recognised as a "good test"[393].

c. Court of competent jurisdiction

It is well established that there can be no estoppel arising out of an order or judgment given in excess of jurisdiction.[394] As a general rule, a court with constitutional authority to exercise judicial power and determine a particular claim or issue is a 'court of competent jurisdiction'. For instance, the High Court enjoys "general jurisdiction",[395] including admiralty and other specific fields of jurisdiction like probate, matrimonial, prize jurisdiction, and is designed to cope with the most complicated cases, even though as a practical restriction, proceedings (whether for damages or for a specified sum) may not be started in that court unless the value of the claim is more than £25,000.[396]

But the matter is of general relevance. *Buehler AG v Chronos Richardson Ltd*[397] illustrates the point. In this case the Court of Appeal held that a decision of the Opposition Division of the European Patent Organisation on whether a patent should be maintained or revoked in the context of the granting process could not estop the

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[389] *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (Introduction n 32) 965 (Lord Wilberforce). See Chapter 4, text to n 151ff.
[390] *Good Challenger Navegante SA v Metalexportimport SA* [2003] EWCA Civ 1668, [2004] 1 Lloyd's Rep 67, (2004) 101(2) LSG 27 [73].
[391] *Penn-Texas Corp v Anstalt (Murat)* [1964] 2 QB 647, 660-61, [1964] 3 WLR 131, [1964] 2 All ER 594, (1964) 108 SJ 356 (Lord Denning MR).
[392] *Norway's Application (Nos 1 and 2)* [1990] 1 AC 723, [1989] 2 WLR 458, [1989] 1 All ER 745, (1989) 133 SJ 290. cf *Good Challenger Navegante SA v Metalexportimport SA* (n 390) [74].
[393] *Good Challenger Navegante SA v Metalexportimport SA* (n 390) [74].
[394] See, eg, *O'Laoire v Jackel International (No2)* [1991] ICR 718, 729, [1991] IRLR 170 (Sir Nicolas Browne-Wilkinson). cf *Foster v Bon Groundwork Ltd* [2012] EWCA Civ 252, [2012] ICR 1027, [2012] IRLR 517 (upholding a decision of the Emploment Appeal Tribunal rejecting a plea of estoppel on the ground that the court whose judgment was invoked lacked subject-matter jurisdiction to deal with the claim whose relitigation was sought).
[395] Senior Courts Act 1981 (c 54), s 19.
[396] CPR r 7.1 in conjunction with PD 7A, r 2.1.
[397] (n 312).

parties from disputing the validity of the patent in a national court in relation to a claim for infringement or revocation. According to Aldous LJ, "the Convention… lays down a logical structure with the national courts having *exclusive jurisdiction* over revocation proceedings and the European Patent Office having the task of granting European patents". [398] In other words, the Oposition Division of the European Patent Organisation was not a court of competent jurisdiction under the European Patent Convention to conclusively determine the issue of validity of the patent between the parties in the context of a claim for infringement or revocation; that issue was subject to the exclusive jurisdiction of the national courts, and there could be no estoppel.

(iii) Same parties

"Estoppel *per rem judicatam* works mutually."[399] An estoppel operates only between the same parties (or their privies); the idea is that "[a] person can only take the benefit of a decision if he would have been prejudiced by it had it gone the other way."[400] The principle on which the limitation of estoppel to parties and privies depends, Lord Selborne LC in *R v Hutchings* observed, is this: "*res inter alios acta alteri nocere non potest*" [401] ('a transaction between others can do no harm to another'), and the underlying concern is each individual's right to access justice; Sir William Grey LC in the *Duchess of Kingston's* case gave early expression to these concerns:

> [A] transaction between two parties, in judicial proceedings, ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment he might think erroneous; and therefore the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of the court upon facts found, although evidence against the parties, and all claiming under them, are not, in general, to be used to the prejudice of strangers.[402]

a. Or privies

The issue of privity arose in *Powell v Wiltshire*.[403] The case involved a dispute over the ownership of an aircraft. The claimant claimed title to the aircraft, having bought it in good faith from a third party, who claimed, in turn, to have bought it in good faith from another third party. However, the defendant contended he owned the aircraft, having obtained judgment against the other third party, which declared his ownership. He argued that this judgment bound the third party from whom the claimant purchased the aircraft, who could not, then, deny the defendant's title, nor pass good title to the claimant.

The High Court ruled in favour of the claimant. On appeal, the Court of Appeal held that a judgment *in personam* could form the basis for an estoppel

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[398] ibid 616.
[399] *Powell v Wiltshire* (n 266) [34] (Arden LJ). *Michael Wilson & Partners Ltd v Sinclair* [2012] EWHC 2560 (Comm), [2013] 1 All ER (Comm) 476 [41] (Teare J).
[400] *Michael Wilson & Partners Ltd v Sinclair* (n 399) [41] (Teare J). cf *Powell v Wiltshire* (n 266) [34] (Arden LJ); and *Sophia Elizabeth Baroness Wenman v William Mackenzie* (1855) 5 El & Bl 447, 458, 119 ER 547 (Coleridge J).
[401] (n 302) 304.
[402] (n 306) 644-45.
[403] (n 266). cf *Michael Wilson & Partners Ltd v Sinclair* (n 399).

between the parties to the proceedings and their privies, and that a person who claimed title to an interest in a chattel (or land) was privy (in interest) of those from whom he claimed title, but only if the title he claimed was acquired *after* the date of the judgment. On the facts, the claimant had bought the aircraft from the third party before the defendant recovered judgment against the other third party. Consequently, the claimant was not estopped from claiming good title to the aircraft. Holman J emphasised the common sense of this position as follows:

> If after A has obtained a final judgment establishing that a chattel belongs to A rather than B, A wishes to sell it, it is essential that a purchaser can rely on the judgment as against B for otherwise A cannot really benefit from his judgment. *Any alternative view would lead to uncertainty and commercial chaos.*[404]

The result is different, as Lord Rodger of Earlsferry observed in *Calyon v Michailaidis*,[405] when the party claimed to be estopped, was neither a party to the original proceedings, nor in any sense stands "in the shoes of"[406] the original parties; a judgment cannot estop strangers.

(iv) Same claim or issue

a. Cause of action estoppel

In a new case, a cause of action estoppel bars either party in the prior case (or their privies) from contradicting the court's finding on the existence of the cause of action underlying the claim in question. Hence, the estoppel solely attaches if the new case concerns the same cause of action estoppel; the most relevant situations involve either an unsuccessful claimant filing a new claim for a cause of action that was previously found not to exist, or an unsuccessful defendant subsequently denying the existence of the cause of action underlying a claim that was previously granted.

The requirement is exacting; "the ingredient of identity of causes of action means just that: identity, not substantial similarity", Popplewell J held in *Naraji v Shelbourne*.[407] The judge added that "[this] is a strict test which is only met by true identity by reference to the essential facts necessary to support the claim at the highest level of abstraction…. If there are different facts which are necessary ingredients of the second cause of action, there will not be identity of causes of action."[408]

Establishing the identity of causes of action between two cases for the purpose of verifying a plea of estoppel can be challenging, for the simple reason that the concept of 'cause of action' is mirred by historical baggage. This difficulty has

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[404] ibid [51].
[405] [2009] UKPC 34.
[406] ibid [21].
[407] (n 280) [149].
[408] ibid. The judge added that "[t]his will not, however prevent the doctrine of cause of action estoppel applying in many cases of substantial but not true identity, because of the principle in Henderson v Henderson, which extends the doctrine to causes of action which ought to have been brought before the court in the first proceedings." This characterisation is erroneous, since the *Henderson v Henderson* principle as currently used denotes an instance of abuse of process, not estoppel *per rem judicatam.* In the situation to which the judge refers, the cause of action asserted was never adjudicated upon, which means that the estoppel doctrine lacks application; raising the cause of action can, however, amount to an abuse of process. See text to n 526ff.

been addressed in relation to the equivalent requirement that conditions the application of the merger doctrine.[409] Three points of general guidance can be restated: first, the material facts in question as a rule determine the identity of the cause of action between two cases; second, if different rights are violated by same act, every violation implies a separate cause of action; and, finally, different legal bases for claims in two cases do not exclude the identity of the cause of action if both the material facts and the right in question are the same.

Regarding the first point two things should be noted: first, the label of a cause of action is irrelevant if the material facts are the same (i.e., as Millett LJ said in *Paragon Finance plc v D B Thakerar & Co,* "a cause of action is defined by its factual ingredients, not by the name ascribed to it";[410] and, second, a cause of action is identical regardless whether a claimant advances different means of evidence to prove the same facts[411].

As regards the second and final point, reference can be made by way of illustration here to *Cinpres Gas Injection Ltd v Melea Ltd.*[412] This case involved a patent claim. The Court of Appeal discounted the relevance of the legal basis for distinguishing causes of action, and held that two consecutive claims based on different ss of the Patents Act 1977 were "in fact concerned with the same cause of action—a claim to entitlement to the grant of the Patent".[413] The Court also observed that "[t]echnicalities about whether a claim was in equity or at common law (which, so long since fusion, are not well understood) should not matter these days. The rule about re-opening a matter once decided should be the same for any sort of cause of action."[414]

b. Issue estoppel

Issue estoppel has generated more controversy than its sister species of estoppel *per rem judicatam*: cause of action estoppel. Illustrative is the Court of Appeal decision in *Yukos Capital SARL v OJSC Rosneft Oil Company*[415] reversing the decision of the High Court,[416] which had held that an Amsterdam Court of Appeal judgment containing a finding of partiality and dependency of the Russian judiciary founded an issue estoppel.[417]

The facts are not rehearsed here.[418] The point the appellant reiterated[419] on appeal was that the Dutch and English proceedings raised distinct issues; according to the appellant, the issue decided by the Amsterdam Court of Appeal was whether based on Dutch public order the Russian Annulment Judgments should be denied

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[409] See text to n 180ff.
[410] (n 211) 406h.
[411] *Coke-Wallis* (n 98) [64] (Lord Dyson).
[412] *Cinpres Gas Injection Ltd v Melea Ltd* (n 316).
[413] ibid [74].
[414] ibid [97].
[415] *Yukos English Court of Appeal* (Introduction n 28).
[416] *Yukos English High Court* (Introduction n 26) (Hamblen J).
[417] Though the case involved a foreign judgment, the conditions applied for an issue estoppel are the same, apart from the caution exercised by English courts to prevent precluding the litigation of an issue that could be relitigated abroad. See Chapter 4, text to n 126ff.
[418] See Introduction, text to n 26.
[419] See *Yukos English High Court* (Introduction n 26) [89]. cf *Yukos English Court of Appeal* (Introduction n 28) [154].

recognition for being the product of a partial and dependent judiciary, whereas the English High Court was asked to rule on whether as a matter of English public order the same Russian judgments should be refused recognition for the same reason.[420] The respondent argued to the contrary that the issue in both proceedings was "exactly the same"; namely, whether the Annulment Judgments were partial and dependent.[421] The respondant added that it was irrelevant that the Amsterdam Court of Appeal applied Dutch public order, whereas the English courts would apply English public order, because "the public policy… is the same in each country and the issue to be decided in accordance with that public policy is identical."[422]

The Court of Appeal held that the issues were different. Rix LJ explained that "'public order' or 'public policy' is inevitably different in each country",[423] and clarified the inherent differences as follows:

> The standards by which any particular country resolves the question whether the courts of another country are 'partial and dependent' may vary considerably and it is also a matter of high policy to determine the circumstances in which this country should recognise the judgments of a state where the interests of that very state are at stake.[424]

As a matter of *English* law, His Lordship added:

> Normally such recognition will be given and, if it is to be refused, cogent evidence of partiality and dependency will be required. Our own law is (or may be) that considerations of comity necessitate specific examples of partiality and dependency before any decision is made not to recognise the judgments of a foreign state.[425]

The approach under *Dutch* law was apparently different; the Amsterdam Court of Appeal demanded neither cogent evidence, nor specific examples of partiality and dependency, before refusing the judgments of a foreign state recognition. To the contrary, the Dutch court based its public policy analysis on the following considerations: (a) "Rosneft and the Russian state are closely intertwined";[426] (b) "the case at issue also involves considerable interests that the Russian state considers to be its own";[427] (c) Rosneft had insufficiently refuted or contested by any concrete facts or documents the Yukos Capital's "properly substantiated" allegation that "in cases pertaining to (parts of) the (former) Yukos Group or the (former) directors of this group, which involve state interests that the Russian state considers to be its own, the Russian judiciary is not impartial and independent but is guided by the interests of the Russian state and is instructed by the executive";[428] and (d) no direct evidence of partiality and dependence of the individual judges concerned was required, because "partiality and dependency by their very nature take place behind the scenes"[429].[430]

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[420] *Yukos English Court of Appeal* (Introduction n 28) [149].
[421] ibid [150].
[422] ibid.
[423] ibid [151].
[424] ibid.
[425] ibid.
[426] Hof Amsterdam 28 April 2009, ECLI:NL:GHAMS:2009:BI2451, JOR 2009, 208 [3.9.1] (*Yukos Capital Sarl/OAO Rosneft*). See *Yukos English Court of Appeal* (Introduction n 28) [143].
[427] ibid [3.9.2].
[428] ibid.
[429] ibid [3.9.4].

The Court of Appeal in the English proceedings made short shrift of this analysis, holding that: "It is *our own public order* which defines the framework of any assessment of this difficult question".[431]

According to the Court, whether the foreign judgments in question were to be regarded as dependent and partial *as a matter of English law* is "not the same question" as whether those judgments are dependent and partial according to some other court by application of "that court's notions of what is acceptable or otherwise according to its law".[432] Hence, the Court of Appeal evidently disagreed with the High Court's reasoning that;

> … the finding that the annulment decisions were the result of a partial and dependent legal decision was both necessary and fundamental to the decision. That the Amsterdam Court of Appeal determined that issue in the context of a different legal question (i.e. by reference to Dutch public order) makes no difference.[433]

According to the Court of Appeal;

> … it makes a great deal of difference whether the issue is being determined by reference to Dutch public order or English public order which is (or may well be) different. The point is that English public order is as explained by Lord Collins in AK Investment and the English court must determine the matter by reference to those considerations not by whatever considerations make up Dutch public order.[434]

As a result, the Court held that Rosneft was not issue estopped from contradicting in the English case Yukos Capital's factual assertion that the Russian judgments were partial and dependent. This decision makes a lot of sense in terms of its result, in particular against the background of the unconvincing decision of the Amsterdam Court of Appeal. Nevertheless, it is respectfully suggested that the Court's reasoning falls short of offering a logical conclusion as to why no issue estoppel arose in the circumstances of the case. Consider the conditions for an issue estoppel restated by Lord Brandon of Oakbrook in *The Sennar (No. 2)*[435] and approved by the Court of Appeal:[436]

> [I]n order to create an estoppel of that kind, 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 section 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 action.[437]

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[430] See, critically, Albert Jan van den Berg, 'Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam, 28 April, 2009' (2010) 27(2) Journal of International Arbitration 179ff.
[431] *Yukos English Court of Appeal* (Introduction n 28) [151].
[432] ibid.
[433] *Yukos English High Court* (Introduction n 26) [94].
[434] *Yukos English Court of Appeal* (Introduction n 28) [156].
[435] *The Sennar (No 2)* (n 58).
[436] *Yukos English Court of Appeal* (Introduction n 28) [147].
[437] *The Sennar (No 2)* (n 58) 499A-B.

By reference to this authorative statement of the law, the Court of Appeal could have simply said that the third requirement for an estoppel—i.e., 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 action—was not met on the facts of the case. However, the Court reasoned differently by holding that "it makes a great deal of difference *whether the issue is being determined by reference to Dutch public order or English public order* which is (or may well be) different."[438] This statement suggests that the issue in question was the same, but that the legal framework by which it to be determined is different, and still confuses the meaning of 'issue' in English law.

1. The meaning of 'issue' and the identity of issues

Answering the question whether two cases involve the same issue calls for a proper understanding of the meaning of 'issue'. According to the High Court in *Yukos*,[439] the issue was whether the Annulment Judgments were the product of a partial and dependent judiciary—the factual question of partiality and dependence. Hence, the court concluded that the issue in the two cases was identical. The court further held that the Amsterdam Court of Appeal judgment could found an estoppel, because the issue was necessary to its decision.[440] The Court of Appeal, as noted, reversed this decision, but without clarifying (a) what was the issue and (b) whether the two cases raised the same issue, though in light of *The Sennar (No. 2)*,[441] the Court of Appeal's decision is only intelligible on the assumption that the issues were indeed distinct.

Hamblen J in the High Court applied the wrong test; the law differentiates, not between various categories of issues (some necessary, others collateral), but between questions that qualify as 'issue' and those that do not. The proper test then involves asking whether the question of partiality and dependence addressed by the Amsterdam Court of Appeal was an 'issue' at all, not whether it was a 'necessary issue', since only findings on issues can give rise to an issue estoppel. A factual dispute (i.e., in this case, the existence of partiality and dependence of the Russian judiciary) divorced from its legal consequences (e.g. non-recognition on grounds of public policy) is not an 'issue'. Rather, the issue is the question that asks about the legal consequences of certain facts (i.e., whether the partiality and dependence of the Russian judiciary barred the recognition of the Annulment Judgments on grounds of English public policy). The classic definition of 'issue' offered by Diplock LJ in *Fidelitas Shipping* points in this direction and guides the way:

> The final resolution of a dispute between parties as to their respective legal 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.[442]

Against the background of this analysis, an 'issue' then is (a) a question as to the legal consequences of particular facts (b) whose answer is a necessary step on the road to the court's decision. Diplock LJ went on to say this:

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[438] *Yukos English Court of Appeal* (Introduction n 28) [156].
[439] *Yukos English High Court* (Introduction n 26).
[440] ibid [50].
[441] *The Sennar (No 2)* (n 58).
[442] *Fidelitas Shipping Co Ltd v V/O Exportchleb* (n 284) 641-42.

> To determine an 'issue' in this sense, which is that in which I shall use the word 'issue' throughout this judgment, it is necessary for the person adjudicating upon the issue first to find out what are the facts, and there may be a dispute between the parties as to this. But while an issue may thus involve a dispute about facts, a mere dispute about facts divorced from their legal consequences is not an 'issue.'[443]

Hence, an issue as defined—a question as to the legal consequences of particular facts whose answer is a necessary step on the road to the court's decision—may involve a factual dispute, but that factual dispute in itself is not an issue. Accordingly, if the same factual dispute arises in relation to a different issue, there can be no estoppel.

2. The scope of the issue estoppel

The scope of an issue estoppel extends to the court's findings of *material* fact for the purpose determining the issue. The estoppel does not extend to findings of *relevant* fact—findings of fact which are merely relevant to proving a material fact, but which are not in themselves material—nor, *a fortiori*, findings of *collateral* fact, which are not even relevant, let alone material. *Thoday v Thoday* clarifies this point. Diplock LJ explained that:

> The determination by a court of competent jurisdiction of the existence or nonexistence of a fact, the existence of which is not of itself a condition the fulfilment of which is necessary to the cause of action which is being litigated before that court, but which is only relevant to proving the fulfilment of such a condition, does not estop at any rate *per rem judicatam* either party in subsequent litigation from asserting the existence or non-existence of the same fact contrary to the determination of the first court.[444]

It may not always be easy to draw the line between material and relevant facts. In fact, Lord Reid in *Carl Zeiss* complained that he found this distinction "difficult to understand", while offering this example:

> Suppose that as an essential step towards the 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.[445]

However, it is respectfully suggested that *Thoday* does not imply that parties cannot be estopped from disputing the existence or non-existence of a fact, but that an issue estoppel only bars the contradiction of findings of *material* fact in relation to the same issue, not in relation to a different issue, even though the fact disputed is the same. Accordingly, to take the first example given by Lord Reid, an issue estoppel will not bar relitigation of the question whether A was alive on that date, because that

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[443] ibid 643.
[444] *Thoday v Thoday* (n 98) 198.
[445] *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (Introduction n 32) 917.

fact was not material, but merely relevant, to the issue whether on that date A owed B £100. In another case between the same parties involving a different issue, that fact can disputed and evidence will be admissible of the fact that A was alive on the relevant date.

In relation to the second of Lord Reid's examples, it can be noted that the fact of a ceremony was material to the issue whether there was a valid marriage. Consequently, in another case presenting the same issue—i.e., is the marriage valid or not?—a party will be estopped from disputing that there was a ceremony if the prior court held that the marriage was valid.

(6) Exceptions

A judgment must obviously be valid to found an estoppel; for instance, there can be no estoppel if the judgment is reversed on appeal, or if the judgment is set aside by original action or in response to a plea of estoppel.[446] In these circumstances, there is no estoppel to start with. In this sense Lord Mansfield in *Moses v Macferlan* observed that "*[t]ill the judgment is set aside, or reversed*, it is conclusive, as to the subject matter of it, to all intents and purposes."[447] The question addressed here is another: in circumstances where there is an estoppel, does the law recognise exceptions to its application? The short answer is: it depends; whereas cause of action estoppel is an absolute bar, issue estoppel is a more flexible bar, allowing for exceptions in the interest of justice in case of special circumstances.[448] Neuberger LJ (as he then was) in *Coflexip* summed up the legal position as follows:

> In relation to strict cause of action estoppel, the law has not changed since 1908, and the estoppel can only be overridden on grounds of fraud or collusion. In relation to strict issue estoppel,… special circumstances, other than fraud or collusion, can be relied on to enable the court to disapply the estoppel, if the justice of the case requires it.[449]

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[446] *P&O Nedlloyd BV v Arab Metals Co (The UB Tiger)* [2006] EWCA Civ 1717, [2007] 1 WLR 2288, [2007] 2 All ER (Comm) 401, [2007] 2 Lloyd's Rep 231, [2006] 2 CLC 985, 116 Con LR 200 [29] (Moore-Bick LJ) ("As a matter of principle, when an appellate court sets aside the order of a lower court that order ceases to have any effect and the decision of the appellate court alone is determinative of the issue between the parties. That is sufficient to determine the present case. Although the decision of Colman J was originally capable of giving rise to an issue estoppel, it could no longer do so once it had been set aside on appeal, regardless of the grounds on which this court made its order. Issue estoppel is a form of estoppel by record and depends, as the cases mentioned earlier demonstrate, on a decision of the court disposing of a substantive dispute between the parties. On a purely formal level it may be said that the setting aside of the order below expunges the only record from which an estoppel was capable of deriving its force. At a substantive level the setting aside of the order means that there is no longer any disposal to which the decision on the issue in question can be regarded as fundamental.").

[447] (1760) 97 ER 676, 679, (1760) 2 Burr 1005 (emphasis added).

[448] *Coke-Wallis* (n 98) [26] (Lord Clarke).

[449] [2004] EWCA Civ 213, [2004] FSR 34, (2004) 27(5) IPD 27047, (2004) 148 SJLB 297 [51]. But see *Spicer v Tuli* (n 360) [16] (Lewison LJ) ("It is common ground that the principles of estoppel arising out of court proceedings are grounded on the underlying principle that there is a public interest in the finality of litigation, and that a person should not be unjustly harassed by a revival of proceedings which have already been disposed of. These principles must be applied to work justice and not injustice…. It is thus open to courts to recognise that in special circumstances the inflexible application of estoppels may work injustice…. Estoppel per rem judicatam, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process…."). His Lordship appears to suggest that estoppel *per rem judicatam* may *generally* be subject to exceptions on grounds of special circumstances. (Note that Lord

The special circumstances exception to issue estoppel is an open category and in practice the exception comes in different shapes and sizes. The most prominent three examples are: first, the discovery of new evidence which could not by reasonable diligence have been adduced in the previous proceedings; second, a relevant change of law; and, finally, the trifling importance of the prior case compared to the new case.

(i) Special circumstances

The "overriding consideration"[450] regarding issue estoppel is that an estoppel should be applied "so as to work justice and not injustice".[451] Accordingly, "the severity of the rule is tempered by a discretion to allow the issue to be reopened in subsequent proceedings when there are special circumstances in which it would cause injustice not to do so".[452] This gives the impression of issue estoppel as a flexible bar. But recognized special circumstances are rare in practice; it is therefore best to note that issue estoppel "is not an *inflexible* rule".[453] In this sense Lord Keith in *Arnold v National Westminster Bank plc* noted that: "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 result".[454]

In practice, issue estoppel is applied unless there are special circumstances such that enforcement of finality in respect of the issue would cause an unjustice. Inherent in the concept of 'special circumstances' is that in a particular case, "whether there are such special circumstances or not will of course depend upon the facts of the particular case",[455] and Lord Walker's warning in *Yeoman's Row Management Ltd v Cobbe* as regards proprietary estoppel may be similarly relevant here:

> [Estoppel] is not a sort of joker or wild card to be used whenever the court disapproves of the conduct of a litigant who seems to have the law on his side. Flexible though it is, the doctrine must be formulated and applied in a disciplined and principled way.[456]

The position regarding cause of action estoppel is a different story: though the prospect of an exception was still recognised in *Henderson v Henderson* where Sir James Wigram VC said a court would not allow a claim to be reopened "except under special circumstances",[457] that position has clearly changed.[458] For example, note the following categorical statement of Smith LJ in *Zurich Insurance Co Plc v Hayward* as regards the implications of a cause of action estoppel: "If there is an estoppel there is no possibility of allowing the action to proceed on the basis that it is fair and just

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Neuberger, who wrote the opinion in *Coflexip*, which rejected exceptions to cause of action estoppel, agreed.)

[450] ibid.

[451] *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (Introduction n 32) 947 (Lord Upjohn).

[452] *Watt (formerly Carter) and others v Ahsan* (n 321) [34] (Lord Hoffmann).

[453] *Fidelitas Shipping Co Ltd v V/O Exportchleb* (n 284) 640 (Lord Denning) (emphasis added).

[454] (n 283) 109. cf *Johnson* (Introduction n 12) 25 (Lord Bingham).

[455] *Good Challenger Navegante SA v Metalexportimport SA* (n 390) [79] (Clarke LJ).

[456] [2008] UKHL 55, [2008] 1 WLR 1752, [2008] 4 All ER 713, [2009] 1 All ER (Comm) 205, [2008] 3 EGLR 31, [2008] 35 EG 142, [2008] 36 EG 142, [2008] WTLR 1461, (2008-09) 11 ITELR 530, [2008] 31 EG 88 (CS), (2008) 152(31) SJLB 31, [2008] NPC 95 [46].

[457] (n 275) 115 (emphasis added).

[458] cf Handley (Part I, Introduction n 11) [7.04].

and because the importance of the purity of justice outweighs the need for finality in litigation."[459] In the same sense Lord Atkin said in *Workington Harbour & Dock Board v Trade Indemnity Co Ltd (No 2)* that:

> The result is that the plaintiffs, who appear to have had a good cause of action for a considerable sum of money, fail to obtain it, and on what may appear to be technical grounds. Reluctant, however, as a judge may be to fail to give effect to substantial merits, he has to keep in mind principles established for the protection of litigants from oppressive proceedings. There are solid merits behind the maxim nemo bis vexari debet pro eadem causa.[460]

The private interest in finality of litigation therefore trumps justice as far as a litigated cause of action is concerned.

a. New evidence

New evidence is generally insufficient to justify an exception to an issue estoppel; a party should ordinarily try to appeal the original judgment out of time on the basis of the fresh evidence.[461] Nevertheless, in case a bill of review no longer lies, a court can still accept an exception for special circumstances in case of the discovery of fresh evidence which could not with reasonable diligence have been discovered and adduced in the previous proceedings.[462] As noted, the same flexibility if absent for a cause of action estoppel; recently this inflexibility has been criticized by the Court of Appeal; for instance, in *Cinpres Gas Injection Ltd v Melea Ltd* the Court expressed its discontent:

> It would make for better justice in principle for a prior decision to be impugnable on the grounds for which a bill of review once lay, namely that there was fresh evidence not discoverable by reasonable diligence, which 'entirely changes the aspect of the case' …. That appears to be the rule (or something like it) in Scotland, as noted by Lord Keith. No one suggests that the Scottish courts are markedly more burdened than those in England by attempts to relitigate cases already decided. Both countries have their share (more than they would like) of such cases but the different rules do not, so far as we know, cause any significant difference between England and Wales on the one hand and Scotland on the other in either the number of such cases or their outcomes. Similarly the somewhat more liberal rule clearly applies in cases of 'issue estoppel' (see above) without causing a mass of inconsistent judgments.[463]

However, apart from cases of fraud or collusion, which justify setting aside the judgment, in which case there is no basis for any estoppel at all, only issue estoppel remains subject to the exception, not cause of action estoppel.[464]

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[459] [2011] EWCA Civ 641, [2011] CP Rep 39 [28].
[460] (n 263) 105-06.
[461] *Fidelitas Shipping Co Ltd v V/O Exportchleb* (n 284) 642 (Diplock LJ). cf *Edgerton v Edgerton* [2012] EWCA Civ 181, [2012] 1 WLR 2655, [2012] CP Rep 17, [2012] 2 FLR 273, [2012] 1 FCR 421, [2012] Fam Law 798 [41] (Lord Neuberger).
[462] *Mills v Cooper* (n 277) 468E. cf *R v Humphrys* [1977] AC 1, 19 (Viscount Dilhorne); and *Vandervell's Trusts (No1), Re* (n 331) 942 (Lord Diplock).
[463] *Cinpres Gas Injection Ltd v Melea Ltd* (n 316) [100].
[464] *Arnold v National Westminster Bank plc* (n 283) 104 (Lord Keith).

b. Change of law

A change in the law subsequent to the judgment giving rise to an issue estoppel is capable of justifying an exception to issue estoppel on grounds of special circumstances: "Whether or not such a change does or does not bring the case within the exception must depend on the exact circumstances of each case."[465] Again, for the sake of clarity, a cause of action estoppel is not subject to this exception as the rule does not allow for exceptions for special circumstances.[466]

c. Prior case of trifling importance

Courts may accept an exception for special circumstances if a prior case was of "trifling importance".[467] Logically, these circumstances occur only in relation to an issue estoppel.[468]

(ii) Not for errors of law

Even though issue estoppel allows for an exception for special circumstances, such circumstances do not include the situation where it is established that the judgment-rendering court made an error of law: "The whole point of an issue estoppel on a question of law is that the parties remain bound by an erroneous decision."[469]

1.4 Abuse of process

Introduction

Procedural conduct that is strictly consistent with the literal application of a court's procedure, including the res judicata doctrine, may nevertheless be barred as an abuse of process, which a court has the inherent power and duty to prevent on its own motion or on application of the affected party, if to allow the conduct "would … be manifestly unfair to a party to litigation before [the court], or would otherwise bring

[465] ibid 110-11.
[466] ibid.
[467] *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (Introduction n 32) 917 (Lord Reid) ("The difficulty which I see about issue estoppel is a practical one. Suppose the first case is one of trifling importance but it involves for one party proof of facts which would be expensive and troublesome; and that party can see the possibility that the same point may arise if his opponent later raises a much more important claim. What is he to do? The second case may never be brought. Must he go to great trouble and expense to forestall a possible plea of issue estoppel if the second case is brought?"). cf *Edgerton v Edgerton* (n 461) [35] (Lord Neuberger); and *South Somerset DC v Tonstate (Yeovil Leisure) Ltd* [2009] EWHC 3308 (Ch), [2010] UKCLR 303, [2009] NPC 144 (Roth J).
[468] ibid ("This does not arise in cause of action estoppel: if the cause of action is important, he will incur the expense: if it is not, he will take a chance of winning on some other point. It seems to me that there is room for a good deal more thought before we settle the limits of issue estoppel.").
[469] *Watt (formerly Carter) and others v Ahsan* (n 321) [33] (Lord Hoffmann).

the administration of justice into disrepute among right-thinking people."[470] The right of court-access, in other words, does not confer an unlimited licence to litigate:[471]

> Litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court… This does not however mean that the court must hear in full and rule on the merits of any claim or defence which a party to litigation may choose to put forward.[472]

As far as concerns finality of litigation, three situations are of particular interest that may arise against the background of relevant prior proceedings, involving attempts at, first, relitigating issues in proceedings against third parties; second, litigating claims or issues which could have been raised before; or, finally, challenging judgments by means other than an appeal.

The sections on merger doctrine and estoppel doctrine clarified that the English res judicata doctrine condones these three types of procedural conduct. First, estoppel doctrine applies applies only in proceedings between the same parties (or their privies).[473] Second, the res judicata doctrine, including merger and estoppel, only applies to matters that a court has actually determined.[474] Finally, whereas the res judicata doctrine precludes the reassertion of a cause of action for which judgment was previously recovered,[475]and the contradiction of judicial findings on a claim or issue,[476] the doctrine fails to address the situation where a party actually asks a court to determine that the court in a prior court erred in its judgment.

The abuse of process doctrine potentially bars these attempts. First, there are circumstances in which it is an abuse of process to seek to relitigate matters which have been determined in a prior case, notwithstanding that a vital condition for application of the res judicata doctrine, like identity of the parties,[477] is not met.[478] Secondly, conduct may amount to an abuse of process if it consists in the raising of a claim or defence, or issue, which could have been raised in previous proceedings, but was not.[479] Finally, a party may abuse a court's procedures by asking the court to sit in judgment on the decision of another court.[480] These three instances of potential abuse of process are habitually known as first, relitigation abuse; second, *Henderson v Henderson*-abuse; and, finally, collateral attack-abuse.

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[470] *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, 536, [1981] 3 WLR 906, [1981] 3 All ER 727, (1981) 125 SJ 829 (Lord Diplock).
[471] *Land Securities Plc v Fladgate Fielder (A Firm)* [2009] EWCA Civ 1402, [2010] 2 WLR 1265, [2010] PTSR 1246, [2010] 2 All ER 741, [2010] 1 EGLR 111, [2010] 1 EG 70 (CS), [2009] NPC 147 [109] (Mummery LJ).
[472] *Johnson* (Introduction n 12) 22 (Lord Bingham).
[473] See text to n 399ff.
[474] See, respectively, text to n 180ff and text to n 407ff.
[475] See text to n 137ff.
[476] See text to n 330ff.
[477] *Dexter Ltd (In Administrative Receivership) v Vlieland-Boddy* [2003] EWCA Civ 14, (2003) 147 SJLB 117 [49] (Clarke LJ). cf *Nomihold Securities Inc v Mobile Telesystems Finance SA* [2012] EWHC 130 (Comm), [2012] Bus LR 1289, [2012] 1 Lloyd's Rep 442, [2012] 1 CLC 339 [42] (Smith J).
[478] *Bradford & Bingley Building Society v Seddon & Ors* [1999] 1 WLR 1482, 1491G-H, [1999] 4 All ER 217, [1999] Lloyd's Rep PN 657, (1999) 96(15) LSG 30, (1999) 143 SJLB 106 (Auld LJ); and *Good Challenger Navegante SA v Metalexportimport SA* (n 390) [93] (Clarke LJ).
[479] See text to n 526ff.
[480] *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, 222, [1978] 3 WLR 849, [1978] 3 All ER 1033, [1955-95] PNLR 151, (1978) 122 SJ 761 (Lord Diplock).

A word of warning is in place at this point: analysis of the abuse of process doctrine demonstrates the problematic nature of any attempt to define in the abstract 'species' of abuse of process; under the appropriate test under the abuse of process doctrine as formulated by the late Lord Bingham of Cornhill in *Johnson v Gore Wood & Co*,[481] a certain procedural conduct can be abusive in one case, and perfectly acceptable in another case.[482] In other words, abuse of process cannot be established in a vacuum, without a consideration of all the circumstances and the interests involved in a particular case. Accordingly, the terms 'relitigation abuse', '*Henderson v Henderson*-abuse' and 'collateral attack-abuse' used in this section refer to situations that in the circumstances of the case and in view of the interests involved, constitute an abuse of process.

(1) The meaning of 'abuse of process'

The concept of 'abuse of process' refers to procedural conduct that, though technically in accordance with procedural law, is in effect manifestly unfair to a party to litigation, or otherwise brings the administration of justice into disrepute.[483] An answer to the question whether particular procedural conduct is 'manifestly unfair' or 'brings the administration into disrepute' so as to constitute abuse of process depends on the circumstances of the case and a balancing of the private and public interests involved. Any decision on abuse of process therefore reflects that "a balance has to be struck and a judgment made as to what is required in the interests of fairness and justice."[484] Considering the severe implications of finding an abuse of process, the party alleging the abuse has the burden of proving the abuse, unless the court faced with the conduct acts of its own motion to strike out the abuse.

(i) A broad, merits-based approach

The category of circumstances that may qualify as an abuse of process is open; in fact, the potentially relevant circumstances are so varied, that courts have deemed it unwise to limit abuse of process to fixed species.[485] Instead, courts apply what Lord Bingham in *Johnson v Gore Wood & Co* called "a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case", so as to determine "whether in all the circumstances a party's conduct is an abuse".[486] This approach excludes too dogmatic an approach,[487] and reflects that the process of establishing abuse is not about fitting procedural conduct into pre-labeled boxes, or about applying hard and fast rules to a given set of facts.[488]

(ii) The balance to be struck

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[481] (Introduction n 12).
[482] *Manson v Vooght* (n 31) 388-89 (May LJ) ("Abuse of process is a concept which defies precise definition in the abstract.").
[483] *Hunter v Chief Constable of the West Midlands Police* (n 470) 536 (Lord Diplock).
[484] Lord Dyson, 'Time to call it a day: some reflections on finality and the law', Edinburgh University, 14 October 2011, 7.
[485] *Hunter v Chief Constable of the West Midlands Police* (n 470) 536 (Lord Diplock).
[486] *Johnson* (Introduction n 12) 31.
[487] ibid.
[488] ibid.

A court that applies the abuse of process doctrine is forced to strike a balance between competing private interests of the party that seeks to put a case before the court and the other party that wishes to be left alone in light of the history of the matter. In the particular context of finality of litigation, this balancing-act reflects that access to justice has two sides and that the sword of Art 6 ECHR cuts on two sides: on the one hand is the need for access to justice, on the other hand is the need for finality of litigation; for example, May LJ in *Manson v Vooght (No 1)* observed that "the court has to balance a plaintiff's right to bring before the court genuine and legitimate claims with a defendant's right to be protected from being harassed by multiple proceedings where one should have sufficed."[489] But also the public interest enters into the equation,[490] as Lord Phillips recognised in *Jameel v Dow Jones & Co Inc*:

> It is no longer the role of the court simply to provide a level playing field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice.[491]

That public interest is, insofar as relevant here, "that there should be finality in litigation and that a party should not be twice vexed in the same matter".[492] This public interest, which is as much a private interest, "is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole."[493] The idea is that a civil justice system may be brought into disrepute by allowing matters to be litigated which have been determined already or which could and should have been so determined, or by allowing challenges to judgments outside of the system of appeals. Once again, Art 6 ECHR reminds that there must be finality of litigation at some point, though, at the same time, as noted, the provision guarantees persons a fair and public hearing in determining their civil rights, making the court responsible for access to justice. Hence, while "[i]t is consistent with the article [6 ECHR] to allow the court to strike out a claim which is an abuse of the process", this decision should not be taken lightly; "at common law it must be clearly shown to be an abuse before it can be struck out."[494] This leads to the burden of proving an abuse of process.

(iii) The burden of proof

The onus of proving abuse of process is squarely on the complaining party, except where a court acts of its own motion to prevent an abuse.[495] For example in relation to *Henderson v Henderson*-abuse, Lord Millett in *Johnson v Gore Wood & Co* rejected the suggestion that the rule on *Henderson v Henderson* abuse of process implies a

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[489] (n 31) 388-89.
[490] *Johnson* (Introduction n 12) 30-1. Note *Stuart v Goldberg* [2008] EWCA Civ 2, [2008] 1 WLR 823, [2008] CP Rep 18, (2008) 152(4) SJLB 28 [57] (Lloyd LJ) ("…when Lord Bingham spoke of a 'broad, merits-based' approach, the merits he had in mind were not the substantive merits or otherwise of the actual claim….").
[491] [2005] EWCA Civ 75, [2005] QB 946, [2005] 2 WLR 1614, [2005] EMLR 16, (2005) 149 SJLB 181 [54].
[492] *Johnson* (Introduction n 12) 31.
[493] ibid.
[494] *Stuart v Goldberg* (n 490) [65] (Lloyd LJ).
[495] *Johnson* (Introduction n 12) 30-31.

presumption of abuse: "The burden should always rest upon the defendant to establish that it is oppressive or an abuse of process for him to be subjected to the second action."[496]

(2) Nature

Abuse of process doctrine is fundamentally a matter of public policy, notwithstanding that the doctrine advances both the private and public interest.[497] The public policy-character of the doctrine is confirmed by the fact that a court can and must strike out an abuse of its own motion, notwithstanding that in most cases the party faced with the abuse will make a plea or application to that effect.[498] By contrast, the res judicata doctrine, which equally protects the private and public interest, is not a matter of public policy, which is demonstrated by the fact that the doctrine is subject to party disposition and cannot be applied by a court *ex officio*.[499] Lord Hoffmann in *Arthur J.S Hall* confirmed the distinction: "The Latin maxims often quoted are nemo debet bis vexari pro una et eadem causa and interest rei publicae ut finis sit litium. They are usually mentioned in tandem but it is important to notice that the policies they state are not quite the same."[500] Whereas the private interest in finality of litigation predominates in the res judicata doctrine, the public interest in appropriate use of the civil justice system, including where possible a 'single' use, preponderates in abuse of process doctrine.

A court's power to avert or punish abuse of process is restated in the CPR.[501] Nevertheless, the power is inherent in any court, "to maintain its character as a court of justice".[502] For instance, as regards the High Court the point has been made that "it would stultify the constitutional role of the High Court as a court of justice if it were not armed with power to prevent its process being misused in such a way as to diminish its capability of arriving at a just decision of the dispute."[503] This "salutary power"[504] then is not discretionary.[505] Indeed, as Lloyd LJ said in *Stuart v Goldberg*:

> Either the proceedings are an abuse of the process, or they are not. It could not be right to strike the case out (on this ground) unless the court is satisfied that the claim

[496] ibid 59-60. cf *Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1982] 2 Lloyd's Rep 132, 138, [1982] Com LR 165 (Sir David Cairns).
[497] *Johnson* (Introduction n 12) 31.
[498] Zuckerman (Introduction n 42) [10.216] ("The jurisdiction may be invoked to protect two different interests: the interests of individual litigants to be protected from unfair practices, and the interests of the public in the proper functioning of the administration of justice. It is because of the public dimension that the court has discretion to act on its own motion to protect itself against abuse. Wholesale disregard of rules and orders amounts to abuse of process because it undermines the court's authority and because it tends to deprive other parties of fair adjudication.").
[499] See text to n 176ff (merger doctrine) and text to n 366ff (estoppel doctrine).
[500] *Arthur JS Hall & Co v Simons* (Introduction n 51) 701.
[501] CPR r 3.4(2)(b) provides in relevant part that a court may strike out a statement of case if it appears to the court that "the statement of case is an abuse of the court's process". See *Johnson* (Introduction n 12) 22.
[502] *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corpn Ltd* (n 75) 977.
[503] ibid.
[504] *Hunter v Chief Constable of the West Midlands Police* (n 470) 536 (Lord Diplock).
[505] ibid. cf *Stuart v Goldberg* (n 490) [81] (Sir Anthony Clarke MR) ("...the decision on the question whether a second action is an abuse of process is not the exercise of a discretion....").

> is an abuse of the process, and if the court were so satisfied, it would be only in very unusual circumstances that it would not strike the claim out.[506]

A reviewing court usually defers to the opinion of the court below on whether particular conduct in the circumstances of the case amounts to abuse, especially if that opinion has been formed by an experience commercial judge.[507] However, legal errors receive no deference; for instance, a decision is reversed if the court applied immaterial factors, omitted to take account of material factors, erred in principle, or came to a conclusion that was impermissible or not open on the facts.[508]

(i) Residual character of the doctrine

A court's power to address abuse of process is in nature residual.[509] This residual nature clarifies how the doctrine relates to other doctrines, like the res judicata doctrine, that safeguard similar interests; other doctrines take precedence insofar as the implicated public interest is adequately protected. Hence, a court will be slow to strike out a statement of case as an abuse of process in circumstances where there is an alternative effective remedy in the form of a plea of finality or res judicata to address the situation.[510]

The res judicata doctrine, where applicable, takes precedence over the abuse of process doctrine. In the event of a plea of res judicata, a court should generally refrain from exercising its inherent jurisdiction to prevent an abuse of process, which is residual in nature.[511] Lord Hobhouse in *Re Norris*, for instance, observed that "[a]ttempts to relitigate issues which have already been the subject of judicial decision may or may not amount to an abuse of process. *Ordinarily* such situations fall to be governed by the principle of estoppel *per rem judicatam* or of issue estoppel".[512] Contrary opinions have been expressed. For instance, Evans LJ in *Desert Sun Loan Corp v Hill* observed that "reliance on the rules governing issue estoppel is unnecessary and superfluous where such an abuse of justice is established."[513] However, it is respectfully suggested that the doctrine abuse of process is not an alternative of the res judicata doctrine.[514] A relitigation attempt

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[506] *Stuart v Goldberg* (n 490) [24].
[507] *Taylor Walton (A Firm) v Laing* [2007] EWCA Civ 1146, [2008] BLR 65, [2008] PNLR 11, [2007] 47 EG 169 (CS), (2007) 104(46) LSG 2 [13] (Buxton LJ).
[508] *Aldi Stores Ltd v WSP Group Plc* [2007] EWCA Civ 1260, [2008] 1 WLR 748, [2008] CP Rep 10, [2008] BLR 1, 115 Con LR 49, [2008] PNLR 14, (2008) 24 Const LJ 334, [2008] CILL 2549, (2007) 104(48) LSG 24, [2007] NPC 128 [15] (Thomas LJ). cf *Stuart v Goldberg* (n 490).
[509] Zuckerman (Introduction n 42) [10.214].
[510] ibid, who offers an example in a different context: "If a claim can be dismissed on the grounds that it is time-barred, it would normally be pointless to describe the act of initiating such a claim as an abuse of process."
[511] *R (on the application of Coke-Wallis) v Institute of Chartered Accountants in England and Wales* [2009] EWCA Civ 730, [2009] CP Rep 46, revd (on other grounds) [2011] UKSC 1, [2011] 2 AC 146, [2011] 2 WLR 103, [2011] 2 All ER 1, [2011] ICR 224, (2011) 108(5) LSG 18 [13] (Sir Anthony May).
[512] [2001] UKHL 34, [2001] 1 WLR 1388, [2001] 3 All ER 961, [2001] 3 FCR 97, (2001) 98(30) LSG 37, (2001) 151 NLJ 1094 [26] (emphasis added).
[513] *Desert Sun Loan Corp v Hill* [1996] 2 All ER 847, [1996] 5 Bank LR 98, [1996] CLC 1132, 1142, [1996] ILPr 406, (1996) 140 SJLB 64.
[514] As suggested in *House of Spring Gardens Ltd v Waite (No2)* [1991] 1 QB 241, 254, [1990] 3 WLR 347, [1990] 2 All ER 990 (Stuart-Smith LJ) ("…the same result can equally well be reached by this route [ie application of the doctrine of abuse of process], which is untrammelled by the technicalities of estoppel.").

barred by the res judicata doctrine may, or may not, amount to an abuse of process; all depends on all circumstances of the case. In other words, the abuse of process doctrine does not cover all cases where the res judicata doctrine potentially imposes finality.

(3) Rationale

The public policy nature of the abuse of process doctrine is distinct from the interests the doctrine serves to protect. The three instances of abuse addressed in this section are all concerned with the public and private interest in finality of litigation; however as far as concerns the abuse of process the underlying idea is that it may be manifestly unfair or otherwise bring the administration of justice into disrepute to allow the relitigation of issues even between different parties; to permit the litigation of matters which could and should have been litigated before; or to condone a challenge of court decisions outside the framework of an appeal. In other words, finality of litigation is required to maintain confidence in the administration of justice. At the same time, it should be noted once again that abuse of process doctrine is not restricted to this particular aspect of a court's role in maintaining the reputation of the civil justice system; many different forms of procedural conduct may bring the administration of justice into disrepute.

(4) Effect

Pursuant to its power to avert or punish an abuse of process, a court can strike out an abuse at any stage of proceedings.[515] More generally, a court can impose a range of conditions on the conduct of the litigation, stay or strike out proceedings, give summary judgment, and order the payment of legal costs and expenses.[516] If the abuse occurs in the form of proceedings initated abroad, a court can also issue an injunction restraining the conduct.[517]

(5) Relitigation abuse

(i) Attempts to relitigate issues against third parties

An attempt to relitigate issues can be an abuse of process. The abuse of process doctrine applies residually, in circumstances where the res judicata doctrine is either inapplicable or not invoked.

The most obvious example involves an attempt to relitigate issues against third parties: in proceedings between A and C an issue arises that was previously determined against C in proceedings against B, who is not a privy of A. In those circumstances, the required identity of parties is missing for the judgment to found an issue estoppel. Nevertheless, C's attempt to relitigate the issue may still be barred as an abuse of process; as Lord Hoffmann said in *Arthur J.S Hall*, "[t]he law

[515] *Summers v Fairclough Homes Ltd* [2012] UKSC 26, [2012] 1 WLR 2004, [2012] 4 All ER 317, [2012] 4 Costs LR 760, [2013] Lloyd's Rep IR 159, (2012) 162 NLJ 910, (2012) 156(26) SJLB 31 [36] (Lord Clarke).
[516] *Land Securities Plc v Fladgate Fielder (A Firm)* (n 471) [109].
[517] *Noble Assurance Co v Gerling-Konzern General Insurance Co* [2007] EWHC 253 (Comm), [2007] 1 CLC 85, [2008] Lloyd's Rep IR 1.

discourages relitigation of the same issues except by means of an appeal", while adding that the public interest in finality of litigation, "can be used to justify the *extension* of the rules of issue estoppel to cases in which the parties are not the same", in the sense that "the courts have a power to strike out attempts to relitigate issues between different parties as an abuse of the process of the court." [518]

Reichel v Magrath[519] offers an early example of relitigation abuse. In this case a vicar entered a claim against his bishop for a declaration that he had not resigned his living and was still the vicar of his parish. This claim was decided against him, including the issue of his status as 'vicar'. When the new vicar then brought proceedings to eject the old vicar from the vicarage, the old vicar sought to relitigate the status-issue by way of defence against the claim. The court struck out this attempt at relitigating the issue as an abuse of process. Lord Halsbury LC explained why:

> I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again. It cannot be denied that the only ground upon which Mr. Keichel can resist the claim by Mr. Magrath to occupy the vicarage is that he (Mr. Eeichel) is still vicar of Sparsholt. If by the hypothesis he is not vicar of Sparsholt and his appeal absolutely fails, it surely must be in the jurisdiction of the Court of Justice to prevent the defeated litigant raising the very same question which the Court Sias decided in a separate action.[520]

In the circumstances of the case, in new proceedings between different parties, not privies, the res judicata doctrine clearly lacked application.[521]

(ii) Attempts to relitigate issues determined by a judgment that is not final and conclusive

The res judicata doctrine lacks application in circumstances where a judgment is not final and conclusive.[522] Nevertheless, an attempt to relitigate an issue determined by such judgment may amount to an abuse of process.

Stephenson v Garnett offers a timeworn example.[523] In a county court action, a claimant recovered judgment for a sum of money and costs, but before the costs were taxed, the claimant agreed on a representation of the poverty of the defendant to accept a smaller sum than that for which judgment had been given and executed a deed releasing the defendant from the judgment debt and costs. Subsequently the claimant applied to the county court for an order to tax on the ground that the release had been obtained by misrepresentation. The court held that that the execution of the deed had been obtained by misrepresentation, and made an order that the costs should be taxed, and should be paid together with the balance remaining due under the

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[518] *Arthur JS Hall & Co v Simons* (Introduction n 51) 701 (emphasis added). cf *Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd* (n 496) 137 (Kerr LJ) ("…an attempt to relitigate in another action issues which have been fully investigated and decided in a former action may constitute an abuse of process, quite apart from any question of res judicata or issue estoppel on the ground that the parties or their privies are the same.").
[519] (1889) LR 14 App Cas 665.
[520] ibid 668.
[521] See text to n 399ff.
[522] See text to n 368ff.
[523] [1898] 1 QB 677.

judgment. The defendant then initiated a claim in the High Court for a declaration that they had been released from the judgment debt and costs, and for an injunction to restrain further proceedings to enforce payment thereof. On the relevance of the res judicata doctrine, Collins LJ noted:

> [T]here is a difficulty in bringing this case within the doctrine of res judicata. It is very difficult to say that an interlocutory proceeding, whereby leave to proceed with the taxation of costs under a judgment was obtained, could be made the foundation of a plea of res judicata in an action to enforce the covenants in the deed.[524]

Nevertheless, though there was no basis for applying res judicata doctrine, the court concluded that in the circumstances of the case there was an abuse of process. Smith LJ reasoned that "I do not rest my decision upon the ground that the matter is res judicata"; instead, His Lordship held that the High Court should have exercised its inherent jurisdiction to stay the new claim on the ground that it was "frivolous and vexatious and an abuse of the process of the Court". According to His Lordship, the identical issue (i.e. whether the deed of release was obtained by fraud) was heard and determined by the county court, which had jurisdiction to hear and determine the question, while the party had every opportunity then of putting forward his case.[525]

(6) Henderson v Henderson-abuse

Attempts to raise claims, defences, or issues which could and should have been raised in a prior case

Filing a claim or raising a defence or issue may be an abuse of process if the matter could and should have been raised in a prior case.[526] This type of abuse is generally (though historically inaccurately)[527] called '*Henderson v Henderson*-abuse'.[528] This form of abuse is distinct from relitigation abuse;[529] relitigation abuse involves an

[524] ibid 682.
[525] ibid 680-81.
[526] *Johnson* (Introduction n 12) 31.
[527] ibid (Lord Bingham) ("…that what is now taken to be the rule in Henderson v Henderson has diverged from the ruling which Wigram V-C made, which was addressed to res judicata.").
[528] ibid ("Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. … The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all."). cf *Barrow v Bankside Members Agency Ltd* [1996] 1 WLR 257, 260,[1996] 1 All ER 981, [1996] 1 Lloyd's Rep 278, [1996] CLC 413, [1996] 5 Re LR 1 (Sir Thomas Bingham MR) ("The rule in *Henderson v Henderson* (1843) 3 Hare 100 is very well known. It 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.").
[529] *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Co of Zurich* (n 350) [16] (Lord Hobhouse) ("For the sake of completeness, it should be added that the use in later distinct proceedings of the *Henderson v Henderson* principle (1843) 3 Hare 100 may fall on the other side of the

attempt to relitigate matters which have actually been determined, whereas *Henderson v Henderson*-abuse is an attempt to litigate *for the first time* matters which could previously have been raised and determined, but were not.[530] This type of abuse is premised on the fact "that the court has decided some other closely related matter", which excludes situations where all parties have done is conclude a settlement agreement.[531]

It bears emphasis that raising a matter which could have been raised in the earlier proceedings is not necessarily an abuse;[532] obviously, in the context of abuse of process, the appropriate test is each and every time whether, on a broad, merits-based judgment, the matter *should* have been raised before, because in light of all circumstances of the case and on balance of the private and public interests involved, the attempt to raise it now is manifestly unfair to the other party or otherwise brings the administration of justice into disrepute. For instance, in a recent employment dispute,[533] the Court of Appeal held that there would be real injustice to a claimant who had previously claimed in person if he was not permitted to bring certain claims which could technically have been brought in a prior case.

As a general matter, courts appear to be cautious in finding *Henderson v Henderson*-abuse on the consideration that "there is a danger of a party being shut out from bringing forward a genuine subject of litigation."[534] This is not to say, however, that the doctrine will never serve to bar the raising of matters which could have been raised before. For instance, in the recent case of *Challinor v Staffordshire CC*, the Court of Appeal struck out claims which could have been made as counterclaim in a prior case between the same parties, because (among other reasons) the defendant in the new case was entitled to believe that the prior proceedings "was the forum in which all of [the claimant's] claims arising out of [the same matter] would be resolved."[535]

(7) Collateral attack-abuse

Challenging a judgment by means other than appeal

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line since that principle relates to issues that might have been raised but were not and therefore depends not upon matters of decision but upon matters which might have been decided but were not.").

[530] *Ashton v Securum Finance Ltd (No1)* [2001] Ch 291, [2000] 3 WLR 1400, (2000) 97(27) LSG 38 [15] (Chadwick LJ) ("Whether it is an abuse of process to seek to litigate, in subsequent proceedings, issues which have been raised (but not adjudicated upon) in earlier proceedings which have themselves been struck out (whether on grounds of delay or on other grounds) is a question which I shall have to address later in this judgment; but that is a different question from the question whether a party should be allowed to raise, in subsequent proceedings, issues which have already been determined or 'laid to rest' (whether by adjudication, or by concession, or as the result of a decision to withdraw) in earlier proceedings."). But see *Good Challenger Navegante SA v Metalexportimport SA* (n 390) [93] (Clarke LJ) ("It is common ground that there are circumstances in which it is an abuse of process to seek to relitigate issues which have been determined or which could have been raised in previous proceedings. *The rule in Henderson v Henderson (1843) Hare 100 is an example of such abuse.*") (emphasis added).

[531] *Zurich Insurance Co Plc v Hayward* (n 459) [52] (Moore-Bick LJ).

[532] *Johnson* (Introduction n 12) 31 (Lord Bingham) ("It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive.").

[533] *Foster v Bon Groundwork Ltd* (n 394) [9] (Elias LJ).

[534] *Brisbane City Council v A-G for Queensland* [1979] AC 411, 425, [1978] 3 WLR 299, [1978] 3 All ER 30, (1978) 122 SJ 506 (Lord Wilberforce).

[535] [2011] EWCA Civ 90 [50] (Tomlinson LJ).

Collateral attack-abuse involves situations where a party uses a new case for an improper purpose: to obtain a decision on the accuracy in fact or law of a final judgment—a purpose the pursuit of which the law allows only by appeal.[536] "[C]ollateral attack", Lord Diplock said in *Saif Ali v Sydney Mitchell & Co*, involves an "attack on the correctness of a subsisting judgment of a court of trial upon a contested issue by re-trial of the same issue, either directly or indirectly in a court of co-ordinate jurisdiction."[537] The law excludes such challenges because "[u]nder the English system of administration of justice, the appropriate method of correcting a wrong decision of a court of justice reached after a contested hearing is by appeal against the judgment to a superior court."[538] The underlying reason for this restriction is, evidential difficulties aside,[539] that "to require a court of co-ordinate jurisdiction to try the question whether another court reached a wrong decision and, if so, to inquire into the causes of its doing so, is calculated to bring the administration of justice into disrepute."[540]

Contradiction of a judgment is not the same as a collateral attack; "[t]here is no general rule preventing a party inviting a court to arrive at a decision inconsistent with that arrived at in another case", as Lord Hobhouse in *Arthur JS Hall v Simons.*[541] Rather, His Lordship emphasised, "[t]he law of estoppel *per rem judicatam* (and issue estoppel) define when a party is entitled to do this."[542] Accordingly, it is not generally an abuse of process to seek to obtain a decision that deviates from a prior decision; such attempt may be barred as a matter of res judicata, by means of a plea of estoppel *per rem judicatam.*[543] A collateral attack occurs where the object of procedural conduct is to obtain a judgment on the accuracy of a judgment by means other than an appeal. Such a challenge of the accuracy of a prior decision can be an abuse. Then

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[536] See, generally, *Arthur JS Hall & Co v Simons* [1999] 3 WLR 873, [1999] 1 FLR 536, [1999] 2 FCR 193, [1999] Lloyd's Rep PN 47, [1999] PNLR 374, [1999] Fam Law 215, [1998] NPC 162, affd [2002] 1 AC 615, [2000] 3 WLR 543, [2000] 3 All ER 673, [2000] BLR 407, [2000] ECC 487, [2000] 2 FLR 545, [2000] 2 FCR 673, [2001] PNLR 6, [2000] Fam Law 806, [2000] EG 99 (CS), (2000) 97(32) LSG 38, (2000) 150 NLJ 1147, (2000) 144 SJLB 238, [2000] NPC 87 [38] (Lord Bingham) ("In considering whether, in any given case, later proceedings do constitute an abusive collateral challenge to an earlier subsisting judgment it is always necessary to consider with care (1) the nature and effect of the earlier judgment, (2) the nature and basis of the claim made in the later proceedings, and (3) any grounds relied on to justify the collateral challenge (if it is found to be such).").

[537] (n 480) 222.

[538] ibid.

[539] ibid 222. cf *Smith v Linskills* [1996] 1 WLR 763, 773, [1996] 2 All ER 353, (1996) 146 NLJ 209, (1996) 140 SJLB 49 (Sir Thomas Bingham MR) ("The virtual impossibility of fairly retrying at a later date the issue which was before the court on the earlier occasion. The present case exemplifies the problem. It is over 12 years since the crime was committed. Recollections (of the participants and the lawyers involved) must have faded. Witnesses have disappeared. Transcripts have been lost or destroyed. Hayes may, or may not, be available to testify. Evidence of events since the trial will be bound to intrude, as it already has. It is futile to suppose that the course of the Crown Court trial can be authentically re-created."). But see *Arthur JS Hall & Co v Simons* (Introduction n 51) 699 (Lord Hoffmann) ("…in principle, evidential difficulties have never been regarded as a reason for declining jurisdiction. The plaintiff has to prove that the lawyer's negligence caused him loss. The burden of proof is upon him. His case may have become so weak with the passage of time that it has to be struck out. But that is no reason for giving lawyers immunity from suit even in cases in which there is no difficulty about proving that their negligence caused loss to the plaintiff. This has to be done in cases which fall outside the immunity.").

[540] (n 480) 222.

[541] *Arthur JS Hall & Co v Simons* (Introduction n 51) 743 (Lord Hobhouse).

[542] ibid.

[543] See text to n 264ff.

again, this is not to say that the contradiction of a judgment never amounts to abuse of process; relitigation abuse is a case in point.[544]

Summary and conclusions

English preclusion law develops against the background of two maxims "*interest reipublicæ ut sit finis litium*" ('it is in the public interest that there should be finality of litigation') and "*nemo debet bis vexari pro eâdem causâ*" ('one should not be vexed twice for the same cause') that together express the principle of finality of litigation.

The elements of English preclusion law are fairly well-defined. First, a final judgment exhausts a court's jurisdiction (i.e. the court is '*functus officio*') meaning that the court cannot in the same case return to its judgment and alter or contradict its decision by reopening the matter determined. Second, in the context of a new case, as part of the res judicata doctrine, 'merger *in rem judicatam*' ('merger doctrine') precludes reassertion of a cause of action for which a judgment has been previously recovered, and 'estoppel *per rem judicatam*' ('estoppel doctrine') bars the contradiction of judicial findings regarding claims or issues. Finally, abuse of process doctrine—a single doctrine that precludes procedural conduct that is fundamentally unfair or otherwise brings the administration of justice into disrepute—serves to effect finality of litigation in circumstances where the res judicata doctrine lacks application; relevant instances of abuse include relitigation abuse, *Henderson v Henderson*-abuse, and collateral attack-abuse.

For purposes of the rule on finality of judgments, a judgment becomes 'final' after it is given, when it is perfected by sealing, if neither the rendering court nor any other court of co-ordinate jurisdiction can vary, re-open or set aside the judgment. A judgment can therefore be final even though it remains subject to an appeal to a court of higher jurisdiction; unless and until a judgment is set aside or varied it establishes with complete finality, or 'conclusively', the parties' respective legal positions. Apart from the court's inherent jurisdiction to vary and make clear its own decisions and to repair mistakes of a clerical nature or errors arising from any accidental slip or omission, exceptions to finality pursuant to the court's inherent *Barrell* jurisdiction[545] to recall and alter a final judgment or CPR rule 52.17 on reopening of final appeals are reserved for the most exceptional circumstances. The scope of review on appeal, and thus an appellate court's jurisdiction, is determined first and foremost by the parties' grounds of appeal, and the court's jurisdiction to re-open a final appeal is (very) strictly limited.

The res judicata doctrine through its constituent merger and estoppel doctrines reflects the mandate of a court under the Senior Courts Act 1981[546] "[to] exercise its jurisdiction in every cause or matter before it as to secure that, as far as possible, all matters in dispute between the parties are completely and finally determined, and all multiplicity of legal proceedings with respect to any of those matters is avoided".[547]

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[544] See text to n 518ff.
[545] *Barrell Enterprises* (n 72).
[546] c 54.
[547] s 49(2)(b).

As part of the res judicata doctrine, the merger doctrine implies that, while every cause of action implies a right of action ('*ubi jus ibi remedium*'), a final judgment that grants a claim 'merges' the underlying cause of action—the cause of action is judicially established as a certainty as part of the record of judgment ('*transit in rem judicatam*')—and, as long as the judgment stands, the law does not recognise another right of action and the merger doctrine bars reassertion of the same cause of action; in other words, a cause action for which judgment is recovered ceases to be actionable.

In nature, the doctrine is not part of public policy even though it serves both the public and private interest in finality of litigation; the doctrine remains subject to party disposition and may not be applied by a court acting of its own motion. Nevertheless, as a reflection of the need for finality of litigation, the doctrine, if adequately invoked, imposes an inflexible bar that does not appear to allow for exceptions based on special circumstances.

The real challenge in applying the doctrine is to establish whether a new claim is based on a cause of action for which a judgment was previously recovered (unlike the estoppel doctrine, the merger doctrine is not conditioned by a same parties (or privies) requirement). Three points of general guidance should guide the analysis. First, a 'cause of action' consists of the *facts* a claimant must of necessity plead and, if denied, prove to support their right to recover a judgment granting a remedy, which means that the label a claimant uses is irrelevant for the purpose of establishing the identity of the cause of action underlying succeeding claims; the court looks at the material facts of each claim. Second, each violation of a distinct right implies a separate cause of action. Finally, different legal bases for succeeding claims do not exclude the identity of the underlying cause of action if both the material facts and the right in question are the same.

The estoppel doctrine also forms part of the traditional res judicata doctrine. The doctrine signifies that, though no general prohibition exists against attempting to obtain a judgment that conflicts with an existing judgment, a party may be barred—'estopped *per rem judicatam*'—from contradicting judicial findings regarding a claim or issue contained in a final and conclusive judgment in new proceedings involving fundamentally the same claim ('cause of action estoppel') or the same issue ('issue estoppel').

In nature, the doctrine is, like merger doctrine, not part of English public policy; the doctrine remains subject to party disposition and may not be applied by a court acting of its own motion. Whereas a cause of action estoppel imposes an inflexible bar, an issue estoppel allows for exceptions based on special circumstances.

Defining the proper scope of an estoppel complicates a correct application of the estoppel doctrine. First, an estoppel applies only mutually—between the original parties (or their privies)—and does not affect strangers. Second, a cause of action estoppel is restricted to findings on the existence (or non-existence) of the cause of action, whereas an issue estoppel extends only to findings regarding the issue. Apart from these restrictions, estoppels extend to any point or evidence that parties might have brought forward in the prior case, notwithstanding that from negligence, inadvertence, or even accident, the parties omitted part of their case, and the estoppel bars both assertions of fact (including denials) and arguments on the legal quality of facts, insofar as such pleadings contradict the prior findings regarding a claim or issue.

The difficulty in applying the estoppel doctrine lies in the concept of 'cause of action' for cause of action estoppel, and the concept of 'issue' for issue estoppel, because the doctrine only applies if the new case involves the same cause of action or the same issue. On the concept of 'cause of action', the same three points hold true that guide the application of merger doctrine. In short, firstly, a 'cause of action' consists of the *facts* a claimant must of necessity plead and, if denied, prove to support their right to recover a judgment granting a remedy; the label a claimant attaches to facts is therefore irrelevant for establishing the identity of causes of action. Second, each violation of a distinct right implies a separate cause of action. Finally, different legal bases for succeeding claims do not exclude the identity of the underlying cause of action if both the material facts and the right in question are the same.

An 'issue' for purposes of issue estoppel includes any question on the legal consequences of particular facts to which an answer is necessary for the court's final decision. The law differentiates between questions that qualify as 'issue' and those that do not; by contrast, the distinction that is sometimes made between 'necessary issues' and 'collateral issues' confuses the true meaning of the concept, since a finding on a question that qualifies as 'issue' is inherently necessary to the court's final decision. Finally, while resolving an an issue—a question on the legal consequences of certain facts—may involve a dispute as to the material facts, an issue estoppel only bars the parties from contesting findings of material fact (as opposed to collateral or even relevant) if those facts are subsequently disputed in relation to the very same issue.

As a final element of English preclusion law, the abuse of process doctrine bars 'abuse of process': procedural conduct that, though technically consistent with procedural law, is in effect manifestly unfair to a party to litigation, or otherwise brings the administration of justice into disrepute. Establishing abuse involves a broad, merits-based judgment that balances the public and private interests involved in light of all the circumstances.[548]

Unlike the res judicata doctrine, the abuse of process doctrine is of public policy; a court is therefore required if necessary to apply the doctrine of its own motion. The doctrine protects the public and private interest in the sound administration of justice. Specifically, as far as concerns the three identified forms of abuse—relitigation abuse, *Henderson v Henderson*-abuse, and collateral attack-abuse—the idea is that it may be manifestly unfair or otherwise bring the administration of justice into disrepute to allow the relitigation of issues even between different parties ('relitigation abuse'); to permit the litigation of matters which could and should have been litigated before ('*Henderson v Henderson*-abuse'); or to condone a challenge of court decisions outside the framework of an appeal ('collateral attack-abuse').

[548] *Johnson* (Introduction n 12) 31.

Chapter 2. The Netherlands

Introduction

Analysis of the problem of finality of litigation in Dutch law has been narrow in scope, and focused on the effect of res judicata (‘*gezag van gewijsde’*),[1] which is codified in Art 236 of the Civil Procedure Code[2] (‘Rv’).[3]

Historically, the res judicata doctrine presented most theoretical and practical difficulties; to illustrate, one commentary complains: “Few existing doctrines have been treated so unsystematically, and are so challenging when it comes to devising clear lines of reasoning as the res judicata doctrine.”[4] By the time of this statement in an influential legal commentary—1953—at least three authors had made an attempt

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[1] See Anne Anema and PJ Verdam (eds), *Mr C Asser’s handleiding tot de beoefening van het Nederlandsch burgerlijk recht: vijfde deel—van bewijs* (Tjeenk Willink, Zwolle 1953) 293-94 (the concept derives from the latin ‘*auctoritas rei iudicatae*’ (‘the authority or effect of the judgment or of the matter adjudicated upon’).

[2] *Wetboek van Burgerlijke Rechtsvordering* (entered into force 1 October 1838) Stb 1828, 33 (as amended).

[3] See AC van Schaick, *Asser-serie procesrecht, 2: eerste aanleg* (Kluwer, Deventer 2011) [101]-[158]; *Burgelijke rechtsvordering: de tekst van het Wetboek van Burgerlijke Rechtsvordering voorzien van commentaar* (4th ed Kluwer, Deventer 2009) Artikel 236; *Groene Serie: burgerlijke rechtsvordering* (Kluwer, Deventer 1953-) Artikel 236; E Gras, *Kracht en gezag van gewijsde: de rechtskracht van einduitspraken van de burgerlijke rechter* (Gouda Quint, Arnhem 1994); YEM Beukers, *Eenmaal andermaal?: beschouwingen over gezag van gewijsde en ne bis in idem in het burgerlijk procesrecht* (WEJ Tjeenk Willink, Zwolle 1994); RP Cleveringa (ed), *Mr. W. van Rossem’s verklaring van het Nederlands wetboek van burgerlijke rechtsvordering* (4th ed Tjeenk Willink, Zwolle 1972) 303-306; WH Ariëns and LEH Rutten (eds), *Mr. C.W. Star Busmann’s hoofdstukken van burgerlijke rechtsvordering* (3rd ed Bohn, Haarlem 1972) [391]-[393]; DJ Veegens, *Het gezag van gewijsde* (Tjeenk Willink, Zwolle 1972); Anema/Verdam (n 1); JLA Visser, *Procesgelding van civiele uitspraken: gezag van gewijsde* (PhD thesis, University of Leiden 1952); Klaus Wiersma, *Het rechtsmiddel verzet van derden* (PhD thesis, University of Leiden 1952) 130ff; J Eggens (ed), *Verklaring van het Burgerlijk Wetboek door Mr. N.F.K. Land: zesde deel, Boek IV, Titel I-VI* (2nd ed Bohn, Haarlem 1933) 211ff; LHC Kuhn, *Het gezag van gewijsde in burgerlijke zaken* (De Bussy, Amsterdam 1905); and Halbe Binnerts, *De exceptie van gewijsde* (Gebroeders van der Hoek, Leiden 1867).

See further AS Rueb and E Gras (eds), *Stein/Rueb: Compendium van het burgerlijk procesrecht* (19th ed Kluwer, Deventer 2013); ALH Ernes and AW Jongbloed, *Burgerlijk procesrecht praktisch belicht* (5th ed Kluwer, Deventer 2011); HJ Snijders, CJM Klaassen and GJ Meijer, *Nederlands burgerlijk procesrecht* (5th ed Kluwer, Deventer 2011); RJB Boonekamp, AC van Schaick and EM Wesseling-van Gent, *Wet en rechtspraak: Burgerlijke rechtsvordering : (incl. EEXverordening)* (2nd ed Kluwer, Deventer 2009); VCA Lindijer, *De goede procesorde: een onderzoek naar de betekenis van de goede procesorde als een normatief begrip in het burgerlijk procesrecht* (Kluwer, Deventer 2008); ThB ten Kate and MM Korsten-Krijnen, *Herroeping, verbetering en aanvulling van burgerrechterlijke uitspraken (art. 382-393, 31 en 32 Rv)* (Kluwer, Deventer 2005); K Teuben, *Rechtersregelingen in het burgerlijk (proces)recht* (Kluwer, Deventer 2004); AIM van Mierlo and FM Bart, *Parlementaire geschiedenis: herziening van het burgerlijk procesrecht voor burgerlijke zaken, in het bijzonder de wijze van procederen in eerste aanleg: wetsvoorstel 26 855 en gedeelten uit de wetsvoorstellen 27 748 (Uitvoeringswet EG-betekeningsverordening), 27 824 (Aanpassingswetgeving): parlementaire stukken systematisch gerangschikt en van noten voorzien* (Kluwer, Deventer 2002); and GR Rutgers, RJC Flach and GJ Boon, *Parlementaire geschiedenis van de nieuwe regeling van het bewijsrecht in burgerlijke zaken: parlementaire stukken systematisch gerangschikt onder red. van G.R. Rutgers en r J.C. Flach door G.J. Boon* (Kluwer, Deventer 1988); RTHPLA van Boneval Faure, *Het Nederlandsche burgerlijk procesrecht* (4th ed Brill, Leiden 1901).

[4] Anema/Verdam (n 1) 311.

at a more or less systematic analysis of the doctrine: Binnerts in 1867,[5] followed by Kuhn in 1905,[6] and then Visser in 1952[7].[8] None of these authors, however, set out to answer the more general question of how the problem of finality of litigation is addressed in Dutch law.

Today, the same maxim—"*lites finiri oportet*" ('there should be finality of litigation')—which underpins the res judicata doctrine also explains the development of various other rules and doctrines which jointly comprise Dutch preclusion law. For instance, Asser recently observed that "[i]f we appreciate that the principle of *lites finiri oportet* also underlies the res judicata doctrine, we may conclude that … we are concerned here with two implementations of the same principle."[9] Asser made this observation in his study of the judge-made doctrine that bars a court in the remainder of a case from redetermining an issue after it has been finally and unconditionally determined ('*leer van de bindende eindbeslissing*').[10]

The remainder of this chapter shows that the principle of finality of litigation, or *lites finiri oportet*, is implemented in Dutch law through by a complex system of rules and doctrines that includes but is certainly not restricted to the res judicata doctrine in Art 236 Rv.

(1) Lites finiri oportet

A single maxim "*lites finiri oportet*" ('there should be an end to litigation') expresses the principle of finality of litigation; the Supreme Court expressed it thus: "[E]very dispute must have an end ('*lites finiri oportet*')".[11] Despite its Latin formulation, this widely used[12] maxim was never formulated as pointedly in any known Roman text;[13]

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[5] Binnerts (n 3).
[6] Kuhn (n 3).
[7] Visser (n 3).
[8] Two later monographs are by Gras (n 3) and Beukers (n 3).
[9] WDH Asser, 'De grondslag van de binding van de rechter aan zijn eigen eindbeslissing' in Th de Boer et al (eds), *Strikwerda's conclusies* (Kluwer, Deventer 2011) 17, 21.
[10] See text to n 76ff.
[11] HR 7 June 1991, NJ 1991, 577 [2] ("…dat elk geding eens ten einde moet zijn ('*lites finiri oportet*')").
[12] The adage is cited particularly by Advocates General in opinions to the Supreme Court. See, eg, AG Wesseling-van Gent in HR 24 December 2010, ECLI:NL:HR:2010:BO2882, NJ 2011, 16, RvdW 2011, 38, NJB 2011, 111 [2.12] (*CHIP(S)HOL III BV/NV Luchthaven Schiphol (No2)*) ("The rationale for *grenzen van de rechtsstrijd na cassatie* and *leer van de bindende eindbeslissing* is according to Asser/Veegens the same: the principle '*lites finiri oportet*' and the requirements of procedural efficiency."). See further AG Huydecoper in HR 4 December 2009, ECLI:NL:HR:2009:BJ7834, NJ 2011, 131 mnt JBM Vranken, RvdW 2009, 1406, JBPr 2010, 6 mnt RPJL Tjittes, NJB 2009, 2258, JOR 2010, 175 [15] (*ASB Greenworld BV/Stichting Nederlands Arbitrage Instituut*) ("The law (legislator) offers means of recourse against judgments. These means are exclusive in nature. … A variation of this argument: the various means of recourse offered by law are aimed at producing a final and conclusive finding on the matter in question. '*Lites finiri oportet*'…."); AG Timmerman in HR 4 February 2005, ECLI:NL:HR:2005:AR4483, NJ 2005, 362 mnt PvS, RvdW 2005, 24, JOR 2005, 106 mnt A van Hees [2.14] (*United Pan-Europe Communications NV/Europe Movieco Partners Limited*) ("Both *gezag van gewijsde* and *gesloten stelsel van rechtsmiddelen* echo the adage '*lites finiri oportet*': litigation should end at some point. If a court has considered and determined a dispute, litigation should conclude. The same matter cannot be litigated again."); and AG Asser in HR 19 November 1993, NJ 1994, 175 [2.18] (*Van Raalte/SH Beheer BV*) ("Pleading *gezag van gewijsde* of such finding implies that in a subsequent case the legal relationship cannot be disputed again. Litigation should end at some point, *lites finiri oportet*.").
[13] JJ Brinkhof, 'Lites finiri oportet' in J Spruit and M van de Vrugt (eds), *Brocardica in honorem G.C.J.J. van den Bergh: 22 studies over oude rechtsspreuken* (Kluwer, Deventer 1987) 15-6 ("The

neither does the *Corpus Juris Canonici* state the maxim word for word, though in style it reminds of early Canon law, which also recognised the need for finality (and it still does).[14] Canon law was heavily influenced by Roman law, so it is suggested that regardless of the uncertainty as to its immediate source, the maxim was in all likelyhood inspired by Roman law, which shaped the law in the Netherlands from the Middle Ages right through to the 17th and 18th centuries.[15]

By way of comparison, a similar maxim, of slightly different wording, made its way into early English law, first as "*expedit reipublicæ ut sit finis litium*" from the late 14th through to the late 18th century and from the 17th century until today in the form of the expression "*interest reipublicæ ut sit finis litium*".[16] This formulation specifically refers to the *public* interest in finality, while the *private* interest in not being sued twice for the same cause was recognised in English law from as early as the 18th century through the adage "*nemo debet bis vexari pro eâdem causâ*".[17]

The Dutch maxim *lites finiri oportet* does not explicate the public and private interest in finality of litigation; in fact, the maxim "*ne bis in idem*", which forms part of criminal procedure[18] and resembles the English maxim "*nemo debet bis vexari pro eâdem causâ*", is not part of civil procedure.[19] Nevertheless, a significant part of preclusion law clearly does serve first and foremost to protect the private interest in finality of litigation, as demonstrated, for instance, by the fact that the res judicata doctrine is subject to party disposition and a court is barred from applying the doctrine of its own motion[20]. Other elements of preclusion law except for the abuse of process doctrine,[21] such as the *leer van de bindende eindbeslissing,*[22] implicate primarily the *public* interest in finality of litigation, and more generally a sound

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association [with Roman law] is of course correct, because in these [Roman] texts the two aspects of the principle are uncovered, namely: that proceedings must end and that matters once determined should not lead to new litigation. The first aspect is to be found in a text of Justinian from the year 530: Codex 3.1.16. The *recursare* of judges—we would say *wraken*—is not unlimited *ne lites in infinitum extendantur*. The two other texts: Codex 7.52.2 from the year 213 of emperor Caracalla and Codex 2.4.10 of emperor Philippus Arabs, show the remaining aspect. In short, *nullus (etenim) erit litium finis* if a judgment or compromise could be challenged too easily."). cf Piet Taelman, *Het gezag van het rechterlijk gewijsde- een begrippenstudie* (Kluwer, Diegem 2001) 16 with further references.

[14] See GP Lancelotti, *Corpus Juris Canonici: Emendatum et Notis Illustratum* (König & filiorum, Basel 1665). cf Cann 1641-1644 of the 1983 Code of Canon Law, in particular Can. 1642§2 ("[an irreversible judgment ('*res iudicata*')] "establishes the rights between the parties and permits an action for execution and an exception of res iudicata which the judge can also declare ex officio *in order to prevent a new introduction of the same case*") (emphasis added).

[15] For a fascinating discussion of the situation in the author's home province, Friesland, see CJH Jansen, JHA Lokin and F Brandsma, *Roman-Frisian law of the 17th and 18th century* (Duncker & Humblot, Berlin 2003). See, for an earlier account, Simon van Leeuwen, *Commentaries on the Roman-Dutch Law* (Butterworth & Son, London 1820) 5ff.

[16] See Chapter 1, text to n 19ff.

[17] ibid.

[18] See, generally, WF van Hattum, *Non bis in idem: de ontwikkeling van een beginsel* (Wolf Legal Publishers, Nijmegen 2012).

[19] See text to n 160.

[20] See text to n 405ff.

[21] See text to n 576ff.

[22] See text to n 76ff.

administration of justice (*goede procesorde*),[23] as signified by the fact that a court must if necessary apply these doctrines of its own motion.[24]

(2) Aspects of preclusion

Lites finiri oportet underlies every aspect of Dutch preclusion law; as Snijders points out, "though uncodified, the maxim underlies the rules and instruments available to courts to prevent repetitive litigation of the same matter over and over again".[25] The best-known exponent of Dutch preclusion law is no doubt Art 236 Rv; the provision that codifies the Dutch res judicata doctrine.[26]

Article 236 Rv attributes judgments res judicata effect ('*gezag van gewijsde*') meaning that the court's findings regarding the claim or issue have conclusive effect ('*bindende kracht*') in another case between the same parties (or their privies).[27] However, while the provision remains the chief agent of finality of litigation in Dutch law, the provision is supplemented by a variety of other rules and doctrines which are equally associated with the maxim of *lites finiri oportet*; Snijders, for example, identifies the following four: "[1] '*ne bis in idem*' …, [2] *gezag van gewijsde* …, [3] the sound administration of justice …, and [4] the prohibition of abuse of process …."[28] However, *ne bis in idem* is no part of Dutch civil procedure,[29] and the sound administration is no rule of preclusion, but a selfstanding principle. Snijders author rightly notes, however, that Art 236 Rv is part only of the story entitled 'Dutch preclusion law'.

Six key characteristics (or rather limitations) of the res judicata effect under Art 236 Rv explain the development of Dutch preclusion law. First, res judicata effect can be attributed only in another case, and does nothing to achieve finality of litigation within the same case.[30] But relitigation within the same case is not

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[23] See text to n 89ff. cf text to n 121ff (*grievenstelsel*), text to n 148ff (*grenzen van de rechtsstrijd na cassatie*), text to n 170ff (*gebrek aan belang*), and text to n 262ff (*gesloten stelsel van rechtsmiddelen*).

[24] HR 13 November 1998, NJ 1999, 173 [3.2] (*Postbank NV/Huijbregts*) ("If a court deems a certain procedural act contrary to the sound administration of justice, it may decide so of its own motion.") ("Wanneer de rechter van oordeel is dat een bepaalde proceshandeling in strijd is met hetgeen een goede procesorde eist, is hij bevoegd dit oordeel ook ambtshalve te geven."). The Supreme Court expressly recognised (in a different context) "the public interest which mandates a moderate recourse to litigation". HR 15 June 2007, ECLI:NL:HR:2007:BA1522, NJ 2008, 153 mnt HJ Snijders, RvdW 2007, 583 [3.4] ("…het algemene belang dat terughoudendheid wordt betracht met een beroep op de rechter…"). See further HR 14 April 1989, NJ 1989, 839 mnt JBM Vranken (the fact that a party could in other proceedings still make their claim (for the first time), while the opponent had not objected to the filing of the claim, offered an insufficient basis for striking out the claim for violating the principle of a sound administration).

[25] HJ Snijders, 'Note on HR 8 October 1993' (1994) NJ 1994, 508 [2] ("Dit adagium is niet als zodanig neergelegd in enige procesregel. Het ligt wel (mede) ten grondslag aan de regels en instrumenten die de rechter ter beschikking heeft om te voorkomen dat er in een zaak telkens opnieuw geprocedeerd wordt."). cf Veegens (n 3) 18. See further Taelman (n 13) 16.

[26] See text to n 318ff.

[27] On the application of Art 236 Rv see text to n 395ff.

[28] Snijders (n 25) [2] ("Dit adagium is niet als zodanig neergelegd in enige procesregel. Het ligt wel (mede) ten grondslag aan de regels en instrumenten die de rechter ter beschikking heeft om te voorkomen dat er in een zaak telkens opnieuw geprocedeerd wordt. Als zodanig dienen zich vier mogelijkheden aan …: 'ne bis in idem' (nr. 3), het gezag van gewijsde (nr. 4), de goede procesorde (nr. 5 e.v.) en het verbod van misbruik van procesrecht (nr. 6 e.v.)."). cf Veegens (n 3) 18. See further Taelman (n 13) 16.

[29] See text to n 160ff.

[30] See text to n 480ff.

unrestricted and, in the public interest in a sound administration of justice, the law imposes finality;[31] three scenarios arise, which are subject to three closely related doctrines: first, a party's attempt in the course of proceedings to reiterate an issue that has already been finally and unconditionally determined is precluded by the '*leer van de bindende eindbeslissing*',[32] which imposes finality within the same instance; second, in the course of an appeal, the '*grievenstelsel*'[33] bars a party from contradicting judicial findings it failed to challenge in its grounds of appeal; and, finally, the '*grenzen van de rechtstrijd na cassatie*'[34] bars the contradiction of findings of the Supreme Court after a successful cassation appeal, when the case is referred back to a lower court for further decision.

Second, res judicata effect precludes the successful *contradiction* of judicial findings, but does not bar the *reassertion* of a cause of action for which the claimant already recovered judgment. The Dutch res judicata doctrine therefore does not include a doctrine of merger *in rem judicatam.* This does not mean, however, that Dutch law tolerates unlimited reassertion of a cause of action; to the contrary, Art 3:303 of the Civil Code[35] ('BW') imposes finality of litigation in the public interest in a sound administration of justice by barring *reassertion* in each case where the claimant lacks an interest sufficient to justify a right of action ('*gebrek aan belang*').[36] Obviously, the recovery of judgment is likely to affect one's interest in suing again.

Third, res judicata effect attaches only to judgments which have acquired the status of res judicata ('*kracht van gewijsde*')—judgments that cannot or can no longer be challenged through ordinary means of recourse.[37] Nevertheless, pursuant to the principle of a sound administration of justice, a court that is confronted with pleadings that contradict an existing judgment that lacks the status of res judicata can stay its proceedings until the judgment acquires that status or is successfully challenged.[38] Moreover, finality is imposed to some extent by the '*gesloten stelsel van rechtsmiddelen*',[39] a doctrine that bars collateral attacks on judgments, as well as by the '*afstemmingsregel*',[40] a doctrine that requires a court in interim proceedings to align its judgment with a judgment given in the main proceedings regardless of the status of that judgment.

Fourth, judgments given in proceedings for an interim measure ('*kort geding vonnis*') can never be attributed res judicata effect.[41] An judgment on claim for an interim measure acquires the status of res judicata, but cannot trigger application of Art 236 Rv. Nonetheless, the doctrine of abuse of process ('*misbruik van procesrecht*') may exceptionally bar the repetition of the same claim for an interim measure, for instance, because the claimant failed to appeal the prior interim

[31] See text to n 76ff (*leer van de bindende eindbeslissing*), text to n 110ff (*grievenstelsel*), text to n 143ff (*grenzen aan de rechtsstrijd na cassatie*).
[32] See text to n 76ff.
[33] See text to n 110ff.
[34] See text to n 143ff.
[35] *Burgerlijk Wetboek* (entered into force 1 January 1992) Stb 1980, 432 (as amended).
[36] See text to n 160ff.
[37] See text to n 462ff.
[38] See Veegens (n 3) 32.
[39] See text to n 224ff.
[40] See text to n 275ff.
[41] See text to n 538ff.

judgment and allowed it to acquire the status of res judicata. [42] The abuse of process doctrine has not (yet) developed to the same extent as in English law. But in the context of repeated claims for an interim measure, the Supreme Court has indicated that a court may strike out as an abuse of process statements of case that were kept back by a party in the first interim proceedings for no reasonable cause notwithstanding the reasonable interest of the opponent in their immediate judicial consideration. More generally, the doctrine may serve to bar a claim that reasserts a cause of action for another purpose than for which the law recognises a right of action, for instance, where the claimant's aim is to damage or harass the defendant.[43]

Fifth and finally, res judicata effect only attaches where a judgment has determined a claim or issue, but not where a matter could and should have been raised and determined in a prior case, but was not. Nevertheless, certainly in theory (and with some careful signs in practice), this conduct can amount to an abuse of process, in particular where the party kept back the matter with the aim of harassing the other party by raising it in new proceedings, or if the exercise of a right to raise the matter in a later case, despite its legitimate aim, disproportionally[44] affects the interest of the opponent in the proceedings (e.g. the matters were previously kept back without a reasonable cause and notwithstanding the reasonable interest of the opponent in their immediate determination).

Against this background, the following elements of Dutch preclusion law can be distinguished:

(1) *Leer van de bindende eindbeslissing* (finality within the same instance);[45]
(2) *Grievenstelsel* (finality on appeal);[46]
(3) *Grenzen aan de rechtsstrijd na cassatie* (finality after cassation);[47]
(4) *Gebrek aan belang* (reassertion of a cause of action);[48]
(5) *Gesloten stelsel van rechtsmiddelen* (collateral attacks on judgments);[49]
(6) *Afstemmingsregel* (finality in interim proceedings after judgment in main proceedings)[50]
(7) *Gezag van gewijsde* (res judicata effect; finality in succeeding cases);[51] and
(8) *Misbruik van (proces)recht* (abuse of rights including abuse of process) [52].

The elements of Dutch preclusion law are analysed in this order. This order reflects the sequence in which each rule or doctrine tends in practice to become relevant. However, this sequence does not imply that a doctrine cannot be relevant at a later stage; for instance, the *leer van de bindende eindbeslissing* also applies on appeal if the court of appeal makes a final and unconditional finding. Moreover, Art 3:303 BW (*gebrek aan belang*), the doctrine of *gesloten stelsel van rechtsmiddelen*, Art 236 Rv (*gezag van gewijsde*) and Art 3:13 (*misbruik van (process)recht*) all preclude

[42] See text to n 591ff.
[43] ibid.
[44] Article 3:13(2) BW.
[45] See text to n 76ff.
[46] See text to n 110ff.
[47] See text to n 143ff.
[48] See text to n 160ff.
[49] See text to n 224ff.
[50] See text to n 275ff.
[51] See text to n 318ff.
[52] See text to n 568ff.

different things and thus do not arise in any particular chronology. Consequently, the order in which the elements of Dutch preclusion law are presented is not fortuitous, even if it is not in all respects determinative.

Nevertheless, res judicata effect is fourth in line, because this effect becomes relevant only in the context of another case, whereas the three preceeding doctrines apply within the confines of the same case. In turn, res judicata effect is analysed after Art 3:303 BW (*gebrek aan belang*) which may bar reassertion of a cause of action after the recovery of judgment, *gesloten stelsel van rechtsmiddelen* on collateral attacks on judgments, and the *afstemmingsregel* on finality in interim proceedings after the rendition of judgment in main proceedings, because, unlike the other doctrines, res judicata effect requires that a judgment has acquired res judicata status[53].

(i) Advances in doctrine

Like the three studies referred to at the outset of this chapter—Binnerts,[54] Kuhn,[55] and Visser[56]—most modern analysis in the area is focused on the res judicata doctrine.[57] The question how Dutch law addresses the problem of finality of litigation has not been the subject of independent analysis. Broadly the same applies to Veegens' influential analysis of the res judicata doctrine on the eve of its recodification in Art 236 Rv on 1 April 1988 as part of the law of procedure (as opposed to the law of evidence);[58] as the title of his treatise suggests, the primary focus of analysis was on the res judicata doctrine.[59] Nevertheless, Veegens rightly acknowledged "the legal vacuum" that is caused by the doctrine's limited scope, which thus "calls for supplementing measures".[60] The author referred specifically to the prohibition of collateral attacks on judgments ('*gesloten stelsel van rechtsmiddelen*')[61] and the lingering controversy over the role (if any) of *ne bis in idem*[62].

The most recent chapter in the analysis of Dutch preclusion law comprises the publication in 1994 of the dissertations of Gras[63] and Beukers[64]. By the time of publication, the authors had already engaged in polemic exchanges on the precise nature of '*gezag van gewijsde*',[65] which Gras equated to a judgment's force of law,[66] while Beukers contended that a judgment's force of law is merely a precondition for

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[53] See text to n 462ff.
[54] Binnerts (n 3).
[55] Kuhn (n 3).
[56] Visser (n 3).
[57] See, eg, Cleveringa (n 3) 303-306.
[58] See text to n 351ff.
[59] Veegens (n 3). This was in fact a revised and shortened version of the work of Anema/Verdam (n 1) 291ff.
[60] Veegens (n 3) 30 (emphasis added).
[61] See text to n 224ff..
[62] Veegens (n 3) 30-32.
[63] (n 3).
[64] (n 3).
[65] YEM Beukers, 'Rechtskracht en gezag van gewijsde' (1991) 5993 WPNR 105; E Gras, 'Reactie naar aanleiding van mw. Mr. Y.E.M. Beukers, WPNR (1991) 5993' (1991) 6014 WPNR 515; and YEM Beukers, 'Naschrift' (1991) 6014 WPNR 518; E Gras, 'Reactie naar aanleiding van mw. Mr. Y.E.M. Beukers, WPNR (1991) 6014' (1992) 6038 WPNR 159.
[66] Gras (n 3) [8.2.3.1] ("Gezag van gewijsde … is één van de vormen van rechtskracht van de uitspraak ….").

the attribution of *gezag van gewijsde,*[67] which she characterised as a procedural effect prohibiting a court from rendering a conflicting judgment[68]. As noted elsewhere, Gras fundamentally misconstrued the nature of '*gezag van gewijsde*',[69] by confusing a judgment's force of law ('*rechtskracht*') and its attributed conclusive effect ('*bindende kracht*'). Moreover, the author misrepresented the significance of the doctrine of *gesloten stelsel van rechtsmiddelen* by suggesting that this doctrine does more than what it actually does—bar collateral attacks on judgments.[70]

By contrast, Beukers' analysis signalled a welcome development in the analysis of this developing area of law; she analysed '*gezag van gewijsde*' in a broader legal context, in its relation with other rules and doctrines that equally implement finality of litigation. Beukers attached particular significance to the distinction of *gezag van gewijsde* and *gesloten stelsel van rechtsmiddelen,*[71] and further distinguished '*procesgelding*'—a doctrine that imposes finality within the same case, which essentially comprises the doctrines introduced above as *leer van de bindende eindbeslissing, grievenstelsel* and *grenzen aan de rechtstrijd na cassatie*.[72] Finally, she delineated situations within the scope of *gezag van gewijsde*, on the one hand, and on the other hand situations covered by the rules and doctrines on *gebrek aan belang,*[73] *strijd met de goede procesorde,*[74] or *misbruik van procesrecht*[75]. Nevertheless, she still considered these various rules and doctrines for the limited purpose of clarifying the meaning of '*gezag van gewijsde*' by contrasting what is presently Art 236 Rv with other elements of Dutch preclusion law, not for the purpose of clarifying how Dutch law implements finality of litigation.

2.1 Leer van de bindende eindbeslissing

Finality within the same instance

After a court has made a final finding,[76] finality is imposed within the same case by the (judge made) doctrine entitled '*leer van de bindende eindbeslissing*',[77] which bars

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[67] YEM Beukers, 'Rechtskracht en gezag van gewijsde' (n 65) 106.
[68] ibid.
[69] See text to n 365ff.
[70] Later the author made a further attempt at clarifying his thoughts on the subject. See Peter Fitger et al, 'Case Note/Annotation/Entscheidungsanmerkung: Res judicata' (1998) 6 European Review of Private Law 105, 124-129.
[71] Beukers (n 3) 13ff. cf Veegens (n 3) 30.
[72] Beukers (n 3) 26ff. The term '*procesgelding*' ('force during proceedings') is avoided for it suggests that the rules associated with this term are concerned with a judgment's force of law, while actually the rules concern the conclusive effect attributed to judicial findings.
[73] Beukers (n 3) 112.
[74] ibid 112 and (in respect of summary proceedings) 116.
[75] ibid 116.
[76] On finality on appeal within the same case see text to n 110ff. Regarding finality within the same case after appeal in cassation see n 143ff. In respect of finalty in other proceedings, see, in particular, text to n 318ff.
[77] HR 4 May 1984, NJ 1985, 3 mnt WH Heemskerk (*Van der Meer/Siller*) [3.3] ("…regel dat de rechter die in een tussenvonnis een of meer geschilpunten heeft beslist, in het verdere verloop van de procedure op die beslissingen niet mag terugkomen…."). cf HR 16 January 2004, ECLI:NL:HR:2004:AM2358, NJ 2004, 318, JBPr 2004, 33 mnt HW Wiersma. See also HR 8 July 1981, NJ 1983, 229 mnt WH Heemskerk; HR 16 October 1981, NJ 1982, 123; and HR 20 November 1982, NJ 1982, 469 mnt CJH Brunner.

a court from revisiting those findings, usually contained in an interlocutory judgment, later on in the same case.[78]

A 'final finding',[79] as opposed to a 'provisional finding',[80] is an unequivocal and unconditional[81] finding on an issue[82]. Such a finding can be contained in an 'interlocutory judgment',[83] which concept refers to any judgment that is not a final judgment.[84] In turn, a 'final judgment' is a court's decision that determines (part of) the claim and is subject to immediate appeal. A final judgment that cannot or is no longer open to ordinary means of recourse, has the status of res judicata,[85] whereas an interlocutory judgment can only be appealed together with the final judgment, unless the rendering court gives leave to appeal.[86]

Recently, the Dutch Supreme Court considerably relaxed the strictness of the doctrine with a view to preventing situations where the doctrine forces a court to render a final judgment on what it knows to be an erroneous factual or legal basis.[87] As a result, the doctrine is now also known as the "*verruimde*" (relaxed) *leer van de bindende eindbeslissing*.[88]

(1) Nature

The doctrine in nature goes to a court's *jurisdiction*; after a court finally determines an issue or (part of) a claim, the issue or claim is for that case determined and the court's jurisdiction is exhausted.

(2) Rationale

The aim of the doctrine is to ensure a sound administration of justice,[89] which requires finality of litigation to be imposed also within the course of a single case with a view to streamlining litigation, and avoiding undesirable delays. The Dutch Supreme Court in *Van der Meer/Siller and Jamart BV* explained the doctrine's rationale as follows:

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[78] The doctrine has its roots in the ninetheenth century. See HR 22 October 1886, W 5344; and HR 20 June 1930, NJ 1930, 1217 mnt PS (*Philips/Tasseron*). See with further references, Asser (n 9) 17-33. See also PA Fruytier, 'De leer van de bindende eindbeslissing in dezelfde instantie, in hoger beroep en na verwijzing na HR 25 april 2008, NJ 2008, 553 (De Vries/Gemeente Voorst)' (2009) Tijdschrift voor Civiele Rechtspleging 93ff; and HJ Snijders, 'Note on HR 25 April 2008' (2008) NJ 2008, 553.
[79] '*Eindbeslissing*'.
[80] '*Tussenbeslissing*'.
[81] See tekst to n 91.
[82] "*Geschilpunt*".
[83] '*Tussenvonnis*'. See Art 337 Rv ("1. Interim judgments that grant of deny a provisional measure can be appealed before the final judgment is rendered. 2. Other interlocutory judgments can only be appealed together with the final judgment, unless the court decides otherwise.") ("1. Van vonnissen waarbij een voorlopige voorziening wordt getroffen of geweigerd, kan hoger beroep worden ingesteld voordat het eindvonnis is gewezen. 2. Van andere tussenvonnissen kan hoger beroep slechts tegelijk met dat van het eindvonnis worden ingesteld, tenzij de rechter anders heeft bepaald.").
[84] "*Eindvonnis*".
[85] "*Kracht van gewijsde*". See text to n 462ff.
[86] Article 337(2) Rv.
[87] See text to n 104ff.
[88] AG Wesseling-van Gent in HR 24 December 2010 (n 12) [2.12] (*CHIP(S)HOL III BV/NV Luchthaven Schiphol (No2)*).
[89] "*Goede procesorde*".

> The doctrine … fulfils a positive function from the perspective of a sound administration of justice, which is aimed at limiting the scope of litigation. Namely, the issues in question are deemed decided for purposes of the pending case, which implies they can only be contested by means of an appeal provided by law and that there is no place for their relitigation in the ongoing case. A departure from this rule would encourage attempts at the relitigation of those issues in the that case. Considering the potential delays of proceedings, this is undesirable.[90]

The Dutch Supreme Court's decision in *Van der Meer/Siller and Jamart BV* also illustrates the basic operation of the doctrine.

(3) Application

The dispute in *Van der Meer/Siller and Jamart BV* related to a contract for the sale of a low pressure kettle. The claimant, a producer of pressure kettles, claimed payment. To prove the sales contract, they filed an order form purportedly signed by the defendant. In reply, the defendant disputed the authenticity of the signature. The Breda District Court dismissed the claim for lack of evidence. On appeal, before proceeding with the main claim, the 's-Hertogenbosch Court of Appeal rendered an interlocutory judgment on the issue of the signature's authenticity. Following trial of the issue, the court found in favour of the claimant and held on that basis that the sales contract was valid. The defendant subsequently made every attempt to relitigate the issue, urging the court to revisit its finding on the basis of new evidence. The court would have none of this:

> The defendant may have argued extensively in their latest submissions why this court ought to revisit its finding that the authenticity of the signature on the orderform has been established so that the contract alleged by the claimant has been proved, but this argument cannot be accepted, because this is an unequivocal and unconditional finding, conclusive upon this court.[91]

On appeal in cassation, the defendant complained that the Court of Appeal had failed to acknowledge that findings in an interlocutory judgment are only *provisional*. Such findings, they argued, can be reconsidered in the final judgment, so that the court was wrong to consider itself bound by its own interlocutory judgment. Alternatively, they asserted, a court is always able to revisit its own prior findings on grounds of a

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[90] HR 4 May 1984 (n 77) [3.3] ("De in de rechtspraak van de HR verankerde regel dat de rechter die in een tussenvonnis een of meer geschilpunten uitdrukkelijk en zonder voorbehoud heeft beslist, in het verdere verloop van de procedure op die beslissingen niet mag terugkomen, heeft een — uit het oogpunt van een goede procesorde positief te waarderen — op beperking van het debat gerichte functie. De betreffende geschilpunten gelden immers, wat het aanhangig geding betreft, als afgedaan, hetgeen meebrengt dat zij slechts kunnen worden bestreden door aanwending van een bij de wet aangegeven rechtsmiddel en dat voor een heropening van het debat met betrekking tot die punten in de lopende instantie geen plaats is. Loslaten van de regel zou een andermaal aan de orde stellen van het betreffende geschilpunt in die instantie in de hand werken. Dit is, wegens de daarin besloten mogelijkheden tot vertraging van de procesgang, ongewenst.").

[91] Reported in ibid at [1] ("Van der Meer heeft in zijn 'conclusie na niet gehouden enquete' weliswaar breedvoerig betoogd dat en waarom het Hof zou moeten herzien zijn in het tussenarrest vervatte oordeel, dat de echtheid van de handtekening onder de orderbevestiging van 4 aug. 1971 vaststaat zodat het volledig bewijs van de door SKS gestelde koopovereenkomst geleverd is; doch op dat betoog kan niet worden ingegaan omdat het hier betreft een uitdrukkelijk en zonder voorbehoud gegeven beslissing waaraan het Hof gebonden is.").

change of circumstances, if those circumstances would have affected the findings had they been known before. (In the case, the defendant referred to an official report that allegedly undermined the evidence on which the interlocutory judgment was based.)[92]

Ten Kate, the Advocate General in the case, disagreed. The argument, he concluded, violated the requirement of a sound administration of justice that "at some point a claim or an issue is to be regarded as conclusively determined and that also a court will have to accept this, even if, in the meantime, it regards its decision as erroneous."[93] That requirement, he added, "is an old maxim: '*Lites finiri oportet*'."[94] To condone relitigation, he warned, would have the following undesirable consequences:

> If litigation were not concluded, a party who refuses to accept the court's finding would have the opportunity to persist in their objections in the same case, and thus to present new evidence or to insist on their ability to prove their case, etc. The relevance of such materials is not *a priori* evident. The interests of the opposing party are (liable to be) affected, since they would be forced to respond over and over again. All this is contrary to the sound administration of justice.[95]

Ten Kate did not disregard the risk that an erroneous finding might become conclusive; however, he concluded that *any* civil justice system sooner or later implies this risk: "As long as the exercise of jurisdiction is a human activity, a court must accept that its judgment reflects no more than the truth it accepts on the basis of what in its view is established up to that point."[96] For that reason, he asserted, "it is immaterial whether the point of finality is reached already by a final finding or only by the final judgment."[97]

The Dutch Supreme Court essentially aligned itself with the opinion of the Advocate General. Both concluded that the doctrine binds *courts* and serves the interest of a sound administration of justice, which requires finality of litigation at some point.[98]

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[92] HR 4 May 1984 (n 77) [3.3] ("…alle beslissingen in een tussenvonnis/tussenarrest van rechtswege slechts een voorlopig karakter dragen, waarop bij eindvonnis/eindarrest nog kan worden teruggekomen en derhalve de rechter door een tussenvonnis niet is gebonden bij de eindbeslissing (= einduitspraak). Althans resp. in ieder geval mag een rechter op grond van gewijzigde omstandigheden in zijn latere uitspraak terugkomen op zijn eerdere beslissingen, dat wil zeggen indien na het interlocutoir, waarin eindbeslissingen voorkomen, nieuwe omstandigheden (misverstanden, misslagen, vergissingen, nieuw gebleken feiten) zich hebben voorgedaan, welke, waren zij tevoren bekend geweest, de eindbeslissingen anders zouden hebben doen luiden….").

[93] AG Ten Kate HR 4 May 1984 (n 77) [35] (*Van der Meer/Siller*) ("Hoe men de zaak ook wendt of keert, eens breekt het ogenblik aan dat een geschil of een geschilpunt als definitief beslist heeft te gelden en dat ook de rechter de gegeven beslissing heeft te aanvaarden, ook al acht hij deze intussen onjuist.").

[94] ibid [35] ("Het is een oud adagium: '*Lites finiri oportet*'.").

[95] ibid [37] ("Bij het ontbreken van een afsluiting van de procedure zou dit de mogelijkheid openen voor een partij, die zich bij een bepaald rechterlijk oordeel niet kan neerleggen, telkens weer in dezelfde instantie bezwaren te maken, met nieuw bewijsmateriaal te komen of nieuw bewijs aan te bieden enz. Aangezien de betekenis van zodanig materiaal niet bij voorbaat vaststaat, is het duidelijk dat aldus de belangen van de wederpartij, die zich dan telkens weer moet verweren, in verdrukking (kunnen) komen. Dit komt in strijd met een goede procesorde.").

[96] ibid [36] ("[D]e rechter [moet], zolang rechtspreken mensenwerk blijft, aanvaarden dat hij bij zijn oordelen in de regel niet verder kan komen dan hetgeen hij voor waar houdt bij alles wat hem op dat ogenblik bekend is.").

[97] ibid [35] ("In dit licht gezien, is het een relatief verschil, of dit eindpunt reeds bereikt is bij de eindbeslissing dan wel eerst bij het eindvonnis.").

[98] HR 4 May 1984 (n 77) (*Van der Meer/Siller*) [3.3] ("Subonderdeel 1–b, dat een uitwerking vormt van subonderdeel 1–a en waarop subonderdeel 1–c (voor zover niet besproken onder 3.2) voortbouwt, strekt

(4) Scope

The doctrine is restricted in scope to findings which are *final*, as opposed to merely provisional. As noted, 'final findings' are findings which are both unequivocal and unconditional; 'provisional findings' are frequently accompanied by qualifying terms in the judgment such as "preliminary" or "so far";[99] ultimately, the characterisation final—provisional is a matter for the court's own interpretation,[100] unless the parties could not reasonably have understood the finding as something else than a final finding[101].[102] The qualification also depends on the substance of the finding; for example, a finding on the pertinent burden of proof is clearly not final, but a finding can be final if the court in relation to the burden of proof decides how it decide the claim in case the burden of proof is met.[103]

(5) Exceptions

The doctrine has always been subject to an exception for special circumstances, which are to be specifically established by the court in its decision, which would make it unacceptable that the court is bound by its own final finding.[104] However, citing the same principle of a sound administration of justice that supports the doctrine, the Dutch Supreme Court in *De Vries/Gemeente Voorst* recently recognised a residual power of courts to revisit its own final findings in order to prevent rendering a final judgment on the wrong factual or legal basis:

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primair ten betoge dat 'alle beslissingen in een tussenvonnis/tussenarrest van rechtswege slechts een voorlopig karakter dragen, waarop bij eindvonnis/eindarrest nog kan worden teruggekomen en derhalve de rechter door een tussenvonnis niet is gebonden bij de eindbeslissing (= einduitspraak)'. Dit betoog kan niet als juist worden aanvaard. De in de rechtspraak van de HR verankerde regel dat de rechter die in een tussenvonnis een of meer geschilpunten uitdrukkelijk en zonder voorbehoud heeft beslist, in het verdere verloop van de procedure op die beslissingen niet mag terugkomen, heeft een — uit het oogpunt van een goede procesorde positief te waarderen — op beperking van het debat gerichte functie. De betreffende geschilpunten gelden immers, wat het aanhangig geding betreft, als afgedaan, hetgeen meebrengt dat zij slechts kunnen worden bestreden door aanwending van een bij de wet aangegeven rechtsmiddel en dat voor een heropening van het debat met betrekking tot die punten in de lopende instantie geen plaats is. Loslaten van de regel zou een andermaal aan de orde stellen van het betreffende geschilpunt in die instantie in de hand werken. Dit is, wegens de daarin besloten mogelijkheden tot vertraging van de procesgang, ongewenst."). The Court advanced a further reason for accepting the auxiliary rule of preclusion, namely, that Dutch procedural law bars the appeal of a judgment if a party's complaints can still be corrected by the judgment rendering court (Art 399 Rv). Under this rule, any appeal of an interlocutory judgment will invariably be inadmissible if parties may endlessly (re)litigate matters while the case lasts, since their objections can formally be addressed by the court which rendered the judgment. ("De primaire stelling van subonderdeel 1–b kan ook daarom bezwaarlijk worden aanvaard, omdat dit in verband met art. 399Rv zou meebrengen dat cassatieberoep tegen tussenuitspraken voor de einduitspraak vrijwel nooit meer zou openstaan.").

[99] See, eg, HR 23 November 2001, ECLI:NL:HR:2001:AD5323.

[100] HR 26 June 2009, ECLI:NL:HR:2009:BI2042, RvdW 2009, 811, NJB 2009, 1348.

[101] HR 23 June 1989, NJ 1990, 381 (*Van den Bogert/Koolen*).

[102] Van Schaick (n 3) [106].

[103] HR 30 March 2012, ECLI:NL:HR:2012:BU3160, NJ 2012, 582 mnt HB Krans, RvdW 2012, 494, NJB 2012, 896, JBPr 2012, 41 [3.3.1]-[3.3.2].

[104] HR 16 January 2004 (n 77) [3.4.2] ("Voor een dergelijke beslissing geldt de, op beperking van het processuele debat gerichte, regel dat daarvan in dezelfde instantie niet meer kan worden teruggekomen, behoudens indien bijzondere, door de rechter in zijn desbetreffende beslissing nauwkeurig aan te geven omstandigheden het onaanvaardbaar zouden maken dat de rechter aan de eindbeslissing in kwestie zou zijn gebonden ….") (emphasis added). cf HR 14 December 2001, ECLI:NL:HR:2001:AD4914, NJ 2002, 57. On the development of the grounds for exceptions to the doctrine see Fruytier (n 77) 93ff.

> [A] court that appreciates that one of its earlier final findings not contained in a final judgment is wrong in law or fact, has the power, after the parties have been given the opportunity to be heard, to revisit that final finding in order to prevent that it would give a final judgment on the wrong basis.[105]

The claimant in *De Vries/Gemeente Voorst* applied for a social benefit with a local council, the defendant, which granted this benefit on the condition that claimant would cease her commercial activites as an interior designer and deregister as such. The claimant never appealed this decision and ceased her commercial activities, but later discovered that by law she had qualified for the benefit regardless of her activities. Accordingly, she sued in tort for damages for being provided with wrong information causing an economic loss. The defendant replied that the claimant could and should have entered an administrative appeal against the decision to conditionally grant the social benefit when this was still possible, but that she had failed to do so and should not now be allowed to sidestep that failure by filing a claim in tort.

The Arnhem Court of Appeal on appeal rendered an interlocutory judgment on the issue whether the defendant could rely on the finality of the administrative decision[106] to bar the claim, and ruled that the defendant could not. After this decision, the Dutch Supreme Court in another case involving similar circumstances held that the finality of an administrative decision can be invoked in bar to a claim in tort. The Arnhem Court of Appeal therefore rendered a second interlocutory judgment, ruling this time that the defendant could indeed rely on the finality of the administrative decision.

In challenging this decision in cassation, the claimant cited the established case law of the Dutch Supreme Court that limited to "special circumstances" a court's power to revisit its own final findings:

> To such a finding the rule aimed at a limitation of the scope of litigation applies so that in the same instance that finding cannot be revisited, *unless special circumstances, which are to be specifically established by the court in its decision, would make it unacceptable that the court is bound by the final finding in question* ….[107]

Against that background, the claimant argued that the new character of the law on the finality of administrative decisions by itself could not justify an exception to bar against a court revisiting its own final finding.

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[105] HR 25 april 2008, ECLI:NL:HR:2008:BC2800, NJ 2008, 553 mnt HJ Snijders, RvdW 2008, 481, JB 2008, 122, AB 2008, 259 mnt R Ortlep [3.3.3] (*De Vries/Gemeente Voorst*) ("De eisen van een goede procesorde brengen immers mee dat de rechter, aan wie is gebleken dat een eerdere door hem gegeven, maar niet in een einduitspraak vervatte eindbeslissing berust op een onjuiste juridische of feitelijke grondslag, bevoegd is om, nadat partijen de gelegenheid hebben gekregen zich dienaangaande uit te laten, over te gaan tot heroverweging van die eindbeslissing, teneinde te voorkomen dat hij op een ondeugdelijke grondslag een einduitspraak zou doen."). For discussion of a number of statutory exceptions, see HR 19 February 2010, ECLI:NL:HR:2010:BK4476, NJ 2011, 121 mnt PCE van Wijmen, RvdW 2010, 325 [6.5.1]-[6.5.4] (*CHIP(S)HOL III BV/NV Luchthaven Schiphol (No 1)*) [6.5.1]-[6.5.4].

[106] "*Formele rechtskracht*".

[107] HR 16 January 2004 (n 77) [3.4.2] ("Voor een dergelijke beslissing geldt de, op beperking van het processuele debat gerichte, regel dat daarvan in dezelfde instantie niet meer kan worden teruggekomen, behoudens indien bijzondere, door de rechter in zijn desbetreffende beslissing nauwkeurig aan te geven omstandigheden het onaanvaardbaar zouden maken dat de rechter aan de eindbeslissing in kwestie zou zijn gebonden ….") (emphasis added). cf HR 14 December 2001 (n 104).

The Dutch Supreme Court disagreed. According to the Court, the requirements of a sound administration of justice imply, not merely that a court is bound by its own final findings, but also that the same court, after giving the parties the opportunity to be heard, must, in order to prevent that it would give a final judgment on the wrong basis, retain the power[108] to revisit a final finding, if the court appreciates that the finding is wrong in law or fact. The Court then held on the facts that "the Court of Appeal had apparently concluded on the basis of the aforementioned judgment of the Dutch Supreme Court that in its first interlocutory judgment it had erred by applying the wrong rule."[109] Apparently, the fact that the final judgment would be based on a wrong finding of law made it unacceptable to bar the Court of Appeal from revisiting its own final finding in the same case.

2.2 Grievenstelsel

Finality on appeal

Within the confines of the same case, the law of civil appeals implies a prohibition for a court of appeal from reviewing irreversible findings of a lower court and such findings are conclusive on appeal. 'Irreversible'[110] findings are findings that neither party on appeal challenged in their grounds of appeal[111]. [112] To this effect, the Dutch Supreme Court recently held that "the [appellee] in its interim appeal failed to challenge the finding of the District Court. ... The starting point then is that the Court of Appeal as appellate court is bound by the finding of the District Court."[113]

(1) Nature

The prohibition derives from a limitation of the *jurisdiction* of an appellate court that is inferred from Art 419(1) Rv[114] (for appeals in cassation)[115] and case law (for other types of appeal),[116] which provide that the dimensions of a case on appeal are a

[108] And in some circumstances the duty. See HR 23 November 2007, ECLI:NL:HR:2007:BB3733, NJ 2008, 552, RvdW 2007, 996, JM 2008, 20 mnt Bos, JBPr 2008, 40 mnt D Roffel (*Ploum/Smeets*). On this case and its implications see Fruytier (n 77) 96-7.
[109] HR 25 april 2008 (n 105) [3.3.3] ("Het hof was kennelijk op grond van de genoemde uitspraak van de Hoge Raad tot de conclusie gekomen dat het in zijn eerste tussenarrest met toepassing van een onjuiste maatstaf verkeerd had beslist.").
[110] '*Onaantastbaar*'.
[111] '*Grieven*' or 'gronden' (generally) or '*middelen*' (in cassation). See HR HR 5 December 2003, ECLI:NL:HR:2003:AJ3242, NJ 2004, 76, RvdW 2003, 190, JBPr 2004, 18 mnt MAJG Janssen.
[112] On the implementation of finality in another case see, in particular, text to n 318ff.
[113] HR 30 March 2012 (n 103) [3.3.5] (emphasis added) ("Zoals hiervoor in 3.1.3 weergegeven, heeft het hof in zijn tussenarrest van 20 november 2001 in deze zaak vastgesteld dat [verweerder] c.s. bij hun tussentijds appel niet zijn opgekomen tegen het hiervoor in 3.1.2 weergegeven oordeel van de rechtbank. Van deze vaststelling is het hof in zijn latere arresten niet teruggekomen. Genoemde vaststelling wordt in cassatie ook niet bestreden. De juistheid ervan moet dan ook uitgangspunt zijn. Dat betekent tevens dat uitgangspunt moet zijn dat het hof als appelrechter aan genoemd oordeel van de rechtbank was gebonden. Het middel is derhalve in zoverre gegrond.").
[114] ("The Supreme Court in its review restricts itself to the grievances on which the appeal is based.") ("De Hoge Raad bepaalt zich bij zijn onderzoek tot de middelen waarop het beroep steunt.").
[115] '*Het stelsel van cassatiemiddelen*'.
[116] '*Het grievenstelsel*'. See, eg, HR 30 March 2012, ECLI:NL:HR:2012:BU8514, NJ 2012, 583 mnt HB Krans, RvdW 2012, 497, NJB 2012, 904, RAR 2012, 85, JBPr 2012, 42 mnt GCC Lewin [3.3.2]

matter of party autonomy; hence, as a rule, the parties on appeal determine which findings of the lower court are subject to review on appeal and, safe for certain matters of public policy, on what grounds.

This key feature of the law of appeals, known as the '*grievenstelsel*' and habitually described by the maxim "*tantum devolutum quantum appellatum*" ('so much devolves [to the court of appeal] as is appealed'), significantly qualifies the basic principle that historically underlies the system of appellate jurisdiction that the whole of a case devolves to a court of appeal.[117] As a result, a court of appeal lacks the power to review and reverse findings of lower courts on grounds not advanced by the parties on appeal, or as the Dutch Supreme Court said in *Van Wijngaarden/Handelsvereeniging Holland-Bombay*, "the Court in cassation has a limited task and it can and may not do anything else than review those parts of a judgment which have been appealed in the grounds of appeal."[118] The Court added the following:

> [I]f a judgment contains a finding on an issue and a finding on the claim, and subsequently only the finding on the claim is appealed, the limitation of the *jurisdiction* of the court in cassation necessarily implies that the finding on the issue becomes irreversible and thus remains intact irrespective of the result of the appeal in cassation.
>
> … [T]he finding on the preliminary issue cannot be deemed a res judicata in the period in which an appeal against the judgment is pending only if the judgment is appealed on formal grounds or if the grounds for appeal concern and potentially affect the decision on the preliminary issue itself….[119]

The other side of the coin is that parties are effectively precluded on appeal from contradicting the findings of the lower court that they failed to challenge in their grounds of appeal, notwithstanding that both parties on appeal may as a rule freely change their case, raising new points of fact or law (or for claimants amending the claim) which reflects the idea, as the Dutch Supreme Court explained, that "[t]he appeal serves to offer the chance to remedy mistakes made at first instance".[120]

(*Krediet Specialist Nederland BV*) ("According to established case law, the limits of the case on appeal are, in principle, determined by the appeal form and the appellate brief, and any cross-appeal.").

[117] '*Devolutieve werking van het appel*'. See HR 22 December 1989, NJ 1990, 704; and HR 20 March 1992, NJ 1992, 725 mnt PA Stein. cf HR 30 March 2012 (n 116) [3.3.2] (*Krediet Specialist Nederland BV*) ("The devolving effect of the appeal, which serves procedural efficiency, implies that the moment one or more grounds of appeal succeed and imply the reversal of the judgment under appeal, the points of the appellee which they have advanced at first instance will have to be considered or reconsidered.") ("De devolutieve werking van het appel, waardoor de proceseconomie wordt gediend, brengt immers mee dat, zodra een of meer grieven doel treffen en op zichzelf tot vernietiging van het bestreden vonnis moeten leiden, de niet prijsgegeven stellingen die de geïntimeerde in dit verband in eerste instantie heeft verdedigd alsnog, dan wel wederom moeten worden beoordeeld."). See further A Hammerstein, 'Kronieken: Hoger beroep' (2004) Tijdschrift voor Civiele Rechtspleging 18, 18-9.

[118] HR 7 May 1926, NJ 1926, 1057 (*Van Wijngaarden/Handelsvereeniging Holland-Bombay*) ("…niet anders kan en mag oordelen dan over die deelen der bestreden uitspraak, waartegen bij de voorgestelde middelen wordt opgekomen…").

[119] ibid.

[120] HR 19 January 1996, NJ 1996, 709 mnt HJ Snijders [3.10] ("Nu hoger beroep mede ertoe strekt de mogelijkheid te bieden in eerste aanleg gemaakte fouten te herstellen…."). The original defendant should however consider the risk involved in Art 348 Rv ('*gedekte verweren*') which states that the original defendant can raise new defences unless they are 'covered' ('*gedekt*') by the proceedings at first instance, which occurs when it is apparent from the behaviour of the defendant that they waived those

Nevertheless, despite the implications for parties, the prohibition inherent in the *grievenstelsel* is directed at courts, and goes to a court of appeal's (appellate) jurisdiction, the scope of which is therefore defined first and foremost by the parties' grounds of appeal.

(2) Rationale

The need for a sound administration of justice, in particular the procedural efficiency attained by limiting the scope of litigation on appeal, provides the rationale for the doctrine. The idea is that without the doctrine's funnelling effect, the scope of on appeal would tend to become inflated, whereas the actual dispute might be limited, with the effect of causing unnecessary delays and extra costs.[121] The Dutch Supreme Court further associates the doctrine with the need to prevent irreconcilable judgments; to be precise, with the need to reduce the risk that a court of appeal renders a judgment irreconcilable with the judgment of a lower court that has acquired the status of res judicata to the extent the parties have failed to appeal it.[122]

(3) Application

The doctrine is well illustrated in *Krediet Specialist Nederland BV*.[123] The dispute related to a disputed employment agreement and wages. The claimant sought a declaration on the existence of the agreement for a certain period and a related order for the payment of wages. The defendant denied the existence of any agreement and alternatively contested the sum of the wages claimed.

The Utrecht District Court granted the claim for a declaration but rejected a part of the claim for the payment of wages. The claimant appealed the judgment, but challenged only the finding that rejected part of the claim for the payment of wages.

On appeal the Amsterdam Court of Appeal reconsidered the issue of the existence of the employment agreement, noting that the defendant had not waived their defence involving the denial of the existence of the agreement.[124] In support, the court cited the principle that the whole of a case at first instance devolves to the court of appeal.[125] Accordingly, the court allowed the defendant to disprove the agreement and in its final judgment the court found that no agreement existed for the period for which wages were claimed on appeal. The claimant appealed:

> [T]he Court of Appeal has by its finding ignored the limits of the case on appeal, and specifically the limiting effect of the grounds of appeal and the devolving effect of the appeal. Considering that [the defendant] failed to enter an appeal against the finding of the District Court that an employment agreement existed [in this period],

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defences. ("De oorspronkelijke verweerder kan nieuwe weren van regten, eene verdediging ten principale opleverende, inbrengen, tenzij dezelve in het geding ter eerster instantie zijn gedekt, waaronder niet begrepen is het geval, dat het regt om ten principale te antwoorden ingevolge artikel 128 vervallen is."). See further WH Heemskerk, 'Incidentele conclusies vóór alle weren?' (2003) Advocatenblad 212-13.

[121] cf HR 4 May 1984 (n 77) (*Van der Meer/Siller*) [3.3]. See text to n 90ff.

[122] See HR 30 March 2012 (n 116) [3.3.4] (*Krediet Specialist Nederland BV*).

[123] ibid.

[124] ibid [3.2.3].

[125] 'Devolutieve werking van het appel'. See, eg, HR 22 December 1989 (n 117); and HR 20 March 1992 (n 117).

> also in the periods stated in the grounds of appeal, this was established finally for purposes of the appeal.[126]

The Dutch Supreme Court reversed the approval of the Court of Appeal. The Court first made the following general observation about the scope of a case on appeal and the function of the principle that the whole of a case devolves to a court of appeal:

> The limits of a dispute on appeal are in line with established case law determined as a rule defined by the appeal form and the appellate brief, and any cross-appeal. The appellee who in the lower court secured a favourable judgment is not required to bring an incidental appeal raising the points they previously raised, but which the court did not consider or reject. Namely, the devolving effect of the appeal, which serves procedural efficiency, implies that the moment one or more of the grievances succeeds and implies the reversal of the judgment under appeal, the points of the appellee which they did not waive in the proceedings below must then be considered or reconsidered.[127]

According to the Supreme Court, the scope of an appeal is subject to party autonomy; that is to say, defined by the parties' grounds of appeal. The Court further confirmed that for reasons of procedural efficiency the devolving effect of an appeal implies that if one or more of the grievances succeeds and leads to the reversal of the judgment under appeal, the court of appeal must then consider or reconsider the appellee's points that were not waived in the proceedings below, because an appellee who in the lower court secured a favourable judgment cannot be expected to file an incidental appeal raising the points previously raised, but which the court did not consider or reject.

However, the Court then confirmed that limits apply to the devolving effect of the appeal in circumstances where a party who is faced with a (partly) adverse judgment fails to challenge its underlying findings on appeal. In this regard the Court held:

> Because the [defendant] has not entered a cross appeal—not even conditionally—challenging the judgment of the District Court insofar as it granted the claim of the [claimant], that judgment acquired the status of res judicata to this extent, with the effect that the finding of the District Court, on which the grant of the claim was based, that there was [in this period] an employment agreement between the parties,

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[126] HR 30 March 2012 (n 116) [3.3.1] (*Krediet Specialist Nederland BV*) ("Middel I bevat onder meer de klacht dat het hof aldus de grenzen van de rechtsstrijd in appel, en meer in het bijzonder het grievenstelsel en de devolutieve werking heeft miskend. Nu KSN geen incidenteel appel heeft ingesteld tegen de beslissing van de kantonrechter dat van 20 november 2007 tot 20 mei 2008 tussen partijen een arbeidsovereenkomst gold, dus ook in de door de grieven bedoelde perioden, stond dit in hoger beroep vast.").

[127] ibid [3.3.2] ("Naar vaste rechtspraak worden de grenzen van het geschil in hoger beroep in beginsel bepaald door de appeldagvaarding en de memorie van grieven, en door een eventueel incidenteel beroep. Voor zover de geïntimeerde in het dictum van het vonnis van de eerste rechter in het gelijk is gesteld, behoeft hij de stellingen die hij in dit verband in eerste instantie had verdedigd, maar die door de eerste rechter buiten behandeling zijn gelaten of verworpen, niet opnieuw door een incidenteel appel aan het oordeel van de appelrechter te onderwerpen. De devolutieve werking van het appel, waardoor de proceseconomie wordt gediend, brengt immers mee dat, zodra een of meer grieven doel treffen en op zichzelf tot vernietiging van het bestreden vonnis moeten leiden, de niet prijsgegeven stellingen die de geïntimeerde in dit verband in eerste instantie heeft verdedigd alsnog, dan wel wederom moeten worden beoordeeld.").

> became irreversible and triggered *gezag van gewijsde* which could be invoked in another case between the parties (Article 236 Rv).[128]

Accordingly, to the extent that a judgment is not appealed it acquires the status of res judicata so that its findings become irreversible and thus, pursuant to Art 236 Rv, conclusive in *other* cases between the same parties.[129] As regards the implications within the *same* case on appeal of a failure to challenge particular findings in a judgment, the Supreme Court held:

> In such circumstances, considering the need to prevent the rendition of irreconcilable judgments having the status of res judicata, it cannot be accepted that on appeal the initial defence of the appellee could (and should) be determined again by reference to the devolving effect of the appeal, notwithstanding that the appellee has failed to enter a cross appeal—not even conditionally—against the unfavourable part of the judgment which implied a rejection of their defence with a view to prevent that this part of the judgment would acquire the status of res judicata and that the underlying finding of the lower court would become conclusive [i.e. pursuant to Article 236 Rv]. The unrestricted application of the principle of the devolving effect [of the appeal], namely, could imply—as occurred in the present case—that the court of appeal decides the issue differently than the first court, with the effect that when the judgment of the court of appeal acquires the status of res judicata, there are two conflicting irreversible judicial findings with conclusive effect.[130]

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[128] HR 30 March 2012 (n 116) [3.3.4]-[3.3.5] (*Krediet Specialist Nederland BV*) ("Doordat KSN geen incidenteel beroep heeft ingesteld - ook niet voorwaardelijk - tegen het vonnis van de kantonrechter voor zover daarbij de vordering van [eiser] is toegewezen, is dat vonnis in zoverre in kracht van gewijsde gegaan met als gevolg dat het oordeel van de kantonrechter, waarop die toewijzing berust, dat in de gehele periode van 20 november 2007 tot 20 mei 2008 tussen partijen een arbeidsovereenkomst heeft bestaan, onherroepelijk werd en gezag van gewijsde verkreeg dat in een ander geding tussen de partijen zou kunnen worden ingeroepen (art. 236 Rv.). In een zodanig geval kan met het oog op het voorkomen van tegenstrijdige onherroepelijke rechterlijke uitspraken, niet worden aanvaard dat in een door de appellant tegen het voor hem ongunstige gedeelte van het dictum ingestelde hoger beroep het primaire verweer van de geïntimeerde op grond van de hiervoor in 3.3.2 genoemde hoofdregel van de devolutieve werking opnieuw zou kunnen (en moeten) worden beoordeeld, zonder dat de geïntimeerde incidenteel appel heeft ingesteld - ook niet voorwaardelijk - tegen het voor hem ongunstige, op de verwerping van zijn verweer berustende gedeelte van het dictum teneinde te voorkomen dat dit gedeelte van het dictum in kracht van gewijsde gaat en de daaraan ten grondslag liggende beslissing van de eerste rechter gezag van gewijsde verkrijgt. Onbeperkte toepassing van de genoemde hoofdregel van de devolutieve werking zou immers tot gevolg kunnen hebben dat - zoals in deze zaak is gebeurd - de appelrechter over hetzelfde geschilpunt een ander oordeel bereikt dan de eerste rechter, zodat na het in kracht van gewijsde gaan van de uitspraak van de appelrechter met betrekking tot dat geschilpunt twee tegenstrijdige onherroepelijke rechterlijke beslissingen met gezag van gewijsde zouden bestaan. 3.3.5 Het voorgaande betekent dat nu KSN heeft nagelaten (voorwaardelijk) incidenteel hoger beroep in te stellen tegen het vonnis van de kantonrechter voor zover daarbij de vordering van [eiser] was toegewezen, het hof het primaire verweer van KSN niet meer in zijn beoordeling van het hoger beroep kon betrekken.").

[129] See text n 318ff.

[130] HR 30 March 2012 (n 116) [3.3.4]-[3.3.5] (*Krediet Specialist Nederland BV*) ("Doordat KSN geen incidenteel beroep heeft ingesteld - ook niet voorwaardelijk - tegen het vonnis van de kantonrechter voor zover daarbij de vordering van [eiser] is toegewezen, is dat vonnis in zoverre in kracht van gewijsde gegaan met als gevolg dat het oordeel van de kantonrechter, waarop die toewijzing berust, dat in de gehele periode van 20 november 2007 tot 20 mei 2008 tussen partijen een arbeidsovereenkomst heeft bestaan, onherroepelijk werd en gezag van gewijsde verkreeg dat in een ander geding tussen de partijen zou kunnen worden ingeroepen (art. 236 Rv.). In een zodanig geval kan met het oog op het voorkomen van tegenstrijdige onherroepelijke rechterlijke uitspraken, niet worden aanvaard dat in een door de appellant tegen het voor hem ongunstige gedeelte van het dictum ingestelde hoger beroep het primaire verweer van de geïntimeerde op grond van de hiervoor in 3.3.2 genoemde hoofdregel van de devolutieve

Hence, to avoid risk of irreconcilable irreversible judicial findings, a court of appeal is barred from revisiting a lower court's finding on an issue that the party adversely affected could have challenged on appeal but did not and that therefore became irreversible, so that the judgment of the lower court to this extent acquired the status of res judicata. Accordingly, the Court ruled that, "because [the defendant] failed to (even conditionally) appeal the judgment of the District Court to the extent that it granted the claim of [the claimant], the Court of Appeal could no longer consider the defence in its determination of the appeal."[131]

(4) Scope

The scope of preclusion on appeal depends on the parties' *grounds* of appeal; in other words the scope of preclusion is subject to party disposition. This reflects the principle the Dutch Supreme Court outlined in *Krediet Specialist Nederland BV* that "[t]he limits of a case on appeal are, in line with established case law, as a rule defined by the statement of appeal and the grounds for the appeal, and the cross appeal, if any."[132] A recent decision of the Dutch Supreme Court in *X/Krediet Specialist Nederland BV* serves the purpose of illustration.[133] The case involved another employment dispute. The employee, a worker at a petrol station, was hired on a contract for 40 hours that contained the option for the employer to ask the employee

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werking opnieuw zou kunnen (en moeten) worden beoordeeld, zonder dat de geïntimeerde incidenteel appel heeft ingesteld - ook niet voorwaardelijk - tegen het voor hem ongunstige, op de verwerping van zijn verweer berustende gedeelte van het dictum teneinde te voorkomen dat dit gedeelte van het dictum in kracht van gewijsde gaat en de daaraan ten grondslag liggende beslissing van de eerste rechter gezag van gewijsde verkrijgt. Onbeperkte toepassing van de genoemde hoofdregel van de devolutieve werking zou immers tot gevolg kunnen hebben dat - zoals in deze zaak is gebeurd - de appelrechter over hetzelfde geschilpunt een ander oordeel bereikt dan de eerste rechter, zodat na het in kracht van gewijsde gaan van de uitspraak van de appelrechter met betrekking tot dat geschilpunt twee tegenstrijdige onherroepelijke rechterlijke beslissingen met gezag van gewijsde zouden bestaan. 3.3.5 Het voorgaande betekent dat nu KSN heeft nagelaten (voorwaardelijk) incidenteel hoger beroep in te stellen tegen het vonnis van de kantonrechter voor zover daarbij de vordering van [eiser] was toegewezen, het hof het primaire verweer van KSN niet meer in zijn beoordeling van het hoger beroep kon betrekken.").

[131] ibid.

[132] HR 1 April 2011, ECLI:NL:HR:2011:BP1474, RvdW 2011, 471, NJB 2011, 807 [3.4.2] ("Het oordeel van het hof komt hierop neer dat, ook al is vordering (b1) ter zake van tijdens de gewone werktijd opgebouwde vakantiedagen niet toewijsbaar nu de daartegen gerichte grief slaagt, de kantonrechter desalniettemin terecht [eiser] heeft veroordeeld tot betaling van (in ieder geval) het toegewezen bedrag, omdat [verweerder] ter zake van tijdens overwerk opgebouwde vakantiedagen naar het oordeel van het hof recht heeft op vergoeding tot een nog hoger bedrag. Aldus is het hof buiten de grenzen van de rechtsstrijd in het incidenteel hoger beroep getreden. De grief van [eiser] stelde slechts de toewijsbaarheid van vordering (b1) aan de orde en betrof de vraag of de tijdens gewone werktijd opgebouwde vakantiedagen reeds waren uitbetaald dan wel onbetaald waren gebleven. Het oordeel daarover staat geheel los van de toewijsbaarheid van vordering (b2), die de vraag betrof of ook tijdens het overwerk vakantiedagen zijn opgebouwd, en zo ja, of die nog vergoed moeten worden. De toewijsbaarheid van vordering (b2) valt dan ook buiten de grenzen van het door het incidentele beroep ontsloten terrein. Dat wordt niet anders doordat [verweerder] ten verwere tegen het incidentele beroep van [eiser] heeft aangevoerd dat, ingeval het hof vaststelt dat hij 85 uur per week voor [eiser] heeft gewerkt, dit gevolgen moet hebben voor de opbouw van vakantierechten en dat dan van een fors hoger aantal uitstaande vakantiedagen moet worden uitgegaan, zodat [eiser] 440 vakantie-uren onbetaald heeft gelaten en van restitutie van het reeds door [eiser] betaalde bedrag geen sprake kan zijn (memorie van antwoord in incidenteel beroep onder 6-6.7). Deze stellingen van [verweerder] laten immers onverlet dat het incidentele beroep van [eiser] slechts de toewijsbaarheid van vordering (b1) aan de orde stelde, welke toewijsbaarheid niet beïnvloed wordt door het oordeel over vordering (b2).").

[133] ibid.

to work overtime (payable at an hourly rate of the base salary plus 50%). Eventually, the employee worked 85 hours per week for a period of about two years. Upon termination of the agreement, the employee claimed payment of (a) unpaid wages for overtime and (b) compensation unused holiday days.[134] Claim (b) consisted of compensation of holiday days earned in the normal working hours (b1) and compensation of holidays earned during overtime (b2).

The Haarlem District Court granted claim (b1), but rejected claims (a) and (b2) on the ground that the claimant had lost his right of action. The claimant appealed the judgment insofar as it concerned claim (a), while the defendant entered a cross appeal in respect of the decision on claim (b1). The Amsterdam Court of Appeal reversed the judgment of the District Court judgment on both claims. However, citing the devolving effect of the appeal, the also court reconsidered claim (b2) and granted it to the amount previously awarded for claim (b1). The defendant challenged this finding, arguing that by determining claim (b2) the Court of Appeal had ignored the scope of the case on appeal, bearing in mind that the claim (b2), which had been rejected by the District Court, had not been made by the claimant on appeal.[135]

The Dutch Supreme Court granted the appeal. The Court observed that the Court of Appeal reasoned that, even though claim (b1) in respect of the holiday days accumulated during normal working hours could not be granted because the ground of appeal against the finding of the lower court succeeded, the District Court had rightly ordered the payment of (in any event) the sum granted at first instance, because the appellee (i.e. the original defendant) had a right to payment of a higher sum in view of the number of accumulated holiday days. According to the Court:

> [T]he Court of Appeal thus overstepped the limits of the case in the cross appeal. The ground of appeal of [the appellant] only addressed the granting of claim (b1) and involved the question whether the holiday days accumulated during normal working time had been paid or not. The finding on this question is entirely distinct from claim (b2), which involved the question whether or not holidays had been accumulated during over time and, if so, whether these days were to be paid. The success of claim (b2) thus falls outside of the terrain opened up by the cross appeal. This conclusion is not altered by the fact that [the appellee] had replied that if the Court of Appeal were to establish that he worked 85 hours per week for [the appellant], this would necessarily have implications for the accumulation of holiday entitlements which would need to be higher, meaning that 440 hours of holiday have been left unpaid so that there can be no question of restitution of the payment already made. These points of [the appellee] do not change the fact that the cross appeal of [the appellant] only addressed claim (b1), the success of which does not depend on a determination of claim (b2).[136]

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[134] ibid.

[135] ibid [3.4.1] ("Volgens het onderdeel miskent het hof daarmee de omvang van de rechtsstrijd in hoger beroep, nu de desbetreffende vordering (b2), die door de kantonrechter was afgewezen, door [verweerder] in het hoger beroep niet is gehandhaafd.").

[136] ibid [3.4.2] ("Het oordeel van het hof komt hierop neer dat, ook al is vordering (b1) ter zake van tijdens de gewone werktijd opgebouwde vakantiedagen niet toewijsbaar nu de daartegen gerichte grief slaagt, de kantonrechter desalniettemin terecht [eiser] heeft veroordeeld tot betaling van (in ieder geval) het toegewezen bedrag, omdat [verweerder] ter zake van tijdens overwerk opgebouwde vakantiedagen naar het oordeel van het hof recht heeft op vergoeding tot een nog hoger bedrag. Aldus is het hof buiten de grenzen van de rechtsstrijd in het incidenteel hoger beroep getreden. De grief van [eiser] stelde slechts de toewijsbaarheid van vordering (b1) aan de orde en betrof de vraag of de tijdens gewone werktijd

In other words, the Court of Appeal lacked the power to reconsider claim (b2), since the parties had not appealed the judgment of the District Court insofar as it concerned that part of the claim.

(i) Grounds of public policy

A court of appeal must supplement of its own motion the legal grounds of an appeal.[137] However, this duty exists only within the limits of the scope of the case on appeal as defined by the parties.[138] For instance, in a case involving an application for leave to execute (*exequatur*) four Austrian judgments,[139] the Groningen District Court granted leave for three of the four judgments, but refused on grounds of public policy the application in respect of the last judgment, while specifying that the Austrian court in this judgment had failed in violation of fundamental procedural principles to address the arguments of the defendant in its judgment. The claimant appealed the refusal in respect of the fourth judgment, while the defendant filed a cross appeal challenging the granting of *exequatur* for the first three judgments. The claimant's ground for appeal was that the defendant had failed to use the means of appeal available in Austria against the judgment in question and had thus waived their right to invoke the Dutch public policy exception. But the Leeuwarden Court of Appeal ignored this ground of appeal and held instead that the manner in which the fourth Austrian judgment had been established was in violation of Dutch public policy so that this judgment could not be recognised in the Netherlands. The Dutch Supreme Court reversed the decision of the Court of Appeal:

> The District Court found in respect of the fourth Austrian judgment that the rendering court had failed to adequately consider the arguments of [the defendant] and decided on that basis that the enforcement of this decision would be in violation of Dutch public policy. The statements of case of the parties on appeal can only be construed as that [the appellant] argued that the [appellee] was barred from invoking the public policy exception as he failed to use the opportunity to appeal the Austrian judgment in question, but the grounds of appeal do not contain a grievance as to the aforementioned findings of the District Court [i.e. on public policy]. For that reason, as the cross appeal contends, the Court of Appeal overstepped the limits of the case

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opgebouwde vakantiedagen reeds waren uitbetaald dan wel onbetaald waren gebleven. Het oordeel daarover staat geheel los van de toewijsbaarheid van vordering (b2), die de vraag betrof of ook tijdens het overwerk vakantiedagen zijn opgebouwd, en zo ja, of die nog vergoed moeten worden. De toewijsbaarheid van vordering (b2) valt dan ook buiten de grenzen van het door het incidentele beroep ontsloten terrein. Dat wordt niet anders doordat [verweerder] ten verwere tegen het incidentele beroep van [eiser] heeft aangevoerd dat, ingeval het hof vaststelt dat hij 85 uur per week voor [eiser] heeft gewerkt, dit gevolgen moet hebben voor de opbouw van vakantierechten en dat dan van een fors hoger aantal uitstaande vakantiedagen moet worden uitgegaan, zodat [eiser] 440 vakantie-uren onbetaald heeft gelaten en van restitutie van het reeds door [eiser] betaalde bedrag geen sprake kan zijn (memorie van antwoord in incidenteel beroep onder 6-6.7). Deze stellingen van [verweerder] laten immers onverlet dat het incidentele beroep van [eiser] slechts de toewijsbaarheid van vordering (b1) aan de orde stelde, welke toewijsbaarheid niet beïnvloed wordt door het oordeel over vordering (b2).").

[137] Article 25 Rv.

[138] See, eg, AG Wesseling-van Gent in HR 20 December 2002, ECLI:NL:PHR:2002:AF0203, NJ 2003, 230 [2.12]ff (*Nederlandse Antillen*).

[139] HR 5 April 2002, ECLI:NL:HR:2002:AD9145, NJ 2004, 170 mnt P Vlas, RvdW 2002, 65.

on appeal by considering the issue whether the manner in which the fourth Austrian judgment was rendered violated Dutch public policy.[140]

Hence, despite the fact that the issue of the public policy exception to the recognition and enforcement of a foreign judgment is a matter of public policy, if the finding on this issue of a lower court is not challenged on appeal, the court of appeal has no jurisdiction to reopen the issue; the court of appeal is bound by the finding of the lower court that has become irreversible due to a failure of the party affected to challenge it on appeal. (The Dutch Supreme Court further held that the Court of Appeal erred by failing to address the ground of appeal that the appellant had indeed advanced, namely, that the foreign judgment debtor had lost their right to invoke the Dutch public policy exception by failing to challenge the judgment in question when they had the opportunity to do so in its State of rendition.)[141]

Advocate General Strikwerda observed similarly in his opinion in the case that "[i]t follows from the *grievenstelsel* that the court of appeal should as a rule respect a finding of the lower court that is unfavourable to the appellant if that finding is not challenged in the grounds of appeal."[142]

2.3 Grenzen van de rechtsstrijd na cassatie

Finality after a successful cassation appeal

Finality within the confines of the same case is imposed, not merely by the prohibition for the judgment-rendering court to revisit its own final findings (*leer van de bindende eindbeslissing*) and the prohibition for a court of appeal to reopen the lower court's irreversible findings (*grievenstelsel*), but also by the limits that a

[140] ibid [3.5] ("De Rechtbank heeft ten aanzien van de vierde beslissing van de Oostenrijkse rechter geoordeeld dat die rechter de stellingen van de vader ten aanzien van zijn gemis aan verdiencapaciteit niet behoorlijk heeft onderzocht en op grond daarvan geoordeeld dat tenuitvoerlegging van die beslissing in strijd is met de Nederlandse openbare orde. De gedingstukken laten geen andere gevolgtrekking toe dan dat het LBIO met zijn incidentele grief slechts heeft betoogd dat aan de vader een beroep op strijd met de openbare orde niet toekomt, nu hij geen gebruik heeft gemaakt van de gelegenheid om van de bedoelde uitspraak van de Oostenrijkse rechter in hoger beroep te gaan en dat die grief geen klacht inhoudt tegen evenvermelde oordelen van de Rechtbank. Naar het incidentele middel terecht betoogt, is het Hof in rov. 7 derhalve buiten de grenzen van de rechtsstrijd in hoger beroep getreden door een onderzoek in te stellen naar de vraag of de wijze van totstandkoming van de vierde beslissing van de Oostenrijkse rechter in strijd is met de Nederlandse openbare orde.").

[141] The Supreme Court refrained from answering this question, but AG Strikwerda, at [24], addressed the point as follows: "In case the inadequacies of the foreign judgment (in this case a lack of reasoning and violation of the right to be heard) can be remedied through a means of recourse and it is not apparent that the affected party was not in a position to challenge the decision, the recognition and enforcement of the foreign judgment cannot be excluded in this country by invoking the public policy exception." ("Wanneer de aan de beslissing van de buitenlandse rechter toegeschreven tekortkomingen (in dit geval schending van de motiveringsplicht en schending van het beginsel van hoor en wederhoor) door het aanwenden van een rechtsmiddel hadden kunnen worden hersteld en niet is gebleken dat de door de beslissing bezwaarde procespartij tot het aanwenden van een rechtsmiddel niet in staat is geweest, kan de buitenlandse beslissing niet met een beroep op de openbare orde van erkenning en/of tenuitvoerlegging hier te lande worden uitgesloten.").

[142] HR 5 April 2002 (n 139) [11] ("Uit het grievenstelsel vloeit voort dat de appèlrechter een voor appellant ongunstige beslissing van de eerste rechter, die niet door een grief is bestreden, in beginsel moet eerbiedigen.").

judgment of the Dutch Supreme Court imposes on the scope of litigation *after* a case has been referred to a lower court for further decision.[143]

Article 424 Rv states the essence of the doctrine, which is referred to as '*de grenzen van de rechtsstrijd na cassatie en verwijzing*', by providing that: "The court to which the case is referred continues its consideration and decides *taking account of the judgment of the Supreme Court*."[144] Against the background of this provision, the Dutch Supreme Court ruled:

> [I]n a case after referral by the Supreme Court, the further consideration and decision must take place within the limits defined by the judgment in cassation. This implies that the court to which the case is referred is bound by the pre-existing final findings in the case which have not been (successfully) challenged and thus have become irreversible.[145]

Upon referral after cassation, the scope of litigation is defined by the Dutch Supreme Court's judgment, and the court of referral lacks the power to revisit final findings in the case which have not been (successfully) challenged and that thus have become irreversible. (For purposes of finality of litigation in the context of *another* case, it should be noted that the judgment subject to the appeal acquires the status of res judicata to the extent that its findings are not (successfully) challenged.)[146]

(1) Nature

The doctrine goes to the jurisdiction of the court to which a case is referred after a (partly) successful cassation appeal; the referral court's mandate is limited to the task of deciding those matters that remain to be finally determined, not to reconsider judicial findings which have become irreversible by reason of the Dutch Supreme Court's judgment. As the Supreme Court recently explained, a court that fails to uphold this doctrine, "misconceives its task as a court to which a case is referred after cassation".[147]

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[143] See Art 422a Rv ("The case is referred to the court whose judgment has been reversed, unless there is a reason in line with Articles 76 and 355 to refer the case to a first instance court.") ("Het geding wordt verwezen naar de rechter, wiens uitspraak vernietigd is, tenzij er overeenkomstig het bepaalde bij de artikelen 76 en 355 reden is tot verwijzing naar de rechter van eerste aanleg."). See further Art 423 Rv ("The Supreme Court can instead of referring a case to the court whose judgment has been reversed, refer the case to another court: (1) if the judgment was given by a District Court, to the Court of Appeal within the same jurisdiction; (2) if the judgment that was reversed was given by a Court of Appeal, to a different Court of Appeal.") ("De Hoge Raad kan, in stede van het geding te verwijzen naar de rechter, wiens uitspraak vernietigd is, het verwijzen naar een andere rechter en wel: 1°. wanneer de vernietigde uitspraak was gewezen door een rechtbank, naar het gerechtshof van het ressort; 2°. wanneer de vernietigde uitspraak was gewezen door een gerechtshof, naar een ander gerechtshof.").

[144] ("De rechter, naar wie het geding is verwezen, zet de behandeling daarvan voort en beslist met inachtneming van de uitspraak van de Hoge Raad.").

[145] HR 16 December 1988, NJ 1989, 180 [3.3] (*Haaland/Staat*) ("…in een geding na verwijzing door de HR de verdere behandeling en beslissing dienen te geschieden binnen de door het verwijzingsarrest getrokken grenzen en dat dit meebrengt dat de rechter naar wie de zaak is verwezen gebonden is aan eerdere in de zaak gegeven eindbeslissingen die in cassatie niet of tevergeefs zijn bestreden en derhalve onaantastbaar zijn geworden.").

[146] See text to n 462ff.

[147] HR 24 December 2010 (n 12) [3.2] (*CHIP(S)HOL III BV/NV Luchthaven Schiphol (No2)*) ("Het principale middel klaagt dus terecht dat het hof zijn taak als verwijzingsrechter heeft miskend.") (emphasis added). cf HR 17 December 2010, ECLI:NL:PHR:2010:BO1806, NJ 2012, 58, RvdW 2011, 5, NJB 2011, 48, JBPr 2011, 19 mnt FJH Hovens [3.4].

(2) Rationale

The rationale of the doctrine is the same as for the other two doctrines that impose finality within the confines of the same case (i.e., the *leer van de bindende eindbeslissing* on finality within the same instance and the *grievenstelsel* on finality on appeal):[148] the principle of a sound administration of justice, which for procedural efficiency concerns implies the need for finality of litigation at some point.[149]

(3) Application

The doctrine is less flexible in terms of its application than the its sister-doctrine, the *leer van de bindende eindbeslissing* on finality within the same instance. This difference can be explained by reference to the fact that the lastmentioned doctrine applies to *interlocutory* judgments rendered at first instance or on appeal, which typically remain subject to an appeal, whereas the present doctrine applies after an appeal in cassation. The doctrine's application is illustrated by the case of *Jan Tore Haaland/Staat der Nederlanden.*[150]

The dispute concerned an accident aboard the Dutch submarine *The Zwaardvis* of the coast of Norway due to a malfunctioning diesel exhaust, which caused the influx of seawater into the vessel's machine room, which, in turn, caused a general power and engine failure. The submarine signaled for assistance, which was provided by the Norwegian firm Jan Tore Haarland ('Haarland'). Haarland sued the Dutch State for payment of the cost of towing *The Zwaardvis,* and claimed a reward for saving the submarine, which in its view would have been lost without its assistance. The Dutch State replied that Haarland had merely assisted—not saved—the submarine.

The Hague District Court rejected the claim, finding that by the time Haarland arrived *The Zwaardvis* was no longer in danger and could have returned safely to harbour, albeit at a significantly reduced speed of four miles per hour, using its main electrical engine which could have been made operational within a few hours. Haarland appealed arguing that the submarine could not have have returned to harbour safely, and that it was impossible to navigate as a result of its limited speed.

The Hague Court of Appeal rejected the appeal and affirmed the District Court's judgment. On appeal in cassation, Haarland challenged the Court of Appeal's findings that the submarine could have returned to harbour *safely* and by its *own steering*.

The Dutch Supreme Court reversed the latter judgment on the ground of the Court of Appeal's failure to reason its findings, and referred the case back to the Court of Appeal for further consideration and decision.

Upon referral, Haarland asserted by reference to a report of the principal mechanic on board the submarine that its main electrical engine could not have been made operational, and argued that this evidence prevented the Dutch State from proving that the submarine could have safely reached harbour. The Dutch State

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[148] See, respectively, text to n 89ff and text to n 121ff.
[149] cf AG Wesseling-van Gent in HR 24 December 2010 (n 12) [2.12] (*CHIP(S)HOL III BV/NV Luchthaven Schiphol (No2)*). cf AG IJzerman in HR 24 March 2011, ECLI:NL:PHR:2011:BQ0540, NTFR 2011, 2630 mnt Lubbers, BNB 2011, 300, FED 2012, 82 mnt E Poelmann [5.8].
[150] HR 16 December 1988 (n 145) (*Haaland/Staat*).

objected that the report invoked by Haarland had always formed part of the case file and therefore could not be relied on in support of Haarland's new assertion.

The Court of Appeal refused to reopen the question:

> [A]fter the referral of a case by the Supreme Court, the further consideration and decision of the case must occur within the limits set by that court, which implies that the court to which the case is referred, is bound by earlier findings in the case that were not challenged on appeal in cassation and which thus have become irreversible, except for where a significant new circumstance occurs.[151]

On appeal, the Dutch Supreme Court confirmed that after the Court refers a case, the court to which the case is refered must consider and decide the case within the limits as defined in cassation, which implies that the court is bound by any final findings that were not (successfully) challenged in the cassation appeal and thus became irreversible.[152] On the implications of this rule in the case, the Court observed:

> The District Court found that *The Zwaardvis* was no longer in danger when the Haabrand [i.e. Haarland's vessel] arrived, since it could have reached [the harbour] using its own electrical propulsion so that within three hours it could move at a speed of four miles per hour. The court based this conclusion on the findings that … the electrical engine had not suffered real damage …. The Court of Appeal held that these findings were accurate. … These final findings were not challenged in the appeal in cassation. The Court of Appeal's judgment was reversed—insofar as relevant here—on the basis of a lack of reasoning regarding the issue whether *The Zwaardvis* could have savely reached [the harbour] and by its own steering.[153]

According to the Supreme Court, the fact that the finding of the Court of Appeal that the electrical engine was operational had not been challenged in cassation implied that the finding had become irreversible and thus bound the Court of Appeal after the case was referred back to it for further determination of the issue whether the submarine could navigate 'safely' to the harbour considering Haaland's assertion that

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[151] ibid [2] ("…na verwijzing van een geding door de HR de verdere behandeling en beslissing dient te geschieden binnen de grenzen door dit college getrokken, hetgeen meebrengt dat de rechter, naar wie de zaak verwezen is, gebonden blijft aan eerdere in die zaak gegeven beslissingen welke in cassatie niet aan de orde zijn gesteld en derhalve onaantastbaar zijn geworden, behoudens wellicht in het zich hier niet voordoende bijzondere geval, dat zich een wezenlijk nieuwe situatie voordoet.").

[152] ibid [3.3] ("…in een geding na verwijzing door de HR de verdere behandeling en beslissing dienen te geschieden binnen de door het verwijzingsarrest getrokken grenzen en dat dit meebrengt dat de rechter naar wie de zaak is verwezen gebonden is aan eerdere in de zaak gegeven eindbeslissingen die in cassatie niet of tevergeefs zijn bestreden en derhalve onaantastbaar zijn geworden.").

[153] ibid [3.2] ("De Rb. had geoordeeld dat de Zwaardvis, ten tijde waarop de Haabrand aan haar vastmaakte, niet (meer) in gevaar verkeerde, immers vanuit haar toenmalige positie zonder (sleepboot)hulp Stavanger zou kunnen bereiken met haar eigen electrische voortstuwing, waarmee zij binnen ongeveer drie uren met een snelheid van vier mijl per uur zou kunnen gaan varen. Dit laatste grondde de Rb. op haar vaststellingen dat de batterijen, evenals de batterijventilatie, nog volledig intakt waren, dat de HEM geen werkelijke schade had geleden en dat bovendien reeds vaststond dat het manoeuvreerbord, waarvan de voortstuwing eveneens afhankelijk was, voor wat die voortstuwing betreft binnen de genoemde tijd gerepareerd kon worden. Bij arrest I heeft het Hof te 's Gravenhage geoordeeld dat deze vaststellingen juist zijn. Daarbij heeft ook het hof — kennelijk op grond van de verklaringen in het voorlopig getuigenverhoor — als vaststaand aangenomen dat 'toen eveneens bekend was dat batterij en hoofdelectromotor in orde waren en het manoeuvreerbord in enkele uren gerepareerd kon worden' (r.o. 8). Deze eindbeslissingen zijn in de eerste cassatieprocedure niet bestreden. Arrest I is vernietigd — voor zover hier van belang — op grond van motiveringsklachten die betrekking hadden op de vraag of de Zwaardvis veilig Stavanger had kunnen bereiken (zonder hulp) en of zij, varend met een snelheid van vier mijl per uur, behoorlijk bestuurbaar was.").

the vessel could not be steered properly at this speed. This, the Supreme Court held, implied that, "the Court of Appeal correctly ruled that it could not allow this pleading, because the [doctrine of *grenzen van de rechtsstrijd na cassatie en verwijzing*] prevented it."[154] The rule that a court to which a case is referred after cassation is prohibited from revisiting irreversible findings means that a party is effectively precluded from contradicting those findings in the remainder of the case.

(4) Scope

Article 424 Rv provides no indication of the doctrine's scope.[155] Generally, it precludes the reopening of any finding that was not or unsuccessfully challenged in the cassation appeal.[156] However, the very fact that a case is referred back to a lower court implies that the judgment that formed the subject of the cassation appeal was reversed at least in part. Accordingly, the relevant inquiry is whether the finding that is invoked as conclusive was dependent on or formed an integral part of a finding that was reversed by the Dutch Supreme Court; if so, the finding in question shared in the fate of the finding reversed and, as a result, cannot bind the court to which the case is referred.[157] Moreover, the court to which the case is referred is not bound by findings that *were* challenged on appeal but which the Supreme Court did not asses because the Court annulled the judgment on other grounds.[158] These questions of scope can be answered only by combined reference to the judgment that formed the subject of the cassation appeal and the decision of the Dutch Supreme Court on the grounds of the appeal.[159]

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[154] ibid [3.2] ("Haalands in 3.1 weergegeven betoog berustte, naar het hof kennelijk heeft aangenomen, op een stelling die betrekking heeft op de vraag of de HEM van de Zwaardvis in orde was en of zij binnen ongeveer drie uren — met een snelheid van vier mijl per uur — op haar eigen electrische voortstuwing kon gaan varen. Daarvan uitgaande heeft het hof terecht geoordeeld dat het op die stelling in dit stadium van het geding geen acht kon slaan, omdat voormelde regel zich daartegen verzet.").

[155] cf AG Wesseling-van Gent in HR 24 December 2010 (n 12) [2.3] (*CHIP(S)HOL III BV/NV Luchthaven Schiphol (No2)*) (with further references).

[156] HR 24 December 2010 (n 12) [3.2] (*CHIP(S)HOL III BV/NV Luchthaven Schiphol (No2)*) ("[the court of appeal could not reopen the issue] because the scope of litigation after cassation was delimited after rejection of the grievances such that the issue was determined conclusively and that the decision of the court of appeal had become irreversible to that extent.") ("Daartoe bestond voor het hof in dit stadium van het geding geen mogelijkheid, nu de rechtsstrijd na cassatie door de verwerping van de desbetreffende onderdelen van het middel aldus was afgebakend dat over dit geschilpunt definitief was beslist en dat het tevergeefs bestreden oordeel van het gerechtshof te 's-Gravenhage in zoverre onaantastbaar was geworden.").

[157] cf AG Wesseling-van Gent in HR 24 December 2010 (n 12) [2.5] (*CHIP(S)HOL III BV/NV Luchthaven Schiphol (No2)*).

[158] HR 19 June 2009, ECLI:NL:HR:2009:BH7843, NJ 2009, 291, RvdW 2009, 769, NJB 2009, 1270.

[159] cf AG Wesseling-van Gent in HR 24 December 2010 (n 12) [2.6] (*CHIP(S)HOL III BV/NV Luchthaven Schiphol (No2)*).

2.4 Gebrek aan belang

Reassertion of a cause of action (the lack of a sufficient interest to justify a right of action)

The maxim *bis de aedem re ne sit actio* ('for the same cause there is no right of action'), an integral part of criminal procedure,[160] forms no part of civil procedure;[161] Dutch civil procedure, in other words, recognises no automatic bar of claims that reassert a cause of action.[162] On the sole occasion that the Court addressed the matter, it observed that "whatever the status of this principle, its application must in any event be avoided in circumstances where it could lead to undesirable consequences".[163] Case law confirms the absence of such a bar; for example, the 's-Hertogenbosch Court of Appeal has held that "[i]nsofar as the District Court was thinking of the principle '*ne bis in idem*', which principle [the defendant] now expressly invokes, that decision is erroneous. Such principle is unknown in the context of civil law".[164]

The absence of a *ne bis in idem* principle in the Dutch civil justice system does not mean that Dutch law permits all claims reassering a cause of action; as Advocate General Aben observed in a recent opinion, "the repetition of the same, already granted claim does not in civil proceedings automatically imply inadmissibility, but the claim *in civilibus* seems to fail on grounds of a lack of interest, in circumstances where this is the case."[165]

As a matter of civil law, the existence of a right of action[166] in respect of a cause of action (in other words, the question whether a cause of action is *actionable*) depends on whether the claimant has a sufficient interest in the claim. To this effect, Art 3:303 BW provides that: "Lacking a sufficient interest, no one has a right of

[160] See Van Hattum (n 18) (with further references).
[161] See, for instance, AG Ten Kate in HR 17 December 1976, NJ 1977, 241 mnt GJ Scholten (*Bunde/Erckens*). On the background of this maxim see Anema/Verdam (n1) 320ff.
[162] Snijders (n 25) [3] ("Until today it was debatable whether our law recognised a rule that boiled down to 'ne bis in idem', a prohibition of the repetition of a decided claim. Lower courts sometimes invoked 'ne bis in idem'. … The present decision is difficult to interpret otherwise than that the Supreme Court does not, at any rate not any more, apply the rule 'ne bis in idem'. This case involved a claim for an interim measure, but the same will no doubt apply in main proceedings.") ("Tot dusverre was het dubieus of ons recht een regel kent die neerkomt op "ne bis in idem", een verbod van herhaling van een eenmaal berechte vordering. De lagere rechter deed wel eens een beroep op 'ne bis in idem'. … Het onderhavige arrest laat zich moeilijk anders uitleggen dan dat de Hoge Raad in het algemeen niet, althans niet meer de regel "ne bis in idem" hanteert. Hij doet dat thans niet in een kort geding, maar zal het ongetwijfeld evenmin doen in een bodemprocedure.").
[163] HR 12 June 1970, NJ 1970, 375 (*Van Houtem/Aussems*).
[164] Hof's-Hertogenbosch 19 September 2007, ECLI:NL:GHSHE:2007:BB9082, JOR 2008, 80 mnt S Boot, JRV 2008, 162 [4.2.1] ("Voor zover de rechtbank het oog heeft gehad op het beginsel van 'ne bis in idem', op welk beginsel [Z.] Suppliers in hoger beroep expliciet een beroep doet, is dat oordeel onjuist. Een dergelijk beginsel kent het civiele en faillissementsrecht niet.").
[165] AG Aben in HR 19 February 2010, ECLI:NL:PHR:2010:BK9031, NJ 2010, 131, RvdW 2010, 364, NS 2010, 99 [3.4.1.] ("Mij lijkt de conclusie gewettigd dat het voor de tweede maal indienen van eenzelfde, reeds toegewezen, vordering naar burgerlijk recht niet zonder meer de niet-ontvankelijkheid van de eiser ten gevolge dient te hebben doch dat die vordering in civilibus waarschijnlijk strandt op het gebrek aan belang, zo dat het geval is.").
[166] '*Vorderingsrecht*'.

action."[167] The provision can bar the reassertion of a cause of action by rendering a claim inadmissible,[168] and potentially affects both successful and unsuccessful claimants[169]. Conversely, the provision does not *a priori* exclude a right of action; for instance, while a claimant may not arbitrarily split a claim, Art 3:303 BW does not deny a right of action if the claimant has a sufficient interest in filing another claim for the same cause of action after having recovered a judgment.

(1) Nature and rationale

Article 3:303 BW is underpinned by the principle of a sound administration of justice.[170] The Dutch Supreme Court in *EVM NV/OHRA Ziektekostenverzekering NV* explained in so many words that "the question whether there is a sufficient interest in a claim … must be answered by establishing what, in light of the particularities of the legal relationship of the parties, the sound administration of justice requires."[171] The provision is therefore a rule addressed to *courts*, which must, if necessary of their own motion, ensure the sound administration of justice.[172]

(2) Application

The central question for purposes of applying Art 3:303 BW is whether by the standards of the provision a claimant's interest in a claim is 'sufficient' to warrant a claim. According to the parliamentary history of the provision, "a sufficient interest of a claimant may be presumed."[173] The explanation adds that "[b]y way of exception

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[167] The provision reads: "Lacking a sufficient interest, no one has a right of action." ("Zonder voldoende belang komt niemand een rechtsvordering toe."). The principle already appears (in a different context) in HR 30 January 1959, NJ 1959, 548 (*Quint/Te Poel*). See Snijders (n 25) ("The winner of a case who wishes to sue again for the same cause generally faces the rule contained in the adage 'no interest, no action' (now Art 3:303 BW)."). See further Beukers (n 3) 110-118.

[168] '*Niet ontvankelijk*'.

[169] See, respectively, text to n 181ff and text to n 214ff.

[170] HR 27 February 1998, NJ 1998, 764 mnt MM Mendel (*Europeesche Verzekering Maatschappij NV/OHRA Ziektekostenverzekering NV*).

[171] ibid [5.3] ("…het Hof [is]— met juistheid — ervan uitgegaan dat de vraag of rechtens voldoende belang bestaat bij een vordering die — zoals hier — louter strekt tot het verkrijgen van een of meer verklaringen voor recht, moet worden beantwoord door na te gaan wat, gegeven de bijzonderheden van de rechtsverhouding waarin partijen tot elkaar staan, de eisen van een goede procesorde meebrengen."). Similarly, Advocate Bakels observed, at [2.10] that, "the prohibition of 'random claimsplitting' … serves a sound administration of justice. … In the present case, the procedural efficiency, an aspect of a sound administration of justice, is served rather than harmed if issues arising repeatedly between the same parties in a large number of cases are determined once and for all." ("…[H]et verbod van 'willekeurige splitsing' waarom het hier gaat, ertoe dient om het belang van een goede procesorde te verzekeren. … In het onderhavige geval wordt de processuele efficiëncy, die een aspect is van het belang van een goede rechtspleging, veeleer gediend dan geschaad als vragen die tussen dezelfde partijen in een groot aantal gevallen telkens weer rijzen, in één worp worden beslist.").

[172] HR 13 November 1998 (n 24) [3.2] (*Postbank NV/Huijbregts*) ("If a court deems a certain procedural act contrary to the sound administration of justice, it may decide so of its own motion.") ("Wanneer de rechter van oordeel is dat een bepaalde proceshandeling in strijd is met hetgeen een goede procesorde eist, is hij bevoegd dit oordeel ook ambtshalve te geven."). cf AG Wesseling-van Gent in HR 24 December 2010 (n 12) [2.10] (*CHIP(S)HOL III BV/NV Luchthaven Schiphol (No2)*).

[173] CJ van Zeben, JW du Pon, and MM Olthof, *Parlementaire geschiedenis van het nieuwe burgerlijk wetboek: parlementaire stukken systematisch gerangschikt en van noten voorzien. Boek 3, Vermogensrecht in het algemeen* (Kluwer, Deventer 1981) 915–16 ("In het algemeen mag voldoende belang voor de eiser worden verondersteld."). cf AG Wesseling-van Gent in HR 22 September 2006,

only, claimant have to prove that their interest is sufficient."[174] This presumption of a sufficient interest implies that Art 3:303 BW is usually applied only pursuant to the defendant's objection;[175] in fact, in cases were a claimant reasserts a cause of action, courts are not generally aware of prior judgments on the same cause of action of other courts. As noted, however, the provision is theoretically addressed to courts, whose task is to ensure of their own motion a sound administration of justice.

The parliamentary history of the provision further clarify that "to determine whether a claimant ought to be denied a right of action, a court should not only verify that the claimant has an interest in making the claim, but also, that this interest is sufficient to justify proceedings."[176] The test then is twofold and pertains, firstly, to the nature of the private interest that the claimant seeks to protect (e.g. the provision allows a claim for damages, not exclusively for emotional interests) and, secondly, to the question whether judicial protection of that private interest is justified.

Moreover, the explanation adds that the provision's application involves, apart from "a weighing of the interests of the parties involved", an assessment of "the requirements of a sound administration of justice, which the court is to secure of its own motion."[177] Along these lines, the Dutch Supreme Court in *EVM NV/OHRA Ziektekostenverzekering NV* explained, as noted above, that the question whether there is a sufficient interest in a claim should be answered by determining what, in light of the particularities of the legal relationship of the parties, a sound administration of justice requires.[178] In a situation where a claimant reasserts a cause of action, the court should therefore consider and balance the claimant's interest in pursuing the claim (justice) and the defendant's interest in finality after the cause of action has been adjudicated upon (finality), as well as the public interest in a sound administration which requires both justice and finality, including the efficient use of judicial resources.[179]

(3) Scope

Article 3:303 BW technically applies in all situations where a party files a civil claim.[180] However, in the present context concerned with the implementation of finality of litigation, two situations in particular are relevant and will be considered in

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ECLI:NL:PHR:2006:AX9705, NJ 2007, 188, RvdW 2006, 875, JBPr 2007, 56 mnt FJH Hovens [2.5] (*Aruba/New Millenium Telecom Services NV*).

[174] ibid ("Slechts bij uitzondering zal de eiser moeten bewijzen dat hij voldoende belang heeft.").

[175] See, for instance, AG Wesseling-van Gent in HR 16 February 2001, ECLI:NL:PHR:2001:AB0025, NJ 2001, 236 [2.13].

[176] Van Zeben, Du Pon, MM Olthof (n 173) ("Om te kunnen uitmaken of aan de eiser de rechtsvordering op deze grond moet worden ontzegd, moet de rechter niet alleen nagaan of de eiser enig belang bij de vordering heeft, maar ook, of dit belang voldoende is om een procedure te rechtvaardigen.").

[177] ibid ("[Het gaat hierbij] niet alleen om de afweging van de belangen van betrokken partijen tegen elkaar, maar ook om de eisen van een behoorlijke procesvoering en het belang van de rechtspleging, waarop de rechter zelf ambtshalve heeft te letten.").

[178] HR 27 February 1998 (n 170) [5.3] (*Europeesche Verzekering Maatschappij NV/OHRA Ziektekostenverzekering NV*).

[179] ibid [4.2] ("…dat de vraag of rechtens voldoende belang bestaat bij een vordering die — zoals hier — louter strekt tot het verkrijgen van een of meer verklaringen voor recht, moet worden beantwoord door na te gaan wat, gegeven de bijzonderheden van de rechtsverhouding waarin partijen tot elkaar staan, de eisen van een goede procesorde meebrengen.").

[180] See, eg, Hof Amsterdam 15 March 1990, KG 1990, 137.

turn: first, reassertion of a cause of action by successful claimants; and, second, reassertion by unsuccessful claimants.

(i) Reassertion by successful claimants

For obvious reasons, the simple repetition of a claim that has previously succeeded hardly ever occurs in practice; at any rate, the claimant would have a hard time explaining the sufficiency of their interest in obtaining the same remedy twice over.[181] By contrast, the scenario where a successful claimant pursues *another*, additional remedy for the same cause of action is far more likely, and the implications of Art 3:303 BW for the admissibility of such claims can be usefully analysed first.

Further, the general scope of Art 3:303 BW implies that the provision's application is not restricted to situations where a successful claimant reasserts a cause of action. Two scenarios in particular merit discussion: first, claims that follow the determination of an collective interest claim under Art 3:305a BW; and, second, claims filed after a court approved collective settlement pursuant to Art 7:907 BW. These two scenarios are relevant because the limited scope of the Dutch res judicata doctrine under Art 236 Rv means that neither a judgment on a collective interest claim, nor a judgment certifying a collective settlement has conclusive effect vis-à-vis third parties. Nevertheless, in certain circumstances, Art 3:303 BW may render this type of claim inadmissible for lack of a sufficient interest.

a. Claim splitting

The splitting of a claim is not automatically barred. Nevertheless, the requirements of a sound administration of justice imply that the *random* splitting of claims is prohibited. For instance, a claimant may not without proper justification such as the protection of the claimant's rights bring successive claims for declaratory and condemnatory relief;[182] Art 3:302 BW confirms that declaratory relief is available, but a claimant still needs a sufficient interest under Art 3:303 BW to pursue such declaration separately from other available remedies.

A Dutch court tends to verify of its own motion whether a claimant has a sufficient interest to claim a declaration separately. This is one of the situations where the claimant will be put to the test and will be required to prove that their interest to split their claim is sufficient in the circumstances of the case. For instance, the Dutch Supreme Court has clarified that Art 3:303 BW requires that "special circumstances have transpired or have been asserted, which, notwithstanding the existence of an

[181] cf Snijders (n 25) ("The successful claim who seeks to sue again for the same cause of action is usually barred by the rule expressed by the adage 'no interest, no action' (today Art 3:303 BW). For obvious reasons, neither this situation nor any of its exceptions frequently materialise in practice." ("De winnaar van een zaak die andermaal wenst te procederen over dezelfde zaak loopt in het algemeen op tegen de rechtsregel die is neergelegd in het adagium 'Geen belang, geen actie' (thans art. 3:303 BW). Op voor de hand liggende gronden komt noch die confrontatie noch enige uitzondering daarop veel voor.").

[182] HR 30 March 1951, NJ 1952, 29 (*Europeesche/Ohra*) ("…the requirements of a sound administration of justice and the interests of civil justice demand that the claimant is not entitled to split their claim randomly in separate claims for declaratory and condemnatory relief, and that this division is allowed only in special circumstances where this is justified for the purpose of protecting the claimant's rights …."). cf HR 19 May 1961, NJ 1961, 534.

entitlement, temporarily prevent the grant of condemnatory relief, but which call for an action to safeguard the entitlement through a conclusive declaratory judgment".[183]

This form of claim splitting arose in *EVM NV/OHRA Ziektekostenverzekering NV*.[184] The claimant, an insurance company, sought a declaration from the court that the defendant, another insurance company, was liable to contribute in respect of payments the claimant had made under a large number of travel insurance agreements, on the ground that the defendant's insurances covered the same risks. The claimant's aim was to obtain a judgment declaring the defendant's liability that would be conclusive under Art 236 Rv in subsequent cases involving specific claims for compensation.[185] The defendant objected, asserting that the claimant engaged in unlawful claim splitting.

The Court of Appeal of Arnhem allowed the claim:

> [T]he question whether there is an interest in a claim must be answered by reference to the requirements of a sound administration of justice. The random splitting of claims can cause unwarranted cases. In this case, however, the claim for a declaration is aimed at preventing the need to relitigate the issue of liability in every other case, which cannot be characterised as arbitrary splitting.[186]

The Dutch Supreme Court approved this decision, and added that the question whether there is a sufficient interest in a claim which is aimed solely at obtaining one or more declarations, must be answered by establishing what, in light of the particularities of the legal relationship of the parties, the requirements of a sound administration of justice require.[187] On this view, the random splitting of claims can cause unwarranted litigation and is prohibited; in certain cases, however, it is recognised that a separate claim for declaratory relief actually serves to *prevent* litigation, like on the fact of the case, where a declaratory judgment is said to avoid litigation by precluding the relitigation of the issue of liability after it is judicially determined.[188]

b. Collective interest claims

Article 3:305a BW defines a 'collective interest claim' as follows: "An association with full capacity to sue and be sued can bring a claim whose object is the protection of interests shared by other persons, if it defends these interests by virtue of its

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[183] ibid.

[184] HR 27 February 1998 (n 170) (*Europeesche Verzekering Maatschappij NV/OHRA Ziektekostenverzekering NV*).

[185] See text to n 318.

[186] HR 27 February 1998 (n 170) [5.3] (*Europeesche Verzekering Maatschappij NV/OHRA Ziektekostenverzekering NV*) ("…ter beoordeling van de vraag of er belang bij een rechtsvordering is moet worden uitgegaan van de eisen van een behoorlijke procesvoering en het belang der rechtspleging. Het willekeurig splitsen van een vordering kan tot nodeloze procedures leiden. In het onderhavige geval is echter de gevorderde verklaring voor recht juist bedoeld om zoveel mogelijk te voorkomen dat van geval tot geval over de draagplicht moet worden geprocedeerd, zodat van een willekeurige splitsing niet kan worden gesproken.")

[187] ibid.

[188] But, it is questionable whether the judgment would have *res judicata* effect under Art 236 Rv due to that provision's mutuality-requirement. See text to n 494ff.

articles of association."[189] The provision excludes a claim for damages; collective interest claims are therefore typically for injunctive or declaratory relief.[190] If a collective interest claim is granted, Art 3:303 BW is likely to bar a subsequent individual claim of a person whose interest was the object of the collective interest claim. Though the case of *Philips Electronics NV/VEB* is not directly on point, it generally clarifies the effects of a judgment on an Art 3:305a BW-claim.[191]

The dispute involved a collective interest claim filed by VEB, an association for shareholders interests, against Philips, a producer of electronic products, for unlawful misrepresentation (read: overstatement) of the company's future business prospects and financial situation. The claimant pursued declaratory relief. In reply, the defendant dispute VEB's standing.

The lower courts confirmed VEB's standing to sue Phillips in the interest of its shareholders, as did the Dutch Supreme Court. The Supreme Court did not directly address the question whether an individual shareholder might still bring a separate claim if the VEB succeeded and recovered a declaratory judgment, but answered that question indirectly:

> [A] judgment that grants this claim [for a declaration] is conclusive only between the claimant and Philips, with the effect that shareholders who believe they have suffered damage by the aforementioned wrongful act of Philips will have to file a claim on that basis, in which case Philips will be able every time, by reference to the particular group of shareholders to which the claimant belongs, to argue why they are not liable for damage of the particular claimant.[192]

The Court clarified two things: first, a claim of an individual shareholder *for damages* is admissible following the VEB's successful collective interest claim; and, second, a judgment between VEB and Philips on the collective interest claim lacks conclusive effect under Art 236 Rv in a subsequent individual shareholder's claim against Philips.[193]

The remaining question is whether an individual claimant's claim *for declaratory relief* would be admissible. The parliamentary history of Art 3:305a BW suggests that Art 3:303 BW will bar such a claim:

> The lack of extension of the *gezag van gewijsde* does not mean that an interested third party, if the claim of the association has been granted, can bring the same claim.

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[189] ("Een stichting of vereniging met volledige rechtsbevoegdheid kan een rechtsvordering instellen die strekt tot bescherming van gelijksoortige belangen van andere personen, voorzover zij deze belangen ingevolge haar statuten behartigt.").
[190] Article 3:305a(3) BW.
[191] HR 7 November 1997, NJ 1998, 268 mnt JMM Maeijer (*Philips Electronics NV/VEB*).
[192] ibid [3.3.5] ("…een vonnis waarbij deze vordering mocht worden toegewezen, enkel tussen haar en Philips gezag van gewijsde zal hebben, zodat die aandeelhouders die menen ten gevolge van voormeld tekortschieten van Philips schade te hebben geleden, haar terzake zullen moeten aanspreken, in het kader van welke individuele procedures Philips telkens voldoende gelegenheid zal hebben om te betogen waarom zij, mede in aanmerking genomen de groep van aandeelhouders waartoe de desbetreffende eiser behoort, jegens hem niet schadeplichtig is.").
[193] HR 1 July 1983, NJ 1984, 360 mnt M van der Scheltema (*Staat/LSV*). cf HR 14 June 2002, ECLI:NL:HR:2002:AE0629, NJ 2003, 689 mnt HJ Snijders, RvdW 2002, 99 (*Nederlandse Vakbond van Varkenshouders/Staat*).

> The principle 'No interest, no action' expressed in Article 3:303 BW prevents this claim.[194]

This statement can only be true if an individual shareholder who sues Philips for damages is somehow able to rely on the declaratory judgment recovered by VEB to the effect that Philips cannot deny the misrepresentation, notwithstanding that Philips could still contest its liability for damages; if an individual shareholder cannot invoke that judgment, the shareholder clearly does have a sufficient interest to claim a declaration.[195]

Case law confirms that a judgment on a collective interest claim can be invoked by an individual claimant in a subsequent claim for damages. Courts have however failed to offer a convincing reason why, considering that the judgment is invoked in a different case and between different parties; for example, the Utrecht District Court in *Stichting Koersplandewegkwijt/Spaarbeleg Kas NV* held:

> The association is not the legal representative of the participants in the financial scheme, but only defends their interests. This implies that the judgment on the collective interests claim is conclusive only between the parties in that case. The declarations claimed by the association are not conclusive upon the group of persons whose interests were defended; they only have effect as a *precedent*.[196]

The effect of judgments as precedent in the sense described by the court is as such unknown in Dutch law. At most the judgment can be used as a means of *evidence.* Though a court can weigh freely the significance of a judgment as a means of evidence in each case, it is unlikely that on that basis Art 3:303 BW will deny an individual claimant a right of action to claim declaratory relief; then again, another question is whether in the particular circumstances of the case such a claim merely for declaratory relief might be struck out under the same provision as random claim splitting.[197]

c. Court approved collective settlements

Under Art 7:907 BW, a 'collective settlement' is "[a]n agreement aimed at compensation of damage caused by an event or a series of like events which is concluded by an association or foundation and one or more other parties who obligate

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[194] Representative Action Act (Explanatory Memorandum) (*Regeling van de bevoegdheid van bepaalde rechtspersonen om ter bescherming van de belangen van andere personen een rechtsvordering in te stellen*) Kamerstukken II (1991-1992) 22486 No 3, 26-27 (*MvT*) ("Overigens houdt niet-uitbreiding van het gezag van gewijsde niet in dat een belanghebbende, indien een vordering aan een belangenorganisatie is toegewezen, zelf nogmaals een gelijkluidende vordering kan instellen. Het in artikel 3:303 nieuw BW neergelegde beginsel 'Zonder voldoende belang komt niemand een rechtsvordering toe' staat daaraan in de weg. De werking van het gezag van gewijsde blijft derhalve in beginsel beperkt tot de procespartijen.").

[195] Rb Utrecht 6 June 2007, ECLI:NL:RBUTR:2007:BA6796 [5.3] (*Stichting Koersplandewegkwijt/Spaarbeleg Kas NV*).

[196] ibid [5.3] ("De Stichting treedt daarbij niet op als procesvertegenwoordiger van of namens de deelnemers aan het KoersPlan, maar behartigt slechts hun belangen. Dat brengt met zich mee dat een vonnis op grond van een collectieve actie ook slechts gezag van gewijsde heeft tussen de in die procedure betrokken partijen. De door de Stichting gevorderde verklaringen voor recht zijn niet bindend ten opzichte van de groep van personen voor wie wordt opgekomen, zij hebben alleen precedentwerking.") (emphasis added).

[197] See text to n 173ff.

themselves to compensate this damage", which "a court can declare obligatory for those persons who suffered the damage, on the application of the parties who concluded the agreement, as long as the association of foundation defends the interests of these persons by virtue of its articles of association."[198] It follows, the instrument is in nature an *agreement*,[199] that is to say, a *settlement* agreement[200] through which, "the parties assume the obligation to a determination of their legal relationship in order to end uncertainty or a dispute, which applies even though it deviates from their legal relationship in fact."[201]

A collective settlement under Art 7:907 BW has two special features: firstly, a collective settlement agreement determines the rights and obligations arising from a damaging event or series of such events that affect third parties and, secondly, a collective settlement agreement becomes contractually binding (on an opt-out basis)[202] for those adversely affected third parties by virtue of a court declaration.[203] This legal extension by court decision of the agreement's effect is deemed justified, because the Amsterdam Court of Appeal[204] has exclusive jurisdiction to grant the required declaration, and will do so only if the court is satisfied that the interests of the affected third parties have been sufficiently guaranteed;[205] for instance, the court tests inter alia the height of the compensation payable under the agreement[206].

Since its entry into force, this option of a collective settlement of claims has been used in a number of significant cases.[207] In those cases, the collective settlement

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[198] Article 7:907(1) BW ("1. Een overeenkomst strekkende tot vergoeding van schade die is veroorzaakt door een gebeurtenis of gelijksoortige gebeurtenissen, gesloten door een stichting of vereniging met volledige rechtsbevoegdheid met één of meer andere partijen, die zich bij deze overeenkomst hebben verbonden tot vergoeding van deze schade, kan door de rechter op gezamenlijk verzoek van de partijen die de overeenkomst hebben gesloten verbindend worden verklaard voor personen aan wie de schade is veroorzaakt, mits de stichting of vereniging de belangen van deze personen ingevolge haar statuten behartigt."). The current rules have been amended in several respects. See Collective Settlement Amendment Act 2013 (*Wet van 26 juni 2013 tot wijziging van het Burgerlijk Wetboek, het Wetboek van Burgerlijke Rechtsvordering en de Faillissementswet teneinde de collectieve afwikkeling van massavorderingen verder te vergemakkelijken (Wet tot wijziging van de Wet collectieve afwikkeling massaschade)*) (entered into force 1 July 2013) Stb 2013, 255.

[199] See Art 6:213(1) BW ("a mutual legal act through which one or more parties assume an obligation vis-a-vis one or more others") ("een meerzijdige rechtshandeling, waarbij een of meer partijen jegens een of meer andere een verbintenis aangaan").

[200] '*Vaststellingsovereenkomst*'. See Arts 7:900 BWff.

[201] Articles 7:900(1) BW ("…ter beëindiging of ter voorkoming van onzekerheid of geschil omtrent hetgeen tussen hen rechtens geldt, zich jegens elkaar aan een vaststelling daarvan, bestemd om ook te gelden voor zover zij van de tevoren bestaande rechtstoestand mocht afwijken.").

[202] Article 7:908(2) BW.

[203] Article 7:908(1) BW ("Zodra het verzoek tot verbindendverklaring onherroepelijk is toegewezen heeft de overeenkomst, bedoeld in artikel 907, tussen partijen en de gerechtigden tot een vergoeding de gevolgen van een vaststellingsovereenkomst waarbij ieder der gerechtigden als partij geldt."). cf Collective Settlement Act (Explanatory Memorandum) (*Wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de collectieve afwikkeling van massaschades te vergemakkelijken (Wet collectieve afwikkeling massaschade)*) Kamerstukken II (2003-2004) 29414 No 3, 3 (*MvT*).

[204] Article 1013(3) Rv. This court has exclusive jurisdiction to certify collective settlement agreements.

[205] 7:908(3)(e) BW ("…de belangen van de personen ten behoeve van wie de overeenkomst is gesloten anderszins onvoldoende gewaarborgd zijn….").

[206] 7:908(3)(b) BW.

[207] See Hof Amsterdam 1 June 2006, ECLI:NL:GHAMS:2006:AX6440, NJ 2006, 461, JA 2006, 88 (*DES*); Hof Amsterdam 25 January 2007, ECLI:NL:GHAMS:2007:AZ7033, NJ 2007, 427, JOR 2007, 71 mnt AFJA Leijten (JOR 2003, 107), JBPr 2007, 39 mnt ChrF Kroes, NJF 2007, 266, JA 2007, 63, RF 2007, 22 (*Dexia*); Hof Amsterdam 29 April 2009, ECLI:NL:GHAMS:2009:BI2717, NJ 2009, 448, NJF

agreement is likely to trigger the application of Art 3:303 BW in case an affected third party who failed to opt out from the settlement agreement brings a separate claim for damages; the claimant arguably lacks a sufficient interest in filing a claim, because he is entitled to damages under the collective settlement agreement.

In practice, the contractual obligations arising under a collective settlement agreement have been equated to the preclusive effects of a judgment; for instance, the parliamentary history of the law creating the instrument states:

> The effects for the affected parties are comparable to the preclusive effect of a judgment on a claim or issue in the sense of Article 236 Rv. Alike *gezag van gewijsde*, namely, a settlement agreement implies that in subsequent cases there can be no new discussion about the legal position as defined by the agreement. In practice, an interested party is prevented from litigating this matter in court.[208]

However, the contractual rights and obligations under a collective settlement *agreement*, which are in law extended by means of a court decision to affected third parties on an opt-out basis, and can thus be enforced in subsequent proceedings involving those parties, should not be confused with the legal effects of the declaratory *judgment* through which the collective settlement agreement becomes binding on affected third parties.[209] This judgment triggers legal consequences first and foremost under the law of contract which, on the condition of the judgment having the status of res judicata,[210] extends the scope of the collective settlement agreement to affected third parties who fail to opt out from the agreement.[211]

Conversely, while the judgment may be conclusive under Art 236 Rv between the parties in the Art 7:907 BW proceedings, it lacks this effect vis-à-vis the affected third parties, who lack standing to resist the application, even though they must be sent a notice of the application proceedings[212] (as well as of the court's

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2009, 247, JOR 2009, 196 mnt AFJA Leijten (in JOR 2003, 107), RF 2009, 73, JONDR 2009, 369 (*Vie d'Or*); Hof Amsterdam 15 July 2009, ECLI:NL:GHAMS:2009:BJ2691, JOR 2009, 325 mnt ACW Pijls, ONDR 2009, 162, RF 2009, 92 (*Vedior*); and Hof Amsterdam 29 May 2009, ECLI:NL:GHAMS:2009:BI5744, NJ 2009, 506, JOR 2009, 197 mnt AFJA Leijten, RF 2009, 74, JONDR 2009, 371 (*Shell*). See Ruud Hermans and Jan de Bie Leuveling Tjeenk, 'International Class Action Settlements in the Netherlands since *Converium*' in Ian Dodds-Smith and Alison Brown, *The International Comparative Legal Guide to: Class & Group Actions 2014* (6th ed Global Legal Group 2013) 5ff.

[208] Representative Action Act (Explanatory Memorandum) (*Regeling van de bevoegdheid van bepaalde rechtspersonen om ter bescherming van de belangen van andere personen een rechtsvordering in te stellen*) Kamerstukken II (1991-1992) 22486 No 3, 3 (*MvT*) ("Na een verbindendverklaring heeft de overeenkomst tussen de partijen en de benadeelden de gevolgen van een vaststellingsovereenkomst (zie het voorgestelde artikel 7:908 lid 1 BW). Dit betekent dat de benadeelden door de uitspraak van de rechter gebonden zijn aan hetgeen in de overeenkomst ter voorkoming of beëindiging van een geschil is bepaald over wat rechtens voor hen geldt (vergelijk artikel 7:900 lid 1 BW). De gevolgen daarvan zijn voor de benadeelden derhalve vergelijkbaar met een rechterlijke beslissing aangaande een rechtsbetrekking die bindende kracht heeft (zie artikel 236 Wetboek van Burgerlijke Rechtsvordering (Rv.)). Evenals het gezag van gewijsde heeft een vaststellingsovereenkomst immers tot gevolg dat in een geding geen hernieuwde discussie kan plaatsvinden over datgene wat in de overeenkomst is bepaald over wat rechtens geldt. Feitelijk wordt een belanghebbende daarmee de mogelijkheid ontnomen om ter zake daarvan de rechter te adiëren.").

[209] See Art 7:907(1) BW.

[210] Article 7:907(1) BW in conjunction with Art 7:908(1) BW.

[211] Article 7:908(2) BW.

[212] Article 1013(5) Rv. The notice to the interested persons is sent by ordinary letter unless the court stipulates a different methode. In addition, the notice is published in one or more court designated newspapers. The notice must state the location and the date and time of the court hearing, and a brief

eventual decision on the application)[213]. In other words, despite the fact that affected third parties are treated as parties to the collective settlement agreement after they fail to opt out and the court declaration acquires the status of res judicata, they are not parties to the proceedings on the application for a court declaration so as to justify application of Art 236 Rv.

(ii) Reassertion by unsuccessful claimants

Article 3:303 BW has general application and also applies to claims by *unsuccessful* claimants that reassert a cause of action.[214] It cannot be said that an unsuccessful claimant lacks an interest in filing another claim for the same cause of action. However, Art 3:303 BW additionally requires that a claim be *objectively* justified, which means that a claim should be warranted on a balance of the all relevant private and public interests. A court must therefore consider whether the claimant's interest in another claim weighs up against the defendant's interest not to be bothered again for the same cause of action, but also whether the claimant's interest in another claim weighs up against the public interest in a sound administration of justice, which requires that court resources be applied efficiently.[215] This balancing act is likely to disfavour reassertion of the cause of action; for example, in a recent decision, the Amsterdam Court of Appeal held that pending an appeal of a judgment that denied a claim, the unsuccessful claimant lacked a sufficient interest to claim again for the same cause of action:

> The District Court decided that the claim for the sum indicated had already been determined by judgment …. The appellant states that this judgment is under appeal and therefore is not conclusive. According to the appellant, the District Court failed to appreciate this. It follows from the statements of the appellant that the claim … has

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description of the settlement agreement and the legal consequences of the approaval of the petition to have the settlement agreement court approved. such request being allowed shall always be stated in the manner indicated by the court. The notice must further state that the petition can be inspected at the court registrar's office and that there is a right to file an answer to the petition. The court may also order that the information must also be published in a different manner.

[213] Article 1017(2) Rv. As soon as the decision of the court has become irreversible, a copy of the court's order declaring the settlement agreement binding must be sent by means of ordinary letter to any persons known to be entitled to compensation and to the legal persons which entered an appearance in the proceedings. Moreover, an announcement must be published in one or more newspapers designated by the court as soon as possible after the order becomes irreversible. The notice must state a brief description of the agreement, in particular the manner in which compensation can be obtained and, if the agreement so provides, the period within which claims must be made, and the legal consequences of the order declaring the agreement binding. The notice must further state how it is possible to opt out from the legal consequences of the court's order and what are the time limits for doing so. Finallly, the notice must state that the court's order and the settlement agreement are available at the court registrar's office for inspection, with the possibility of obtaining a copy. The court may also order that the information must also be published in a different manner.

[214] Beukers (n 3) 112 incorrectly suggests that Art 236 Rv is sufficient to tackle the problem of reassertion of a cause of action, since this provision only prevents contradiction of judicial findings. She suggests further that in circumstances where 236 Rv is not applicable (e.g. in case a judgment has not acquired the status of *res judicata*) the principle of a sound administration of justice will lead to the inadmissibility of the claim. But this approach leads to the strange result that a claim is admissible in cases where Art 236 Rv is applicable, but inadmissible where the provision is inapplicable. Rather, Art 3:303 BW has general application, also in case of reassertion by an unsuccessful claimant, since the provision is founded on the principle of a sound administration of justice. See text to n 214ff.

[215] cf ThB Ten Kate, 'Efficiency en recht' (afscheidsrede als Procureur-Generaal bij de Hoge Raad der Nederlanden, 22 June 2001) in (2001) Trema 303-08.

> already been determined and the proceedings are still pending, currently on appeal. This implies that the appellant lacks an interest to obtain another decision on this claim in the present proceedings.[216]

Prior to the enactment of 3:303 BW, courts reached the same result by direct application of the principle of a sound administration of justice, which also underpins the current provision, as illustrated by the case of *Rijwielfabriek de Vierkleur NV/Crossley Motoren NV*.[217] The dispute related to the sale of a complex industrial machine. Failing payment of one instalment of the purchase price, the claimant sued for breach of contract. The defendant answered by alleging the claimant's failure to deliver a suitable machine, and filed a counterclaim for termination of the contract.

At first instance, the principal claim was rejected and the counterclaim grantded. By contrast, the Court of Appeal granted the claim and rejected the counterclaim. However, in the interim, the seller had filed a new claim for payment of new instalments that by then had become due. Again, the defendant argued that the claimant had failed to supply a proper machine and again filed a counterclaim for termination of the agreement. The claimant answered by invoking the first judgment that had already rejected the counterclaim. On appeal in this case, the Court of Appeal eventually struck out the claim, declaring it inadmissible (*niet ontvankelijk*) on this ground:

> [I]t is inappropriate and contrary to a proper functioning legal order to seize the court again with a view to obtaining a new decision between the same parties on the same cause of action when the court has already decided upon that cause of action between the same parties through a judgment that remains in force.[218]

The Court of Appeal cited the need for "a proper functioning legal order", which is also referred to as the principle of a sound administration of justice. The Hoge Raad upheld the decision as based on *general principles of law*.[219]

Reference can further be made to the case of *Leutscher/Van Tuijn.*[220] Also this case predates the enactment of Art 3:303 BW and the issue of finality in question

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[216] Hof Amsterdam 1 March 2011, ECLI:NL:GHAMS:2011:BP7262 [3.14]-[3.15].

[217] HR 26 January 1917, NJ 1917, 225 (*Rijwielfabriek de Vierkleur NV/Crossley Motoren NV*).

[218] Hof Den Haag 17 April 1916 (in HR 26 January 1917 (n 217) (*Rijwielfabriek de Vierkleur NV/Crossley Motoren NV*)) ("O. nu, dat … de appellante niet het recht had een geheel gelijkluidende vordering omtrent dezelfde rechtsvraag opnieuw aanhangig te maken bij den rechter, die reeds in deze rechtskwestie een beslissing gaf en wiens vonnis door den hoogeren rechter werd vernietigd. Dat immers, wanneer de rechter omtrent een bepaalde rechtsvraag tusschen twee partijen een beslissing heeft gegeven, welke voorlopig onaantastbaar is, het niet aangaat en in strijd is met een gezonde rechtsorde om den rechter opnieuw te adiëren ten einde tusschen dezelfde partijen omtrent dezelfde rechtsvraag opnieuw een beslissing te verkrijgen.")

[219] HR 26 January 1917 (n 217) (*Rijwielfabriek de Vierkleur NV/Crossley Motoren NV*) ("O. … dat door die beslissing, die rust op algemene rechtsbeginselen, geen artikelen der wet, in het bijzonder niet die in het middel aangehaalde, zijn geschonden…."). cf Hof 's-Gravenhage 27 June 1963, NJ 1965, 247 (*Bouw-Maatschappij Limburg NV/Eigl*) ("A proper functioning legal order excludes the possibility of litigating the same dispute fifteen months later; the formulation of Article 1954 does not require the more restrictive interpretation, which the applicant seeks [ie 1954 infers only a legal presumption not a principle of ne bis in idem]; a reasonable application of this provision calls for the solution also adopted by the District Court. The court therefore correctly deemed the claim inadmissible.") ("…[A]lleen reeds een goede procesorde verzet zich ertegen om 15 maanden later opnieuw volkomen gelijk geding te gaan voeren; de bewoordingen van art. 1954 dwingen geenszins tot de beperkte strekking, die app.e daaraan wil zien toegekend; een redelijke toepassing daarvan vordert de hier, ook door de Rb., voorgestane opvatting. De Rb. heeft dan ook terecht hierop de vordering niet ontv. geacht….").

could presently be resolved by reference to this provision. The dispute, the resolution of which involved over forty judgments, related to the take over of a lemonade factory. The claimant (Leutscher) had previously been ordered to render the balance of the accounts of the lemonade factory in lign with the sale agreement subject to a penalty payment for each day he failed to comply. Leutscher failed to comply. But when Van Tuijn, the defendant in the case in question, sought to execute the order imposing a penalty payment, Leutscher filed a claim for an interim measure preventing the execution, citing *force majeure* as justification for not complying with the court's order of. This claim was rejected on the ground that Leutscher's failure to comply with the order was due to own fault. Leutscher appealed, but failed on appeal and in cassation. However, Leutscher then filed a new claim for an interim measure, which on the same grounds aimed at preventing the execution of the penalty payment.

The Breda District Court declared the claim inadmissible on the ground that the claim had already been rejected.

The 's-Hertogenbosch Court of Appeal confirmed this judgment, while reasoning that a new claim for an interim measure based on the same cause of action that supported a prior claim that had already been rejected violated the principle of a sound administration of justice.

The Dutch Supreme Court upheld this decision as follows: "The Court of Appeal did not err in law by its decision that it is contrary to a sound administration of justice to claim the same remedy for the same cause of action as alleged in the prior interim proceedings."[221]

Advocate General Biegman-Hartogh observed in the case that: "It is of no practical significance whether this rule is based on Article 1954 BW [now 236 Rv] or the unwritten rule aimed at maintaining a sound administration of justice."[222] To date, that choice is relevant, if only because Art 236 Rv lacks application to judgments given in interim proceedings. Moreover, a proper understanding of Art 236 Rv implies that this provision *never* renders a claim inadmissible; in fact, the provision, where applicable, renders the findings in a judgment conclusive, and thus in effect the provision precludes the (successful) contradiction of those findings by the original parties to the judgment (or their privies).[223]

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[220] HR 27 May 1983, NJ 1983, 600 (*Leutscher/Van Tuijn (No 1)*).

[221] ibid [4] ("Door te oordelen dat het in strijd is met een goede procesorde om op inhoudelijk dezelfde gronden als aangevoerd in het vorige k.g. thans hetzelfde te vorderen, heeft het Hof geen blijk gegeven van een onjuiste rechtsopvatting. 's Hofs oordeel dat de aangevoerde gronden inhoudelijk dezelfde zijn, berust op uitleg van het eerdere vonnis en van de gedingstukken in de onderhavige zaak. Dit oordeel is voorbehouden aan de rechter die over de feiten oordeelt. Het behoefde geen nadere motivering tegen de achtergrond van het feit dat Leutscher in het onderhavige kort geding slechts een betoog heeft gevoerd daarop neerkomende dat hij thans is uitgegaan van een andere uitleg van het vonnis van 21 mei 1974 dan waarvan hij in het vorige kort geding is uitgegaan.").

[222] ibid [3.1] ("Of men nu van mening is dat deze regel voortvloeit uit het in art. 1954 BW bepaalde, dan wel berust op het ongeschreven recht ter handhaving van een goede procesorde, lijkt mij van weinig practisch belang.").

[223] See text to n 365ff..

2.5 Gesloten stelsel van rechtsmiddelen

Collateral attack on judgments

A judgment-rendering court has the power on application of a party or of its own motion and after hearing the parties, to correct a simple mistake in its judgment (i.e. not procedural or substantive errors)[224] that is apparent to the parties and third parties and can be rectified straightforwardly[225]. In all other cases, pursuant to the (judge-made) doctrine that the validity (‘*geldigheid*’)[226] of a judgment can only be affected by an available means of recourse[227]—‘*gesloten stelsel van rechtsmiddelen*’—a judgment, even if erroneous, is presumed valid (‘*geldig*’) and has the force of law (‘*rechtskracht*’)[228] between the parties, as long as the judgment is not annulled[229] or revoked[230].[231]

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[224] HR 27 May 2011, ECLI:NL:HR:2011:BP8693, NJ 2012, 625 mnt HJ Snijders, RvdW 2011, 678, JOR 2011, 275, JBPr 2012, 3 mnt FJH Hovens, NJB 2011, 1180 (*Van Dooren/VECO Lasconstructies VOF*). cf HR 4 April 2003, ECLI:NL:HR:2003:AF2828, NJ 2003, 417, RvdW 2003, 68.

[225] Article 31 Rv (“De rechter verbetert te allen tijde op verzoek van een partij of ambtshalve in zijn vonnis, arrest of beschikking een kennelijke rekenfout, schrijffout of andere kennelijke fout die zich voor eenvoudig herstel leent. De rechter gaat niet tot de verbetering over dan na partijen in de gelegenheid te hebben gesteld zich daarover uit te laten.”).

[226] ‘*Geldigheid*’.

[227] HR 4 April 2003 (n 224) [3.3].

[228] ‘*Rechtskracht*’.

[229] Ordinary means of recourse against judgments include the possibility of objecting a default judgment (‘*verzet*’, Art 143 Rvff), appeal (‘*hoger beroep*’, Art 332 Rvff) and appeal in cassation (‘*beroep in cassatie*’, Art 398 Rvff). These means of recourse cease to be available in one of the following three circumstances: (1) the parties accept judgment (Arts 81(3), 334, 361 and 400 Rv, as construed in HR 30 June 2006, NJ 2006, 364); (2) the judgment is rendered or upheld in the highest instance, typically in cassation (note that certain judgments cannot be appealed; see, eg, Art 110(3) Rv or Art 332(1) Rv); or (3) the time limit for using an available means of recourse expires (see Art 339(1) Rv for appeal and Art 402(1) Rv for appeal in cassation).

[230] Extraordinary means of recourse—third party proceedings (‘*derdenverzet*’, Art 376 Rv) and revocation (‘*herroeping*’, Art 382 Rv)—do not affect the *res judicata* status of a judgment until it is amended or annulled (in case of third party proceedings) or revoked (once proceedings are re-opened) and the court has rendered a new judgment. A judgment that has *res judicata* effect under Art 236 Rv can still be revoked if it appears that the court’s decision was induced by fraud or was based on false documents, or that one of the parties in violation of Art 22 Rv withheld crucial documents. See Hof ‘s-Hertogenbosch 1 November 2005, ECLI:NL:GHSHE:2005:AV0367 (held that a judgment that is based on proceedings involving a fraud of one of the parties nonetheless has *res judicata* effect if the party who was able to claim revocation of the judgment failed to avail themselves of this option in time. If a third party (ie a person who did not appear in the proceedings in person, was not represented, did not join the proceedings or was not impleaded therein) is affected in his interests by a judgment, that party may initiate so called third party proceedings (‘*derdenverzet*’, Art 376 Rv) against the original parties to have the judgment amended to accord with their legitimate interests (Art 380 Rv). If amendment is impossible, the judgment can be annulled.

[231] HR 27 January 1989, NJ 1989, 588 mnt WH Heemskerk [3.2] (*Jamin/Geels*) (“The closed system of means of recourse against judgments foreseen by law implies that an erroneous judgment—except for the rare case … of complete absence of force of law—cannot be affected in any other way than via a means of recourse and also that if no means of recourse is available the judgment has force of law between the parties.”) (“Het gesloten stelsel van in de wet geregelde rechtsmiddelen brengt mee dat een onjuiste rechterlijke uitspraak - afgezien van het zeldzame en hier niet aan de orde zijnde geval van het geheel ontbreken van rechtskracht - niet anders dan door het aanwenden van een rechtsmiddel kan worden aangetast en dat ook indien geen rechtsmiddel beschikbaar is, de uitspraak tussen pp. rechtskracht heeft.”). cf HR 24 October 2003, ECLI:NL:HR:2003:AM2625, NJ 2004, 558 mnt HJ

Consequently, if a judgment was rendered by authorised judges and appears on its face to be a valid judgment with force of law between the parties and capable of enforcement, the *gesloten systeem van rechtsmiddelen* implies that "the nullity of such judgment can only be established by the means of recourse available against it".[232]

The only exception to the doctrine is the (very) rare case that a judgment is on its face invalid and lacks any force of law (e.g. what purports to be a judgment was produced by unauthorised individuals posing as judges);[233] however, even the evident violation of fundamental norms, like the requirement that a judgment be pronounced in public, offers no ground for a court lacking the necessary annulment or revocation jurisdiction to invalidate a judgment, and treat it as non-existent[234].

Snijders, RvdW 2003, 165 [3.2.3] (*Kollöffel/Haan*). See also, in the context of criminal procedure, HR 4 March 1974, NJ 1975, 241 mnt ThW van Veen.

[232] HR 13 September 1991, NJ 1991, 767 [4] (*Dreesmann/Vede BV*) ("The judgment of which it is not in dispute that it was rendered by the judges mentioned appears on its face to be a judgment binding on the parties and capable of execution. The closed system of means of recourse provided for by law implies that the nullity of such judgment can only be effected by using a means of recourse available against it. The Court of Appeal … therefore rightly upheld the decision of the District Court that the force of the judgment must be presumed as well as its decision on that basis to strike out the claim.") ("Het vonnis van de rechtbank van 5 aug. 1987, ten aanzien waarvan niet in geschil is dat het is gewezen door de daarin genoemde rechters, doet zich naar het uiterlijk voor als een de betrokkenen bindende en voor gerechtelijke tenuitvoerlegging vatbare rechterlijke uitspraak. Het gesloten stelsel van in de wet geregelde rechtsmiddelen brengt mee dat de nietigheid van zodanige uitspraak uitsluitend door aanwending van het daartegen openstaande rechtsmiddel geldend kan worden gemaakt. Het hof heeft zich dus - afgezien van de in zijn arrest gebezigde gronden - terecht verenigd met het oordeel van de rolrechter dat van de bindende kracht van voormeld vonnis moet worden uitgegaan en met diens op dat oordeel steunende beslissing tot weigering van opbrenging van de zaak ter rolle.").

[233] HR 27 January 1989 (n 231) [3.2] (*Jamin/Geels*) ("The closed system of means of recourse against judgments foreseen by law implies that an erroneous judgment—except for the rare case … of complete absence of force of law—cannot be affected in any other way than via a means of recourse and also that if no means of recourse is available the judgment has force of law between the parties.") ("Het gesloten stelsel van in de wet geregelde rechtsmiddelen brengt mee dat een onjuiste rechterlijke uitspraak - afgezien van het zeldzame en hier niet aan de orde zijnde geval van het geheel ontbreken van rechtskracht - niet anders dan door het aanwenden van een rechtsmiddel kan worden aangetast en dat ook indien geen rechtsmiddel beschikbaar is, de uitspraak tussen pp. rechtskracht heeft."). See, eg, Rb Arnhem 8 December 2004, ECLI:NL:RBARN:2004:AS3429 [30] ("the closed system of means of recourse against judgments implies that a judgment can only be affected by a means of recourse. The only exception which the Supreme Court recognises is the situation where the force of law is absent altogether. This only occurs in extremely exceptional circumstances, like when a judgment lacks certain essential elements forcing the conclusion that the judgment is 'non-existent'. Here this is not the case; the judgment was rendered by a court of competent jurisdiction and also meets all pertinent requirements." ("…het gesloten systeem van rechtsmiddelen [brengt] mee dat een vonnis enkel door een rechtsmiddel kan worden aangetast. De enige uitzondering die de Hoge Raad hier op maakt is het geval van het ontbreken van rechtskracht. Daarvan kan slechts in hoogst uitzonderlijke gevallen sprake zijn, zoals indien het vonnis bepaalde wezenlijke elementen ontbeert en daarom geconcludeerd moet worden dat het vonnis als het ware 'niet bestaat'. Hiervan is in het onderhavige geval geen sprake. Het vonnis is door een bevoegde rechter gewezen en voldoet ook overigens aan alle daaraan te stellen eisen."). cf AG Asser in HR 13 September 1991 (n 232) [3.5] (*Dreesmann/Vede BV*), who indicates that the Supreme Court perhaps referred to "absolute or *de jure* invalid judgments by entities or persons unauthorised to act judicially or entirely impracticable judgments." ("Uw Raad [heeft] mogelijk met name het oog heeft gehad op de, zo men wil als 'absoluut'' of van rechtswege nietig te beschouwen, uitspraken van instanties of personen die niet door de wet met rechtspraak zijn belast, dan wel volstrekt onuitvoerbare uitspraken….).

[234] HR 13 September 1991 (n 232) [4] (*Dreesmann/Vede BV*).

(1) Meaning

The *gesloten stelsel van rechtsmiddelen* protects a judgment's validity ('*geldigheid*'), not its force of law ('*rechtskracht*'). A proper understanding of the doctrine therefore requires a distinction of the two concepts.

(i) Validity and force of law

A judgment is 'valid' if the judgment *exists in the eyes of the law*, which occurs at the moment of the judgment's pronouncement by the rendering court.[235] By contrast, a judgment has 'force of law' if the judgment *compels the parties' compliance*,[236] which a judgment does from the moment it becomes valid;[237] force of law therefore does not depend on the prior service of the judgment on the party addressed; as the Dutch Supreme Court explained, "judgments apply *de jure*" so that "the obligation to

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[235] HR 11 November 1977, NJ 1978, 503 (*Engelen/Smeets*) ("…het vonnis als zodanig door de mondelinge uitspraak tot stand komt, terwijl de voorschriften omtrent het brengen op het audientieblad en de ondertekening betrekking hebben op de schriftelijke vastlegging van het door de mondelinge uitspraak tot stand gekomen vonnis; dat mitsdien de niet-naleving van het voorschrift van art. 61, eerste zin, de geldigheid van het vonnis niet raakt."). Moreover, in HR 2 November 1990, NJ 1991, 800 mnt HJ Snijders [3.2] (*Images BV/Van Delft*) the Court clarified that a judgment is deemed to have been 'pronounced' even if it is only read out in part or if recitation of the judgment was wholly omitted with the approval of the parties, noting that "[t]his rule [ie the judgment is valid from the moment of its pronouncement] must … be upheld in the interest of legal certainty. It must therefore be assumed that this rule also applies if at the occasion of the pronouncement, the judgment is only read out in part or—as is apparently presently the case—the recitation of the judgment has been omitted with the approval of the parties. This means that the judgment as pronounced at the hearing or as it is to be presumed to have been pronounced at the hearing, applies as the judgment …."). ("Aan deze regel moet… terwille van de rechtszekerheid worden vastgehouden. Aangenomen moet derhalve worden dat deze regel ook geldt wanneer ter zitting waarop uitspraak wordt gedaan het vonnis slechts gedeeltelijk wordt voorgelezen dan wel — zoals hier kennelijk is gebeurd — voorlezing daarvan met goedvinden van de partijen achterwege wordt gelaten. Dit brengt mee dat het vonnis zoals het ter zitting is uitgesproken dan wel zoals het geacht moet worden ter zitting te zijn uitgesproken als het vonnis heeft te gelden …."). The Court further added that in case the judgment rendering court provided the parties with a transcript during the hearing of the pronouncement, this document is irrefutable evidence of the court's findings and decisions until that moment. ("…the document [ie the transcript which had instead been handed to the parties] is to be presumed to include the reasons and the decisions of the court until the moment of pronouncement. In view of the nature of the judicial act so generated and made public, any evidence to disprove the contents [of the transcript] is inadmissible…."). ("…dit stuk geacht moet worden de overwegingen en beslissingen in te houden waartoe de rechter op het tijdstip van de uitspraak was gekomen. In verband met de aard van deze aldus tegelijk tot stand gekomen en openbaar gemaakte handeling van de rechter is tegenbewijs ter zake van deze inhoud niet toegelaten….").

[236] cf HJ Snijders, 'Note on HR 27 November 1992' (1993) NJ 1993, 570 [2] ("'*Rechtskracht*' denotes the application of the judicially established (established, modified, imposed) rights and obligations of the parties; if the judgment has *res judicata* status, those rights and obligations are established irreversibly." ("'Rechtskracht' duidt op het gelden van de in het dictum van een uitspraak gesanctioneerde (vastgestelde, gewijzigde, opgelegde) rechten en verplichtingen van partijen; is die uitspraak onherroepelijk, dan staan daarmee ook de in die uitspraak gesanctioneerde rechten en verplichtingen onherroepelijk vast."). cf Beukers (n 3) 24 ("'*Rechtskracht*' means the application of the rights and duties established in the judgment, but does not imply the application of these rights and duties (the *bindende kracht*) in a subsequent case. Put simply *rechtskracht* implies the application of the judicially determined rights and duties between the parties, but *gezag van gewijsde* involves the question whether the court is bound by this determination.").

[237] A judgment has the force of law even if a court's decision is declaratory in nature or alters the status of a person, property or legal relationship and does not command that parties do or refrain from doing something; the parties are to abide by the court's decision and act in accordance with that decision.

comply with the court's order arises the moment a judgment is pronounced."[238] The 1896 civil procedural code amendment ('*wet-Hartogh*')[239] confirmed this position.

The concepts are closely related in that any judgment must be valid to have the force of law, and if annulled, a judgment automatically looses its force of law.[240] Conversely, not every valid judgment retains the force of law; the force of law of a judgment can be affected by the rendition of a conflicting judgment. In this scenario, the judgment remains valid, but no longer compels the parties' compliance, because the court's decision or order has been superseded by another. The first judgment loses its force of law from the moment of pronouncement of the succeeding judgment; for the preceding period, the first judgment's force of law is a legal fact.

(2) Effect

The doctrine bars any court other than the court of competent appellate or revocation jurisdiction from pronouncing on a judgment's validity, including its accuracy in fact or law; the parties are thus in effect precluded from attacking a judgment collaterally. By contrast, the doctrine does not prohibit a court from rendering a conflicting judgment; the rendition of a conflicting judgment merely affects a judgment's force of law, not its validity. For the same reason, the doctrine does not serve to preclude parties from pursuing another, conflicting decision on a claim or issue that has previously been rendered res judicata. The doctrine, in other words, is consistent with the concurrent validity of conflicting judgments, as well as with the loss by a judgment of its force of law due to the pronouncement of a conflicting judgment. The case of *Kollöffel/Haan* illustrates the point.[241]

The dispute concerned the status of two judgments that in short succession were given between the same parties on the same claim. The original dispute related to a tenant's exclusive right to use part of a property. Apart from declaratory relief on this issue, the claim was for injunctive relief preventing the landlord's interference with that right. The first judgment granted the claim. This judgment was never appealed and acquired the status of res judicata. The second judgment, materially the same as the first judgment, *was* appealed. On appeal, the respondent argued that the appeal was inadmissible, because granting the appeal would violate the *gesloten stelsel van rechtsmiddelen*. The Dutch Supreme Court rejected this argument as follows:

> [T]he Court of Appeal correctly held that two judgments co-existed…. The fact that the first judgment acquired the status of res judicata does not render the appeal against the second judgment inadmissible, as the second judgment is to be regarded as a judgment through which the court gave a new decision on the same claim. The

[238] HR 27 April 1979, NJ 1980, 169 mnt WH Heemskerk (*Tepea BV/Wilkes*) ("Sedert de Wet van 7 juli 1896, S. 103 (wet Hartogh), waarbij o.m. art. 66 Rv is gewijzigd, gaat dit wetboek er van uit dat vonnissen in beginsel van rechtswege werken. Dit brengt mee dat in een geval als het onderhavige de verplichting tot voldoening aan het door de Pres. gegeven bevel ingaat op het tijdstip van het uitspreken van het vonnis.").
[239] Civil Procedure Code Amendment Act 1896 (*Wet van 7 juli 1896 tot wijziging van het Wetboek van Burgerlijke Regtsvordering*) (entered into force 1 July 1897) (*wet-Hartogh*) Stb 1896, 103.
[240] HR 28 September 1984, NJ 1985, 83 mnt WH Heemskerk [3.2].
[241] HR 24 October 2003 (n 231) (*Kollöffel/Haan*).

> first judgment lost its significance on account of rendition of the second judgment… meaning that the first judgment could no longer be executed.[242]

According to the Court, the *gesloten stelsel van rechtsmiddelen* does not exclude the co-existence of two conflicting judgments on the same claim. The Court added that the second judgment derived the first judgment of its force of law, meaning that the judgment could no longer be executed.

Through this decision the Dutch Supreme Court filled the legal vacuum left by the removal in 2002 of 'conflicting judgments'[243] as a separate ground for the extraordinary means of recourse against a judgment,[244] which provided that only the judgment rendered first in time retained the force of law[245]. Presently, as Snijders put it, the maxim *iudicium posterium derogat iudicio priori* applies, with the effect that a new judgment ends the force of law of a mutually exclusive older judgment. He explained that:

> The Supreme Court rules that the first judgment 'lost its significance' on account of of the second. If this is the case, which I am happy to accept, there can be no other conclusion than that the first judgment, lacking any effect, has no longer any force of law.[246]

The author adds that "unlike what the Supreme Court appears to suggest", the case introduced "an exception to the principle that a judgment can only be affected by a means of recourse."[247] But is this true? The *gesloten stelsel van rechtsmiddelen* pertain merely to the *validity* of a judgment, not its force of law, as reiterated by the Dutch Supreme Court in *Stichting Informatica Drenthe Opleidingen/Rolf*:

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[242] ibid [3.2.4] ("…het hof [heeft] met juistheid geoordeeld dat 'hieruit volgt dat er in dit geschil twee vonnissen naast elkaar bestaan ...' …. Aan de ontvankelijkheid van het hoger beroep tegen het kort geding vonnis van 22 maart 2001 kan niet afdoen dat het kort geding vonnis van 13 maart 2001 in kracht van gewijsde is gegaan, nu het vonnis van 22 maart, dat niet als een herstelvonnis kan worden beschouwd, moet worden aangemerkt als een vonnis waarin de kort geding rechter opnieuw een beslissing heeft gegeven op dezelfde vordering. Het gevolg hiervan was dat het vonnis van 13 maart 2001 door de nieuwe beslissing in hetzelfde kort geding zijn betekenis had verloren, zodat dat vonnis niet meer ten uitvoer gelegd zou kunnen worden.").

[243] '*Tegenstrijdige vonnissen*'.

[244] Article 382(5) Rv ('*request civiel*') ("De vonnissen op tegenspraak in het laatste ressort gewezen, en die welke op verstek gewezen en niet meer vatbaar voor verzet zijn, kunnen herroepen worden, op het verzoek van degenen die partij geweest, of geroepen zijn, om de volgende redenen: … 5°. Indien tusschen dezelfde partijen, op dezelfde gronden en door denzelfden regter, tegenstrijdige vonnissen in het hoogste ressort gewezen zijn…."). See, presently, Article 382 Rv ('herroeping'), which excludes this ground for revoking a judgment.

[245] Article 394, second paragraph, Rv ("Indien het request civiel wordt aangenomen ter zake van strijdigheid van vonnissen, wordt bij de uitspraak bevolen dat het eerst gewezen vonnis alleen van kracht zal zijn.").

[246] HJ Snijders, 'Note on HR 24 October 2003' (2004) NJ 2004, 558 [7] ("De Hoge Raad overweegt dat het eerste vonnis door het tweede 'zijn betekenis had verloren'. Als dat zo is, en ik wil daar graag in meegaan, dan kan het niet anders zijn dan dat aan het eerste vonnis bij gebreke van enig rechtsgevolg ook geen rechtskracht meer toekomt. Zie hier dan toch, anders dan de Hoge Raad in r o. 3.2.3 lijkt te suggereren, een uitzondering op de regel dat een rechterlijke uitspraak slechts door een rechtsmiddel kan worden aangetast.").

[247] ibid [7] ("De Hoge Raad overweegt dat het eerste vonnis door het tweede 'zijn betekenis had verloren'. Als dat zo is, en ik wil daar graag in meegaan, dan kan het niet anders zijn dan dat aan het eerste vonnis bij gebreke van enig rechtsgevolg ook geen rechtskracht meer toekomt. Zie hier dan toch, anders dan de Hoge Raad in r o. 3.2.3 lijkt te suggereren, een uitzondering op de regel dat een rechterlijke uitspraak slechts door een rechtsmiddel kan worden aangetast.").

> The *gesloten stelsel van rechtsmiddelen* implies that a judgment cannot be affected other than through a means of recourse. It is incompatible with this [doctrine] if a party were to be able—outside the framework of an available means of recourse—to make the validity of a judgment the subject of a new case on the basis of some new circumstances and to have it reviewed.[248]

The Court in *Kollöffel/Haan* emphasised that the rendition of a conflicting judgment does not affect the validity of the prior judgment; accordingly, it is respectfully suggested that the *gesloten stelsel van rechtsmiddelen* still stands without exception other than that identified at the outset of this section: the rare circumstance that a judgment is patently invalid, which lack of legal status any court has the power to establish and declare. *Kollöffel/Haan* merely clarified that a judgment's force of law, unlike its validity, *can* be affected by a subsequent conflicting judgment.

The *gesloten stelsel van rechtsmiddelen* does not bar a court from deciding differently a claim or issue that has already been determined by a judgment that has acquired the status of res judicata, nor does the doctrine bar a party from seeking a new, conflicting decision on such claim or issue. In particular, the doctrine does not bar an unsuccessful defendant from claiming back money paid on the judgment debt on the ground of undue payment or unjust enrichment. If a court grants the claim, the resulting judgment contradicts the first judgment, and affects that judgment's force of law, not its validity. In practice, if the defendant in the new claim (the successful claimant in the first claim) invokes the existing judgment between the parties, the court is likely to dismiss the new claim, but the court will do so on the basis of the the first judgment's force of law; a sum paid pursuant to a valid court order is never undue, nor can the payee, absent other circumstances, be unjustly enriched.[249] This situation arose in *Jamin/Geels*[250].[251]

The dispute in *Jamin/Geels* centred on an erroneous judgment by which the Breda (sub)District Court had terminated an employment agreement at the request of an employee and ordered the employer to pay compensation. The employment agreement was void as it involved the payment of black money; however, the parties merely litigated the compensation due, not the agreement's validity. The employer lost and paid the judgment debt, and the judgment acquired the status of res judicata. Subsequently, the employee claimed payment of another sum of money owed to him by the employer under the same employment agreement. But this time, the employer disputed the agreement's validity, and filed a counterclaim for repayment of the money paid on the first judgment, which the employer argued was erroneous.

The Breda (sub)District Court rejected the counterclaim. On appeal, the Breda District Court held that the agreement was indeed void and to this extent the court reversed the (sub)District Court's judgment. Nevertheless, the court rejected the counterclaim:

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[248] HR 21 March 1997, NJ 1997, 380 [3] (*Stichting Informatica Drenthe Opleidingen*) ("Het gesloten stelsel van in de wet geregelde rechtsmiddelen brengt mee dat een rechterlijke uitspraak niet anders dan door het aanwenden van een rechtsmiddel kan worden aangetast. Met het voorgaande is onverenigbaar dat men — buiten het stelsel van rechtsmiddelen om — op grond van een naderhand opgekomen omstandigheid, gelegenheid zou hebben om de geldigheid van een rechterlijke beslissing tot onderwerp van een nieuw geding te maken en zo opnieuw te doen toetsen.").

[249] See text to n 235ff.

[250] HR 27 January 1989 (n 231) (*Jamin/Geels*). See Beukers (n 3) 14ff; and Gras (n 3) 218ff.

[251] See the discussion of Beukers and Gras regarding this case (n 65). See, generally, Beukers (n 3) 14ff.

> The money reclaimed was previously paid by [the employer] not by virtue of an obligation arising from a void employment agreement—in which case a claim for undue payment would be justified—but in accordance with a judgment that acquired the status of res judicata. It cannot, then, be argued that [the employer] paid without cause …. Any contrary decision would necessitate the court to revoke a res judicata in violation of the *gesloten stelsel van rechtsmiddelen*; the doctrine does not allow this.[252]

The District Court acknowledged the apparent conflict between the decision declaring the employment agreement a nullity *ex tunc* and the judgment with the status of res judicata, which presumed the existence of that same agreement and on that basis ordered the payment of compensation. Nevertheless, the court clarified, "this conflict is illusory considering that … [the employer] could have appealed the judgment of the (sub)District Court in order to raise the issue in question, whether actually there is an employment agreement."[253]

On appeal, the judgment of the Breda District Court was challenged on the ground that the court had erred by failing to appreciate that "the legal basis or '*causa*' for the payment made in accordance with the judgment of the subDistrict Court had disappeared, because the judgment assumed the existence of an employment agreement that the court had retroactively declared void."[254]

The Dutch Supreme Court, which heard the appeal from the District Court judgment (which itself had ruled as court of appeal on the subdistrict court's judgment), rejected the appeal and confirmed the District Court's judgment as follows:

> The Breda (sub)District Court's judgment that has acquired the status of res judicata and awarded [the employee] compensation at the expense of [the employer] implies between the parties that the amount paid by [the employer] in compliance with that

[252] Reported in HR 27 January 1989 (n 231) (*Jamin/Geels*) ("Jamin BV heeft destijds het thans teruggevorderde bedrag niet voldaan op grond van een verbintenis uit de nietige arbeidsovereenkomst - in welk geval een vordering uit onverschuldigde betaling op zijn plaats zou zijn - maar op grond van een onherroepelijke rechterlijke beslissing. Aldus kan niet volgehouden worden, dat Jamin BV onverschuldigd heeft betaald, terwijl de Rb. ook ambtshalve geen rechtsgronden aanwezig acht, die deze vordering van de curatoren kunnen dragen. Een andersluidend oordeel zou impliceren, dat de Rb. buiten het wettelijk stelsel van rechtsmiddelen om een in kracht van gewijsde gegane rechterlijke beslissing zou dienen te herroepen, hetgeen dit stelsel niet toelaat.").

[253] ibid ("Die tegenstelling bestaat evenwel in zoverre slechts in schijn, nu naar de huidige stand van de jurisprudentie, Jamin van bedoelde beslissing van de Ktr. in hoger beroep had kunnen komen teneinde in dat appel aan de orde te stellen de vraag die pp. thans verdeeld heeft gehouden nl. of er wel sprake was van een arbeidsovereenkomst. Die vraag raakte immers de ontvankelijkheid van de vordering van Geels ex art. 1639w BW. Dat Jamin zich destijds wellicht niet bewust is geweest van bedoelde nietigheid kan aan het vorenstaande niet afdoen; indien die onbekendheid mogelijk te wijten is geweest aan verzwijging door haar voormalige directeur Van Hees kan zulks aan Geels niet worden tegengeworpen.")

[254] HR 27 January 1989 (n 231) [grievance No 2] (*Jamin/Geels*) ("de Rb… miskent dat aan de betaling door Jamin op grond van de beslissing van de Ktr. van 9 mei 1983 - welke beslissing (tot betaling van schadevergoeding), naar de Rb. zelf verderop in haar vonnis (grosse, p. 6, regel 9 en 10), terecht, opmerkt, was 'gebaseerd op het bestaan van een arbeidsovereenkomst' - de rechtsgrond, de 'causa'', is ontvallen, nu die beslissing het bestaan van een arbeidsovereenkomst tussen Jamin en Geels vooronderstelde, welke arbeidsovereenkomst nadien (door de Rb.) - terecht – 'ab initio'' nietig is verklaard").

> judgment cannot be regarded as having been paid without cause, even if the court wrongly assumed the existence of a valid employment agreement.[255]

According to the Supreme Court, in other words, at the time of payment of the judgment debt, the judgment (still) had force of law, compelling the employer's compliance with the court's order to pay the employee compensation; the source of the obligation to pay was the *judgment*, not the employment agreement. Consequently, it was irrelevant that the agreement was void, because as long as the judgment had force of law at the time of payment, the payment was due when it was made.[256] Another question is whether the second judgment affected the force of law of the first judgment; as noted above, the conflicting judgment did affect the force of the first judgment, but only from the moment of its pronouncement; the force of law of the first judgment at the time of payment of the judgment debt is a legal fact.

Admittedly, the Dutch Supreme Court in *Stichting Informatica Drenthe Opleidingen/Rolf* held that the *gesloten stelsel van rechtsmiddelen* excludes the possibility that "a judgment with the status of res judicata could be derived of force of law outside the scope of an appeal by obtaining a court declaration that the judgment never acquired force of law or that the force of law of the judgment was extinguished."[257] The doctrine excludes this possibility because a court without competent appellate or revocation jurisdiction cannot validly declare the judgment of another court invalid. *Kollöffel/Haan* does not contradict this, by rendering a judgment that conflicts with an existing judgment a court does not assert the power to declare the judgment of another court invalid, nor does the conflicting judgment de facto impinge on the validity of the existing judgment; only the force of law of the existing judgment is affected from the moment of the conflicting judgment's pronouncement.

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[255] ibid [3.2] (*Jamin/Geels*) ("De onherroepelijkheid van de beschikking van de Ktr. waarbij aan Geels ten laste van Jamin een vergoeding is toegekend, heeft tussen pp. tot gevolg dat hetgeen door Jamin ter voldoening aan die beschikking is betaald niet als onverschuldigd betaald aangemerkt en teruggevorderd kan worden, ook al zou de Ktr. ten onrechte van het bestaan van een geldige arbeidsovereenkomst zijn uitgegaan.") (emphasis added).

[256] In fact, considering that the judgment had acquired the status of *res judicata* and could no longer be annulled, the obligation to pay was absolute, except for the possibility that grounds for extraordinary means of recourse appeared. See text to n 462ff.

[257] HR 21 March 1997 (n 248) [3.4] (*Stichting Informatica Drenthe Opleidingen*) ("The argument incorrectly assumes that a judgment … has force of law, or legal consequences, only as long as the agreement [that formed the basis for the judgment] retains its validity…. Moreover, the argument ignores that this view implies that a judgment that has acquired the status of res judicata could be derived of force of law outside the scope of an appeal by obtaining a court declaration that the judgment never acquired force of law or that the force of law of the judgment was extinguished. This view … conflicts with the gesloten stelsel van rechtsmiddelen.") ("Dit betoog faalt. Het neemt ten onrechte tot uitgangspunt dat aan een ontbindingsbeschikking als bedoeld in art. 1639w slechts rechtskracht, althans rechtsgevolg toekomt, indien de arbeidsovereenkomst op het in de beschikking bepaalde tijdstip van ontbinding nog steeds bestaat. Voorts miskent het onderdeel dat deze opvatting erop neerkomt dat aan een onherroepelijke rechterlijke uitspraak zonder aanwending van enig rechtsmiddel rechtskracht zou kunnen worden ontzegd door in een volgend geding te doen vaststellen dat deze uitspraak geen rechtskracht heeft verkregen of dat de rechtskracht daaraan is ontvallen omdat de grondslag waarop de uitspraak berustte, is weggevallen. Deze opvatting is dan ook, naar het Hof terecht heeft aangenomen, onverenigbaar met het gesloten stelsel van de in de wet geregelde rechtsmiddelen.").

(3) Nature

The *gesloten stelsel van rechtsmiddelen* is in nature a doctrine of public policy going to a court's jurisdiction: any court other than the court of competent annulment or revocation jurisdiction must abide *of its own motion*, and the decision of a court that fails to do so, stands to be reversed.[258] By way of example, the Dutch Supreme Court in *De Bruin/AM Wonen BV*[259] reversed a decision of the Amsterdam Court of Appeal in enforcement proceedings[260] holding that an arbitral award could not be executed because the award was factually erroneous. On appeal in cassation, the award creditor challenged this decision on the ground that the *gesloten stelsel van rechtsmiddelen* barred the court from redetermining the claim as the Court of Appeal did. The Supreme Court agreed and reversed, reasoning that "the Court of Appeal … redetermined the claim on the basis of new expert evidence, thereby undermining the decision of the arbitrator…. This is not allowed in execution proceedings."[261]

(4) Rationale

The *gesloten stelsel van rechtsmiddelen* signals that the means of recourse against judgments specified by law—if any[262]—are finite. According to the Dutch Supreme Court, the doctrine is founded on the principle of finality of litigation, or as the Court put it, in in holding that the judgment of the highest appellate court, the court in cassation, cannot be subjected to further appeal, "the principle underlying the *gesloten stelsel van rechtsmiddelen* that every dispute must have an end at some point ('*lites finiri oportet*')".[263] The public policy nature of the doctrine puts emphasis on the *public* interest in finality of litigation served by the *gesloten stelsel van rechtsmiddelen*.

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[258] See, eg, Hof Arnhem 3 November 2004, ECLI:NL:GHARN:2004:AR6520, NTFR 2004, 1801 [3.1].

[259] HR 23 March 2007, ECLI:NL:HR:2007:AZ5441, NJ 2007, 177, RvdW 2007, 339 (*De Bruin/AM Wonen BV*).

[260] Article 348 Rv.

[261] HR 23 March 2007 (n 259) [3.7] (*De Bruin/AM Wonen BV*) ("Vooropgesteld zij dat het arbitraal vonnis onherroepelijk is geworden en dat daarvoor verlof tot tenuitvoerlegging is verleend. In dit executiegeschil heeft het hof niettemin met de door het hem gegeven bewijsopdracht - door het hof zelf in de rechtsoverwegingen 1 en 5 van zijn eindarrest getypeerd als tegenbewijs, dat neerkomt op ontzenuwing van het oordeel van de arbiter dat de roetvorming in de woning van De Bruin is/wordt veroorzaakt door terugstroming van lucht via het ventilatiestelsel in haar huis - het geschil opnieuw beoordeeld aan de hand van een opnieuw door een deskundige verricht onderzoek naar de roetvorming en de terugstroming in het appartement van De Bruin. Daarvoor is in dit executiegeschil echter geen plaats. De daarop gerichte rechtsklacht van onderdeel 1 slaagt. De overige klachten van het onderdeel behoeven geen behandeling.").

[262] For instance, no means of recourse are available against judgments of the Supreme Court. HR 7 June 1991 (n 11) [2].

[263] ibid ("Met name kan niet als juist worden aanvaard dat aan partijen de mogelijkheid behoort te worden geboden om, zo zij menen dat de cassatierechter zich niet heeft gehouden aan de in art. 419 Rv aan zijn onderzoek gestelde grenzen, tegen zijn uitspraak door middel van rekest-civiel op te komen: daartegen verzet zich de aan het gesloten stelsel van rechtsmiddelen ten grondslag liggende gedachte dat elk geding eens ten einde moet zijn ('lites finiri oportet'), met welke gedachte niet valt te rijmen dat tegen de uitspraak van de in hoogste instantie beslissende rechter, de rechter in cassatie, nog weer beroep zou openstaan.").

(5) Application and scope

All cases discussed so far, including in particular *Jamin/Geels*[264]—the first case where the Dutch Supreme Court explicitly cited the doctrine—*Dreesmann/Vede BV*,[265] *Stichting Informatica Drenthe Opleidingen/Rolf*,[266] and *Kollöffel/Haan*,[267] clarify the *gesloten stelsel van rechtsmiddelen* by illustrating the circumstances where the doctrine prohibits a court from sitting in judgment on the judgment of another court, or mandates a court to strike out, if necessary of its own motion, a collateral attack on a judgment. For example, the 'attack' in *Jamin/Geels*, for instance, was by a claimant who sued for undue payment and consisted in their assertion that the judgment ordering the payment which they reclaimed had lost its basis because the legal relationship on it was founded was null and void.

A different type of attack arose in *Top Kapi/De Smet Juwelier BV*,[268] a decision of the Haarlem District Court not previously discussed. In this case, a claim for the eviction of a property based on a court declaration that the lease for this property had terminated, saw the defendant allege that the declaratory judgment on which the claim was based was procured by fraud and based on a legal error of the rendering court. After noting that the defendant had failed to appeal the judgment that therefore acquired the status of res judicata, the court rightly struck out the defence on the ground that "[i]t would be incompatible with the [*gesloten stelsel van rechtsmiddelen*] to raise the issue whether this judgment is based on a factual or legal error in any other way than by means of an appeal."[269] Indeed, Dutch law special means of recourse are available to address cases of fraud,[270] and the factual or legal erroneousness of a judgment can only be raised on appeal.

Nevertheless, the doctrine is inherently limited in scope; in particular, the doctrine lacks application in circumstances where a party does not actually collaterally attack a judgment. *Kollöffel/Haan* already offered an example: as the Dutch Supreme Court clarified, the doctrine does not prevent parties from seeking a conflicting judgment on a matter previously rendered res judicata (though the res judicata doctrine may potentially be invoked to bar the attempt); a conflicting judgment affects the existing judgment's force of law, not its validity. The recent case of *Chipshol/Staat der Nederlanden*[271] is a further case in point; whereas all lower courts applied the doctrine, the Supreme Court rightly held that the doctrine was irrelevant on the facts.

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[264] HR 27 January 1989 (n 231) (*Jamin/Geels*). See text to n 250ff.
[265] HR 13 September 1991 (n 232) (*Dreesmann/Vede BV*).
[266] HR 21 March 1997 (n 248) (*Stichting Informatica Drenthe Opleidingen*).
[267] HR 24 October 2003 (n 231) (*Kollöffel/Haan*). See text to n 242ff.
[268] Rb Haarlem 17 March 2004 (in AG Wesseling-van Gent in HR 11 November 2005, ECLI:NL:PHR:2005:AU3718).
[269] ibid [4.3] ("Top Kapi wordt echter niet gevolgd in haar stelling dat De Smet geen rechten kan ontlenen aan het vonnis van 24 juli 1997. Tegen dat vonnis heeft Top Kapi geen hoger beroep ingesteld, zodat dat vonnis gezag van gewijsde heeft gekregen. Dit betekent dat bij dat vonnis tussen partijen onherroepelijk is vastgesteld dat de onderhavige huurovereenkomst is ontbonden. Het zou met het gesloten systeem van rechtsmiddelen onverenigbaar zijn om de vraag of dit vonnis op een feitelijke of juridische misslag berust, anders dan via de weg van daartegen gericht hoger beroep aan de orde te stellen.").
[270] Article 382(a) Rv.
[271] HR 19 March 2010, ECLI:NL:HR:2010:BK8146, NJ 2010, 172, RvdW 2010, 435, NJB 2010, 737, JBPr 2010, 42 mnt HLG Wieten (*CHIP(S)HOL III BV/Staat*).

The dispute related to events that occurred after the Haarlem District Court rendered a judgment establishing the liability of Schiphol, a Dutch airport, for the damage suffered by Chipshol, a real estate company, resulting from a building ban imposed on the company by the Dutch State at the airport's initiative. The court ruled that expert evidence would be required to establish Chipshol's exact damage. Then something peculiar happened: all judges on the court were replaced by new judges shortly before the final pleadings on the quantification of damages. The newly constituted court awarded EUR 16 milion in damages—a fraction of the claim.

Chipshol appealed. At the same time, however, Chipshol applied for a provisional hearing of witnesses with a view to a potential claim against the Dutch State for an alleged violation of its procedural rights under Art 6 ECHR or, alternatively, negligence by the management of the Haarlem District Court. The hearing would serve to establish whether the court management had violated any norm by replacing all judges on the bench during proceedings, and also whether this act influenced the eventual outcome of the case.

The Hague District Court rejected the application. The Hague Court of Appeal confirmed this decision. On appeal in cassation, the Dutch Supreme Court summarised the lower courts' reasoning in this way:

> a. the damages that Chipshol wants to claim from the State consist of the difference between the damages awarded by the newly constituted bench and the higher amount that the original bench would have awarded, b. the judgment awarding the damages to be paid by the airport can be appealed in cassation, c. the *gesloten stelsel van rechtsmiddelen* implies that Chipsol cannot collaterally claim the damages also by means of a tort claim against the State, and d. namely, the court that determines the tort claim must assume the accuracy of the damages award as established after the conclusion of the available means of recourse ….[272]

The Supreme Court rightly reversed this approval on the ground that the doctrine of the *gesloten stelsel van rechtsmiddelen* was irrelevant on the facts of the case. The doctrine would have applied if Chipshol had by its application actually challenged the validity of the District Court's judgment on the quantification of the damages, for instance, by alleging corruption of the court. But, Chipshol did not challenge the judgment, but sought to secure a prospective claim for the infringement of its fundamental procedural rights caused by the court management's decision to replace an entire bench of judges at a critical point in ongoing proceedings. If anything, the application alleged that the court management was corrupt and violated its fundamental rights, not that the judgment on the quantification of damages was invalid. The Dutch Supreme Court held accordingly:

> Contrary to the view of the Court of Appeal, the granting of the claim filed on this ground [i.e. infringement of fundamental procedural rights] is not barred by the fact that Chipshol could file an appeal in the cases against the airport [and another party]

[272] ibid [3.3] ("a. de schade die Chipshol van de Staat wil vorderen bestaat uit het verschil tussen de schadeloosstelling die door de vervangende kamer is toegewezen en de hogere schadeloosstelling die de oorspronkelijke kamer zou hebben vastgesteld, b. tegen de uitspraak waarin de door de Luchthaven te betalen schadeloosstelling wordt vastgesteld cassatieberoep openstaat, c. het gesloten stelsel van rechtsmiddelen meebrengt dat Chipshol de schadeloosstelling niet daarnaast óók langs de weg van een vordering uit onrechtmatige daad tegen de Staat kan vorderen, en d. de rechter die de vordering uit onrechtmatige daad beoordeelt immers moet uitgaan van de juistheid van de schadeloosstelling zoals die na toepassing van het openstaande rechtsmiddel (cassatie in de procedure tegen de Luchthaven, en hoger beroep in de procedure tegen LVNL) is vastgesteld.").

> …. Admittedly the (as yet unkown) outcome of these cases after all means of recourse have been used will govern the issue what Chipshol is legally entitled to vis-à-vis the airport [and the other party] so that to this extent it does not suffer damage as a result of the unlawful act of the court management alleged by it. Nevertheless, the facts alleged by Chipshol, if established, would imply a serious infringement of its fundamental right to a fair trial guaranteed inter alia by Article 6 ECHR. In a claim for this infringement against the State, Chipshol could claim at any rate as remedy for this infringement a court declaration to this effect.[273]

Another interesting aspect of the decision is that the Court indicates that the eventual judgment on the quantum of damages given on appeal will in the context of the new claim determine to what Chipshol is entitled vis-à-vis the airport and, if pleaded, the court must apply that judgment as law between the parties. In other words, that judgment would between the parties have the force of law and determine their mutual rights and obligations. Another issue altogether arises if one of the parties in the new claim were to allege that the judgment is erroneous or otherwise unsound. In those circumstances, the *gesloten stelsel van rechtsmiddelen* applies. Finally, if a party in the proceedings on the new claim merely contradicts the irreversible findings contained in the judgment, the doctrine lacks application, although Art 236 Rv on the judgment's conclusive effect could be invoked.[274]

2.6 Afstemmingsregel

Finality in interim proceedings following judgment in main proceedings

Against the background of Art 257 Rv, which states that "[i]nterim findings do not affect the main case",[275] a (judge-made)[276] doctrine entitled '*afstemmingsregel*' ('rule of alignment') requires a court in interim proceedings ('*kort geding* ')[277] to align its judgment with the findings contained in a judgment given in the context of main proceedings ('*bodemprocedure*'), [278] regardless of whether those findings are

[273] ibid [3.6] ("Aan de toewijsbaarheid van een op die grond gebaseerde vordering staat, anders dan volgens het hof het geval is (zie hiervoor in 3.3), niet in de weg dat Chipshol in de procedures tegen de Luchthaven en tegen LVNL een rechtsmiddel heeft kunnen instellen. Weliswaar heeft de (thans nog niet bekende) uitkomst van die procedures na aanwending van alle rechtsmiddelen te gelden als hetgeen waarop Chipshol jegens de Luchthaven en LVNL rechtens aanspraak kan maken, zodat zij in zoverre geen schade lijdt ten gevolge van het door haar gestelde onrechtmatig handelen van het gerechtsbestuur. Maar dat neemt niet weg dat de door Chipshol gestelde gang van zaken, indien deze zou komen vast te staan, een ernstige schending zou betekenen van haar door onder meer art. 6 EVRM gegarandeerde fundamentele recht op een eerlijk proces. In een op die schending gebaseerde procedure tegen de Staat zou Chipshol in elk geval, als genoegdoening voor deze schending, een daartoe strekkende verklaring voor recht kunnen vorderen.").
[274] See text to n 318ff.
[275] ("De beslissingen bij voorraad brengen geen nadeel toe aan de zaak ten principale.")
[276] See HR 7 January 2011, ECLI:NL:HR:2011:BP0015, NJ 2011, 304 mnt HB Krans, RvdW 2011, 118, NJB 2011, 124, JOR 2011, 134, JBPr 2011, 20 mnt G van Rijssen (*Yukos International UK BV/OOO Promneftstroy*). cf HR 19 May 2000, ECLI:NL:HR:2000:AA5870, NJ 2001, 407 mnt HJ Snijders, RvdW 2000, 134, JB 2000, 267 mnt Red (*Staat/Vereniging Nederlandse Vakbond Varkenshouders*). On the doctrine see HB Krans, 'Note on HR 7 January 2011' (2011) NJ 2011, 304; and Van Schaick (n 3) [107].
[277] '*Kort geding*'.
[278] '*Bodemprocedure*'.

contained in an interlocutory or final judgment, in the reasons or in the dispositive part, and whether the judgment has acquired the status of res judicata;[279] the doctrine effectively compels the rendition of a consistent judgment[280].

(1) Nature

The *afstemmingsregel* is a doctrine of public policy aimed directly at courts in interim proceedings. To this effect, the Dutch Supreme Court in *Yukos Int et al v Promneftstroy and Rosneft*[281] said that "[a] court deciding a claim for interim relief after a court in main proceedings has given judgment, *must*, as a rule, align its judgment to the findings of that court".[282]

(2) Rationale

The doctrine is arguably based on two principles: first, the primacy of main proceedings, as reflected in the aforecited Art 257 Rv,[283] and, second, a sound administration of justice.[284] The superior procedural guarantees offered by main proceedings[285] and efficiency in the administration of justice require that the outcome

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[279] HR 7 January 2011 (n 276) [3.4.2] (*Yukos International UK BV/OOO Promneftstroy*) ("De rechter die in kort geding moet beslissen op een vordering tot het geven van een voorlopige voorziening nadat de bodemrechter reeds een vonnis in de hoofdzaak heeft gewezen, dient in beginsel zijn vonnis af te stemmen op het oordeel van de bodemrechter, ongeacht of dit oordeel is gegeven in een tussenvonnis of in een eindvonnis, in de overwegingen of in het dictum van het vonnis, en ongeacht of het vonnis in kracht van gewijsde is gegaan.") cf HR 19 May 2000 (n 276) [3.2] (*Staat/Vereniging Nederlandse Vakbond Varkenshouders*).

[280] ibid. On this case see HB Krans (n 276).

[281] ibid.

[282] ibid [3.4.2] (emphasis added) ("De rechter die in kort geding moet beslissen op een vordering tot het geven van een voorlopige voorziening nadat de bodemrechter reeds een vonnis in de hoofdzaak heeft gewezen, dient in beginsel zijn vonnis af te stemmen op het oordeel van de bodemrechter, ongeacht of dit oordeel is gegeven in een tussenvonnis of in een eindvonnis, in de overwegingen of in het dictum van het vonnis, en ongeacht of het vonnis in kracht van gewijsde is gegaan.") cf HR 19 May 2000 (n 276) [3.2] (*Staat/Vereniging Nederlandse Vakbond Varkenshouders*).

[283] Article 257 Rv ("Interim findings do not affect the main case.") ("De beslissingen bij voorraad brengen geen nadeel toe aan de zaak ten principale."). This provision refers to the situation where main proceedings follow interim proceedings, whereas the afstemmingsregel applies in the opposite case where interim proceedings trail main proceedings. See Krans (n 276) [6] ("het primaat van het oordeel in de bodemzaak").

[284] HB Krans (n 276) [4] ("If one considers the nature of both types of proceedings, it transpires that main proceedings should be accorded precedence. This starting point is also generally acceptable: even from the perspective of efficiency in the administration of justice and the superior procedural guarantees offered by main proceedings compared with interim proceedings, the primacy of main proceedings is such that the outcome of such proceedings in principle 'permeates' any proceedings for interim measures in the same case. The contrary starting point also increases the risk that interim proceedings are used as a disguised means of recourse against a judgment in the main proceedings.") ("Als men de aard van beide typen procedures in ogenschouw neemt, is duidelijk dat aan de bodemprocedure meer gewicht moet worden toegekend. Met dit uitgangspunt kan men dan ook vrede hebben: alleen al vanuit het oogpunt van efficiënte rechtsbedeling en gelet op het surplus aan waarborgen dat de bodemprocedure biedt ten opzichte van het kort geding is het overwicht van de bodemprocedure zodanig dat de uitkomst daarvan in beginsel 'doortikt' naar een kort geding in dezelfde zaak. Als dat uitgangspunt anders zou zijn, zou dat bovendien de kans kunnen vergroten dat een kort geding wordt ingezet als (verkapt) rechtsmiddel tegen de uitspraak in de bodemprocedure.").

[285] Interim proceedings do not allow for a trial of the facts and as such are suitable only for disputes where the facts are sufficiently clear and the potential implications of an interim measure reasonably

of main proceedings should "permeate"[286] proceedings for interim measures. Indeed, main proceedings and interim proceedings have diverging aims; while a judgment in main proceedings serves to determine a claim or issue conclusively and to provide final relief,[287] a judgment in interim proceedings determines matters provisionally[288] and provides interim relief[289]. A contrary position would increase the risk that interim proceedings are used as a disguised means of recourse against a judgment in the main proceedings—obviously in violation of and principally barred by the *gesloten stelsel van rechtsmiddelen.*[290]

(3) Application

Following earlier decisions that formed the roots of the doctrine,[291] the Dutch Supreme Court formulated the current version of the *afstemmingsregel* in *Yukos Int et al v Promneftstroy and Rosneft.*[292] The case and its sequal in *Promneftstroy/Yukos International UK BV et al*[293] offer a good illustration of the practical implications of the doctrine. The dispute related to revenues generated by the sale by the defendant, Yukos International UK BV ('Yukos International'), a Dutch company, of shares it held in a Lithuanian oil refinery. Yukos International is controlled by Yukos Finance BV ('Yukos Finance'), another Dutch company, whose shares were held, in turn, by OAO Yukos Oil Company ('Yukos Oil'), the Russian company leading the well-known group of companies involved in oil production and trading ('Yukos Group').

After the forced break up of the Yukos Group, Yukos Oil was declared insolvent. Soon after, Mr Rebgun ("Rebgun"), the court-appointed curator, sold Yukos Oil's shares in Yukos Finance to the claimant, OOO Promneftstroy ("Promneftstroy"), another Russian company. The transfer took place in the Netherlands. Promneftstroy then sued Yukos International in proceedings for an interim measure, claiming an order that the revenues from the sale of the oil refinery,

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foreseeable. Art 256 Rv ("Indien de voorzieningenrechter oordeelt dat de zaak niet geschikt is om in kort geding te worden beslist, weigert hij de voorziening.").

[286] HB Krans (n 276) [4] ("If one considers the nature of both types of proceedings, it transpires that main proceedings should be accorded precedence. This starting point is also generally acceptable: even from the perspective of efficiency in the administration of justice and the superior procedural guarantees offered by main proceedings compared with interim proceedings, the primacy of main proceedings is such that the outcome of such proceedings in principle 'permeates' any proceedings for interim measures in the same case. The contrary starting point also increases the risk that interim proceedings are used as a disguised means of recourse against a judgment in the main proceedings.") ("Als men de aard van beide typen procedures in ogenschouw neemt, is duidelijk dat aan de bodemprocedure meer gewicht moet worden toegekend. Met dit uitgangspunt kan men dan ook vrede hebben: alleen al vanuit het oogpunt van efficiënte rechtsbedeling en gelet op het surplus aan waarborgen dat de bodemprocedure biedt ten opzichte van het kort geding is het overwicht van de bodemprocedure zodanig dat de uitkomst daarvan in beginsel 'doortikt' naar een kort geding in dezelfde zaak. Als dat uitgangspunt anders zou zijn, zou dat bovendien de kans kunnen vergroten dat een kort geding wordt ingezet als (verkapt) rechtsmiddel tegen de uitspraak in de bodemprocedure.").

[287] '*Met bindende kracht*'.

[288] '*Bij voorraad*'.

[289] '*Voorziening bij voorraad*'. Article 254 Rv.

[290] See text to n 224ff.

[291] See, eg, HR 19 May 2000 (n 276) (*Staat/Vereniging Nederlandse Vakbond Varkenshouders*).

[292] HR 7 January 2011 (n 276) (*Yukos International UK BV/OOO Promneftstroy*).

[293] Rb Amsterdam 17 March 2011, ECLI:NL:RBAMS:2011:BP8070 (*OOO Promneftstroy/Yukos International UK BV*).

to which it claimed entitlement by virtue of its ownership of Yukos Finance, be kept in a separate bankaccount and were not to be expended at pains of a penalty payment.

The Amsterdam District Court granted the claim. On appeal, Yukos International invoked a prior judgment in main proceedings of the Amsterdam District Court that refused the recognition of the Russian insolvency judgment appointing Rebgun as curator on grounds of public policy ('the non-recognition judgment').[294] At the time of the interim proceedings, the non-recognition judgment was under appeal, so that Art 236 Rv lacked any application.[295] Nevertheless, Yukos International argued that the judgment precluded Promneftstroy from asserting ownership of the shares in Yukos Finance, thus ruling out any entitlement to the disputed revenues, because the assertion would contradict the non-recognition judgment, which held that the Russian insolvency judgment lacked validity in the Netherlands, so that any act intended to have legal effect done on the basis of that judgment also lacked validity in the Netherlands, including the sale and transfer by Rebgun of the shares in Yukos Finance.

The Amsterdam Court of Appeal rejected the argument and (basically) upheld the order of the District Court. The court reasoned that for purposes of the interim measure requested, the possibility could not be excluded that Promneftstroy had indeed obtained ownership of the Yukos Finance shares, notwithstanding that the Russian insolvency judgment had been refused recognition in the Netherlands. Accordingly it ruled that:

> Even if the court aligns itself with the judgment in the main proceedings [i.e. the non-recognition judgment], the lack of powers of Rebgun to act as curator in this territory in the insolvency of Yukos Oil or the invalidity of his acts which are governed by Dutch law, this does not necessarily mean that the acts in the Russian Federation for the liquidation of the assets of the insolvent entity there established must be denied effect as a matter of Dutch law, nor does it imply without more that the transfer of the shares in Yukos Finance (which occurred within this territory) is inconsequential due to the lack of power or a valid title.[296]

On appeal in cassation, Yukos International argued that the Court of Appeal erred by failing to align its judgment with the pre-existing non-recognition judgment. According to Yukos International, only one of the following two positions could be true: either Rebgun was entitled to act in the Netherlands in respect of Yukos Oil or he was not. The non-recognition judgment had confirmed the latter position, meaning that Rebgun was powerless in the Netherlands and his acts there in respect of Yukos Oil, including the transfer of the shares in Yukos Finance, invalid.[297]

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[294] Rb Amsterdam 31 October 2007, ECLI:NL:RBAMS:2007:BB6782, JOR 2008, 56 mnt PM Veder, ONDR 2008, 60 mnt MA Broeders (*Godfrey /Rebgun*).

[295] See text to n 462ff. Also note lack of identity of parties (in this regard see text to n 494ff).

[296] Reported in HR 7 January 2011 (n 276) [3.12] (*Yukos International UK BV/OOO Promneftstroy*) ("6.1 … Ook indien het hof het bodemvonnis tot richtsnoer neemt, volgt uit de onbevoegdheid van Rebgun om hier te lande op te treden in zijn hoedanigheid van curator in het faillissement van Yukos Oil, respectievelijk uit de ongeldigheid van diens door de Nederlandse rechtsorde beheerste rechtshandelingen, niet zonder meer dat naar Nederlands recht de rechtsgevolgen moeten worden ontzegd aan hetgeen in de Russische Federatie is geschied ter liquidatie van het vermogen van de aldaar gevestigde gefailleerde, en staat evenmin zonder meer vast dat de levering van de aandelen Yukos Finance (die hier te lande heeft plaatsgevonden) van onwaarde is wegens beschikkingonbevoegdheid of omdat zij een geldige titel ontbeert.").

[297] HR 7 January 2011 (n 276) [2.1] (*Yukos International UK BV/OOO Promneftstroy*) ("Het hof is aldus uitgegaan van een onjuiste rechtsopvatting. Immers, het door het hof in dit kort geding terecht tot

Advocate General Strikwerda in his opinion to the Dutch Supreme Court accepted this ground for the appeal. He observed that if the Court of Appeal had indeed assumed that the non-recognition judgment implied that the legal acts governed by Dutch law by Rebgun were invalid and that the transfer of the Yukos Finance shares was a legal act subject to Dutch law because it occurred within Dutch territory, there could be no other conclusion than that the transfer of the shares in Yukos Finance was also invalid.[298]

The Supreme Court agreed and reversed the Court of Appeal approach. According to the Court, the non-recognition judgment left the Court of Appeal no other option than to find that Promneftstroy had never become shareholder of Yukos Finance.[299] Though Art 236 Rv was inapplicable on the facts, since the non-recognition judgment had not acquired the status of res judicata, the Court assigned the preclusive effect of the non-recognition judgment to what it labelled the "*afstemmingsregel*"—a rule of alignment that implies that:

> A court deciding a claim for interim relief after a court in main proceedings has given judgment, must, as a rule, align its judgment to the findings of that court, irrespective whether it is contained in an interlocutory or final judgment, in the reasons or dispositive part of the record, and irrespective whether the judgment has become irreversible.[300]

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richtsnoer genomen bodemvonnis houdt volgens het hof in (i) dat Rebgun onbevoegd is om in Nederland op te treden in hoedanigheid van curator in het faillissement van Yukos Oil en (ii) dat de door de Nederlandse rechtsorde beheerste rechtshandelingen ongeldig zijn. Daaruit volgt niet alleen zonder méér dat deze curator niet alleen geen stemrechten kan uitoefenen op de door Yukos Oil gehouden aandelen in Yukos Finance. Er volgt ook zonder méér uit dat hij daarover niet als curator van Yukos Oil kan beschikken en/althans geen geldige koopovereenkomst kon aangaan en/of geen geldige leveringshandeling kon verrichten (voor de levering in Nederland). Het is immers van tweeën één: óf de curator is bevoegd en kan in Nederland met betrekking tot Yukos Finance rechtsgeldig rechtshandelingen stellen óf hij kan dat niet, maar dan valt ook niet in te zien waarom er méér voor nodig zou zijn om de curator als beschikkingsonbevoegd en zijn als curator van Yukos Oil verrichte rechtshandelingen als ongeldig aan te merken.") ("The court of appeal erred in law. Namely, the judgment given in the main proceedings—justly regarded by the court as determinative in these proceedings for interim measures—implies according to the court (i) that Rebgun has no right to act in The Netherlands in the capacity of curator in the insolvency of Yukos Oil and (ii) that the legal acts which are subject to the Dutch legal order are invalid. This means not only that this curator had no right to vote on the shares held by Yukos Oil in Yukos Finance. It also means that he could not in the capacity of curator act and/or conclude a sales agreement and/or effect a valid transfer in respect of these shares (for effectuation in The Netherlands). Namely, only one of the following applies: either the curator is entitled to act in The Netherlands in respect of Yukos Oil or he is not, but, if the latter is true, it is incomprehensible why anything else is required to regard the curator as powerless and his acts in respect of Yukos Oil as invalid.").

[298] HR 7 January 2011 (n 276) [17]-[18] (*Yukos International UK BV/OOO Promneftstroy*) ("Het hof heeft tot uitgangspunt genomen dat uit het bodemvonnis volgt dat de 'door de Nederlandse rechtsorde beheerste rechtshandelingen' welke door Rebgun als curator zijn verricht, 'ongeldig zijn'. De levering van de aandelen Yukos Finance door Rebgun als curator aan Promneftstroy ziet het hof kennelijk als een 'door de Nederlandse rechtsorde beheerste rechtshandeling'. Het hof tekent immers aan dat die levering 'hier te lande heeft plaatsgevonden'. … Onder dit door het hof gekozen uitgangspunt kan de conclusie geen andere zijn dan dat de levering 'ongeldig' is.").

[299] ibid [3.4.4] ("Ingevolge het vonnis van 31 oktober 2007 mist het Russische faillissementsvonnis hier te lande iedere rechtskracht, zodat het hof — nu uit de stukken van het geding niet blijkt van een omstandigheid die een uitzondering op voormelde regel zou kunnen rechtvaardigen — tot geen ander oordeel had kunnen komen dan dat Promneftstroy geen aandeelhouder in Yukos Finance is geworden.").

[300] ibid [3.4.2] ("De rechter die in kort geding moet beslissen op een vordering tot het geven van een voorlopige voorziening nadat de bodemrechter reeds een vonnis in de hoofdzaak heeft gewezen, dient in

The court acknowledged that the doctrine can be subject to "exceptions in certain circumstances".[301] However, such circumstances, the Court concluded, were not present on the facts of the case.

Unsurprisingly, the decision of the Dutch Supreme Court was not the end of the story; Promneftstroy filed a new claim for interim relief against Yukos International in the Amsterdam District Court,[302] seeking (inter alia) a freezing order prohibiting the use or transfer of a large sum of money kept by Yukos International on a Dutch account, until a Dutch court had finally decided by judgment having the status of res judicata that Promneftstroy had not become the owner of the Yukos Finance shares.

Against the background of the Supreme Court judgment confirming the applicability of the *afstemmingsregel*, that same doctrine was a likely obstacle to this new claim. Nevertheless, Promneftstroy disputed the applicability of the doctrine for two reasons: first, the Supreme Court had manifestly erred by applying the doctrine to a judgment given in proceedings to which Promneftstroy was not a party; and, second, the Supreme Court manifestly erred by applying the doctrine in proceedings for a protective measure, which type of proceedings requires a different balancing of interests than the *afstemmingregel* is able to offer.

The District Court rejected the claim, noting that "*there should be an end to litigation* and the Supreme Court has the final say."[303] On the alleged errors of the Supreme Court, the court pondered "the question of a legal theoretical nature whether the Supreme Court is capable at all of manifest errors".[304] Neverthelss, on whether the Supreme Court manifestly erred by applying the *afstemmingsregel* in the circumstances involving a non-party (or privy) to t the prior proceedings, the court observed:

> The Supreme Court has in this case applied the *afstemmingsregel* while Promneftstroy was not a party to the main proceedings that culminated in [the non-recognition judgment]. Yukos rightly pointed out that the *afstemmingsregel* does not mean that the judgment … has res judicata effect in the sense of Article 236 Rv, but that the court in interim proceedings must take that judgment given in main proceedings as directing its decision whether or not the interim relief claimed should be granted. This is not in violation of Article 19 Rv or Article 6 ECHR.[305]

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beginsel zijn vonnis af te stemmen op het oordeel van de bodemrechter, ongeacht of dit oordeel is gegeven in een tussenvonnis of in een eindvonnis, in de overwegingen of in het dictum van het vonnis, en ongeacht of het vonnis in kracht van gewijsde is gegaan.") cf HR 19 May 2000 (n 276) [3.2] (*Staat/Vereniging Nederlandse Vakbond Varkenshouders*).

[301] ibid [3.4.3] ("Deze afstemmingsregel geldt ook in het zich hier voordoende geval dat in een bodemprocedure wordt geoordeeld dat een in het buitenland uitgesproken faillissement hier te lande niet kan worden erkend omdat het tot stand gekomen is op een wijze die strijdig is met de Nederlandse openbare orde, terwijl vervolgens in een kort geding de vraag moet worden beantwoord of de curator in het faillissement hier te lande rechtsgeldig rechtshandelingen, in dit geval: levering van de aandelen Yukos Finance aan Promneftstroy, heeft kunnen verrichten.").

[302] Rb Amsterdam 17 March 2011 (n 293) (*OOO Promneftstroy/Yukos International UK BV*).

[303] ibid [6.2].

[304] ibid [6.3].

[305] ibid ("De Hoge Raad heeft in dit geval de afstemmingsregel toegepast terwijl Promneftstroy geen partij was in het geschil dat heeft geleid tot het bodemvonnis van 31 oktober 2007. Zoals Yukos terecht heeft aangevoerd houdt de afstemmingsregel niet in dat het vonnis van 31 oktober 2007 voor Promneftstroy bindende kracht heeft als bedoeld in artikel 236 Rv, doch dat de kort gedingrechter dat bodemvonnis als richtsnoer dient te nemen bij de vraag of een voorlopige voorziening al dan niet moet worden verleend. Van schending van artikel 19 Rv en/of van artikel 6 EVRM is dus geen sprake.").

The District Court added the following on the question whether application of the *afstemmingsregel* in a case involving a non-parties to the prior main proceedings violates fundamental procedural rights, in particular Art 19 Rv and Art 6 ECHR:

> In the proceedings in the Supreme Court the point that Promneftstroy was not a party in the main proceedings was considered at length. It can be inferred from this that the Supreme Court held that the *afstemmingsregel* also applies in circumstances where a person was not a party to the main proceedings, but is a party in the subsequent interim proceedings, assuming that both cases (as in this instance) are essentially concerned with the same matter. This ruling cannot be reviewed or reversed by a court in interim proceedings.[306]

The court's reasoning is unconvincing. The *afstemmingsregel* as applied does in effect imply *prima facie* a denial of justice, by denying Promneftstroy the opportunity to litigate an issue it has not previously been in a position to litigate; Promneftstroy was neither party nor privy to the prior non-recognition judgment proceedings.[307] On these facts, Art 19 Rv and Art 6 ECHR appear to be very much in play.

Nevertheless, it is suggested that application of the *afstemmingsregel* was justified on the facts due to the particular *nature* of a non-recognition judgment, which is a decision of a public policy nature on a matter that is not subject to party disposition (a court is required if necessary to consider it of its own motion) and which applies for the Dutch legal order as a whole and for reasons of legal certainty has *erga omnes* application.[308] The judgment by which the Russian insolvency

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[306] ibid ("In de feiten die in het arrest van de Hoge Raad zijn opgenomen, is tevens opgenomen wie partij waren bij het geschil dat tot het bodemvonnis heeft geleid. Bij de Hoge Raad is uitgebreid aan de orde geweest dat Promneftstroy geen partij was. Hieruit kan worden afgeleid dat de Hoge Raad de afstemmingsregel tevens van toepassing acht in een geval dat een partij geen partij was in de bodemzaak, doch wel in de kort gedingzaak, ervan uitgaande dat beide zaken (zoals in dit geval) materieel over dezelfde kwestie gaan. Dit oordeel van de Hoge Raad kan niet door de kort gedingrechter worden herzien of gewijzigd.").

[307] cf HB Krans (n 276) [8]-[9] ("It seems self-explanatory that the court in interim proceedings should only align its decision with the judgment of the court in the main proceedings if both sets of proceedings involve the same parties. This follows from the rationale of the doctrine, even though it does not follow from the wording of the Supreme Court's formulation of the afstemmingsregel in the present case or in the case of Staat/Varkenshouders. Besides, this decision makes clear that this starting point is not without exceptions. … In the interim proceedings different parties face each other than in the main proceedings. … What is the law on this point cannot in my view be derived from the decision. … Apparently, it is not necessary for the question whether the court in interim proceedings must align its judgment with that of the court in main proceedings that the parties involved in the interim proceedings are exactly the same as those in the main proceedings; this is what the judgment [of the Supreme Court] clarifies.") ("Het ligt voor de hand te veronderstellen dat de kort geding rechter zich slechts moet richten naar het oordeel van de bodemrechter indien in beide procedures dezelfde partijen optreden. Hoewel dat niet blijkt uit de bewoordingen waarmee de Hoge Raad de afstemmingsregel thans en in het arrest Staat/Varkenshouders omschrijft, volgt dat naar mijn idee uit genoemde ratio van deze regel. Bovenstaand arrest maakt duidelijk dat dit uitgangspunt niet zonder uitzonderingen is. Waar in de bodemzaak twee vervangen bestuurders en Yukos Finance enerzijds optraden tegen de curator en twee nieuwe bestuurders anderzijds, staan in onderhavig kort geding (onder meer) een koper van de betreffende aandelen en Yukos International tegenover elkaar. In kort geding staan dus andere partijen tegenover elkaar dan in de bodemzaak. … Wat op dit punt exact rechtens is, kan naar mijn idee niet uit bovenstaand arrest worden afgeleid. … Voor de vraag of de kort geding rechter zijn oordeel moet richten naar dat van de bodemrechter is kennelijk niet per se noodzakelijk dat in dat kort geding exact dezelfde partijen tegenover elkaar staan als in de bodemzaak, zo maakt dit arrest duidelijk.").

[308] cf AG Timmerman (in a different context) in HR 26 November 2010, ECLI:NL:PHR:2010:BN8533, NJ 2011, 55 mnt P van Schilfgaarde, RvdW 2010, 1400, NJB 2010, 2237, JOR 2011, 7 mnt RGJ de Haan, RON 2011, 9 [3.9]ff. See also HR 10 November 2006, ECLI:NL:HR:2006:AY4033, NJ 2007, 561

judgment was denied recognition on grounds of Dutch public policy therefore by its nature has implications beyond the parties involved in the non-recognition proceedings.

In relation to the non-recognition judgment, the *afstemmingsregel* ensures that after a foreign judgment has been denied recognition in main proceedings, a court in subsequent interim proceedings will not render an inconsistent judgment, *notwithstanding* that the non-recognition judgment has not (yet) acquired the status of res judicata and thus lacks conclusive effect.

The potentially harsh implications of the doctrine are soothed by the fact that the doctrine allows for exceptions[309] *if* Promneftstroy is able to establish either that the non-recognition judgment is manifestly based on error and that the case is so urgent that there is no time to await the decision on the appeal pending against the judgment, or that there is a change in circumstances so material that it should be assumed that the court in the main proceedings would have rendered a different judgment, if had it been aware of those circumstances.[310]

(4) Scope

The most significant restriction in scope of the *afstemmingsregel* is that the doctrine applies solely in the context of interim proceedings. A further limitation is that the doctrine applies only to judgments given in main proceedings. Moreover, the judicial findings whose contradiction is to be precluded by the doctrine must be final, not provisional,[311] even though it is irrelevant whether those findings are contained in the reasons or in the operative part of the judgment, whether the judgment invoked is final or interlocutory, or whether the judgment relied on has acquired the status of res judicata.[312]

The doctrine is wide in scope because it applies if there is a *risk of conflict* between the judgment to be rendered by the court in interim proceedings and an existing judgment given in main proceedings. Accordingly, the scope of the doctrine is not restricted to situations where the issue or claim is identical (unlike for instance Art 236);[313] for instance, in *Yukos Int et al v Promneftstroy and Rosneft*,[314] the judgment in main proceedings determined the issue whether the foreign insolvency

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mnt HJ Snijders, RvdW 2006, 1055, JOR 2007, 5 mnt P Sanders, JBPr 2007, 32 mnt BA Boersma, RON 2007, 3, JRV 2007, 68 [3.5].

[309] See text to n 316ff.

[310] HR 7 January 2011 (n 276) [3.4.2] (*Yukos International UK BV/OOO Promneftstroy*) ("This principle can be subject to exceptions in certain circumstances, which may be the case if the judgment of the court in main proceedings is manifestly based on a error and the case is so urgent that it is no option to await the decision on the appeal pending against the judgment and further if there is a change in circumstances of such a nature that it must be assumed that the court in the main proceedings would have rendered a different decision, had it known these facts.") ("Onder omstandigheden kan er plaats zijn voor het aanvaarden van een uitzondering op dit beginsel, hetgeen het geval zal kunnen zijn indien het vonnis van de bodemrechter klaarblijkelijk op een misslag berust en de zaak dermate spoedeisend is dat de beslissing op een tegen dat vonnis aangewend rechtsmiddel niet kan worden afgewacht, alsook indien sprake is van een zodanige wijziging van omstandigheden dat moet worden aangenomen dat de bodemrechter ingeval hij daarvan op de hoogte zou zijn geweest, tot een andere beslissing zou zijn gekomen.").

[311] On the distinction of 'final' and 'provisional' judicial findings, see text to n 79ff.

[312] HR 7 January 2011 (n 276) [3.4.2] (*Yukos International UK BV/OOO Promneftstroy*).

[313] See text to n 482ff.

[314] HR 7 January 2011 (n 276) (*Yukos International UK BV/OOO Promneftstroy*).

judgment could be recognised in the Netherlands, while subsequently in interim proceedings the issue was whether transfer in the Netherlands of shares to Promneftstroy by an administrator in foreign insolvency proceedings was valid.[315] Obviously, though there was no identity of issues, there was a risk of conflicting judgment, because the shares transfer could only be valid if the foreign insolvency judgment *was* recognised.

(5) Exceptions

The *afstemmingsregel* applies even if the judgment in the main proceedings has not acquired the status of res judicata. The doctrine may therefore apply notwithstanding that the judgment in the main proceedings is under appeal, and the chances that this appeal will be successful seem to be irrelevant.[316]

Nevertheless, the doctrine can be subject to exceptions in at least two circumstances: first, if the judgment of the court in main proceedings is manifestly erroneous and the case is so urgent that it is no option to await the decision on the appeal pending against the judgment; and, second, if there is a change in circumstances so material that it must be assumed that the court in the main proceedings would have rendered a different judgment, had it known those circumstances.[317]

2.7 Gezag van gewijsde

Finality in succeeding cases (the contradiction of judicial findings)

Article 236 Rv[318] attributes "*gezag van gewijsde*" ('res judicata effect') to (certain)[319] judgments that cannot or can no longer be affected by ordinary means of appeal—i.e. judgments which have acquired so-called "*kracht van gewijsde*" ('res judicata status'). Res judicata effect implies that a court's findings regarding the claim or issue have "*bindende kracht*" ('conclusive effect')[320] between the same parties (or their privies)[321] in another case that involves the same "*rechtsbetrekking*" ('claim or

[315] ibid [3.4.3] ("Deze afstemmingsregel geldt ook in het zich hier voordoende geval dat in een bodemprocedure wordt geoordeeld dat een in het buitenland uitgesproken faillissement hier te lande niet kan worden erkend omdat het tot stand gekomen is op een wijze die strijdig is met de Nederlandse openbare orde, terwijl vervolgens in een kort geding de vraag moet worden beantwoord of de curator in het faillissement hier te lande rechtsgeldig rechtshandelingen, in dit geval: levering van de aandelen Yukos Finance aan Promneftstroy, heeft kunnen verrichten.").
[316] Krans (n 276) [7].
[317] HR 7 January 2011 (n 276) [3.4.2] (*Yukos International UK BV/OOO Promneftstroy*) ("Onder omstandigheden kan er plaats zijn voor het aanvaarden van een uitzondering op dit beginsel, hetgeen het geval zal kunnen zijn indien het vonnis van de bodemrechter klaarblijkelijk op een misslag berust en de zaak dermate spoedeisend is dat de beslissing op een tegen dat vonnis aangewend rechtsmiddel niet kan worden afgewacht, alsook indien sprake is van een zodanige wijziging van omstandigheden dat moet worden aangenomen dat de bodemrechter ingeval hij daarvan op de hoogte zou zijn geweest, tot een andere beslissing zou zijn gekomen.").
[318] On this provision see, especially, Van Schaick (n 3) [101]–[158]; Beukers (n 3); and Veegens (n 3).
[319] See text to n 536ff.
[320] '*Bindende kracht*'. See text to n 365ff.
[321] See text to n 494ff.

issue'). [322] Conclusive effect means that a party is barred from (successfully) contradicting judicial findings, by offering the opponent an effective reply,[323] so that inconsistent pleadings are *rejected* (or a claim *dismissed*).[324]

The res judicata doctrine of Art 236 Rv can be invoked both as a sword and as a shield. For instance, a claimant can after recovering judgment for a breach of contract invoke the res judicata effect of the judgment in an *offensive* mode, in support of a new claim for another breach of the same contract, for the pupose of precluding the same defendant (or a privy) from successfully disputing the contract's validity; by the same token, a defendant can after previously defeating a breach of contract claim through proof of the nullity of the contract, rely on the doctrine in a *defensive* mode, to fend off a new claim by the same claimant (or a privy) for breach of the same contract.

(1) Background

(i) A false start

Gezag van gewijsde had a false start in Dutch law.[325] The res judicata doctrine was first codified by Art 1953 of the (old) Civil Code 1838[326] ('OBW') in 1838. The provision read: "Legal presumptions are those that, by virtue of a specific legal provision, relate to certain acts or facts. Of this nature are among others: ... 3°. the *gezag* the law attributes a *gewijsde*".[327] This provision mirrored Art 1350 of the French Code Civil ('CC'): "La présomption légale est celle qui est attachée par une loi spéciale à certains actes ou à certains faits; tels sont: … 3° L'autorité que la loi

[322] "Beslissingen die de rechtsbetrekking in geschil betreffen en zijn vervat in een in kracht van gewijsde gegaan vonnis, hebben in een ander geding tussen dezelfde partijen bindende kracht." See text to n 351ff.

[323] cf Van Schaick (n 3) [140] (*res judicata* effect implies that "irreversible judicial findings regarding the dispute between parties cannot in new proceedings between those parties be controverted and will be taken as the starting point for those proceedings between the parties.").

[324] Reproduced in HR 17 December 2010 (n 147) [4.16] ("Laatstgenoemd artikel leidt ertoe dat alle beslissingen zoals die in het eerdere vonnis zijn genomen bindend zijn, zodat alle daarmee strijdige stellingen in de nieuwe procedure moeten worden verworpen en alle daarmee strijdige vorderingen moeten worden afgewezen.").

[325] See further Binnerts (n 3) 20ff; Van Boneval Faure (n 3) 190; Eggens (n 3) 211ff; Anema/Verdam (n 3) 319ff. On the practice prior to the introduction of the Civil Code see, eg, Ulrik Huber, *Heedensdaegse rechtsgeleertheyt, soo elders, als in Frieslandt gebruikelijk* (3rd ed Gerard onder de Linden, Amsterdam 1726) 838ff.

[326] *Burgerlijk Wetboek*, Stb 1838, 12.

[327] ("Wettelijke vermoedens zijn dezoodanige welke, uit krachte eener bijzondere wetsbepaling, met zekere handelingen or met zekere daadzaken verbonden zijn. Van dien aard zijn onder andere: ... 3°. Het gezag hetwelk de wet aan een regterlijk gewijsde toekent...."). cf Article 3427 of the 1820 Draft Civil Code ("The *kracht van gewijsde zaak*, aside from execution, implies that that what has been determined by judgment is regarded as truthful and just....") ("De kracht van gewijsde zaak, buiten de executie, bestaat daarin, dat hetgeen bij het vonnis beslist is, voor waarheid en recht wordt gehouden ...."). The second paragraph offered the following clarification: "The facts and circumstances which have been admitted or proved as recorded in the record of judgment, or on which the court evidently based its judgment, may not thereafter be disputed, nor may the right of the party established be controverted." ("De feiten en omstandigheden, welke bij het vonnis erkend of bewezen zijn ter neder gesteld, of waarop de rechter kennelijk zijne beslissing gegrond heeft, mogen derhalve daarna niet meer in twijfel getrokken, noch het verklaarde recht van de partijen betwist worden."). Finally, the provision added that: "At the same time, the kracht van gewijsde zaak applies to all that, in respect of all that necessarily flows from the judgment." ("Insgelijks geldt de kracht van gewijsde zaak, ten aanzien van al wat uit de gedane beslissing noodzakelijk voortvloeit.").

attribue à la chose jugée". [328] The drafters of the French code in turn had relied heavily on the writings of Pothier.[329]

According to Pothier's interpretation of Roman law, "*autorité de la chose jugée*" (a term he derived from "*auctoritas rei judicata*") amounted to a presumption that all contained in a judgment is true and just, so as to exclude all contrary evidence: "res judicata *pro veritate accipitur*". [330] On that basis, the author concluded, a judgment gives rise to a defence entitled *exceptio rei judicatae,* which renders any inconsistent evidence inadmissible. [331] As a result, *autorité de la chose jugée,* and thus *gezag van gewijsde,* was conceived as legal presumption under the law of evidence.[332]

(ii) Reconsideration

The characterisation as legal presumption did not endure. Two main reasons can be identified. In the first place, Pothier's understanding of Roman law was discredited after analysis of Gaius' *Institutiones* upon their rediscovery in 1816, which suggested that the maxim res judicata *pro veritate accipitur*—originally attributed to Ulpianus [333]—had a more limited significance in Roman procedural law (*ordo iudiciorum privatorum*) than Pothier had been led to think on the basis of early commentaries on the *Corpus Juris*. These commentaries presented the maxim squarely as the foundation for Roman preclusion law, by reason of its inclusion in the *Digests* under the heading "*De diversis regulis iuris antique*". [334] However, the true significance of the maxim was probably restricted to judgments on *legal status*, in particular, civil status and the validity of wills. Ulpianus, for instance, used the phrase *quia res iudicata pro veritate accipitur* exclusively in respect of his observation that a freed person must be recognised by all as a freeborn if this is made out by judgment.[335]

Gaius's *Institutiones* further clarified that prior to Justinian law, going back as long ago as the time of the *Twelve Tables*, essentially two alternative scenarios of preclusion existed in Roman procedural law depending on the law on which the original claim was based. First, if the first claim had been based on civil law, the

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[328] See Eggens (n 3) 211ff; Binnerts (n 3) 20ff.
[329] See Taelman (n 13) 6ff with further references.
[330] R-J Pothier, *Traité des obligations* (Langlet, Brussels 1835) 324-325 [820]-[821] ("L'autorité de la *chose jugée* fait présumer vrai et equitable tout ce qui est contenu dans le jugement; et cette presumption étant *juris et de jure,* exclut toute preuve du contraire: *Res judicata pro veritate acciputur; L. 207. ff. de r J. 1352. C. G. L.* 4. *T.* 4. *A.* 5. … Il naît du jugement une exception qu'on appellee *exception rei judicatae,* qui la rend non recevable. … L'autorité de la *chose jugée,* ne permettant pas la prevue du contraire de ce qui a été jugé, la partie contre qui le jugement a été rendu n'est pas écoutée à offrir de justifier que le juge est tombé dans quelque erreur même de simple calcul: *res judicatae si sub praetextu computationis instaurentur, nullus erit litium finis. L. 2. cod. de re jud.*") (Translation by the author: "*L'autorité de la chose jugée* implies a presumption that all that is contained in the judgment is true and equitable; and this presumption excludes all contrary proof: *Res judicata pro veritate accipitur.* … The judgment gives rise to a defence entitled *exception rei judicatae* that renders it inadmissible. … *L'autorité de la chose jugée,* preventing proof inconsistent with what has been decided, even excludes a party from asserting that the judge was mistaken in the calculation of a sum: *res judicatae si sub praetextu computationis instaurentur, nullus erit litium finis.*").
[331] ibid.
[332] Veegens (n 3) 15.
[333] D 1.5.25.
[334] D 50.17.207.
[335] Veegens (n 3) 14-15.

obligation previously litigated was dissolved by the so-called *litis contestatio* (the dispute as defined in front of the *Praetor* before it was remitted to a *judex* for adjudication) so that no obligation existed thereafter for which the law might provide a right of action.

Second, if the claim had been based instead on *imperium*, the obligation continued to exist and the law would provide a right of action, but at the same time the law offered a defence ('*exceptionem*') entitled "*rei iudicatae vel in iudicium deductae*" causing dismissal of the claim without trial.[336] This rule was subsequently associated with the maxim *bis de eadem re ne sit actio* ('for the same cause there is no second right of action') as reduced to *ne bis in idem*, even though this maxim seems to have derived from a rule that applied first and foremost to judgments *in rem.*[337]

In the second place, Dutch commentators concluded that classification of *gezag van gewijsde* as a legal presumption failed to explain its practical significance and implied undesirable consequences; for instance, Binnerts in his 1867 thesis demonstrated that *gezag van gewijsde* under Art 1953 OBW did not found an irrefutable presumption (*praesumptio juris et de jure*),[338] since any legal presumption, he found, is by nature refutable, unless the law *explicitly* states otherwise. Art 1958 OBW confirmed this conclusion as follows: "A legal presumption exempts the person in whose benefit it exists from the need to prove. No evidence is admissible against the legal presumption if the law declares certain acts invalid or bars proceedings based on this presumption, unless the law explicitly renders such evidence admissible…."[339] Since Art 1953 OBW did not bar proceedings—it stated that a party

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[336] Book III [181]. ("Hence it follows that if I sue for a debt by action based on statute law, I cannot afterwards, by the letter of the civil law, bring another action for the same, because I plead in vain that 'it ought to be given to me,' inasmuch as by the *litis contestatio* the necessity that it should be given to me ceased. It is otherwise if I proceed by action founded on the *imperium* for then the obligation still remains, and therefore, by the letter of the law, I can afterwards bring another action: but I must be met by the exception *rei judicatae* or *in judicium deductae*.") Translation by JT Abdy and Bryan Walker, *The Commentaries of Gaius* (CUP, Cambridge 1870) 233-34. This paragraph follows the following explanation by Gaius, at [180], of the significance of the *litis contestatio*: "An obligation is also dissolved by the *litis contestatio* when proceedings are taken by action based on the statute law. For then the original obligation is dissolved and the defendant begins to be bound by the *litis contestatio:* but if he be condemned, then, the *litis contestatio* being no longer binding (lit. being swept away), he begins being bound on account of the judgment. And this is the meaning of what is said by ancient writers, that 'before the *litis contestatio* the debtor ought to give, after the *litis constestatio* he ought to suffer condemnation (submit to award), after condemnation (award) he ought to do what is adjudged."

[337] On the roots and significance of Roman *res judicata* doctrine, see Anema/Verdam (n 3) 296ff with further references. Further analysis of Roman procedural law and *res judicata* doctrine in particular is best left to historians. See E Metzger, 'Roman Judges, Case Law, and Principles of Procedure' (2004) 22 Law and History Review 1, 4 ("Our knowledge of Roman civil procedure is based on the smallest evidence. We have a single example of a treatise on procedure in book four of Gaius' Institutes (though Gaius writes more on actions than on procedure proper), together with a body of expurgated classical texts, fragments of statutes, and some documents prepared for litigation. The scarcity of the evidence, and the gap-filling required to make it make sense, have made textbook discussions of procedure vulnerable to fashion. The problem is made worse by the fact that the evidence has tended to trickle in, so that an idea, though widely accepted, may be based on outdated evidence. Anyone who studies procedure should be wary of ideas which have passed from textbook to textbook without change, and accept that many of these ideas are open to revision.").

[338] Binnerts (n 3) 20ff.

[339] ("Een wettelijk vermoeden ontslaat dengenen, in wiens voordeel hetzelve bestaat, van alle verdere bewijzen. Geen bewijs wordt tegen een wettelijk vermoeden toegelaten, in geval de wet, op grond van dit vermoeden zekere bepaalde handelingen nietig verklaart, of den regts-ingang weigert; ten zij de wet

could plead *gezag van gewijsde* and until when—the provision therefore gave rise to no more than a refutable presumption (*praesumptio juris tantum*). Consequently, the maxim *praesumptio cedit veritati* ('a presumption cedes to the truth') applied to *gezag van gewijsde* as opposed to res judicata *pro veritate accipitur* ('a judgment is to be accepted as the truth'). The implications were unacceptable, Binnerts noted:

> *Gezag van gewijsde,* classified as a legal presumption, is therefore insignificant; nothing prevents that a matter previously litigated repeatedly becomes the subject of subsequent litigation, because nothing can prevent a party from alleging and proving that the judgment contains an untruth, which calls for evidence of the contrary; nothing therefore rules out that the modern society becomes a scene of unending, everlasting litigation; legal certainty is unattainable in such circumstances. This is the result of characterising *gezag van gewijsde* as a legal presumption, that the court's decision is regarded as the truth, and it is astonishing that authors applying this classification have not been warned off by its consequences.[340]

Binnerts proposed that *gezag van gewijsde* should be understood differently, as meaning that what has been decided by a court *applies as law* between the parties, who are not thereafter allowed to dispute the decision; a judgment establishes the *legal* truth, so thereafter there is no place for the *absolute* truth.[341] He still accepted res judicata *pro veritate accipitur* as founding maxim of *gezag van gewijsde*. And, while Binnerts' criticism of the characterisation of *gezag van gewijsde* was generally accepted, increasingly, a judgment's normative character was regarded as the basis for *gezag van gewijsde*; Veegens, for instance, noted:

> The judgment, the assumption is, is evidence of what has been judicially determined. Evidence to disprove this determination is inadmissible. This approach has clearly influenced our Civil Code, but today it is beyond the need of rejection. We are dealing with a binding, not an evidential, effect, though the record can also have evidential value. Symbolic for the gains of this insight is the gradual withering of the maxim *res iudicata pro veritate habetur* and its replacement by the more forceful adage *res iudicata ius facit inter partes*, which stems from D 25.3.3 pr.—the judicial decision is law between the parties.[342]

The most visible result of this fundamental reconsideration of *gezag van gewijsde* was that the concept was dissociated completely from the law of evidence, and associated with the law of judgments.

(iii) Reinterpretation

Another element in the development of the res judicata doctrine was the reinterpretation of the conditions for *gezag van gewijsde.* Article 1954 OBW specified these conditions as follows: "[*Gezag van gewijsde*] does not extend beyond the subject matter of the judgment. To be able to invoke [*gezag van gewijsde*], it is required that the thing claimed is the same, that the claim is based on the same cause

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zelve het tegenbewijs mogt hebben vrijgelaten, en onverminderd hetgeen omtrent den geregtelijken eed en de geregtelijke bekentenis is vastgesteld.").

[340] Binnerts (n 3) 24-25.

[341] ibid 31.

[342] Veegens (n 3) 19. cf Anema/Verdam (n 3) 309 ("It is indicative of this development that the maxim: '*res iudicata pro veritate habetur*' was slowly superseded in legal writing by the maxim: '*res iudicata facit ius inter partes*' which has been consistently used to signify *gezag van gewijsde.*").

and is made by and against the same parties in the same relation."[343] Also this provision echoed the French *Code* Civil; to be precise Art 1351 CC: *"L'autorité de la chose jugée n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement. Il faut que la chose demandée soit la même; que la demande soit fondée sur la même cause; que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité."*[344] In turn, this provision was attributed to Pothier, who wrote:

> *L'autorité de la chose jugée* extends only to the subject-matter of the judgment. This is why the party who failed in their claim against me must be precluded from making a new claim against me by the defence of *rei judicatae,* which derives from the *autorité de la chose jugée* that the judgment rejecting the claim provided me on the condition that the new claim has the same subject-matter as the first. For this three things must coincide, 1. The thing claimed must be the same as that claimed in the first claim. 2. The thing must be claimed for the same cause as in the first claim. 3. The capacity in which the party claims must be the same as that in the first claim.[345]

The resulting 'triple identity' test under Art 1954 OBW required the identity between the prior and present proceedings of (1) the thing claimed, (2) the cause of action and (3) the parties (in the same procedural roles). The provision further specified that *gezag van gewijsde* extended no further than the judgment's subject-matter.

The test met with little approval in Dutch doctrine; Visser, for instance, observed that "the text of our law is só full of oblique and obsolete terms echoing long forgotten controversies and died out legal conceptions, that our Code really calls for decoding rather than interpretation."[346] Courts rejected in particular the condition that the thing claimed—i.e. the remedy—be the same for *gezag van gewijsde* to attach, as illustrated by the Dutch Supreme Court decision in *Rijwielfabriek de Vierkleur NV/Crossley Motoren NV*.[347] The facts are set out elsewhere.[348] On appeal, the Hague Court of Appeal explained the ground for reinterpreting the conditions for *gezag van gewijsde*:

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[343] "Het gezag van een geregtelijk gewijsde strekt zich niet verder uit dan tot het onderwerp van het vonnis. Om dat gezag te kunnen inroepen, wordt vereischt dat de zaak welke gevorderd wordt dezelfde zij; dat de eisch op dezelfde oorzaak beruste, en door en tegen dezelfde partijen in dezelfde betrekking gedaan zij." Both provisions were contained in the fourth book of the Civil Code on evidence and time-limitation (*Van bewijs en verjaring*), specifically Title IV on legal presumptions (*Van vermoedens*).

[344] "L'autorité de la chose jugée n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement. Il faut que la chose demandée soit la même ; que la demande soit fondée sur la même cause ; que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité." Chapter IV is entitled "*De la preuve des obligations et de celle du paiement*" (on proof and payment) and Section 3 is called "*Des présomptions*" (on presumptions)

[345] Pothier (n 330) [823] ("L'autorité de la *chose jugée* n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement. C'est pourquoi, pour que la partie, qui a été renvoyée ou mise hors de cour sur la demande qu'elle avait donnée contre moi, doive être exclue d'une nouvelle demande qu'elle a donnée depuis contre moi, par l'exception *rei judicatae*, qui naît de l'autorité de la *chose jugée* qu'a le jugement qui m'a donné congé de sa demande, il faut que sa nouvelle demande ait le même objet qu'avait la première, dont le jugement m'a donné congé. Il faut, pour cela, que trois choses concourent, 1°. Il faut qu'elle demande la même chose qui avait été demandée par la première demande don't on m'a donné congé. 2°. Il faut que, par la nouvelle demande, elle demande cette chose pour la même cause pour laquelle elle l'avait demandée par la première. 3°. Il faut qu'elle la demande dans la même qualité dans laquelle nous procédions sur la première.").

[346] Visser (n 3) 3.

[347] HR 26 January 1917 (n 217) (*Rijwielfabriek de Vierkleur NV/Crossley Motoren NV*).

[348] See text to n 217ff.

> [T]he reference in Article 1954 Civil Code to the thing claimed in addition to the cause for the claim was copied from Article 1351 *Code Civil*, which in turn derived this formulation from Pothier, who, in light of what he thought could be derived from the writings of Roman jurists, required both *eadem res* and *eadem causa*. …[C]ommentators have demonstrated subsequently that Pothier was mistaken, and that where these jurists referred to *eadem res* and *eadem causa*, reference was in fact made to *eadem quaestio*…. …[O]ur Article 1954 is therefore to be interpreted in this broader sense, and the test must be whether a decision is sought in respect of a right which has already been determined, not whether the remedy sought in the new proceedings is the same as in the previous proceedings.[349]

The court applied this new test and established that litigation in both the first and second case pertained solely to the question whether the claimant had fulfilled the obligation to deliver the agreed machine; the parties did not dispute the instalments, so, if the claimant had adequately delivered, the defendant had the obligation to pay. This issue had already been determined by judgment in favour of the claimant; accordingly, the court held that this finding also applied in the subsequent case. The court observed further that "it is irrelevant whether the finding is contained in the dispositive part or in one of the reasons." In justification, the court reasoned as follows:

> [T]he alternative interpretation of Article 1954 Civil Code would imply that in claims for instalments based on one and the same contract, the existence of this contract would have to be determined over and over again, which could, contrary to the apparent purpose of the provision, lead to conflicting judgments. …[F]or that reason, based on the legal presumption consisting in the [*gezag van gewijsde*] of the judgment, it is presumed that the applicant fulfilled their obligation to deliver the machine, so that the respondent is required to pay the purchase price.[350]

Though the court continued to (formally) adhere to the view that *gezag van gewijsde* implied a legal presumption, the court radically departed from the conditions for *gezag van gewijsde* specified by Art 1954 OBW; on the court's view, the principal condition for *gezag van gewijsde* is that the issue is the same, not that also the remedy claimed is identical.

(iv) Recodification

By 1969, following a 1959 draft legislative proposal of the State Committee on Civil Legislation,[351] the legislature acknowledged that Art 1953 OBW misrepresented the nature of *gezag van gewijsde*, and proposed to recodify *gezag van gewijsde* as related to a judgment's force of law, as part of the law of judgments[352]. Using the concept "*bindende kracht*"—today the same concept denotes the conclusive effect attributed under Art 236 Rv to irreversible judicial findings—the legislature stated the following:

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[349] Reported in HR 26 January 1917 (n 217) (*Rijwielfabriek de Vierkleur NV/Crossley Motoren NV*).
[350] ibid.
[351] Staatscommissie voor de Nederlandse Burgerlijke Wetgeving, *Bewijsrecht: ontwerp van wet met memorie van toelichting* (Staatsdrukkerij- en uitgeverijbedrijf, 's-Gravenhage 1959).
[352] New Law of Evidence Act (Explanatory Memorandum) (*Nieuwe regeling van het bewijsrecht in burgerlijke zaken*) Kamerstukken II (1969-1970) 10377 No 3, 22 (*MvT*).

> Articles 1953, 3° and 1954 of the Civil Code erroneously characterise *gezag van gewijsde* as a legal presumption, creating the false impression that these provisions relate to the evidential significance of a judgment, while in truth they relate to its force of law. For that reason the new provision is located within the fourth section of Title I of the first book 'On judgments in general' in the form of Article 67.[353]

The legislature further proposed to delete Art 1954 OBW and abolish the triple identity-test for *gezag van gewijsde*. Instead, *gezag van gewijsde* would merely require that the issue be the same:

> The unclear content of Article 1954 (the same thing and same cause) has over the years led to case law of the Hoge Raad pursuant to which invoking the *gewijsde* in subsequent proceedings is permissible if the issue in question is the same, irrespective of whether the thing claimed is the same.[354]

Recodification eventually only actually occurred twenty years later, on 1 April 1988.[355] *Gezag van gewijsde* became part of the law of judgments, in Art 67 Rv (now Art 236 Rv). In *literal translation* the provision reads:

> 1. Findings regarding the legal relationship in dispute and contained in a judgment having the status of res judicata, have in another case binding force between the same parties. 2. Privies in title or interest are equated to the parties, unless the law provides otherwise. 3. Courts will not apply *gezag van gewijsde* out of their own motion.[356]

The drafting is in various respects unclear and soon proved unworkable.[357] Today, the text does not accurately reflect the *actual meaning* courts have in practice interpreted into the provision. In particular, concept "legal relationship in dispute" has been construed as meaning the 'legal question';[358] more specifically, the claim or issue[359].[360] The following is a translation that reflects the gradual process of judicial (re)interpretation:

> 1. Findings regarding the claim or issue, contained in a judgment with the status of res judicata, have conclusive effect between the same parties in another case. 2. Privies in title or interest are treated like the parties, unless the law provides

[353] Rutgers/Flach/Boon (n 3) 411 ("De artikelen 1953, 3° en 1954 B.W. rangschikken het gezag van een rechterlijk gewijsde ten onrechte onder de vermoedens; zij wekken de valse schijn alsof het gaat om de bewijsrechtelijke betekenis van het gewijsde hoewel zij in wer-kelijkheid de bindende kracht er van betreffen. Daarom is de nieuwe bepaling geplaatst in de vierde afdeling van titel I van het eerste boek 'van vonnissen in het algemeen' en wel als artikel 67.").

[354] ibid ("De onduidelijke inhoud van artikel 1954 (dezelfde zaak en dezelfde oorzaak) heeft in de loop der jaren geleid tot de jurisprudentie van de Hoge Raad ingevolge waarvan een beroep op het gewijsde in een later geding geoorloofd is indien het alles beheersende geschilpunt hetzelfde is, onverschillig of wat geëist wordt hetzelfde is.").

[355] Stb 1987, 590.

[356] ("1. Beslissingen die de rechtsbetrekking in geschil betreffen en zijn vervat in een in kracht van gewijsde gegaan vonnis, hebben in een ander geding tussen dezelfde partijen bindende kracht. 2. Onder partijen worden mede begrepen de rechtverkrijgenden onder algemene of bijzondere titel, tenzij uit de wet anders voortvloeit. 3. Het gezag van gewijsde wordt niet ambtshalve toegepast.").

[357] Veegens (n 3) 25.

[358] '*Rechtsvraag*'.

[359] In reference specifically to the issue to be determined, that Court has also applied the term "*geschilpunt*". See HR 14 October 1988, NJ 1989, 413 mnt JBM Vranken [3.2] (*Wijnberg/Westland/Utrecht Hypotheekbank NV*). cf AG De Vries Lentsch-Kostense in HR 6 February 2004, ECLI:NL:PHR:2004:AN8908, NJ 2004, 250 mnt SW, RvdW 2004, 29 [3.1.1].

[360] HR 15 May 1987, NJ 1988, 164 mnt WH Heemskerk [3.4] (*Van Huffel/Van den Hoek*).

> otherwise. 3. Courts may not of their own motion apply *gezag van gewijsde* [res judicata effect].[361]

Apart from case law, a valid and, typically,[362] binding source source of statutory interpretation is the provision's parliamentary history.

(v) Parliamentary history

The government's explanatory memorandum[363] on the proposed recodification of *gezag van gewijsde* forms a crucial part of the provision's parliamentary history. It sets out the purpose of the provision and its proposed interpretation. Like the text of the provision, the memorandum is in various respects unclear and its translation risks (mis)interpretation of crucial terms. Nevertheless, this risk is outweighed by the interpretative significance of the report; hence, the text in relevant part reads:

> The first paragraph of Article 67 attributes conclusive effect ['*bindende kracht*'] to findings regarding rights or obligations of parties, insofar as they form the foundation for the eventual judgment the effect of which is invoked. Consequently, judicial findings that do not determine what rights or obligations apply as law between the parties have no conclusive effect; this excludes findings in non-contentious proceedings, findings exclusively on facts or law, *obiter dicta*. The term '*in een in kracht van gewijsde gegaan vonnis'* means that conclusive effect is conferred only on a judgment that is not or no longer open to variation, appeal, or appeal in cassation. Established case law and most commentators accept this requirement….
>
> Conclusive effect operates between the parties, since it is their legal relationship that is submitted to the court. The second paragraph puts privies in title in the same position as the parties, and the same applies to persons who succeed the parties in contract…. For the lastmentioned group this only applies after rendition of the judgment of which the res judicata effect is invoked…. These persons are not invariably bound by judgments against their predecessors, e.g. not when they can successfully rely on the protection offered by law to *bona fide* third parties. … This possibility of an exception has been explicitly stated in Article 67, 'unless the law provides otherwise'.
>
> The parties can invoke the res judicata effect in other proceedings concerning wholly or in part the same legal relationship previously adjudicated upon. If the defendant contends that the same is claimed for the same cause of action, the claim will be dismissed by virtue of this plea of res judicata.
>
> If the claim is different, e.g. a second instalment on a loan for which the first instalment was already awarded by judgment based on the claimant's right to

[361] ("1. Beslissingen die de rechtsbetrekking in geschil betreffen en zijn vervat in een in kracht van gewijsde gegaan vonnis, hebben in een ander geding tussen dezelfde partijen bindende kracht. 2. Onder partijen worden mede begrepen de rechtverkrijgenden onder algemene of bijzondere titel, tenzij uit de wet anders voortvloeit. 3. Het gezag van gewijsde wordt niet ambtshalve toegepast.").

[362] cf AG Verkade in HR 10 April 2009, ECLI:NL:PHR:2009:BH2465, NJ 2009, 183, RvdW 2009, 515, JBPr 2009, 25 mnt IPM van den Nieuwendijk, NJB 2009, 814 [4.4.4] ("Deciding contrary to a position in an explanatory memorandum is not an unsurmountable hurdle; this happens more frequently in practice. An explanatory memorandum is a (authoritative) statement of one or more ministers, but no law.") ("Dat afstand genomen wordt van een stelling in een MvT is geen onneembare horde; dat gebeurt in jurisprudentie wel vaker. Een Memorie van Toelichting is een (gezaghebbend) standpunt van een of meer ministers, maar geen wet.").

[363] '*Memorie van Toelichting*'.

payment, the claimant can rely on this finding with the effect that the claim for the second instalment will be awarded.

Invoking the res judicata effect of a judgment is a right of the parties; courts will not apply this effect of their own motion, as confirmed in the third paragraph. This is also established case law….

Article 1957 of the Civil Code attributes status-judgments force *erga omnes*, as long as the judgment was rendered against a person who had standing to defend the claim; the proposal contains no such rule. Like a contract binds only the parties, so a judgment binds only them. Nonetheless, third parties can undergo the consequences of a contract concluded by others, so too they can be faced with a judgment between others. This applies in particular in respect of judgments on the status of the parties; so-called status-judgments that affect the legal status of those whose family ties were in dispute. These judgments bind third parties, albeit only to the extent that their interests are not negatively affected, but this binding effect is unlike the conclusive effect of the judgment between the parties in other proceedings. Also other judgments than status-judgments may in effect apply to third parties; for example, judgments terminating an agreement or annulling an agreement for incapacity, misrepresentation or fraud. Article 1957 should not be regarded as an exception to Article 1954, not as a special feature of status-judgments, but as an implication of the fact that constitutive judgments can have general application.[364]

[364] Rutgers/Flach/Boon (n 3) 411-413 ("In overeenstemming daarmee verleent het eerste lid van artikel 67 bindende kracht aan beslissingen aangaande rechten of verplichtingen van partijen voor zover zij aan de conclusies van het vonnis, waarvan het gezag wordt ingeroepen, ten grondslag lagen. Mitsdien hebben rechterlijke beslissingen die niet vaststellen welke rechten of verplichtingen tussen partijen als recht gelden geen gezag van gewijsde; dus niet beslissingen in oneigenlijke rechtspraak, beslissingen louter over feiten of wetsuitlegging, beslissingen die ten overvloede gegeven zijn. De woorden 'in een in kracht van gewijsde gegaan vonnis' drukken uit, dat de bindende kracht alleen toekomt aan een vonnis dat niet of niet meer vatbaar is voor verzet, hoger beroep of cassatie. De heersende rechtspraak en de meeste schrijvers aanvaarden deze eis; anders Asser-Anema-Verdam, blz. 342 v en Land-Eggens, blz. 220 v, waartegen Star Busmann, Hoofdstukken no. 392.

De in het eerste lid gekozen formulering stemt grotendeels overeen met de thans heersende opvatting. Verg. Asser-Anema-Verdam, blz. 347 v, 355; Land-Eggens, blz. 229; Pitlo, Bewijs en Verjaring 5e druk, blz. 104 v, Wiersma, Het Rechtsmiddel verzet van derden, Prft. Leiden 1952, blz. 136; Scholten onder H.R. 29 april 1926, N.J. 1926 blz. 1061.

De bindende kracht geldt tussen partijen, omdat het haar rechtsbetrekking is die aan de rechter rwerd voorgelegd. De rechtverkrijgenden zijn naar het tweede lid onder partijen begrepen, ook die onder bijzondere titel; verg. H.R. 28 april 1916, N.J. 1916 blz. 736. Wat laatstgenoemden betreft vanzelfsprekend voor zover de rechtsovergang plaats vindt, nadat het vonnis waarvan het gezag wordt ingeroepen, is gewezen; verg. Asser-Anema-Verdam, blz. 368 v, Wiersma t.a.p. blz. 143 v Rechtverkrijgenden onder bijzondere titel zijn evenwel niet altijd gebonden aan tegen hun voorgangers gewezen vonnissen, b.v. niet wanneer zij een beroep kunnen doen op de bescherming die de wet aan bepaalde derden te goeder trouw verleent. Men denke aan artikelen als 1198, derde lid, 1910 en 2014 B.W. en aan de artikelen 115, 116, 176, 196, 510 en 511 W.v.K.; verg. Wiersma t.a.p. blz. 140 v In verband daarmede is in artikel 67 de beperking opgenomen 'tenzij uit de wet het tegendeel volgt'.

Het gezag van gewijsde kan door de betrokken partijen worden ingeroepen in een ander geding, aan hetwelk geheel of ten dele dezelfde rechtsbetrekking te gronde ligt als waarover het gewijsde zich heeft uitgesproken. Beroept de gedaagde er zich op dat hetzelfde op dezelfde gronden wordt gevorderd, dan volgt op deze zgn. exceptie van gewijsde zaak afwijzing van de eis.

Wordt niet hetzelfde gevorderd maar b.v. de tweede termijn van een inschuld waarvan bij het eerste vonnis de eerste termijn werd toegewezen op grond van des eisers recht op de hoofdsom, dan kan de eiser zich op die beslissing beroepen met het gevolg dat de nog onbetaalde termijn wordt toegewezen.

In sum, the report purports to clarify five things regarding a judgment's *gezag van gewijsde*, or 'res judicata effect':

(1) the effect is attributed by law to judicial findings that support a judgment on disputed rights and obligations, excluding (a) findings in non-contentious proceedings; (b) findings exclusively of fact or law; and (c) *obiter dicta*;
(2) the effect attaches only to a judgment that has the status of res judicata ('*kracht van gewijsde*') in the sense that the judgment is not or no longer open to variation, appeal, or appeal in cassation;
(3) the effect can be invoked in other proceedings between the same parties or their privies that relate in whole or in part the same legal relationship that has been previously adjudicated upon;
(4) the effect causes either the dismissal or granting of a claim, depending on the circumstances of the case; and
(5) the effect is to be distinguished from certain judgments' *erga omnes* application (i.e. judgments on the status of a person, thing or act intended to have legal consequences).

Nevertheless, the explanatory memorandum offers no definition of "*bindende kracht*". The same problem affects the concept of "*rechtsbetrekking in geschil*", though the report makes clear that it is no condition for the attribution of res judicata effect a new case concern the same legal relationship, but that the provision also applies if the new proceedings relate only in part to the same legal relationship.

(2) Meaning

The res judicata effect of a judgment ("*gezag van gewijsde*"), which implies the *conclusive effect* ("*bindende kracht*") attributed by law—Art 236 Rv—to irreversible judicial findings regarding a claim or issue in another case between the same parties (or their privies) involving the same claim or issue, must be distinguished from a judgment's force of law ("*rechtskracht*"). (Note, as pointed out elsewhere,[365] that a judgment's force of law must be distinguished from its validity ("*geldigheid*").) A

Het beroep op de bindende kracht van het gewijsde is een aan de partijen toekomende bevoegdheid; als zodanig wordt het gezag van gewijsde niet ambtshalve toegepast, aldus het derde lid. Zo luidt ook de heersende rechtspraak; verg. H.R. 30 juni 1932, N.J. 1932 blz. 1410.

Artikel 1957 B.W. kent aan z.g. staatvonnissen kracht toe tegen elk en een iegelijk, mits gewezen tegen wie bevoegd was de eis tegen te spreken; het ontwerp doet dit niet. Evenals een overeenkomst alleen partijen bindt, bindt het gewijsde alleen haar. Niettemin kunnen derden de gevolgen ondervinden van een door anderen gesloten overeenkomst gelijk zij het kunnen van een tussen anderen gewezen vonnis. Met name geldt het laatste voor vonnissen betreffende de persoonlijke staat der procespartijen; het zijn zgn. constitutieve vonnissen, een nieuwe rechtstoestand in het leven roepende tussen degenen over wier familierechtelijke betrekking door hen geding werd gevoerd. Deze vonnissen gelden tegenover derden, althans voor zover zij er niet door worden benadeeld in hun rechten, maar dit is iets anders dan de bindende kracht die het gewijsde voor partijen heeft in een ander geding. Immers ook andere constitutieve vonnissen dan staatvonnissen kunnen feitelijk werking hebben jegens derden; men denke aan die welke de ontbinding van een overeenkomst uitspreken of haar nietigheid wegens handelingsonbekwaamheid, dwaling of bedrog. Men moet de bepaling van artikel 1957 niet zien als een uitzondering op artikel 1954, niet als een bijzonderheid van staatvonnissen, doch veeleer als uitvloeisel van de omstandigheid dat constitutieve vonnissen algemene werking kunnen hebben. Van Boneval Faure II, 4e dr. blz. 326 v staat dan ook de afschaffing van artikel 1957 voor. Evenzo oordeelt de staatscommissie voor de herziening van Boek IV, blz. 210 e.v., alsmede het ontwerp-Gratama, Toelichting blz. 65, alsmede Toelichting ontwerp 1903, uitgave Gebr. Belinfante blz. 122, en Asser-Anema-Verdam, blz. 374.").

[365] See text to n 235ff.

judgment's force of law stems from the rendering court's jurisdiction[366]—the sovereign power of compulsion that a court exercises;[367] conversely, res judicata effect (if any) derives from Art 236 Rv—a crucial rule of civil procedure aimed at achieving finality of litigation.

The soundness of this distinction is demonstrated by the fact that not every judgment with force of law has res judicata effect—two examples: first, a judgment has force of law—it compels the parties' compliance—from the moment of its rendition,[368] but res judicata effect (if any) attaches only after the judgment acquires the status of res judicata;[369] and, second some types of judgment never trigger res judicata effect; for instance, a judgment in interim proceedings has force of law but because Art 236 Rv lacks application to this type of judgment, the judgment never has res judicata effect, even after acquiring the status of res judicata. In other words, even if parties are as a rule compelled to comply with a court's decision, that court's findings are not invariably conclusive in another case.[370]

(i) Conclusive effect and force of law

Doctrine has confused the concepts of force of law and conclusive effect. This confusion is unsurprising because the term used for conclusive effect—"*bindende kracht*"—is ambiguous and can be literally understood as denoting either something compulsory[371] or something conclusive[372].[373] The tendency results to treat the res judicata effect attributed to certain judgments by Art 236 Rv as an aspect of a judgment's force of law; Gras, for instance, concludes that "invoking the res judicata effect of a judgment implies that the prior judicial finding applies as a kind of 'ad-hoc-rule of law', especially for the parties."[374] Res judicata effect, he concludes, "is one of the manifestations of the force of law of a judgment".[375]

By contrast, Beukers rightly characterises res judicata effect as an "add-on" legal consequence deriving from procedural law; to be precise, Art 236 Rv.[376] According to the author, a judgment's force of law is merely a precondition for the attribution of res judicata effect.[377] Meijers observes similarly that: "Res judicata

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[366] '*Rechtsmacht*'.
[367] Constitution of 1815 (*Grondwet voor het Koninkrijk der Nederlanden van 24 augustus 1815*) Stb 1815, 45 (as amended), Art 112 ("The judicial power has the task to determine disputes regaring civil rights and obligations") ("Aan de rechterlijke macht is opgedragen de berechting van geschillen over burgerlijke rechten en over schuldvorderingen.").
[368] Under conditions the judgment may even be executed immediately upon its rendition. Article 233 Rv, which provides that a court can declares its judgments provisionally executable, notwithstanding that it may still be subject to an appeal or other means of recourse.
[369] See text to n 462ff..
[370] cf Taelman (n 13) 40-41 regarding Belgian law on this point.
[371] '*Verplichtend*'.
[372] '*Belemmerend*'.
[373] *Van Dale Groot Woordenboek van de Nederlandse Taal* (14th ed) defines the verb "*binden*" both as "*in zijn vrijheid belemmeren*" (restricting one's freedom) and "*een verplichting doen ontstaan*" (creating an obligation).
[374] Gras (n 3) [8.2.3.1] ("Het inroepen van het gezag van gewijsde leidt er dan toe dat de eerdere rechterlijke beslissing functioneert als een soort 'ad-hoc-wetsbepaling', speciaal voor partijen.").
[375] ibid ("Gezag van gewijsde … is één van de vormen van rechtskracht van de uitspraak ….").
[376] YEM Beukers, 'Rechtskracht en gezag van gewijsde' (n 65) 106.
[377] ibid.

effect is a procedural instrument".[378] On this view, the law, as opposed to the judgment, is the source of res judicata effect of a judgment, and thus the conclusive effect of the judicial findings contained in that judgment. Indeed, as pointed out above, the fact that a judgment's force of law does not automatically imply that the judgment also has res judicata effect shows the absurdity of treating res judicata effect as an aspect of a judgment's force of law.

a. The roots of the confusion

The confusion of force of law and conclusive effect goes back to the middle of the nineteenth century, when, following the rejection of the Pothier-inspired classification as an evidential effect ('*bewijskracht'*), a judgment's res judicata effect was gradually associated with the maxim *res iudicata ius facit inter partes* ('a judgment makes law between the parties'); for instance, Binnerts in 1867 described the reasoning of this approach as follows:

> "The sense and meaning of this rule is that what has been decided by the court applies as *law* between the parties, who are not allowed to question its intrinsic value, i.e. its reasonableness or unreasonableness, through litigation; the judgment creates complete legal certainty, leaving no room for the absolute truth, it creates a *formal truth*."[379]

The 'rule' Binnerts referred to is the maxim "*res iudicata pro veritate accipitur*" ('the judgment is to be accepted as the truth'). Though Pothier relied on the same maxim, Binnerts clearly construed the adage in a completely different sense. Similarly, around the turn of the century, Van Boneval Faure concluded that res judicata effect is "the instrument through which the legal system enforces the law enacted by the judgment between the parties, so that the truth of the decision is maintained."[380] Van Schaick's recent analysis of Art 236 Rv illustrates that the confusion persists today:

> The [*bindende kracht*] of the judgment is of course not limited to another case between the same parties. Res judicata effect forms part of the essence of civil procedural law. If the judgment would lack [*bindende kracht*], the judgment would not really conclude the dispute of the parties. Even if—as usual—no new case arises between the parties, the [*bindende kracht*] of the judgment is a given. … The judgment contains the legal truth (*res iudicata pro veritate accipitur*).[381]

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[378] EM Meijers, 'Het Bontmantelarrest' (1925) 2878 WPNR 97, 99 ("Gezag van gewijsde is een processueel rechtsmiddel….").

[379] Binnerts (n 3) 31 ("De zin en betekenis van dezen regel is deze: wat door den rechter is beslist geldt voor den gedingvoerende partijen als *wet*, waarvan het haar niet is toegestaan, om in rechten de innerlijke waarde d. i. de billijkheid of onbillijkheid te onderzoeken, het gewijsde bewerkt volkomen juridische zekerheid, nevens welke de absolute waarheid niet meer in aanmerking komt, het schept *formele waarheid*.").

[380] Van Boneval Faure (n 3) 314 ("Dit is het rechtsmiddel waardoor het recht, dat het vonnis tusschen partijen vaststelde, wordt gehandhaafd, waardoor de waarheid van het gewijsde wordt in stand gehouden.").

[381] Van Schaick (n 3) [140] ("De bindende kracht van het vonnis is natuurlijk niet beperkt tot een ander geding tussen dezelfde partijen. Het gezag van gewijsde behoort tot het wezen van het civiele procesrecht. Als het vonnis geen bindende kracht zou hebben, zou het vonnis het geschil van partijen niet werkelijk beëindigen. Ook als het – zoals gewoonlijk – niet tot een nieuwe procedure tussen partijen komt, is de bindende kracht van het vonnis een gegeven. … Het vonnis bevat de juridische waarheid (*res iudicata pro veritate accipitur*)."). cf Veegens (n 3) 19 ("We are concerned here with a bindende not an

This characterisation still confuses a judgment's force of law with the res judicata effect that Art 236 Rv attributes to certain judgments. The illogicality of this confusion is now sufficiently established; nevertheless, it is suggested to further clarify the actual relationship between a judgment's force of law and any res judicata effect it is attributed under Art 236 Rv.

(ii) Force of law as precondition for conclusive effect

On a proper understanding of these various concepts, a judgment's force of law is, if anything (besides the obligation to abide by the court's decision), a precondition for the attribution of legal consequences to the judgment, including res judicata effect under Art 236 Rv. The Dutch Supreme Court in *Kollöffel/Haan* clarified that the moment a judgment loses its force of law it loses its legal "significance"; for instance, in that case, the Court held that such judgment "could no longer be executed."[382] Apart from execution, the loss of force of law also affects other legal consequences like preclusion under Art 236 Rv, as the Supreme Court confirmed (indirectly) in *Stichting De Thuishaven/Van Zaanen-Pols.*[383]

The dispute involved a claim for undue payment of charges for common spaces under a rental agreement. The claimant, a tenant, alleged that the defendant, a housing corporation and party to the rental agreement, for years charged separately for the maintenance of common spaces, while these services were already paid for as part of the monthly rent.

The Hague (sub)District Court held by declaratory judgment that the charges formed part of the main rent for the year 1979 and should not have been charged separately. This judgment acquired the status of res judicata.

Based on this judgment, the tenant then sued for repayment of charges paid unduly for the period 1979 to 1985. The (sub)District Court granted the claim. On appeal to the Hague District Court, the defendant contended that the (sub)District Court had erred by precluding by reference to the prior judgment the litigation of the height of the rent due. The Hague District Court rejected this ground of appeal as follows:

> The argument of [the appellant] that the [declaratory] judgment has no conclusive effect would undermine the [statutory provision stipulating] that a judgment of this

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evidential force. Illustrative for the slow but sure adoption of this view is the gradual departure from the adage res iudicata pro veritate habetur to the even stronger maxim res iudicata ius facit inter partes—the judgment is law for the parties.") ("Wij hebben hier te doen met een bindende, niet met een bewijzende werking, al kan het vonnis soms ook bewijskracht hebben. Tekenend voor het veldwinnen van dit inzicht is het op de achtergrond raken van het adagium *res iudicata pro veritate habetur* en zijn vervanging door de nog sterkere op D.25.3.3 pr. teruggaande spreuk *res iudicata ius facit inter partes*, het gewijsde strekt de partijen tot wet.").

[382] HR 24 October 2003 (n 231) [3.2.4] (*Kollöffel/Haan*) ("…het hof [heeft] met juistheid geoordeeld dat 'hieruit volgt dat er in dit geschil twee vonnissen naast elkaar bestaan ...' …. Aan de ontvankelijkheid van het hoger beroep tegen het kort geding vonnis van 22 maart 2001 kan niet afdoen dat het kort geding vonnis van 13 maart 2001 in kracht van gewijsde is gegaan, nu het vonnis van 22 maart, dat niet als een herstelvonnis kan worden beschouwd, moet worden aangemerkt als een vonnis waarin de kort geding rechter opnieuw een beslissing heeft gegeven op dezelfde vordering. Het gevolg hiervan was dat het vonnis van 13 maart 2001 door de nieuwe beslissing in hetzelfde kort geding zijn betekenis had verloren, zodat dat vonnis niet meer ten uitvoer gelegd zou kunnen worden.").

[383] HR 4 May 1990, NJ 1990, 677 mnt PA Stein (*Stichting De Thuishaven/erfgenamen Van Zaanen-Pols*).

> type is not subject to appeal and cassation. In a subsequent case, the judgment could then be challenged using the same means of recourse just identified.[384]

The Dutch Supreme Court confirmed this, reasoning that:

> The *gesloten stelsel van rechtsmiddelen* implies that an erroneous judgment—except for the rare case … of complete absence of force of law—cannot be affected in any other way than via a means of recourse and that even if no means of recourse is available … the judgment has between the parties force of law.[385]

The Court does not here expressly state that force of law is precondition for the attribution of res judicata effect. Nevertheless, the Court added that "*[t]his entails* that the finding in the judgment of the (sub)District Court regarding the charges for the common spaces is conclusive not only for the year 1979 but also for the years 1980-1985 considering that the issue was on this point the same for all those years."[386] What the Court essentially says is that pursuant to the *gesloten stelsel van rechtsmiddelen* a judgment's validity can only be affected by means of appeal or revocation, and that a valid judgment as a rule has force of law, so that it can (if the conditions of Art 236 Rv are met) be attributed res judicata effect.

a. Application erga omnes and conclusive effect

The distinction of a judgment's force of law and the res judicata effect that Art 236 Rv attributes certain judgments clarifies the nature of the conclusive effect of judicial findings in other proceedings. However, beyond this clarification, the distinction also avoids the type of confusion illustrated by the following observation of Advocate General Bakels:

> The rule that res judicata effect applies only between the (official) parties [Article 236(2) Rv), is subject to a number of exceptions that widen its scope. … [T]he nature of the judgment can imply that the res judicata effect is not limited to the parties themselves. In this regard one should think in particular of … status-judgments, which are constitutive in nature and therefore they also apply vis-à-vis strangers.[387]

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[384] ibid [3.3] ("Bovendien zou de stelling van De Thuishaven dat aan die beschikking geen bindende kracht toekomt het bepaalde dat van een beschikking ex art. 14 HPW hoger beroep en cassatie is uitgesloten, ondergraven. In een opvolgende dagvaardingsprocedure zou de beschikking dan immers kunnen worden aangevochten op een wijze die overeenkomt met evenbedoelde rechtsmiddelen.").

[385] ibid [3.3.2] ("Het gesloten stelsel van in de wet geregelde rechtsmiddelen brengt, afgezien van het zeldzame en hier niet aan de orde zijnde geval van het geheel ontbreken van rechtskracht, mede dat een onjuiste rechterlijke uitspraak - waarvan hier overigens geen sprake is - niet anders dan door het aanwenden van een rechtsmiddel kan worden aangetast en dat ook indien, zoals hier ten aanzien van de beschikking van de Ktr. het geval is, geen rechtsmiddel beschikbaar is, de uitspraak tussen pp. rechtskracht heeft (HR 27 jan. 1989, NJ 1989, 588). Hieruit vloeit voort dat het in de beschikking van de Ktr. neergelegde, hiervoor vermelde oordeel omtrent de kosten van de gemeenschappelijke ruimten in het onderhavige geding bindende kracht heeft niet alleen met betrekking tot het jaar 1979, maar ook met betrekking tot de jaren 1980-1985, nu de rechtsbetrekking in geschil op dit punt in al die jaren dezelfde was.").

[386] ibid.

[387] HR 11 February 2000, ECLI:NL:HR:2000:AA4767, NJ 2000, 259, RvdW 2000, 49, FJR 2000, 40 mnt IJ Pieters, PW 2000, 21196 [2.4] ("Op de regel dat het gezag van gewijsde alleen geldt tussen de (formele) procespartijen, bestaat een aantal verruimende uitzonderingen. Ten eerste bepaalt art. 67 Rv lid 2, dat onder partijen mede worden begrepen hun rechtverkrijgenden onder algemene of bijzondere titel, tenzij uit de wet het tegendeel voortvloeit. Ten tweede kan ook de aard van de beslissing meebrengen dat

What is called the force "*erga omnes*" of status-judgments is not an exception to Art 236(2) Rv, which provides that res judicata effect applies only between the parties (or their privies). When a court renders a status-judgment, it exercises a particular form of jurisdiction; the court seeks to compel the 'whole world', or at least those within its jurisdiction, to abide by its determination of the status of the person, thing or legal relationship in question, and the law provides for special means of recourse to protect the interests of third parties, or 'strangers', adversely affected by the judgment.[388] Even the Government's explanatory memorandum for what is now Art 236 Rv, though unclear on various points, makes clear that, "this [force of law *erga omnes* of status-judgments] is unlike the res judicata effect of the judgment between the parties in other proceedings."[389]

(3) Nature and rationale

Res judicata effect is no longer misrepresented as an evidential effect.[390] Article 236 Rv forms part of the Code of Civil Procedure, Book One on "The Process of Litigation", Section Twelve on "The Judgment" (and even more specifically, Title II on "Summons Proceedings") and thus derives from the law of judgments.

Moreover, res judicata effect can no longer be confused with a judgment's force of law;[391] while the force of law of a judgment is an expression of the court's jurisdiction, res judicata effect is an attribute of the law, by which to implement finality of litigation.

Finally, as Art 236(3) Rv clarifies, the attribution of res judicata effect to a judgment is a matter subject to party disposition; a court is expressly prohibited from applying Art 236(1) Rv, which codifies the res judicata doctrine, of its own motion—as Meijers put it: "*[A] party* can force the court to reject a claim without inquiring into its merits, or to regard a fact or right as established without being able to inquire into its accuracy."[392] Res judicata effect is not then a matter of public policy, even if finality of litigation is regarded as in the public interest.

This last characteristic of res judicata effect distinguishes the Dutch res judicata doctrine from most other elements of preclusion law,[393] which are based on the principle of a sound administration of justice, and which a court must therefore

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het gezag van gewijsde niet beperkt is tot de procespartijen zelf. Hierbij moet met name worden gedacht aan vonnissen die de persoonlijke staat van de procespartijen betreffen (staatvonnissen), die constitutief van aard zijn en daarom ook tegen derden werken. Onder het oude recht kende art. 1957 BW aan zodanige vonnissen kracht toe 'tegen elk en een iegelijk'. In het kader van het thans geldende art. 67 Rv heeft de wetgever een afzonderlijke regeling niet wenselijk geacht. Het gaat hier immers niet zozeer om een uitzondering op de beperkte reikwijdte van het gezag van gewijsde, als wel om de aard van de desbetreffende uitspraak.").

[388] '*derdenverzet*' (Art 376 Rv).

[389] New Law of Evidence Act (Explanatory Memorandum) (*Nieuwe regeling van het bewijsrecht in burgerlijke zaken*) Kamerstukken II (1969-1970) 10377 No 3, 23 (*MvT*) (Deze vonnissen gelden tegenover derden, althans voor zover zij er niet door worden benadeeld in hun rechten, maar dit is iets anders dan de bindende kracht die het gewijsde voor partijen heeft in een ander geding.").

[390] See text to n 325ff.

[391] See text to 371ff.

[392] Meijers (n 378) 99 ("…waardoor men verkrijgt òf dat de rechter zonder nader onderzoek een eisch moet afwijzen, òf dat hij een feit of een recht als vaststaand moet aannemen, zonder dat de juistheid van dit feit of recht op enige wijze nader onderzocht mag worden.) (emphasis added).

[393] Except for abuse of process doctrine. See text to n 576ff.

apply of its own motion.[394] In other words, Art 236 Rv protects first and foremost the *private* interest in finality of litigation, whereas the other elements of Dutch preclusion law serve the *public* interest, which of course includes adequate protection of the private interest in finality of litigation.

(4) Application

Res judicata effect is subject to the conditions specified in Art 236 Rv. Those conditions have been interpreted in practice. Before considering these conditions, a numer of preconditions for the application of Art 236 Rv should be noted. As a general matter, the proper administration of res judicata effect involves a close interpretation of the judgment invoked;[395] the Dutch Supreme Court has held that a court's findings on the interpretation of a judgment for the purpose of applying Art 236 Rv are *factual* in nature, and thus cannot be challenged on appeal in cassation.[396]

(i) Preconditions

a. A court of competent jurisdiction

A court can only conclusively determine claims and issues which are within its proper jurisdiction. Any findings of the court on claims or issues that exceed its jurisdiction cannot be attributed conclusive effect in proceedings before the court that does have the required jurisdiction to determine the claim or issue in question.[397]

b. Validity

If a judgment is invalid—lacks existence in the eyes of the law—there is technically nothing Art 236 Rv can be applied to. The issue of little consequence for the application of Art 236 Rv, because the *gesloten stelsel van rechtsmiddelen* implies that a judgment is to be presumed valid until it is annulled or revoked.[398]

Since the provision only applies to judgments which have the status of res judicata,[399] the problem of validity presents itself only if a judgment is revoked, or in the rare case that a judgment is patently invalid.[400] In all other circumstances, a court asked to apply Art 236 Rv lacks the power to decide on the validity of the judgment in question. In particular, the court is prohibited from pronouncing on the factual or

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[394] See, eg, text to n 89 (regarding *leer van de bindende eindbeslissing*).
[395] Hof Arnhem 31 March 2009, ECLI:NL:GHARN:2009:BI2161, NJF 2009, 334 [5.2] ("The answer to the question of the extent of res judicata effect and whether and to what extent it bars the granting of a claim, can depend … on an interpretation of the prior decisions. Diverging interpretations are reasonably possible, as illustrated by the fact that the District Court in the present case also saw things differently.") ("De vraag hoe ver het gezag van gewijsde strekt en of en in hoeverre het aan toewijzing van de ingestelde vordering in de weg staat, kan afhankelijk zijn (en was in dit geval ook afhankelijk) van uitleg van de eerdere uitspraken. Dat over die uitleg in redelijkheid verschillend gedacht kan worden, wordt in het onderhavige geding naar het oordeel van het hof treffend geïllustreerd door het feit dat de rechtbank er ook inderdaad anders over dacht.").
[396] cf AG Strikwerda in HR 20 February 1998, NJ 1998, 510, RvdW 1998, 60 [15] (*Seip/Van Ginneken*).
[397] cf Beukers (n 3) 29.
[398] See text to n 224ff.
[399] See text to n 462ff.
[400] See text to n 235ff.

legal accuracy of the judgment and, by the same token, the parties are effectively precluded from attacking the judgment collaterally.[401]

c. Force of law

A judgment's force of law is a precondition for attributing the judgment any legal consequences as a judgment, including res judicata effect. As discussed elsewhere in more detail, the moment a judgment loses its force of law it loses its legal "significance", thus excluding in particular any prospect of execution of the judgment and preclusion by the judgment.[402] Along these lines, Beukers observed that "alike for executability, the force of law is also a *conditio sine qua non* for the surplus res judicata effect."[403]

The problem is unlikely to arise frequently. In most cases, the loss of force of law coincides with a judgment's loss of validity; for instance, the moment of its annulment or revocation. In cases where a judgment loses force of law due to the rendition of a conflicting judgment, and thus remains valid, the judgment cannot be attributed res judicata effect from the moment the conflicting judgment is pronounced.[404]

d. A plea of res judicata

Article 236(3) Rv prohibits a court from applying res judicata effect of its own motion.[405] This condition signals that the Dutch res judicata doctrine protects first and foremost the *private* interest in finality of litigation.[406] According to the Dutch Supreme Court in *Cooijmans BV/Raadschelders*:

> A court may not base its decision on res judicata effect in the absence of a plea to that effect by one of the parties. … A plea of res judicata should be so clear that the opponent is able to contest it, potentially by reference to special circumstances…. This conforms to the requirements of a sound administration of justice, which—unlike what the Court of Appeal held—do not then imply that a court must of its own motion verify the res judicata effect of any potential prior judgments.[407]

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[401] See text to n 241ff..
[402] ibid.
[403] YEM Beukers, 'Rechtskracht en gezag van gewijsde' (n 65) 106 ("Net als bij de executoriale kracht is rechtskracht ook voor het surplus gezag van gewijsde een conditio sine qua non.").
[404] See text to n 382ff.
[405] Article 236(3) Rv ("*Gezag van gewijsde* shall not be applied ex officio.") ("Het gezag van gewijsde wordt niet ambtshalve toegepast."). See already HR 30 June 1932, NJ 1932, 1410; and HR 27 June 1952, NJ 1952, 79. cf HR 16 February 2001 (n 175) (*VOF De Ganzeveer/PCT Verhuur BV*) [3.2]-[3.4]. See further JJ Vriesendorp, 'Ambtshalve toepassing van het gezag van gewijsde in het burgerlijk geding?' (1977) NJB 1977 61-65.
[406] See text to n 390ff.
[407] HR 8 October 1982, NJ 1984, 58 mnt WH Heemskerk (*Cooijmans BV/Raadschelders*) [3.1] ("De rechter mag niet het gezag van gewijsde aan zijn beslissing ten grondslag leggen zonder dat daarop door een der pp. een beroep is gedaan. Dat een zodanig beroep is gedaan, kan niet worden aangenomen op de enkele grond dat de conclusie in hoger beroep van de verwerende partij 'onmiskenbaar daartoe strekt dat de appelrechter ten aanzien van de vraag waaromtrent in reconventie door de lagere rechter is beslist, in conventie in gelijke zin zal beslissen'. Een beroep op het gezag van gewijsde behoort immers zo duidelijk te geschieden dat de wederpartij zich daartegen aan de hand van de inhoud van de ingeroepen uitspraak - eventueel in het licht van bijzonderheden als in de onderdelen 3-5 aan de orde gesteld - kan

The Supreme Court clarified in this case that a plea of res judicata may not be inferred from the sole fact that the defendant's statement of case on appeal "is clearly aimed at obtaining from the court of appeal a finding on an issue that conforms to the finding on that issue given by the lower court in relation to a counterclaim".[408] Also the mere reference to an existing judgment in combination with a warning against irreconcilable judgments is insufficient to justify application of Art 236 Rv.[409] *A fortiori*, the mere allusion to a prior judgment is inadequate as basis for the provision's application.[410] Similarly, it appears to be insufficient that a judgment forms part of the case file, considering that a party must invoke the res judicata effect.[411]

Parliamentary history similarly provides that the res judicata effect under Art 236 Rv "should be expressly invoked by the interested party", while specifying that the plea of res judicata "must take place in such a way as to allow the opponent to defend himself with reference to the judgment invoke—perhaps considered in light of certain particular circumstances."[412]

Then again, Art 236 Rv need not be specifically referred to, and as a practical matter, lower courts have shown themselves in practice quite willing to infer a plea of res judicata from the pleadings of a party, even though such a plea was not explicitly made. A basic requirement seems to be that both the court and the opponent should be able to understand that application of Art 236 Rv is sought.[413] Reference can be made in illustration to the case of *Meditours Reizen BV*.[414]

The dispute involved a claim against a travel agency for breach of a travel agreement, by booking an unacceptable hotel that ruined the claimant's holidays. The defendant impleaded a third party that the defendant alleged was liable to compensate the claimant for any damages.

The Hague District Court granted the main claim as well as the claim against the impleaded third party. The claimant appealed, challenging the sum of the damages granted. The judgment insofar as it concerned the claim against the impleaded party was not appealed and acquired the status of res judicata. The appeal succeeded and the Hague Court of Appeal granted substantially higher damages. Accordingly, the defendant sued the third party for payment of additional compensation. However, the third party replied that the claimant's second claim for

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verweren. Dit is in overeenstemming met de eisen van een goede rechtspleging, die - anders dan het Hof heeft overwogen - dan ook niet meebrengen dat de rechter ambtshalve op het gezag van gewijsde van eventuele eerdere beslissingen heeft te letten.").

[408] ibid ("Dat een zodanig beroep is gedaan, kan niet worden aangenomen op de enkele grond dat de conclusie in hoger beroep van de verwerende partij 'onmiskenbaar daartoe strekt dat de appelrechter ten aanzien van de vraag waaromtrent in reconventie door de lagere rechter is beslist, in conventie in gelijke zin zal beslissen'.").

[409] HR 21 June 1996, NJ 1997, 470 mnt HJ Snijders [3.9].

[410] HR 24 September 2004, ECLI:NL:HR:2004:AP6874, NJ 2006, 200, RvdW 2004, 109 (*Dryade/Staat*). cf the opinion of AG Huydecoper in the same case. He argues, at [12]-[13] that an implicit plea of res judicata may in certain circumstances be derived from the behaviour of a party, while the reference to the earlier decision in itself is insufficient.

[411] ibid [3.4.5].

[412] See text to n 363ff. cf Van Schaick (n 3) [141].

[413] HR 10 April 1964, NJ 1964, 473.

[414] Rb Haarlem 27 June 2007, ECLI:NL:RBHAA:2007:BA8213, NJF 2007, 370 (*Meditours Reizen BV/Sultana Travel & Tours Holland*).

the same cause of action was barred. The District Court, it is suggested erroneously,[415] characterised this defence as a plea of res judicata:

> [T]he issue between the parties is whether the judgment given between them on the [first claim] bars the granting of the claim in the present proceedings. Accordingly, the court is to determine whether this judgment has res judicata effect in the sense of Article 236 Rv.[416]

In *Maatschappij van Assurantie/Van der Laan*,[417] the defendant stated that the same claims had already been asserted and dismissed in a previous case. The court characterised this statement as a plea of res judicata. In *SHP Planontwikkeling BV*, the Leeuwarden Court of Appeal concluded that a defence amounted to a plea of res judicata simply because the defendant contended that a certain fact was established because the claimant had not challenged a prior judgment in which the court had found this fact.[418]

A final point on timing. A plea of res judicata can be made at any appropriate point of time in the course of proceedings, in response to an inconsistent statement of case of an opponent, bearing in mind the requirement that the plea should be made in accordance with the requirements of a sound administration of justice, in particular, in such a way as to allow the opponent to respond. Technically, the law distinguishes between *motions* (on procedural issues)[419] and *replies* (respecting claims or issues)[420]. Motions must be raised jointly with any reply to a claim, and the right to file a motion is lost after the first opportunity to reply to the claim has passed.[421] Conversely, a reply can be made as long as the first opportunity to do so was used. The Dutch Supreme Court has explained the strict rule regarding motions as follows:

> [The rule] serves to prevent that after the parties litigate the claim or issue in question, the defendant could assert at a late stage in the proceedings that the court cannot determine the merits of that claim or issue on the ground of rules that due to their procedural nature do not pertain to the claim or issue.[422]

'Motions' then include only those pleas that in view of their *procedural* nature are aimed at preventing the court from determining the merits of the claim or issue.[423]

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[415] The court should have dismissed the claim on the basis of Art 3:303 BW, for lack of a sufficient interest to justify another right of action. See text to n 160ff.

[416] Rb Haarlem 27 June 2007 (414) [4.1] (*Meditours Reizen BV/Sultana Travel & Tours Holland*).

[417] Ktr Zierikzee 16 February 2001, NJ 2001, 400 (*Maatschappij van Assurantie/Van der Laan*).

[418] Hof Leeuwarden 22 August 2007, ECLI:NL:GHLEE:2007:BB2285, NJF 2007, 539 (*SHP Planontwikkeling BV*).

[419] '*Excepties*'. See Art 128(3) Rv ("The defendant advances all motions and his reply simultaneously at pains of waiver of unraised motions, and in the absence of a reply, of waiver of the right to do so.") ("De gedaagde brengt alle excepties en zijn antwoord ten principale tegelijk naar voren, op straffe van verval van de niet aangevoerde excepties en, indien niet ten principale is geantwoord, van het recht om dat alsnog te doen.").

[420] '*Antwoord ten principale*'. Article 128(3) Rv.

[421] Article 128(3) Rv.

[422] HR 22 October 1993, NJ 1994, 374 mnt HE Ras [3.3] ("…strekt ertoe te voorkomen dat na debat van partijen over de rechtsbetrekking die onderwerp is van het geding, de gedaagde in een laat stadium van het geding nog zou kunnen opwerpen dat de rechter, op grond van regels die wegens hun zuiver processuele aard die rechtsbetrekking zelf niet raken, niet tot een beoordeling van het geschil omtrent de rechtsbetrekking kan komen.").

[423] ibid [3.3] ("Aldus moeten de in art. 141 lid 2 genoemde excepties worden beperkt tot die verweermiddelen die ertoe strekken dat de rechter, aan wie het geschil is voorgelegd, op grond van

This concept includes a plea disputing jurisdiction.[424] Conversely, a successful plea of res judicata does not bar the determination of a claim or issue—Art 236 Rv merely cuts litigation short by offering an effective reply to any statement of case that contradicts a conclusive finding; accordingly, a plea of res judicata is characterised as a reply and not a motion motion.[425] The need not then be made at the first opportunity to file a reply; on the whole, Van Schaick therefore notes correctly that "a party can invoke the res judicata effect at any stage in the proceedings as long as the plea does not violate the requirements of a sound administration of justice."[426]

(ii) Conditions

A valid judgment with force of law does not invariably have res judicata effect. First of all, some types of judgment are by their very nature excluded from Art 236 Rv's scope of application,[427] like judgments in interim proceedings,[428] and certain judgments in petition proceedings[429]. The details of these limitations of scope are addressed elsewhere.[430]

For a plea of res judicata to succeed five conditions codified in Art 236 Rv must be met. The finding said to be conclusive must be (1) a finding regarding a claim or issue that is (2) contained in judgment that has acquired res judicata status insofar as concerns the finding, and the conclusive effect of the finding must be (3) invoked in another case (4) between the same parties (or their privies) and (5) in relation to the same claim or issue.

a. Finding regarding the claim or issue

Article 236 Rv literally states that conclusive effect is attributed only to "findings regarding the legal relationship in dispute" ("*[b]eslissingen die de rechtsbetrekking in geschil betreffen*"). According to the Dutch Supreme Court in *Van Huffel/Van den Hoek*, this means that the finding must be regarding the "legal question" ("*rechtsvraag*"); more specifically, the claim or issue to be determined.[431] (Note that courts also use the term "*geschilpunt*" to refer to an 'issue'.)[432] As construed in practice, Art 236(1) Rv therefore applies to findings regarding the claim or issue; hence, the Arnhem District Court correctly restated the law as follows: "By the term 'legal relationship in dispute' is meant the issue, or the claim, arising between the parties."[433]

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regels van processuele aard niet tot een beoordeling van de rechtsbetrekking in geschil zelf kan komen.").

[424] See Arts 208 and 209 Rv, which apply by analogy.

[425] cf Van Schaick (n 3) [145].

[426] ibid [142].

[427] See text to n 536ff.

[428] See text to n 538ff.

[429] See text to n 550ff.

[430] See text to n 536ff.

[431] See HR 15 May 1987 (n 360) [3.4] (*Van Huffel/Van den Hoek*).

[432] HR 14 October 1988 (n 359) [3.2] (*Wijnberg/Westland/Utrecht Hypotheekbank NV*). cf AG De Vries Lentsch-Kostense in HR 6 February 2004 (n 359) [3.1.1].

[433] Rb Arnhem 1 March 2006, ECLI:NL:RBARN:2006:AW2120 [4.2.3] (*De Dikkenberg BV*) ("Met de 'rechtsbetrekking in geschil' wordt bedoeld het geschilpunt, de rechtsvraag, die partijen verdeeld houdt.").

For the purpose of clarification, consider whether Art 236 Rv covers the finding of the Amsterdam Court of Appeal in *Yukos Capital Sarl/OAO Rosneft*[434] that Russian judgments annulling arbitral awards were the product of a partial and dependent judicial process. This is no finding 'on' an issue (the issue was whether the annulment judgments violated Dutch public policy). Nevertheless, Art 236 Rv extends to findings 'regarding' an issue, which includes findings on questions of material fact and law in determining an issue; *Siegers/Citco Bank Antilles NV* confirms this point.[435]

The case involved a dispute arising from the execution of a secured loan agreement for US$85.000 between borrower Siegers and lender Citco Bank Antilles NV ('Citco Bank'). Immediately after crediting Siegers's account, the Bank debited the same account for the amount US$55.000 in favour of a third party. Siegers alleged that Citco Bank had done so without consent and claimed damages in tort. In defence Citco Bank alleged that it was entitled to debit Siegers' account because the parties had agreed that Siegers would take over the debt owed by the third party to the bank.

The court found that the parties had in fact agreed that Siegers would take over the debt of the third party and would use the loan for payment of the money owed. On that basis the court held that the Citco Bank was entitled to debit Siegers' account for the money owed by the third party. Accordingly, the court upheld the bank's defence and rejected Siegers' claim.

Siegers subsequently claimed again, this time for breach of contract, and alleged that Citco Bank had breached their loan agreement by failing to make the agreed funds available by debiting his account without consent in favour of the third party. In answer to the claim, Citco Bank contended that Siegers had agreed to the debiting of the account in favour of the third party and that Siegers was precluded from relitigating this point.

The court at first instance and on appeal rejected the claim on the basis that Siegers was barred from disputing the agreement to debit the account with the third party debt, so that he was unable to establish a breach of contract.

In support of his cassation appeal, Siegers contended that the courts below had misapplied the res judicata doctrine of the Dutch Antilles (a doctrine equivalent to Art 236 Rv). Siegers argued that the finding of the court in the first case was neither "a (mixed) finding of fact" nor "a finding regarding the issue in question" and therefore could not be conclusive.

The Supreme Court rejected this argument, reasoning as follows:

> The grievance postulates that a judicial finding, despite regarding the issue in question, cannot be conclusive if that finding is factual in the sense that it, as the grievance puts it, establishes a fact. This starting point is incorrect. Such a finding has conclusive effect in another case between the same parties if that finding does not merely establish a fact (cf. HR 15 May 1987, NJ 1988, 164), but is part of the finding on the issue in question, meaning that the issue is (in some measure) determined by the fact's legal consequences which, according to that finding, apply between the parties.[436]

[434] Hof Amsterdam 28 April 2009 (Chapter 1 n 426).
[435] HR 17 November 1995, NJ 1996, 283 (*Siegers/Citco Bank Antilles NV*).
[436] ibid [5.3] (*Siegers/Citco Bank Antilles NV*).

According to the Supreme Court, Art 236 Rv applies to a finding of fact as long as that finding is part of the finding on the issue, meaning that the issue is in some measure determined by the fact's legal consequences that, according to the finding, apply between the parties. On the facts, the Court held:

> The finding of the first instance court in the previous case … did not merely establish a fact, that is, part of what the parties agreed … in the framework of their loan agreement, but at the same time the legal concequences flowing from that fact for the parties, namely, that Siegers should use a part of his available credit to the amount of US$55.000 for the repayment of the debt of …[the third party] to the bank so that the bank was entitled to debit Siegers' account for that amount.[437]

The very same reasoning applies to the finding of the Amsterdam Court of Appeal noted above; the finding that the Russian annulment judgments that Rosneft invoked to avert the enforcement of the arbitral awards in the Netherlands were the product of a partial and dependent judiciary. This finding of fact (the annulment judgments were the product of a partial and dependent judiciary) formed part of the court's finding on the issue (Dutch public policy barred the recognition of the annulment judgments) because the issue (whether Dutch public policy barred the recognition of the annulment judgments) was determined by the legal concequences (refusal of recognition) which according to that finding apply between the parties.

The Dutch Supreme Court as part of its reasoning in *Siegers/Citco Bank Antilles NV* referred to its prior decision in *Van Huffel/Van den Hoek*,[438] where the Court held that "a finding that merely establishes the existence of a fact" has no conclusive effect.[439] In doctrine this decision was understood as excluding from the scope of Art 236 Rv "pure findings of fact"; for instance, Beukers takes from the case that "[a] purely factual finding therefore has no conclusive effect."[440] But what is a 'pure finding of fact'?

Siegers/Citco Bank Antilles NV puts the Supreme Court's ruling in *Van Huffel/Van den Hoek* into the right perspective; the case clarified that the factual nature of a finding is irrelevant for determining the applicability of Art 236 Rv. The relevant inquiry is whether the finding of fact forms part of the finding on the issue in the sense that the issue is (in some measure) determined by the fact's legal consequences. The 'pure finding of fact' the Court referred to in *Van Huffel/Van den Hoek* is a finding by which the court merely establishes the existence of a 'collateral fact'—a fact whose existence or inexistence is *immaterial* to the issue (or claim).

The condition that a finding must be a 'finding regarding the claim or issue in question' excludes 'unnecessary' findings (*obiter dicta*) as well as findings which are not 'regarding the claim or issue'; along these lines, for instance, the Zwolle District

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[437] ibid [3.4] ("De door het Gerecht in eerste aanleg in het vorige geding tussen partijen gegeven beslissing waarvan de Bank in het huidige geding het gezag van gewijsde inroept, behelst niet alleen de vaststelling van een feit, te weten een bestanddeel van hetgeen partijen op 28 oktober 1988 in het kader van de credietovereenkomst met elkaar afspraken, maar tevens het naar het oordeel van het Gerecht voor partijen uit dat feit voortvloeiende rechtsgevolg, te weten dat Siegers een gedeelte groot $ 55 000 van het hem verleende crediet zou aanwenden voor de aflossing van de schuld van Tromp aan de Bank en dat het om die reden de Bank vrijstond om de rekening van Siegers met dat bedrag te debiteren.").

[438] HR 15 May 1987 (n 360) (*Van Huffel/Van den Hoek*).

[439] ibid [3.4] ("de beslissing van de Pachtkamer, aldus verstaan, betreft een beslissing waarbij enkel het bestaan van een feit wordt aangenomen: aan een zodanige beslissing komt gezag van gewijsde niet toe.").

[440] Beukers (n 3) 97-8.

Court in *Bonar Plastics* observed that "no conclusive effect can be attributed to *obiter dicta* or findings that conclude proceedings but are not regarding the claim or issue. This situation arises *inter alia* where the claim is dismissed because no cause of action is stated".[441]

1. Unnecessary findings

Leutscher/Van Tuyn clarifies when a finding is 'unnecessary'.[442] The dispute concerned a claim for a declaration that the claimant had lawfully applied for an order to set aside a judgment that granted a third party debt order to secure execution of a number of penalty payments that the claimant had allegedly incurred for failing to comply with a judgment. That application had been rejected on the ground that several penalty payments had already been incurred by the time the third party debt order was claimed. In its judgment, the court also made a finding on the earliest date from which penalty payments could have been incurred. The applicant appealed the judgment rejecting the application, while their opponent cross-appealed the finding on the earliest date that penalty payments could have been incurred. The Amsterdam Court of Appeal had rejected both appeals.

In the claim for a declaration the issue was whether the finding on the specific date from which the penalty payments could have been incurred had conclusive effect. The Supreme Court said "no":

> By its judgment … the Amsterdam Court of Appeal rejected both the appeal against the rejection of the application and the cross appeal against the finding of the District Court…. The Court of Appeal's finding on the lastmentioned appeal… was unnecessary to determine the issue arising between the parties in those proceedings, namely, whether [on a specific date] already one or more penalty payments had been incurred…, so that no conclusive effect attaches to that finding.[443]

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[441] Rb Zwolle-Lelystad 17 November 2005, ECLI:NL:RBZLY:2005:AU9180, PRG 2006, 19 (*Bonar Plastics*) [4] ("Dit betekent dat geen gezag van gewijsde kan worden toegekend aan ten overvloede gegeven beslissingen en aan beslissingen die weliswaar het geding beëindigen maar de rechtsbetrekking als zodanig niet raken. Daarvan is onder meer sprake in het geval de vordering wordt afgewezen omdat niet voldaan is aan de stelplicht aangaande de grondslag daarvan (zie o.m. HR 19 november 1993, NJ 1994, 175).").

Elsewhere the court emphasised that "in accordance with Article 236 Rv findings regarding the claim or issue which are contained in a judgment having the status of *res judicata* have conclusive effect in another case between the same parties. This means that not only the findings contained in the operative part have conclusive but also the necessary findings contained in the reasons, that is, the part of the judgment where the court determined the legal consequences of certain facts necessary for its decision." ("De kantonrechter stelt voorop dat ingevolge het eerste lid van artikel 236 Rv beslissingen die de rechtsbetrekking in geschil betreffen en zijn vervat in een in kracht van gewijsde gegaan vonnis, in een ander geding tussen dezelfde partijen bindende kracht hebben. Daarmee is bedoeld dat niet alleen de beslissingen die zijn opgenomen in het dictum van het eerdere vonnis, maar ook de dragende overwegingen daarvan, dat wil zeggen die gedeelten van de inhoud van het vonnis waarin de kantonrechter aan bepaalde feiten rechtsgevolgen heeft verbonden, die noodzakelijk waren voor zijn beslissing, bindende kracht hebben.").

[442] HR 20 January 1984, NJ 1987, 295 (*Leutscher/Van Tuyn (No 2)*).

[443] ibid [3.10] ("Bij zijn arrest van 27 nov. 1980 verwierp het Hof te Amsterdam zowel het appel van Leutscher tegen de ongegrondverklaring van het verzet als de grief welke de Van Tuyns in incidenteel appel hadden ontwikkeld tegen de hiervoor aangehaalde overweging van de Rb. 's Hofs oordeel omtrent die grief - in het onderdeel aangehaald - was niet dragend voor de beslissing omtrent het geschilpunt van pp. in die procedure, - te weten of op 29 nov. 1976 door Leutscher reeds een of meer dwangsommen waren verbeurd zodat daaraan geen gezag van gewijsde toekomt. Het beroep van Leutscher op gezag van

To determine the application for setting aside it was unnecessary to establish the earliest moment when a penalty payment could have been incurred if it was clear that by the time the third party debt order was given a penalty payment had in fact already been incurred.

Van Huffel/Van den Hoek offers another illustration.[444] The case involved a disputed (agreement to conclude a) lease agreement with respect to a farm. The claimant had previously sold the farm to the defendant on the condition that the farm would be leased back to the claimant's son. Several years into the lease, the son decided to move away, which would cause the lease to terminate. Before the son's departure, negotiations took place on a possible take over of the lease by the claimant. However, without notifying the claimant, the defendant leased the farm to a third party. The claimant alleged that the parties had by then already reached an agreement, at least to conclude a lease agreement.

The claimant filed a claim for an order that the parties record their lease agreement or at least an order compelling the defendant to conclude the lease agreement. In support of the claim, the claimant invoked a letter that was sent after a meeting of the parties and that, the claimant argued, demonstrated that by the time that the defendant had contracted with the third party the only outstanding point in the parties' negotiations was that the defendant wanted the claimant to live in the farm building, while the claimant wanted to rent the building to a third party and live elsewhere, which point the claimant had attempted to resolve by an offer to purchase the farm building.

The claim failed.

On appeal, the Arnhem Court of Appeal found that no agreement whatsoever had been concluded and that the letter relied on by the claimant "only established that a central matter to the agreement, the question of occupancy, was unresolvable".[445]

The claimant subsequently filed another claim, this time for breach of legitimate expectations that a lease agreement would be concluded at the end of negotiations. The claim alleged that the parties had reached such an advanced stage in negotiations that the defendant was no longer entitled to terminate negotiations without making the claimant a final offer.[446]

This claim succeeded, despite the defendant's plea of res judicata by reference to the prior court's finding that the point of occupancy had been unresolvable, so that there was no prospect at an agreement.

On appeal, the Hague Court of Appeal held that "[i]t does not follow from the letters and witness statements that [the defendant] ever told [the claimant] that the lease of the farm was possible only if the latter would himself live in the farm building."[447] Accordingly, the court held that the defendant should have made a final

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gewijsde van dit oordeel is dan ook bij het bestreden arrest van het Hof te 's-Hertogenbosch terecht verworpen.").

[444] HR 15 May 1987 (n 360) (*Van Huffel/Van den Hoek*).

[445] Hof Arnhem 13 April 1981 (in the opinion of the AG in HR 15 May 1987 (n 360) [7] (*Van Huffel/Van den Hoek*)).

[446] The Pachtkamer had no jurisdiction to hear claims with this subject-matter.

[447] Hof 's-Gravenhage 4 April 1985 (in the opinion of the AG in HR 15 May 1987 (n 360) [13] (*Van Huffel/Van den Hoek*)) ("Uit de overgelegde brieven en de verklaringen van de gehoorde getuigen (in het pachtgeding; t.K.) blijkt niet dat Van Huffel ooit onomwonden aan Van den Hoek heeft gezegd, dat deze alleen dan de boerderij kon pachten indien hij zelf op de boerderij ging wonen. Het oordeel van de Pachtkamer van het Hof te Arnhem in zijn arrest van 13 april 1981 (zie onder 7 hierboven; t.K.), dat uit

offer before being free to contract with a third party. The court added that "the court does not adopt the finding of the Arnhem Court of Appeal [that the problem of occupancy of the farm building was unresolvable]".[448]

On appeal to the Supreme court, the appellant argued that the Hague Court of Appeal had violated (what is presently) Art 236 Rv, by failing to give conclusive effect to the finding of the Arnhem Court of Appeal that the problem of occupancy of the farm building was unresolvable, so that the Hague court could not find that there was a prospect at an agreement.

The Supreme Court rejected the argument, noting first that the Arnhem Court of Appeal's finding "merely establishes the existence of a fact: such findings have no conclusive effect."[449] The Court arguably meant that the finding on *resolvability* of the point of occupancy was *unnecessary* for the issue: whether an agreement existed between the parties; namely, the court's finding of that there was any open point was enough to exclude the existence of an agreement; it was unnecessary then also to establish whether this point was (un)resolvable.

In *Vonck/Nedgoed BV*,[450] the Dutch Supreme Court made another relevant observation on 'unnecessary' findings, by indicating that it is irrelevant for Article 236 Rv that a court's determination of the issue in the first case was based on two *alternative* findings; on the facts of the case, the finding, first, that the lessor's breach of contract had not been established and, second, that unsufficient additional circumstances had been alleged to render the third party's acts unlawful. The appellant argued that the second finding was *obiter dictum* since the issue was determined by the first finding, but the Court held that both findings were conclusive in another case between the same parties and could not be regarded as *obiter*, or unnecessary.[451]

2. Finding not regarding the claim or issue—failure to state a case

Van Raalte/SH Beheer BV clarifies when a finding is not 'regarding the issue or claim'.[452] The dispute related to works carried out in a house that allegedly caused damage to walls and ceilings and to goods present in the house. In relevant part the statement of claim read:

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de brief van 22 okt. 1979 slechts kan worden afgeleid dat het kernprobleem van de bewoning onoplosbaar was, neemt dit hof dan ook niet over.").

[448] ibid.

[449] HR 15 May 1987 (n 360) [3.4] (*Van Huffel/Van den Hoek*) ("…de beslissing van de Pachtkamer, aldus verstaan, betreft een beslissing waarbij enkel het bestaan van een feit wordt aangenomen: aan een zodanige beslissing komt gezag van gewijsde niet toe.").

[450] HR 13 October 2000, ECLI:NL:HR:2000:AA7481, NJ 2001, 210 (*Vonck/Nedgoed BV*).

[451] ibid [3.6]-[3.7] ("3.6. Onderdeel 2 voert aan dat het in het vonnis van 13 maart 1996 gegeven oordeel dat Vonck 'onvoldoende (heeft) gesteld dat en zo ja welke bijkomende omstandigheden aan de zijde van Nedgoed haar handelen onrechtmatig zouden maken', een ten overvloede gegeven oordeel is, waaraan geen gezag van gewijsde kan toekomen. 3.7. De Rechtbank heeft het in rov. 9.4 van haar vonnis van 13 maart 1996 genoemde verweer van Vonck verworpen op twee gronden, die deze verwerping ieder zelfstandig kunnen dragen. De eerste grond was dat niet vaststond dat er sprake was van wanprestatie van Warnars c.s. De tweede grond hield in dat, indien veronderstellenderwijs zou worden aangenomen dat er wanprestatie was gepleegd en dat Nedgoed daarvan op de hoogte was geweest, Vonck onvoldoende heeft gesteld omtrent bijkomende omstandigheden aan de zijde van Nedgoed, die haar handelen onrechtmatig zouden maken. Nu onderdeel 2 uitgaat van een onjuiste lezing van genoemd vonnis, kan het bij gebrek aan feitelijke grondslag niet tot cassatie leiden.").

[452] HR 19 November 1993 (n 12) (*Van Raalte/SH Beheer BV*). cf Beukers (n 3) 70.

> Due to these works holes resulted in the walls and ceilings of the living room and bedroom of the claimant, and entering grime and dust damaged several goods of [the claimant] that were present there. [The claimant] is of the view that [the defendant] has disturbed their peaceful enjoyment of their house and should pay the resulting damage and repair the house. [The claimant] by letter … asserted [the defendant's] liability…. [The defendant] replied by letter … acknowledged that damage had occurred to plaster, paint and ceilings, and promised to make repairs. Then the lawyer of [the claimant]… called on [the defendant] to pay the aforementioned damage estimated at 2.200,-- including interest, within a period of ten days.[453]

The Amsterdam (sub)District Court dismissed the claim on these grounds:

> "The claimant's statement of claim for payment of 2.200,-- in damages is inadequate. From the allegations neither the nature of the damage the claimant alleges to have suffered can be derived, nor the justification for the amount claimed. The must therefore be dismissed.[454]

The claimant never appealed this judgment, which thus acquired res judicata status. However, the claimant subsequently filed the same claim. The court that was seized of the claim construed the defendant's reply as a plea of res judicata and dismissed the claim on that basis by reference to the existing judgment between the same parties.

On appeal the Amsterdam District Court confirmed this decision.

The Supreme Court observed that the appeal raised the question whether the finding of the Amsterdam (sub)District Court that dismissed the first claim claim excludes the possibility of granting the subsequent claim with the same object. The Court answered this question as follows:

> As the (sub)District Court rightly took as its starting point in the present case, the answer to this question depends on whether the judgment in the first case can be attributed conclusive effect, and this must be established by application of [Article 236 Rv], according to which findings regarding the claim or issue in question which are contained in a judgment having the status of res judicata are conclusive in another case between the same parties. A finding is no 'finding regarding the claim or issue' if the court dismisses a claim on the ground that the claimant's statement of case is insufficient to enable the court to determine the claim.[455]

It is important to distinguish situations where pleadings are insufficient to *enable* the court to determine the claim or issue[456] from situations where a court is able to determine the claim or issue, but does so against a party because the facts pleaded cannot have the legal consequences sought, a situation that occurred in *Vonck/Nedgoed BV*.[457]

The dispute related to the sale of a property. The property was leased under an agreement that granted the lessee a priority right to purchase the property for the amount offered by any third party and accepted by the lessor. The lessor sold the

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[453] ibid.
[454] ibid.
[455] HR 19 November 1993 (n 12) [3.3] (*Van Raalte/SH Beheer BV*).
[456] cf Rb Zwolle-Lelystad 17 November 2005 (n 441) [4]-[5] (*Bonar Plastics*) (Article 236 Rv cannot be applied where a claim is dismissed because the claimant fails to provide sufficient factual information and where their pleadings do not align with the claim).
[457] HR 13 October 2000 (n 450) (*Vonck/Nedgoed BV*).

property to a third party without first offering it to the lessee. The new owner then filed a claim for termination of the rental agreement for breach of contract by the lessee, who had subleased the property without prior approval. The lessee replied that the new owner had unlawfully induced the lessor's breach of contract.

On appeal from the (sub)District Court, the District Court rejected this defence as follows:

> [The defendant] has supplemented the pleadings on appeal by alleging the unlawful profiting from a breach of contract. As [the claimant] had the opportunity to respond to this addition, the court will consider it. To successfully invoke the unlawful profiting from a breach of contract by a third party, first of all, the breach of contract must be established, and that the party that is accused of unlawfully profiting therefrom knew about this breach of contract. There are additional requirements before the profiting of a breach of contract is unlawful. In the present case it is not established that there was a breach of contract, but even if this could be assumed and [the third party] was aware of it, the allegations of [the defendant] are insufficient to justify the conclusion that and, if so, what circumstances relating to [the third party] make its acts unlawful. The assertion that [the third party] would use the property for its own use is insufficient to this end.[458]

Having rejected the defence of unlawful inducement of a breach of contract, the court granted the claim for termination of the lease agreement.

Subsequently, the lessee filed a claim in tort for damages against the third party for unlawfully inducing the lessor's breach of contract.

The District Court dismissed the claim based on Art 236 Rv:

> The allegation has already been considered and adjudicated upon by this court …, in the context of a defence by [the claimant in present proceedings]. No appeal in cassation was filed against this judgment. The finding on the issue relating to the unlawful act of [the defendant] vis-à-vis [the claimant] therefore has conclusive effect.[459]

The District Court held that it was irrelevant for the attribution of res judicata effect that the lessee acted as *defendant* in the first case (alleging unlawful inducement in defence) and as *claimant* in the second case (alleging unlawful inducement as cause of action):

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[458] ibid [9.4] ("9.4 Vonck heeft zijn stellingen bij pleidooi in hoger beroep aangevuld met een beroep op onrechtmatig profiteren van wanprestatie. Nu Nedgoed in de gelegenheid is geweest om op deze aanvulling te reageren, zal ook de rechtbank hierop ingaan. Voor een beroep op onrechtmatig profiteren van wanprestatie van een ander, moet in de eerste plaats vaststaan dat wanprestatie is gepleegd en dat degene die het onrechtmatig profiteren wordt verweten wetenschap van die wanprestatie droeg. Daarnaast zullen er bijkomende omstandigheden aanwezig moeten zijn, die het profiteren van de wanprestatie onrechtmatig doen zijn. In het onderhavige geval staat niet vast dat sprake was van wanprestatie, maar al zou daarvan wel uitgegaan kunnen worden en zou Nedgoed daarvan op de hoogte zijn geweest, dan nog heeft Vonck onvoldoende gesteld dat en zo ja welke bijkomende omstandigheden aan de zijde van Nedgoed haar handelen onrechtmatig zouden maken. Het gestelde eigen gebruik van het pand door Nedgoed is daarvoor onvoldoende.").

[459] ibid ("Deze stelling van Vonck is reeds besproken en beoordeeld door deze rechtbank in het vonnis van 13 maart 1996, rolnummer H 94.1561, gewezen tussen Vonck als eiser in hoger beroep en Nedgoed als gedaagde in hoger beroep, naar aanleiding van een door Vonck bij pleidooi aldus luidend gevoerd verweer. Tegen dat vonnis is geen cassatie aangetekend. De beslissing op het hier bedoelde geschilpunt betreffende onrechtmatig handelen van Nedgoed jegens Vonck heeft tussen die partijen daarom gezag van gewijsde.").

> That the issue did not arise in relation to the cause of action for the claim of [the claimant] against [the defendant], but in relation to a defence filed in response to a claim by [the defendant] is irrelevant, considering that the court determined the issue, …, which was the same as now arising in relation to the cause of action for their claim against [the defendant].[460]

On appeal in cassation, the lessee argued that the District Court in its judgment in the first case had not determined the issue, but had merely decided that the defendant (claimant in the second case) made allegations that were insufficient to establish the additional circumstances required to qualify the claimant's acts as unlawful.

The Supreme Court rejected this argument:

> [I]t follows from the court's interpretation of its [first judgment], which is not incomprehensible, that it made a finding in this judgment on the same issue as now arises in relation to the cause of action alleged by [the claimant] in support of their claim against [the defendant], and that it was not the case that [the claimant] had made pleadings that were so insufficient in respect of this issue that as a result the court was unable to determine the issue ….[461]

Hence, the situation where a court cannot determine an issue due to inadequate pleadings must be distinghuished from the situation where a court can determine the issue on the merits and does so against a party. On the facts of this particular case, it is difficult to speak of 'issue' or 'claim', and the Court consistently refers to 'the legal question', because unlawful inducement was raised as a defence in the first case, and as a cause of action underlying the claim in the second case.

b. In a judgment having res judicata status*—irreversibility of the finding*

To have conclusive effect a finding must be contained in a judgment that has acquired res judicata status insofar as concerns that finding;[462] the finding must, in other words, be irreversible.[463] A judgment acquires 'res judicata status'—and a finding contained therein becomes 'irreveresible'—if it cannot[464] or cannot any longer[465] be

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[460] ibid ("Dat het geschilpunt niet aan de orde kwam als grondslag van een vordering van Vonck op Nedgoed, maar als grondslag van een door hem tegen een vordering van Nedgoed gevoerd verweer heeft in dit verband geen belang, nu de rechtbank een beslissing nam met betrekking tot de rechtsbetrekking die toen in geschil was, namelijk over de vraag of Nedgoed onrechtmatig handelde jegens Vonck door de aankoop van de onroerende zaak, die Vonck van Warars c.s. huurde, met voorbijgaan aan de uit die huurovereenkomst voortvloeiende aanbiedingsplicht van Warnars c.s. aan Vonck, hetzelfde dat Vonck thans als grondslag van zijn vordering op Nedgoed aanvoert.").

[461] ibid [3.5] ("Uit deze uitleg door de Rechtbank van haar vonnis van 13 maart 1996, die niet onbegrijpelijk is, volgt dat zij in dat vonnis een beslissing heeft gegeven over dezelfde rechtsbetrekking in geschil, die Vonck thans als grondslag van zijn vordering op Nedgoed aanvoert, en dat zich niet het geval voordoet dat Vonck in de aan dat vonnis voorafgaande procedure zo weinig heeft aangevoerd omtrent die rechtsbetrekking dat de rechter als gevolg daarvan niet in staat was dienaangaande een beslissing te geven (vgl. HR 19 november 1993, nr. 15119, NJ 1994, 175). Onderdeel 1 kan daarom niet tot cassatie leiden.").

[462] Article 236(1) Rv ("*vervat in een in kracht van gewijsde gegaan vonnis*").

[463] "*Onaantastbaar*".

[464] See, eg, Art 332 Rv which excludes an appeal against judgments on claims below EUR 1750.

[465] See, eg, Art 339 Rv which provides that the time limit for filing an appeal is three months. Another circumstance is where a party waives the right to appeal the judgment. Article 334 Rv.

challenged by ordinary means of recourse.[466] 'Ordinary means of recourse' involve either an appeal[467] or appeal in cassation,[468] or, in case of a default judgment, an application to set aside or vary the judgment[469].[470]

Van Schaick rightly asks "what effect should be attributed to findings which are not yet irreversible."[471] Indeed, the rules of preclusion which have so far been discussed do not seem to close this gap left by Art 236 Rv, which is revealed when a party in a new case between the same parties contradicts findings contained in judgment that has not (yet) acquired the res judicata status. This gap is only partially closed by the fact that a finding becomes irreversible notwithstanding that the judgment in which the finding is contained is under appeal if that finding is not challenged on appeal; to this extent, the judgment acquires res judicata status.[472] For example, the Dutch Supreme Court in *Van Wijngaarden/Holland-Bombay*[473] held that "the judgment concerning the preliminary issue cannot be deemed to have res judicata status in the period in which an appeal against the judgment is pending only if the judgment is appealed on procedural grounds or if the grounds for appeal concern and potentially affect the finding on the preliminary issue itself".[474]

More recently, the Dutch Supreme Court confirmed this approach in *Krediet Specialist Nederland BV*,[475] holding that in case a finding was not challenged on appeal, the judgment in which the finding is contained acquired the status of res judicata to this extent, with the effect that the finding became irreversible and triggered res judicata effect which could be invoked in another case between the parties.[476]

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[466] Parliamentary history specifies that a judgment has this status when "[the judgment] is not or no longer open to objection, appeal or appeal in cassation" ("De woorden 'in een in kracht van gewijsde gegaan vonnis' drukken uit, dat de bindende kracht alleen toekomt aan een vonnis dat niet of niet meer vatbaar is voor verzet, hoger beroep of cassatie."). New Law of Evidence Act (Explanatory Memorandum) (*Nieuwe regeling van het bewijsrecht in burgerlijke zaken*) Kamerstukken II (1969-1970) 10377 No 3, 22-23 (*MvT*).

[467] '*Hoger beroep*'. Article 332 Rvff.

[468] '*Cassatie*'. Article 398 Rvff.

[469] '*Verzet*'. See Art 143 Rvff.

[470] The reference to 'ordinary' means of recourse suggests the existence of 'extraordinary' means of recourse, which is the procedure by which in exceptional circumstances a judgment can be revoked ('*herroeping*', Art 382 Rvff) but their availability does not prevent a judgment from attaining the status of *res judicata*.

[471] Van Schaick (n 3) [144].

[472] See text to n 128ff.

[473] HR 7 May 1926 (n 118).

[474] ibid.

[475] HR 30 March 2012 (n 116) (*Krediet Specialist Nederland BV*).

[476] ibid [3.3.4]-[3.3.5] ("Doordat KSN geen incidenteel beroep heeft ingesteld - ook niet voorwaardelijk - tegen het vonnis van de kantonrechter voor zover daarbij de vordering van [eiser] is toegewezen, is dat vonnis in zoverre in kracht van gewijsde gegaan met als gevolg dat het oordeel van de kantonrechter, waarop die toewijzing berust, dat in de gehele periode van 20 november 2007 tot 20 mei 2008 tussen partijen een arbeidsovereenkomst heeft bestaan, onherroepelijk werd en gezag van gewijsde verkreeg dat in een ander geding tussen de partijen zou kunnen worden ingeroepen (art. 236 Rv.). In een zodanig geval kan met het oog op het voorkomen van tegenstrijdige onherroepelijke rechterlijke uitspraken, niet worden aanvaard dat in een door de appellant tegen het voor hem ongunstige gedeelte van het dictum ingestelde hoger beroep het primaire verweer van de geïntimeerde op grond van de hiervoor in 3.3.2 genoemde hoofdregel van de devolutieve werking opnieuw zou kunnen (en moeten) worden beoordeeld, zonder dat de geïntimeerde incidenteel appel heeft ingesteld - ook niet voorwaardelijk - tegen het voor hem ongunstige, op de verwerping van zijn verweer berustende gedeelte van het dictum teneinde te voorkomen dat dit gedeelte van het dictum in kracht van gewijsde gaat en de daaraan ten grondslag liggende beslissing van de eerste rechter gezag van gewijsde verkrijgt. Onbeperkte toepassing van de

It is suggested with Veegens[477] that pursuant to the principle of a sound administration of justice, a court that is confronted with pleadings that contradict the finding in an existing judgment that sofar as concerns the finding contradicted lacks res judicata status can clearly stay its proceedings until the judgment that is contradicted either acquires res judicata status or is successfully challenged. Further, depending on the precise nature of the pleadings, if those pleadings are aimed at challenging the accuracy of the judgment or otherwise go to the judgment's validity, the *gesloten stelsel van rechtsmiddelen*[478] requires that the court strike out the collateral attack on the judgment. Finally, the *afstemmingsregel*[479] requires a court in interim proceedings to align its judgment with a judgment given in the main proceedings regardless of the res judicata status of that judgment.

c. In another case

Article 236 applies only in the context of another case,[480] not within one and the same case. In itself, this condition is clear and does not require elaboration. Nevertheless, it should be noted that this requirement forced the development of the supplemental doctrines of preclusion that serve to effect finality of litigation within the same case.[481]

d. Involving the same claim or issue

Article 236 Rv lacks application if the finding of the court whose judgment is relied upon for res judicata effect related to a different issue (or 'legal question') than that in the new case. The text of the provision does not expressly state this condition. Nevertheless, the Dutch Supreme Court in *Van Huffel/Van den Hoek* confirmed its application.[482]

Advocate General Asser in his opinion in *Siegers/Citco Bank Antilles NV* concluded similarly that "[t]he Supreme Court [in *Van Huffel/Van den Hoek*] accordingly expressed that it is inappropriate to invoke the conclusive effect of a

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genoemde hoofdregel van de devolutieve werking zou immers tot gevolg kunnen hebben dat - zoals in deze zaak is gebeurd - de appelrechter over hetzelfde geschilpunt een ander oordeel bereikt dan de eerste rechter, zodat na het in kracht van gewijsde gaan van de uitspraak van de appelrechter met betrekking tot dat geschilpunt twee tegenstrijdige onherroepelijke rechterlijke beslissingen met gezag van gewijsde zouden bestaan. 3.3.5 Het voorgaande betekent dat nu KSN heeft nagelaten (voorwaardelijk) incidenteel hoger beroep in te stellen tegen het vonnis van de kantonrechter voor zover daarbij de vordering van [eiser] was toegewezen, het hof het primaire verweer van KSN niet meer in zijn beoordeling van het hoger beroep kon betrekken.").

[477] See Veegens (n 3) 32.

[478] See text to n 224ff.

[479] See text to n 275ff.

[480] "*[A]nder geding*".

[481] See the text to n 25ff with further references to particular sections.

[482] HR 15 May 1987 (n 360) [3.4] (*Van Huffel/Van den Hoek*) ("[Article 236 Rv lacks application if] the finding of the [court whose judgment was relied upon for res judicata effect] related to a different issue—that is, the legal relationship in dispute—than that in the present case.) ("…dat de door de Pachtkamer van het Hof te Arnhem gegeven beslissing betrekking had op een andere rechtsvraag - anders gezegd: op een andere rechtsbetrekking in geschil - dan die welke ter beantwoording stond in de onderhavige procedure.").

finding of fact isolated from the finding on the issue in question in relation to which it was made."[483]

If a new case concerns another claim or issue, a prior finding cannot be regarded as conclusive in the new set of proceedings, notwithstanding that the finding is equally necessary for the determination of the new claim or issue. In those circumstances, the only relevance of the existing judgment is evidential, not preclusive.[484]

1. Identity of issues

The facts of the case of *Van Huffel/Van den Hoek*, which illustrates the problem of identity of issues between the prior and new case, are introduced elsewhere.[485] Insofar as relevant here, it suffices to note that the Supreme Court advanced a further reason for rejecting the cassation appeal, which appeal argued that the Hague Court of Appeal had failed to attach conclusive effect to the finding of the Arnhem Court of Appeal that the outstanding point on the habitation of the farm was unresolvable.

According to the Supreme Court, "the finding of the Arnhem Court of Appeal related to a *different issue*—i.e. the legal relationship in dispute [or 'legal question']—than that in the present case."[486] For that reason, even though the Arnhem Court of Appeal clearly did find that an agreement was ruled out because a key point of disagreement was unresolvable, this finding lacked conclusive effect in the new case, because the finding pertained to a different issue; to be precise, in the first case the issue was *whether there was an agreement*, while the second case raised the issue *whether there were legitimate expectations that an agreement was still possible*.

The case clarifies that a finding of fact isolated from the issue cannot have conclusive effect. In support for this conclusion, reference can also be made to the opinion of Advocate General Asser in *Siegers/Citco Bank Antilles NV*, who made the same point:

> If a new case concerns another issue, a prior factual finding cannot be regarded as having conclusive effect by the court called upon to determine that issue in the new set of proceedings, notwithstanding that the factual finding is equally relevant for the finding on the new issue. This relevance relates to the evidential value of the prior judgment.[487]

By way of illustration, recall the case of *Yukos.*[488] In this case, the requied identity of the issues was manifestly absent: the Amsterdam Court of Appeal determined the

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[483] HR 17 November 1995 (n 435) [2.14] (*Siegers/Citco Bank Antilles NV*).
[484] ibid [2.9]. Under Art 152(2) Rv a Dutch court would freely assess the judgment's evidential value.
[485] See text to n 444ff.
[486] HR 15 May 1987 (n 360) [3.4] (*Van Huffel/Van den Hoek*) ("de door de Pachtkamer van het Hof te Arnhem gegeven beslissing betrekking had op een andere rechtsvraag - anders gezegd: op een andere rechtsbetrekking in geschil - dan die welke ter beantwoording stond in de onderhavige procedure.") (emphasis added).
[487] HR 17 November 1995 (n 435) [2.9] (*Siegers/Citco Bank Antilles NV*) ("Is in een nieuw geding een andere rechtsbetrekking in geschil, dan kan zo'n eerdere feitelijke beslissing geen bindende kracht hebben voor de rechter die in dat nieuwe geding over deze rechtsbetrekking heeft te oordelen, ook al is die feitelijke beslissing op zichzelf genomen ook voor de in het nieuwe geding aangaande de rechtsbetrekking in geschil te geven beslissing relevant. Die relevantie heeft dan te maken met de bewijskracht van het eerdere vonnis.").
[488] *Yukos English High Court* (Introduction n 26). See Chapter 1, text to n 415ff.

issue whether Dutch public policy barred the recognition of the Annulment Judgments in The Netherlands, whereas the English High Court had to determine whether English principles of substantial justice prevented the recognition of the same judgments in England and Wales. It is irrelevant for Art 236 Rv that both cases involved the same dispute of fact (partiality and dependence of the Russian judiciary), because the *issues* in relation to which that fact was material were different. This is not to say that the Amsterdam Court of Appeal judgment is devoid of any relevance; nonetheless, the proper significance of the judgment is evidential, not preclusive.

2. Identity of claims

The task of establishing the identity of *claims* can be more of a challenge. Courts tend to look at the material facts, the *cause of action* ('*feitelijke grondslag*'), underlying the claim; for instance, the Leeuwarden Court of Appeal in *Hoogland/Bruggink* observed the required identity of claims arose, because "[the claimant] has pleaded precisely the same factual occurrence … labelled as tort, as previously adjudicated upon … when it was labelled as breach of contract."[489] However, the Amsterdam Court of Appeal in *Meissner von Hohenmeiss/Bloemsma BV* appeared to adopt an different approach by referring to the "*legal basis*" of the claim, reasoning as follows:

> In [both cases], [the claimant] claims damages which [the defendant] argues is liable to pay by breaching their contractual obligation …. Hence the same claim is in question between the parties in both cases, and a different factual cause of the damage does not imply that there is a different legal basis of the claim of [the claimant]. That basis remains damages based on a breach of contract by [the defendant] …. The claimant therefore actually repeats the claim.[490]

The dispute related to a contract for repair works to a roof. The instructing party refused to pay the agreed sum to the company that had carried out the works. The company therefore sued for breach of contract, and claimed payment. The instructing party, however, filed a counterclaim for breach of contract, alleging that the works were carried out inadequately and that resulting leakages had caused damage. Accordingly, the claimant argued that the company was not entitled to the full sum agreed under the contract and that the company was liable for the damage arising from the leakages.

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[489] Hof Leeuwarden 18 June 2003, ECLI:NL:GHLEE:2003:AO3499, NJ 2004, 90 [6] ("Dit laatste is hier naar het oordeel van het hof onmiskenbaar het geval, nu door Hoogland aan de rechtbank exact hetzelfde feitencomplex - met als kernpunt de gestelde onjuiste toepassing van bestrijdingsmiddelen - onder de noemer van onrechtmatige daad werd voorgelegd, als waarover het Scheidsgerecht reeds had geoordeeld onder de noemer wanprestatie. Aan het vooroverwogene doet niet af dat onder omstandigheden een als wanprestatie aan te merken gedraging tevens een onrechtmatige daad kan opleveren.").

[490] ibid [4.3] ("Zowel in het geding bij de kantonrechter als in het geding dat heeft geleid tot het vonnis waarvan beroep, vordert Meissner immers nakoming van de verbintenis tot schadevergoeding die, naar zij stelt, op Bloemsma is komen te rusten omdat hij wanprestatie heeft gepleegd in de nakoming van zijn verbintenis voortvloeiende uit de overeenkomst van aanneming van juli 1989 tot het verrichten van werkzaamheden aan de dakdekking van het pand aan de Nassaustraat 4 te Amsterdam. Derhalve gaat het in beide gevallen om dezelfde rechtsbetrekking tussen partijen en brengt een andere feitelijke oorzaak van de schade niet mee dat gesproken kan worden van een andere juridische grondslag van de vordering van Meissner. Die grondslag blijft immers schadevergoeding op grond van wanprestatie door Bloemsma in de nakoming van de overeenkomst van aanneming tot verrichten van werkzaamheden aan de dakdekking van genoemd pand. Meissner herhaalt dus feitelijk haar vordering.").

The Amsterdam Court of Appeal, though it used the term "legal basis", actually referred to the 'cause of action', namely, the breach of contract: the defendant had inadequately carried out the agreed repair works to the roof with the result that damage occurred. That the claimant in tried to establish the new claim for breach of contract by reference to different facts does not imply that this case involves a new claim in the sense of a different cause of action; the claimant again alleged the defendant had inadequately carried out the agreed repair works to the roof with the result that damage had occurred.[491]

For purposes of Art 236 Rv, it is likely that the Dutch Supreme Court is less interested in the precise meaning of 'claim' (or 'issue' for that matter); than it is in establishing whether the new case raises the same legal question; the provision refers to 'legal relationship in dispute', which term the Supreme Court interpreted as meaning the 'legal question'—the legal consequences of material facts. This emphasis on the 'legal question' explains why in *Vonck/Nedgoed BV* it held that it was irrelevant for the attribution of res judicata effect that the lessee acted as *defendant* in the first case (alleging unlawful inducement in *defence*) and as *claimant* in the second case (alleging unlawful inducement as *cause of action*):

> That the issue did not arise in relation to the cause of action for the claim of [the claimant] against [the defendant], but in relation to a defence filed in response to a claim by [the defendant] is irrelevant, considering that the court determined the issue, …, which was the same as now arising in relation to the cause of action for their claim against [the defendant].[492]

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[491] cf HR 16 May 1975, NJ 1976, 465 mnt WH Heemskerk (*Du Crocq/Van Tuijn*) ("It is irreconcilable with the *res judicata* effect of the judgment of the Breda District Court, which acquired *res judicata status*, rejected Van Tuijn's defence based on alleged nonconformity of the goods delivered by De Crocq, granted Du Crocq's claim for payment of the purchase price, and rejected Van Tuijn's counterclaim, for Van Tuijn to avoid payment by again alleging the nonconformity of the delivered goods, notwithstanding that Van Tuijn this time tried to achieve this outcome by challenging the validity of the sales agreement on grounds of misrepresentation or deceit, and notwithstanding that this claim was based on different conditions of the goods that were discovered after the prior judgment acquired *res judicata status*. What applies for the claim based on misrepresentation or deceit also applies for a claim for hidden defects. However, the *res judicata* effect of the judgment does not bar granting a claim of Van Tuijn for damages caused by Du Crocq's alleged deceit, insofar as granting this claim is not irreconcilable with the legal consequences of the sales agreement.") ("…dat toch, nadat bij het in kracht van gewijsde gegane vonnis van de Rb. te Breda van 13 april 1971 het beroep van Van Tuijn op de ondeugdelijkheid van de door Du Crocq geleverde waar was verworpen en op grond daarvan Du Crocqs vordering tot betaling van de koopprijs was toegewezen en Van Tuijns tegenvordering tot ontbinding van de overeenkomst was afgewezen, met het gezag van gewijsde van dat vonnis onverenigbaar was, dat Van Tuijn zich andermaal met een beroep op het ontbreken van bepaalde eigenschappen van de geleverde waar aan de betaling van de koopprijs zou kunnen onttrekken, ook al trachtte zij dit in de tweede procedure te bereiken door aantasting van de geldigheid van de koopovereenkomst op grond van dwaling of bedrog en al ging het daarbij om andere - na het in kracht van gewijsde gaan van het eerste vonnis ontdekte - eigenschappen van die waar; dat wat hiervoor gezegd is over Van Tuijns vordering tot nietigverklaring van de koop ter zake van dwaling of bedrog, ook geldt voor haar vordering ter zake van verborgen gebreken; dat het gezag van gewijsde van het vonnis van de Rb. te Breda van 13 april 1971 echter niet in de weg staat aan de toewijzing van de vordering van Van Tuijn, strekkende tot vergoeding van schade die zij zou hebben geleden ten gevolge van door Du Crocq beweerdelijk gepleegd bedrog of misleiding, voor zover deze toewijzing niet onverenigbaar is met het in stand houden van de rechtsgevolgen van de koopovereenkomst….").

[492] HR 13 October 2000 (n 450) (*Vonck/Nedgoed BV*) ("Dat het geschilpunt niet aan de orde kwam als grondslag van een vordering van Vonck op Nedgoed, maar als grondslag van een door hem tegen een vordering van Nedgoed gevoerd verweer heeft in dit verband geen belang, nu de rechtbank een beslissing nam met betrekking tot de rechtsbetrekking die toen in geschil was, namelijk over de vraag of

On appeal in cassation, the lessee argued that the District Court in its judgment in the first case had not determined the issue, but had merely decided that the defendant (claimant in the second case) made allegations that were insufficient to establish the additional circumstances required to qualify the claimant's acts as unlawful.

The Supreme Court rejected this argument:

> [I]t follows from the court's interpretation of its [first judgment], which is not incomprehensible, that it made a finding in this judgment on the same issue as now arises in relation to the cause of action alleged by [the claimant] in support of their claim against [the defendant], and that it was not the case that [the claimant] had made pleadings that were so insufficient in respect of this issue that as a result the court was unable to determine the issue ….[493]

Hence, the situation where a court cannot determine an issue due to inadequate pleadings must be distinghuished from the situation where a court can determine the issue on the merits and does so against a party. On the facts of this particular case, it is difficult to speak of 'issue' or 'claim', and the Court consistently refers to 'the legal question', because unlawful inducement was raised as a defence in the first case, and as a cause of action underlying the claim in the second case.

e. Between the same parties (or their privies)

Res judicata effect under Art 236 Rv applies only between the same parties (or their privies); the identity of parties (or privies)-requirement derives directly from Art 236(2).[494] Not only res judicata effect is so limited; more generally, in a case where an interested third party filed the same claim based on the same factual and legal basis as previously filed by others (not privies), the Dutch Supreme Court held that not even the requirements of a sound administration of justice could bring about that a person is barred by a judgment given in proceedings to which he was not a party.[495]

The term "same parties" in Art 236(1) Rv refers principally to the original claimant and defendant, and to those who became parties in the course of the proceedings, either on own initiative (by joining or intervening in the proceedings) or

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Nedgoed onrechtmatig handelde jegens Vonck door de aankoop van de onroerende zaak, die Vonck van Warars c.s. huurde, met voorbijgaan aan de uit die huurovereenkomst voortvloeiende aanbiedingsplicht van Warnars c.s. aan Vonck, hetzelfde dat Vonck thans als grondslag van zijn vordering op Nedgoed aanvoert.").

[493] ibid [3.5] ("Uit deze uitleg door de Rechtbank van haar vonnis van 13 maart 1996, die niet onbegrijpelijk is, volgt dat zij in dat vonnis een beslissing heeft gegeven over dezelfde rechtsbetrekking in geschil, die Vonck thans als grondslag van zijn vordering op Nedgoed aanvoert, en dat zich niet het geval voordoet dat Vonck in de aan dat vonnis voorafgaande procedure zo weinig heeft aangevoerd omtrent die rechtsbetrekking dat de rechter als gevolg daarvan niet in staat was dienaangaande een beslissing te geven (vgl. HR 19 november 1993, nr. 15119, NJ 1994, 175). Onderdeel 1 kan daarom niet tot cassatie leiden.").

[494] Article 236(2) Rv. cf Article 12 of the Netherlands General Provisions Act 1829 which implies that, as a rule, a court's decision only binds the parties to the proceedings. General Provisions Act 1829 (*Wet van 15 mei 1829, houdende algemeene bepalingen der wetgeving van het Koningrijk*) (entered into force 1 October 1838) Stb 1829, 28 (as amended), Art 12 ("Geen regter mag bij wege van algemeene verordening, dispositie of reglement, uitspraak doen in zaken welke aan zijne beslissing onderworpen zijn.").

[495] HR 11 February 2000 (n 387) [3.3] ("…de eisen van een goede procesorde niet kunnen meebrengen dat iemand wordt gebonden aan de beslissing in een geding waarin hij geen partij was.").

at the initiative of one of the parties (by impleading or third party notice). A change in the procedural roles of the parties in subsequent proceedings does not affect the application of Art 236 Rv.[496] In the event of complex litigation involving multiple claimants and defendants, a proper application of Art 236 Rv requires a close examination of the findings contained in the resulting judgment, in order to establish whether it is justified to attach conclusive effect to a particular finding in respect of all parties, since not all parties may be implicated by that finding.[497]

In most cases a party will stand for their own interests. But this is not invariably so. Minors and those lacking the capacity to act in proceedings, for example, typically need representation.[498] The same applies to a party who acts on behalf of another person in his own name[499] or in the name of the other person[500].[501] A distinction therefore applies between the person who is formally the party to the proceedings [502] and the person whose interests are represented and who is ultimately bound by the court's decision[503].[504] If these two roles are not united in one person, the person whose interests were represented is deemed a party within the meaning of Art 236 Rv; to illustrate, courts have held that the majority shareholder of a corporation which is a party to proceedings may be considered a party for purposes of Art 236 Rv even though he is not formally a party.[505]

Another example concerns the members of a community of ownership. Each member of the community has the legal power to initiate proceedings in the interest of the community.[506] The Dutch Supreme Court in *Carreau Gaschereau/Sunresorts NV*[507] ruled accordingly that if a member of community files a claim in the interest of the community, all members of the community are bound by the resulting judgment

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[496] HR 13 October 2000 (n 450) (*Vonck/Nedgoed BV*).

[497] HR 23 March 2001, ECLI:NL:HR:2001:AB0694, NJ 2003, 716, JOR 2001, 120 mnt ThAL Kliebisch (*ABN AMRO Bank NV/Nederlandsche Trustmaatschappij BV*).

[498] See, eg, Art 1:245(4) BW (parents and guardians); Article 1:381(2) BW (curator); Article 1:441(1) BW (administrator); and Art 1:453(2) BW (mentor).

[499] HR 26 June 1985, NJ 1986, 307 mnt JMM Maeijer (*NV GKN/Stichting SOBIS*).

[500] HR 28 October 1988, NJ 1989, 83 (*Bakridi/HBN BV*); and HR 22 October 2004, ECLI:NL:HR:2004:AP1435, J 2006, 202 mnt HJ Snijders, RvdW 2004, 120, JBPr 2005, 5 mnt A Knigge and LC Dufour (*Brink/ABN AMRO Bank NV*). See also Ktr Rotterdam 24 February 1983, NJ 1984, 677 (*De Stichting Beeldrecht/Rotterdam*).

[501] Article 7:414 in conjunction with Art 3:60 BW.

[502] '*Formele procespartij'*.

[503] '*Materiële procespartij*'.

[504] cf AG Wesseling-van Gent in HR 26 November 2004, ECLI:NL:PHR:2004:AP9665, NJ 2005, 41 [2.23]-[2.24].

[505] Hof Amsterdam 9 February 2006, ECLI:NL:GHAMS:2006:AX0095, NJF 2006, 328; and Hof Leeuwarden 18 October 2006, ECLI:NL:GHLEE:2006:AZ0547 (*Beckering's Exploitatiemaatschappij BV*). In certain circumstances, the party in a case must *de facto* be represented by a third party; for example, the director of a company involved in a case will usually only act as its representative in the course of legal proceedings, while the company itself is characterised both as the actual party to the proceedings and the legal person whose interests are represented. Article 2:240 BW. In light of the previous remarks, the director of the company is to be considered a party within the meaning of Art 236 Rv if he is simultaneously its majority shareholder.

[506] Article 3:171 BW provides explicitly for the power of the member of a community to bring a claim on behalf of the community.

[507] HR 24 April 1992, NJ 1992, 461 (*Carreau Gaschereau/Sunresorts NV*). cf HR 21 November 2003, ECLI:NL:HR:2003:AJ0498, NJ 2004, 130 (*Hermans/Fortis Bank NV*) (confirming that the member of the community who is the actual party to the proceedings (formele procespartij) on the basis of Art 3:171 BW represents the interests of the other members of the community, who are therefore to be characterised as "materiële procespartij" in the proceedings and thus equally as party in the sense of Art 236 Rv).

and deemed to be parties within the meaning of Art 236 Rv. The same applies between spouses in respect of claims forming part of their matrimonial property.[508]

1. Privity

The res judicata effect of a judgment extends to persons who succeed the parties.[509] This extension of the subjective scope of res judicata effect can result from either succession under general title[510] or succession under a specific title[511].[512] However, the extension occurs only if the succession takes place *after* rendition of the judgment of which the res judicata effect is pleaded,[513] although succession may also take place in the course of proceedings, as long as the process is completed before the judgment is given[514]. Persons likely to succeed a party to pending proceedings therefore have an interest in joining or intervening in those proceedings. The provision allows for a measure of protection against the negative effect of *gezag van gewijsde* for succeeding parties acting in good faith; for instance, a person may not be aware of the judgment given against a predecessor and in the circumstances of the case they were not objectively required to be aware.[515] The availability of this protection may further depend on the specific provisions governing the type of succession in question.[516]

As a rule, third parties are not affected by the res judicata effect of a judgment;[517] for example, minority shareholders of a corporation are not affected,[518]

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[508] Rb 's-Gravenhage 6 December 2000, NJ 2001, 345 (*Nieuwveen Rubra Beleggings- en Exploitatiemaatschappij BV*). cf Article 6:15(2) BW (multiple creditors) which states for all types of community of ownership that if the obligation is indivisble and is part of the community, the members of the community have one common claim.

[509] Article 236(2) Rv.

[510] Article 3:80(2) ('*rechtsverkrijging onder algemene titel*'). This includes inheritance, joinder of estates, merger, and division in relation to the whole or a proportional part of an estate of another person holding the predecessor's liabilities as well as the assets. Examples in practice include testate succession ('*testamentaire vererfing*', Art 4:116 BW), intestate succession ('*wettelijke vererfing*', Art 4:182 BW), succession by the State to a vacant estate ('*onbeheerde nalatenschap*', Art 4:189 BW), the establishment of a joint matrimonial estate ('*huwelijksgemeenschap*', Art 1:93 BW), or the merger of legal persons ('*fusie*', Art 2:309 BW). The conversion of a legal person (omzetting van een rechtspersoon) in another is not characterised as general succession. Article 2:18 BW.

[511] Article 3:80(3) BW ('*rechtsverkrijging onder bijzondere titel*'). This includes assignment (ie transfer of rights, Art 3:84 BW) or transmission of rights ('*overgang van rechten*', see Title II, Book 6 BW), time limitation ('*verjaring*', Title IV, Book 3 BW), expropriation ('*onteigening*', see HR 24 September 2004 (n 410) (*Dryade/Staat*) and any other kind of acquisition of rights provided by law according to its nature (e.g. real, personal, and intellectual property, limited rights in property, or claims). This form of legal succession often, but not always (e.g. subrogation, prescription and expropriation) involves a contractual arrangement (e.g. contracts for the assignment of property rights or contract rights).

[512] Article 236(2) Rv. See also HR 28 April 1916, NJ 1916, 736.

[513] New Law of Evidence Act (Explanatory Memorandum) (Nieuwe regeling van het bewijsrecht in burgerlijke zaken) Kamerstukken II (1969-1970) 10377 No 3, 23 (MvT).

[514] ibid.

[515] ibid.

[516] For instance, in relation to the protection of a buyer of an immoveable property, see Art 3:86 in conjunction with Arts 3:23 and 3:24 BW.

[517] Not even the principle of a sound administration of justice, let alone the doctrine of *res judicata*, can form the basis binding a person to a judgment in proceedings to which he was not a party. HR 11 February 2000 (n 387) [3.3] ("[T]he principle of a sound administration of justice cannot form the basis binding a person to a judgment in proceedings to which he was not a party.") ("de eisen van een goede procesorde niet kunnen meebrengen dat iemand wordt gebonden aan de beslissing in een geding waarin hij geen partij was."). See, regarding *res judicata* effect, Rb Middelburg 4 January 2006, ECLI:NL:RBMID:2006:AZ5049 (*Seatrade Group NV/Sucorrico SA*) (refusing to apply Art 236 Rv, because the parties in the subsequent case were different).

nor are the partners of a partnership,[519] nor persons in whose interest a collective action was brought[520]. Moreover, the res judicata effect of a judgment between a creditor and debtor does not typically extend to the relationship between the creditor and a guarantor,[521] nor *vice versa*[522].

Nevertheless, as noted, third parties may become parties to proceedings, in which case Art 236 Rv applies. Some third parties join the proceedings by filing a motion to join on the side claimant or the defendant[523] or intervene in the proceedings by filing a motion to bring a claim against both the claimant and the defendant in the same proceedings[524]. Other third parties are drawn into the proceedings by the parties, for instance, when the defendant impleads a third party as guarantor[525] or when the claimant files notice against a third party on the basis of a legal requirement[526].

In practice, in most instances where a relevant connection exists between one of the parties and a third party, the law stipulates that the third party be joined in the proceedings; to illustrate, an insured party who is not involved as party in a direct action of the injured party against the insurer must be given notice of the proceedings, but if the insurer fails to join as a party, the resulting judgment does not have res judicata effect as far as concerns that party.[527] Other examples include cases concerning property rights where other parties have a property interest,[528] or enforcement disputes where there are third party debtors[529].

If a claimant does not fulfil the obligation to join necessary third parties, the defendant has a right to file a protest,[530] though it is unclear whether courts have the power to order the joining of parties concerned of their own motion[531]. Typically, a court will prompt the claimant to join the necessary third parties. If the claimant fails to comply, their claim may be dismissed or the judgment will lack effect in respect of the third parties.

In other situations, the obligation to join third parties follows from the "indivisibility of the legal relationship"[532] in question,[533] meaning that the nature and

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[518] HR 2 May 1997, NJ 1997, 662 mnt JMM Maeijer (*Kip/De Coöperatieve Raiffeisen-Boerenleenbank Winterswijk BA*).
[519] HR 13 December 2002, ECLI:NL:HR:2002:AE9261, NJ 2004, 212 mnt HJ Snijders, RvdW 2003, 1, JOR 2003, 32 mnt JM Blanco Fernández, JBPr 2003, 25 mnt VL van den Berg, ONDR 2003, 11 mnt L Timmerman (*Hitz/Theunissen*).
[520] HR 7 November 1997 (n 191) (*Philips Electronics NV/VEB*).
[521] HR 1 December 1939, NJ 1940, 445 (*Klazienaveen/Smit*).
[522] HR 13 December 2002 (n 519) (*Hitz/Theunissen*); and Hof 's-Hertogenbosch 17 November 1993, NJ 1994, 493 (*Quickprime Finance Ltd/Limbutex BV*).
[523] Article 217ff Rv.
[524] ibid.
[525] Article 210ff Rv.
[526] Article 118 Rv.
[527] See AG Langemeijer in HR 20 January 2006, ECLI:NL:HR:2006:AT6013, NJ 2008, 461, JAR 2006, 50, RvdW 2006, 104, VR 2006, 157, SES 2007, 118, RAR 2006, 49, JA 2006, 59 mnt FT Oldenhuis, AG Langemeijer (*Hooge Huys Schadeverzekeringen NV*).
[528] See, eg, Art 3:218 BW (claims relating to usufruct where the main property owner is to be summoned); Art 5:95 BW (claims relating to a ground lease where the main property owner is to be summoned); and Art 5:104 BW (claims relating to a building lease where the main property owner is to be summoned).
[529] Article 438(2) Rv in conjuntion with Art 477b(3) Rv.
[530] The motion is also called '*exceptio plurium litis consortium*'.
[531] HLG Wieten, 'Fundamentele Herbezinning: Ambtshalve oproeping van derden door de rechter wenselijk?' (2004) TCR 1ff.
[532] '*Ondeelbaarheid van de rechtsverhouding*'.

content of a legal relationship may necessitate, in light of the circumstances of the case, that the decision of the court will be the same for all interested parties, in order to avoid irreconcilable decisions. Such indivisibility exists, for instance, where a lease agreement has been concluded between several persons (e.g. a lessor, lessee and the owner of the property).[534] The same applies to a case raising the issue of entitlement to an inheritance.[535]

(5) Limitations of scope

Certain types of judgment fall outside the scope of Art 236 Rv; in particular, a judgment in interim proceedings,[536] though it acquires the res judicata status, never triggers the application of Art 236 Rv. The position is slightly different in respect judgments in petition proceedings;[537] to which Art 236 Rv is in certain cases applied by analogy.

(i) Interim judgments

In urgent cases and in view of the parties' interests, Art 254 Rv allows for a claim of interim measures from the President of a District Court[538].[539] An 'interim judgment' can be declared provisionally executable,[540] even by the court acting of its own motion; however, as noted in relation to the *afstemmingsregel*,[541] an interim judgment does not prejudice the outcome in main proceedings, which may still be initiated regardless of the outcome in the interim proceedings. Article 257 Rv provides to this effect that "interim findings do not affect the main proceedings."[542] A interim judgment is therefore excluded from the scope of Art 236 Rv. The Dutch Supreme Court in *Kloes/Fransman* explained the exclusion as follows:

> [T]he Court of Appeal failed to acknowledge that a judgment in proceedings for an interim measure cannot be attributed res judicata effect. Namely, an interim judgment contains only provisional decisions and findings which are not conclusive on the parties in the main proceedings, nor conclusive in new proceedings for interim measures.[543]

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[533] HR 11 February 1943, NJ 1943, 197; HR 28 June 1946, NJ 1946, 547 (*Landman/Landman*); HR 24 December 1982, NJ 1983, 370 (*Schoonbrood/Schoonbrood*); HR 26 October 1984, NJ 1985, 134; and HR 26 March 1993, NJ 1993, 489 mnt PA Stein.
[534] HR 24 January 1992, NJ 1992, 280.
[535] HR 28 June 1946 (n 533) (*Landman/Landman*).
[536] '*Kort geding vonnissen*'.
[537] '*Beschikkingen*'.
[538] '*Voorzieningenrechter*'.
[539] Article 254(1) Rv.
[540] Article 258 Rv.
[541] See text to n 275ff.
[542] Article 257 Rv ("De beslissingen bij voorraad brengen geen nadeel toe aan de zaak ten principale.").
[543] HR 16 December 1994, NJ 1995, 213 [3.3] (*Kloes/Fransman*) ("Een vonnis in kort geding bevat immers slechts voorlopige oordelen en beslissingen waaraan partijen niet in de bodemprocedure en evenmin in een later kort geding gebonden zijn."). cf Hof Leeuwarden 22 August 2007 (n 418) (*SHP Planontwikkeling BV*); Rb Arnhem 4 July 2007, ECLI:NL:RBARN:2007:BB0138 (*Aloysius Gerardus Maria*); and Rb 's-Gravenhage 20 July 2007, ECLI:NL:RBSGR:2007:BB0014, NJ 2007, 513, NJF 2007, 410 (*De Sociale Verzekeringsbank/ANBO*).

The dispute related to a lease agreement respecting an immovable property. A landlord filed for an interim measure against a tenant, claiming an eviction order on the ground that the tenant had damaged the property and caused a nuisance to other tenants. The President of the Amsterdam District Court rejected the claim.

The landlord subsequently filed another claim for an interim measure, claiming once more the tenant's eviction and damages for the damage caused to their property. In defence, the tenant invoked the first judgment between the same parties by which the same claim had already been rejected. The President in this case granted the claim.

The Amsterdam Court of Appeal reversed and ultimately rejected the claim by application of (what is presently) Art 236 Rv. The court considered that "[the defendant] has invoked the res judicata effect [of the interim judgment]",[544] and added:

> [B]ecause in this case the res judicata effect must be respected, [the claimant] could only be allowed to repeat the claim in the first set of proceedings for an interim measure … if, apart from exceptional circumstances, new facts occurred after the interim judgment acquired the res judicata status that had not been alleged or otherwise established.[545]

On appeal in cassation, the challenge to the Amsterdam Court of Appeal decision was that the court had erroneously attributed res judicata effect to a judgment on a claim for an interim measure. The Supreme Court as noted agreed, and held that that the Court of Appeal had erred by failing to recognise that an interim judgment cannot be attributed res judicata effect, because an interim judgment only contains *provisional* decisions and findings that never have conclusive effect in subsequent proceedings, irrespective whether these are main proceedings or repetitive proceedings for interim measures.[546] Nevertheless, the inapplicability of Art 236 Rv does not mean that interim proceedings are entirely infinite; despite the reluctance of the Supreme Court to impose finality of litigation after judgment in proceedings for an interim measure, [547] the abuse of process doctrine may in exceptional circumstances act as bar, and a number of recent lower court decisions signal attempts to address a perceived problem of a lack of finality after judgment is rendered in interim proceedings.[548]

(ii) Judgments in petition proceedings

Art 236 Rv lacks direct application to judgments in petition proceedings ('*beschikkingen*') in the sense of Book Once, Title Three on 'Petition proceedings at first instance' of the code of civil procedure.[549] Such proceedings are initiated by

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[544] ibid [4.2].
[545] ibid [4.3]-[4.4].
[546] ibid [3.3] ("Een vonnis in kort geding bevat immers slechts voorlopige oordelen en beslissingen waaraan partijen niet in de bodemprocedure en evenmin in een later kort geding gebonden zijn."). cf Hof Leeuwarden 22 August 2007 (n 418) (*SHP Planontwikkeling BV*); Rb Arnhem 4 July 2007 (n 543) (*Aloysius Gerardus Maria*); and Rb 's-Gravenhage 20 July 2007 (n 543) (*De Sociale Verzekeringsbank/ANBO*).
[547] See text to n 538ff.
[548] See text to n 591ff.
[549] Arts 261-291 Rv.

application ('*verzoekschrift*'),[550] as opposed to a claim form ('*dagvaarding*'). This lack of a rule on res judicata effect appeared from a technical viewpoint to exclude the attribution of conclusive effect to findings in a judgment in petition proceedings. However, the Dutch Supreme Court in *Van Gasteren v Beemster* held that Art 236 Rv can be applied by analogy to judgments in petition proceedings:

> Even though [what is now 236 Rv] was enacted for judgments in proceedings initiated by claim form, it is capable of analogous application to judgments given in proceedings on application which are founded on findings regarding the application or issue between the parties.[551]

The case involved a dispute between the owners of apartments on the appropriate method for calculating individual shares in common costs. The method specified by notarial deed defined those cost shares as being proportionate to the estimated value of the apartments which the owners assumed to be corresponding to the original purchase prices. However, this mode of calculation by reference to the original prices eventually caused controversy, since the price of the penthouse, which had been bought by the developer, proved to be strikingly low compared to that of other apartments. The majority of owners therefore sought a change of the notarial deed so as to link the share in the common costs to the construction cost of each apartment, and filed an application with the Alkmaar (sub)District Court for a court authorisation to replace the consent required of owners who refused to cooperate without reasonable ground.[552] The court granted the application.

On appeal, the Alkmaar District Court reversed and rejected the application; according to the court an equitable calculation of the cost shares was possible on the basis of the present deed, by obtaining an independent valuation of the penthouse apartment, and the court added that the purchase price of the penthouse appeared inconsistent with market prices.

Subsequently, after obtaining a valuation of the penthouse by a realestate agent, the applicants filed a new application. In support of their case, the applicants invoked the judgment of the District Court in the first set of proceedings, in particular, the court's finding that the original purchase price of the penthouse appeared inconsistent with normal market prices. The (sub)District Court granted the application. This decision was upheld by the District Court.

On appeal in cassation, the appellant contended that the District Court erred in applying (what is now) Art 236 Rv, because this provision lacked application to judgments given in petition proceedings.

The Supreme Court rejected this argument and confirmed as noted that 236 Rv, though specifically enacted for judgments in summons proceedings, was capable of analogous application to judgments in petition proceedings.[553] Accordingly, as long as a judgment in petition proceedings contains irreversible findings regarding an issue or the application, the judgment can be attributed res judicata effect.

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[550] Art 261 Rvff.

[551] HR 30 October 1998, NJ 1999, 83 [3.3] (*Van Gasteren/Beemster*) ("Hoewel art. 67 Rv is geschreven voor vonnissen, leent het zich voor analogische toepassing op beschikkingen op verzoekschrift, waarin beslissingen zijn gegeven over een rechtsbetrekking in geschil tussen partijen.").

[552] Article 5:140 BW.

[553] HR 30 October 1998 (n 551) [3.3] (*Van Gasteren/Beemster*) ("Hoewel art. 67 Rv is geschreven voor vonnissen, leent het zich voor analogische toepassing op beschikkingen op verzoekschrift, waarin beslissingen zijn gegeven over een rechtsbetrekking in geschil tussen partijen.").

Two points of caution apply: first, the attribution of res judicata effect to a judgment in petition proceedings may be unwarranted by virtue of the particular subject-matter of the case; and, second, certain petition proceedings are on their face contentious in nature, but are in fact insufficiently adversarial in nature to warranting the analogous application of Art 236 Rv.

2. Maintenance and like proceedings

The attribution of res judicata effect may be unwarranted in case the principal object of proceedings is not to settle a dispute on rights and obligations (like in proceedings initiated by claim form) but to safeguard particular public interests, such as the wellbeing of a child, or the (financial) interests of a person who is mentally (or otherwise) unable to look after their own affairs. Though this type of case tends to trigger a great amount of controversy and extensive litigation, Art 236 Rv is unlikely to be applied if the imposition of finality of litigation endangers a satisfactory protection of the interests involved; in other words, the particular subject-matter of proceedings may exclude attribution of res judicata effect, notwithstanding that the proceedings is contentious in nature.

Take the example of judgments on maintenance obligations. Judgments on maintenance obligations are given on application, and proceedings are often highly contentious in character. The Supreme Court confirmed that "[i]n principle, res judicata effect in the sense of Article 236 Rv attaches equally to findings on issues arising in respect of a application for maintenance that underly a judgment between the same parties that has res judicata status".[554] But, the Court immediately added the following qualification:

> This res judicata effect, however, is limited in that … a judgment on maintenance obligations can be revised or revoked by a subsequent judgment if it is no longer justified due to a change of circumstances … or if it was never justified as it was based on inaccurate or incomplete facts …. In proceedings involving a request … for the revision of a judgment on maintenance, the court is not bound by findings underlying the judgment whose amendment is requested, if one of the grounds for revision is fulfilled. In those circumstances, the court will have to redetermine the maintenance obligations and it is not bound by findings in the judgment of which the revision is sought.[555]

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[554] HR 25 May 2007, ECLI:NL:HR:2007:BA0902, NJ 2007, 518 mnt SFM Wortmann, RvdW 2007, 502, JPF 2007, 113 [3.4.1] ("In beginsel komt ook gezag van gewijsde, als bedoeld in art. 236 Rv., toe aan beslissingen met betrekking tot geschilpunten ter zake van aanspraken op levensonderhoud, vervat in een tussen dezelfde partijen gegeven, in kracht van gewijsde gegane beschikking …."). cf HR 30 October 1998 (n 551) (*Van Gasteren/Beemster*).

[555] ibid ("Dit gezag van gewijsde wordt evenwel in zoverre beperkt dat ingevolge art. 1:401 BW een rechterlijke uitspraak betreffende levensonderhoud bij een latere uitspraak kan worden gewijzigd of ingetrokken, wanneer zij nadien door wijziging van omstandigheden ophoudt aan de wettelijke maatstaven te voldoen (lid 1) of indien zij van de aanvang af niet aan de wettelijke maatstaven heeft beantwoord doordat bij die uitspraak van onjuiste of onvolledige gegevens is uitgegaan (lid 4). Wordt op de voet van art. 1:401 wijziging van een rechterlijke uitspraak betreffende levensonderhoud verzocht, dan is de rechter niet gebonden aan geschilbeslissingen in de uitspraak waarvan wijziging wordt verzocht, indien blijkt dat een of meer van de in die bepalingen genoemde gronden zich voordoen. De rechter zal in dat geval de uitkering tot levensonderhoud opnieuw hebben vast te stellen, rekening houdend met alle terzake dienende omstandigheden, en hij is daarbij niet gebonden aan oordelen omtrent die omstandigheden in de beslissing waarvan wijziging wordt verzocht ….").

The case involved a claim for revision of a maintenance judgment. The applicant alleged a lack of ability to pay. In reply, the respondent invoked Art 236 Rv and argued that the finding establishing the applicant's ability to pay in the first set of proceedings was conclusive. Moreover, the respondent contended that there was no change in circumstances, but that the applicant had simply failed to successfully contest the ability to pay in the prior case.

On appeal in cassation, the Supreme Court held that no res judicata effect could attach to the existing judgment and that the finding of the applicant's ability to pay could not have conclusive effect, because Dutch law expressly provided for the possibility of applying for a revision of the decision on maintenance on the ground that the judgment was based on a wrong or incomplete factual basis. In respect of the respondent's second argument that the applicant had failed to successfully dispute the ability to pay, the Court held that "it is irrelevant that it is partly due to an applicant's own fault that the court based its judgment on inaccurate or incomplete information".[556]

2. Insufficiently adversarial proceedings

The second point of caution concerns the fact that certain petition proceedings are insufficiently adversarial in nature to justify application by analogy of Art 236 Rv, because the parties lack an adequate opportunity in the course of proceedings to litigate the matters in dispute to the extent warranting the attribution of res judicata effect to the resulting judgment.

By way of example, consider the following recent decision of the Arnhem Court of Appeal in an employment dispute.[557] As a general matter, proceedings on an application for the termination of an employment agreement tend to be highly contentious in nature. The court hearing the application held that Dutch law, not German law, governed the employment agreement. In subsequent proceedings, the issue of applicable law again cropped up. The employee invoked Art 236 Rv, and argued that the finding on applicable law had conclusive effect in the new case, thus excluding the other party from successfully pleading applicability of German law.

The Arnhem Court of Appeal held that "the nature of the proceedings, which involves only marginal consideration of the issues, excludes that the resulting judgment in respect of the finding on the applicable law is attributed res judicata effect."[558] The court therefore redetermined the issue (eventually the court also found Dutch law was applicable).

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[556] ibid ("Meer in het bijzonder bij de toepassing van art. 1:401 lid 4 geldt dat niet van belang is of het (mede) aan de partij die wijziging verzoekt is te wijten dat de rechter bij zijn eerdere beslissing is uitgegaan van onjuiste of onvolledige gegevens…. Hieruit volgt dat het voorgaande ook van toepassing is in een procedure waarin op de voet van art. 1:401 wijziging van de alimentatie wordt verzocht, terwijl in een eerdere procedure waarin door de verzoeker hetzelfde was verzocht, dat verzoek was afgewezen omdat de verzoeker onvoldoende gegevens had overgelegd ter staving van de door hem aan zijn verzoek ten grondslag gelegde wijziging van omstandigheden."). cf HR 28 May 2004, ECLI:NL:HR:2004:AO4015, NJ 2004, 475 mnt SFM Wortmann, RvdW 2004, 77, EB 2004, 66; and HR 21 April 2006, ECLI:NL:HR:2006:AU9734, NJ 2006, 269, RvdW 2006, 417, RFR 2006, 72, FJR 2006, 94 mnt IJ Pieters.

[557] Hof Arnhem 15 December 2009, ECLI:NL:GHARN:2009:BL9006.

[558] ibid [3.3] ("Naar het oordeel van het hof verzet de aard van de rekestprocedure in hoger beroep, nu het daarbij slechts om een marginale toets gaat, zich er tegen dat aan deze beschikking ten aanzien van het oordeel met betrekking tot het toepasselijke recht gezag van gewijsde toekomt.").

(6) Exceptions

In spite of fulfilment of the (pre)conditions for application of Art 236 Rv, a judgment may be denied res judicata effect in circumstances that justify an exception to prevent undesirable consequences. The text of the provision does not state such general ground for an exception; Article 236(2) Rv merely provides for an exception to the extension of res judicata effect to privies, by stating that this extension occurs "unless the law provides otherwise". Nevertheless, albeit in a different context,[559] the Supeme Court has previously shown itself reluctant to imposing finality of litigation in circumstances where this would have "undesirable consequences".[560]

(i) A material change of circumstances

Enforcing finality may be undesirable in light of a material change in (factual)[561] circumstances. This exception is similar to that applicable to the *afstemmingsregel*, which doctrine the Supreme Court held is inapplicable "if there is a change in circumstances of such a nature that it must be assumed that the court in the main proceedings would have rendered a different decision, had it known these circumstances."[562] For example, in *Erkelens Beheer BV/Stichting Pensioenfonds Metaal en Techniek*,[563] the Hague Court of Appeal rejected an attempt at defeating a plea of res judicata by holding that the change of circumstances should justify a different determination of the claim (or issue).[564] After establishing that the judgment triggered res judicata effect, the court added that:

> [The circumstances] alleged by the [respondent] that [the issue] should now be determined differently are in the court's view insufficient. [The circumstances] are marginal …. Most of [the circumstances] remain [identical], so that it is inconceivable that the change in circumstances imply that the res judicata effect no longer pertains.[565]

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[559] See text to n 163ff.

[560] HR 12 June 1970 (n 163) (*Van Houtem/Aussems*).

[561] The exception does not apply to a change in the law, including case law. If the legislator wishes to achieve this ex ante effect, it must provide for this expressly. See AG Leijten in HR 11 October 1985, NJ 1986, 40 (*Omega Schoenen BV/Monisima BV*).

[562] HR 7 January 2011 (n 276) [3.4.2] (*Yukos International UK BV/OOO Promneftstroy*) ("…indien sprake is van een zodanige wijziging van omstandigheden dat moet worden aangenomen dat de bodemrechter ingeval hij daarvan op de hoogte zou zijn geweest, tot een andere beslissing zou zijn gekomen.").

[563] Hof 's-Gravenhage 3 November 2006, ECLI:NL:GHSGR:2006:AZ4151, PJ 2008, 24.

[564] cf HR 20 February 1942, NJ 1942, 351.

[565] Hof 's-Gravenhage 3 November 2006 (n 563) [3.3] ("Hetgeen door geïntimeerde sub 2 is aangevoerd ten betoge dat de werkzaamheden van Clean=Clean thans zodanig zijn gewijzigd dat daar thans anders over moet worden geoordeeld acht het hof onvoldoende. Tussen partijen is niet in geschil dat het gebruik van de wasstraten slechts een zeer klein deel van de werkzaamheden uitmaakt. Het overgrote deel van de werkzaamheden die in het bedrijf van Clean=Clean worden uitgevoerd bestaat nog steeds uit het wrijven en behandelen van diverse delen van auto's, nieuwe en gebruikte en zowel aan de buitenkant als aan de binnenkant met diverse materialen, vloeistoffen, niet zijnde water, zodat niet valt in te zien dat door de wijziging van de werkzaamheden het gezag van gewijsde thans niet meer zou bestaan. Dat in de eerdere procedure geen getuigen zijn gehoord doet aan het gezag van gewijsde niet af, evenmin als het feit dat in deze procedure ook andere partijen als eiser optreden. De conclusie is dat krachtens het gezag van gewijsde van het vonnis van 19 maart 1996 Clean=Clean niet valt onder de werkingssfeer van de SVUM en dat de grief slaagt. De vorderingen van geïntimeerde sub 2 zullen worden afgewezen.").

It is suggested that a relevant change of circumstances may concern facts occurring before or after the judgment, but that facts which could have been raised in the prior case cannot be invoked as amounting to a change of circumstances sufficient to defeat a plea of res judicata.[566]

Finally, the situation of a change of circumstances that justifies an exception to res judicata effect must be distinguished from the situation where a change of circumstances simply amounts to a new cause of action that justifies granting the same remedy. In this sense, the Hague Court of Appeal held, and the Supreme Court approved, that "res judicata effect does not bar another claim… if [the claimant] founds this claim on the basis of new circumstances relevant to the claim and those circumstances are established."[567] In that case, a husbands claim for a divorce was rejected, and later he filed an new claim for divorce on the basis of new circumstances. In such case, the claim is different and no res judicata effect attaches in the first place.

2.8 Misbruik van (proces)recht

Abuse of process

As a general rule, Art 3:13(1) BW prohibits the exercise of a right to the extent it is abused.[568] Through Art 3:15 BW this prohibition extends to the law of procedure;[569] hence, the provision also precludes abuse of procedural rights ('*misbruik van procesrecht*'), apart from abuse of substantive rights.[570]

In the present context, the rights implicated include in particular the right of court access, as guaranteed under Art 6(1) ECHR, specifically the right to file a claim or defence and to raise issues, and an adequate opportunity to litigate a case. (Note that a right of action in the sense of Art 3:303 BW is technically a substantive right.)[571]

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[566] cf Beukers (n 3) 79.

[567] HR 6 April 1990, NJ 1990, 516 [3.2] ("…gezag van gewijsde niet eraan in de weg staat dat de man thans opnieuw een vordering tot ontbinding van het huwelijk instelt wanneer hij aan die vordering gewijzigde, voor de rechtsbetrekking in geschil relevante omstandigheden ten grondslag legt en die omstandigheden komen vast te staan.").

[568] Article 3:13(1) BW ("1. Degene aan wie een bevoegdheid toekomt, kan haar niet inroepen, voor zover hij haar misbruikt."). cf HR 17 February 1927, NJ 1927, 391 (holding that every right can be exercised in a manner that is unnecessary and unreasonable); and HR 15 June 1928, NJ 1928, 1604 (to establish an abuse of right, it must be established in fact that the person who has the right exercised it without any reasonable interest).

[569] Article 3:15 BW. cf Enactment of Books 3-6 of the new Civil Code Act (fourth part) (amendment of Book 3) (Explanatory Memorandum) (*Invoeringswet Boeken 3-6 van het nieuwe Burgerlijk Wetboek (vierde gedeelte) (wijziging van Boek 3)*) Kamerstukken II (1981-1982) 17496 No 3, 11 (*MvT*) ("Room has been left for the development of a separate test for the abuse of procedural rights (HR 26 June 1959, NJ 1961, 553), in which test also the public interest tends to be included.") ("Op dezelfde wijze wordt tevens ruimte geschapen voor een afwijkende maatstaf voor misbruik van processuele bevoegdheden (HR 26 juni 1959, NJ 1961, 553), waarbij eveneens publieke ke belangen (het belang van een goede procesorde of van een behoorlijke rechtspleging) betrokken plegen te zijn.").

[570] *Invoeringswet Boeken 3-6 van het nieuwe Burgerlijk Wetboek (vierde gedeelte) (wijziging van Boek 3), Memorie van Toelichting* (1981-1982) 17 496, nr 3, 10.

[571] See text to n 160ff.

(1) Effect

Though potentially far-reaching, compared to equivalent doctrines abroad, like English abuse of process doctrine,[572] the role of abuse of process as part of Dutch preclusion law is (currently) relatively limited.

Nevertheless, in the event of a violation of the abuse of rights prohibition, the responsible statement of case (e.g. the claim or defence, or the pleading raising or arguing an issue) can be struck out, or "passed over" as the Dutch Supreme Court put it in *Dogan/The Netherlands*.[573] Further, if the abuse causes (or is likely to cause) damage or affects some other legally protected interest, the abuse may form the basis for a claim in tort,[574] and the award of damages or other relief like an injunction. (Note that as regards injunctive relief obtainable from the court, it has been held that this relief would need to be carefully limited, because "a (generally stated) injunction could violate Art 6 ECHR which guarantees the unobstructed access to justice.")[575]

(2) Nature and rationale

The parliamentary history clarifies that Art 3:13 BW aims "to enable the court to restrain legal rights which are exercised in a manner that is—shortly stated—unacceptable".[576] The norm itself is addressed to *parties*, not courts, and serves primarily the private interest; the provision is not then of public policy and courts apply it only when a violation is duly alleged.

Conversely, in certain cases, the exercise of a procedural right may disproportionally affect the *public* interest in a sound administration of justice, in which case the court must be able to act of its own motion.[577] However, this involves enforcement of a sound administration of justice, not the prevention (or remediation) of an abuse of right.

(3) What amounts to an abuse?

According to Art 3:13(2) BW,[578] an abuse of right may consist especially in three circumstances: first, the exercise of a right with no other purpose than to harm

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[572] See Chapter 1, text to n 470ff.

[573] HR 8 October 1993, NJ 1994, 508 mnt HJ Snijders [3.4] (*Dogan/Staat*) ("ter zijde laten").

[574] Article 6:162 BW.

[575] Rb Amsterdam 17 March 2011 (n 293) [7.7] (*OOO Promneftstroy/Yukos International UK BV*) ("Vordering F (een procesverbod) is evenmin toewijsbaar omdat de voorzieningenrechter niet in de toekomst kan kijken. Yukos heeft zich in dit verband beroepen op misbruik van (proces)recht aan de zijde van Promneftstroy, maar ook hier geldt dat aan een dergelijk beroep hoge eisen moeten worden gesteld. Aan die eisen is in dit geval niet voldaan. Niet kan worden gezegd dat Promneftstroy procedures aanhangig maakt tegen Yukos met geen ander doel dan Yukos te schaden (zie artikel 3.13 BW). Toewijzing van een (algemeen geformuleerd) procesverbod zou bovendien strijdig kunnen zijn met artikel 6 EVRM dat het recht op onbelemmerde toegang tot de rechter waarborgt.").

[576] *Invoeringswet Boeken 3-6 van het nieuwe Burgerlijk Wetboek (vierde gedeelte) (wijziging van Boek 3), Memorie van Toelichting* (1981-1982) 17 496, nr3, 10.

[577] But see HR 14 April 1989 (n 24) (the fact that a party could in other proceedings still make their claim (for the first time) was an insufficient reason for striking out the claim in other proceedings, while the opponent had not objected to the claim).

[578] ("A power can be abused in among other ways by exercising it with no other aim but to damage another person or with an aim other than the aim for which the power was conferred, or if exercise of the power is unreasonable considering the disproportional impact on the interest affected compared to the

another person; second, the exercise of a right for another purpose than for which it was created; or, finally, the exercise of a right that affects another protected interest disproportionately compared to the interest served.

The first scenario is logically a particular of the second; no right is created for the purpose of harming another person (*détournement de pouvoir*). The two scenarios are therefore discussed jointly. Further, application of the rule in the third scenario involves a weighing of interests:[579] on the one hand, the interest served by allowing the conduct; on the other hand, the interest affected by allowing the conduct. Conversely, the first and second scenarios do not involve such balancing act; any exercise of a right for a different purpose than for which the right was created is barred.

(i) Use of a right for another than its intended purpose

A party that alleges abuse consisting in the exercise of a procedural right for a purpose other than the purpose for which the right was created (including for the sole purpose of harming another person) must plead, and if contested, prove the circumstances that amount to the abuse; as the Amsterdam District Court in *Promneftstro/Yukos* observed, "the bar is high for such a plea".[580] For instance, while the 's-Hertogenbosch Court of Appeal acknowledged that "a repeated application for a declaration of insolvency can amount to an abuse of process", it recognised at the same time that "[t]he sole circumstance that a prior application … was rejected does not make [a new application] an abuse of process."[581]

(ii) Use of a right that disproportionately affects another's interest

Establishing this form of abuse is difficult; for instance, the exercise of a right to make a statement of case amounts to an abuse of process only if, despite its legitimate aim, it *disproportionally*[582] affects (or is likely to affect) the interest of the opponent involved in the proceedings. Only exceptionally, the balance of the interests served and affected mandates barring the exercise of the right; two possible circumstances include, first, a claim or other pleading based on a statement of facts the claimant knows (or should know) to be (plainly) untrue; and, second, a statement of case that the responsible party knows (or should know) from the start to lack any prospect of success (whatsoever), thereby rendering the pleading entirely inappropriate.[583]

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interest served.") ("Een bevoegdheid kan onder meer worden misbruikt door haar uit te oefenen met geen ander doel dan een ander te schaden of met een ander doel dan waarvoor zij is verleend of in geval men, in aanmerking nemende de onevenredigheid tussen het belang bij de uitoefening en het belang dat daardoor wordt geschaad, naar redelijkheid niet tot die uitoefening had kunnen komen.").

[579] HR 29 June 2001, ECLI:NL:HR:2001:AB2388, JOR 2001, 169, TVI 2001, 197 mnt GW [3.5] ("Anders dan waarvan de klacht uitgaat komt bij beoordeling van de vraag of een bevoegdheid is misbruikt doordat zij is uitgeoefend voor een ander doel dan waarvoor zij is verleend, naar volgt uit art. 3:13 lid 2 BW, een belangenafweging niet aan de orde.").

[580] Rb Amsterdam 17 March 2011 (n 293) [7.7] (*OOO Promneftstroy/Yukos International UK BV*) ('"…aan een dergelijk beroep hoge eisen moeten worden gesteld.").

[581] Hof's-Hertogenbosch 19 September 2007 (n 164) [4.2.3] ("Vorenstaande laat onverlet dat een herhaald verzoek tot faillietverklaring misbruik van procesrecht kan opleveren. Van enige misbruikgrond als genoemd in artikel 3:13 lid 2 BW is het hof niet kunnen blijken. De enkele omstandigheid dat een eerder verzoek tot faillietverklaring werd afgewezen levert geen misbruik van procesrecht op.").

[582] Article 3:13(2) BW.

[583] Rb Den Haag 24 February 2010, ECLI:NL:RBSGR:2010:BM1469 [3.2] ("[O]nly in highly exceptional circumstances there can be an abuse of process, in particular where a claim is based on a

For the purpose of illustrating the exceptional nature of this form of abuse, consider *X/Dusseldorp Beheer BV*.[584] In this case, the Hague Court of Appeal held that the fact that a judgment is likely to have res judicata effect is in itself insufficient to conclude that a claim lacks any prospect of success, so as to render an abuse the exercise of the right to file a claim.

The defendant in the case argued that the claimant made an abuse of process by filing a claim notwithstanding that the res judicata effect of the judgment given in a prior case between the parties implied that the new claim had no real chance of success, and claimed damages in tort for violation of Art 3:13(1) BW. First, unlike the District Court, the Hague Court of Appeal accepted that the defendant had rightly invoked the res judicata effect of the existing judgment. But then the court observed:

> [T]his does not automatically imply that [the defendant's] claim in tort [for abuse of process] is well-founded. In the event that a claim can be successfully defeated by a plea of res judicata, this does not automatically mean that the claim is to be regarded as having no prospect of success so that the principle of access to justice must be set aside.[585]

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statement of facts the claimant knew or should have known to be (plainly) untrue or on a statement of case of which the claimants should from the start have understood that they had no prospect of success (whatsoever) and were thus entirely inappropriate….") ("…slechts bij hoge uitzondering sprake kan zijn van misbruik van procesrecht, met name indien een vordering is gebaseerd op feiten en omstandigheden waarvan de eisers de (evidente) onjuistheid kenden of behoorden te kennen of op stellingen waarvan de eisers op voorhand moesten begrijpen dat deze geen (enkele) kans van slagen hadden en dus volstrekt ondeugdelijk waren (vergelijk Hoge Raad 29 juni 2007, NJ 2007 nr. 353)."). cf HR 29 June 2007, ECLI:NL:HR:2007:BA3516, NJ 2007, 353, RvdW 2007, 638 [4.5] (*Waterschap Regge en Dinkel/Milieutech Beheer BV*) ("The basis for this claim was not accepted [in the prior case], but this does not imply that [the claimant] made an abuse of process or committed a tort in their relation with [the defendant] by initiating these proceedings. This could only be the case if [the claimant] had based their claim on facts and circumstances of which they knew or had to know the inaccuracy or on statements of case which they should have understood to be without any prospect of success." ("De grondslag van deze vordering is weliswaar in de tweede herroepingsprocedure niet als juist aanvaard, doch daaruit volgt niet dat de Waterschappen ten opzichte van Milieutech misbruik van procesrecht hebben gemaakt of onrechtmatig hebben gehandeld door deze procedure te voeren. Daarvan zou pas sprake kunnen zijn als de Waterschappen hun vordering hadden gebaseerd op feiten en omstandigheden waarvan zij de onjuistheid kenden of hadden behoren te kennen of op stellingen waarvan zij op voorhand moesten begrijpen dat deze geen kans van slagen hadden, zoals het hof in rov. 4.7 en 4.8 van zijn tussenarrest — in cassatie onbestreden gelaten — in enigszins andere bewoordingen had vooropgesteld. Onderdeel 5 klaagt terecht dat het hof in zijn eindarrest is uitgegaan van een andere, hiermee niet in overeenstemming zijnde, maatstaf.").

[584] Hof Arnhem 31 March 2009 (n 395).

[585] ibid [5.1]-[5.2] (5.1 In eerste aanleg heeft Dusseldorp Beheer in reconventie gesteld dat [appellant] door haar in rechte te betrekken hoewel het gezag van gewijsde van de in het eerste geding genomen beslissingen zijn vordering bij voorbaat kansloos maakte, misbruik van procesrecht heeft gemaakt en jegens haar, Dusseldorp Beheer, onrechtmatig heeft gehandeld. … 5.2 Anders dan de rechtbank is het hof, zoals uit het in de vorige paragraaf overwogene volgt, van oordeel dat Dusseldorp Beheer het gezag van gewijsde terecht heeft ingeroepen. Dat betekent nog niet noodzakelijkerwijs dat de vordering van Dusseldorp Beheer toewijsbaar is. Indien tegen een vordering met succes het gezag van gewijsde van eerdere uitspraken ingebracht heeft kunnen worden, volgt daaruit nog niet dat ten tijde van het instellen van de vordering deze als op voorhand kansloos diende te worden beschouwd in die zin en in die mate dat het uitgangspunt van de vrije toegang tot de burgerlijke rechter daarvoor moet wijken. De vraag hoe ver het gezag van gewijsde strekt en of en in hoeverre het aan toewijzing van de ingestelde vordering in de weg staat, kan afhankelijk zijn (en was in dit geval ook afhankelijk) van uitleg van de eerdere uitspraken. Dat over die uitleg in redelijkheid verschillend gedacht kan worden, wordt in het onderhavige geding naar het oordeel van het hof treffend geïllustreerd door het feit dat de rechtbank er ook inderdaad anders over dacht. Op deze gronden verwerpt het hof deze grief.").

The court reasoned this decision by reference to the fact that defining the proper scope of res judicata effect, and determining whether and to what extent this affects a claim may require the interpretation of the judgment invoked for purposes of founding the plea of res judicata; a court cannot without first undertaking this interpretation strike out a claim.

(iii) Raising matters which could and should have been raised before

The filing of a claim or the raising of an issue which could have been filed or raised in a prior case can amount to an abuse. This situation is not a selfstanding form of abuse; the abuse consists either in the keeping back of a claim or issue with the aim of harassing the other party in new proceedings, or in the exercise of a right to raise a matter that, despite its legitimate aim, disproportionally[586] affects the interest of the opponent in the proceedings.

The Dutch Supreme Court in *Kenouche/The Netherlands*[587] contemplated the latter form of abuse when it held that raising matters which could have been raised before can amount to abuse, "if those matters were kept back by a party in the first interim proceedings with no reasonable cause notwithstanding the reasonable interest of the opponent in their immediate determination in the first case."[588] The Court added that "a significant factor can be whether the matters could still be made in the context of an appeal in respect of the first judgment which had not yet ended [at the time of the new claim]".[589]

This case involved proceedings on a claim for an *interim* measure against the *State*; the Court specifically acknowledged "the State's legitimate interest in cases like the present that without valid reason new facts are not repeatedly advanced in new interim proceedings, which interest cannot be sufficiently protected by a cost order against the claimant in the second interim proceedings."[590] Though it it is

[586] Article 3:13(2) BW.
[587] HR 8 October 1993 (n 573) (*Dogan/Staat*).
[588] ibid [3.4] ("Met betrekking tot de overige klachten van het middel stelt de Hoge Raad voorop dat de rechter in kort geding verplicht is om op alle in overeenstemming met de regelen van procesrecht aangevoerde relevante stellingen van partijen acht te slaan, ook als deze reeds in een eerder kort geding tussen dezelfde partijen naar voren gebracht hadden kunnen worden, maar niet naar voren gebracht zijn. Dit lijdt slechts uitzondering, wanneer de betreffende partij door pas in het tweede kort geding deze stellingen in te roepen misbruik van procesrecht zou maken. Dit zal zich, voor zover in deze zaak van belang, kunnen voordoen en dan tot ter zijde laten van die stellingen kunnen leiden, wanneer deze stellingen, in weerwil van een redelijk belang van de tegenpartij dat ook daarop reeds destijds terstond zou worden beslist, in het eerste kort geding zonder redelijke grond zijn achtergehouden. Bij de beoordeling daarvan kan van belang zijn of de betreffende stellingen na het tweede kort geding alsnog in een nog niet geëindigd hoger beroep van het eerste kort geding aan de orde konden worden gesteld, wat in het onderhavige geval ten tijde van de uitspraak van de president in eerste aanleg het geval was. Opmerking verdient voorts dat de Staat er een te respecteren belang bij heeft dat in zaken als de onderhavige niet steeds weer, zonder goede grond, nieuwe feiten in een nieuw kort geding naar voren kunnen worden gebracht, aan welk belang niet reeds kan worden tegemoet gekomen door de eisende partij in de kosten van het tweede kort geding te veroordelen.").
[589] ibid ("Bij de beoordeling daarvan kan van belang zijn of de betreffende stellingen na het tweede kort geding alsnog in een nog niet geëindigd hoger beroep van het eerste kort geding aan de orde konden worden gesteld, wat in het onderhavige geval ten tijde van de uitspraak van de president in eerste aanleg het geval was.").
[590] ibid ("Opmerking verdient voorts dat de Staat er een te respecteren belang bij heeft dat in zaken als de onderhavige niet steeds weer, zonder goede grond, nieuwe feiten in een nieuw kort geding naar voren kunnen worden gebracht, aan welk belang niet reeds kan worden tegemoet gekomen door de eisende partij in de kosten van het tweede kort geding te veroordelen.").

unclear how this case translates to the admittedly different context of *main* proceedings in *civil and commercial* cases, it is suggested that broadly the same considerations apply to individual claimants faced with repeated claims and issues which could have been raised in prior proceedings, but were not without reasonable cause.

(iii) Developments regarding interim proceedings

Certain recent lower court decisions signal attempts at addressing a perceived problem of a lack of finality following the rendition of judgment in interim proceedings. The problem is two-fold. First, the prior rejection of a claim for an interim measure does not imply that a court can automatically strike out a new claim for an interim measure that is based on the same facts, even if the claimant failed to appeal the prior rejection. To this effect, the Dutch Supreme Court in *Kloes/Fransman* ruled that "the sole circumstance that a claimant in interim proceedings failed to appeal a judgment in an earlier set of interim proceedings in which they stated (also) the same facts in support of their claim, need not imply that the court in subsequent interim proceedings must refrain from a (repeated) assessment of those facts."[591] While in *Kenouche/The Netherlands* the Supreme Court warned that "the failure to file an appeal can contribute to the conclusion that to file again a claim in interim proceedings on the same grounds for the relief that was previously denied in interim proceedings amounts to an abuse of process",[592] this failure is only one factor in the assessment, and the bar for establishing abuse is high.

In the second place, as discussed elsewhere,[593] a judgment in interim proceedings, even one that has acquired res judicata status, is excluded from the scope of Art 236 Rv and never triggers res judicata effect; the Dutch Supreme Court in *Kloes/Fransman* explained why: "A judgment in interim proceedings contains only *provisional* findings which are not conclusive upon parties in main proceedings, nor in subsequent interim proceedings."[594] The parties cannot then be barred from contradicting its findings.

Nevertheless, two examples of recent practice show that establishing abuse may not be an unsurmountable hurdle. The first case involved a dispute which stemmed from the foreclosure and sale of a property. The party being foreclosed initiated interim proceedings against the new owners claiming an injunction against the transfer of ownership of the property, which had been sold at an auction, on the ground that the auctioning of the property was unlawful, because the debt to the bank as well as the auctioning costs had been paid *before* the auction took place.

After this claim was rejected, the same claimant filed another claim on the same ground, albeit this time for interim injunctive relief to avert their eviction from the property by the new owners.

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[591] HR 16 December 1994 (n 543) [3.3] (*Kloes/Fransman*) ("de enkele omstandigheid dat de eisende partij in kort geding niet in hoger beroep was gekomen van het vonnis in een eerder kort geding waarin hij (mede) dezelfde feiten aan zijn vordering ten grondslag had gelegd, niet behoeft mee te brengen dat de rechter in het tweede kort geding zich moet onthouden van een (herhaald) onderzoek van die feiten.").
[592] ibid.
[593] See text to n 538ff.
[594] HR 16 December 1994 (n 543) [3.3] (*Kloes/Fransman*) (emphasis added) ("Een vonnis in kort geding bevat immers slechts voorlopige oordelen en beslissingen waaraan partijen niet in de bodemprocedure en evenmin in een later kort geding gebonden zijn.").

The Arnhem District Court dismissed the claim as inadmissible for abuse of process. First the court confirmed that the prior interim judgment could not trigger any res judicata effect, so that "[i]n subsequent proceedings between the same parties the findings of the court on the claim(s) or issue(s) between the parties are not conclusive, unlike in the situation following judgment in main proceedings."[595] According to the District Court, this implied that "in subsequent interim proceedings the claims and issues arising between the parties can be relitigated."[596] But then the District Court explained why the filing of the new claim might be characterised as an abuse of process:

> If this occurs [i.e. the filing of a new claim in interim proceedings] based on exactly the same facts and circumstances as in the preceding interim proceedings, either there will not be a sufficient interest in the new interim proceedings or the situation can amount to an abuse of process, as a result of which the new claim in interim proceedings will have to be dismissed.[597]

The decision sits uncomfortably with the special character of interim proceedings; moreover, the mere fact that the new claim was based on exactly the same facts is insufficient to justify characterising the claim as an abuse. The District Court should have verified whether the claimant filed the claim for another purpose than for which their right of action existed, or whether the interest of the defendant not to be bothered with another claim outweighed the claimant's interest in filing the claim. Another question altogether is whether Art 3:303 BW might deny the claimant a right of action for lack of a sufficient interest in filing the claim.[598]

The second case arose from a dispute relating to public procurement. One of the unsuccessful parties initiated interim proceedings to challenge the authority's decision to award the project to another. This claim was rejected. Then another party, also unsuccessful in the procurement, initiated interim proceedings with a view to challenge the decision awarding the project to the successful party. The 's-Hertogenbosch District Court struck out the claim as an abuse of process. The District Court conceded, however, that:

> There is no rule of law that forbids a third party from initiating interim proceedings involving a person who was also a party to prior interim proceedings. Neither is it excluded that such interim proceedings imply a new finding on the issues that arose between the parties in the prior interim proceedings. This is inherent in the nature of interim proceedings; interim judgments have not res judicata effect, the court in interim proceedings is not confined by the prior finding, nor is the court in main proceedings.[599]

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[595] Rb Arnhem 4 July 2007 (n 543) [4.2] (*Aloysius Gerardus Maria*) ("In latere procedures tussen dezelfde partijen staat, anders dan bij een uitspraak in een bodemprocedure het geval is, niet onbetwistbaar vast wat de rechter over hun rechtsbetrekking in een eerder kort gedingvonnis heeft beslist….").

[596] ibid ("Dit betekent dat ook in een later kort geding opnieuw de rechtsbetrekking van partijen aan de orde kan worden gesteld.").

[597] ibid ("Als dat gebeurt op precies dezelfde feiten en omstandigheden en met aanvoering van precies dezelfde gronden als in het eerdere kort geding, zal evenwel het belang bij het latere kort geding ontbreken dan wel zal dat misbruik van procesrecht kunnen opleveren, op grond waarvan de vordering in het latere kort geding moet worden afgewezen….").

[598] See text to n 163ff.

[599] Rb 's-Hertogenbosch 12 July 2011, ECLI:NL:RBSHE:2011:BR1264 [4.6].

Nevertheless, it concluded the claim amounted to an abuse. Most importantly, the District Court reasoned that the claimant had a full and adequate opportunity to litigate the claim by joining the prior proceedings and no clear reason for not using this opportunity, so that the State's interest was disproportionately affected by the delays and cost of litigating the claims separately and successively. The District Court added that three considerations further jusitified striking the claim out as an abuse of process. First, it is in the public interest that all grievances relating to one procurement are resolved together in the same proceedings so that public procurement can be conducted as efficiently as possible, which implies that interested third parties will have to join and intervene in the proceedings as much as possible. Second, the failure to join the prior proceedings conflicts with the public interest that parties show restraint in their addressing courts with claims. Finally, the claimant was informed of the existence of the interim proceedings.[600]

2.9 Interface and delineation

The identification of various aspects of preclusion implies the need to consider their interface and delineation. As a general rule, as Beukers suggests,[601] rules of preclusion other than Art 236 Rv are *supplementary* in that they effect finality of litigation in circumstances where, for one reason or another, *gezag van gewijsde* does not arise.

(1) Leer van de bindende eindbeslissing: finality within the same instance

A straightforward delineation applies between the *leer van de bindende eindbeslissing*[602] and the two remaining rules of preclusion which are similarly relevant only within the confines of a single case: whereas the *leer van de bindende eindbeslissing* involves preclusion *within the same instance* (either at first instance or on appeal) by forcing a court to stick by its own final and unconditional findings in the remainder of proceedings, the *grievenstelsel*[603] and the *grenzen aan de rechtsstrijd na cassatie*[604] both relate exclusively to preclusion *in another instance*, to be precise, the appellate instance and the instance of referral after cassation respectively.

At some point the Dutch Supreme Court appeared to equate all rules which effect finality within the context of one and the same case, treating them all as part of the doctrine of the *leer van de bindende eindbeslissing.*[605] Now it is clear, however, that the (three) rules in question diverge in terms of their effect and, more fundamentally, that they are rooted in different doctrines altogether. In fact, only the rule that a court may not revisit its own final findings contained in an interlocutory judgment later on in the same instance remains associated with the doctrine of the *leer van de bindende eindbeslissing.* This became clear when the Court recently

[600] ibid [4.7].
[601] Beukers (n 3) 17.
[602] See text to n 76ff.
[603] See text to n 110ff.
[604] See text to n 143ff.
[605] See, eg, HR 4 May 1984 (n 77) (*Van der Meer/Siller*). cf HR 16 September 1994, NJ 1995, 75.

restruck the balance between correctness and repose in respect of this rule so as to allow a court to revisit its own final judicial findings in circumstances where this averts that a final judgment is founded on an erroneous factual or legal basis.[606] The Court subsequently made clear that this change applies only to preclusion within the same instance, noting that upon referral of a case back to a lower after cassation, "the question is *not* whether the court could revisit a final finding of the Court of Appeal."[607] According to the Court, "the dispute was so demarcated after cassation that the issue had been determined once and for all and that the finding of the [Court of Appeal] on the issue had become *irreversible*."[608] Permitting the court to revisit the finding in question, the Court added, "was impossible at this stage of the case".[609] The difference between these rules of preclusion is understandable considering that the rule which derives from the *leer van de bindende eindbeslissing* applies to *final* judicial findings, which can still be challenged on appeal, whereas the other two rules concern findings which are *irreversible*, which can no longer be challenged on appeal.

The rule of preclusion which derives from the Dutch appellate system, which provides that only those findings actually challenged are as a rule subject to appellate review (the '*grievenstelsel*') and which implies that a court of appeal is barred from revisiting the findings of a lower court which the parties have failed to challenge in their grounds of appeal, is equivalent to the rule of preclusion addressed in this section in the sense that both rules concern judicial findings which have become irreversible. The principal difference of the two rules is not their effect, but the object as well as the context of their application; whereas the firstmentioned rule applies to the judgment of a lower court in the context of an appeal, the rule addressed here applies to the judgment of the Supreme Court in the context of proceedings following a referral of a case back to a lower court.

The *gesloten stelsel van rechtmiddelen*[610] may also apply within the same instance. However, this doctrine has different implications than the *leer van de bindende eindbeslissing*; the former prohibits collateral attacks on a judgment (i.e. challenges to a judicial finding other than through an available means of recourse against the judgment in which that finding is contained) while the latter prohibits a court from redetermining issues which it has finally and unconditionally determined. In other words, though both doctrines can be relevant in the same context, they are aimed at addressing different 'evils' and should therefore be distinguished.

In its relation with *gezag van gewijsde*[611] it should be noted that the *leer van de bindende eindbeslissing* complements 236 Rv in two ways: first, the doctrine applies within the same case while *gezag van gewijsde* is relevant only in another

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[606] See text to n 104ff.
[607] HR 24 December 2010 (n 12) [3.2] (*CHIP(S)HOL III BV/NV Luchthaven Schiphol (No2)*) ("Anders dan het hof heeft geoordeeld, gaat het hier niet om de beantwoording van de vraag of mocht worden teruggekomen van de bindende eindbeslissing van het gerechtshof te 's-Gravenhage. Daartoe bestond voor het hof in dit stadium van het geding geen mogelijkheid, nu de rechtsstrijd na cassatie door de verwerping van de desbetreffende onderdelen van het middel aldus was afgebakend dat over dit geschilpunt definitief was beslist en dat het tevergeefs bestreden oordeel van het gerechtshof te 's-Gravenhage in zoverre onaantastbaar was geworden.") (emphasis added). cf HR 17 December 2010 (n 147) [3.4].
[608] ibid.
[609] ibid.
[610] See text to n 224ff.
[611] See text to n 318ff.

case; and, second, it applies to judgments immediately upon their rendition whereas *gezag van gewijsde* attaches only judgments having acquired the status of res judicata.

The *afstemmingsregel*,[612] alike the *leer van de bindende eindbeslissing*, requires a court to align its judgment with a prior judgment. But this doctrine, though it also applies right after the rendition of judgment, only becomes relevant in the context of *another case*; to be precise, in interim proceedings succeeding main proceedings, while the *leer van de bindende eindbeslissing* is limited to the same case.

Finally, nothing particular needs to be said on the delineation with the doctrine of *misbruik van (process)recht*,[613] which enables a court to restrain rights including procedural rights which are exercised in an unacceptable manner. The only overlap between the doctrines is their overlap in that both may apply within the same instance. Otherwise, there is no coincidence in either their nature or application.

(2) Grievenstelsel: finality on appeal

The delineation of the *grievenstelsel*[614] and other doctrines which are relevant only within the confines of a single case—the *leer van de bindende eindbeslissing*[615] and the *grenzen van de rechtsstrijd na cassatie*[616]—has been addressed before[617]. As specified there, the *grievenstelsel*, alike the *grenzen van de rechtsstrijd na cassatie*, relates exclusively to preclusion *in another instance*, to be precise, the appellate instance, while the *leer van de bindende eindbeslissing* involves preclusion *within the same instance* (either at first instance or on appeal).

The difference with the *grenzen aan de rechtsstrijd na cassatie* is that this doctrine applies in the instance of referral after a successful cassation appeal, whereas the *grievenstelsel* is relevant only on appeal. Moreover, the *grievenstelsel* applies only to judicial findings which have not been challenged in the grounds of an appeal against the judgment containing those findings, whereas the *grenzen aan de rechtsstrijd na cassatie* applies also to findings which have not been *successfully* challenged in the cassation appeal.

Broadly the same distinction applies between the *grievenstelsel* and the remaining rules of precluision as noted for the *leer van de bindende eindbeslissing.* So, for instance, the difference with *gezag van gewijsde*[618] is also that Art 236 Rv lacks application *within the same case* (i.e in proceedings at first instance, on appeal or following reversal on appeal). In other words, a judgment may trigger the application of 236 Rv with the effect of barring the successful contradiction by parties of irreversible judicial findings contained therein, but only in the context of another case between the same parties.

[612] See text to n 275ff.
[613] See text to n 568ff.
[614] See text to n 110ff.
[615] See text to n 76ff.
[616] See text to n 143ff.
[617] See text to n 602ff.
[618] See text to n 318ff.

(3) Grenzen aan de rechtsstrijd na cassatie: finality after a successful cassation appeal

What has been said to demarcate the *grievenstelsel*[619] and the *leer van de bindende eindbeslissing*[620] is also relevant for the delination of the *grenzen aan de rechtsstrijd na cassatie*[621] under Art 424 Rv, which means that in a proceedings after a successful cassation appeal, the court to which the case is referred by the Supreme Court, is bound by those findings which were not (successfully) challenged in cassation. As regards the demarcation of this doctrine in relation to the remaining aspects of preclusion, what has been said for that purpose on the *grievenstelsel* equally holds true for the present doctrine.

(4) Gebrek aan belang: the lack of a sufficient interest in a claim (the reassertion of causes of action)

Article 3:303 BW (*gebrek aan belang*) [622] supplements Art 236 Rv on *gezag van gewijsde*[623] by offering a ground for precluding the *reassertion* of a cause of action in circumstances where the claimant lacks an interest sufficient to justify a right of action, while 236 Rv only bars the successful *contradiction* of judicial findings.[624] This limited effect of 236 Rv was confirmed by the Dutch Supreme Court in *Ladan/De Bruin,*[625] where it held that "no rule of law, including [what is now 236 Rv] prevents the granting of a claim that is aimed at obtaining, after an irreversible judgment … has been given, an order … [for the same remedy] reinforced with a penalty payment."[626]

It follows, nothing in 236 Rv prevents a claimant (successful or unsuccessful) from bringing another claim for the same cause of action, because *gezag van gewijsde* only serves to cut litigation short by offering litigants an effective *reply* to statements of case made in contradiction of (certain) judicial findings; the provision never renders a claim inadmissible. In fact, the provision even aids a new claim, by precluding the defendant from denying the existence of the cause of action that was established in the prior set of proceedings.

Just as Art 236 Rv fails to prevent a successful claimant from pursuing another claim for the same cause of action, the provision is equally ineffective when it comes to avoiding reassertion by claimants who were previously *unsuccessful*. The *gezag van gewijsde* of the judicial findings underlying the judgment previously rejecting the claim, if invoked efficaciously, may well serve to cut litigation short.

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[619] See text to n 110ff.
[620] See text to n 76ff.
[621] See text to n 143ff.
[622] See text to n 160ff.
[623] See text to n 318ff.
[624] Reassertion may simply involve the repetition of a claim; that is, the claimant—typically unsuccessful before—claims the same remedy for the same cause of action. But, reassertion may also involve 'claim splitting', which arises in the event a claimant claims another remedy for the same cause of action.
[625] HR 22 May 1981, NJ 1983, 609 ("geen rechtsregel, ook niet die vervat in artikel 1954, in de weg aan toewijzing van een vordering, welke ertoe strekt om, nadat reeds bij onherroepelijke beschikking krachtens art. 925 Rv een bevel tot afgifte van een minderjarige was gegeven, alsnog een tot een bepaalde persoon gericht, en met een dwangsom versterkt bevel tot afgifte van die minderjarige te verkrijgen.").
[626] ibid.

But in the absence of rules preventing reassertion, courts will be required to adjudicate upon the same cause of action again (and again) to the satisfaction of the claimant's litigation appetite.

It has been suggested that the problem of reassertion by unsuccessful claimants is addressed in Dutch law by the (unwritten) principle that a judgment can only be challenged through one of the means specified by law, which is commonly referred to as the '*gesloten stelsel van rechtsmiddelen*'[627]. So, Gras argues, for instance, that "the repetition of a rejected claim ought to be declared inadmissible *ex officio* for the same reason as a belated appeal: violation of the system of means of recourse against judgments, in other words, the force of the prior judgment."[628] This view is mistaken, because the author wrongly assumes that the object of a claimant who reasserts their cause of action is necessarily to *challenge* the judgment by which their claim was previously rejected, or that a court would necessarily review the merits of the existing judgment if it reconsidered the claim in question. Clearly this is not the case. The point can be illustrated by reference to the situation where a previously unsuccessful claimant discovers new evidence which in their view substantiates their claim. If the claimant for that reason reasserts his cause of action, he does not allege that the decision rejecting the previous claim was erroneous; he simply contends that he is now able to prove that his claim is well-founded. Similarly, the court does not act against the principle of *gesloten stelsel van rechtsmiddelen* by determining the claim, as it reviews the merits of the new claim, not the existing judgment rejecting the previous claim.

Gras' mistake is rooted in his interpretation of the principle of *gesloten stelsel van rechtsmiddelen* as prohibiting the pursuit (by parties) and the rendition (by courts) of conflicting judgments. In truth, however, the principle aims at attaining finality by restricting the available means of recourse against judgments to those expressly provided by law. On account of the principle, the validity of a judgment can only be affected through one of those means of appeal.[629] The *gesloten stelsel van rechtsmiddelen* principle therefore requires that a court strikes out, if necessary of their own motion, any attempt of a party at making the accuracy of a judgment the subject-matter of proceedings through a claim or a pleading on an issue. As a result of this principle, a party who disagrees with a judgment must pursue their grievances through one of the available means of recourse against that judgment. In essence, the principle goes to the jurisdiction of a court; a judgment may only be reviewed by the court of appeal designated by law as having the necessary review jurisdiction and courts of concurrent jurisdiction lack the power to appraise each other's judgments. But the principle does not exclude the concurrent existence of conflicting judgments; it merely clarifies that the force of law of a judgment is not affected by the rendition of a conflicting judgment of a court lacking jurisdiction to review the judgment on its merits. Dutch law, in other words, does not rule out the rendition of conflicting judgments and parties are not automatically precluded from seeking to obtain such judgments.

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[627] See text to n 224ff.

[628] E Gras, 'Reactie naar aanleiding van het artikel van mw. mr. Y.E.M. Beukers' (n 65) 515 ("In het algemeen kan gezegd worden dat de herhaling van een reeds berechte vordering om dezelfde reden ambtshalve niet-ontvankelijk moet worden verklaard als dat moet gebeuren met een te laat ingesteld appel: strijd met het rechtsmiddelenstelsel, d.i. de kracht van gewijsde van de eerdere uitspraak.").

[629] See text to n 241ff.

A final remark should be made in respect of *misbruik van (process)recht*[630]. The abuse of a (procedural) right in the sense of Art 3:13 BW presumes the existence of that right, whereas Art 3:303 BW implies that a right (of action) lacks existence. Accordingly, if a claimant does not have a sufficient interest in a claim, 3:303 BW means that they lack a right to file that claim. If they still file that claim, that act can never constitute an abuse of right, since the claimant has no right which could conceivably abuse. Accordingly, it is respectfully suggested that Advocate General Langemeijer in *Van Aalten/VU (Jeffrey)* was wrong to suggest that "[t]o file a claim without an interest can amount to an abuse of right if the conditions of Article 3:13(2) are fulfilled".[631] As said, in the absence of a sufficient interest, there is no right to be abused. In the same case, the Dutch Supreme Court clarified that 3:303 BW cannot be treated as an application of Art 3:13. According to the Court, neither the law nor the aim of the provisions in question support this view, nor can support for that view be found in the parliamentary history of the provisions.[632] Accordingly, 3:13 BW only applies in this particular context in circumstances where the claimant has a right of action or where that right of action is not contested by the defendant.

Moreover, it should be noted that 3:303 BW applies only to a particular right, namely, a right of action, and accordingly has a much narrower scope than 3:13 BW which bars the abuse of any right, including a right of action, but also procedural rights.

(5) Gesloten stelsel van rechtsmiddelen: collateral attacks on judgments

The unwritten principle of *gesloten stelsel van rechtsmiddelen*[633] precludes a different type of procedural behaviour than the *gezag van gewijsde*[634] attaching to judgments under Art 236 Rv. The *gesloten stelsel van rechtsmiddelen* applies only if a party actually attacks an existing judgment by asserting outside the context of an appeal or revocation proceedings that the judgment is factually or legally erroneous or that the judgment is otherwise invalid. Mere contradiction of existing judicial findings is insufficient to trigger its application. For example, an unsuccessful defendant may without violating the principle reclaim money they paid pursuant to a judgment by denying the existence of the cause of action on which that judgment was based. At the same time, the *gezag van gewijsde* potentially prevents what the *gesloten stelsel van rechtsmiddelen* condones, namely, the successful contradiction of judicial findings which have become irreversible.

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[630] See text to n 568ff.

[631] HR 9 October 1998, NJ 1998, 853 [2.17] (*Van Aalten/VU (Jeffrey)*) ("Procederen zonder belang kan weliswaar misbruik van recht opleveren indien tevens aan een van de in art. 3.13, tweede lid, genoemde criteria is voldaan, maar dit hoeft niet het geval te zijn.").

[632] ibid [3.5] ("The grievance suggests that Article 3:303 can be treated as an application of Article 3:13(2) (abuse of right). The grievance fails. Neither the law nor the aim of the aforementioned provision support this view. Support for this view cannot be found either in the parliamentary history of those provisions.") ("Het onderdeel strekt allereerst ten betoge dat art. 3:303 als een toepassing kan worden gezien van art. 3:13 lid 2 (misbruik van bevoegdheid). In zoverre faalt het onderdeel. Tekst noch strekking van voormelde bepalingen biedt steun voor deze opvatting. Die steun is ook niet te vinden in de geschiedenis van de totstandkoming van deze bepalingen (zie Parl. Gesch. Boek 3, p. 916).").

[633] See text to n 224ff.

[634] See text to n 318ff.

Another question concerns the distinction of *gesloten stelsel van rechtsmiddelen* and *gezag van gewijsde*, on the one hand, and on the other hand, the force of law[635] of a judgment. The force of law of a judgment is no aspect of preclusion; it merely implies that the parties are to abide by the court's order in a judgment and further means that the judgment can be implemented within a legal order (e.g. by execution). Nevertheless, the case of *Aegon Schadeverzekering NV/Ontvanger der rijksbelastingen* illustrates that cause to consider their delineation remains.[636]

The dispute arose in the wake of a judgment ordering an insurance company to pay the Dutch tax authorities a sum of money which it held for a policy holder who had claimed compensation for the damage they suffered after their car was stolen. That judgment was given on a claim pursuant to a third party debt (attachment) order against the insurer which the tax authorities had obtained to secure payment of a tax debt of the policy holder. The insurer paid the sum awarded, but subsequently discovered that the policy holder had committed fraud by staging the theft of the car. Accordingly, they claimed repayment of the money on the ground of undue payment. The tax authority replied in defence that they were not unjustly enriched by the payment as it occurred in compliance with a judgment having the status of res judicata and further they invoked the *gesloten stelsel van rechtsmiddelen* to support their argument that it does not matter that the judgment was based on the wrong facts. The District Court rejected the claim. On appeal the Court of Appeal confirmed this decision:

> The District Court correctly considered on the basis of [*Jamin/Geels*] that the [*gesloten systeem van rechtsmiddelen*] implies that a judgment founded on an erroneous basis … can only be affected through a means of recourse and rightly decided that the claim for undue payment could not succeed because [the insurer] failed to appeal the judgment which declared that [the insurer] was obliged to pay the sum of money to the tax authority which thus acquired the status of res judicata.[637]

On appeal in cassation, the appellant disputed the appropriateness of a full blown application of the *gesloten stelsel van rechtsmiddelen* to the judgment in question, which was not a typical judgment on a claim between two parties serving to determine the legal relationship in question, but a judgment which merely established the sum of money to be paid pursuant to a third party debt order. Advocate General Vranken aligned himself with the judgment of the Court of Appeal and proposed that the Supreme Court reject the appeal:

> The proceedings … were not of a provisional nature, meaning that the nature of these proceedings do not in the present circumstances—it has become apparent that the

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[635] See text to n 235ff.

[636] HR 27 November 1992, NJ 1993, 570 mnt HJ Snijders (*Aegon Schadeverzekering NV/Ontvanger der rijksbelastingen*).

[637] ibid [4.5] ("Met de rechtbank is het hof van oordeel dat het verweer van de ontvanger gegrond is. De rechtbank heeft terecht op de voet van genoemd arrest van de Hoge Raad overwogen dat het gesloten stelsel van in de wet geregelde rechtsmiddelen meebrengt dat een op een onjuiste grondslag gebaseerde rechterlijke uitspraak, behoudens het hier niet aan de orde zijnde geval van het geheel ontbreken van rechtskracht, niet anders dan door een rechtsmiddel kan worden aangetast en terecht beslist dat, nu Aegon tegen het vonnis waarin tussen partijen bindend werd vastgesteld dat Aegon het in dat vonnis vermelde bedrag ingevolge het beslag aan de ontvanger diende af te dragen, geen rechtsmiddel heeft aangewend en dit onherroepelijk is geworden, haar vordering uit onverschuldigde betaling niet kan slagen.").

> factual basis of the declaratory judgment is erroneous—justify an exception to the [*gesloten stelsel van rechtsmiddelen*].[638]

The Supreme Court also rejected the appeal and upheld the judgment of the Court of Appeal. However the former only adopted the Court of Appeal's conclusion (i.e. that the payment by the insurer could not be reclaimed as paid without cause), not its reasoning. The Supreme Court gave it own reasons for rejecting the appeal, which are markedly different from those given by both the Court of Appeal and the Advocate General:

> In assessing the ground of appeal it should be noted first off that the defence of the tax authority implies a plea of the *gezag van gewijsde* of [the judgment ordering payment]. As [the insurer] was ordered by this judgment to pay the sum stated therein, the *gezag van gewijsde* of this judgment bars the granting of [the insurer's] claim for undue payment of the sum paid to the tax authority in compliance with this judgment. The payment was not without cause, because the payment was based on the judgment by which [the insurer] was so ordered. The issue whether there was a cause for payment on the basis of the insurance agreement cannot be considered as a result of the *gezag van gewijsde* of the [judgment ordering payment]. The decision of the Court of Appeal was therefore right irrespective of its reasoning.[639]

The question arises why the Supreme Court's decision in the present case is based on *gezag van gewijsde* while in comparable cases like *Jamin/Geels*[640] and *Stichting De Thuishaven/Van Zaanen-Pols*[641] the Supreme Court relied on the force of law of the existing judgment. The answer is straightforward: in the present case, unlike in the other cases, the defendant actually invoked the *gezag van gewijsde* of the prior judgment, which is a condition for its application; a court is barred from applying the doctrine of its own motion.[642] Another point to consider is that a plea of *gezag van gewijsde* to defeat a claim would as a matter of practice normally precede a substantive defence based on the force of law of the judgment ordering payment[643].

Unlike the Supreme Court, the Court of Appeal settled for the *gesloten stelsel van rechtsmiddelen* as the basis for its decision to reject the claim for undue payment.

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[638] ibid [22] ("Deze schets van de belangen die zowel voor de beslaglegger als voor de derde-beslagene met de verklaringsprocedure werden gediend, leiden mij samen met de omstandigheid dat de verklaringsprocedure gevoerd werd als een gewone dagvaardingsprocedure en niet een voorlopig karakter droeg, tot de conclusie dat naar oud recht de aard van de verklaringsprocedure in een geval als het onderhavige - achteraf komt vast te staan dat de feitelijke grondslag van het verklaringsvonnis onjuist is -, geen uitzondering rechtvaardigt op het gesloten stelsel van rechtsmiddelen.").

[639] ibid [3.3] ("Bij de beoordeling van het middel moet worden vooropgesteld dat in het door de ontvanger gevoerde, in 3.1 weergegeven verweer een beroep op het gezag van gewijsde van het vonnis van 15 juli 1986 ligt besloten. Nu Aegon bij dit vonnis is veroordeeld tot afgifte van het daarin vermeld bedrag, staat het gezag van gewijsde van dit vonnis in de weg aan toewijzing van de vordering van Aegon, gegrond op onverschuldigde betaling van het ingevolge dit vonnis aan de ontvanger betaalde bedrag. De afgifte door Aegon aan de ontvanger is niet zonder rechtsgrond geschied, omdat die afgifte haar grond vond in het vonnis waarbij Aegon daartoe werd veroordeeld. De vraag of voor de afgifte door Aegon aan de ontvanger een rechtsgrond bestond uit hoofde van de voormelde verzekeringsovereenkomst, kan als gevolg van het gezag van gewijsde van het vonnis niet meer aan de orde komen. Het hof heeft dus een juiste beslissing gegeven, wat er zij van de door het hof gebezigde gronden.").

[640] See text to n 250ff.

[641] See text to n 383ff.

[642] See text to n 405ff.

[643] ibid.

This choice is problematic, because the claimant did not collaterally attack the original judgment ordering payment, for example, by alleging alike in *Jamin/Geels* that the judgment was factually erroneous. To the contrary, they merely pursued a conflicting judgment by arguing that they owed nothing under the insurance policy so that there was no reason to pay the tax authorities anything. The *gesloten stelsel van rechtsmiddelen* does not preclude this. The principle only bars statements of case which assert the factual or legal erroneousness of a judgment or that otherwise aim at undermining a judgment's validity. In other words, it precludes parties from making the validity of an existing judgment the subject matter of proceedings in a court of concurrent jurisdiction. The Supreme Court therefore rightly rejected the reasoning of the Court of Appeal.

It follows that the question of delineation depends in large part on the procedural conduct of the parties in a particular case. To be precise, the *gesloten stelsel van rechtsmiddelen* is mandatory in nature, so that a court must, if necessary of its own motion, strike out any statement of case qualifying as an attack. Accordingly, even if none of the parties pleads the principle, a court must act if a party asserts outside the context of an appeal or revocation proceedings that an existing judgment is factually or legally erroneous or otherwise invalid. However, the principle is irrelevant in circumstances where a party does not attack a judgment but merely contradicts the judicial findings contained therein. Instead, this situation falls within the remit of the doctrine of *gezag van gewijsde.*

Then again, the doctrine of *gezag van gewijsde* is subject to party autonomy, meaning that a court is absolutely prohibited from applying it of its own motion. If a party fails to invoke the *gezag van gewijsde* of a judgment, then, the court must disregard the fact that the claim or issue in question was already determined, with the risk that it renders a conflicting judgment affecting the force of law of the judgment previously given between the parties (or their privies).

Finally, also the force of law of a judgment must be pleaded. If so, the court will have to take the fact that the parties are bound to comply with the judgment into account in the process of determining the legal relationship of the parties. For instance, if a party claims for undue payment while payment was made in compliance with the order of a court, the force of law of the judgment ordering payment is a fact whose legal implication is that a claim for undue payment must fail.

(6) Afstemmingsregel: finality in interim proceedings after judgment in main proceedings

The *afstemmingsregel*[644] applies and serves to effect finality in circumstances where Art 236 Rv (*gezag van gewijsde*)[645] does not, namely, when a judgment given in main proceedings has not (yet) acquired the status of res judicata.[646] Interim proceedings which follow the rendition of judgment in main proceedings are considered a new case, even though they may concern the same matters. Hence, the *leer van de bindende eindbeslissing,*[647] which applies only within the confines of the same case, is inapplicable.

[644] See text to n 275ff.
[645] See text to n 318ff.
[646] See text to n 462ff.
[647] See text to n 76ff.

The *afstemmingsregel*, by requiring a court in interim proceedings to align its judgment with an existing judgment given in main proceedings, in effect bars the parties from successfully contradicting the judicial findings contained in that judgment. In addition, the doctrine has been said to be inspired in part by the need to prevent attempts at the use of interim proceedings as a (disguised) means of recourse against judgments in main proceedings.[648] However, it is suggested that the doctrine concerns the contradiction of judicial findings, while collateral attacks on judgments (i.e. actions whose object is to challenge judgments by means other then an appeal), disguised or not, are addressed by another doctrine: the *gesloten stelsel van rechtsmiddelen*.[649]

(7) Gezag van gewijsde: finality in succeeding cases (the contradiction of judicial findings)

The delineation of *gezag van gewijsde*[650] and the remaining aspects of preclusion has been separately considered in relation to each individual aspect. It may be briefly rehearsed, however, in relation to the *leer van de bindende eindbeslissing*, [651] the *grievenstelsel* and the *grenzen aan de rechtsstrijd na cassatie*, that these three doctrines apply only with one and the same case, while *gezag van gewijsde* is relevant only in the context of another case.

On the demarcation with Art 3:303 BW (*gebrek aan belang*) [652] it can be repeated that this provision supplements the *gezag van gewijsde* by offering a ground for precluding the *reassertion* of a cause of action in circumstances where the claimant lacks an interest sufficient to justify a right of action, while 236 Rv only bars the successful *contradiction* of judicial findings.[653]

The difference between the *gesloten stelsel van rechtsmiddelen*[654] and *gezag van gewijsde* consists in the fact that each precludes a different type of procedural behaviour; whereas the *gesloten stelsel van rechtsmiddelen* applies where a party attacks an existing judgment by asserting (outside the context of an appeal or revocation proceedings) that the judgment is factually or legally erroneous or that the judgment is otherwise invalid, *gezag van gewijsde* is solely relevant to prevent the successful contradiction of judicial findings.

A similar distinction applies to the distinction with *misbruik van (process)recht*[655]. Namely, this specific doctrine precludes a party from exercising their rights including procedural rights in an unacceptable manner, while *gezag van gewijsde* prevents the successful contradiction of judicial findings. For the purpose of

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[648] Krans (n 276) [4] ("…that could increase the chance that interim proceedings are used as a (disguised) means of recourse against a judgment in the main proceedings.") ("…zou dat bovendien de kans kunnen vergroten dat een kort geding wordt ingezet als (verkapt) rechtsmiddel tegen de uitspraak in de bodemprocedure.").
[649] See text to n 224ff.
[650] See text to n 318ff.
[651] See text to n 76ff.
[652] See text to n 160ff.
[653] Reassertion may simply involve the repetition of a claim; that is, the claimant—typically unsuccessful before—claims the same remedy for the same cause of action. But, reassertion may also consist of 'claim splitting', which arises in the event a claimant claims another remedy for the same cause of action.
[654] See text to n 224ff.
[655] See text to n 568ff.

delineation it should be noted that the mere contradiction of judicial findings does not in itself amount to an abuse,[656] nor does the filing of a claim with only small chances of success because an excisting judgment is likely to have *gezag van gewijsde* in the proceedings regarding that claim[657].

(8) Misbruik van (proces)recht: abuse of right (including abuse of process)

The doctrine of *misbruik van (process)recht*[658] precludes the exercise of rights including procedural rights in an unacceptable manner. In practice, the only real question of delination is likely to arise in relation to Art 3:303 BW (*gebrek aan belang*)[659]. This question has been addressed before in the discussion of 3:303 BW.[660] In essence, the issue can be resolved by pointing out that 3:13 BW presumes the existence of a right, whereas 3:303 BW implies the absence of a right. Besides, 3:13 BW which bars the abuse of any right, including a right of action, has a much wider scope in this respect than 3:303 BW, which only pertains to a right of action.

Summary and conclusions

"*Lites finiri oportet*" ('there should be finality of litigation') is a good 'Dutch' expression for the principle of finality of litigation. Unfortunately, the remainder of Dutch preclusion law is less straightforward: on the one hand, the res judicata doctrine—codified in Art 236 Rv—fails to offer the desired degree of finality in practice and for that reason has been supplemented by a complex system of statutory rules and judge-made doctrines; and, on the other hand, the law is characterised by conceptual imprecision that obscures the nature of res judicata effect ('*gezag van gewijsde*') as well as the res judicata doctrine's delineation from the other elements of preclusion law.

Res judicata effect means that judicial findings regarding a claim or issue ('*rechtsbetrekking in geschil*') have conclusive effect ('*bindende kracht'*) between the same parties (or their privies) in another case involving the same claim or issue. Conclusive effect, in turn, implies that a party is barred from (successfully) contradicting a judicial finding; a res judicata plea ('*exceptie van gewijsde*') offers an effective reply to inconsistent pleadings, which are to be rejected (and an inconsistent claim dismissed). The effect, which is attributed by law, is distinct from a judgment's force of law ('*rechtskracht*'), which stems from a court's jurisdiction and compels compliance with the court's decision. Unlike res judicata effect, a judgment has force of law the moment it is pronounced and becomes valid ('*geldig*').

The doctrine is subject to waiver, which shows that the res judicata effect is not a matter of public policy but serves first and foremost the *private* interest in finality of litigation. Apart from the requirement of a plea of res judicata, the doctrine's application is subject to five conditions: (1) the findings said to be conclusive are regarding the claim or issue; (2) the findings are irreversible; (3) the

[656] See text to n 578ff.
[657] ibid.
[658] See text to n 568ff.
[659] See text to n 160ff.
[660] See text to n 622ff.

contradiction of those findings occurs in the context of in another case; (4) there is an identity of the claim or issue between the prior and present case; and (5) there is an identity of the parties involved. Arguably, the doctrine is not absolute, and the law will permit an exception if its application involves undesirable consequences.

Though the doctrine retains it crucial role, five limitations clarify why the doctrine fails to offer the desired degree of finality of litigation: first, res judicata effect ('*gezag van gewijsde*') only applies in another case, not within the same case; second, signalling that the maxim *bis de aedem re ne sit actio* ('for the same cause there is no right of action') forms no part of Dutch civil procedure, res judicata effect precludes only the contradiction of judicial findings, not the reassertion of a cause of action for which judgment has been recovered; third, res judicata effect attaches to judgments with res judicata status ('*kracht van gewijsde*'), not to judgments that remain subject to challenge by ordinary means of recourse; fourth, res judicata effect never attaches to judgments on an interim measure ('*kort geding vonnis*'); finally, res judicata effect attaches where a judgment actually determined a claim or issue, not where the matter could and reasonably should have been raised and determined in a prior case, but was not.

The intricate scheme that developed in practice to fill the perceived gaps in finality of litigation consists of the following supplementary rules and doctrines. First, in response to the concern that the res judicata doctrine applies only applies in the context of another case, three judge-made doctrines have developed that impose finality within the context of the *same case*. Unlike the res judicata doctrine, the three doctrines go to a court's jurisdiction and are not then subject to party disposition; a court must if necessary act of its own motion, which demonstrates that the doctrines serve principally the *public* interest in finality, which is deemed necessary for a sound administration of justice. The first of the three doctrines bars a court in the remainder of the case from reopening an issue the court has finally and unconditionally determined ('*leer van de bindende eindbeslissing*'). The remaining two doctrines are equivalent in nature and effect, but respectively apply on appeal ('*grievenstelsel'*), and following a successful appeal in cassation ('*grenzen van de rechtstrijd na cassatie*').

Second, Art 3:303 BW supplements the res judicata doctrine, which merely serves to preclude the contradiction of irreversible judicial findings, by barring the reassertion of a cause of action for which judgment has been recovered in circumstances where the successful claimant lacks an sufficient interest to justify a further right of action ('*gebrek aan belang*'). The principle of a sound administration of justice underpins this rule, and requires that a court, if necessary of its own motion, strikes out a claim if on balance the claimant's interest in pursuing the claim is outweighed by the defendant's interest in finality, and the public interest in justice and finality, including the efficient use of judicial resources.

Third, in response to the problem that res judicata effect (if any) attaches only after a judgment acquires res judicata status, a judge-made doctrine ('*gesloten stelsel van rechtsmiddelen*') that operates from the moment of a judgment's rendition, bars any court other than the competent appellate or revocation court from ruling on a judgment's 'validity' ('*geldigheid*'). This doctrine is of public policy and is equally based on the principle of a sound administration of justice, which requires that, in the public interest in finality, a judgment's validity can only be affected in a limited number of ways defined by law. A court must therefore, if necessary of its own

motion, strike out any collateral attack by parties, including challenges of a judgment's accuracy.

Significantly, the doctrine does not bar a court from rendering a conflicting judgment; a conflicting judgment does not affect the validity of an existing judgment, but merely a judgment's 'force of law' ('*rechtskracht*'). Nevertheless, pursuant to the same principle of a sound administration of justice, a court confronted with pleadings that contradict the findings in an existing judgment without res judicata status, can stay its proceedings until the existing judgment either acquires res judicata status or is successfully challenged on appeal or revoked.

Fourth, once more in response to the problem that the res judicata doctrine applies only to judgments with res judicata status, a further judge-made doctrine ('*afstemmingsregel'*) requires that a court seized of a claim for an *interim* measure aligns its decision with any judgment given in main proceedings, regardless of that judgment's status. Though a specific provision proclaims the precedence of the main proceedings over conflicting interim proceedings, alike most supplementary preclusion rules and doctrines, this doctrine of alignment fundamentally rests on the principle of a sound administration of justice, meaning that the doctrine's application is not dependent on a plea of one of the parties.

The final and most tentative supplement of the res judicata doctrine is the prohibition of abuse of right ('*misbruik van recht*') under Art 3:13(1) BW, which through Art 3:15 BW extends to the law of procedure and thus prohibits abuse of process ('*misbruik van procesrecht*'). The prohibition bars the exercise of a right for a purpose other than for which the right was created, and further excludes the exercise of a right that, despite its legitimate aim, disproportionally affects (or is likely to affect) the interest of another party.

Signs in practice indicate that the provision may serve to address the perceived lack of finality after proceedings for an interim measure, which results because the res judicata doctrine categorically lacks application to judgments on claims for an interim measure; for instance, the provision could bar a new claim for an interim measure if the claimant failed to file an appeal the judgment rejecting the prior claim. Moreover, against the background of the fact that the res judicata doctrine only applies where a matter has been determined, the provision may effect finality in respect of claims or issues that were not raised and determined in a prior case, but could and reasonably should have been raised; the abuse may then consist in the keeping back of a claim or issue with the aim of harassing the other party in new proceedings, or in the exercise of a right to raise a matter that, despite its legitimate aim, disproportionally affects the interest of the opponent in the proceedings.

Concluding Remarks

This part on finality of litigation as a matter of domestic law examined the principle of finality of litigation as implemented in English and Dutch law. Chapter 1 addressed English law, followed by Chapter 2, which considered Dutch law. The goal was to analyse the law in action, as practiced; different challenges applied for English law and Dutch law respectively.

In English law, the main challenge was to distill from a mountain of cases relevant legal principles that reflect with reasonable precision the courts' common approach to specific issues; doctrine in this particular area of civil justice is comparatively far and wide between, and does not trigger the kind of theoretical controversy encountered in civil law systems. By contrast, in Dutch law, the principal challenge was to rationalise a system based on an intricate combination of vague statute-based rules and judge-made doctrines; added into the mix was fundamental doctrinal controversy over the nature of res judicata effect, which tends further to obscure the law.

The analysis of the two legal systems applied a *functional* approach: rather than assess the application of pre-selected rules or doctrines—e.g. 'res judicata doctrine' or 'abuse of process'—the analysis was framed at the level of *principle*; the sole assumption in this regard, based on prior comparative research,[1] was that both English and Dutch law, much like any system based on the rule of law, recognise the value of finality of litigation. Hence, this part inquired into how the English and Dutch legal systems implement finality of litigation after justice has been done in the form of a judgment.

To briefly mark the limitations (read: pitfalls) of a rule-oriented approach, it is sufficient to note that an assessment focused on 'res judicata doctrine' would definitely have failed to establish that Art 3:303 BW in Dutch law fulfils a function comparable to the English doctrine of merger *in rem judicatam* by denying a right of action if a claimant lacks a sufficient interest to justify another claim (e.g. in case the claimant already recovered judgment); Article 3:303 BW is a general rule that qualifies a prospective claimant's right of action (a transferable property interest), which forms no part of the traditional res judicata doctrine, which in Dutch law is limited to something akin to the English doctrine of estoppel *per rem judicatam.*

Following the assessment in relative isolation of English and Dutch preclusion law in the preceding chapters, this part concludes by comparing the problem of finality of litigation in both legal systems, how the two systems propose to resolve this problem, and how these solutions operate.

(1) General observations

The principle of finality of litigation forms an integral part of the English and Dutch legal systems. A more interesting finding is that both legal systems appear to distinguish between the *public* and *private* interest in finality of litigation; the distinction is most clearly recognised by English courts, which habitually cite two

[1] British Institute of International and Comparative Law, 'The Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, Res Judicata and Abuse of Process' (2006) <wwwbiiclorg/files/4608_comparative_report_-_jls_2006_fpc_21_-_finalpdf>.

maxims "*interest reipublicæ ut sit finis litium*" ('it is in the public interest that there should be finality of litigation') and "*nemo debet bis vexari pro eâdem causâ*" ('one should not be vexed twice for the same cause') in justification for imposing finality, whereas Dutch courts cite more generally to "*lites finiri oportet*" without specifying the interests served.

The emphasis on either the public or the private interest apprears to vary from one preclusion rule to another. This characteristic provides insight into the nature of the relevant rules in each system. For example, in both systems, the res judicata doctrine applies only pursuant to a plea by one of the parties; a court is barred from applying the doctrine of its own motion. The characteristic signals that the doctrine serves first and foremost the *private* interest in finality of litigation, notwithstanding that, as a general matter, the availability in the legal system of the res judicata doctrine as an instrument to impose finality is also a matter of public concern. By contrast, the English abuse of process doctrine as well as the doctrine on the finality of judgments must be applied by a court of its own motion, notwithstanding that in most cases the party faced with the abuse will make a plea or application to that effect. This indicates that when it comes to such matters as relitigation-abuse, *Henderson v Henderson*-abuse and collateral attack-abuse, the emphasis is on the *public* interest in finality of litigation.

Similarly, Dutch preclusion rules or doctrines which are based most fundamentally on the principle of a sound administration of justice ('*beginsel van een goede procesorde*')—first, Article 3:303 BW on the exclusion of a right of action in the absence of a sufficient interest in a claim ('*gebrek aan belang*'); second, the doctrines on finality within the same case ('*leer van de bindende eindbeslissing*', '*grievenstelsel*' and '*grenzen van de rechtsstrijd na cassatie*'); the prohibition of collateral attacks on judgments ('*gesloten stelsel van rechtsmiddelen*'); and, finally, the rule of alignment in proceedings for an interim measure after judgment in a main case ('*afstemmingsregel*')—must all be applied, if necessary, by the court of its own motion. Conversely, the Dutch doctrine on the abuse of right ('*misbruik van recht*') as codified in Article 3:13 BW, which through Art 3:15 BW also precludes abuse of process ('*misbruik van procesrecht*') applies only on application of a party, suggesting that insofar as this doctrine is used as an agent of finality (e.g. in response to vexatious litigation, or unreasonable attempts to relitigate a claim or to raise a matter which could have been previously raised) it serves principally the *private* interest.

(2) Three paradigmatic situations

At a high level of abstraction, this part addressed three paradigmatic situations. The first situation concerns the '*finality of a judgment*', which refers to the situation where a legal system provides that no court without competent appellate jurisdiction can pronounce on the validity of an existing judgment, and that parties are barred from collaterally attacking that judgment (i.e. by means other than ordinary recourse).

Secondly, '*finality within a case*' denotes the situation where a legal system prohibits a court from reopening in the remainder of the case matters it has finally determined, or courts of appeal from reopening matters finally determined by the court below which have not been challenged on appeal, or courts of referral from

reopening matters finally determined by a court of appeal, or (in effect) bars parties from relitigating such matters.

The third and final situation—'*finality in another case*'—involves circumstances where a legal system bars the (re)litigation of matters that were previously determined or could and should have been so determined. As regards finality in another case, three principal sub-scenarios can be distinguished: first, '*claim preclusion*' indicates the situation where a legal system bars relitigation regarding a cause of action that formed the basis of a prior (un)successful claim (i.e. a demand of a remedy from a court), which includes but is not limited to the situation where the legal system bars another claim for the same cause of action; second, '*issue preclusion*' represents the situation where a legal system bars relitigation regarding an issue that was previously determined; and, finally, '*wider preclusion*' stands for the situation where a legal system bars the litigation of claims or issues that were not, but could and should have been raised and determined in a prior case.

(3) The finality of a judgment

Both English and Dutch law enforce the *finality of judgments* by excluding the possibility that a court without competent appellate or revocation jurisdiction pronounces on the accuracy or legality of an existing judgment, and effectively bar parties from collaterally attacking such judgment by means other than ordinary recourse. English law does so through abuse of process doctrine, which excludes collateral attack-abuse, whereas Dutch law achieves the same result through a separate judge-made doctrine of *gesloten stelsel van rechtsmiddelen*, not abuse of process doctrine.

Despite being formally different doctrines, both aim at safeguarding a sound administration of justice, which could be brought into disrepute if any court could endlessly pronounce on the validity of any existing judgment. The doctrines are further equivalent in that a court, if necessary, must strike out a collateral attack of its own motion; the issue of validity of an existing judgment goes to the jurisdiction of the court addressed, and is thus a matter of public policy. A shared limitation of the doctrines is that the bar of collateral attacks on a judgment does not imply a prohibition on the rendition of a conflicting judgment; while a party is barred from challenging a judgment in any court other than the court of competent appellate or revocation jurisdiction, a party is not barred from seeking a different decision by pleading in a manner that contradicts the existing judgment, and the court addressed is not prohibited from rendering the conflicting judgment. The point can be conceptualised by noting that the doctrines are equally aimed at protecting a judgment's validity, not its force of law.

The comparison of English and Dutch law on the *finality of judgments* occurs against the background of the shared obligations of the United Kingdom and the Netherlands as Contracting States of the ECHR, under Art 6(1) ECHR on the right to a fair trial,[2] and that the ECtHR in *Brumărescu v Romania* held that:

> The right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which

[2] "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

> declares, among other things, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, inter alia, that where the courts have finally determined an issue, their ruling should not be called into question.[3]

Another (potentially) relevant framework is that the United Kingdom and the Netherlands are EU Member States. However, the CJEU has consistently held—in response to the question whether Art 4(3) TEU imposes on a national court an obligation to reopen or set aside a final judgment if that decision infringes EU law—that, subject to the principles of equivalent and effective enforcement of EU law, the principle of procedural autonomy implies that, in the absence of EU legislation in this area;

> European Union law does *not* require a national court to disapply domestic rules of procedure conferring finality on a decision … even if to do so would make it possible to remedy an infringement of a provision of European Union law, regardless of its nature, on the part of the decision at issue….[4]

Against this background, the legal position in English and Dutch law of allowing the rendition of conflicting judgments raises the question whether the United Kingdom and the Netherlands on this points comply with the requirements of Art 6(1) ECHR and even Art 1 of Protocol No 1 to the Convention[5]. The ECtHR in *Macovei v Moldova* held that the rendition of a conflicting judgment on an issue that has previously been finally resolved deprives the existing final judgment of any effect, and thus violates the principle of legal certainty and the right to a court under Art 6(1) of the Convention.[6] Moreover, the Court held that rendering a judgment ineffective, after it has acquired res judicata status, constitutes an interference with the judgment beneficiary's right to the peaceful enjoyment of that 'possession' in violation of Art 1 of Protocol 1.[7]

A valid response is that both legal systems provide adequate instruments, in particular in the form of res judicata doctrines, to preclude relitigation of discrete

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[3] (Introduction n 46) [61].

[4] Case C-76/10 *Pohotovosť sro v Iveta Korčkovská* [2010] ECR I-11557 [45] (emphasis added). cf Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055 [46]-[47]; and *Kapferer* (Introduction n 8) [21].

[5] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (Protocol No 1) (adopted 20 March 1952, entered into force 18 May 1954) 213 UNTS 221.

[6] (2007) 45 EHRR 48 [44]-[45].

[7] ibid [49]. See further, regarding rules providing for extraordinary means of recourse, *Driza v Albania* (2009) 49 EHRR 31 [64] ("This principle [finality of judgments] insists that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. Higher courts' powers of review should be exercised to correct judicial errors and miscarriages of justice, but not to carry out a fresh examination. The review should not be treated as an appeal in disguise, and the mere possibility of there being two views on the subject is not a ground for re-examination. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character…."). The Court added, at [69]-[70], that "it is the State's responsibility to organise the legal system in such a way as to identify related proceedings and where necessary to join them or prohibit the further institution of new proceedings related to the same matter, in order to circumvent reviewing final adjudications treated as an appeal in disguise, in the ambit of parallel sets of proceedings…. In sum, the Court considers that, by granting the President of the Supreme Court's request for leave to seek a review of a final judgment and by allowing the introduction of parallel sets of proceedings, the Supreme Court set at naught an entire judicial process which had ended in a final and enforceable judicial decision which was thus res judicata.").

issues, which allow a party in whose favour a judgment was rendered to prevent the subsequent rendition of a conflicting judgment.

(4) Finality within a case

The English and Dutch legal systems equally impose *finality within a case*—the situation where a legal system prohibits the reopening of matters which have already been finally determined in the context of the same case. Both legal systems do so by restricting the *jurisdiction* of the judgment-rendering court, the competent appellate court, and any court to which the case is referred back following an appeal. In English law, a final judgment exhausts the jurisdiction of the rendering court; the court is '*functus officio*' after finally determining the matter in question. Moreover, an appellate court's jurisdiction is limited to the parties' grounds of appeal, which define the outer limits of the scope of review, while the judgment of the appellate court determines the scope of any subsequent referral to a lower court, which (obviously) excludes matters unchallenged on appeal or already determined by the court of appeal.

In Dutch law, similarly, as a rule bars a court in the remainder of the case from reopening an issue the court has finally and unconditionally determined ('*leer van de bindende eindbeslissing*'). The remaining two doctrines are equivalent in nature and effect, but respectively apply on appeal ('*grievenstelsel'*), and following a successful appeal under ('*grenzen van de rechtstrijd na cassatie en verwijzing*'). The *grievenstelsel*—a doctrine inherent in the law of civil appeals—prohibits an appelate court from reviewing irreversible findings of a lower court; findings are 'irreversible' which are unchallenged in the parties's grounds of appeal. The doctrine of *grenzen van de rechtstrijd na cassatie en verwijzing*—summarily condified in Art 424 Rv—means that upon referral after cassation, the scope of litigation is defined by the Supreme Court's judgment, and the court of referral lacks the power to revisit final findings in the case which have not been (successfully) challenged and that thus have become irreversible.

The English and Dutch doctrines are also equivalent in nature and rationale; the limitation of a court's jurisdiction is in both systems a matter of public policy, which must therefore be enforced if necessary by a court of its own motion, and serves the public interest in a sound administration of justice, which requires finality to be imposed also within the course of a single case with a view to streamlining litigation, and avoiding undesirable delays.

Some differences exist in terms of the conditions for application of the doctrines on finality within a case, as well as regarding the limitations of and exceptions to the doctrines' application. In English law, a first instance court's jurisdiction is exhausted after its *judgment* becomes 'final', which occurs when the judgment is perfected by sealing after which the judgment cannot be varied, re-opened or set aside by the rendering court or any other court of co-ordinate jurisdiction, even though it may be still subject to appeal. Conversely, the focus in Dutch law is on when the court's *finding* becomes 'final', which requires an unequivocal and unconditional determination of an issue, though a final finding can be contained in an interlocutory judgment—a judgment that in the absence of separate leave to appeal from the rendering can only be appealed together with the

'final judgment', which is the court's decision that determines (part of) the claim and can immediately be appealed.

Hence, finality within the same case can technically attach at an earlier stage in Dutch law, though in practice the difference is marginal at best, since the ability of an English court (both at first instance and on appeal) to recall and alter its judgment after it is given but before it is perfected ('*Barrell*'-jurisdiction) is restricted to exceptional circumstances. Moreover, in another respect, the finality imposed in Dutch in respect of a first instance court's final finding on an issue is less than English law imposes within the same case in respect to a final judgment; apart from a general exception for special circumstances, if a Dutch court of first instance appreciates that one of its earlier final findings not contained in a final judgment is wrong in law or fact, the court has the power, after the parties have been given the opportunity to be heard, to revisit that final finding in order to prevent that it would give a final judgment on the wrong basis.

(5) Finality in another case

English and Dutch law both impose *finality in another case*—the situation where a legal system bars the (re)litigation of matters previously determined or matters which could and should have been so determined. As regards finality in another case, three principal sub-scenarios can be distinguished: first, '*claim preclusion*' indicates the situation where a legal system bars relitigation regarding a cause of action that formed the basis of a prior (un)successful claim; second, '*issue preclusion*' represents the situation where a legal system bars relitigation regarding an issue that was previously determined; and, finally, '*wider preclusion*' stands for the situation where a legal system bars the litigation of claims or issues that were not, but could and should have been raised and determined in a prior case, or otherwise extends preclusion, for instance, in the relation with strangers to the prior litigation, or regarding matters that were determined but not rendered res judicata.

(i) Claim preclusion

Claim preclusion—the situation where a legal system bars relitigation regarding a cause of action that formed the basis of a prior (un)successful claim—in English law is by the res judicata doctrine, which comprises two doctrines: first, 'merger *in rem judicatam*' ('merger doctrine'), which bars reassertion of a cause of action for which a judgment has been previously recovered; and, second, 'estoppel *per rem judicatam*' ('estoppel doctrine'), which in its 'cause of action estoppel' form precludes the contradiction of judicial findings regarding claims.

By comparison, in Dutch law, claim preclusion operates in part by res judicata doctrine, as codified in Art 236 Rv, which is more limited in function than the English res judicata doctrine, and more akin to estoppel doctrine as it bars parties from (successfully) contradicting judicial findings regarding a claim. Another part of claim preclusion is by Art 3:303 BW, which denies a right of action if a claimant lacks a sufficient interest in a claim, which may be the case where a claimant has previously recovered judgment for the reasserted cause of action.

Some significant differences are notable. First, the English res judicata doctrine applies to final judgments, whereas the Dutch res judicata doctrine applies

only to judgments with res judicata status. As noted, in English law, a judgment is 'final' when the judgment on a claim or issue is perfected by sealing after which it cannot be varied, re-opened or set aside by the rendering court or any other court of co-ordinate jurisdiction, *but may be still subject to appeal*. Conversely, in Dutch law, a final judgment—a judgment that finally determines (part of) a claim but remains subject to ordinary means of recourse—only acquires res judicata status when and to the extent that it is not or no longer subject to ordinary means of recourse.

Nevertheless, in practice, Dutch courts have found ways to address this (unfortunate) limitation of the res judicata doctrine. In the context of interim proceedings ('*kort geding* '), if one of the parties contradicts the findings in a judgment that lacks res judicata status but was given in main proceedings ('*bodemprocedure*'), a judge-made rule of alignment ('*afstemmingsregel*') requires the court to render a consistent with the judgment in the main proceedings, regardless of whether that judgment has res judicata status. (Note that though English law offers claimants the option of obtaining interim relief before trial (e.g. interim injunctions) as well as the option of pursuing a summary judgment, the exact equivalent of the Dutch concept of 'interim proceedings' is unknown in England and Wales. At any rate, in English proceedings for interim relief or summary judgment the problem of lacking res judicata status does not arise, since the English res judicata doctrine applies regardless of this status, as long as a judgment is final and conclusive.)

Moreover, in the context of ordinary proceedings, a court can, pursuant to the principle of a sound administration of justice ('*goede procesorde*') stay the proceedings when a party contradicts the finding in an existing judgment that lacks res judicata status until that judgment either acquires res judicata status or is successfully challenged.

A second difference concerns the English merger doctrine, which is (to an extent) comparable to the Dutch Art 3:303 BW. Both concern a claimant's right of action, and are similar in terms of their effect: a claimant is denied a right of action in respect of a cause of action, which means under Art 3:303 BW that the claimant cannot be 'received' by the court ('*niet-ontvankelijk*'), and under the merger doctrine that a court can strike out the claim and give summary judgment. Conversely, the English merger doctrine is more limited as it applies only to preclude reassertion by successful claimants, whereas Art 3:303 BW can additionally apply to reassertion by unsuccessful claimants. (This is not to say that reassertion by unsuccessful claimants is accepted in England and Wales; to the contrary, a court can strike out a claim or give summary judgment if the new claim has not real prospect of success, which is likely to be the case if the defendant in response to the claim successfully invokes the estoppel doctrine.)

A further difference as regards reassertion by successful claimants is that Dutch law is somewhat less hostile than English law to claim splitting—the situation where a successful claimant claims a further remedy for the same cause of action. Whereas the merger doctrine *mechanically* denies any further right of action upon the recovery of judgment for a cause of action, thus forcing a claimant to recover once and for all, Art 3:303 BW does not *a priori* exclude a right of action; under Art 3:303 BW a claimant may not arbitrarily split a claim, but the provision does not deny a right of action if the claimant has a sufficient interest in another claim for the same cause of action, even after having recovered judgment.

(ii) Issue preclusion

The situation where a legal system bars relitigation regarding an issue that was previously determined—*issue preclusion*—exists in English and Dutch law alike. In English law, issue preclusion occurs first and foremost by the res judicata doctrine, and more specifically the estoppel doctrine in its 'issue estoppel' form, which bars the contradiction of judicial findings regarding issues. Further, the abuse of process doctrine may also imply issue preclusion, by barring 'relitigation-abuse', which may consist in the attempt to relitigate an issue between different parties, or in the attempt to relitigate an issue determined by a judgment that is not final and conclusive.

To compare, in Dutch law, issue preclusion operates by the res judicata doctrine, since Art 236 precludes the (successful) contradiction of inrreversible judicial findings regarding an issue in another case. The prohibition of abuse of right ('*misbruik van recht*') under Art 3:13 BW, which through Art 3:15 BW also applies to abuse of procedural rights ('*misbruik van procesrecht*') bars the exercise of a right for a purpose other than for which the right was created, and further excludes the exercise of a right that, despite its legitimate aim, disproportionally affects (or is likely to affect) the interest of another party. Theoretically, this provision could serve to preclude the equivalent of 'relitigation-abuse' as barred by the English abuse of process doctrine, but, to-date, Dutch courts have not extended abuse of process doctrine sofar in practice.

(iii) Wider preclusion

The situation where a legal system bars the litigation of claims or issues that were not, but could and should have been raised and determined in a prior case, or otherwise extends preclusion, for instance, in the relation with strangers to the prior litigation, or regarding matters that were determined but not rendered res judicata—*wider preclusion*—certainly arises in England and Wales pursuant to English abuse of process doctrine, which bars '*Henderson v Henderson*-abuse'—an attempt to raise a claim or issue which could have been raised in a prior case where the court decided some closely related matter and that, on a broad, merits-based judgment, *should* have been raised before, because in light of all circumstances of the case and on balance of the private and public interests involved, the attempt to raise it now is manifestly unfair to the other party or otherwise brings the administration of justice into disrepute. Moreover, the English abuse of process doctrine also excludes forms of relitigation-abuse, where a matter was determined whose relitigation is not precluded by the ordinary res judicata doctrine, for example, because the relitigation attempt is between strangers (non-mutual estoppel), or because the judgment-rendering court lacked the necessary jurisdiction to render the matter it determined also res judicata.

The same cannot be said for the Netherlands. What can be said is that the prohibition of abuse of right ('*misbruik van recht*') under Art 3:13 BW, which through Art 3:15 BW also applies to abuse of procedural rights ('*misbruik van procesrecht*') bars the exercise of a right for a purpose other than for which the right was created, and further excludes the exercise of a right that, despite its legitimate aim, disproportionally affects (or is likely to affect) the interest of another party. Under this provision, the filing of a claim or the raising of an issue which could have been filed or raised in a prior case can *theoretically* amount to an abuse. In particular, the keeping back of a claim or issue with the aim of harassing the other party in new

proceedings constitutes an abuse. Moreover, there is (high) authority for the position that an abuse may also consist in the exercise of a right to raise a matter that, despite its legitimate aim, disproportionally affects the interest of the opponent in the proceedings, because the matter was not brought up in the prior case without reasonable cause, whereas the opponent had a reasonable interest in the immediate determination of the matter in that case.

Part II. Finality of Litigation Between Jurisdictions

Introduction

The need for foreign judgment 'recognition' derives from the limits that international law imposes on the sphere of validity of a state's legal order, by excluding from that sphere the territory of other states.[1] Along these lines, the PCIJ in *Lotus* held as a general matter that "the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State."[2] This restriction extends, beyond laws, also to individual norms—i.e. *judgments*[3]—that a state enacts through its courts,[4] as reflected in the Court's following observation:

> Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.[5]

Against this framework, the validity of a judgment *abroad*, in the territory of another State, is not excluded, but depends on action of the State addressed, through

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[1] See Kelsen (Introduction n 53) 46.
[2] *SS Lotus (France v Turkey)* [1927] PCIJ Series A No 10, 18.
[3] cf Kelsen (Introduction n 53) 19.
[4] See, eg, *Seismic Shipping Inc v Total E&P UK Plc (The Western Regent)* [2005] EWCA Civ 985, [2005] 2 All ER (Comm) 515, [2005] 2 Lloyd's Rep 359, [2005] 2 CLC 182 [66] ("the judgments of the courts of one nation can have effect in the courts of another nation only through international agreement or the willingness of the law of the foreign nation to recognise or enforce those judgments."). A recent article, Adrian Briggs, 'Recognition of foreign judgments: A matter of obligation' (2013) 129 LQR 2013, 87, explains, at 98, that as a matter of English private international law, "[i]f a foreign judgment is shown to fulfil the requirements of the common law for its recognition, the person against whom it was given owes the other an obligation to abide by it, which means that the judgment creditor has a right to bring proceedings to enforce it." Though this statement holds generally true, the author also suggests, at 91, that the basis for foreign judgment recognition is the respect which the common law accords to "exercises of sovereignty over things ... which are physically located within the territorial jurisdiction of the foreign court", or "private agreement", "where a person is shown to have agreed with his opponent, by word or deed, to abide by the judgment of a court." It is important to note in this regard that the nature of the obligation a foreign judgment imposes does not vary according to the 'public' (ie sovereignty over things present) or 'private' (ie private consent) basis on which the foreign court exercised jurisdiction; in each instance, a judgment is an exercise of sovereign power of compulsion, of state sovereignty. See further FA Mann, 'Conflict of laws and public law' (1971) 132 Recueil des cours 107, 118 who likens the recognition of foreign laws with the recognition of foreign judgments; and Ralf Michaels, 'Recognition and Enforcement of Foreign Judgments', *Max Planck Encyclopedia of Public International Law* (2009) [1].
[5] *Lotus* (n 2) 19. cf Briggs (n 4) 154 ("The right to adjudicate and to order compliance with a judgment is an exercise of sovereign power: when a judge orders a person to hand over money or other property, or refrain from engaging in particular activity, his authority to lay down the law stops at the border of the country in which he has been appointed.").

what the PCIJ calls a "permissive rule"—here: private international law—by which that state agrees to incorporate a foreign judgment into its legal order—'recognise'—by conferring it *local* validity. 'Validity' as used here refers to the legal status by which a judgment has existence *as judgment* in the eyes of the law, and thus as a rule has the force of law *of a judgment* between the parties, and is capable of triggering the legal consequences attached *to a judgment*, in particular, execution (to effect justice) and preclusion (to impose finality).

To so define the meaning of recognition, is to reveal its rationale: to allow in the *private* interest for local justice and finality after the rendition of judgment abroad. In the context of things, considering that domestic judgments have no validity *per se* in the territory of other States, the rationale arguably has a further, secondary element, namely, the *public* interest that domestic judgments are recognised abroad (though some States seek in vain to achieve this aim by imposing a reciprocity-requirement, such requirement wisely forms no part of neither English nor Dutch law).

The English Court of Appeal in the recent case of *Yukos Capital Sarl v OJSC Rosneft Oil Co* tried, it is respectfully suggested incorrectly, to sever the link between judgments and international law, by holding that the English 'act of state' doctrine lacks application to judgments.[6] According to the Court, judgments are not acts of state for the purposes of the act of state doctrine,[7] so that "[o]nly the more normal restraints of judicial comity hold sway in that judicial context, as well of course as other principles, such as principles of estoppel, and all the rules which govern the recognition or enforcement of foreign judgments."[8] But the Court erred by ignoring the limited function of the act of state doctrine, which bars an English court, by depriving it of jurisdiction as a matter of domestic law, from adjudicating upon the validity of another State's act *in the territory of the enacting State insofar as concerns that State's legal order*.[9] Key in this criticism is that in *Yukos*, nobody challenged the validity of a foreign judgment *in the rendering State* (or *in the international community*); the issue was whether a foreign judgment should through recognition be granted validity *in England and Wales.* The act of state point was therefore moot to begin with. Briggs recently concluded similarly:

> If one accepts that an adjudication is a sovereign act - and it is hard to see how this could be denied - it would follow that the validity of a foreign adjudication is not open to question. However, this argument almost certainly proves too much: it cannot be correct that a court called upon to recognize a judgment may not raise questions about the foreign judgment. What the recognizing court is called upon to do is to decide whether the foreign judgment, valid and binding according the foreign law under which it was given, is valid and binding in the State called upon to recognize it,

[6] *Yukos English Court of Appeal* (Introduction n 28).
[7] ibid [73]. cf ibid at [87], and [125].
[8] *Yukos English Court of Appeal* (Introduction n 28) [128].
[9] In nature the doctrine is domestic; the doctrine is unknown to other states, is modelled after the Anglo-American view as to the comity of nations, and reflects the idea that to permit a domestic court to examine and rule on another State's sovereign act's validity within the territory or legal order of the enacting State would "imperil the amicable relations between governments and vex the peace of nations". See Lord Collins of Mapesbury (ed), *Dicey, Morris and Collins on the Conflict of Laws* (15th ed Sweet & Maxwell, London 2012) Chapter 25 [41]. The rationale for the doctrine consists of the fundamental international law principles of equality of States and territorial sovereignty. See *Regina v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147, 269, [1999] 2 WLR 827 (Lord Millett).

> and that is not to call into question the validity of the foreign judgment, but only its effect in the legal order of the receiving State. It is not called upon to decide that the acts of the foreign State, or foreign court, are invalid. The act of State principle, therefore, seems to be *irrelevant*.[10]

The House of Lords in *Kuwait Airways Corp v Iraqi Airways Co (No.6)* confirmed the relevance of a distinction of *three* discrete issues of validity arising in respect of an act of State.[11] Set against the background of a UN Security Council Resolution *invalidating* the acts of Iraq in relation to its invasion of Kuwait, this case raised the issue of the validity of a confiscatory Iraqi resolution affecting a number of airplanes stationed in Kuwait. The Court held that the act of state doctrine did not prevent an English court from refusing to recognize this act's validity in England and Wales for violating to English public policy, while adding that "recognition would also be contrary to this country's obligations under the UN Charter",[12] signaling that the UN Security Council Resolution affected the act's validity insofar as concerns the international legal order.

As regards a foreign judgment then *three* distinct issues of validity arise, which crop up, more generally, in relation to any act of state: first, a foreign judgment's validity *within the territory of the enacting State* according to the law of that State; second, a foreign judgment's validity *within the State addressed* according to the law of that State; and, finally, a foreign judgment's validity *within the international community* (whether defined regionally or globally) according to international law (e.g. by reference to what is sometimes called 'international public policy'[13]). The Court of Appeal in Yukos failed to appreciate that the act of state doctrine concerns the validity of a foreign judgment only in the first sense—i.e. the foreign judgment's validity—*within the territory of the enacting State according to the law of the enacting State*—and does not pertain to the remaining two issues, which are governed respectively by English private international law on foreign judgment recognition and international law.

A. Recognition of foreign judgments

The discretion left to States by international law to regulate the jurisdiction of their own courts in cases with a foreign element, the reach of their laws, as well as the recognition of foreign judgments, explains the great variety of rules that States have been able to adopt without (insurmountable) objections or complaints on the part of other States.[14] In large part, Chapter 3 on the English and Dutch municipal rules of private international law analyses how States have exercised this discretion in respect of foreign judgments.

At the same time, States have sought to remedy the difficulties resulting from such variety—lacunæ in or conflicts of jurisdiction and laws, and a lack of or inadequate provision for foreign judgment recognition—by adopting a patchwork of

[10] Briggs (n 4) 140 (emphasis added). cf Van de Velden (Introduction n 26) 520 fn 9.
[11] [2002] UKHL 19, [2002] 2 AC 883, [2002] 2 WLR 1353, [2002] 3 All ER 209, [2002] 1 All ER (Comm) 843, [2003] 1 CLC 183.
[12] ibid [29] (Lord Nicholls).
[13] See, eg, *Kuwait Airways Corp v Iraqi Airways Co (No 6)* (Part II Introduction n 11) [114] (Lord Nicholls).
[14] See *Lotus* (n 2) 19.

bi- and multilateral conventions, and, as far as the United Kingdom and the Netherlands are concerned, supranational measures in an EU-context, the aim and effect of which is to limit the discretion international law presently leaves to States in this respect.[15] The final section of Chapter 3 evaluates the resulting EU-framework for judgments.[16]

B. Recognition and preclusion

If 'recognition' involves the question whether a foreign judgment gains local *validity*, 'preclusion' concerns the question what *legal consequences* properly attach to the judgment. The distinction of these two problems is not new.[17] For the Brussels Regime, for instance, the Jenard Report expresses the need for the distinction very clearly: "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 recognized, and these do not always have the force of res judicata."[18] Moreover, civil and common writers alike increasingly acknowledge that recognition and preclusion are discrete problems,[19] even though some persist in conflating the two questions,[20] and others distinguish between recognition "in a broad sense" (i.e. including preclusion) and recognition "in a narrow sense".[21]

Recognition and preclusion are in fact related only in that recognition is a *precondition* for preclusion; in other words, a foreign judgment must gain local validity before it can trigger any legal consequences, including preclusive effects. At the same time, while every foreign judgment to be preclusive must first be recognised, not every recognised judgment is also preclusive; certain judgments

[15] ibid.
[16] On the practice of Member/Contracting States are regards third State judgments see SP Baumgartner, 'How Well Do U.S. Judgments Fare in Europe' (2008) 40 George Washington International Law Review 173-230. See generally and with individual country reports, Gerhard Walter and SP Baumgartner (eds), *Recognition and Enforcement of Foreign Judgments Outside the Scope of the Brussels and Lugano Conventions* (Kluwer Law International, The Hague 2000).
[17] Von Savigny (n 14) 259-60. cf Guthrie (n 14) 185.
[18] P Jenard, 'Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Signed at Brussels, 27 September 1968)' [1979] OJ C59/1, 43. For further reference, see P Schlosser, 'Report on the convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (Signed at Luxembourg, 9 October 1978)' [1979] OJ C59/71; DI Evrigenis, 'Report on the accession of the Hellenic Republic to the Community Convention on jurisdiction and the enforcement of judgments in civil and commercial matters' [1986] OJ C298/1; P Jenard and G Möller, 'Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters at Lugano on 16 September 1988' [1990] OJ C189/57; and Fausto Pocar, 'Explanatory report on the Convention Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007' [2009] OJ C319/1.
[19] See generally Péroz (Introduction n 41); and Barnett (Introduction n 24). Also see Kessedjian (Introduction n 1616) [169].
[20] See, eg, Nygh and Pocar Report (n 18) 102 ("Recognition is given to a judgment 'when it is given the same effect that it has in the state where it was rendered with respect to the parties, the subject matter of the action and the issues involved'. Its most obvious effect is when a foreign judgment is pleaded to prevent a party to the judgment from bringing a fresh action between the same parties on the same cause of action or to prevent that party from re-litigating in the forum a matter of fact or law necessarily decided between the same parties by a foreign court, even if the cause of action is different.").
[21] See, eg, Schütze (Introduction n 18).

compel compliance, but do not preclude. For instance, an English court will habitually recognise a Dutch judgment notwithstanding that the judgment remains subject to an ordinary appeal, or the time for filing an appeal has not expired.[22] Accordingly, the parties will have to comply with the Dutch court's order also in England and Wales, despite the fact that the judgment lacks any res judicata effect in The Netherlands,[23] and is unlikely to be attributed conclusive effect in English proceedings[24]. In another instance, a binding and enforceable Dutch judgment may lack preclusive effect, not because the judgment has not yet acquired the res judicata status, but because the judgment (e.g. a judgment for interim relief)[25] is by nature incapable of triggering preclusion.

By the same token, a refusal to attribute preclusive effect does not imply a refusal of recognition. To illustrate, in *Yukos*,[26] the English courts determined whether a judgment of the Amsterdam Court of Appeal triggered preclusion in the form of an issue estoppel in the context of English enforcement proceedings. After the High Court held it did,[27] the Court of Appeal on appeal refused to attribute the judgment issue preclusive effect because the issues involved in the Dutch and English proceedings were different.[28] However, the Dutch judgment met all applicable conditions for its recognition; the 1967 Netherlands—United Kingdom Convention,[29] as implemented by the Foreign Judgments (Reciprocal Enforcement) Act 1933,[30] provides for certain limited grounds for refusing recognition only,[31] none of which applied in the case. Accordingly, the Court's conclusion that there could be no

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[22] Though under the Brussels I Regulation, an English court may in those circumstances stay its proceedings. Regulation, Art 37(1) ("A court of a Member State in which recognition is sought of a judgment given in another Member State *may* stay the proceedings if an ordinary appeal against the judgment has been lodged.") (emphasis added). cf Article III(3) of the 1967 Netherlands-United Kingdom Convention ("Where the judgment debtor satisfies the court applied to that an appeal is pending, or that he is entitled and intends to appeal against the judgment in the country of the original court, the court applied to may recognise the judgment").

[23] See Chapter 2, text to n 462ff.

[24] See Chapter 4, text to n 85ff.

[25] See Chapter 2, text to n 536ff.

[26] *Yukos English High Court* (Introduction n 26). For the facts, see Chapter 1, text to n 415ff.

[27] ibid. See Chapter 1, text to n 415ff

[28] *Yukos English Court of Appeal* (Introduction n 28). See Chapter 1, text to n 415ff.

[29] Convention (United Kingdom of Great Britain and Northern Ireland and Netherlands) providing for the reciprocal recognition and enforcement of judgments in civil matters (adopted 17 November 1967, entered into force 21 September 1969) 699 UNTS 11. See the Reciprocal Enforcement of Foreign Judgments (the Netherlands) Order (SI 1969/1063, as amended by SI 1977/2149).

[30] 23 and 24 Geo 5 c 13.

[31] Convention, Art III(2) ("Subject to the provisions of paragraphs (3) to (5) of this article judgments given in the territory of one High Contracting Party shall be recognised in the territory of the other except where the court applied to is satisfied of the existence of any of the following objections to the judgment: (a) in the case in question, the jurisdiction of the original court is not recognised under the provisions of Article IV; (b) the judgment debtor, being the defendant in the proceedings in the original court, did not (notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear; (c) the judgment was obtained by fraud; (d) the recognition of the judgment would be contrary to public policy in the country of the court applied to; (e) the judgment debtor, being a defendant in the original proceedings, was a person who, under the rules of public international law, was entitled to immunity from the jurisdiction of the courts of the country of the original court and did not submit to the jurisdiction of that court; (f) the judgment is sought to be enforced against a person who, under the rules of public international law, is entitled to immunity from the jurisdiction of the court applied to."). Article III(4) offers a further ground for refusal in case of irreconcilable judgments.

preclusion does not imply that the Court thereby denied the Dutch judgment recognition in violation of the 1967 Convention; on the contrary, the Court recognised the judgment and assessed its legal consequences, but concluded that in the circumstances the conditions for preclusion were not met.

C. Preclusion by foreign judgments

States have adopted diverging approaches to the problem of preclusion by foreign judgments. The problem arises because preclusion laws vary between jurisdictions. Essentially, then, the problem of preclusion by foreign judgments is one of resolving conflicts of preclusion laws.

Chapter 3. Recognition of Foreign Judgments

Introduction

Foreign judgment recognition (and enforcement) is one of the three key problems private international law aims to resolve (aside from adjudicatory jurisdiction and applicable law in cases with a foreign element). Vischer in his Hague lectures even observed that "[i]n the trias of conflicts problems presented by jurisdiction, choice of law and recognition of foreign judgments and acts, it is the latter which in my opinion is most important."[1] He ventured this classification on the ground that one should expect to see most progress in the development of private international law on the problem of foreign judgment recognition, and because a liberal approach to recognising foreign judgments can overcome some of the negative effects of the divergence of municipal conflicts solutions.

In the eighty years since, Vischer's prediction has proved largely accurate, though as he noted, a liberal approach to foreign judgment recognition overcomes only *some* of the negative effects of divergence of municipal conflicts solutions; in fact, the divergence of municipal conflicts solutions has partly undermined progress on the problem of foreign judgment recognition. For instance, as Lord Collins noted in *Rubin v Eurofinance SA*, "[r]ecognition and enforcement of judgments in civil and commercial matters … have been the subject of intense international negotiations at the Hague Conference on Private International Law, which ultimately failed because of inability to agree on recognised international bases of *jurisdiction*."[2]

The significance of the problem that arises when a foreign judgment is invoked locally is at any rate commonly accepted.[3] At the same time, however, the meaning of 'recognition' (and 'enforcement') is frequently left unclear; hence, while most authors agree that the foreign *judgment* forms the subject of recognition, and further agree that recognition is a *precondition* for enforcement, they tend to leave the concept of 'recognition' (and 'enforcement') undefined. In particular, whereas the 'recognition' of a foreign judgment is generally associated with its 'effects',[4] the nature of this relationship remains unspecified. In its literal sense, to recognise means to acknowledge the existence, validity, or legality of something.[5] This reflects how some authors characterise the problem; for instance, Hijmans describes 'recognition' as the acknowledgment of a judgment's validity. On this view, recognition is a *precondition* for effects, since the validity of a judgment forms the foundation for its effects.[6] Upon fulfilment of the requirements for recognition, Hijmans observes, a foreign judgment can be attributed legal consequences, irrespective of whether

[1] Frank Vischer, 'General course on private international law' (1992) 232 Recueil des Cours 9, 234.
[2] [2012] UKSC 46, [2013] 1 AC 236, [2012] 3 WLR 1019, [2013] 1 All ER 521, [2013] 1 All ER (Comm) 513, [2013] Bus LR 1, [2012] 2 Lloyd's Rep 615, [2013] BCC 1, [2012] 2 BCLC 682, [2012] BPIR 1204 [142].
[3] Peter Schlosser, 'Jurisdiction and international judicial and administrative co-operation' (2000) 284 Recueil des cours 9, 31ff.
[4] GAL Droz, 'Regards sur le droit international privé comparé: cours général de droit international privé' (1991) 229 Recueil des cours 9, 82.
[5] *The Concise Oxford English Dictionary* (12th ed OUP, Oxford 2008).
[6] See, eg, Hijmans (Introduction n 19) 20-1.

execution or preclusion is sought.[7] According to other authors, however, to recognise a foreign judgment amounts to recognising its effects, as if preclusive effects are vested in a judgment.[8] On this view, preclusion by a foreign judgment unavoidably turns into a question of foreign judgment recognition.[9]

In a sense, the relationship of the recognition and preclusion is comparable to that of enforcement and execution. For instance, the ECtHR in the recent case of *Saccoccia v Austria*[10] the Court applied Art 6(1) ECHR to *exequatur* proceedings in respect of foreign judgments. The accuracy of its understanding of the significance of '*exequatur* proceedings' appears doubtful where it described them as "proceedings relating to the execution of a foreign court's decision".[11] In fact, *exequatur* proceedings concern the 'enforceability' of a foreign judgment (i.e. its *legal status* as 'enforceable judgment'), as opposed to its 'execution' in the sense of implementation, or putting into effect. The Court later clarified, however, that "[a]ll they [i.e. domestic courts in *exequatur* proceedings] have to do is to examine whether the conditions for granting execution have been met."[12] Here, the Court rightly restricts its construction of '*exequatur*' to declaration of enforceability—the act that *precedes* execution (i.e. the process aimed at ensuring the effectiveness of a recognised and enforced foreign judgment, for instance, by means of execution).

3.1 England and Wales

Introduction

The recognition (and enforcement) of foreign judgments has long been recognised as a special area of English private international law.[13] The subject, widely viewed as "a

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[7] ibid 26.

[8] See, eg, J Kosters and Ph Suyling, 'La reconnaissance des effets de jugements étrangers' in *International Law Association, Report of the Thirtieth Conference held at the Peace Palace, The Hague, Holland, 30th August – 3rd September, 1921* (Sweet & Maxwell, London 1922) 354.

[9] See, eg, A Briggs, *The Conflict of Laws* (OUP, Oxford 2002) 119-20 ("Recognition of a judgment means treating the claim which was adjudicated as having been determined once and for all. … When the judgment is recognized, the matter is res judicata, and the party bound by it will be estopped from contradicting it in subsequent proceedings in an English court. … The tradition of English textbooks is to concentrate on the enforcement of judgments, and to treat recognition as an afterthought of limited practical importance. But the logic of the law is that recognition is the necessary primary concern, for without it the judgment can have no effect in the English legal order."). Regarding the Brussels I Regulation, Briggs adds, at 131: "To recognize a judgment means, in principle at least, to give it the effect it has under the law of the state in which it was given." cf TC Hartley, 'The modern approach to private international law: international litigation and transaction from a common-law perspective' (2006) 319 Recueil des cours 9, 280 ("When a foreign judgment is recognized, what exactly is it that is recognized? Here there is a difference between the common law and the civil law. In the civil law, the final ruling or order (in German, the Tenor or Spruch ; in French, the dispositif) is all that is recognized. In the common-law world, however, the doctrine known variously as issue estoppel, collateral estoppel or issue preclusion requires a court in certain circumstances to recognize rulings by the court of origin on preliminary issues.").

[10] (2010) 50 EHRR 11.

[11] ibid [62].

[12] ibid [63].

[13] cf *NML Capital Ltd v Argentina* [2011] UKSC 31, [2011] 2 AC 495, [2011] 3 WLR 273, [2011] 4 All ER 1191, [2012] 1 All ER (Comm) 1081, [2011] 2 Lloyd's Rep 628, [2011] 2 CLC 373, (2011) 155(27) SJLB 39 [86] (Lord Mance JSC). See Piggott (Introduction n 1) 3ff; John Westlake, *A treatise on private international law, with principal reference to its practise in England* (5th ed Sweet & Maxwell, London

technical subject matter",[14] is broadly concerned with "the treatment to be accorded by courts in the United Kingdom to judgments of foreign courts."[15]

(1) Why English courts recognise foreign judgments

(i) The limited sphere of validity and force of judgments

The law on foreign judgment recognition exists because English courts (rightly)[16] regard a foreign judgment as a sovereign act of compulsion—an exercise of the State's judicial power—the sphere of validity of which is delimited territorially under international law; lacking recognition, a foreign judgment *per se* has no significance in England and Wales. In 1744, Lord Hardwicke in *Gage v Bulkeley* explained this position as follows:

> [E]very sentence, having its authority from the sovereign in whose dominions it is given, cannot bind the jurisdiction of foreign courts, who own not the same authority, and have a different sovereign, and are only bound by judicial sentence given under the same sovereign power by which they themselves act….[17]

All foreign judgments regardless of subject-matter—civil judgments and tax or penal judgments alike—are subject to this same general restriction; Rix LJ in *Seismic Shipping Inc v Total E&P UK Plc (The Western Regent)* recently reiterated this position, and emphasised that the *private* law subject-matter of a dispute does not exempt a judgment from the law on foreign judgments and the requirement of recognition (and enforcement):

> Whereas the agreement of parties does not, save in a case which trespasses against public policy or public order, seek to impinge on the sovereignty of foreign nations, and whereas in any event respect in matters of contract for party autonomy is so widespread as possibly to be regarded as practically universal, *the judgments of the courts of one nation can have effect in the courts of another nation only through international agreement or the willingness of the law of the foreign nation to recognise or enforce those judgments.*[18]

This is the legal position of *foreign* judgments; by contrast, judgments from a different part of the United Kingdom which are invoked in another part of that single

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1912) §311ff; Lord Chancellor, *British and foreign legal procedure. Report of the committee appointed by the Lord Chancellor to consider the conduct of legal proceedings between parties in this country and parties abroad and the enforcement of judgments and awards* (Cmd 251, 1919) (the 'Sumner Committee Report'); Lord High Chancellor, *Foreign Judgments (Reciprocal Enforcement) Committee report* (Cmd 4213, 1932) (the 'Greer Committee Report'); Horace Emerson Read, *Recognition and enforcement of foreign judgments in the common law units of the British commonwealth* (Harvard University Press, Cambridge, Mass, 1938); Marussia Borm-Read, 'Recognition and Enforcement of Foreign Judgments' (1954) 3 ICLQ 49; JD McClean and KW Patchett, *The recognition and enforcement of judgments and orders and the service of process within the Commonwealth* (Commonwealth Secretariat, 1977); Barnett (Introduction n 24) [2.01]ff; Adrian Briggs and Peter Rees, *Civil jurisdiction and judgments* (5th ed Informa, London 2009); Adrian Briggs, 'The principle of comity in private international law' (2011) 354 Recueil des cours 65, 145ff; and *Dicey, Morris & Collins* (Part II, Introduction n 9) Chapter 14.

[14] *Black Clawson International Ltd v Papierwerke AG* (Chapter 1 n 309) 637 (Lord Diplock).

[15] ibid.

[16] cf Briggs (n 13) 145.

[17] (1744) Ridgeway Temp Hardwicke 263, 263-64, 27 ER 824.

[18] *Seismic Shipping Inc v Total E&P UK Plc (The Western Regent)* (Part I, Introduction n 4) [66] (Rix LJ) (emphasis added).

State, are not subject to international law; instead, a comparable principle derives from the United Kingdom's *constitutional* framework.[19]

a. Judgments from other jurisdictions within the UK

International law has no direct implications in the relations between Scotland, Northern Ireland and England and Wales; for purposes of international law the United Kingdom—comprising its constituent parts—is a *single* State. Consequently, a Scottish or Northern Irish judgment is not strictly a 'foreign' judgment in an English court. Nevertheless, similar issues of recognition and enforcement arise within the United Kingdom, not as a matter of international law, but by virtue of *constitutional principle.*

1. The constitutional principle

The United Kingdom's constitution, as developed by the Constitutional Reform Act 2005,[20] implies the division of the United Kingdom into separate jurisdictions with distinct civil justice systems and autonomous courts whose jurisdiction does not extend to the whole territory of the United Kingdom but is geographically restricted to the territory of the particular part of the United Kingdom in which they sit.[21] This division is relevant in light of the variety of distinctions between the laws of England and Wales, Scotland and Northern Ireland, so that, for instance, Scotland differs from Northern Ireland in some ways, and in other ways from England and Wales.[22]

A sign of the independence of the three jurisdictions within the United Kingdom is s 41(2) of the Constitutional Reform Act 2005, which provides that a decision of the Supreme Court of the United Kingdom on appeal from a court of any part of the United Kingdom, other than a decision on a devolution matter,[23] is to be regarded as the decision of a court of that part of the United Kingdom only in the sense that, for instance, a decision on appeal from the Court of Session in Sctoland would be regarded as a decision of a *Scottish* court, and would have binding effect in Scottish courts accordingly, but would not have binding effect in English courts, although nothing prevents English courts from adopting such a decision as persuasive authority, so as to be readily followed.[24]

2. Recognition and enforcement within the UK

The resulting issues of recognition and enforcement arising between the different parts of the United Kingdom used to be addressed by the now defunct Judgments Extension Act 1868.[25] The act was limited in scope and merely catered for the enforcement, by registration, of *money* judgments from one part in another part of the

[19] See on the background of recent constitutional reform, Cambridge Centre for Public Law, *Constitutional Reform in the United Kingdom: Practice and Principles* (Hart, Oxford 1998).
[20] c 4, s 41.
[21] ibid s 41(1).
[22] ibid explanatory notes [163].
[23] ibid s 41(3)(b) provides that such decisions are not binding on the Supreme Court itself but are binding in all other proceedings in the Kingdom.
[24] ibid explanatory notes [164].
[25] 31 & 32 Vict c 54.

jurisdiction.[26] The 1868 Act was conceived "to render judgments or decreets obtained in certain Courts in England, Scotland, and Ireland respectively effectual in any other part of the United Kingdom."[27] Section 3 provided that the (certificate of) a money judgment covered by the statute was from the date of its registration;

> … of the same force and effect as a judgment obtained or entered up in the Court in which it is so registered, and all proceedings shall and may be had and taken on such certificate as if the decreet of which it is a certificate had been a judgment originally obtained or entered up on the date of such registration as aforesaid in the Court in which it is so registered.

On the effect of registration under the 1868 Act Lindley LJ observed in *In Re Low*:

> The judgment, therefore, must now be regarded as an English judgment. … The object of the statute is simply to prevent the necessity of bringing several actions in England, Scotland, and Ireland, instead of one, in order to establish a right to be enforced anywhere within Great Britain and Ireland.[28]

Today the issues are addressed in the Part II of the Civil Jurisdiction and Judgments Act 1982.[29] On the issue of recognition of judgments between the jurisdictions within the United Kingdom, s 19(1) stipulates that:

> A judgment to which this section applies given in one part of the United Kingdom shall not be refused recognition in another part of the United Kingdom solely on the ground that, in relation to that judgment, the court which gave it was not a court of competent jurisdiction according to the rules of private international law in force in that other part.

In terms of enforcement, the Civil Jurisdiction and Judgments Act 1982, adopts fundamentally the same approach as the 1868 Act, although its scope is broader in that it covers also *non-money* judgments.[30] Otherwise the general effect of registration under the two acts is equivalent; schedule 6, paragraph 6(1), provides that a registered (certificate of a) money judgment;

> … shall, for the purposes of its enforcement, be of the same force and effect, the registering court shall have in relation to its enforcement the same powers, and proceedings for or with respect to its enforcement may be taken, as if the certificate had been a judgment originally given in the registering court and had (where relevant) been entered.

Further, schedule 7, paragraph 6(1), states that the non-money provisions contained in a registered (certified copy of a) judgment;

> … shall, for the purposes of their enforcement, be of the same force and effect, the registering court shall have in relation to their enforcement the same powers, and proceedings for or with respect to their enforcement may be taken, as if the judgment

[26] See Scottish Law Commission, *Judgments Extension Acts* (Scot Law Com No 12, 1969) 13 <www.scotlawcom.gov.uk/files/6013/1221/2520/cm12.pdf> accessed 9 January 2012.
[27] Preamble.
[28] [1894] 1 Ch 147, 157-58. See Scottish Law Commission (n 26).
[29] c27. See Briggs and Rees (n 13) [7.89].
[30] Civil Jurisdiction and Judgments Act 1982, s 18(1) in conjunction with schedules 6 (money judgments) and 7 (non-money judgments).

containing them had been originally given in the registering court and had (where relevant) been entered.

Considering the likeness of the issues of recognition and enforcement arising between jurisdictions within the United Kingdom under constitutional principle and the issues cropping between States under international law, much of what is said below in clarification of the concepts of 'recognition' and 'enforcement' of foreign judgments is relevant between the different jurisdictions within the United Kingdom. Nevertheless, two things should be kept in mind when addressing these issues. First, the cause in the sense of the *legal source* of the issues arising in respect of the use of foreign judgments in the United Kingdom is international law, whereas domestic (constitutional) law is the source of those issues cropping up regarding judgments moving between the different parts of the United Kingdom.

Second, issues of recognition and enforcement arising in respect of *domestic* judgments—judgments given in one and invoked in another part of the United Kingdom—are governed first and foremost by United Kingdom statute: the Civil Jurisdiction and Judgments Act 1982 discussed above. English common law determines residually the recognition and enforcement of judgments in civil and commercial matters which are excluded from the scope of the 1982 Act,[31] for instance, to the extent that a judgment involves a provisional (including protective) measure other than an order for the making of an interim payment.[32]

Conversely, issues of recognition and enforcement of *foreign* judgments are regulated at various levels including (a) at the national level by statute where United Kingdom has in the past negotiated and concluded treaties to resolve these issues in the relations with other States, (b) at the European level where the European Union has regulated the issues in the relations between EU Member States or in the relations of EU Member States and EFTA Member States or third States, or (c) at the municipal level where the common law of England and Wales governs residually.

b. Development of a legal framework

The position then is judgments of the courts of one nation can have effect in the courts of another nation only through international agreement or the willingness of the law of the foreign nation to recognise or enforce those judgments. Historically, this position implied that, absent treaties on the subject, the law of foreign judgments developed as forum law and, lacking acts of Parliament, as *common law*. But, since the early part of the nineteenth century,[33] the area has been increasingly occupied by *legislation* in the form of statutes giving effect to domestic policy or to international agreements contracted by the UK, and of late European regulations.[34]

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[31] ibid s 18(2)-(8).
[32] ibid s 18(5)(d).
[33] The Crown Debts Act 1801 (41 Geo 3 c 90) and the Crown Debts Act 1824 (5 Geo 4 c 111), for instance, provided both for the recovery in England and Ireland of judgments for Crown debts issued by the Courts of Exchequer in Ireland and England respectively, and for the reciprocal enforcement in the two countries of Chancery orders "for payment or for accounting for money". Under the acts the enforcement procedure was by way of enrolling in the books of the registering court a copy of the original order or decree. See generally Scottish Law Commission (n 26).
[34] See for an overview text to n 88ff.

1. The obligation to recognise foreign judgments

It is generally accepted that English courts recognise and enforce foreign judgments because they are *bound* to do so, not as a matter of discretion. At the same time, international law is commonly rejected as the source of this obligation; along these lines, Blackburn J said in *Godard v Gray*:

> It is *not* an admitted principle of the law of nations that a state is bound to enforce within its territories the judgment of a foreign tribunal. Several of the continental nations (including France) do not enforce the judgments of other countries, unless where there are reciprocal treaties to that effect. But in England and in those states which are governed by the common law, such judgments are enforced, not by virtue of any treaty, nor by virtue of any statute, but upon a principle very well stated by Parke, B., in *Williams v Jones.*[35]

Clearly, the law has developed since 1870. Today in many cases the recognition and enforcement is directly prescribed by statute or EU regulation; all existing legislative measures except one order recognition and enforcement under certain conditions and subject to certain exceptions.[36] But also at common law, the obligation to recognise and enforce foreign judgments under certain conditions and subject to certain exceptions is well-established; Blackburn J in *Godard v Gray* made this point unequivocally:

> If, indeed, foreign judgments were enforced by our Courts out of politeness and courtesy to the tribunals of other countries, one could understand its being said that though our Courts would not be so rude as to inquire whether the foreign Court had made a mistake, or to allow the defendant to assert that it had, yet that if the foreign Court itself admitted its blunder they would not then act: but *it is quite contrary to every analogy to suppose that an English Court of law exercises any discretion of this sort*. We enforce a legal obligation, and we admit any defence which shews that there is no legal obligation or a legal excuse for not fulfilling it….[37]

While it is clear that an *English* (common law) principle founds the duty to recognise and enforce, there was some uncertainty regarding the precise substance of this principle. Blackburn J in *Godard v Gray* discreetly rejected 'comity',[38] saying that English courts do *not* enforce foreign judgments "out of politeness and courtesy to the tribunals of other countries"[39]. He made this point explicitly in *Schibsby v Westenholz*;

> … if the principle on which foreign judgments were enforced was that which is loosely called 'comity,' we could hardly decline to enforce a foreign judgment given in France against a resident in Great Britain under circumstances hardly, if at all, distinguishable from those under which we, mutatis mutandis, might give judgment

[35] (1870-71) LR 6 QB 139, 148 (emphasis added).
[36] Administration of Justice Act 1920 (10 & 11 Geo 5 c 81), s 9(1) ("the court may, if in all the circumstances of the case they think it just and convenient that the judgment should be enforced in the United Kingdom."). While the provision signals a discretion, discretions can be exercised wrongly as they must be exercised judicially, according to the law, not arbitrarily, meaning that the court *should* enforce if in all the circumstances of the case this is objectively just and convenient. See by parity of reasoning *Brown v Dean* [1910] A.C. 373, 375 (Lord Loreburn LC).
[37] (n 35) 152 (emphasis added).
[38] See text to n 41ff.
[39] (n 35) 152.

> against a resident in France; but it is quite different if the principle be that which we have just laid down.[40]

In truth, in *Godard v Gray*, Blackburn J stated only the rule, not also its underlying principle. While the judge clearly rejected the idea that comity commands English courts to enforce foreign judgments, did he propose anything in its place? He said that a judgment of a court of competent jurisdiction creates a legal obligation that an English court should enforce. But why should English courts enforce the obligations created by foreign judgments? Neither he nor Parke B before him offered an answer to this question.

2. Comity as recognition rationale?

Many things can be said of the relationship between the English principle of comity and the recognition and enforcement of foreign judgments.[41] But, whereas comity is an established principle of English private international law, its marriage with the law of foreign judgments is shaky (to say the least); in fact, it fair to say that the union, if any, resulted in separation some 175 years ago with the judgment of Parke B in *Russell v Smyth*, who held that "[w]here the Court of a foreign country imposes a duty to pay a sum certain, there arises an obligation to pay, which may be enforced in this country";[42] a view he reiterated a few years later in *Williams v Jones*:

> The *principle* on which this action is founded is, that, where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced….[43]

On this basis English courts have rejected comity as the English (private international law) principle underlying the recognition and enforcement of foreign judgments.[44] For example, Slade LJ in *Adams and Others v Cape Industries* held that it was clear that "at common law in this country foreign judgments are enforced, if at all, not through considerations of comity but upon the basis of a principle explained thus by Parke B. in *Williams v Jones*".[45] "That appears to be the modern position", Ward LJ concluded in *Rubin v Eurofinance SA* while referring to *Adams*, indicating that the view is more widely among the English judiciary.[46]

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[40] (1870-71) LR 6 QB 155, 159.
[41] See Briggs (n 13) 145ff.
[42] (1842) 9 M & W 810, 819, 152 ER 343.
[43] (1845) 13 M & W 628, 153 ER 262, 265 (emphasis added).
[44] *Blohn v Desser* [1962] 2 QB 116, 123-124, [1961] 3 WLR 719 (Diplock J) ("…I do not accept that comity is the basis on which English courts recognise and enforce foreign judgments, for there are many instances in which English courts exercise jurisdiction in personam over non-resident foreigners where they do not recognise a similar jurisdiction in a foreign court…."). cf *Indyka v Indyka* [1969] 1 AC 33, 58, [1967] 3 WLR 510, [1967] 2 All ER 689, (1967) 111 SJ 456 (Lord Reid) ("'Comity' is a word of many meanings but for several reasons the meaning which it appears to have in Travers v Holley does not appear to me to be a satisfactory basis for recognition. Comity has never been the basis on which we recognise or give effect to foreign judgments. This was made clear by Blackburn J. in Schibsby v Westenholz…."); and *Meyer v Ralli* (1876) 1 CPD 358 (Archibald J with whom Lord Coleridge CJ agreed).
[45] [1990] Ch 433, 513, [1990] 2 WLR 657, [1991] 1 All ER 929, [1990] BCC 786, [1990] BCLC 479.
[46] [2010] EWCA Civ 895, [2011] Ch 133, [2011] 2 WLR 121, [2011] 1 All ER (Comm) 287, [2011] Bus LR 84, [2011] CP Rep 2, [2011] BCC 649, [2011] 2 BCLC 473, [2011] BPIR 1110, (2010) 160 NLJ

Consider again what Parke B actually said in and *Russell v Smyth* and *Williams v Jones*: *the judgment of a court of competent jurisdiction creates a legal obligation on which an action to enforce that obligation may be maintained in England and Wales*. This is a 'principle' only in the sense of 'rule of law' applied by English courts faced with foreign judgments, not a 'principle' as in 'something which underlies a rule, and explains or provides the reason for it'.[47] In other words, Parke B stated what is now regarded as the English rule on foreign judgments; he did not specify the rationale for of this rule. At the end of the day, the judge left open the question *why* English courts enforce foreign judgments.

Admittedly, Blackburn J's reasoning in *Godard v Gray* and *Schibsby v Westenholz* implies a *rejection* of comity only if 'comity' is understood as a *courtesy* to foreign states (and their courts), because this implies a discretion, not an obligation. Indeed, as Lord Collins noted in *Agbaje v Agbaje* comity is a term of "very elastic content",[48] which is used at times not simply as a principle of *courtesy* to foreign states (and their courts)—as Blackburn J understood it—but as something more than courtesy, albeit less than obligation; that is, as a principle of *respect and convenience*. This is how the United States Supreme Court positioned it in 1895 in *Hilton v Guyot*:[49]

> 'Comity' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of anothern ation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[50]

This view of 'comity' was embraced and amplified nearly 100 years later by the Supreme Court of Canada in *Morguard Investments Ltd v De Savoye*.[51] La Forest J delivered the judgment for the Court, arguing that the difficulties caused by the definition of 'comity' as mere "deference and respect due by other states to the actions of a state legitimately taken within its territory", so that if "the state where the judgment was given had power over the litigants, the judgments of its courts should be respected" resulted from;

> … a misapprehension of the real nature of the idea of comity, an idea based not simply on respect for the dictates of a foreign sovereign, but on the convenience, nay

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1192, revd (on other grounds) [2012] UKSC 46, [2013] 1 AC 236, [2012] 3 WLR 1019, [2013] 1 All ER 521, [2013] 1 All ER (Comm) 513, [2013] Bus LR 1, [2012] 2 Lloyd's Rep 615, [2013] BCC 1, [2012] 2 BCLC 682, [2012] BPIR 1204 [34]-[35] ("At first enforcement was founded on the doctrine of comity. Then Parke B. explained in Williams v Jones [1845] 13 M.W. 628 at 633: 'where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced.' That appears to be the modern position."). See *Rubin v Eurofinance SA* (n 2) [107]-[110] (Lord Collins).

[47] See Fitzmaurice (Introduction, n 4).

[48] [2010] UKSC 13, [2010] 1 AC 628, [2010] 2 WLR 709, [2010] 2 All ER 877, [2010] 1 FLR 1813, [2010] 2 FCR 1, [2010] Fam Law 573, (2010) 107(12) LSG 20, (2010) 154(11) SJLB 29 [51].

[49] 159 US 113 (1895).

[50] ibid 163-64. See HH Koh, 'International business transactions in United States Courts' (1996) 261 Recueil des cours 9, 203ff.

[51] [1990] CarswellBC 283 [31].

> *necessity*, in a world where legal authority is divided among sovereign states, of adopting a doctrine of this kind.[52]

Hilton and *Morguard* clearly do not go so far as the third of the three possible constructions of 'comity' summed up below—comity as an *obligation* of States to recognise and enforce foreign judgments as proposed, for example, by Lord Westbury in *Shaw v Gould,* who in 1868—two years before *Godard* and *Schibsby*—observed that:

> The extent and limits of the comity of nations, or of the *obligation* which one nation is under to receive and admit the judgments of the Courts of another country, are well defined in one of the axioms of Huber, who says: '*Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicetur.'*[53]

Against this (necessarily brief) background,[54] there are at least three possible understandings of 'comity' so that foreign judgments are to be recognised and enforced as a matter of (a) mere *courtesy* to foreign states (including their courts); (b) something *more than courtesy but less than obligation*: respect *and* convenience; or (3) *obligation*. This variable understanding of the concept demonstrates the lack of a universal understanding of what 'comity' implies; States have and will continue to develop their proper comity principles reflecting the specific requirements of the time and the particular circumstances of each individual State.

But when Lord Collins speaks, one listens (carefully), and His Lordship was at least willing in *Agbaje* to contemplate that 'comity' "is said to be the basis for the enforcement and recognition of foreign judgments."[55] There is certainly high authority for this proposition; for instance, as early as 1815, Lord Ellenborough CJ in *Power v Whitmore* said:

> [B]y the comity which is paid by us to the judgment of other Courts abroad of competent jurisdiction we give a full and binding effect to such judgments, as far as they profess to bind the persons and property immediately before them in judgment, and to which their adjudications properly relate….[56]

Nevertheless, it is suggested that due to its international law pedigree, comity is basically a *negative* principle; that is, in this particular sphere it discourages certain judicial acts. Along these lines, Brooke LJ for the Court of Appeal in *Kuwait Airways Corp v Iraqi Airways Co (No.6)* specified the nature and context of comity very carefully as follows:

> First, there is the prima facie rule that a foreign sovereign is to be accorded that absolute authority which is vested in him to act within his own territory as a sovereign acts. This rule reflects concepts of both private and public international law as to territorial sovereignty. As such, we think that the rule is founded primarily on a view as to the comity of nations, rather than on concern as to giving offence to the

[52] (1990) 76 DLR (4th) 256 (emphasis added).
[53] (1868) LR 3 HL 55, 81-82 (emphasis added). The cited passage of Huber means: "By the courtesy of nations, whatever laws are carried into execution, within the limits of any government, are considered as having the same effect every where, so far as they do not occasion a prejudice to the rights of the other governments, or their citizens." cf *Emory v Grenough* (1797) 3 US 369, 371.
[54] For a detailed account and analysis, see Briggs (n 13).
[55] (n 48) [54].
[56] (1815) 4 M & S 141, 105 ER 787, 791.

> foreign sovereign or as to the absence of judicial standards: see *Buck v Attorney General* [1965] Ch 745, 770 per Diplock LJ . We say this because, if the sovereign purports to act outside his territory, or even if he acts within it in a penal or discriminatory way and a claimant then seeks to found his claim on that sovereign act, the English court arrogates to itself the right in the first case not to recognise and in the second case not to enforce it. This shows that embarrassment about sitting in judgment on the acts of a foreign sovereign is not per se the cause of judicial restraint in this context. Rather, each sovereign says to the other: 'We will respect your territorial sovereignty. But there can be no offence if we do not recognise your extraterritorial or exorbitant acts.'[57]

Elucidating the true nature of comity, Stanley Burnton LJ said recently in *Harms Offshore AHT Taurus GmbH & Co KG v Bloom*, "comity owed by the courts of different jurisdictions to each other will normally make it *inappropriate* for the court to grant injunctive relief affecting procedures in a court of foreign jurisdiction."[58] Similarly, the principle precludes English courts from adjudicating directly on the validity of acts of foreign States within their own jurisdictions or the jurisdiction of other States.[59] And in *Yukos*, the Court of Appeal noted that "[o]ur own law is (or may be) that considerations of *comity* necessitate specific examples of partiality and dependency before any decision is made not to recognise the judgments of a foreign state";[60] in other words, comity advises against refusing recognition on a weak evidentiary basis. Hence, despite its elastic content,[61] it is difficult to see comity imposing a *positive* obligation on English courts to recognise and enforce foreign judgments.

(ii) The rationale for foreign judgment recognition

In his recent Hague lectures, Briggs observed that "territorial sovereignty is also the reason that we will recognize, and may then give judgments of our own which may then be enforced, judgments given against a person who was present within the territorial jurisdiction of the foreign court when the proceedings were begun."[62] In essence, the author finds the rationale for foreign judgment recognition in a State's '*international jurisdiction*'[63] based on the presence within the territory of a person or thing: "If the person was present, he, just like property within the territory of the court, is open to and liable to final, authoritative, and decisive, adjudication there."[64] On this view, foreign judgments are to be granted recognition because "sovereign acts are territorial, and when a sovereign has so acted, his act is to be respected, and if our courts are asked to do it, his judgments are to be recognized."[65]

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[57] [2001] 3 WLR 1117, [2001] 1 All ER (Comm) 557, [2001] 1 Lloyd's Rep 161, [2001] CLC 262, (2000) 97(48) LSG 37, (2001) 145 SJLB 5, affd [2002] UKHL 19, [2002] 2 AC 883, [2002] 2 WLR 1353, [2002] 3 All ER 209, [2002] 1 All ER (Comm) 843, [2003] 1 CLC 183 [318].
[58] [2009] EWCA Civ 632, [2010] Ch 187, [2010] 2 WLR 349, [2009] Bus LR 1663, [2009] CP Rep 43, [2010] BCC 822, [2009] 2 BCLC 473 [27] (emphasis added).
[59] See Part II, Introduction, text to n 6ff.
[60] *Yukos English Court of Appeal* (Introduction n 28) [151] (emphasis added).
[61] *Agbaje v Agbaje* (n 48) [51] (Lord Collins).
[62] Briggs (n 13) 150.
[63] See FA Mann, 'The doctrine of jurisdiction in international law' (1964) 111 Recueil des cours 1; and 'The doctrine of international jurisdiction revisited after twenty years' (1984) 186 Recueil des cours 9.
[64] Briggs (n 13) 150
[65] ibid.

However, territorial sovereignty explains merely why a foreign judgment—absent recognition—lacks validity in England and Wales.[66] Moreover, the jurisdiction of the foreign court (judged by English standards) is, as noted below,[67] a precondition for granting a foreign judgment recognition; in other words, absent jurisdiction, no recognition. But, it is respectfully suggested, the existence of jurisdiction does not explain why English courts recognise foreign judgments, at least not in the sense of identifying the *rationale*, or purpose, behind the obligation for English courts to recognise foreign judgments (subject to certain conditions and exceptions).

The actual rationale for foreign judgment recognition has two elements: first and foremost, the *private* interest in justice and finality after a court of competent jurisdiction has determined a claim or issue; and, second, the *public* interest that English judgments are recognised abroad (some States seek in vain to achieve this aim by imposing a reciprocity-requirement, which forms no part of English law).[68]

A year or so after Blackburn J in *Godard v Gray* restated the English approach to foreign judgments—English courts must under certain conditions and subject to certain exception recognise foreign judgments and enforce the obligations thereby created[69]—James LJ in *Re Davidson's Settlement Trusts* remarked that "it would be impossible to carry on the business of the world if Courts refused to act upon what had been done by other Courts of competent jurisdiction."[70] Neither he nor Blackburn J purported to unveil the *rationale* for foreign judgment recognition and enforcement, but His Lordship clearly painted the bleak picture of a world without. He was not the first English judge to acknowledge the need to recognise foreign judgments; nearly two centuries earlier, the King's Bench in *Hughes v Cornelius* observed:

> [A]s we are to take notice of a sentence in the Admiralty here, so ought we of those abroad in other nations, and we must not set them at large again, for otherwise the merchants would be in a pleasant condition; for suppose a decree here in the Exchequer, and the goods happen to be carried into another nation, should the Courts abroad unravel this?[71]

The predicament would be twofold. First, a refusal to act on a foreign judgment inflicts substantial injustice on a judgment creditor who recovered judgment only to see the judgment debtor (along with any assets) move abroad. Second, a disregard of foreign judgments amounts to granting dissatisfied, insatiable or vexing litigants endless bites at the cherry, by opening the door to the pursuit of judicial second (and third) opinions in another jurisdiction. Instead, abroad as at home, justice should effective and final, and English courts have acknowledged this from the earliest of times;[72] for instance, Lindley LJ in *Nouvion v Freeman* observed that upon recognition of a foreign judgment, "[t]he judgment is treated as res judicata, and as giving rise to a new and independent obligation which it is just and expedient to recognise and enforce."[73]

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[66] See Part II, Introduction, text to n 1ff.
[67] See text to n 143ff.
[68] cf Briggs (n 13) 148.
[69] See text to n 35ff.
[70] (Introduction n 1) 386. See Piggott (Introduction n 1) 28.
[71] (1691) 2 Shower KB 232, 89 ER 907, 908.
[72] See *Hughes v Cornelius* (n 71). Also *Captain Alexander Hamilton v Dutch East India Company* (1732) VIII Brown 264, 3 ER 573, 576-77.
[73] (1888) LR 37 Ch D 244, 256, affd (1889) LR 15 App Cas 1.

Against this background, it transpires that the alternative bases for the recognition of foreign judgments, usefully summed up by Lord Wilberforce in *Carl Zeiss*—i.e. "vested rights" and "limiting relitigation"—are not in fact mutually exclusive but complementary reasons for recognising foreign judgments, even though the emphasis should not be on any supposed yet imaginary rights vested in a foreign judgment but on the obligations actually created by the foreign court's order based on the determination of the claim or issue subjected to its jurisdiction.[74]

a. Justice

No English court will grant a foreign judgment recognition and enforcement in England and Wales if this were to inflict a substantial injustice upon the judgment debtor;[75] the other side of this coin is that by granting foreign judgments recognition and enforcement in England and Wales, courts do justice to judgment creditors who would otherwise suffer substantial injustice on account of their inability to effect the justice they obtained abroad in the form of a judgment that imposes obligations on the judgment debtor. In this sense, Lord Abinger CB in *Russell v Smyth* said:

> [T]he decree of the [Scottish] Court of Session creates a duty in the party to pay a debt…. It is plain that this is … a Court of competent jurisdiction…, and not having the power by its own process of enforcing the payment of them in this country. … The defendant might have offered some defence, but he quits Scotland, so that the plaintiffs had no remedy against him in that country. The action may be sustained on the ground of morality and justice. The maxim of the English law is to amplify its remedies, and, without usurping jurisdiction, to apply its rules to the advancement of substantial justice. Foreign judgments are enforced in these Courts, because the parties liable are bound in duty to satisfy them.[76]

Lindley LJ in *Nouvion v Freeman* similarly reasoned that a foreign judgment is treated as giving rise to a new and independent obligation for the judgment debtor which it is "just" (apart from "expedient") to recognise and enforce.[77] The Administration of Justice Act 1920,[78] which codifies the common law at the time of enactment, provides similarly, in s 9(1), that the court may, if in all the circumstances of the case they think it "just" (as well as "convenient") that the judgment should be enforced in the United Kingdom.

The equivalent concern—the substantial injustice caused if creditors of English judgments are prevented from executing abroad the obligations imposed by English courts—prompted the UK to establish the Foreign Judgments (Reciprocal Enforcement) Act 1933[79] and to negotiate and conclude in that framework international agreements providing for the reciprocal recognition and enforcement of judgments with other States.[80] This point was made very clearly by Greer LJ in *Yukon*

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[74] *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (Introduction n 32) 967. The term 'vested rights' used by His Lordship is perhaps less useful, since it may lead us back into old controversies. Besides, as a matter of English law no rights vest in a judgment; judgments determine rights and grant remedies, creating new obligations.
[75] See text to n 203ff.
[76] (n 42) 346.
[77] (n 73) 256.
[78] 10 & 11 Geo 5 c 81.
[79] 23 and 24 Geo 5 c 13.
[80] See text to n 88ff.

Consolidated Gold Corp Ltd v Clark who said that: "It was however fully appreciated by those who thought about foreign judgments, that British judgments were never enforced as of right in foreign countries, and that was believed, and rightly believed, to operate as an injustice to this country."[81] Hence, foreign judgment recognition is also recognised as a matter of *public* concern in the sense that it is in the public interest that justice done in the form of an English judgment will be effective abroad.

b. Finality

"[L]itigation would be interminable" if the English res judicata doctrine lacked application to foreign judgments, James Wigram VC remarked in *Henderson v Henderson.* [82] However, whereas English preclusion law applies to an English judgment because any act that on its face appears to be an English judgment is by constitutional principle presumed to be valid and, until set aside, to be given the legal consequences of an English judgment (including any preclusive effects under the law of preclusion), no equivalent principle applies to (most) foreign judgments.[83] In fact, short of recognition, (the record of) a foreign judgment used to be treated as mere *evidence*.[84]

Hence, if a foreign judgment invoked by a party in English proceedings is *evidence* only—whether *prima facie* or conclusive—technically no judgment exists in the eyes of English law to which English preclusion law could be applicable. Blackburn J in *Godard v Gray* emphasised this point and explained its implications in the course of his argument in favour of the view that the judgment of a court of competent jurisdiction—whether English or foreign—creates a *prima facie obligation* which the judgment debtor must obey and which the English courts should enforce:

> This may seem a technical mode of dealing with the question; but in truth it goes to the root of the matter. For if the judgment were merely considered as *evidence* of the original cause of action, it must be open to meet it by any counter evidence negativing the existence of that original cause of action. If, on the other hand, there is a primâ facie *obligation* to obey the judgment of a tribunal having jurisdiction over the party and the cause, and to pay the sum decreed, the question would be, whether it was open to the unsuccessful party to try the cause over again in a court, not sitting as a court of appeal from that which gave the judgment. It is quite clear this could not be done where the action is brought on the judgment of an English tribunal; and, on principle, it seems the same rule should apply, where it is brought on that of a foreign tribunal.[85]

These days, *Henderson v Henderson*[86] is not particularly well-known for clarifying the reason why foreign judgments are recognised in England and Wales; today it is construed (perhaps inaccurately) as a vital part of English law precluding a party's attempt at litigating matters which could and should have made the subject of

[81] [1938] 2 KB 241, 253, [1938] 1 All ER 366. cf *Hughes v Cornelius* (n 71) 908 (clearly demonstrating the thinking in the minds of English courts at the time).
[82] (n 275) 115.
[83] Such presumption now applies under the Brussels and Lugano Regime (see text to n 465ff), as well as in relation to judgments from other parts of the United Kingdom (see 20ff).
[84] See text to n 120ff.
[85] (n 35) 149-50.
[86] (Chapter 1 n 275).

litigation before.[87] Nevertheless, the case symbolises the English principle of finality of litigation applied in its widest sense to a judgment rendered out of the jurisdiction.

(iii) The current legal framework

Legislation exists for judgments from a wide variety of jurisdictions, including other jurisdictions within the UK (addressed above),[88] the Commonwealth,[89] a number of European and non-European States with which the UK has agreed bilaterally the reciprocal enforcement of judgments,[90] and all EU/EFTA Member States[91]. Then again, all legislative interference to date has been delimited in scope, with the effect that the common law stands superseded for some, not all foreign judgments; the resulting framework is broadly this:[92]

(1) the Administration of Justice Act 1920 ('the 1920 Act');[93]

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[87] ibid 115 ("The plea of res judicata applies, except in special cases, 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, which the parties, exercising reasonable diligence, might have brought forward at the time.").

[88] Civil Jurisdiction and Judgments Act 1982 (c27), section 18(1) in conjunction with schedules 6 (money judgments) and 7 (non-money judgments) provide that any interested party who wishes to secure the enforcement in another part of the United Kingdom (Scotland, Northern Ireland, or England and Wales) of any money or non-money provisions contained in a judgment may apply for a certificate (money judgments, see schedule 6 paragraph 2(1) or a certified copy of the judgment (non-money judgment, see schedule 7 paragraph 2(1)) which can be registered and executed as a local judgment.

[89] Administration of Justice Act 1920 (10 & 11 Geo 5 c 81) provides for the option of enforcement by registration of judgments from various "British dominions, protectorates and mandated territories" in respect of which a declaration in the sense of ss 13 and 14 of the act was made. Today it includes judgments given in Anguilla, Antigua and Barbuda, Bahamas, Barbados, Belize, Bermuda, Botswana, British Indian Ocean Territory, British Virgin Islands, Cayman Islands, Christmas Island, Cocos (Keeling) Islands, Republic of Cyprus, Dominica, Falkland Islands, Fiji, The Gambia, Ghana, Grenada, Guyana, Hong Kong, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Malta, Mauritius, Montserrat, Newfoundland, New Zealand, Nigeria, Territory of Norfolk Island, Papua New Guinea, St. Christopher and Nevis, St. Helena, St. Lucia, St. Vincent and the Grenadines, Saskatchewan, Seychelles, Sierra Leone, Singapore, Solomon Islands, Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus, Sri Lanka, Swaziland, Tanzania, Trinidad and Tobago, Turks and Caicos Islands, Tuvalu, Uganda, Zambia, Zimbabwe. See the consolidated schedule to The Reciprocal Enforcement of Judgments (Administration of Justice Act 1920, Part II) (Consolidation) Order 1984 (SI 1984/129).

[90] Foreign Judgments (Reciprocal Enforcement) Act 1933 (23 and 24 Geo 5 c 13) applies to judgments from jurisdictions in respect of which an order or declaration in the sense of ss 1 or 7 of the act has been made: Australia, and Australian states and territories (SI 1994/1901), Austria (SI 1962/1339), Belgium (SI 1936/1169), certain Canadan courts but excluding the courts of Québec (SI 1987/468, SI 1987/2211, SI 1988/1304, SI 1988/1853, SI 1989/987, SI 1991/1724, SI 1992/1731, SI 1995/2708), France (SI 1936/609), (West) Germany (SI 1961/1199), Guernsey (SI 1973/610, India, Isle of Man (SI 1973/611, Israel (SI 1971/1039, amended by 2003/2618)), Italy (SI 1973/1894), Jersey (SI 1973/612), Netherlands (SI 1969/1063, amended by SI 1977/2149), Norway (SI 1962/636), Pakistan (SI 1958/141), Suriname (SI 1981/735), Tonga (SI 1980/1523). See the particular orders or declarations for specifics and restrictions. As far as concerns Commonwealth countries to which the Administration of Justice Act 1920 applies, the act is superseded to the extent of the 1933 Act. Where the Brussels and Lugano Regime applies to a judgment covered by the 1933 Act, the former regime supersedes the rules of the latter.

[91] On the Brussels and Lugano Regime see text to n 465ff.

[92] For a comprehensive overview see Briggs and Rees (n 13) [7.01]ff.

[93] 10 & 11 Geo 5 c 81. See s 9(1) ("Where a judgment has been obtained in a superior court in any part of His Majesty's dominions outside the United Kingdom to which this Part of this Act extends, the judgment creditor may apply to the High Court in England or Northern Ireland or to the Court of Session in Scotland, at any time within twelve months after the date of the judgment, or such longer period as may be allowed by the court, to have the judgment registered in the court, and on any such application

(2) the Foreign Judgments (Reciprocal Enforcement) Act 1933 ('the 1933 Act');[94]
(3) the Civil Jurisdiction and Judgments Act 1982 ('the 1982 Act');[95]
(4) the Brussels I Regulation;[96]
(5) the European Enforcement Order for uncontested claims Regulation;[97]
(6) the European Small Claims Procedure Regulation;[98]
(7) Carriage of Goods by Road Act 1965[99] and other statutes implementing conventions on particular matters;[100] or (residually)
(8) Common law[101].

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the court may, if in all the circumstances of the case they think it just and convenient that the judgment should be enforced in the United Kingdom, and subject to the provisions of this section, order the judgment to be registered accordingly.") For procedural aspects see CPR Part 74, s I, and PD 74A, s I.

[94] 23 and 24 Geo 5 c 13. See s 2(1) ("A person, being a judgment creditor under a judgment to which this Part of this Act applies, may apply to the High Court at any time within six years after the date of the judgment, or, where there have been proceedings by way of appeal against the judgment, after the date of the last judgment given in those proceedings, to have the judgment registered in the High Court, and on any such application the court shall, subject to proof of the prescribed matters and to the other provisions of this Act, order the judgment to be registered: Provided that a judgment shall not be registered if at the date of the application—(a) it has been wholly satisfied; or (b) it could not be enforced by execution in the country of the original court.").

[95] c 27. See s 4(1) ("(1) A judgment, other than a maintenance order, which is the subject of an application under Art 31 of the 1968 Convention for its enforcement in any part of the United Kingdom shall, to the extent that its enforcement is authorised by the appropriate court, be registered in the prescribed manner in that court. In this subsection 'the appropriate court' means the court to which the application is made in pursuance of Art 32 (that is to say, the High Court or the Court of Session).").

[96] (Introduction n 44).

[97] Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims [2004] OJ L143/15 (as amended). The regulation entered into force on 21 January 2005 and applies since 21 October 2005, with the exception of Arts 30, 31 and 32, which have applied from 21 January 2005 (see Art 33). In accordance with Art 3 of Protocol (No 21) on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice [2012] OJ C 326/295, the United Kingdom and Ireland have notified their wish to take part in the adoption and application of the regulation and hence they are bound by it. Conversely, in accordance with Arts 1 and 2 of Protocol (No 22) on the position of Denmark [2012] C326/299, Denmark is not bound by the regulation or subject to its application. For England and Wales see CPR Part 74, s V, and PD 74B.

[98] Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure [2007] OJ L199/1. The regulation entered into force on 1 August 2007 and applies since 1 January 2009, with the exception of Art 25 of the regulation, which has applied since 1 January 2008 (see Art 29). In accordance with Art 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, the United Kingdom and Ireland have notified their wish to take part in the adoption and application of the regulation and hence they are bound by it. Conversely, in accordance with Arts 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark is not bound by the regulation or subject to its application.

Not included in the list is Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1. On the same subject-matter, the Union has participated in the negotiation and adoption of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance <www.hcch.net/upload/conventions/txt38en.pdf> accessed 28 December 2012. The Union has neither signed nor concluded the convention to date; a status table is available <www.hcch.net/index_en.php?act=conventions.status&cid=131> accessed 28 December 2012.

[99] c 37, which implements the Convention on the Contract for the International Carriage of Goods by Road (CMR) (adopted 19 May 1956, entered into force 2 July 1961) 399 UNTS 189.

[100] See Briggs and Rees (n 13) [7.01]ff.

The number of regimes illustrates the point; the current legal framework for foreign judgments is a patchwork, rendering the law on foreign judgments rather inaccessible. No doubt this is good for lawyers, but surely the status quo conflicts with the basic need for legal certainty so that "people can know where they stand".[102] If a "rule of simplicity" indeed generally governs the law, its aim being to resolve in the simplest possible way the problems of those who have to obey it, we should recall what Kahn-Freund said in his Hague Lectures: "Private international law is intellectually fascinating. Is this not in fact its main curse?"[103]

The delineation between regimes is capable of presenting a large variety of difficulties. Symptomatically, Briggs and Reese address the question which scheme or schemes of recognition and enforcement will apply? [104] Subject to the circumstances of a particular case, any of the following factors may be relevant in the process of delineation or designating the applicable regime or regimes: (1) the time of rendition of judgment; (2) the judgment-rendering jurisdiction; (3) the judgment-rendering court; (4) the subject-matter of the underlying claim(s); (5) the type of judgment in question; and (6) the type of remedy awarded (or denied)[105].

a. Persistent conceptual issues

Still further obscurity and diversity characterise the law. This is most apparent in relation to the problem of foreign judgment 'enforcement'. At common law enforcement involves a so-called 'action on the judgment', whereas under any of the legislative schemes it operates by 'registration of the judgment'. The use of a single term 'enforcement' suggests a single significance, whereas in fact the same concept has a different implication at common law than under the various legislative schemes; whereas at common, 'enforcement' implies that a foreign judgment creditor recovers from an English court an enforceable *English* judgment based on the recognised foreign judgment,[106] under legislative schemes, 'enforcement' means that the *foreign* judgment itself becomes executable in England and Wales.

A further obscurity is caused by the undue association by the use of a single term 'enforcement' of the distinct processes of enforcement as a matter of *private international law* and enforcement as a matter of *procedural law*; whereas in private international law, 'enforcement' implies as noted above that either an English court renders an executable English judgment on the basis of the recognised foreign judgment, or that the recognised foreign judgment becomes executable itself in England and Wales, for purposes of procedural law, 'enforcement' refers to the process by which a judgment is executed against the assets or person of the judgment debtor.

The problem of 'recognition' is similarly confused. The main difficulty is that the concept, though widely used, is nowhere defined, and tends to conceil the distinct

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[101] See text to n 110ff.
[102] Lord Mance, 'Should the law be certain?' (The Oxford Shrieval lecture, University Church of St Mary The Virgin, Oxford, 11 October 2011) <www.supremecourt.gov.uk/docs/speech_111011.pdf>.
[103] O Kahn-Freund, 'General problems of private international law' (1974) 140 Recueil des cours 139, 466.
[104] Briggs and Rees (n 13) [7.02].
[105] Eg money/ non-money.
[106] *Black Clawson International Ltd v Papierwerke AG* (Chapter 1 n 309) 615 (Lord Reid) ("technically we do not enforce the foreign judgment as such").

problem of preclusion by foreign judgments. For instance, "wider recognition" has been used to describe the situation where a foreign judgment is given a more extensive preclusive effect than would attach under English law.[107] Taking the contrary position to its logical conclusion means that to attach no preclusive effect implies a refusal to recognise a foreign judgment. This surely is not the law; for instance, the Court of Appeal in *Yukos* concluded that the Amsterdam Court of Appeal judgment lacked preclusive effect, but surely first granted it recognition. Nevertheless, the judgment of the High Court in the same case illustrates the confusion of the problems; Hamblen J observed that "[c]onsiderations such as that it may have been impractical for a litigant to deploy his full case in an 'earlier case of trivial character abroad' are more likely to be relevant to whether there are 'special circumstances' which would make it unjust to *recognise* the decision."[108] The "special circumstances" exception, as set out in Chapter 1,[109] actually relates to the exception to an issue estoppel, not to any exception to foreign judgment recognition.

(2) Recognition: The doctrine of obligation

Introduction

The common law approach to the recognition and enforcement of foreign judgments is described as the 'doctrine of obligation'.[110] Lord Wilberforce in *Carl Zeiss* accurately observed that "[i]t has taken some time before the recognition of foreign judgments by English courts was placed on a logical footing".[111] Indeed, the roots of the doctrine can be traced back only to the middle of the nineteenth century; to be precise, to the 1842 judgment of Parke B in *Russell v Smyth*,[112] as later construed by Blackburn J in 1870 in the familiar cases of *Godard v Gray* and *Schibsby v Westenholz*.[113]

The doctrine reduced to its essence means that a foreign judgment is now to be accepted for what is actually is—a *judgment*—and that a foreign judgment is no longer reduced to something it is not—mere *evidence*.[114] Under the doctrine, an English court must treat the judgment of a foreign court of competent jurisdiction as

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[107] See, eg, *Black Clawson International Ltd v Papierwerke AG* (Chapter 1 n 309) 632 (Lord Wilberforce).
[108] ibid [49] (emphasis added).
[109] See Chapter 1, text to n 450ff.
[110] See, eg, Briggs (n 13) 148.
[111] *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (Introduction n 32) 965.
[112] (n 42) 819.
[113] Respectively (n 35); and (n 40). But note that as late as 1882 the principle was still regarded as unsettled. See *Abouloff v Oppenheimer* (1882-83) LR 10 QBD 295, 300 (Lord Coleridge CJ) ("I do not think it necessary to inquire for the present purpose what is the strictly accurate mode of stating the principle, on which the courts of this country enforce the obligation created by foreign judgments. It has been stated by Parke, B., in Williams v Jones, with the assent of Lord Blackburn in Godard v Gray and in Schibsby v Westenholz, in one way, and it has been stated by Lord Brougham, in Houlditch v Donegall, and apparently by other great authorities, in another. Non nostrum est tantas componere lites; it is enough for me to say that the English courts do enforce obligations created by judgments…."). Nevertheless, His Lordship's remark that "English courts do enforce obligations created by judgments" shows a preference for the rule laid down by Parke B and Blackburn J. See Adrian Briggs, 'Which Foreign Judgments Should We Recognise Today?' (1987) 36 ICLQ 240.
[114] See for a discussion of the older English authorities Piggott (Introduction n 1) 3ff.

judgment and, subject to certain exceptions, 'recognise' the judgment in the true sense of the word, and, if so requested, enforce the obligations thereby created.[115]

a. The parallel doctrine of preclusion

The rationale for foreign judgment recognition—justice and finality—suggests that the development of the doctrine of *obligation* since 1842 tells part of the story only, namely, that of situations where a foreign judgment is invoked in an English court for the purpose of ensuring *compliance* with the foreign court's order in England and Wales.

Around the same time, in 1845, the House of Lords in *Ricardo v Garcias*[116] developed what may be entitled the 'doctrine of *preclusion*', aimed at situations where a foreign judgment is invoked in an English court, not for the purpose of ensuring compliance with the obligation imposed by the foreign court, but for the purpose of preclusion to ensure *finality of litigation* in England and Wales.[117]

Ricardo v Garcias implied that foreign judgments were from that time recognised as judgments, not evidence, so that English preclusion law (here cause of action estoppel) could apply to them.[118] English law on foreign judgments recognition is therefore based on the doctrine of *obligation and preclusion*, which more accurately reflects the rationale for foreign judgment recognition and enforcement: *justice and finality*.[119]

(i) The old approach: foreign judgments as evidence

In 1834, Lord Brougham in *Houlditch v Donegall* still supported the approach that treated a foreign judgment as *evidence*: *prima facie* evidence for some purposes (enforcement); *conclusive* evidence for others (*inter alia* preclusion).[120] The

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[115] See text to n 35ff. cf *Gage v Bulkeley* (n 17) 264, 627 ER 824 (Lord Hardwicke) ("[T]he distinction seems to be, where such foreign sentence is used as a plea to bind the courts here as a judgment, and when it is made use of in evidence as binding the justice of the case only.").

[116] (1845) 8 ER 1450, (1845) 12 Cl & F 368.

[117] ibid.

[118] See, however, *Black Clawson International Ltd v Papierwerke AG* (Chapter 1 n 309) 633 (Lord Wilberforce) ("It must be remembered that at common law foreign judgments do not give rise to an estoppel by record. If relied on by a plaintiff in an English Court, they are so as obligations, which the defendant ought to discharge: so the nature of the obligation must be made known and if necessary explained."). It is unclear how His Lordship's observation relates to his judgment in *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (Introduction n 32) 965. It is suggested that his judgment in *Carl Zeiss* is preferable.

[119] See text to n 62ff.

[120] *Edward Houlditch, John Houlditch, James Houlditch, and Francis Stubbs v The Most Honourable George Augustus Marquess of Donegall* (Chapter 1 n 300) 476-77 ("One point of law, at least, is clear, namely, that a judgment between parties in a Court is conclusive between them and between those who are privy to the suit. But it is equally clear that a judgment in a foreign Court of Record … may be made the ground of proceeding in the Courts of this country; and the great rule of all civilized countries among each other is, (and the rule is equally applicable to Irish, Scotch and Colonial judgments, as to those of foreign countries,) that a judgment in any one of them may be made the ground of proceeding validly and with effect in this country; but no more. The mode of proceeding is that of an action on simple contract, an action of assumpsit. The question has been a vexata question in our Courts, and numerous dicta have been uttered upon the point, whether a foreign judgment is only primâ facie a ground of action, or whether it is conclusive and not traversable. The language of the opinions on one side has been so strong, that we are not warranted in calling it merely the in clination of our lawyers; it is their decision, that in this country a foreign judgment is only primâ facie, not conclusive evidence of a debt.").

implications of this approach were negative for foreign judgment creditors, because a foreign judgment was regarded, not as obligatory to the extent to which it was obligatory in the rendering jurisdiction, nor as obligatory to the extent to which by English law judgments were obligatory, not as conclusive evidence, but as matter *in pais*—as consideration *prima facie* sufficient to raise a promise.[121]

In other words, as Lord Wilberforce in *Carl Zeiss* put it: "Unlike English judgments, [foreign judgments] were not considered to be *judgments* of a court of record".[122] A foreign judgment might serve prima face to prove a judgment creditor's cause of action, but not conclusively; the judgment debtor could dispute and disprove it. An English court would in effect redetermine the whole claim, notwithstanding that for purposes of preclusion, the foreign judgment *was* treated as conclusive, albeit as conclusive *evidence*, not as judgment with preclusive effect;[123] hence, as Lord Wilberforce added in *Carl Zeiss*, "the simplest form of estoppel—by record—could not be applied to them."[124]

(ii) The current approach: Judgments of courts of competent jurisdiction create legal obligations

Parke B is widely credited with the introduction of the doctrine of obligation. In *Russell v Smyth* he drifted away from the old approach, and concisely and, as later proved, influentially said that: "Where the Court of a foreign country imposes a duty to pay a sum certain, there arises an obligation to pay, which may be enforced in this country."[125] Regarding this principle, he added *obiter*, a number of years later in *Williams v Jones*—itself not a case involving a foreign judgment—that "[i]t is in this way that the judgments of foreign and colonial courts are supported and enforced".[126]

In *Ricardo v Garcias* the foreign judgment relied on was recognised as judgment creating a "res judicata" which could form the basis in England and Wales for preclusion. Lord Campbell at first entertained some doubt as to whether the cause of action in question in the particular case had actually been rendered res judicata by the foreign (French) court, but in terms of *principle* he had no doubt at all: "[A] foreign judgment might be pleaded as res judicata, because 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."[127]

a. Faith and credit to foreign judgments

[121] *Phillips v Hunter* (1795) 2 Blackstone (H) 402, 126 ER 618, 622-23 (Eyre LC). For a discussion of the older cases see Piggott (n 1) 3ff.
[122] *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (Introduction n 32) 965 (emphasis added).
[123] *Martin v Nicolls* (1830) 3 Sim 458, 57 ER 1070; and *Phillips v Hunter* (n 121) 622-23 (Eyre LC) ("In all other cases, we give entire faith and credit to the sentences of foreign courts, and consider them as conclusive upon us.").
[124] *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (Introduction n 32) 965.
[125] (n 42) 819.
[126] (n 43) 265.
[127] (n 116) 401.

A fact not frequently noted in the analysis of the source of the doctrine of obligation (and preclusion) is that Parke B in *Russell v Smyth* agreed[128] with the opinion of Lord Abinger CB in the same case, who relied[129] on the judgment of Eyre LC in *Emerson v Lashley*,[130] that "there is that sort of *credit* given to the judgments of a court of competent jurisdiction, that they create debts and duties, upon which actions of debt are founded. General policy and convenience require, that *faith* should be given to those judgments, and that duties should arise".[131]

This rudimentary 'faith and credit' principle regarding foreign judgments implied that an English court should recognise a foreign judgment of a foreign court of competent jurisdiction as a judgment creating obligations (give "faith") and should be enforced (given "credit"). This principle is not to be confused with the *full* faith and credit given to judgments between U.S. states,[132] or for that matter, in effect between the different parts of the United Kingdom[133]. As Lord Wilberforce explained in *Carl Zeiss*, "foreign judgments retain their distinction from English judgments"[134] albeit *only* in respect of "the limited grounds on which foreign judgments may be examined such as fraud, public policy or want of jurisdiction" [135]. Other degrees of faith and credit apply under the legislative regimes for foreign judgments.[136]

b. *Restatement:* Godard v Gray *and* Schibsby v Westenholz

A quarter of a century after *Russell v Smyth*, Blackburn J (as he then was) adopted Parke B's approach and significantly elaborated upon it in his judgment for the majority in *Godard v Gray* and *Schibsby v Westenholz.*[137]

The cases offered "occasion to consider the whole subject of the law of England as to enforcing foreign judgments."[138] In *Godard v Gray*, the judge started by citing approvingly the judgment of Parke B in *Williams v Jones*, describing it as "a principle very well stated".[139] In *Schibsby v Westenholz*, he went considerably further, restating the principle as follows:

> [T]he true principle on which the judgments of foreign tribunals are enforced in England is that … the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action.[140]

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[128] (n 42) 347.
[129] ibid.
[130] *Emerson, One, &c v Lashley* (1793) 2 H Bl 248, 126 ER 533.
[131] ibid 251 (emphasis added).
[132] See text to n 488ff.
[133] See text to n 20ff.
[134] *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (Introduction n 32) 966.
[135] ibid.
[136] See, in particular, the Brussels and Lugano Regime, text to n 465ff.
[137] Respectively (n 35); and (n 40).
[138] (n 40) 158.
[139] ibid 148-49.
[140] ibid 159. cf *Adams v Cape Industries Plc* (n 45); *Harris v Taylor* [1915] 2 KB 580; *Emanuel v Symon* [1908] 1 KB 302; and *Rousillon v Rousillon* (1880) LR 14 Ch D 351.

Close readers will notice two significant differences. First, according to Parke B, the obligations under foreign judgments "*may* be enforced" (signifying a discretion), whereas according to Blackburn J, English courts "*are bound* to enforce" (stating an obligation).[141] Secondly, while Parke B mentioned no exceptions to the principle he formulated (though he alluded to the availability of a defence for *fraud*), Blackburn J expressly considered the prospect of things that negative the obligation under the judgment, or form a legal excuse for not performing it.[142]

Blackburn J's reason for rejecting the old approach (foreign judgments at to be treated as evidence) in favour of the new approach (foreign judgments are to be recognised as judgments) was that where a foreign court exercises *jurisdiction* on grounds acceptable by English standards, its decision can be recognised as product of the exercise of jurisdiction—as *judgment*—rather than mere evidence of a recorded transation. This reasoning, in turn, signals the basic requirement for granting recognition to a foreign judgment: jurisdiction.

(iii) Precondition: jurisdiction by English standards

A precondition for the recognition of a foreign judgment at common law is that the judgment-rendering court had jurisdiction *by English standards*—only then, an English court will consider upholding the parties' duty to obey the foreign court's order.[143] Blackburn J expressed the condition as follows in *Godard v Gray*: "It must be open… to the defendant to shew that the Court which pronounced the judgment had not jurisdiction to pronounce it",[144] because a lack of jurisdiction "negatives the existence of that legal obligation",[145] which is otherwise assumed on the face of a judgment.

Blackburn J addressed the relevance of jurisdiction in additional detail in *Schibsby v Westenholz*.[146] This case involved an action on a French default judgment obtained by a Dane resident in France, who there sued some other Danes resident and doing business in England and Wales for breach of contract consisting in the failure to deliver by ship the quantity of oats from Sweden for which was paid. Service of process was effected in accordance with French law by serving the summons on the *Procureur Impérial*, and the French consulate in London served on the defendants a copy of the summons. The defendants did not appear within one month, and judgment was given against them; they further failed to appear and be heard on the merits

[141] See text to n 35ff.
[142] See text to n 202ff.
[143] *Rubin v Eurofinance SA* (n 2) [107]-[110] (Lord Collins). Lord Collins, at [128], explained the standard on the following basis: "There is a reason for the limited scope of the *Dicey rule* and that is that there is no expectation of reciprocity on the part of foreign countries." His Lordship added, at [129], that "[a] change in the settled law of the recognition and enforcement of judgments… has all the hallmarks of legislation, and is a matter for the legislature and not for judicial innovation", and, at [130], that "[f]urthermore, the introduction of judge-made law extending the recognition and enforcement of foreign judgments would be only to the detriment of United Kingdom businesses without any corresponding benefit." (Before this explanation, His Lordship noted, at [127], that "reciprocity has not played a part in the recognition and enforcement of foreign judgments at common law. The English court does not concede jurisdiction in personam to a foreign court merely because the English court would, in corresponding circumstances, have power to order service out of the jurisdiction".).
[144] (n 35) 149.
[145] ibid 148.
[146] (n 40).

within two months after that judgment, with the result that the judgment became final and conclusive in France.

The French court assumed jurisdiction on the ground that under French law, a French subject could sue a foreigner, though not resident in France, and that for this purpose an alien. A person resident in France (like the Dane) was considered by French law a French subject.

The Dane, having recovered the French judgment, sought to have it enforced in England and Wales by means of an action on the judgment. In answer to the claim, the defendant asserted that he was neither resident nor domiciled in France, or in any other way subject to the jurisdiction of the French court, nor had he appeared; and that he was not summoned, nor had any notice or knowledge of the pending of the proceedings, or any opportunity to defend himself.

Blackburn J acknowledged: "[E]very country can pass laws to bind a great many persons". But the judge then asked: "Can the empire of France pass a law to bind the whole world?" His answer: a resounding "No". Accordingly, he continued, "the further question has to be determined, whether the defendant in the particular suit was such a person as to be bound by the judgment which it is sought to enforce";[147] that is, whether the defendant was though he disputes it, "subject to the jurisdiction of the French court".[148] After reviewing grounds of jurisdiction acceptable to English law, he concluded that "there existed nothing in the present case imposing on the defendants any duty to obey the judgment of a French tribunal."[149]

Consequently, as a matter of English law the relevant question was not whether the French court *could* exercise judicial power and impose an obligation—it clearly could—but whether by English standards the taking of jurisdiction was acceptable, so as to qualify the French court as a court of competent jurisdiction in the eyes of English law, thus calling for the recognition of its judgment.[150]

a. The irrelevance of foreign jurisdictional principles

Whereas Blackburn J in *Godard v Gray* still assumed that the obligation created by a judgment was negatived if the defendant proved that the foreign court exceeded the jurisdiction given to it by the foreign law,[151] it was later clarified that it is irrelevant for recognition as a matter of English private international law that the foreign court had jurisdiction under its *own* rules.[152] Hence, even if a judgment is invalid for lack of jurisdiction according to foreign law, it does not follow that it will be ignored in England and Wales.[153]

It may sound paradoxical to say that a foreign judgment is to be treated as valid in England and Wales, which is invalid in the rendering State. However, Lindley MR in *Pemberton v Hughes* rightly noted that "this paradox disappears when

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[147] ibid 160-61.
[148] ibid 157.
[149] ibid 160-61.
[150] cf *Adams v Cape Industries Plc* (n 45) 514 (Slade LJ); and *Pemberton v Hughes* [1899] 1 Ch 781, 791 (Lindley MR). On the grounds of jurisdiction acceptable to English courts see Briggs and Rees (n 13) [7.44]ff.
[151] (n 35) 149.
[152] *Pemberton v Hughes* (n 150) 790 (Lindley MR).
[153] ibid.

the principles on which English Courts act in regarding or disregarding foreign judgments are borne in mind."[154] His Lordship explained that "[i]f 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." [155] Consequently, a judgment debtor who believes that the judgment-rendering court lacked jurisdiction under foreign law should appeal the judgment in the judgment-rendering jurisdiction using the means available there; an English court will not assume the role of court of appeal in respect of foreign judgments.

b. Against this background: The nature of the obligation

A valid question is whether an English court recognises (a) the obligation imposed by the court of competent jurisdiction or (b) the obligation assumed by the judgment debtor to comply with the foreign court's order. Considering the inseparable link between *jurisdiction* and recognition—the acceptability of the rendering court's jurisdiction by English standards is a precondition for recognition—'recognition' logically concerns the obligation imposed by the foreign court in the exercise of its jurisdiction.

Nevertheless, some have understood the doctrine of obligation as asking "whether the party who is now said to be bound by the foreign judgment stood or behaved in such a way, in relation to the foreign court, for it to be appropriate to say that *he obliged himself* to obey or abide by the judgment."[156] On this view, the relevant 'obligation', "appears to have been understood in this sense as a voluntary, or private, or consensual or (quasi-) contractual obligation, assumed by the party to be bound, rather than one simply imposed by force of the general law."[157]

If this view is correct—and it is suggested it is *not*—recognition is about the obligation *assumed* by the parties by voluntarily appearing or otherwise submitting or agreeing to submit to the jurisdiction of a foreign court, as opposed to obligations *imposed* by a foreign court exercising jurisdiction over those parties. In that case the 'enforcement' of foreign judgments by English courts involves the giving of effect to the (privately assumed) obligations to comply with (judicially imposed) obligations created by foreign judgments.

This view entails that in an 'action on the judgment' at common law, the cause of action of the judgment creditor is actually the judgment debtor's *undertaking or promise* to comply with the foreign judgment, not the foreign judgment itself. This resembles the approach to foreign judgments as described in 1795 by Eyre LC in *Phillips v Hunter*:

> [W]e treat [the foreign judgment], not as obligatory to the extent to which it would be obligatory perhaps in the country in which it was pronounced, nor as obligatory to the extent to which by our law sentences and judgments are obligatory, not as

[154] ibid.
[155] ibid.
[156] Briggs and Rees (n 13) [7.56] (emphasis added).
[157] ibid. The authors add: "From then on, the obligation was held to arise, or not to arise, from the activity of the party to be obliged, and not from anything else. It was irrelevant to ask what should have happened, or where an action should have been brought. The question was whether the party to be obliged acted in such a way as to oblige himself to obey the judgment."

> conclusive, but *as matter in pais, as consideration primâ facie sufficient to raise a promise.…*[158]

But *Phillips v Hunter* was superseded by the doctrine of obligation; today, a foreign judgment is no longer considered as a matter *in pais*, as consideration prima facie sufficient to raise a promise,[159] which view directly conflicts with *Godard v Gray* and *Schibsby v Westenholz.*[160] The 1887 judgment of Lindley LJ in *Nouvion v Freeman* describes the actual approach very well: "The *judgment* is treated as res judicata, and as giving rise to a new and independent obligation which it is just and expedient to recognise and enforce."[161] Similarly, in the same case, Cotton LJ searched for "a *judgment* as the law of England will allow to be made a cause of action, so as to found on it alone a proceeding in this country."[162] His Lordship did not search for the judgment debtor's *promise* to comply with the foreign judgment as cause for the action, but the obligation imposed by the judgment itself.

Moreover, the view that recognition concerns the obligation *assumed* by the parties to comply with the foreign judgment is inconsistent with the parallel statutory approach, especially the 1920 and 1933 Acts, which purported to codify the common law; the fact that the enforcement by registration of a foreign judgment renders the judgment *per se* enforceable in England and Wales signifies that under the statutes, the foreign *judgment* is recognised as a judicial act that is binding in the sense that the parties are obliged to comply with the foreign court's order.

1. The types of 'obligation' enforceable

If recognition actually concerns the *obligation imposed by a foreign court of competent jurisdiction*, as opposed to the obligation assumed by a judgment debtor to comply with the foreign court's order, the next inquiry is into the *types* of 'obligation' imposed by a foreign court are properly enforceable in England and Wales. In this regard, as a minimum, an English court will recognise a judgment for a *quantified monetary amount*.[163] Along these lines, Parke B said in *Russell v Smyth* that: "Where the Court of a foreign country imposes a duty to pay *a sum certain*, there arises an obligation to pay, which may be enforced in this country."[164] Similarly, Blackburn J

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[158] (n 121) 622 (emphasis added) ("It is in one way only that the sentence or judgment of the Court of a foreign state is examinable in our courts, and that is, when the party who claims the benefit of it applies to our courts to enforce it. When it is thus voluntarily submitted to our jurisdiction, we treat it, not as obligatory to the extent to which it would be obligatory perhaps in the country in which it was pronounced, nor as obligatory to the extent to which by our law sentences and judgments are obligatory, not as conclusive, but as matter in pais, as consideration primâ facie sufficient to raise a promise: we examine it as we do all other considerations of promises, and for that purpose we receive evidence of what the law of the foreign state is, and whether the judgment is warranted by that law. In all other cases, we give entire faith and credit to the sentences of foreign courts, and consider them as conclusive upon us.").

[159] See text to n 120ff.

[160] See text to n 125ff.

[161] (n 73) 256 (emphasis added).

[162] ibid 252 (emphasis added).

[163] *Russell v Smyth* (n 42) 819 (Parke B). cf *Airbus Industrie GIE v Patel* [1996] ILPr 465, (1996) 93(24) LSG 26, revd [1997] 2 Lloyd's Rep 8, [1997] CLC 197, [1997] ILPr 230, (1996) 93(36) LSG 35, (1996) 140 SJLB 214, revd [1999] 1 AC 119, [1998] 2 WLR 686, [1998] 2 All ER 257, [1998] 1 Lloyd's Rep 631, [1998] CLC 702, [1999] ILPr 238, (1998) 95(18) LSG 32, (1998) 148 NLJ 551, (1998) 142 SJLB 139 [26] (Colman J).

[164] (n 42) 819 (emphasis added).

in *Schibsby v Westenholz* held that "the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the *sum* for which judgment is given, which the courts in this country are bound to enforce".[165] But will an English court also recognise and enforce a foreign judgment imposing an injunction or granting declaratory relief?

In 1996, Colman J in *Airbus Industrie GIE v Patel* unequivocally refused to enforce an *injunction* of a Bangalore court, concluding that "it is quite clear that, at common law, enforcement of foreign judgments has always been confined to the enforcement of judgments for a quantified monetary amount", adding that "never [has there] been a general principle that any other orders of a foreign court can be enforced."[166] The judge's reasoning for rejecting the claim for an injunction was his interpretation of the *basis* for foreign judgment enforcement at common law: "enforceability [of a foreign judgment in England and Wales] is based on the creation of a judgment *debt* which can be sued upon as a separate in personam obligation".[167] Indeed, on this view only debts can be enforced.[168] But the judge's interpretation of the basis for foreign judgment enforcement is doubtful; the actual basis is that a foreign court of competent jurisdiction imposed an *obligation to pay*, not the creation of a judgment *debt*. Parke B himself said in *Russell v Smyth* that: "Where the Court of a foreign country imposes a duty to pay a sum certain, there arises *an obligation to pay*, which may be enforced in this country."[169]

At first sight, Briggs and Reese also appear to answer the question negatively where they state that "[i]f a foreign judgment is entitled to recognition, it may be enforced at the suit of the claimant or judgment debtor if … (ii) *it is for a fixed sum of money*".[170] However, the authors immediately add that the condition that the judgment be *for a fixed sum of money* is misleading and "does not mean *at all* what it appears to say".[171] Today, they note, English courts are able in practice to enforce *any* obligation—monetary and non-monetary—and they add that "one should not be taken by what orthodoxy appears to state."[172]

What 'orthodoxy' appears to state is that until 1873, when Parliament passed the Judicature Act and thus merged common law and equity, the remedies available in common law and equity courts varied significantly; common law courts, in particular, were significantly constrained in the remedies ad their disposal; for instance, a common law court could not impose a prohibitive injunction, so that parties were often required to use succeeding or concurrent proceedings in the equity court to obtain full relief.

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[165] (n 40) 159. cf *Adams v Cape Industries Plc* (n 45); *Harris v Taylor* (n 140); *Emanuel v Symon* (n 140); *Rousillon v Rousillon* (n 140).
[166] (n 163) [26].
[167] ibid [28] (emphasis added).
[168] The judge further distinguished the basis for enforcement at common law from the basis for recognition "for the purposes of defence or estoppel", which he noted, "is based on the quite different principle of the discouragement in the interests of justice of relitigation of matters already judicially determined as between the parties." See (n 163) [28].
[169] (n 42) 819 (emphasis added).
[170] Briggs and Rees (n 13) [7.70] (emphasis added).
[171] ibid.
[172] ibid [7.71].

Under the Senior Courts Act 1981,[173] any English court with general jurisdiction, like the High Court, can grant any remedy to which the claimant is at law *or* in equity entitled for the cause of action underlying the claim. The available remedies are therefore extremely varied. Specifically, the CPR recognise as remedies the payment of money; specific performance of a contract; delivery of goods; interest; and costs.[174]

In addition, a court may grant interim remedies like 'interim injunctions' (i.e. a court order prohibiting a person from doing something or requiring a person to do something);[175] interim declarations; orders for the detention, custody or preservation of relevant property;[176] an order to deliver up goods;[177] or a 'freezing injunction' (i.e. an order restraining a party from removing from the jurisdiction assets located there or restraining a party from dealing with any assets whether located within the jurisdiction or not).[178]

Furthermore, the Court of Appeal or the High Court, in circumstances where it has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to or in substitution for an injunction or specific performance.[179] Finally, an English court is not bound by the claim form of the claimant in deciding which remedy to award for a cause of action; the court is empowered to award any remedy a claimant has a right at law or in equity to recover, even if that remedy is not specified in the claim form of the claimant.[180]

Today, an English court seized of an action on a foreign injunction or declaration therefore has its whole arsenal of available remedies, and the court is more than capable of giving an English judgment based on the foreign judgment that imposes the same or at least equivalent relief as the foreign judgment. The old restrictions on the jurisdiction of common law courts have disappeared, so that whereas it used to be comprehensible that English courts were unable to enforce foreign injunctions for the simple reason that they lacked the necessary instruments to do so, since 1873 the courts have jurisdiction to grant any remedy necessary and impose any corresponding obligations to ensure an adequate enforcement.

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[173] c 54, s 49(1) and (2) ("(1) Subject to the provisions of this or any other Act, every court exercising jurisdiction in England or Wales in any civil cause or matter shall continue to administer law and equity on the basis that, wherever there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail. (2) Every such court shall give the same effect as hitherto—(a) to all equitable estates, titles, rights, reliefs, defences and counterclaims, and to all equitable duties and liabilities; and (b) subject thereto, to all legal claims and demands and all estates, titles, rights, duties, obligations and liabilities existing by the common law or by any custom or created by any statute, and, subject to the provisions of this or any other Act, shall so exercise its jurisdiction in every cause or matter before it as to secure that, as far as possible, all matters in dispute between the parties are completely and finally determined, and all multiplicity of legal proceedings with respect to any of those matters is avoided.").

[174] cf CPR r 3.5(2)(b).

[175] cf Glossary.

[176] CPR r 25.1(1)(c)(i). Other interim measures relating to property include orders for: (a) the inspection of relevant property; (b) the taking of a sample of relevant property; (c) the carrying out of an experiment on or with relevant property; (d) for the sale of relevant property which is of a perishable nature or which for any other good reason it is desirable to sell quickly; and (e) for the payment of income from relevant property until a claim is decided. See CPR r 25.1(1)(c)(ii)-(vi).

[177] See, eg, Torts (Interference with Goods) Act 1977 (c 32), s 4.

[178] See generally CPR r 25.1.

[179] Senior Courts Act 1981 (c 54), s 50.

[180] CPR r 16.2(5).

The main question in respect of a foreign declaratory judgment is whether such a judgment imposes an 'obligation'; Toulson LJ in *West Tankers Inc v Allianz SpA (The Front Comor)* formulated the linguistic challenge thus: "A declaratory judgment or award decides some question as to the respective rights and obligations of the parties. It is not 'executory' in form in that *it does not formally order either party to do or to refrain from doing anything.*"[181] Nevertheless, His Lordship added immediately: "I include the words 'in form' because the practical as distinct from the formal effect may be compulsive. If, for example, a court declares a deportation order to be unlawful, everyone knows that such a judgment is prohibitive in effect though not in form."[182]

A declaration is therefore for practical purposes 'obligatory', since the parties must abide by the rights and obligations as declared by the court. Moreover, an English court have the power to grant declaratory relief.

West Tankers involved a claim under s 66 of the Arbitration Act 1996[183] for the enforcement of an English arbitral award granting negative declaratory relief (i.e. that the successful party had no liability to the other party in respect of the subject matter of the arbitration), not the recognition and enforcement of a foreign declaratory judgment. [184] The question was whether an English court has the necessary power to order a judgment to be entered in the terms of such awards. Section 66 of the Arbitration Act provides insofar as relevant here that:

> 1. An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect. 2. Where leave is so given, judgment may be entered in terms of the award.

Toulson LJ observed that in light of this provision the question was, more specifically:

> [W]hether the phrase 'enforced in the same manner as a judgment to the same effect' is confined to enforcement by one of the normal forms of execution of a judgment which are provided under the rules or whether it may include other means of giving judicial force to the award on the same footing as a judgment.[185]

According to His Lordship, "[t]he broader interpretation is closer to the purpose of the Act and makes better sense in the context of the way in which arbitration

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[181] [2012] EWCA Civ 27, [2012] 2 All ER (Comm) 113, [2012] Bus LR 1701, [2012] 1 Lloyd's Rep 398, [2012] CP Rep 19, [2012] 1 CLC 312, 140 Con LR 45, [2012] ILPr 19, (2012) 109(6) LSG 21 [22]. cf *St George's Healthcare NHS Trust v S (Guidelines)* [1999] Fam 26, 60, (1997-98) 1 CCL Rep 578, [1998] Fam Law 662 (Judge LJ) ("Non-compliance with a declaration cannot be punished as a contempt of court, nor can a declaration be enforced by any normal form of execution, although exceptionally a writ of sequestration might be appropriate: see *Webster v Southwark London Borough Council* [1983] QB 698.").

[182] ibid.

[183] c 23.

[184] Section 66 of the Arbitration Act provides: "1. An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect. 2. Where leave is so given, judgment may be entered in terms of the award. … 4. Nothing in this section affects the recognition or enforcement of an award under any other enactment or rule of law, in particular under Part II of the Arbitration Act 1950 (enforcement of awards under the Geneva Convention) or the provisions of Part III of this Act relating to the recognition and enforcement of awards under the New York Convention or by an action on the award."

[185] ibid [35].

works."[186] Hence, an English court can presently in appropriate cases enforce a declaratory award issued by an arbitration tribunal. By extension, the same reasoning applies to foreign judgments granting declaratory relief.

(iii) Conditions: The obligation was imposed finally and conclusively in proceedings where the merits were open to contention by the defendant

Apart from the precondition that the foreign judgment was rendered by a court of competent jurisdiction, the obligation imposed by that court must have been imposed 'finally and conclusively' by means of a judgment that was 'on the merits'.[187]

a. The obligation was imposed finally and conclusively

English courts do not enforce every obligation imposed by a foreign court of competent jurisdiction, but only those imposed 'finally and conclusively'. Whereas neither Parke B in *Russell v Smyth* and *Williams v Jones*, nor Blackburn J in *Godard v Gray* and *Schibsby v Westenholz* expressed this condition in so many words, neither of the two judges expressly negated the condition; rightly so, because the condition applied both before and afterwards. (Parke B in *Russell v Smyth* merely observed that on the facts of the case it was unnecessary to determine "[w]hether the decree be final or not" or to define "how far the judgment of a Court of competent jurisdiction, in the absence of all fraud, is conclusive upon the parties."[188])

As early as 1852, Sir John Romilly MR in *Paul v Roy* held that "it would be new in practice for this Court to enforce a foreign judgment, unless it were final and conclusive."[189] Subsequently, in 1890, Lord Herschell in *Nouvion v Freeman* confirmed "that a judgment, to come within the terms of the law as properly laid down, must be a judgment which results from an adjudication of a Court of competent jurisdiction, such judgment being *final and conclusive*."[190] First, a judgment must be '*final'*, His Lordship held, in the sense that it "puts an end to and finally settles the controversy which arose in the particular proceeding".[191] But, he added, "of itself [this is not] sufficient to make it a final and conclusive judgment upon which an action may be maintained in the Courts of this country, when such judgment has been pronounced by a foreign Court."[192]

Second, the foreign judgment must be '*conclusive*' so that the judgment "cannot thereafter *in that Court* be disputed, and can only be questioned in an appeal to a higher tribunal."[193] An English court will not then enforce a foreign judgment in a situation where "the adjudication is consistent with the non-existence of the debt or obligation which it is sought to enforce, and it may thereafter be declared by the tribunal which pronounced it that there is no obligation and no debt".[194]

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[186] ibid [36].
[187] Briggs and Rees (n 13) [7.59] ("In order to be recognised at all, a judgment must be final and conclusive, and must be a judgment on the merits of the action.").
[188] (n 42) 819.
[189] (1852) 15 Beavan 433, 440, 51 ER 605.
[190] (Chapter 1 n 373) 8-9.
[191] ibid.
[192] ibid.
[193] ibid 10.
[194] ibid 10.

b. The obligation was imposed in proceedings where the merits were open to contention by the defendant

The condition that a foreign judgment to be recognised must be 'on the merits'[195] it is not a very clear. Lord Diplock in *The Sennar (No.2)* observed: "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."[196] His Lordship held that what it means in the context of judgments is that the court has held that it has jurisdiction and that its judgment on cannot be varied, re-opened or set aside by the court that delivered it or any other court of co-ordinate jurisdiction although it may be subject to appeal to a court of higher jurisdiction. But this explanation of the condition overlaps so significantly with the condition that the obligation be finally and conclusively imposed that it has no claim to separate existence. Subsequently in *Black Clawson*, His Lordship adjusted his understanding of the concept:

> [P]rovided the defendant has had due notice of the proceedings, a foreign judgment by default obtained against him by the plaintiff is enforceable … notwithstanding that it has been given upon what is solely a procedural ground governed by the lex fori and is not a judgment which can be described as being 'on the merits.'[197]

Another way of construing the condition was put forward by Lord Brandon of Oakbrook in *The Sennar (No.2)*:

> 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.[198]

Lord Brandon's explanation of 'on the merits', while admittedly reflecting the natural meaning of the term, is difficult to harmonise with the fact that English courts habitually enforce foreign *default* judgments, which cannot be characterised as being 'on the merits', as Lord Millett pointed out in *Strachan v Gleaner Co Ltd*, "[a] default judgment is one which has not been decided on the merits."[199] Such judgments can evidently finally and conclusively impose an obligation as His Lordship pointed out in the same case:

> [O]nce judgment has been given (whether after a contested hearing or in default) for damages to be assessed, the defendant cannot dispute liability at the assessment hearing …. If he wishes to do so, he must appeal or apply to set aside the judgment; while it stands the issue of liability is res judicata.[200]

Default judgments are not usually reasoned in the sense referred to by Lord Brandon and are rendered without trial or contested hearing, where a defendant has either

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[195] Briggs and Rees (n 13) [7.43]; Barnett (Introduction n 24) [2.09].
[196] *The Sennar (No 2)* (Chapter 1 n 58) 494.
[197] *Black Clawson International Ltd v Papierwerke AG* (Chapter 1 n 309) 635.
[198] *The Sennar (No 2)* (Chapter 1 n 58) 499E/G. cf *Good Challenger Navegante SA v Metalexportimport SA* [2003] EWHC 10 (Comm), [2003] 1 Lloyd's Rep 471, affd [2003] EWCA Civ 1668, [2004] 1 Lloyd's Rep 67, (2004) 101(2) LSG 27 [36] (Michael Crane QC).
[199] (Chapter 1 n 376) [21]. cf *Evans v Bartlam* (Chapter 1 n 377) 480 (Lord Atkin).
[200] ibid [16]-[20].

failed to file an acknowledgment of service or has failed to file a defence. Accordingly, the true meaning of the requirement must be different; it was most accurately put by Lord Herschell in *Nouvion v Freeman*:

> The principle upon which I think our enforcement of foreign judgments must proceed is this: that in a Court of competent jurisdiction, *where according to its established procedure the whole merits of the case were open, at all events, to the parties, however much they may have failed to take advantage of them, or may have waived any of their rights*, a final adjudication has been given that a debt or obligation exists which cannot thereafter in that Court be disputed, and can only be questioned in an appeal to a higher tribunal.[201]

The requirement that a foreign judgment be 'on the merits' then is that the merits were *open* to the parties' contention in accordance with the rules of procedure of the judgment-rendering court, irrespective the question whether they took advantage of the opportunity offered them, or may have waived any of their procedural rights.

(iv) Exceptions

A foreign judgment can be recognised and enforced if the obligation under the judgment was imposed by a foreign court of competent jurisdiction, the obligation was finally and conclusively imposed, and the obligation was imposed after proceedings where the merits of the claim were open to the defendant's contention. But there are exceptions. Recognition occurs, *unless*, as Blackburn J put it in *Godard v Gray*, the defendant establishes as a good defence to the English action on the foreign judgment, "anything which negatives the existence of that legal obligation, *or* excuses the defendant from the performance of it".[202]

Two types of defence to enforcement can be distinguished on this basis: first, matters that *negate* the obligation imposed by the foreign court; and, second, matters that *justify a failure to comply with* the obligation.

a. Matters that negate *the obligation*

Circumstances that negate the obligation include defences that go to the *obligation*: (1) the judgment-rendering court was not of 'competent jurisdiction'; (2) the judgment does not 'finally and conclusively' create the obligation; or (3) the procedure of the judgment-rendering court was not in character so that the 'merits were open to the contention of the defendant'.

b. Matters that justify a failure to comply with the obligation

Matters that justify a failure to comply with the obligation imposed by the foreign court are different in nature from matters that negate the obligation, because in relation to the former, the English court acknowledges the obligation imposed by the foreign court, whereas in relation to the latter, there is no obligation. Blackburn J mentioned as possible justification for a failure to comply with the obligation, the circumstance that (1) "the judgment was obtained by the fraud by the plaintiff"[203] or

[201] (1889) LR 15 App Cas 1, 9-10.
[202] (n 35) 148-49.
[203] ibid 149. cf *Dicey, Morris & Collins* (Part II, Introduction n 9) r 43.

(2) "the foreign Court has knowingly and perversely disregarded the rights given to an English subject by English law" [204]. Further defences have been accepted over time.[205]

The current list is not exhaustive but additionally includes at least the following circumstances:[206] (1) enforcement of the judgment would conflict with public policy;[207] (2) the judgment was obtained in proceedings contrary to natural justice; [208] (3) enforcement is excluded by statute; [209] or (4) the judgment is inconsistent with an earlier judgment of a court in England or of another court of competent jurisdiction[210].

As a general point, a English court will start from the position that "[n]ormally such recognition will be given and, if it is to be refused [for allegations attacking the integrity of the judicial system of a foreign State], cogent evidence … will be required." [211] This approach is inspired by "*considerations of comity* necessitate specific examples of [a lack of integrity of a judicial system] before any decision is made not to recognise the judgments of a foreign state."[212]

3.2 The Netherlands

Introduction

Article 431 Rv has long cast a shadow over Dutch private international law.[213] The provision has been *misrepresented* as a categorical bar to the recognition and

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[204] ibid.
[205] See Briggs and Rees (n 13) [7.58]; and Barnett (Introduction n 24) [2.09].
[206] Dickinson (n 11) 68. See further Barnett (Introduction n 24) chs 2, 4 and 5.
[207] *Dicey, Morris & Collins* (Part II, Introduction n 9) r 44.
[208] ibid r 45.
[209] For instance, judgments within the scope of s 5(1) of the Protection of Trading Interests Act 1980 (c 11).
[210] *Showlag v Mansour* [1995] 1 AC 431, 440-41, [1994] 2 WLR 615, [1994] 2 All ER 129, [1994] CLC 314, [1995] ILPr 157 (Lord Keith) ("the correct general rule is that where there are two competing foreign judgments each of which is pronounced by a court of competent jurisdiction and is final and not open to impeachment on any ground then the earlier of them in time must be recognised and given effect to the exclusion of the later. At the same time it is to be kept in mind that there may be circumstances under which the party holding the earlier judgment may be estopped from relying on it.").
[211] *Yukos English Court of Appeal* (Introduction n 28) [151].
[212] ibid (emphasis added).
[213] See Jan Fresemann Viëtor, *De kracht van buitenlandsche vonnissen* (JB Huber, Groningen 1865); D Josephus Jitta, 'Onder welke voorwaarden moet de Nederlandse wetgever uitvoerbaarheid verleenen aan de vonnissen van den buitenlandschen burgerlijke rechter?' in *Handelingen der Nederlandsche Juristen-Vereniging 1888* (Belinfante, The Hague 1888) 1-73; TMC Asser, 'Onder welke voorwaarden moet de Nederlandse wetgever uitvoerbaarheid verleenen aan de vonnissen van den buitenlandschen burgerlijke rechter?' in *Handelingen der Nederlandsche Juristen-Vereniging 1888* (Belinfante, The Hague 1888) 199ff; J Offerhaus, 'The Private International Law of the Netherlands' (1921) 30 The Yale Law Journal 250; EM Meijers, 'Het Bontmantelarrest' (1925) 2878 WPNR 97; EM Meijers, 'Het Bontmantelarrest' (Part II) (1925) 2879 WPNR 109; EM Meijers, 'Het Bontmantelarrest' (Part III) (1925) 2881 WPNR 157; WL van Spengler, *De kracht van buitenlandsche vonnissen gewezen in burgerlijke zaken* (E Ijdo, Leiden 1926); L van Praag, 'Welke kracht hebben in Nederland de door vreemde rechters in burgerlijke zaken gewezen vonnissen?' (1928) 47 Rechtsgeleerd Magazijn 339; IH Hijmans, 'Welke kracht behoort te worden toegekend aan beslissingen in burgerlijke en handelszaken van den buitenlandschen rechter (scheidslieden daaronder niet begrepen)?' in *Handelingen der Nederlandsche Juristen-Vereniging 1929, Tweede stuk* (Belinfante, The Hague 1929) 1; AEJ Nysing, 'Welke kracht behoort te worden toegekend aan beslissingen in burgerlijke en handelszaken van den buitenlandschen rechter (scheidslieden

enforcement of foreign judgments in the Netherlands; for instance, Vitta in his Hague lectures (mis)informed students of "the Dutch legislation, according to which a foreign judgment is susceptible to neither recognition nor enforcement, so that the litigation has to be started from the beginning."[214] Similarly, Ehrenzweig and Jayme characterised Dutch law as "hostile to recognition",[215] while Lorenzen noted that: "Foreign judgments are not enforced and a new suit on the original cause of action can be brought."[216] Lowenfeld expresses his amazement at the (supposed) effect of Art 431 Rv: "I did not believe anyone today would take that position [that judgments are purely territorial, with no effect outside the rendering state], until I learned that, absent a treaty, that is the law in as generally enlightened and internationalist countries as in the Netherlands".[217]

The *myth* must now finally be laid to rest (once and for all); in truth, Art 431 Rv is no more than the domestic law expression of the international law principle of territoriality.[218] Yet, territoriality has formed the basis of Dutch private international law, not its negation; against the background of the fact that Dutch territory is principally excluded from the sphere of validity of foreign judgments, the Netherlands has *for centuries* recognised and enforced foreign judgments in the interest of justice and finality of litigation between legal systems. Moreover, the Netherlands has done so at common law (*commuun recht*), not merely when mandated by international agreement or European legislation.[219] On the whole, on the

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daaronder niet begrepen)?' in *Handelingen der Nederlandsche Juristen-Vereniging 1929, Tweede stuk* (Belinfante, The Hague 1929) 1; RD Kollewijn, *Parker School of Foreign and Comparative Law Bilateral Studies: American-Dutch private international law* (2nd ed Oceana, New York 1961); J Kosters and CW Dubbink, *Algemeen deel van het Nederlandse internationaal privaatrecht* (De erven F Bohn NV, Harlem 1962) 767-873; Hans Smit, 'International Res Judicata in the Netherlands: A Comparative Analysis' (1966) 16 Buffalo Law Review 165; D Kokkini-Iatridou and JP Verheul, 'Les effets des jugements et sentences étrangers aux Pays-Bas' in *Netherlands reports to the 8. International Congress of Comparative Law: Pescara 1970* (Kluwer, Deventer 1970) 129; JP Verheul, *Erkenning en tenuitvoerlegging van vreemde vonnissen* (2nd ed TMC Asser Press, The Hague 1989); RC Verschuur, *Vrij verkeer van vonnissen* (Kluwer 1995); AH van Hoek, 'Erkenning van vonnissen in het privaatrecht: een studie naar de grenzen van wederzijdse erkenning' (2003) 21 NIPR 337; Norel Rosner, *Cross-border recognition and enforcement of foreign money judgments in civil and commercial matters* (Ulrik Hubert Institute for Private International Law, Groningen 2004); ThM de Boer and R Kotting, 'Private International law' in JMJ Chorus, PHM Gerver, EH Hondius, *Introduction to Dutch law* (4th ed Kluwer Law International, Alphen aan den Rijn 2006) 269; Mirjam Freudenthal, *Grensoverschrijdende erkenning en tenuitvoerlegging* (Sdu, The Hague 2009); Mirjam Freudenthal, *Schets van het Europees civiel procesrecht* (2nd ed Kluwer, Deventer 2013); BJ van het Kaar, 'The Netherlands' in CJH van Lynden, *Enforcement of judgments, Awards & Deeds in Commercial Matters* (Thomson Reuters, London 2013) 229; *Groene Serie: burgerlijke rechtsvordering* (Kluwer, Deventer 1953-) Article 431 Rv, and Art 985ff.

[214] Edoardo Vitta, 'Cours général de droit international privé' (1979) 162 Recueil des cours 9, 102 ("la législation Hollandaise, d'àpres laquelle le jugement étranger n'est pas susceptible de reconnaissance ou d'exécution, de sorte que le process doit être recommencé ab initio.").

[215] AA Ehrenzweig and Erik Jayme, *Private International Law: A Comparative Treatise on American International Conflicts Law, Including the Law of Admiralty. Volume 2, Special Part, Jurisdiction, Judgments, Persons (Family)* (AW Sijthoff, Leiden 1973) 59.

[216] EG Lorenzen, 'The Enforcement of American Judgments Abroad' (1920) 29 The Yale Law Journal 268, 291.

[217] AF Lowenfeld, 'International Litigation and the Quest for Reasonableness: General Course on Private International Law' (1994) 245 Recueil des cours 9, 157 (emphasis added).

[218] See Part II, Introduction, text to n 1ff.

[219] General Provisions Act 1829 (*Wet van 15 mei 1829, houdende algemeene bepalingen der wetgeving van het Koningrijk*) (entered into force 1 October 1838) Stb 1829, 28 (as amended), Art 13 ("The judge who refuses to render justice for reasons of the lack, unclarity or incompleteness of the law, can be

scale from openness to hostility to foreign judgments, the Netherlands sits *comfortably* on the former side.

(i) Background

The late nineteenth century U.S. Supreme Court case of *Hilton v Guyot*[220] is an unconventional starting point for a discussion of *Dutch* private international law on foreign judgment recognition. The case concerned the recognition in the U.S. of a French judgment of which enforcement by action on the judgment was sought. The Court denied recognition, and any preclusive effect, and allowed relitigation of the original claim. In justification, the Court cited a "*want of reciprocity*, on the part of France, as to the effect to be given to the judgments of this and other foreign countries". [221] According to the Court, "no foreign judgment can be rendered executory in France without a review of the judgment *au fond* (to the bottom), including the whole merits of the cause of action on which the judgment rests."[222] On that basis the Court held:

> The reasonable, if not the necessary, conclusion appears to us to be that judgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are *prima facie* evidence only of the justice of the plaintiffs' claim.[223]

The case is an appropriate point of departure, because (what the U.S. Supreme Court *thought* was Dutch law) formed a key element in the Supreme Court's approval of reciprocity regarding foreign judgment recognition and enforcement. According to the Court, while this principle had been "never either affirmed or denied by express adjudication in England or America",[224] "*[i]n Holland the effect given to foreign judgments has always depended upon reciprocity*".[225] The Court based this conclusion on Story's *Commentaries on the Conflict of Laws.*[226] This influential

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prosecuted for a denial of justice.") ("De regter die weigert regt te spreken, onder voorwendsel van het stilzwijgen, de duisterheid of de onvolledigheid der wet, kan uit hoofde van regtsweigering vervolgd worden.").

[220] (n 49).

[221] ibid 210 (Gray J).

[222] ibid 216 (Gray J).

[223] ibid 227 (Gray J). The refusal of 'full credit' in this case is not the same as denying 'full faith'; whereas a refusal to give a foreign judgment full credit implies that the judgment, though shorn of preclusive effect, can still be regarded as evidence of the validity of the judgment creditor's claim, the latter forces a court to ignore a foreign judgment altogether. As Fuller J noted, at 233-34, in his dissent, "the majority of the court [held] that defendants cannot be permitted to contest the validity and effect of this judgment on the general ground that it was erroneous in law or in fact, and the special grounds relied on are seriatim rejected." His criticism was exactly that, "although no special ground exists for impeaching the original justice of a judgment, such as want of jurisdiction or fraud", the Court still found that "the right to retry the merits of the original cause at large, defendant being put upon proving those merits, should be accorded in every suit on judgments recovered in countries where our own judgments are not given full effect, on that ground merely."

[224] ibid 212 (Gray J).

[225] ibid 218 (Gray J) (emphasis added).

[226] Joseph Story, *Commentaries on the conflict of laws, foreign and domestic: in regard to contracts, rights, and remedies, and especially in regard to marriages, divorces, wills, successions, and judgments* (8th ed Little, Brown and Company, Boston 1883).

treatise admitted to difficulties in ascertaining the prevailing rule in Europe, but still emphasised that:

> Holland seems at all times, *upon the general principle of reciprocity*, to have given great weight to foreign judgments, and in many cases, if not in all cases, to have given to them a weight equal to that given to domestic judgments, wherever the like rule of reciprocity with regard to Dutch judgments has been adopted by the foreign country, whose judgment is brought under review.[227]

Adding his seal of approval, Story said that "[t]his is certainly a very reasonable rule; and may, perhaps, hereafter work itself firmly into the structure of international jurisprudence."[228]

Against this background, the U.S. Supreme Court set out to verify whether reciprocity had in fact materialised in State practice. Following a wideranging comparative assessment, the Supreme Court found that: "In the great majority of the countries… the judgment rendered in a foreign country is allowed the same effect *only* as the courts of that country allow to the judgments of the country in which the judgment in question is sought to be executed."[229] Accordingly, the Supreme Court concluded that: "The prediction of Mr. Justice Story … has thus been fulfilled, and the rule of reciprocity has worked itself firmly into the structure of international jurisprudence."[230]

The general accuracy of this conclusion is not questioned here. However, the Supreme Court erred in its assessement of Dutch law. Prior to stating its conclusion on Dutch law cited above, the Supreme Court conceded that "whether [reciprocity applies] by reason of Dutch ordinances only, or of general principles of jurisprudence, *does not clearly appear*."[231] This did not prevent the Court from relying on Story's word. However, Story's *Commentaries* cited not one Dutch authority; instead, the assessment of Dutch law relied entirely and exclusively on a 1823 treatise by Henry, another American author, who had merely consulted *sixteenth and seventeenth* century commentaries, while ignoring contemporary Dutch law and practice.[232]

As a result, the U.S. Supreme Court—*in 1895*—overlooked two crucial early nineteenth century developments in Dutch law that upended reciprocity as the basis on which Dutch courts recognised foreign judgments: first, the imposition in 1811 of

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[227] ibid §618 (emphasis added). See *Hilton v Guyot* (n 49) 190-91 (Gray J). (Note that Story gave the same assessment of Dutch law in the first edition of the Commentaries (Hilliard, Gray and Company, Boston 1834) §618.)
[228] ibid. cf *Hilton v Guyot* (n 49) 190-191 (Gray J).
[229] ibid 227 (Gray J) (emphasis added).
[230] ibid.
[231] ibid 218 (Gray J) (emphasis added).
[232] J Henry, *The judgment of the Court of Demerara: in the case of Odwin v Forbes, on the plea of the English certificate of bankruptcy in the English certificate of bankruptcy in bar, in a foreign jurisdiction, to the suit of a foreign creditor, as confirmed in appeal with the authorities, and foreign and English cases : to which is prefixed a treatise on the difference between personal and real statutes, and its effect on foreign judgements and contracts, marriages and wills. With an appendix on the present law of France respecting foreigners* (S Sweet, London 1823). At 76, Henry concluded that "[t]his comity, in giving effect to the judgments of other tribunals, is generally exercised by states under the same sovereign, on the ground that he is the fountain of justice in each, though of independent jurisdiction; and it has also been exercised in different states of Europe with respect to foreign judgments, particularly in the Dutch states, who are accustomed by the principle of reciprocity to give effect in their territories to the judgments of foreign states, which show the same comity to theirs".

French law in the Netherlands; and, second, the enactment on 1 October 1838 of the Dutch Code of Civil Procedure. The Dutch legal position that the Supreme Court actually described, relying on Story, was valid in the time of the Republic of the United Netherlands (*Republiek der Verenigde Nederlanden*)—the Union of the sovereign States of Holland, Zeeland, Gelderland, Utrecht, Friesland, Overijssel and Groningen—throughout the sixteenth, seventeenth and eighteenth centuries.

a. The Dutch Republic: reciprocity (enforcement by pareatis)

In 1534, long before the founding of the Dutch Republic in 1588, two Dutch Provinces—Holland and Utrecht—concluded an agreement on the mutual recognition for judgments.[233] According to this agreement, "[j]udgments of the Province of Utrecht were executed in Holland without prior review" (and *vice versa*).[234] As regards the judgments of *other* States, the matter was fundamentally a matter of reciprocity; for instance, Van Zurck in 1711 observed on the law of Holland, that "[a]s a rule, judgments of other courts are respected … *if they also respect ours.*"[235] To illustrate, the Supreme Court of Holland and Zeeland by judgment of 22 October 1755 on the question whether it was appropriate to grant leave to execute a Belgian judgment in Holland, ruled as follows:[236]

> No special reasons are known to us on what such a refusal could be based, while, even though on principle a court can have its judgment executed neither beyond its territory, nor in the territories controlled by other Sovereigns and, though courts in whose territory the goods of the judgment debtor are located are not bound to execute the judgments rendered by those of other Sovereigns, the furthering of a proper administration of justice which all courts should bear in mind and seek to attain, has caused a development of those rules in the courts of most neighbouring Kings, by letters of request sent to the foreign court together with the judgment, calling for its execution in their territory, with the promise to do the same if so requested.[237]

The recognition granted foreign judgments on the basis of reciprocity therefore stemmed from the need to further of *a proper administration of justice between sovereign States*. This need existed not only in the relations with third States, but also between the Provinces, because within the Republic the seven member States

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[233] cf Act on Ratification of the Convention between Netherlands and Belgium on jurisdiction, bankruptcy, and the validity and enforcement of judgments, arbitration awards and authentic instruments (Explanatory Memorandum) (*Goedkeuring van het op 28 Maart 1925 te Brussel tusschen Nederland en België gesloten verdrag, enz.*) (1925-1926) 177 No 3, 9 (MvT). See further Fresemann Viëtor (n 213) 156.

[234] Eduard van Zurck, *Codex Batavus, waer in het algemeen kerk- en burgerlyk recht van Hollant, Zeelant, en het Ressort der Generaliteit* (Adriaen Beman, Delft 1711) 679.

[235] ibid (emphasis added).

[236] Cited by AG Faider in his opinion in Hof van Brussel 17 March 1847, W 819.

[237] ("Ons zijn geene bijzondere redenen bekend, waarop zulk eene weigering zou kunnen worden gegrond, vermits, ofschoon de regel meebrengt, dat een regter het vonnis niet buiten zijn gebied kan doen ten uitvoer leggen, noch ook in lander, aan andere Souvereinen onderworpen, en ofschoon de regters, onder wier gebied de goederen des veroordeelden gelegen zijn, niet zijn gehouden, om de vonnissen ten uitvoer te leggen, geslagen door die van eene andere souvereiniteit, zoo heeft de bevordering en de goede bedeling van het regt, die alle regters, zooveel mogelijk, moeten in 't oog houden en trachten te begunstigen, eene wijziging in die regelenen tot stand gebragt in de meeste regtbanken van de naburige Vorsten, daar de requisitoriale brieven, welke de regter, die gevonnisd heeft, met het vonnis aan den vreemdeling right, hem opvorderde, om de uitvoering daarvan in zijn gebied toe te staan, met belofte, dat hij, in soortgelijk geval, op zijn verzoek, hetzelfde zal doen.").

retained autonomy in internal affairs, including the administration of justice, so that a judgment from Utrecht or any other province had essentially the same status in Holland as had judgments from foreign states like Belgium, England or France. The 1534 agreement between Holland and Utrecht therefore kept its significance also after 1588, while according to Van Zurck, judgments from Gelderland were refused execution in Holland as late as the eighteenth century, because Gelderland failed to respect judgments from Holland.[238]

Enforcement occurred at the request of the foreign judgment-rendering court by the granting of leave to execution, or '*pareatis*'. Such requests took the form of letters rogatory ('*Letteren Requisitoir*') which could be addressed either to the local court in whose jurisdiction execution was desired, but also generally to all courts ('*Opene Letteren Requisitoir*'). Based on this request, leave to execute ('*Letteren van Attache*') could be granted by the Court of Appeal of the Province where execution was desired, with the effect that the judgment became executable in the entire Province.[239] Such '*Letteren van Attache'* involved "an authorisation to a bailiff to execute a judgment given by a court lacking jurisdiction in the territory of the Court of Appeal, which was requested by rogatory letter, and *attached* to the judgment."[240] Alternatively the request for enforcement could be addressed to the local court in whose jurisdiction exection was pursued, in which case the foreign judgment became executable in the jurisdiction of that court alone. (By way of comparison, this mode of enforcement closely resembles that practiced by the English court of admiralty in the early seventeenth century.)[241]

1. The condition of jurisdiction and early public policy

The jurisdiction of the foreign judgment court was a precondition for the grant of leave to execution. Further, the granting of leave to execution was subject to the exception that the foreign judgment was not in violation of the law of the place where enforcement was sought. Foreign judgments were not then automatically enforced; Van Zurck pointed out to this effect that "[j]udgments of friendly and allied States require execution in the Netherlands, as long as they do not violate the laws of these

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[238] Van Zurck (n 234) 679.

[239] Joannes van der Linden, *Verhandeling over de judicieele practijcq, of form van procedeeren voor de Hoven van Justitie in Holland gebruikelijk: voor eenige jaaren door een voornaam en kundig practizijn bij wegen van een korte schets zaamgesteld, vervolgens in den jaare 1781 in 't licht gegeven en nu geheel overzien, verbeterd en uitgebreid* (A en J Honkoop, Leiden 1798) 216. See further Fresemann Viëtor (n 213) 151ff.

[240] Paul Merula, *Manier van procederen in de provintien van Hollandt, Zeelandt en West-Vrieslandt belangende civile zaken* (Jan Daniel Beman, Rotterdam 1750) 30 (citing Anonymous, *Manier van procederen voor den Hove van Hollant hedendaags gebruykelijk* (2nd ed, The Hague) 270-71) (emphasis added). This edition was complemented by the work of Gerard de Haas (the first edition was published in Amsterdam in 1592).

[241] See *Hilton v Guyot* (n 49) 170 (Gray J) (citing (1607) Weir's Case (Pasch Term) 5 Jac B R, 1 Rolle, Abr 530, 12, 6 Vin Abr 512, 12 ("If a man of Frizeland sues an Englishman in Frizeland before the governor there, and there recovers against him a certain sum, upon which the Englishman, not having sufficient to satisfy it, comes into England, upon which the governor sends his letters missive into England, omnes magistratus infra regnum Angliae rogans, to make execution of the said judgment, the judge of the admiralty may execute this judgment by imprisonment of the party, and he shall not be delivered by the common law; for this is by the law of nations that the justice of one nation should be aiding to the justice of another nation, and for one to execute the judgment of the other, and the law of England takes notice of this law, and the judge of the admiralty is the proper magistrate for this purpose, for he only hath the execution of the civil law within the realm.").

countries, or were given without jurisdiction devoid of validity."[242] A court could therefore check "whether any of the well-known reasons compromising execution were present."[243] Finally, upon enforcement by the granting of leave to execution, execution of the foreign judgment took place in the same manner as a local judgment, under the law of the place of enforcement.[244]

2. In the absence of reciprocity: The action on the judgment

The principle of reciprocity applied throughout the seventeenth and eighteenth centuries.[245] The approach to a foreign judgment of a State that failed to accord mutual recognition is disputed; for instance, on the position in Holland, Viëtor observed that "one had to sue the debtor again in Holland by reasserting the cause of action".[246] However, Van der Linden found that courts acknowledged the unjustice of forcing a party whose claim had already been upheld abroad to bring the same claim again and to allow the defendant a new chance at defeating it.[247] A foreign judgment creditor could therefore bring an action on the foreign judgment and claim that "the defendant be ordered to comply with the judgment and to act as this judgment requires."[248] In those proceedings, which resemble the modern mode of enforcement under Art 431(2) Rv, the defendant could plead the same defences as available in a *pareatis* procedure, but could not contradict the foreign court's findings or the force of that court's order.

b. French influence: révision au fond (enforcement by exequatur)

French law was imposed on the Netherlands in 1811.[249] The Dutch approach to foreign judgments thus became identical in law to the French approach, as defined by Art 546 of the *Code de procedure civile* ('CPC')[250] and Art 2123 of the *Code Civil* ('CC'),[251] which applied against the background of Art 121 of the Royal Ordinance of

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[242] Van Zurck (n 234) 678. cf Fresemann Viëtor (n 213) 155.
[243] ibid.
[244] ibid 679.
[245] Fresemann Viëtor (n 213) 155.
[246] ibid 161.
[247] ibid.
[248] Van der Linden (n 239) 212. Note however that Fresemann Viëtor (n 213) doubted the accuracy of this statement and, at 162, asked: "Why does only Van der Linden mention this way of giving force and execution to a foreign judgment despite the absence of reciprocity? Did this liberality only make its entry in the later days of the Republic? The older writers make no mention of it."
[249] See CH van Rhee, 'Dutch Civil Procedural Law in an International Context' in Masahisa Deguchi and Marcel Storme (eds), *The reception and transmission of civil procedural law in the global society: legislative and legal educational assistance to other countries in procedural law* (Maklu, Antwerpen/Apeldoorn 2008) 191, 195ff. Also see generally Fresemann Viëtor (n 213).
[250] « Les jugement rendus par les officieurs étrangers ne seront susceptibles d'exécution en France que de la manière et dans les case prévus par les articles 2123 et 2128 du code civil. » ("Foreign judgments given by foreign judges are only susceptible to execution in France in the manner foreseen by Articles 2123 and 2128 of the Code Civil"). See J-E Boitard, G de Linage, G-F Colmet-Dâage, *Leçons sur toutes les parties du code de procédure civile: Tome second* (6th ed Cotillon, Paris 1854) [802]. See presently, Art 509 CPC (« Les jugements rendus par les tribunaux étrangers … sont exécutoires sur le territoire de la République de la manière et dans les cas prévus par la loi. ») ("Judgments given by foreign courts … are only executable in France in the manner and in the cases foreseen by law.").
[251] « Elle [ie l'hypothèque judiciaire] résulte également des décisions arbitrales revêtues de l'ordonnance judiciaire d'exécution ainsi que des décisions judiciaires rendues en pays étrangers et déclarées exécutoires par un tribunal français. » ("A lien cannot, in like manner, arise from judgments rendered in

15 January 1629 ('Code Michaud')[252].[253] A detailed analysis of this approach is beyond the scope of this thesis, but its principal aspects can be mentioned. They were outlined by the French Supreme Court (*Court de Cassation*) in *Holker v Parker*.[254] After the French experience, reciprocity never returned to Dutch private international law.

1. Holker v Parker

The French Supreme Court in *Holker v Parker* clarified that a foreign judgment could be executed in France only following its enforcement by the grant of leave to execution ('*exequatur*') by a French court, which process (in France until the

any foreign country, save only as they have been declared executable by a French court, without prejudice, however, to provisions to the contrary, contained in public laws and treaties."). See presently, Art 2412 CC. Article 546 CPC also referred to Art 2128 CC which is not of direct relevance here. This provision stated that: « Les contrats passés en pays étranger ne peuvent donner d'hypothèque sur les biens de France, s'il n'y a des dispositions contraires à ce principe dans les lois politiques ou dans les traités. » ("Contracts entered into in a foreign country cannot give a lien upon property in France if there are no provisions contrary to this principle in public laws or in treaties.").

[252] *Ordonnance du 15 janvier 1629 sur les plaintes des Etats assemblés en 1614 et de l'assemblée des notables réunis à Rouen et à Paris en 1617 et 1626*, Art 121 ("Judgments rendered, contracts or obligations recognized, in foreign kingdoms and sovereignties, for any cause whatever, shall have no lien or execution in our kingdom. Thus the contracts shall stand for simple promises; and, notwithstanding the judgments, our subjects against whom they have been rendered may contest their rights anew before our judges.") (« Les jugements rendus, contrats et obligations reçus ès royaumes et Souverainetés étrangères, pour quelque chose que se soit, n'auront aucune hypothèque ni exécution en notre royaume; ains tiendront les contrats lieu de simples promesses; et non-obstant les jugements, nos sujets, contre lesquels ils ont été rendus, pourront de nouveau débattre leurs droits comme entiers par-devant nos officiers. »).

[253] Van Rhee (n 249) 197 with further references.

[254] Judgment of 19 April 1819, Cass civ (1819) S I 129 (*Parker*). See KH Nadelmann, 'Recognition of Foreign Money Judgments in France' (1956) 5 The American Journal of Comparative Law 248ff. Also see the discussion of this case in *Hilton v Guyot* (n 49) 215-217 (Gray J). In addition see Fresemann Viëtor (n 213) 164ff with further references.

Supreme Court's 1964 decision in *Munzer*)[255] involved a check of the factual and legal soundness ('*révision au fond*') of the foreign judgment.[256]

Holker v Parker involved a dispute arising from a partnership between Holker, a Frenchman, and Parker, a U.S. citizen. Before the partnership accounts were settled, Holker sued Parker in France. Parker successfully contested the jurisdiction of the French courts on the ground that he was a foreigner, and that he was not domiciled in France. Holker then in the U.S. and recovered judgment ordering Parker to pay a sum certain. However, Parker had no property in the U.S. and by then resided in France, so Holker obtained from a French judge leave to execute the U.S. judgment in France.

The Paris Court of Appeal reversed this decision.[257] According to the Court, the fundamental (international law) principle of sovereign independence, which forms

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[255] Judgment of 7 January 1964, Cass civ Ire (1964) JCP 1964 II 13590 (*Munzer*) ("But given that the judgment provides just that, to authorize the enforcement, the French judge must ensure that five conditions are fulfilled, namely the foreign court's jurisdiction which issued the decision, the due process followed before that court, the application of the designation of the proper law by standards of French choice of law-rules, compliance has international public policy and the absence of any fraud on the law, that this verification is enough to protect the legal order and French interests—the proper aim of the exequatur procedure—and is in all matters both the expression and the limit of the power of control of the judge who is charged with rendering foreign judgments executable in France, without the judge having to conduct a review of the merits of the decision....") (« Mais attendu que l'arret attaqué énonce justement que, pour accorder l'exequatur, le juge français doit s'assurer que cinq conditions se trouvent remplies, à savoir la compétence du tribunal étranger qui a rendu la décision, la régularité de la procédure suivie devant cette juridiction, l'application de la loi compétente d'après les règles françaises de conflit, la conformité a l'ordre public international et l'absence de toute fraude à la loi, que cette vérification qui suffit à assurer la protection de l'ordre juridique et des intérêts français, objet même de l'institution de l'exequatur, constitue en toute matière à la fois l'expression et la limite du pouvoir de contrôle du juge chargé de rendre exécutoire en France une décision étrangère, sans que ce juge doive procéder à une révision au fond de la décision…. »). See on *Munzer*, JC Regan, 'The Enforcement of Foreign Judgments in France Under the Nouveau Code de Procedure Civile' (1981) 4 Boston College International and Comparative Law Review 149ff; and Hélène Gaudemet-Tallon, 'La reconnaissance des jugements étrangers portant sur une somme d'argent, en matière civile et commerciale' (1986) 38 Revue internationale de droit comparé 487ff with further references.

[256] See Judgment of 20 February 2007, Cass civ (2007) D 1115 (*Cornelissen*), where the Cour de Cassation limited the conditions for *exequatur* ("But whereas to grant exequatur outside the scope of any international agreement, a French court must ensure that three conditions are met, namely the jurisdiction of the foreign court was based on the nexus of the dispute and the court seized, the compliance with international substantive and procedural public policy and the absence of fraud; that the exequatur judge need not verify that the law applied by the foreign court is the one designated by the French choice of law-rule….") (« Mais attendu que, pour accorder l'exequatur hors de toute convention internationale, le juge français doit s'assurer que trois conditions sont remplies, à savoir la compétence indirecte du juge étranger, fondée sur le rattachement du litige au juge saisi, la conformité à l'ordre public international de fond et de procédure et l'absence de fraude à la loi ; que le juge de l'exequatur n'a donc pas à vérifier que la loi appliquée par le juge étranger est celle désignée par la règle de conflit de lois française…. »). See Bertrand Ancel and Horatia Muir Watt, 'Les jugements étrangers et la règle de conflit de lois: chronique d'une séparation' in *Vers de nouveaux équilibres entre ordres juridiques – Liber amicorum Hélène Gaudemet-Tallon* (Dalloz, Paris 2008) 135ff with further references.

[257] Judgment of 27 August 1816 ("Considering that judgments rendered by foreign courts have neither effect nor authority in France; that this rule is doubtless more particularly applicable in favor of Frenchmen, to whom the King and his officers owe a special protection, but that the principle is absolute, and may be invoked by all persons, without distinction, being founded on the independence of States; that the ordinance of 1629, in the beginning of its article 121, lays down the principle in its generality when it says that judgments rendered in foreign kingdoms and sovereignties, for any cause whatever, shall have no execution in the kingdom of France, and that the Civil Code, article 2123, gives to this principle the same latitude when it declares that a lien cannot result from judgments rendered in a foreign country, except so far as they have been declared executory by a French tribunal, (which is not a

the basis of the principle of territoriality, inspired the enactment of Art 121 of the Code Michaud,[258] which bars to the (direct) execution in French territory of foreign judgments. Against this background, the Court held that Art 2123 CC qualified as an exception to the basic principle expressed in the Code Michaud, by allowing the execution of foreign judgments following their enforcement by *exequatur*. The Court contrasted the *exequatur* procedure with the *pareatis* procedure applied in former times; as opposed to *pareatis*, the granting of *exequatur* implied a *full* examination of the justice done by the foreign court.

The French Supreme Court upheld this decision. The Court held that the Code Michaud enacted, in absolute terms and without exception, that foreign judgments should not have execution in France, but that the Civil Code and the Code of Civil Procedure authorised that the French tribunals to declare such judgments executable in France, so that the Code Michaud was immaterial to the question of enforcement. Specifically, the Supreme Court ruled that Arts 2123 and 2128 CC and 546 CPC did not authorise French courts to declare foreign judgments executable in France *without review*—without consideration of the cause of action.[259] The Supreme

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matter of mere form, like the granting in past times of a pareatis from one department to another for judgments rendered within the kingdom, but which assumes, on the part of the French tribunals, a cognizance of the cause, and a full examination of the justice of the judgment presented for execution, as reason demands, and that this has always been practiced in France, according to the testimony of our ancient authorities); that there may result from this an inconvenience, where the debtor, as is asserted to have happened in the present case, removes his property and his person to France, while keeping his domicile in his native country; that it is for the creditor to be watchful, but that no consideration can impair a principle on which rests the sovereignty of governments, and which, whatever be the case, must preserve its whole force.") (translation by the author). See Désiré Dalloz and Armand Dalloz, *Jurisprudence générale: Supplément au Répertoire méthodique et alphabétique de législation de doctrine et de jurisprudence en matière de droit civil, commercial, criminal, administratif, de droit des gens et de droit publique: Tome vingt-deuxième* (Paris 1850) 146 fn 1.

[258] Royal ordinance of 15 January 1629 (*Ordonnance du 15 janvier 1629 sur les plaintes des Etats assemblés en 1614 et de l'assemblée des notables réunis à Rouen et à Paris en 1617 et 1626*) (Code Michaud), Art 121 ("Judgments rendered, contracts or obligations recognized, in foreign kingdoms and sovereignties, for any cause whatever shall give rise to no lien or execution in our Kingdom. Thus, the contracts shall stand for simple promises, and, notwithstanding such judgments, our subjects against whom they have been rendered may contest their rights anew before our own judges.") (« Les jugements rendus, contrats et obligations reçus ès royaumes et Souverainetés étrangères, pour quelque chose que se soit, n'auront aucune hypothèque ni exécution en notre royaume; ains tiendront les contrats lieu de simples promesses; et non-obstant les jugements, nos sujets, contre lesquels ils ont été rendus, pourront de nouveau débattre leurs droits comme entiers par-devant nos officiers. »).

[259] Judgment of 19 April 1819 (n 254) (*Parker*) ("On the violation of Article 121 of the ordinance of 1629—The ordinance of 1629 enacted, in absolute terms and without exception, that foreign judgments should not have execution in France. It is only by the Civil Code and the Code of Civil Procedure that the French tribunals have been authorised to declare them executable. Hence, the ordinance of 1629 has no application here. On the violation of Articles 2123 and 2128 CC and 546 CPC—These articles did not authorise the courts to declare judgments rendered in a foreign country executable in France without review. Such an authorisation would be as contrary to the institution of the courts as would be the award or the refusal of execution arbitrarily and at will. This authorisation, which would impinge on the right of sovereignty of the French Government, was so far from the legislature's intent that he took care to reserve the power to give the order of exequatur to the president and not to the court, because a tribunal can only decide after deliberation and may not grant, even by default, the claim made in front of it other than if it is found to be justified and well-founded (see 116 and 150 CPC). Finally, the CC and CPC make no distinction between different judgments rendered in foreign countries, and permit judges to declare them all executable, and therefore, as judgments given against Frenchmen are subject to review under the CC, as they have always been, it could not be decided that all others could be rendered executable in another way than by considering the cause of action, without adding to the law and without

Court therefore concluded that the Paris Court of Appeal was right to reject a plea of res judicata ('*exception de chose jugée*') which Holker argued could be founded on the American judgment and to require instead that the claimant state the facts on which the claim was based so that they could be disputed by the defendant and established by the court.

2. The end of French influence: The period 1811-1838

The French were ousted from Dutch territory by the end of 1813. Nevertheless, French law continued to apply, including the abovementioned provisions on foreign judgments, because the administering power of the 'United Netherlands' (*Verëenigde Nederlanden*)—soon to become the 'United Kingdom of the Netherlands' (*Verenigd Koninkrijk der Nederlanden*)—declared on 1 December 1813[260] that:

> All aforementioned Judicial Authorities are provisionally compelled, until further rules are made, *to continue to render justice in accordance with the laws currently in force and in the form thereby stipulated*, without prejudice to such changes as will be made by Us in the future.[261]

In the interim, the 1814 Constitution of the United Netherlands[262] mandated the enactment of a Civil Procedure Code with a view to altogether replacing French law.[263] However, this enterprise took a quarter of a century, only to be completed in 1838 with the introduction of the Dutch Code of Civil Procedure ('Rv'), which entered into force on 1 October that year.[264] Accordingly, the French approach of granting foreign judgment enforcement by *exequatur* following *révision au fond* continued to be practiced in the Netherlands. Only *French* judgments received a different treatment at the hands of Dutch courts.

3. The treatment of French judgments: Prelude of a Dutch approach to foreign judgments

By decision of 11 December 1813 it was decreed that: "No … judgments … of any subject-matter of the … French Supreme Court or other French Authorities against residents of the United Netherlands, given after 21 November 1813, will be recognised, or have any res judicata effect, or any force of law."[265] In other words,

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introducing an arbitrary distinction founded neither in reason nor in principle.") (translation by the author).

[260] Administration of Justice Decree 1813 (*Besluit, van den 1sten December 1813, no 25, houdende bepalingen betrekkelijk de Titulaturen van Hoven en Regtbanken in de Verëenigde Nederlanden, en van de openbare Aanklagers bij dezelven*) Stb 1813, 3.

[261] ibid Art 6 ("Alle de voornoemde Justitiële Autoriteiten te gelasten, om, bij provisie en tot daaromtrent nadere bepalingen zullen zijn gemaakt, voort te gaan, regt te spreken, overeenkomstig de thans in vigeur zijnde wetten, en met in achtneming der vormen daarbij voorgeschreven, onderminderd zoodanige modificatiën, als door Ons, bij vervolg van tijd, zullen worden vastgesteld.") (emphasis added).

[262] *Grondwet voor de Vereenigde Nederlanden 1814* <www.denederlandsegrondwet.nl/9353000/1/j9vvihlf299q0sr/vi4kkjf9a4zn> accessed 16 January 2013.

[263] ibid Art 100 ("Enacted will be a Civil Code, a Penal Code, a Commercial Code, a code on the organization of the judiciary and the administration of justice.") ("Er zal worden ingevoerd een algemeen Wetboek van burgerlijk regt, lijfstraffelijk regt, van den koophandel, en van de zamenstelling der regterlijke magt en de manier van procederen.").

[264] Civil Procedure Code (*Wetboek van Burgerlijke Rechtsvordering*) Stb 1828, 33.

[265] Enforcement of Justice Decree 1813 (*Besluit, van de 11den December 1813, no 1, houdende bepalingen ten aanzien van de Lijfstraffelijke Regts-oefening, in de Verëenigde Nederlanden*) Stb 1813,

judgments against Dutch residents given in name of the French authorites after 21 November 1813 were to be *ignored*. This decision was supplemented by decision of 20 February 1816:

> No judgments … given against Our subjects during the time that our countries were under to French power, can be executed against Our subjects, unless they were rendered regarding residents of the former United Netherlands, prior to or at the latest on 21 November 1813….[266]

French judgments rendered against Dutch subjects *until* 21 November 1813 could be executed in the Netherlands, albeit only after their enforcement by *exequatur* by a Dutch court in accordance with the procedure referred to in Art 2:

> In order to be able to have executed judgments … given prior to the aforementioned date and during the French administration, even if they were rendered in our Empire in the former French executable form, the interested party must submit it to the President of the court of their or the opponent's residence, so that the President declares the judgment executable.[267]

Révision au fond was no precondition for enforcement, as specified by Art 3:

> The Presidents will not be allowed to consider the merits of the cases underlying the judgments submitted to them; so that, if they conclude that the these acts were done … within the timeframe indicated in Article 1, they shall declare them valid without costs or hearing the other party, by signing upon it: *This … judgment … rendered in* [year] *on* [date] *is executable in name of the King.*[268]

The approach in Art 3 of enforcement by *exequatur* without *révision au fond* was later codified in Art 431 Rv.

10, Art 21 ("Geene Advijsen of Uitspraken, Arresten, Appointementen en Bevelschriften, van welken aard die ook mogen zijn, van den Franschen Staatsraad, het Hof van Cassatie of andere Fransche Autoriteited, tegen Ingezetenen van de Verëenigde Nederlanden, na den 21sten November 1813 geëmaneerd, zullen worden gerespecteerd, of eenig gezag van gewijsde hebben, of van eenige verbindende kracht zijn.").

[266] Execution of French Judgments Decree 1816 (*Besluit van 20 Februari 1816, over de bepalingen die in acht te nemen zijn bij het ter executie leggen van vonnissen of akten in Frankrijk uitgesproken of verleden voor dat de verschillende Nederlandsche provincien opgehouden hadden een deel van hetzelve uit te maken*) Stb 1816, 15, Art 1 ("Geene gewijsden… tegen Onze onderdanen gewezen, gedurende het tijdvak dat onze landen aan het Fransche bestuur onderworpen zijn geweest… zullen tegen Onze onderdanen kunnen worden ter executie gelegd, ten zij dezelve zijn uitgesproken … ten opzigte der inwoners der voormalige Vereenigde Neederlanden, vóór of uiterlijk op den 21sten November 1813 ….").

[267] ibid Art 2 ("Ten einde gewijsden… welke vóór dato van den bij het vorige artikel gestelden termijn en gedurende het fransche bestuur, zelfs binnen Ons Rijk onder het voormalige fransche executoire formulier zijn uitgesproken … voortaan ter executie te kunnen leggen, zal de zoodanige der partijen die daar in belang stelt, derzelve vooraf behooren aan te bieden aan den President van de regtbank van het arrondissement, waaronder hij of wel zijne wederpartij woonachtig is, ten einde zoodanig vonnis… door de gem. President worde executoir verklaard.").

[268] ibid Art 3 ("De Presidenten zullen zich in de merites der zaken, waartoe de voorsz. aan hen aangebodene vonnissen… betrekkelijk zijn, niet mogen inlaten, en alleen onderzoeken van welke dagtekening derzelve zijn voorzien; te dien effecte, dat, bijaldien zij bevinden dat dezelve stukken zijn gegeven … binnen het tijdperk bij art. 1 hierboven breeder omschreven, zij dezelve, zonder kosten en zonder verhoor van de partij, zullen geldig verklaren, door daarop aan te teekenen: Zij deze akte, decisie, gewijsde of vonnis gewezen of gepasseerd te …. op den …. executabel in naam des Konings.").

c. The Dutch codification of 1838 (Article 431 Rv): The abolition of révision au fond (enforcement exceptionally by exequatur)

Article 431 Rv forms part of Book Two of the Code of Civil Procedure entitled 'On the execution of judgments'. With effect on 1 October 1838, this single provision replaced all French law on foreign judgments. In its current form the provision reads:

> 1. Except for the ways anticipated by Articles 985-994, neither judgments of foreign courts, nor authentic instruments drawn up outside of the Netherlands, can be *executed* in the Netherlands. 2. The disputes can be considered and determined by a Dutch court anew.[269]

Since its entry into force, the provision has been repeatedly amended, but the essence has remained the same: foreign judgments cannot be executed in the Netherlands unless explicit provision is made for the grant of leave to execution ('*exequatur*'). The original version of the provision read as follows:

> Apart from the situations expressly stated by law, no judgments given by foreign judges or courts can be *executed* in the Kingdom. The disputes can be considered and determined by a Dutch court anew. In the abovementioned exceptions, the judgment of the foreign judge or court is not executed in this territory before, on application, leave to execution has been obtained in the form specified in the prior article from the District Court is whose jurisdiction the judgment is to be executed. In the application and granting of this leave, the case itself is not subjected to a new examination.[270]

The new Dutch Code of Civil Procedure was in large part a translation of its French predecessor. However, Art 431 Rv marked a significant departure from the French approach to foreign judgments. Two changes in particular are notable. First,

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[269] ("1. Behoudens het bepaalde in de artikelen 985-994, kunnen noch beslissingen, door vreemde rechters gegeven, noch buiten Nederland verleden authentieke akten binnen Nederland ten uitvoer worden gelegd. 2. De gedingen kunnen opnieuw bij de Nederlandse rechter worden behandeld en afgedaan."). On the backgound of this provision see Verheul (n 213) 12ff with further references. Article 767 Rv adds that: "Lacking another way to obtain an enforceable instrument in the Netherlands, the main claim, including the claim for the costs of protective measures, can be filed at the District Court that granted leave for protective measures, or avoided or repealed such measures after the provision of a security. In case the protective measure implicates a third party, this provision only applies if the good seized was expressly described in the application." ("Bij gebreke van een andere weg om een executoriale titel in Nederland te verkrijgen kan de eis in de hoofdzaak, de vordering ter zake van de beslagkosten daaronder begrepen, worden ingesteld voor de rechtbank waarvan de voorzieningenrechter het verlof tot het gelegde of het tegen zekerheidstelling voorkomen of opgeheven beslag heeft verleend. In geval van verlof tot beslag onder een derde geldt dit alleen indien het goed waarop beslag zal worden gelegd in het verzoekschrift uitdrukkelijk is omschreven.").

[270] Stb. 1838, 12 ("Behalve in de gevallen uitdrukkelijk bij de wet vermeld, kunnen geene vonnissen door vreemde regters of regtbanken gewezen, binnen het Koningrijk worden ten uitvoer gelegd. De gedingen kunnen op nieuw bij den Nederlandschen regter worden behandeld on afgedaan. In de hierboven gemelde uitgezonderde gevallen wordt het vonnis van vreemde regters of regtbanken niet in dit Rijk ten uitvoer gelegd, dan na verkregen verlof van executie, in den vorm bij het voorgaand artikel gemeld, van de regtbank van het arron-dissement, in hetwelk zoodanig vonnis moet worden ten uitvoer gelegd. Bij het verzoeken en verleenen van dit verlof wordt de zaak zelve niet aan een nieuw onderzoek onderworpen."). The provision was subsequently amended in 1964 to clarify the Dutch exequatur procedure. See the Formalities for the Enforcement of Foreign Judgments Amendment Act 1964 (*Wet van 7 oktober 1964, houdende de regeling van de formaliteiten, vereist voor de tenuitvoerlegging van in vreemde Staten totstandgekomen executoriale titels in burgerlijke zaken*) (entered into force on 11 November 1964) Stb 1964, 381.

enforcement by *exequatur* was no longer generally available, but became an exceptional mode of enforcement. Under Art 431 Rv, enforcement by *exequatur* was available by way of "exception" in "situations expressly stated by law". Under French law, subject to *révision au fond*, enforcement by *exequatur* was generally available.

Just how exceptional enforcement by *exequatur* became is illustrated by the fact that until 1868, Art 724e of the Commerce Act on matters of general average in the context of international shipping was the only provision that (arguably) required the execution of foreign judgments.[271] In 1868, Art 40 of the Treaty on the Rhine was the first provision that (undisputably) mandated the execution of foreign judgments in the Netherlands, so that, on that basis, *exequatur* could be granted by Dutch courts.[272] For any other foreign judgment, enforcement by *exequatur* was unavailable, and Art 431(2) Rv provided that a Dutch court could be seized notwithstanding that the claim had already been granted abroad: "The disputes can be considered and determined by a Dutch court anew."[273]

Second, *révision au fond* was abolished for foreign judgments which could be enforced by *exequatur*, so that the original claim was not examined anew. The provision, in other words, ruled out any review of the factual or legal accuracy of a foreign judgment prior to its enforcement.[274] Accordingly, the provision stipulated that in situations where enforcement occurred by the granting of leave to execute the foreign judgment, "the case itself is not subjected to a new examination."[275]

1. Parliamentary history

Article 431 Rv in its original version,[276] explicated that the law can provide for exceptions to the prohibition of the execution of foreign judgments in the Netherlands. In those circumstances, a foreign judgment can be executed only after obtaining, on application, *leave to execution* ('*exequatur*') from the District Court in whose jurisdiction the judgment is to be executed. Conversely, in the form initially proposed in 1827, the rule recognised no exceptions:

> No judgments given by foreign courts will be executed in the Kingdom; for that reason, disputes determined by a foreign court can be dealt with and determined anew by a Dutch court.[277]

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[271] Commerce Act (*Wetboek van Koophandel*), Stb 1826, 18 (as amended). The Government even disputed that this provision even stipulated the execution of foreign general average judgments. See *Regeling van de formaliteiten, vereist voor de tenuitvoerlegging van in vreemde Staten totstandgekomen executoriale titels in burgerlijke zaken*, *Kamerstukken* I (1962-1963) 7179, No 3 (MvT) [3].

[272] *Convention Révisée pour la Navigation du Rhin* (signed on 17 October 1868, entered into force on 1 July 1869) Stb 1869, 37, Art 40(1). See Verheul (n 213) 103ff.

[273] See text to n 270.

[274] ibid. The fourth and final paragraph of Art 431 Rv made it chrystal clear that there was no place for such a review of the factual and legal accuracy of foreign judgments in the context of the new Dutch *exequatur* procedure by specifying that "the case itself is not subjected to a new examination."

[275] ibid.

[276] ibid.

[277] Draft Civil Procedure Code (*Wetboek van Burgerlijke Regtspleging, Ontwerp van Wet, 17 oktober 1827*) Kamerstukken I (1827-1828) No III, Art 2 ("Geene vonnissen, door buitenlandsche regtbanken gewezen, zullen in het Koningrijk ten uitvoer worden gelegd; dien tengevolge kunnen gedingen, door eenen buitenlandschen regter beslist, op nieuw bij den Nederlandschen regter worden behandeld en afgedaan. Les jugements, rendus par les tribunaux des pays étrangers, ne seront pas exécutoires dans le Royaume; ainsi les questions, décidées par les tribunaux des pays étrangers, pourront être débattues de nouveau devant les tribunaux du Royaume."). cf, on the rationale for the provision, the Government's

This approach was contrary to that practiced in France pursuant to Art 546 CPC and Art 2123 CC.[278] Meijers,[279] alike Jitta,[280] observed that the proposal was inspired by an *earlier* French Statute—the so-called 'Code Michaud',[281] a Royal *Ordinance* of 15 January 1629, whose Art 121 read:

> Judgments rendered, contracts or obligations recognized, in foreign kingdoms and sovereignties, for any cause whatever shall give rise to no lien or execution in our Kingdom. Thus, the contracts shall stand for simple promises, and, notwithstanding such judgments, our subjects against whom they have been rendered may contest their rights anew before our own judges.[282]

Van Praag concluded that the provision was inspired by "mistrust of many foreign judgments, more than theoretical considerations of sovereignty".[283] At any rate, the proposal met with strong disapproval; for instance, Lipman complained in 1828 that the rule, "however consistent with the principle of the independence of States, is less suitable for a friendly and civilised organisation of our century, than for a period of common savagery and unending war."[284] He asked whether it was fair that a foreign judgment was useless for its creditor in the Netherlands, so that the creditor would be required to pursue the claim again; to accept the delay of a new judicial examination; to pay a *cautio judicatum solvi*; and to have to prove the cause of action all over again?

Concerns also arose in Parliament; one MP stated "that there can be cases where it is unjust to ignore foreign judgments."[285] Another warning was that:

> Although the judgments pronounced in a foreign country, may not be executable in the Kingdom, it seems nonetheless that there may be instances in which such judgments could be pleaded as conferring rights as a basis for a claim, alike agreements in a foreign country. For example, if after a voluntary litis-contestation, a judgment imposed obligations on both parties, and that the inhabitants of this Kingdom would execute the judgment against his opponent in a foreign country, the

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reasoning regarding its Amendments to the Second Book of the Draft Code of Civil Procedure (*Wijzigingen in het Tweede Boek van het Wetboek van Burgerlijke Regtsvordering, Ontwerp van Wet, 17 February 1837*) Kamerstukken I (1836-1837) No XIII, Art 4. See text to n 292ff.

[278] See tekst to n 249ff.

[279] Meijers, 'Het Bontmantelarrest' (Part II) (n 213) 111-12.

[280] Josephus Jitta (n 213) 2-3.

[281] *Ordonnance du 15 janvier 1629 sur les plaintes des Etats assemblés en 1614 et de l'assemblée des notables réunis à Rouen et à Paris en 1617 et 1626.*

[282] (« Les jugements rendus, contrats et obligations reçus ès royaumes et Souverainetés étrangères, pour quelque chose que se soit, n'auront aucune hypothèque ni exécution en notre royaume; ains tiendront les contrats lieu de simples promesses; et non-obstant les jugements, nos sujets, contre lesquels ils ont été rendus, pourront de nouveau débattre leurs droits comme entiers par-devant nos officiers. »).

[283] Van Praag (n 213) 345.

[284] SP Lipman, *Aanmerkingen op het ontwerp van Wetboek van burgerlijke regtspleging* (JW van Leeuwen, Leiden 1827) 46.

[285] Government responses (*Wetboek van burgerlijke regtspleging, Antwoorden der Regering op de Aanmerkingen der Afdelingen, 28 januari 1828*) Kamerstukken I (1827-1828) No III, 4 B, Art 2 ("Eén lid der lilde Afdeeling heeft, ten aanzien van het tweede lid van dit ARTIKEL, de bedenking gemaakt, dat er gevallen kunnen bestaan, waarin het onbillijk zoude zijn om geen acht te slaan op de buitenlandsche vonnissen.").

> other party could not also request the execution of that judgment here? The well-known interest of trade seems to make necessary legislation in this regard.[286]

The Government replied as follows: "As a rule it must be clear that a foreign judgment, in itself, cannot be executed within this territory, because no one can be deprived of their everyday daily court",[287] signifying that (at least) one of the Government's objectives in enacting Art 431 Rv was to protect residents in the Netherlands against unvoluntary civil proceedings abroad.[288]

This response echoed the 1814 Constitution of the United Netherlands,[289] which appeared to call for such protection; Article 101(c) of the Constitution stated that: "No one can against his will be deprived of the court provided by law."[290] At the same time, the Government cautioned that "this does not imply that if that document records acts or promises on the side of Dutchmen, these can and will be taken into account by a court here alike any obligation contracted abroad, without the judgment being enforceable here of its own accord."[291]

In 1837 the Government proposed final changes to the draft provision, recognising the possibility of exceptions to the principle that no foreign judgment could be executed in the Netherlands. Government acknowledged that "[w]hile maintaining the unshakable principle, it has been deemed necessary to express it in such a manner that there is no conflict with one or the other specific legal provisions."[292] In support of this change, the Government cited the example of

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[286] *Wetboek van burgerlijke regtspleging, Processen-Verbaal van de Beraadslagingen der Afdeelingen, Nota* (1827-1828) III, 4 A (« Quoique les jugements, prononcés en pays étranger, ne puissent être exécutoires dans ce Royaume, il parait néanmoins qu'il peut y exister des cas, dans lesquels ces jugements pourraient être allégués comme des titres pour fonder une demande, aussi bien que les conventions passées en pays étranger. Par exemple, si, après une litis-contestation volontaire, un jugement aurait adjugé aux parties des prestations réciproques, et que l'habitant de ce Royaume aurait mis en exécution ce jugement contre sa partie en pays étranger, celle-ci ne pourra-t-elle pas demander également l'exécution de ce même jugement? L'intérêt bien-entendu du commerce paraît rendre indispensables des dispositions législatives à cet égard. »).

[287] Government responses (*Wetboek van burgerlijke regtspleging, Antwoorden der Regering op de Aanmerkingen der Afdelingen, 28 januari 1828*) Kamerstukken I (1827-1828) No III, 4 B, Art 2 ("Naar den regel behoort het vast te staan, dat een buitenlandsch vonnis, als zoodanig, hier te lande niet ten uitvoer kan worden gelegd, omdat niemand van zijnen dagelijkschen regter kan worden afgetrokken."). On this statement see NF van Nooten, 'De voorschriften betrekkelijk de tenuitvoerlegging van vonnissen en authentieke akten in een vreemd land gewezen of verleden, vastgesteld bij het Wetboek van Burgerlijke Regtsvordering en bij den Code de Procedure Civile, vergeleken met die van het Ontwerp van een Wetboek van Burgerlijke Regtsvordering, hoofdzakelijk de voorgestelde regeling bij tractaat' in BJL de Geer and RTHPLA van Boneval Faure, *Nieuwe bijdragen voor regtsgeleerdheid en wetgeving* (Müller, Amsterdam 1868) 27, 28.

[288] cf FG Scheltema, 'Rechtsmacht van den Nederlandschen rechter (IV, Slot)' (1930) 3137 WPNR 61.

[289] *Grondwet voor de Vereenigde Nederlanden 1814*.

[290] ("Niemand kan tegen zijnen wil worden afgetrokken van den regter, dien de wet hem toekent.").

[291] Government responses (*Wetboek van burgerlijke regtspleging, Antwoorden der Regering op de Aanmerkingen der Afdelingen, 28 januari 1828*) Kamerstukken I (1827-1828) No III, 4 B, Art 2 ("Dit neemt echter niet weg dat, wanneer uit dat stuk blijkt, van daden of toestemmingen van de zijde der Nederlanders, daarop, evenzeer als op eene buitenland's aangegane verbindtenis, bij den regter alhier acht kan en zal worden geslagen, zonder dat daarom het vonnis als zoodanig uitvoerlijk zij.").

[292] Amendments to the Second Book of the Draft Code of Civil Procedure (*Wijzigingen in het Tweede Boek van het Wetboek van Burgerlijke Regtsvordering, Ontwerp van Wet, 17 February 1837*) Kamerstukken I (1836-1837) No XIII, Art 4 ("Het stellig beginsel, in art. 377 uitgedrukt, behoudende, heeft men echter gemeend hetzelve zoodanig te moeten uitdrukken, dat er geene strijdigheid moge bestaan met deze of gene bijzondere wetsbepalingen….").

foreign judgments on general average which under the Commerce Act[293] could already be executed in the Netherlands:

> The Parliament's deliberations signified that the *jurisdiction* of those foreign courts was recognised and desired by the chambers of commerce; in those circumstances the judgments of such foreign courts should be executed; it cannot have been the wish of the chambers of commerce to submit such decisions to new proceedings in this country, because in those circumstances it would be of little use to first obtain a judgment from the foreign court. But apart from the express provisions made by law, the principle retains its validity and is even reinforced. In the exceptions made an *exequatur* is required, which does not allow a relitigation of the case, but only a *quod ad formam* examination of the judgment.[294]

This is a significant observation: the Government indicated that acceptance of the *jurisdiction* of a foreign court is decisive for the question whether a foreign judgment can be executed in the Netherlands following enforcement by *exequatur*; if the Netherlands recognises the jurisdiction of the judgment-rendering court, its judgment should be executed and new proceedings in Dutch courts involving a relitigation of the case should be prevented. Nevertheless, the starting point of Dutch law under what was to become Art 431 Rv remained the same: in principle, the execution of foreign judgments in the Netherlands is prohibited.

2. Subsequent amendment

The last significant revision of the text of Art 431 Rv occurred in 1964, with the introduction of a more comprehensive regulation, in Arts 985 through 994 Rv, of the *exequatur* procedure for cases where a foreign judgment is exempted from the prohibition of its execution in Dutch territory.[295] Article 985 Rv provides: "If a judgment of a foreign court is executable in the Netherlands, it shall not be executed other than after leave to this end is obtained by grant of a court."[296]

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[293] (*Wetboek van Koophandel*), Stb 1826, 18, Art 724e.

[294] ibid ("…zoo heeft men bij voorbeeld, bij de herziening van het Wetboek van Koophandel, in den titel, die van avarijen handelt, bepaald (art. 20 der wet van den 26sten December 1835, Staatsblad n°. 49), dat de benoeming van deskundigen tot het opmaken van de rekening der avarij-grossen en de homologatie van het opmaken dier avarij in eene vreemde haven zal kunnen geschieden door de aldaar bevoegde magt. Uit de gewisselde consideratiën met de Afdeelingen der Tweede Kamer en uit de beraad-slagingen, daarover gehouden, is het gebleken, dat men de vreemde regtbanken daartoe heeft bevoegd geoordeeld en dat zulks zelfs door kamers van koophandel was verlangd; in die gevallen moeten ook dan die uitspraken van vreemde regters kunnen worden ten uitvoer gelegd; het verlangen der kamers van koophandel kan zeker niet geweest zijn zoodanige uitspraken aan een nieuw geding hier te lande te onderwerpen, want dan zoude het ter afdoening der zaak weinig baten, dat men eerst eene uitspraak van den vreemden regter had ingeroepen. Maar buiten de uitdrukkelijk aldus bij de wet uitgezonderde gevallen, blijft de regel geldig en verkrijgt zelfs nieuwe kracht. In de uitgezonderde gevallen wordt echter een exequatur vereischt, om hetwelk te verkrijgen de zaak zelve niet weder kan worden in geschil gebragt, maar alleen het vonnis quod ad formam onderzocht."). Article 724 of the Trade ande Commerce Act stated that: "Abroad the determination of the general average is made by the competent jurisdiction." ("Buiten 's lands wordt de avarij-gros door de aldaar daartoe bevoegde magt opgemaakt.").

[295] Formalities for the Enforcement of Foreign Judgments Amendment Act 1964 (*Wet van 7 oktober 1964, houdende de regeling van de formaliteiten, vereist voor de tenuitvoerlegging van in vreemde Staten totstandgekomen executoriale titels in burgerlijke zaken*) (entered into force on 11 November 1964) Stb 1964, 381.

[296] Article 985 Rv ("Wanneer een beslissing, gegeven door de rechter van een vreemde Staat, in Nederland uitvoerbaar is krachtens een verdrag of krachtens de wet, wordt zij niet ten uitvoer gelegd dan

The Government explained that the only exemptions at the time were those introduced by various international agreements concluded by the Netherlands.[297] Since 1964, the number of relevant conventions has increased.[298] In addition, there is now a growing number of European regulations which imply an exemption to the bar on execution.[299] The rules of these various international and European instruments tend to vary considerably. For that reason, Art 990 Rv clarifies that Art 985 Rv and following provide a general framework that is superseded by any conflicting rule in the particular international or European instruments, in accordance with the principle *lex specialis derogat lex generalis.*

2. Early comment on Article 431 Rv

Since the moment of taking effect, Art 431 Rv has triggered considerable speculation and disagreement in doctrine. Lipman in an early commentary argued that the provision bars only foreign judgments' *execution* in the Netherlands in the sense that "the judgment of the Portuguese court cannot be executed here in name of *Donna Maria*."[300] However, Fresemann Viëtor disputed this narrow interpretation;[301] in his view, the provision excluded not only the execution in the name of a foreign Sovereign, but also enforcement by *exequatur*. He concluded that "it is not enough that our court attaches enforceable status; the case itself needs to be considered again and a Dutch judgment must take its place."[302] On this view, a foreign judgment "has no validity as judgment in our country."[303] De Pinto in his review of Fresemann Viëtor's book strongly disagreed with this reasoning and argued—like Lipman—that: "Article 431 states no more than that judgments given by a foreign court, *cannot be executed against goods or persons located in the Netherlands in the name of the foreign sovereign of which the court derives its jurisdiction.*"[304] He added:

> It follows immediately from this rule that he, against whom the foreign judgment which has not yet been complied with, cannot be used as executable title, from his side cannot rely on it as res judicata. In other words, where the *actio judicati* is

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na daartoe verkregen rechterlijk verlof. De zaak zelf wordt niet aan een nieuw onderzoek onderworpen.").

[297] *Regeling van de formaliteiten, vereist voor de tenuitvoerlegging van in vreemde Staten totstandgekomen executoriale titels in burgerlijke zaken*, Kamerstukken I (1962-1963) 7179, No 3 (MvT) [3].

[298] See text to n 411ff.

[299] ibid.

[300] Discussed in EM Meijers, 'Het Bontmantelarrest II' (Part II) (n 213) 109-10 (reference is to (1842) Regtsgeleerd Bijblad IV 314-15). Meijers further points out, at 110, that Lipman had previously, in contradiction of this position, criticised a proposed provision for excluding the recognition and enforcement of foreign judgments. See Lipman (n 284) 46ff.

[301] Fresemann Viëtor (n 213) 171-72.

[302] ibid.

[303] ibid 179.

[304] AA de Pinto, 'J Freseman Viëtor, *De kracht van buitenlandsche vonnissen*; J Voûte, *Bijdrage tot het vraagstuk der buitenlandsche vonnissen*' (1866) 27 Themis 151, 163 ("…dat art. 431 niets anders bepaalt dan dat vonnissen, gewezen door een vreemden regter, *niet* in naam van den vreemden souverein, aan wien die regter zijne regtsmacht ontleent, *kunnen worden ten uitvoer gelegd op de goederen of de personen die zich in Nederland bevinden.*").

> excluded, the *exceptio judicati* is not permitted. Article 431(2) Rv is nothing else than a pure expression of this undisputable principle.[305]

With an emphasis of (the lack of) *trust* in foreign judiciaries, he then argued:

> Unless an international agreement provides otherwise, it seems to me that a foreign judgment should have no existence as judgment for a Dutch court. Evidential value may be accorded…. Further, in my view, one should not go further where one is concerned with judgments given by a court of a country with which there is no agreement on reciprocal execution, perhaps out of lack of trust in the laws and court system.[306]

Similarly, the Government, citing distrust and a possible lack of reciprocity, in its explanatory memorandum to the 1925 Convention negotiated and concluded with Belgium on recognition and enforcement of foreign judgments,[307] observed:

> Some countries address the situation by concluding agreements with other countries, on which basis the force of law is attributed mutually to judgments and authentic instruments. … Other counties sought a solution by attributing foreign judgments and instruments effect by law, with or without a requirement of reciprocity. This system was adopted in Italy (with reciprocity) and Germany (without reciprocity). The Netherlands did not wish to go down this road. Namely, apart from the consideration that from the attribution of effect to foreign judgments by Dutch law no obligation ensued for other States to extend the force of Dutch judgments and also that, if the

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[305] ibid 165. cf JWM Schröder, 'Executie van vreemde vonnissen' (1932) 3 Nederlands Juristenblad 285, 289 ("Any need for an example? Look at the English practice, which provides it. Also in England an exequatur procedure is unknown. Still, English law has developed a system for the enforcement of foreign judgments that can claim to be the most liberal in the world. In essence, it implies the following: the obligation that the foreign judgment imposes upon the parties is recognised in the form of *res judicata* effect. By claiming performance of that obligation through an 'action on the foreign judgment', through an indirect procedure, an efficient procedure for enforcement of the foreign judgment is provided. In this way, in England a practice has developed, which by addressing *res judicata* effect has also mastered the problem of enforcement of foreign judgments. This is the ideal on which currently inspires Dutch case law. It has taken long before the Dutch courts became aware of this horizon which has thus appeared.") ("Wil men een voorbeeld? Het is de Engelse rechtspraktijk, die het ons verschaft. Men weet, dat ook in Engeland een exequaturprocedure onbekend is. Toch heeft het Engelsche recht zich een stelsel van executie van het vreemde vonnis geassumeerd, dat als het meest liberale ter wereld kan gelden. Het komt in groote lijnen hierop neer, dat de gebondenheid, die het vreemde vonnis aan partijen oplegt, in den vorm van een gezag van gewijsde wordt erkend. Door met 'an action on a foreign judgment', in het kader der indirecte procedure, nakoming van die verbintenis te vragen, heeft men zich tevens het middel voor een gemakkelijke executie van het vreemde vonnis zelve verschaft. Zoo heeft zich in Engeland een rechtspraak kunnen vormen, die met een regeling van het gezag van gewijsde zich tevens over het vraagstuk van de executie van het vreemde vonnis het meesterschap heeft verworven. Dit is het ideaal, waarop de Nederlandsche rechtspraak thans inspireert. Het heeft lang geduurd eer de Nederlandsche rechter zich den horizon bewust werd, die hiermede lag geopend.").

[306] De Pinto (n 304) 157 ("Als geen tractaat het tegendeel meebrengt, komt het mij voor, dat het vreemde vonnis als vonnis voor den Nederlandschen regter niet moet bestaan. Bewijskracht zal hij eraan mogen toekennen…. Verder moet men, meen ik, niet gaan, waar men te doen heeft met vonnissen, gewezen door den regter van een land, waarmede men, misschien uit gebrek aan genoegzaam vertrouwen in de daar geldende wetgeving en regtspraak, geen tractaat van wederkerige uitvoerbaarheid heeft gesloten.").

[307] Convention between Netherlands and Belgium on jurisdiction, bankruptcy, and the validity and enforcement of judgments, arbitration awards and authentic instruments (*Verdrag tussen het Koninkrijk der Nederlanden en het Koninkrijk België betreffende de territoriale rechterlijke bevoegdheid, betreffende het faillissement en betreffende het gezag en de tenuitvoerlegging van rechterlijke beslissingen, van scheidsrechterlijke uitspraken en van authentieke akten*) (adopted 28 March 1925, entered into force 1 September 1929) Stb 1929, 250.

> law would only accord effect in case of the existence of reciprocity, it would be at the discretion of other States to give or not to give this effect reciprocally, the Netherlands did not want to allow that in this way foreign judgments would have to be executed of foreign States for which there was no certainty that their laws, judiciary or administration offered sufficient guarantees for the adequacy of the judgments given in their territory.[308]

As late as 1925 then the Dutch government portayed Art 431 Rv as excluding the recognition (and enforcement by action on the judgment) of foreign judgments in the Netherlands in the absence of a convention to that effect.

3. Early practice

In 1866, the Dutch Supreme Court in *Musch/Gilman*[309] construed Art 431(1) Rv narrowly, and thus rejected Viëtor's interpretation of the provision in favour of Lipman's view that the provision bars the execution of foreign judgments in the Netherlands, not their recognition and enforcement.

In the proceedings leading up to cassation, the District Court of Maastricht and, on appeal, the Limburg Court of Appeal had enforced two Belgian judgments—the courts had declared the foreign judgments enforceable in the Netherlands—notwithstanding that the judgments were were excepted under Art 431(1) Rv. The appeal in cassation alleged that Art 431 Rv prohibites a Dutch court from declaring a foreign judgment enforceable in the Netherlands, and requires the rendition of an independent Dutch judgment on the claim.[310]

According to the Supreme Court, Art 431(1) Rv prohibits the execution of a foreign judgment, regardless whether the foreign judgment concerns a Dutch person or only foreigners, and requires a review and reconsideration and decision by the Dutch court. However, subject to those conditions, the Supreme Court ruled, "the provision does not require that the judgment of the Dutch court contains a completely

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[308] Act on Ratification of the Convention between Netherlands and Belgium on jurisdiction, bankruptcy, and the validity and enforcement of judgments, arbitration awards and authentic instruments (Explanatory Memorandum) (*Goedkeuring van het op 28 Maart 1925 te Brussel tusschen Nederland en België gesloten verdrag, enz.*) (1925-1926) 177 No 3, 9 (MvT) ("Sommige landen trachtten het te verhelpen door met andere staten verdragen te sluiten, waarbij wederzijds aan vonnissen en authentieke akten, gewezen of verleden in de beide verdragsluitende landen, rechtskracht werd verleend. Voorbeelden daarvan werden hierboven reeds genoemd. Andere landen zochten eene oplossing van de moeilijkheid door toekenning van rechtsgevolg aan vreemde vonnissen en authentieke akten bij de wet, met of zonder de voorwaarde van reciprociteit. Bit laatste stelsel werd bijv. gekozen door Italië (zonder reciprociteit) en door Duitschland (met reci prociteit); Nederland echter wenschte dien weg niet in te slaan. Immers, afgescheiden van de overweging, dat uit de toekenning van rechtsgevolg aan vreemde vonnissen en vreemde authentieke akten bij de Nederlandsche wet, geen verplichting voor de andere staten voortsproot om omgekeerd aan Nederlandsche uitspraken en authentieke akten reehts-kracht te verleenen en dat ook, indien de wet dat rechtsgevolg slechts in geval van het bestaan van reciprociteit toekende, het aan de andere staten vrij zou staan door al of niet verleening van reciprociteit dat rechtsgevolg al of niet te doen intreden, wilde men hier te lande niet op deze wijze mogelijk maken, dat in Nederland óók zouden moeten worden tenuitvoerge-legd vonnissen en authentieke akten van vreemde staten, waarvan niet de zekerheid bestond dat hunne wetgeving, rechtspraak of administratie voldoende waarborgen boden voor de deugdelijkheid der op hun gebied gewezen of ver-leden vonnissen en authentieke akten.").

[309] HR 5 January 1866, W 2765.

[310] ibid ("…dat mitsdien alleen overblijft de beslissing der vraag, of art. 431 B. r in den regel vordert niet slechts een nieuw onderzoek, maar ook eene geheel nieuwe op zich zelf staande uitspraak, en alzo verbiedt (zoo als *in casu* heeft plaats gehad) uitvoerbaar verklaren binnen Nederland van vreemde, door den Nederlandschen regter na een nieuw onderzoek juist bevonden vonnissen….").

selfstanding order and thus *does not prevent a Dutch court from declaring enforceable in the Netherlands a foreign judgment* which the court approves and accepts following its own examination."[311] Taking a practical view, the Court emphasised that both methods—(a) the rendition of a Dutch judgment on the basis of the foreign judgment and (b) a declaration rendering the foreign judgment enforceable in the Netherlands—"lead to the same result and, though not mentioned explicitly, both are allowed in view of the provision's aim and spirit."[312]

This ruling was largely ignored in practice, arguably due to a highly critical note of De Pinto, who later became vice-president of the Supreme Court.[313] He rejected the judgment for failing to state any reason other than that Dutch law does not prohibit the granting of *exequatur* in respect of judgments recognised at common law, and that allowing exequatur was consistent with the aim and spirit of Art 431 Rv, but without actually stating (the source of) this aim and spirit.[314] However, his principal argument for rejecting the availability of *exequatur* for judgments recognised at common law was based on the historical antecedents of the provision;[315] he asked:

> Now, in France there was and still is disagreement regarding the question about the required extent of revision that must precede *exequatur*. Conversely, on the availability of exequatur, however, no disagreement is possible. Article 2123 [Code Civil] recognises it in so many words. Why did the Dutch legislator, if it wanted the same approach, specify something completely different? Why did it state the option of exequatur only as exception in the third paragraph of the provision, after stipulating to begin with in the second paragraph that: the case in which the foreign judgment is rendered, can be considered here anew—the *exceptio* vanished together with the *actio iudicati*.[316]

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[311] ibid ("…bij dat artikel niet wordt gevorderd, dat het vonnis van den Nederlandschen regter moet bevatten eene buiten eenig verband tot het vreemde vonnis staande veroordeeling, en alzoo niet verbiedt het in Nederland uitvoerbaar verklaren der door den Nederlandschen regter na eigen onderzoek juist bevonden en overgenomen vreemde uitspraak….") (emphasis added).

[312] ibid ("…dat alzo beide, tot hetzelfde einde leidende en in het wezen der zaak niet verschillende vormen wel niet uitdrukkelijk, maar niettemin naar den geest en de bedoeling van het artikel, zijn veroorloofd.").

[313] De Pinto (n 304) 166. cf Asser (n 213) 199.

[314] ibid.

[315] See text to n 249ff.

[316] De Pinto (n 304) 166. It should be noted that the version of 431 Rv to which the author referred was that which entered into force on 1 October 1838 as part of the Dutch Code of Civil Procedure. It read: "Apart from the situations expressly stated by law, no judgments given by foreign judges or courts can be executed within the Kingdom. The disputes can be considered and determined by a Dutch court anew. In the abovementioned exceptions, the judgment of the foreign judge or court is not executed in this territory before on application leave to execute has been obtained in the form specified in the prior article from the District Court is whose jurisdiction the judgment is to be executed. In the application and granting of this leave, the case itself is not subjected to a new examination." See text to n 270ff.

The author continued as follows: "With what right can I the judgment debtor be forced to accept an action for *exequatur* of a French, English, Chinese judgment, where the law says: you have no concern with the case taking place in France, England, China, and the court cannot take the easy way out by reason in this or like manner: 'considering that the Chinese judgment wás rendered, it is declared executable in the Netherlands'? Is this only a matter of form? The Supreme Court says so. Be that as it may, that form is then, considering the prohibition under Article 431 Rv, of such a nature as may be called d'*ordre public*; in any event this essential formal requirement applies, a form that for a defendant is highly significant, aside from many other reasons, mainly because the issue of *exequatur* is closely related to the variable grounds for jurisdiction of the Dutch court."

The prevailing view today is that enforcement by *exequatur* is unavailable for judgments recognised at common law, for which execution is not mandated by statute, European regulation or international agreement; nevertheless, for judgments recognised at common law, a mode of enforcement by action on the foreign judgment (*actio judicata*) has developed via Art 431(2) Rv, which strongly resembles the English common law mode of enforcement by 'action on the foreign judgment'.[317]

4. Modern commentary

Historically, Art 431 Rv has been represented abroad as a bar to the recognition and enforcement of foreign judgments.[318] Offerhaus in his 1921 Yale Law Journal review of Dutch private international law reported "[a]n interesting evolution … characterized by an increasing trust in the justice of judgments rendered abroad".[319] At the same time, the author expressed the wish that "this progress would go so far as to lead to the enforcement of foreign judgments and their recognition as res

[317] See text to n 428ff.

[318] More recently, in doctrine available in Dutch only, this view has changed in that it is widely accepted that in the context of Art 431(2) Rv proceedings, whether or not it is described as allowing 'enforcement by action on the foreign judgment', (at least some) foreign judgments that grant a claim can be recognised and be attributed a form of preclusive effect. For instance, *Groene Serie: burgerlijke rechtsvordering* (n 213) provides that "[i]f a foreign enforceable title cannot by law or treaty be executed in the Netherlands, Article 431(2) Rv implies that the case must be reconsidered and redetermined in a Dutch court. The defendant will have to tolerate this new case and is unable to invoke *ne bis in idem*. The Dutch court must in every case determine if and to what extent a foreign judgment must be given *res judicata* effect [reference to *The Furcoat* case]. The main rule then is that pursuant to Article 431(2) Rv the claim must be reconsidered and redetermined on the merits. In some cases the reconsideration and redetermination on the merits is unnecessary and a superficial scrutiny of the foreign judgment will suffice. This applies in cases involving (1) a judgment of a foreign court that determines claims in proceedings that provide equivalent procedural guarantees as in this jurisdiction (e.g. the right to be heard and proper summoning of the parties) and (2) parties who freely submitted to the jurisdiction of the foreign court, either expressly by an exclusive choice of court, or implicitly by their procedural conduct. … In case the foreign court had jurisdiction on the basis of an exclusive choice of court agreement, the reconsideration of the case under Article 431(2) Rv implies the following. In the new case in the Netherlands, it suffices for the judgment creditor to plead the choice of court agreement and the judgment obtained, and the claim only needs to be for a judgment for what the judgment debtor was order to do by the foreign court. In the case under Article 431(2) Rv, the starting point must be that the parties are compelled to comply with the foreign judgment. … An implicit choice of court can be sooner assumed for a claimant than for a defendant."

Similarly, but more generously, Verheul (n 213) 24-25 observes that "[a]t common law, the current situation is difficult to describe in clear terms. It is evident that also in the absence of a treaty, a foreign judgment will be recognised if the usual conditions are met. Also, it can be said that these conditions relate to jurisdiction, public policy, fair trial, and the judgment's *res judicata status*", and then adds that "[a] foreign judgment for the claimant granting a claim, which is not covered by treaty, cannot be executed in the Netherlands. Consequently, the claimant must start a new case in a Dutch court. The '*ne bis in idem*' does not bar this case, as made clear by Article 431(2) Rv. However, in this second case, the claimant can in support of his claim invoke the *res judicata* effect of the foreign judgment, if it satisfies the conditions for recognition. In those circumstances, the claim must be granted *without reconsideration of the merits*. New evidence submitted by the defendant is not admissible. The judgment of the Dutch court, though in form a new judgment on the claim, is in fact a formality, comparable to the grant of leave to execution by *exequatur*. … … The claimant can if desired also completely ignore the foreign judgment that granted the claim and file a completely new claim in the Netherlands. The claimant can even claim more than was awarded abroad. It is then up to the defendant to invoke the foreign judgment to fend off the higher claim. If the defendant succeeds, the Dutch court should partly dismiss the new claim, to the extent it goes beyond what was granted under the foreign judgment."

[319] Offerhaus (n 213) 279.

judicatae."[320] Enforcement, he complained, is granted only in "*exceptional* cases" (i.e. those cases provided for by statute or international instrument),[321] while adding that "[o]ur courts also appear to apply Art 431… when the foreign judgment is invoked as res judicata…. The foreign judgment gives no guarantee, therefore, that a new suit may not be brought before a Dutch court."[322]

By 1921, the Dutch Supreme Court had not yet decided *Kühne/Platt* ('*The Fur Coat Case*') ('*Bontmantelarrest*'),[323] which significantly clarified Art 431 Rv. Offerhaus later reported on this development.[324] Besides, in his 1921 article, Offerhaus made an attempt at limiting the negative implications of Art 431 Rv by emphasising the narrow scope of the provision to include only judgments *requiring execution* (e.g. money judgments). Accordingly, he argued that the provision did not affect the existing practice of granting recognition to foreign judgments that do *not* require execution (e.g. insolvency judgments).[325]

Kollewijn in his 1962 bilateral study on American-Dutch private international law concluded that, aside from the rare exceptions under specific statute or international instrument, "judgments rendered by foreign courts cannot be enforced in the Netherlands, nor can an *exequatur* be obtained thereon."[326] He added that "one who obtains a judgment in his favor abroad must start a new lawsuit before a Dutch court on the merits if he wants to attach property of his opponent in the Netherlands".[327] At the same time he noted that "article 431 of the Code of Civil Procedure forbids only the enforcement of judgments, which means enforcement by methods such as attachment of the property of the debtor or arrest."[328]

Like Offerhaus in 1921, Kollewijn emphasised the provision's narrow scope, which "does not prevent the recognition of foreign constitutive judgments, such as divorce decrees."[329] A further limitation he noted is that "Article 431 of the Code of Civil Procedure does not apply to judgments *for the defendant*, since it deals only with the enforcement of foreign judgments, and there can be no such enforcement if the complaint has been dismissed."[330] On this view, Art 431 Rv applies only to judgments for the plaintiff, while unwritten private international law governs

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[320] ibid (emphasis added). Note, however, that a little over a decade later the same author concluded on the basis of HR 24 June 1932, NJ 1932, 1262 where the Court held that "it [the Dutch court addressed] must consider in each particular case what preclusive effect is to be attributed a foreign judgment", that: "By now it is accepted that in all these circumstances it concerns the preclusive effect and that the terms '*rechtskracht*' and '*bindende kracht*' do not refer to something else." See J Offerhaus, 'Overzicht der Nederlandsche Rechtspraak: Internationaal Privaatrecht' (1934) 3387 WPNR 511, 512. See however Chapter 2, text to n 371ff (the term '*rechtskracht*' more properly denotes the force of law of a judgment, whereas '*bindende kracht*' as referred to in Art 236 Rv denotes the conclusiveness of a court's findings in the context of another case).

[321] ibid 278 (emphasis added).

[322] ibid.

[323] HR 14 November 1924, NJ 1925, 91, W 11301 (*Kühne/Platt* (*Bontmantel*)).

[324] Offerhaus (n 320) 512.

[325] Offerhaus (n 213) 279 (referring in illustration to judgments of insolvency and judgments appointing a guardian, and citing HR 2 June 1876, W 3997; Rb Rotterdam 14 April 1913, NJ 1913, 697; Hof Amsterdam 24 April 1914, NJ 1915, 789; Rb Amsterdam 8 January 1915, NJ 1915, 205; HR 5 November 1915, W 9938 (*In re Mees en Moens*); HR 24 November 1916, NJ 1917, 5, W 10098 (*ENVM/M*); and HR 23 February 1917, NJ 1917, 347).

[326] Kollewijn (n 213) 34.

[327] ibid.

[328] ibid.

[329] ibid.

[330] ibid 37.

judgments *for the defendant*. Regarding judgments for the plaintiff, it implies the following:

> [A] Dutch court is not bound by the findings of fact and law made by its foreign counterpart. Hence, the existence of a foreign judgment does not prevent the plaintiff from starting a lawsuit for the second time; article 431 expressly provides that the action can be recommenced before a Dutch court. The findings of the foreign court are not conclusive upon the Dutch court.[331]

But Kollewijn added that "[u]nwritten law has developed to supplement this statutory law"[332] in respect of judgments for the plaintiff *given by a court designated by agreement of the parties*, to the effect that:

> "In such cases, the losing party, *by virtue of the agreement*, is bound to comply with the foreign judgment. The winning party cannot ask the Dutch court to enforce the foreign judgment, but he may request *enforcement of the agreement*. The agreement imposes upon the parties the obligation to perform it according to *bona fides* (articles 1374 and 1375 of the Civil Code), and *bona fides* obligates the losing party to comply with the judgment of the court designated by the agreement."[333]

However, in these cases, the source of the debtor's duty is the *agreement*, not the foreign judgment. Accordingly, a person, by consenting to being sued, may submit voluntarily to the jurisdiction of the foreign court and, in this way, become bound to comply with the foreign judgment.[334] In those circumstances, "[t]he Dutch court must consider only whether the foreign court rendering the judgment was the court actually agreed upon and whether the procedure followed was fair. It may still be impossible, however, to compel compliance with the foreign judgment, in the event such compliance might violate the public policy of the forum."[335]

Regarding judgments *for the defendant*, which are outside the scope of Art 431 Rv, Kollewijn paraphrased the Dutch Supreme Court in *The Fur Coat* case as holding:

> [A] Dutch court must decide in each case *whether and to what extent a foreign judgment will be recognized*, and … that in this case the seller was bound by the English judgment: it would be contrary to *bona fides* if the [losing] plaintiff were allowed to prosecute his claims in a Dutch court after he had submitted them voluntarily to an English court and had obtained an adverse judgment.[336]

Not so long thereafter, Smit in his 1966 article entitled 'International Res judicata in the Netherlands: A Comparative Analysis'[337] argued, along the lines of Kollewijn, that Art 431 Rv properly applies only to judgments awarding some type of *executable relief* (i.e. money judgments or injunctions), not to judgments on status and *in rem*, or declaratory judgments. However, Smit went one step further by contending that Art 431 Rv was intended solely to prevent a foreign judgment creditor from obtaining in the Netherlands, "recognition of a judgment against a

[331] ibid 35.
[332] ibid (emphasis added).
[333] ibid.
[334] ibid.
[335] ibid.
[336] ibid 37-38.
[337] Smit (n 213).

judgment debtor *whom he had sued before a court other than that of the latter's domicile*."[338]

Smit's central thesis is that Art 431 Rv is even narrower in scope than suggested by Kollewijn, and is limited to judgments given against defendants *involuntarily sued abroad, away from their daily court*. He argued that this interpretation of Art 431 Rv is not merely desirable but also confirmed by the provision's legislative history.[339] All other foreign judgments granting relief, he argued, are beyond the reach of the provision and fall to unwritten principles of private international law.

Nevertheless, even within its narrow scope of application, Smit still concluded that Art 431 Rv bars both recognition and enforcement, because the provision mandates a new claim and bars execution. He arrived at this conclusion, because he defined 'recognition' as the process of granting of res judicata effect, and he defined 'enforcement' as the execution of a foreign judgment against the person or assets of a judgment debtor. At the same time, Smit perceived a peculiar ambivalence in the Dutch Supreme Court's decisions:

> On the one hand, it posits as dogma that section 431 forbids the granting of execution or res judicata effect to foreign judgments; but, on the other hand, it explicitly acknowledges that a Dutch court, without coming into conflict with section 431, may freely determine whether and to what extent to grant authority to a foreign judgment.[340]

Smit criticised the Court's approach as "neither particularly helpful nor quite consistent"; *unhelpful*, because the Court fails to offer guidance on when it is appropriate to attribute a foreign judgment preclusive effect, and *inconsistent*, because the Court appears to condone in the second part of its formula what it prohibits in the first.

De Boer and Kotting in a more recent analysis of Dutch law on foreign judgments emphasise, like Offerhaus and Kollewijn, the need to distinguish between categories of foreign judgment for the purpose of applying Art 431 Rv, which in their view applies only to judgments awarding executable relief, not to judgments that create or alter a status, declaratory judgments and dismissals, whose recognition and enforcement outside the scope of Statute, European regulations or international agreements is governed by unwritten principles of private international law.

De Boer and Kotting acknowledge that a first-impression of Art 431 Rv is that "[t]he enforcement of foreign judgments outside the scope of an enforcement treaty or regulation is blocked by Art 431 of the Code of Civil Procedure. This provision… disallows enforcement of foreign judgments and prescribes a whole new adjudication by a Dutch court."[341] Article 431 Rv therefore appears to bar the enforcement of a limited (but important) category of foreign judgments covered. The authors further observe that for cases outside the scope of international and European instruments, Dutch private international law fails to provide a comprehensive doctrine on recognition and does not treat foreign judgments as res judicata.[342]

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[338] ibid 169 (emphasis added).
[339] See text to n 276ff.
[340] Smit (n 213) 171.
[341] De Boer and Kotting (n 213) 292ff.
[342] ibid.

At the same time, De Boer and Kotting characterise *The Furcoat* case as marking a significant change in Dutch private international law: "This negative point of departure has been considerably mitigated in case law, starting with a decision by the *Hoge Raad* dating from 1924 [i.e. *The Fur Coat*]."[343] Against the background of this case, the authors summarise the current system as follows:

> When enforcement of a foreign judgment is sought, a Dutch court—while formally deciding the case anew—will actually *recognize* the foreign decision by adopting it as its own judgment, which is of course enforceable in the Netherlands. The only point for the Dutch court to decide, then, is the issue of whether it is reasonable to have the foreign decision *enforced*. If not, the case will be adjudicated anew. *This interpretation has in fact turned Article 431 into a general rule of enforcement, even though the procedure still takes the form of a new trial*.[344]

By contrast, Struycken in his Hague Lectures still denies that Art 431(2) Rv is a general mode for the enforcement of foreign judgments—by action on the foreign judgment—that meet the conditions for recognised under Dutch private international law; though the author acknowledges the unprincipled nature of the distinction, he still concludes that enforcement by action on the foreign judgment under Art 431(2) Rv is admitted only, "for cases where the foreign court has decided *on the basis of a choice of court clause*".[345] Thus Struycken suggests that a foreign judgment given by a court that assumed jurisdiction in line with internationally acceptable standards, but not on the basis of a choice of court agreement, cannot be enforced in the Netherlands, even if the judgment can be recognised in accordance with unwritten principles of private international law.

Both De Boer and Kotting and Struycken refute the myth that Art 431 Rv bars generally the recognition and enforcement of foreign judgments at common law. Nevertheless, the authors still suggest that a literal reading of the provision implies such bar to recognition and enforcement, whereas the provision does no such thing; in fact, the provision expressly bars only a foreign judgment's *execution* (i.e. measures to implement a foreign judgment against the person and assets of a judgment debtor), not its *enforcement* (in the private international law sense); and, in light of the bar to execution, the provision states that the same matter can be submitted to a Dutch court, which does not imply a bar to a foreign judgment's recognition (i.e. granting the foreign judgment local validity, so that it can trigger (preclusive) effects).[346]

(1) Why Dutch courts recognise foreign judgments

In the Netherlands, a foreign judgment is treated as a sovereign act of compulsion involving the exercise of judicial power, or 'jurisdiction', whose sphere of validity and force is delimited territorially, so as to exclude Dutch territory; to this effect, the Supreme Court in *Pezella/Casseres* ruled:

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[343] ibid 294.
[344] ibid.
[345] AVM Struycken, 'Co-ordination and Co-operation in Respectful Disagreement: General Course on Private International Law' (2004) 311 Recueil des Cours 9, 528.
[346] See text to n 428ff.

> [T]he assertion is right, that a judgment pronouncing an insolvency, *like any other judgment*, has no force outside the borders of the State where it was pronounced, so that its force does not extend beyond the *jurisdiction* of the rendering court.[347]

Already before this decision, the Supreme Court ruled along these lines in *Breadhead v Stoomvaartmaatschappij Zeeland ('The Prins Hendrik')* when the Court interpreted the effect of Art 431 Rv.

(i) The limited sphere of validity and force of judgments

The Prins Hendrik case concerned the preclusive effect of an English judgment. In large part, the case turned on a proper interpretation of Art 431 Rv and its link with the principle of territoriality.[348]

The dispute resulted from a collision of a British steamship (the 'Gotha') and a Dutch steamship (the 'Prins Hendrik'). The owners of the Gotha filed a damages claim in the English High Court for negligent navigation. The owners of the Prins Hendrik appeared and filed a defence. The English court granted the claim, finding that the collision was due to the negligence of the Prins Hendrik.[349]

Subsequently, privies of the Prins Hendrik's owners filed a damages claim in Middelburg District Court (the Netherlands) for negligent navigation by the Gotha. The defendants invoked the English judgment and entered a res judicata *plea*, arguing that "the dispute was resolved and must be considered res judicata, so that the principle of '*non bis in idem*' requires that the claimant's present claim be declared inadmissible."[350]

The Middelburg District Court rejected this plea on the ground that the owners of the Prins Hendrik in the English case had not freely submitted to the jurisdiction of the High Court, so that the English judgment could not be relied on in the Dutch proceedings.[351] The Hague Court of Appeal confirmed this judgment on appeal. The cassation appeal argued that the Court of Appeal should have applied Arts 1953(3) and 1954 BW on res judicata effect to the English judgment, considering that both parties had freely cooperated in the procurement of the English judgment.[352]

The Supreme Court rejected the appeal, and formulated the following general approach from which the Court has not departed since:

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[347] HR 31 May 1907, W 8553 (emphasis added).

[348] HR 31 January 1902, W 7717 (*Breadhead/Stoomvaartmaatschappij Zeeland*). See Part II, Introduction, text to n 1ff.

[349] See *Prins Hendrik, The* [1899] P 177.

[350] HR 31 January 1902 (n 348) (*Breadhead/Stoomvaartmaatschappij Zeeland*) ("dat het geschil dus tot een oplossing is gekomen, die als res judicata moet worden beschouwd, en het beginsel 'non bis in idem' noodzaakt de eischeres in hare tegenwoordige vordering niet-ontvankelijk te verklaren….").

[351] ibid ("geen beroep kan worden gedaan worden op een vonnis, door een buitenlandsche rechter gewezen; terwijl ten aanzien van de bewering der gedaagden, dat het vonnis voor de eischeres als gewijsde zaak te beschouwen zou zijn daar zij moet geacht worden de bevoegdheid van den Engelschen rechter te hebben erkend, is aangenomen, dat deze gevolgtrekking uit de handelingen der eischeres niet opgaat….").

[352] ibid ("het Hof gezag van gewijsde heeft geweigerd aan het vroeger tusschen partijen door den Engelschen rechter gewezen vonnis, welke weigering èn in het algemeen èn in het onderwerpelijk geval, waar het vonnis onder medewerking van beide partijen werd gewezen en daaraan door beide gevolg gegeven, niet is gerechtvaardigd….").

> [I]n cases where a court acts as one of the organs through which the State exercises jurisdiction, its decisions are valid only for the territory to which that jurisdiction extends, and beyond that territory they have force only in the manner and subject to the conditions prescribed by the competent authority in each State addressed.[353]

According to the Court, the principle of territoriality implies that a foreign judgment lacks validity beyond the territory over which the enacting State has jurisdiction, in the territory over which other States have jurisdiction; in other words, territoriality implies that a foreign judgment lacks validity in Dutch territory. Territoriality, the Court later explained in *Kallir v Comfin*, is not a constraint that a State self-imposes by domestic law, but a limitation that international law imposes upon States,[354] or as the Court put it, territoriality, "is rooted in the limits of sovereignty, not the intention of the legislator".[355]

At the same time, the Court clarified that territoriality does not exclude that a foreign judgment acquires validity in Dutch territory. A foreign judgment *can* gain validity in Dutch territory, but only on Dutch terms, which determine the manner and

[353] ibid ("…dat toch, waar de rechter optreedt als een der organen van het Staatsgezag, zijn uitspraken als zoodanig alleen gelden voor het grondgebied waarover dat gezag zich uitstrekt, en daar buiten alleen verbindend zijn op zoodanige wijze en onder zoodanige voorwaarden als de bevoegde macht in elken betrokken Staat heeft voorgeschreven…."). cf HR 31 May 1907 (n 347) (*Pezella/Casseres*).

[354] Dutch adherence to the limits imposed by international law finds expression in the General Provisions Act 1829 (*Wet van 15 mei 1829, houdende algemeene bepalingen der wetgeving van het Koningrijk*) (entered into force 1 October 1838) Stb 1829, 28 (as amended), Art 13a ("The jurisdiction of the court and the executability of judgments … is limited by the exceptions recognised in international law.") ("De regtsmagt van den regter en de uitvoerbaarheid van regterlijke vonnissen en van authentieke akten worden beperkt door de uitzonderingen in het volkenregt erkend.").

[355] HR 15 April 1955, NJ 1955, 542 (*Kallir/Comfin*) ("…even though the Dutch State, sovereign only within its own territory, cannot ensure the application of a Dutch judgment of insolvency to assets of the insolvency debtor located beyond its borders, and though only the foreign State can decide on this force within its legal order, the Dutch Insolvency Code contains no provision that prohibits an administrator in a Dutch insolvency from including in the insolvency to the extent possible assets located abroad.") ("dat toch, al moge de Nederlandse Overheid, die slechts binnen eigen gebied souverein is, niet bij machte zijn aan de in Nederland uitgesproken faillietverklaring ten aanzien van het buiten de Nederlandse grenzen gelegen vermogen van den gefailleerde werking te verzekeren en al kan alleen de buitenlandse Overheid over deze werking binnen zijn rechtsgebied beslissen, de Fw. Generlei bepaling inhoudt, welke zou verbieden, dat de curator in een Nederlands faillissement vermogensbestanddelen van de gefailleerde, welke zich in het buitenland bevinden, in den boedel van het Nederlandse faillissement betrekt, indien en voorzover hem dit mogelijk is; … dat ook het bepaalde in … [de Fw.] steum geeft aan de opvatting, dat de territoriale werking van het Nederlandse faillissement ten aanzien van het vermogen van den schuldenaar aldus begrepen moet worden, dat zij enkel berust op de grenzen der souvereiniteit, en niet op de bedoeling van den wetgever, dat de gevolgen van het faillissement tot het vermogen op Nederlands grondgebied beperkt moeten blijven….").

conditions for the foreign judgment's recognition.[356] The principle of territoriality so understood, formed the roots of Dutch law on foreign judgments.[357]

The Supreme Court in *Yukos Finance BV v Rebgun* recently reiterated the territoriality principle.[358] The case involved the question whether a curator appointed by judgment of a Russian insolvency court could validly act as curator in the Netherlands by exercising voting rights in a shareholders meeting. The Court stated summarily: "To the extent that no international instrument binding on the Netherlands states the contrary, a judgment of insolvency has territorial application". [359] Until a foreign (insolvency) judgment acquires validity in Dutch territory (by recognition), the foreign judgment can trigger no legal consequences *as judgment*. (Note that though the Court added that "[t]his principle of territoriality does not prevent the application in the Netherlands of other effects of an insolvency declared abroad",[360] this statement expresses no exception to territoriality as it concerns the legal consequences that Dutch law may attach to the *fact* of a foreign insolvency. Similarly, in another context, the Court clarified that territoriality does not bar the use of a foreign judgment as a means of evidence, which does not concern the foreign judgment *as judgment*.[361])

The Court in the later *Yukos*-related case of *Yukos Int et al v Promneftstroy and Rosneft*[362] further elucidated the implications of territoriality. The Court held:

> [T]he decision in the main proceedings was that the foreign insolvency judgment could not be recognised in this territory because it was made in a manner that violates Dutch public policy, while in a subsequent case the question was whether the curator in that [foreign] insolvency can in this territory perform valid legal acts, in this case: transferring shares Yukos Finance to Promneftstroy. … This decision [denying recognition] implies that the Russian insolvency judgment lacks any force of law in this territory, so that the Court of Appeal… could not have arrive at any other decision than that Promneftstroy never became shareholder of Yukos Finance.[363]

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[356] See AG Gregory in HR 5 January 1866 (n 309) (*Musch/Gilman*), for instance, who reminded that "the Government contends that, although the rule is that a foreign judgment as such cannot be executed in this territory, 'this does not imply that when the document confirms certain acts or agreements of Dutch persons, the Dutch court will take these into account as it takes account of obligations assumed abroad, even though as such they are not executable in this country." ("…in de memorie van beantwoording door de Regering gezegd wordt, dat, ofschoon naar den regel behoort vast te staan, dat een buitenlandsch vonnis als zoodanig hier te lande niet ten uitvoer kan worden gelegd, 'dit echter niet wegneemt, dat, wanneer uit dat stuk blijkt van daden of toestemmingen van de zijde der Nederlanders, daarop, evenzeer als op eene buitenlands aangegane verbintenis, bij de regter alhier acht kan en zal worden geslagen, zonder dat daarom het vonnis als zoodanig uitvoerlijk zij.'"). See HR 5 January 1866 (n 309) (*Musch/Gilman*). See text to 428ff.

[357] Kosters and Dubbink (n 213) 780.

[358] HR 19 December 2008, ECLI:NL:HR:2008:BG3573, NJ 2009, 456 mnt ThM de Boer, RvdW 2009, 85, JOR 2009, 94 mnt PM Veder, ONDR 2009, 76 mnt MA Broeders, NJB 2009, 140 [3.4.3] (*Yukos Finance BV/Rebgun*).

[359] ibid.

[360] ibid [3.4.3].

[361] cf AG Gregory in HR 5 January 1866 (n 309) (*Musch/Gilman*).

[362] HR 7 January 2011 (Chapter 2 n 276) (*Yukos International UK BV/OOO Promneftstroy*).

[363] ibid ("in een bodemprocedure wordt geoordeeld dat een in het buitenland uitgesproken faillissement hier te lande niet kan worden erkend omdat het tot stand gekomen is op een wijze die strijdig is met de Nederlandse openbare orde, terwijl vervolgens in een kort geding de vraag moet worden beantwoord of de curator in dat faillissement hier te lande rechtsgeldig rechtshandelingen, in dit geval: levering van de aandelen Yukos Finance aan Promneftstroy, heeft kunnen verrichten. 3.4.4 Bij dat uitgangspunt treft zowel de rechtsklacht van onderdeel 2.1 als die van onderdeel 2.2 doel. Ingevolge het vonnis van 31

It may be recalled that both *Yukos*-related cases discussed here essentially turned on the question whether a foreign curator can validly act in the Netherlands if the foreign (insolvency) judgment that appointed the curator is denied recognition in the Netherlands on grounds of public policy.

The Dutch Supreme Court negated this question: under the principle of territoriality, a foreign judgment lacks validity in Dutch territory unless it is granted validity by recognition; but, the foreign insolvency judgment in question, which forms the basis for the curator's power to act and perform legal acts, was denied recognition and thus lacks validity in the Netherlands (i.e. has no existence in the eyes of Dutch law). Consequently, if there was no basis for the curator's power to perform legal acts in the Netherlands, he had no power to peform such acts, meaning that any acts performed in fact are equally invalid.

This decision is further elucidated by reference to the opinion of Strikwerda, the Advocate General in the case, who said similarly:

> [E]very legal act for the implementation of that judgment in the Netherlands cannot be regarded as valid, irrespective whether that legal act is valid or invalid under the applicable substantive law (in this case Dutch law). If the outcome were different, the foreign judgment would be attributed effect in the Netherlands, while that judgment lacks any force of law in this country.[364]

The Russian judgment in question appointed a curator who claimed *on that basis* the authority under Dutch law to transfer property in the Netherlands. Failing recognition of that judgment in the Netherlands, there was no legal basis for claiming the status of curator in the Netherlands or the authority to transfer property in the Netherlands.

a. The link of Article 431 Rv and territoriality

Article 431 Rv codifies the principle of territoriality in Dutch law. The Dutch Supreme Court confirmed this role in *The Prins Hendrik*.[365] But the Supreme Court also pointed out in that case that the provision, which bars the *execution* in Dutch territory, is only a partial codification of the principle; more generally, and despite the absence of an express statutory provision that codifies this aspect of territoriality, territoriality restricts *any* effect that depends on the recognition of the jurisdiction of

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oktober 2007 mist het Russische faillissementsvonnis hier te lande iedere rechtskracht, zodat het hof - nu uit de stukken van het geding niet blijkt van een omstandigheid die een uitzondering op voormelde regel zou kunnen rechtvaardigen - tot geen ander oordeel had kunnen komen dan dat Promneftstroy geen aandeelhouder in Yukos Finance is geworden.").

[364] ibid [19] ("Voor zover het hof met zijn verwijzing naar beschikkingsonbevoegdheid en het ontbreken van een geldige titel heeft willen aangeven dat de beschikkingsonbevoegdheid van Rebgun en/of de mogelijke ongeldigheid van de titel van de levering (de veilingkoop) naar Nederlands recht niet steeds tot ongeldigheid van de levering van de aandelen behoeft te leiden, miskent het hof dat de 'ongeldigheid' van de levering van de aandelen in Yukos Finance niet het gevolg is van materieelrechtelijke gebreken die ingevolge het op die levering toepasselijke recht mogelijk daaraan kleven, maar het gevolg is van het feit dat het Russische faillissementsvonnis in Nederland niet kan worden erkend en dus iedere rechtskracht mist. Dit brengt mee dat ook iedere rechtshandeling die ter uitvoering van dat vonnis in Nederland wordt verricht, niet als rechtsgeldig kan worden erkend, ongeacht of die rechtshandeling ingevolge het daarop toepasselijke — in dit geval Nederlandse — rechtsstelsel in materieelrechtelijke zin geldig is of niet. Zou men hierover anders oordelen, dan wordt aan het faillissementsvonnis in Nederland werking toegekend, terwijl dat vonnis hier te lande nu juist iedere rechtskracht mist.").

[365] See text to n 348ff.

the foreign judgment-rendering court, including *preclusion* by way of a foreign judgment:

> This principle is stated expressly in Article 431 Rv for execution, but it applies equally for the preclusive effect which the law attributes a judgment, despite the fact that no statement to this effect exists. Also the preclusive effect depends on the recognition of the jurisdiction of the court rendering the judgment and, to this extent then, there is not difference between the execution of the foreign judgment and the bar to its contradiction in a Dutch court.[366]

There is no relevant difference between execution or preclusion for purposes of territoriality, because both effects depend on the prior recognition of the foreign court's jurisdiction and judgment in Dutch territory. With the same underlying rationale, the Court in *S v Bannier q.q.* described the implications of Art 431 Rv as a condification of territoriality a bit broader:

> A *statutory rule* that, save for exceptions not applicable here, prohibits the execution of foreign judgments in this country and in addition determines that disputes can be considered and determined anew by a Dutch court, not only prevents the taking of execution measures for the implementation of the order of the foreign court, but also incompatible with that statute is any obligation of the Dutch court to grant an order because the foreign court did so, or to found its judgment on facts only because the foreign court established those facts in its judgment….[367]

Article 431(2) Rv contains no prohibition of preclusion by way of foreign judgments in the Netherlands. The provision merely states that: "Disputes can be considered and determined by a Dutch court anew." On its face and taking into account that 431(2) Rv applies only to judgments requiring execution,[368] the provision essentially gives a claimant who has recovered judgment abroad, the right to reassert their original cause of action in a Dutch court. In this sense the provision reminds of the old English "non-merger" rule which is said to have governed foreign judgments in England and Wales until its abrogation by s 34 of the Civil Jurisdiction and Judgments Act 1982.[369] The provision, in other words, excludes a plea of finality

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[366] HR 31 January 1902 (n 348) (*Breadhead/Stoomvaartmaatschappij Zeeland*) ("…dat toch, waar de rechter optreedt als een der organen van het Staatsgezag, zijn uitspraken als zoodanig alleen gelden voor het grondgebied waarover dat gezag zich uitstrekt, en daar buiten alleen verbindend zijn op zoodanige wijze en onder zoodanige voorwaarden als de bevoegde macht in elken betrokken Staat heeft voorgeschreven; dat dit beginsel, wat betreft de gerechtelijke tenuitvoerlegging, uitdrukkelijk is uitgesproken in art. 431 B. r , maar eveneens geldt ten aanzien van het gezag, hetwelk de wet aan een rechterlijk gewijsde toekent, al ontbreekt daaromtrent zoodanige uitspraak; dat toch ook dit gezag berust op erkenning van de rechtsmacht van den rechter, die de beslissing gegeven heeft, en in zooverre dus geen verschil is tusschen eene gerectelijke tenuitvoerlegging van het vreemde vonnis en het verbod om daarmee strijdende aanspraken voor den Nederlandschen rechter geldend te maken…."). cf HR 31 May 1907 (n 347) (*Pezzella/Casseres*).

[367] HR 1 April 1938, NJ 1938, 989 ("…dat echter een wettelijke regeling, die, behoudens uitzonderingen die zich hier niet voordoen, de ten uitvoerlegging van vreemde vonnissen hier te lande wraakt en in aansluiting daaraan bepaalt, dat de gedingen opnieuw bij den Nederlandschen rechter kunnen worden behandeld en afgedaan, niet alleen belet het nemen van executiemaatregelen ter uitvoering van de door den vreemden rechter uitgesproken veroordeling, doch met zoodanige regeling ook onvereenigbaar is een verplichting van den Nederlandschen rechter om een veroordeling uit te spreken, omdat de vreemde rechter dit gedaan heeft, of om feiten aan zijn veroordeling ten grondslag te leggen, alleen omdat de vreemde rechter die feiten bij zijn vonnis als juist aanvaard heeft….").

[368] See text to n 382ff.

[369] See Chapter 4, text to n 40ff.

in response to a claim of a successful claimant who reasserts the cause of action for which they already recovered judgment abroad.

Nevertheless, the Dutch Supreme Court insisted that Art 431(2) Rv signifies that territoriality applies to preclusion generally, even though the provision does not make this explicit.[370] Thus, while the provision explicitly rules out only what in English law would be called 'merger' of the original cause of action of a claimant who was successful abroad and recovered judgment, the provision further signifies that preclusion by way of foreign judgments that lack recognition in the Netherlands is, alike execution, prohibited. This interpretation, the Court noted "is confirmed by the rule of Article 431(2) Rv that disputes can be considered and determined by a Dutch court anew, because a new consideration by a Dutch court is incompatible with the ability of the parties to invoke a foreign judgment as res judicata."[371]

This conclusion proved fatal in for the defendants in *The Prins Hendrik* case, who based their res judicata *plea* on the English High Court judgment. The res judicata *plea* did not fail because no foreign judgment can ever trigger preclusion in the Netherlands; instead, the plea failed because the Court refused to recognise the jurisdiction of the English court and thus, by extension, its judgment; despite the fact that the owners of the Prins Hendirk had cooperated in the English proceedings, "[they] did not submit voluntarily so as to waive their right of action under Article 127 of the Code of Procedure".[372] For lack of recognition, the English judgment acquired no validity in the Netherlands and thus could not trigger preclusion in Dutch proceedings.

1. Article 431(1) Rv: the prohibition of execution

Article 431(1) Rv bars the execution of foreign judgments in the Netherlands (safe for the exceptions by statute or international instrument).[373] The Supreme Court in *In re Mees and Moens* explained the meaning of 'execution' ('*tenuitvoerlegging*') in the provision as follows:

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[370] HR 31 January 1902 (n 348) (*Breadhead/Stoomvaartmaatschappij Zeeland*) ("…dat toch, waar de rechter optreedt als een der organen van het Staatsgezag, zijn uitspraken als zoodanig alleen gelden voor het grondgebied waarover dat gezag zich uitstrekt, en daar buiten alleen verbindend zijn op zoodanige wijze en onder zoodanige voorwaarden als de bevoegde macht in elken betrokken Staat heeft voorgeschreven; dat dit beginsel, wat betreft de gerechtelijke tenuitvoerlegging, uitdrukkelijk is uitgesproken in art. 431 B. r , maar eveneens geldt ten aanzien van het gezag, hetwelk de wet aan een rechterlijk gewijsde toekent, al ontbreekt daaromtrent zoodanige uitspraak; dat toch ook dit gezag berust op erkenning van de rechtsmacht van den rechter, die de beslissing gegeven heeft, en in zooverre dus geen verschil is tusschen eene gerectelijke tenuitvoerlegging van het vreemde vonnis en het verbod om daarmee strijdende aanspraken voor den Nederlandschen rechter geldend te maken…."). cf HR 31 May 1907 (n 347) (*Pezzella/Casseres*).

[371] HR 31 January 1902 (n 348) (*Breadhead/Stoomvaartmaatschappij Zeeland*). cf HR 31 May 1907 (n 347) (*Pezzella/Casseres*).

[372] ibid ("dat het beroep der eischeres op de omstandigheid, dat het door hen bedoelde vonnis werd gewezen onder medewerking der verweerderes, niet kan opgaan, omdat, gelijk bij het beklaagde arrest op feitelijke gronden is aangenomen, van eene berusting in den zin dat de verweerderes zou hebben afstand gedaan van hare bevoegdheid om volgens art. 127 B. r te dagvaarden, geene sprake kan zijn…."). Article 127 Rv, which has been abolished as ground for jurisdiction in the Netherlands, provided that a foreigner, even if not resident in the Netherlands, could be sued in a Dutch court for the performance of obligations owed to a Dutchman and created either in the Netherlands or abroad.

[373] To be precise, Art 431(1) Rv reads: "Apart from the provisions made in Articles 985-994 Rv, neither judgments of foreign courts, nor authentic instruments drawn up outside of the Netherlands, can be executed in the Netherlands."

> Article 431 Rv implies a prohibition, other than in the situations specified by law, to execute foreign judgments in the Netherlands, *that is to say*, to seek to obtain payment in the manner foreseen in the Second Book of the Code of Civil Procedure by charging the person or the goods of the judgment debtor.[374]

Accordingly, Art 431(1) Rv refers to the charging or seizing of assets of a judgment debtor ('*executorial beslag*')[375] or, in case of judgments granting relief other than a sum of money or maintenance judgments, the judgment debtor's imprisonment ('*lijfsdwang*')[376].[377] This process involves the bailiff,[378] not the court, which is involved only if the person affected by the execution measures initiates an execution dispute under Art 438 Rv.[379]

The source of confusion as to the meaning of Art 431(1) Rv has been that the meaning of 'execution' is ambiguous; the same term is used in private international law to denote the process of 'enforcement' ('*tenuitvoerlegging*'), which gives a foreign judgment the legal status of a judgment that can be executed in accordance with the law of the place where execution is sought. However, the actual effect of Art 431(1) Rv is to make the Dutch machinery for ensuring the effectiveness of judgments unavailable for foreign judgments. By contrast, a domestic judgment can be executed throughout the Netherlands as of right by virtue of Art 430(1) Rv, on the sole condition that the judgment is drawn up in executable form—captioned "*In name of the King*"—and served on the person against whom execution is to be effected.[380] Along these lines, the Supreme Court in *Musch v Gilman and Riga* said: "Article 431

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[374] HR 5 November 1915 (n 325) (*In re Mees en Moens*) (emphasis added). cf Nysingh (n 213) 4 ("Execution is the process of implementing with the assistance of state authorities a judgment against the person or goods of the judgment debtor through the means and the procedure provided for by law.") ("Tenuitvoerleggen is het executeren, het met behulp van het staatsgezag verhaal zoeken op persoon of goederen van den schuldenaar, met de middelen en op de wijze, als in de wet geregeld.").

[375] See Arts 439 to 584 Rv.

[376] See Arts 585 to 600 Rv.

[377] cf Van Praag (n 213) 341; Nysing (n 213) 4.

[378] '*Gerechtsdeurwaarder*'. See Art 434 Rv.

[379] cf *Advies ontwerp-Verordening Brussel I (document COM (2010) 748 d.d. 14 december 2010)* (5689654/11/6, 2011) Staatscommissie voor het Internationaal Privaatrecht and Adviescommissie voor Burgerlijk Procesrecht <www.eerstekamer.nl/eu/publicatie/20110909/advies_ontwerp_verordening_brussel/document> accessed 1 June 2013 [3.2.4.] ("In the Dutch system of the law of execution of judgments, as regulated in Book Two of the Code of Civil Procedure, the execution of a civil judgment is by a bailiff who acts at the request of the judgment creditor. No court is involved in the execution of a judgment, unless the judgment debtor who is affected by the execution, initiates an execution dispute under Article 438 Rv.") ("In het Nederlandse stelsel van executierecht, zoals voorzien in het tweede boek van het Wetboek van Burgerlijke Rechtsvordering, geschiedt de executie van een civiel vonnis door een deurwaarder, die daarbij in opdracht van de executant handelt. Bij deze executie is in beginsel geen rechterlijke instantie betrokken, tenzij de partij tegen wie de executie zich richt, een executiegeschil op de voet van artikel 438 Rv entameert.").

[380] Article 430 Rv ("1. The copies of judgments rendered in the Netherlands drawn up in an executable form ['grosse'] … can be executed throughout the Netherlands. 2. They should be headed by the words: In name of the King. 3. They cannot be executed before service upon the person against whom the execution will take place.") ("1. De grossen van in gewezen vonnissen, van beschikkingen van de Nederlandse rechter en van in Nederland verleden authentieke akten alsmede van andere bij de wet als executoriale titel aangewezen stukken kunnen in geheel Nederland worden ten uitvoer gelegd. 2. Zij moeten aan het hoofd voeren de woorden: In naam des Konings. 3. Zij kunnen niet worden ten uitvoer gelegd dan na betekening aan de partij tegen wie de executie zich zal richten.").

Rv generally denies foreign judgments the execution effect attributed Dutch judgments of their own right".[381]

2. Judgments that do not require execution

Article 431 Rv affects only foreign judgments *requiring execution*.[382] This interpretation of the provision derives from its placement in Book Two of the Code of Civil Procedure entitled 'On the execution of judgments'. As a result, the provision lacks application to foreign status or *in rem* judgments,[383] declaratory judgments, dismissal judgments, and insolvency judgments, at least to the extent these judgments do not call for execution measures in the Netherlands.[384] At the same time, this type of judgment *is* subject to the limitations of the principle of territoriality, which excludes from Dutch territory anything that requires prior recognition of the jurisdiction of the foreign judgment-rendering court and by extension its judgment. Accordingly, failing recognition, also this type of judgment lacks validity in Dutch territory.

b. Judgments from other parts of the Kingdom (Aruba, Curaçao and Sint Maarten)

The Netherlands forms part of the Kingdom of the Netherlands (*Koninkrijk der Nederlanden*), along with three other constituent countries: Aruba, Curaçao and Sint Maarten. Only the Kingdom is a State subject to international law, whereas the relations of the Kingdom's countries are governed by the Charter of the Kingdom of the Netherlands (*Statuut voor het Koninkrijk der Nederlanden*),[385] which established a new legal order[386].

Article 40 of the Charter provides that "[j]udgments given and orders issued by a court in the Netherlands, Aruba, Curaçao or Sint Maarten and engrossments of authentic acts issued by them, *can be executed throughout the Kingdom*, in accordance with the law in the Country of execution."[387] The Dutch Supreme Court, in its capacity as Supreme Court of the Kingdom of the Netherlands,[388] explained the provision's rationale and scope as follows in *P v De Voogdijraad Sint Maarten*:

> Article 40, which is founded on the idea that the Kingdom is a single justice area for purposes of the execution of judgments given in the Kingdom, implies by reason of its aim that the force of law of these judgments is the same in all parts of the

[381] HR 5 January 1866 (n 309) (*Musch/Gilman*) ("…dat art. 431 B. r aan vreemde vonnissen in den regel ontzegt de aan Nederlandsche regterlijke gewijsden, als zodanig, toegekende executoriale kracht….").
[382] HR 14 November 1924 (n 323) (*Kühne/Platt* (*Bontmantel*).
[383] HR 24 November 1916 (n 325) (*ENVM/M*).
[384] See HR 6 April 1882, W 4758. cf Van Praag (n 213) 341-42.
[385] *Wet van 28 October 1954, houdende aanvaarding van een statuut voor het Koninkrijk der Nederlanden*, Stb 1954, 503 (as amended), Art 1(1).
[386] ibid Preamble.
[387] ibid Art 40.
[388] ibid Art 23(1) in conjunction with the Dutch Antilles Cassation Appeals Act 1961 (*Rijkswet van 20 juli 1961, houdende de Cassatieregeling voor de Nederlandse Antillen*) (entered into force 1 March 1965) Stb 1961, 212 (as amended).

> Kingdom, not only for purposes of their executability, but also for their conclusive effect and evidential effect.[389]

Unlike the Supreme Court, Advocate General Strikwerda added that Art 40 of the Charter implies fundamentally that "[t]here is no place for prior recognition."[390] On this view, "it is less accurate to speak of 'obligatory recognition' or 'automatic recognition'", because "there is no recognition at all; judgments 'automatically' have throughout the Kingdom the effects which they have by law in the country of the judgment-rendering court."[391] On this view, for instance, a Dutch court cannot ignore as invalid in the Netherlands a judgment given in Aruba on the ground that the judgment-rendering court lacked jurisdiction, or because the proceedings giving rise to the judgment failed to comply with the requirements of due process.[392]

This conclusion is certainly correct as a matter of *international law*, because from an international law viewpoint, the use of judgments within the Kingdom is a *domestic affair*, so that the principle of territoriality lacks application to the movement of judgments between the Kingdom's constituent countries. Article 431 Rv—itself an expression of the principle of territoriality—is irrelevant in cases where a judgment given in Aruba, Curaçao or Sint Maarten is subsequently invoked in the Netherlands, since the judgment is technically not a 'foreign' judgment.[393]

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[389] HR 14 January 1994, NJ 1994, 403 [5.3] (*Voogdijraad Sint Maarten*) ("Art. 40, dat berust op de gedachte dat het Koninkrijk voor wat betreft de vatbaarheid voor tenuitvoerlegging van binnen het Koninkrijk gegeven rechterlijke uitspraken, als één rechtsgebied moet worden beschouwd, brengt naar zijn strekking mee dat de rechtskracht van deze uitspraken in alle delen van het Koninkrijk gelijk is, niet alleen voor wat betreft de vatbaarheid voor tenuitvoerlegging, maar ook voor wat betreft bindende kracht en bewijskracht.").

[390] ibid [16] ("Ik zou menen dat in het beginsel dat rechterlijke uitspraken, in Nederland, de Nederlandse Antillen of Aruba gedaan, in het gehele Koninkrijk (zonder exequatur) ten uitvoer kunnen worden gelegd besloten ligt dat ook de andere werkingen van het vonnis, te weten de bindende kracht en de bewijskracht, van rechtswege daaraan in het gehele Koninkrijk toekomt. In het 'meerdere' (executoriale kracht) ligt het 'mindere' (bindende kracht, bewijskracht) besloten. Voor een daaraan voorafgaande erkenning is geen plaats. In zoverre lijkt mij ook minder juist om te spreken van verplichte erkenning of dat erkenning zonder meer dient plaats te vinden. Van erkenning is überhaupt geen sprake; de rechterlijke uitspraken hebben 'automatisch' in het gehele Koninkrijk de werking die zij van rechtswege in het land van de rechter hebben."). But see MH ten Wolde, *Internationaal Privaatrecht* (2nd ed Hephaestus, Groningen 2013) 14 (noting that under Art 40 of the Charter, judgments must be "recognised" throughout the Kingdom).

[391] ibid.

[392] ibid [12] ("Houdt de wederkerige uitvoerbaarheid van rechterlijke vonnissen en bevelen in dat ook de andere werkingen van een rechterlijke uitspraak (bindende kracht, bewijskracht) van rechtswege gelden, of gaat daaraan een erkenning vooraf? Mag bijv. de Nederlandse rechter aan een door de Antilliaanse rechter gewezen vonnis bindende kracht ontzeggen op de grond dat de Antilliaanse rechter zich ten onrechte bevoegd heeft geacht of op de grond dat geen behoorlijke procesvoering heeft plaatsgevonden? En mag mutatis mutandis de Antilliaanse rechter zich hetzelfde oordeel voorbehouden ten aanzien van vonnissen en beschikkingen van de Nederlandse rechter?).

[393] See *Regeling van de formaliteiten, vereist voor de tenuitvoerlegging van in vreemde Staten totstandgekomen executoriale titels in burgerlijke zaken*, Kamerstukken I (1962-1963) 7179, No 3 (MvT) [7] ("Perhaps it is unnecessary to point out that the new ninth title, as is evident from the term 'foreign [literally: alien] State', has no application to judgments from Suriname and the Dutch Antilles. The execution in the Netherlands of these executable instruments is not based on Arts 431 in conjunction with 985 and 993, but—like before—on Art 40 of the Charter. Execution occurs in line with the mandate of the lastmentioned provision in accordance with the rules applicable in the Netherlands for the execution of Dutch executable instruments.") ("Wellicht ten overvloede zij vermeld, dat de nieuwe negende titel, naar ook reeds uit de telkens gebezigde term 'vreemde Staat' blijkt, geen betrekking heeft op executoriale titels, afkomstig uit Suriname en de Nederlandse Antillen. De tenuitvoerlegging van deze executoriale titels in Nederland berust niet op de artikelen 431 juncto 985 en 993 van het Wetboek van

Arguably, Strikwerda is also correct that the Charter does not re-enact a principle of territoriality among the Kingdom's countries. Admittedly, there is no uniformity of law in the Kingdom; Article 39 of the Charter merely requires that the Kingdom's constituent countries closely align the fundamental parts of their legal systems, including civil law and civil procedure. In addition, the Kingdom does not as a rule have rules of 'private interregional law' ('*interregionaal privaatrecht*') to resolve conflicts of laws or conflicts of jurisdiction so that each country must apply its own rules of private interregional law.[394] However, the Kingdom is a single justice area over which the Dutch Supreme Court has general appellate jurisdiction,[395] which means that unless and until a judgment from anywhere in the Kingdom is successfully challenged in the Supreme Court, it has validity by virtue of the Charter for the territory of the Kingdom as a whole.

c. The Development of a legal framework

Territoriality under international law (as construed by Dutch courts) implies that a foreign judgment lacks validity in the Netherlands; a foreign judgment can acquire validity in Dutch territory, but only in the manner and subject to the conditions for its 'recognition' prescribed by Dutch law.[396] Article 431 Rv echoes the principle of

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Burgerlijke Rechtsvordering, doch — evenals voorheen — op artikel 40 van het Statuut voor het Koninkrijk der Nederlanden. Zij geschiedt, overeenkomstig hetgeen laatstgenoemd artikel voorschrijft, met inachtneming van de wettelijke bepalingen, die in Nederland gelden voor tenuitvoerlegging van Nederlandse executoriale titels.").

[394] HR 14 January 1994 (n 389) [3.5.2] (*Voogdijraad Sint Maarten*) ("As the Advocate General set out in his opinion at 14, the Kingdom does not have, certain exceptions irrelevant here aside, rules of private interregional law, so that each country must apply its proper rules of private interregional law. … The appeal fails insofar as it complains that the Court of Appeal failed to establish whether the Kingdom has unwritten principles of private interregional law. …[T]he Court of Appeal has rightly taken as its starting point that in the absence of a rule of Dutch-Antillean private interregional law, that gap must be filled by aligning with Dutch-Antillean private international law, so that there is no inconsistency.") ("3.5.2 Zoals is uiteengezet in de conclusie van de Advocaat-Generaal onder 14, kent het Koninkrijk, behoudens enkele hier niet ter zake doende uitzonderingen, geen regels van interregionaal privaatrecht, zodat elk land zijn eigen regels van interregionaal privaatrecht dient toe te passen. Het bestreden oordeel is dan ook juist, zodat het onderdeel faalt. Hierop stuit ook onderdeel 3.1.2 af, voorzover het de klacht bevat dat het hof heeft nagelaten te onderzoeken of er ongeschreven interregionaal privaatrecht binnen het Koninkrijk bestaat. Voor het overige faalt dit onderdeel, dat het hof weliswaar in rov. 2.13 van zijn eindbeschikking inconsistentie ten opzichte van rov. 2.15 verwijt, maar dat eraan voorbij ziet dat het hof in rov. 2.15, met juistheid, tot uitgangspunt neemt dat bij gebreke van een bestaande ongeschreven regel van Nederlands-Antilliaans interregionaal privaatrecht, in die leemte moet worden voorzien door aansluiting te zoeken bij het Nederlands-Antilliaanse internationaal privaatrecht, zodat van inconsistentie geen sprake is.").

[395] Charter, Art 23(1) in conjunction with Dutch Antilles Cassation Appeals Act 1961 (*Rijkswet van 20 juli 1961, houdende de Cassatieregeling voor de Nederlandse Antillen*) (entered into force 1 March 1965) Stb 1961, 212 (as amended), Art 1.

[396] HR 31 January 1902 (n 348) (*Breadhead/Stoomvaartmaatschappij Zeeland*) ("…dat toch, waar de rechter optreedt als een der organen van het Staatsgezag, zijn uitspraken als zoodanig alleen gelden voor het grondgebied waarover dat gezag zich uitstrekt, en daar buiten alleen verbindend zijn op zoodanige wijze en onder zoodanige voorwaarden als de bevoegde macht in elken betrokken Staat heeft voorgeschreven; dat dit beginsel, wat betreft de gerechtelijke tenuitvoerlegging, uitdrukkelijk is uitgesproken in art. 431 B. r , maar eveneens geldt ten aanzien van het gezag, hetwelk de wet aan een rechterlijk gewijsde toekent, al ontbreekt daaromtrent zoodanige uitspraak; dat toch ook dit gezag berust op erkenning van de rechtsmacht van den rechter, die de beslissing gegeven heeft, en in zooverre dus geen verschil is tusschen eene gerectelijke tenuitvoerlegging van het vreemde vonnis en het verbod om

territoriality by expressly prohibiting the execution of foreign judgments in the Netherlands, unless Dutch law expressly provides for the judgment's 'enforcement' by *exequatur*, which involves a Dutch court giving leave to execution in Dutch territory.[397]

In the absence of specific provisions by statute or international instrument, the law of foreign judgment recognition (and enforcement) in civil and commercial matters is governed by *judge-made* law;[398] some time ago, Hijmans summed up the position as follows: "Dutch jurisprudence has managed at the cost of litigants to devise principles eventually offering a mostly satisfactory answer to most (not all!) issues."[399] By contrast, Vlas recently observed that "[r]eform is urgently needed, but is not yet underway."[400] Arguably, the real deficiency is not the contents of the law, but its inaccessibility due to the fact that the law on foreign judgment recognition (and enforcement) is uncodified. As a result, the Netherlands continues to be widely *mis*represented as hostile to foreign judgments. As discussed below, the law is actually very liberal and advanced; the call, if any, should therefore be for *codification* of existing principles, not fundamental reform.

Since the second half of the nineteenth century, the Netherlands has sought (to some extent successfully) to address the issue internationally, as evidenced by the negotiation and conclusion of a number of international agreements, and of late, the issue has been further tackled supranationally for the Netherlands in the form of European regulations.[401] Then again, for judgments in civil and commercial matters there is today nothing comparable to the 1957 New York Convention on the recognition and enforcement of arbitral awards.[402] Judgments from major trading partners like America, China, Russia, Australia, and Canada therefore remain for the most part subject to (judge-made) 'common law' (*commuun recht*).[403]

(ii) The rationale for foreign judgment recognition

The principle of territoriality merely explains why foreign judgments lack validity in Dutch territory;[404] the principle fails to explain why Dutch courts have developed a practice of foreign judgment recognition, and why the Netherlands so actively pursues the matter internationally. In this regard, certain treaties that mandate the mutual recognition of judgments expressly aim at increasing economic and social

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daarmee strijdende aanspraken voor den Nederlandschen rechter geldend te maken…."). cf HR 31 May 1907 (n 347) (*Pezzella/Casseres*).

[397] Interestingly, Art 988(2) Rv provides that the judgment of the District Court addressed with the application for leave to execution is executable, which suggests that even *exequatur* does not render a foreign judgment executable in the Netherlands. Obviously, under Art 992 Rv, any special provisions by law or international instrument take precedence over Art 988(2) Rv.

[398] This is the case for judgments in civil and commercial matters. The situation is markedly different for judgments in family law matters. See Art 10:100ff BW. See further Paul Vlas, 'On the Development of Private International Law in The Netherlands: From Asser's Days to the Codification of Dutch Private International Law (1910-2010)' (2010) 57 NILR 167, 178ff.

[399] Hijmans (n 213) 4.

[400] Vlas (n 398) 178.

[401] See text to n 411ff.

[402] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3. After the failure of the Hague judgments project, the watered down Convention on Choice of Court Agreements (Hague Choice of Court Convention) (adopted 30 June 2005) [2009] OJ L133/3 has not yet entered into force.

[403] See text to n 428ff.

[404] See Part II, Introduction, text to n 1ff. cf Text to n 347ff.

activity between the contracting States.[405] Surely, the public benefits are part of the equation. Courts, like the Supreme Court of Holland and Zeeland in 1755, cite the need to further a proper administration of justice among legal systems as well as within.[406]

Perhaps the rationale for foreign judgment recognition is too obvious to merit separate statement; as Smit observed, "Dutch scholars, unlike their American counterparts, have generally abstained from probing into the reasons that may motivate recognition of foreign judgments."[407] It is suggested that Dutch practice, which is discussed below,[408] broadly reflects Jitta's view that "[c]onsidering the limits means at the State's disposal when it seeks to uphold the law in international traffic, it should accord such significance to foreign judgments as required by the interest in *legal certainty* in global relations."[409] In this regard, he added, "legal certainty in international traffic requires not only that eventually *justice* is done, but also that a judgment given by a court of competent jurisdiction brings lasting *finality* to litigation."[410]

(iii) The current legal framework

Bearing in mind the influence of international agreements and European regulations, the Dutch legal framework for foreign judgment recognition can be stated as follows:[411]

(1) European Enforcement Order for uncontested claims Regulation;[412]
(2) European Small Claims Procedure Regulation;[413]
(3) Brussels and Lugano Regime;[414]
(4) Revised convention for Rhine navigation [415] and other international agreements on particular matters;[416]
(5) Convention between Netherlands and Belgium on jurisdiction, bankruptcy, and the validity and enforcement of judgments, arbitration awards and authentic instruments;[417]

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[405] See, eg, Act on Ratification of the Convention between Netherlands and Germany on the mutual recognition and enforcement of judgments and other enforceable instruments in civil and commercial matters (Explanatory Memorandum) (*Goedkeuring van het op 30 augustus 1962 te 's-Graven-hage gesloten Verdrag tussen het Koninkrijk der Neder-landen en de Bondsrepubliek Duitsland betreffende de wederzijdse erkenning en tenuitvoerlegging van rechter-lijke beslissingen en andere executoriale titels in burgerlijke zaken*) (1963-1964) 7670 No 3 (*MvT*).
[406] See text to n 236ff.
[407] Smit (n 213) 173.
[408] See text to n 428ff.
[409] Josephus Jitta (n 213) 20 ("Rekening houdende met de gebrekkige middelen die hem ten dienste staan, wanneer hij als handhaver van het recht in het internationaal verkeer wil optreden, moet hij aan buitenlandsche vonnissen zoodanige kracht toekennen, als door het belang der rechtszekerheid in het wereldverkeer wordt gevorderd…."). cf Nysing (n 213) 8-11.
[410] ibid 51.
[411] For a comprehensive overview of all conventions until 1980, see Verheul (n 213).
[412] (n 97).
[413] (n 98).
[414] (Introduction n 44).
[415] *Herziene Rijnvaartakte* (adopted 17 October 1868, entered into force 1 July 1869) Stb 1869, 37.
[416] See Verheul (n 213) 103ff.
[417] *Verdrag tussen het Koninkrijk der Nederlanden en het Koninkrijk België betreffende de territoriale rechterlijke bevoegdheid, betreffende het faillissement en betreffende het gezag en de tenuitvoerlegging van rechterlijke beslissingen, van scheidsrechterlijke uitspraken en van authentieke akten* (adopted 28 March 1925, entered into force 1 September 1929) Stb 1929, 250.

(6) Convention between Netherlands and Italy on the recognition and enforcement of judgments in civil and commercial matters;[418]
(7) Convention between Netherlands and Germany on the mutual recognition and enforcement of judgments and other enforceable instruments in civil and commercial matters;[419]
(8) the Convention between the Netherlands and Austria on the Reciprocal Recognition and Enforcement of Judgments and Authentic Instruments in Civil and Commercial Matters;[420]
(9) Convention between the United Kingdom of Great Britain and Northern Ireland and Netherlands providing for the reciprocal recognition and enforcement of judgments in civil matters;[421]
(10) Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters;[422]
(11) Agreement between Netherlands and Suriname providing for the reciprocal recognition and enforcement of judicial decisions and authentic acts in civil matters;[423] or (residually)
(12) common law[424].

a. The enforcement regime

Unlike for recognition at common law, there is a statutory regime for the enforcement of foreign judgments. Two situations should be distinguished. The first situation arises where a domestic statute, European regulation or international agreement mandates execution of the foreign judgment in question. Article 431(1) Rv then allows for enforcement by *exequatur* through the procedure of Arts 985 to 990 Rv. According to Art 992 Rv, this procedure applies only insofar as the specific instrument that mandates execution does not derogate (e.g. the enforcement

[418] *Verdrag tussen het Koninkrijk der Nederlanden en de Italiaanse Republiek betreffende de erkenning en de tenuitvoerlegging van rechterlijke beslissingen in burgerlijke en handelszaken* (adopted 17 April 1959, entered into force 18 May 1963) 474 UNTS 207, Stb 1963,15.
[419] *Verdrag tussen het Koninkrijk der Nederlanden en de Bondsrepubliek Duitsland betreffende de wederzijdse erkenning en tenuitvoerlegging van rechterlijke beslissingen en andere executoriale titels in burgerlijke zaken* (adopted 30 August 1962, entered into force 15 September 1965) 547 UNTS 173, Stb 1965, 91.
[420] Convention between Netherlands and Austria on the reciprocal recognition and enforcement of judgments and authentic instruments in civil and commercial matters (*Verdrag tussen het Koninkrijk der Nederlanden en de Republiek Oostenrijk betreffende de wederzijdse erkenning en tenuitvoerlegging van rechterlijke beslissingen en authentieke akten op het gebied van het burgerlijk recht*) (adopted 6 February 1963, entered into 30 April 1966) 570 UNTS 101, Stb 1965, 596.
[421] *Verdrag tussen het Koninkrijk der Nederlanden en het Verenigd Koninkrijk van Groot-Brittannië en Noord-Ierland betreffende de wederkerige erkenning en tenuitvoerlegging van vonnissen in burgerlijke zaken* (adopted 17 November 1967, entered into force 21 September 1969) 699 UNTS 11, Stb 1969, 44.
[422] *Verdrag betreffende de erkenning en de ten uitvoerlegging van buitenlandse vonnissen in burgerlijke en handelszaken* (adopted 1 February 1971, entered into force 20 August 1979) 1144 UNTS 249, Stb 1979, 137 <www.hcch.net/index_en.php?act=conventions.status&cid=78> accessed 1 March 2013 (applies to Albania, Cyprus, Portugal and Kuwait).
[423] *Overeenkomst tussen het Koninkrijk der Nederlanden en de Republiek Suriname betreffende de wederzijdse erkenning en de tenuitvoerlegging van rechterlijke beslissingen en authentieke akten in burgerlijke zaken* (adopted on 27 August 1976, entered into force 10 January 1979) 1135 UNTS 432, Trb 1976, 144, 1979, 7.
[424] See text to n 428ff.

procedure created under the Brussels and Lugano Regime)[425] or dispenses with the need for prior enforcement altogether (e.g. the EEO Regulation[426] or the Small Claims Regulation,[427] which exclude the need for enforcement).

The second scenario plays out in the absence of a domestic or international basis for the execution of a foreign judgment. In these circumstances there is no explicit statutory ground for enforcement, and Art 431(2) Rv provides that disputes can be considered and determined by a Dutch court anew. A foreign judgment creditor must therefore reassert the cause of action for which he recovered judgment abroad. But two things should be noted considering that Dutch courts liberally recognise foreign judgments: first, in a new claim based on the original cause of action, both parties can invoke the foreign judgment (e.g. a defendant who has already paid the foreign judgment debt can argue that the claimant lacks a sufficient interest to justify a right of action, while the claimant can invoke the res judicata effect of the foreign judgment); and, second, a foreign judgment creditor can file a claim on the basis of the foreign judgment ('action on the foreign judgment') which then forms the basis of a Dutch judgment, which can be executed throughout the Netherlands under Art 430(1) Rv.

(2) Recognition

Introduction

The Netherlands recognises foreign judgments, not merely when recognition is expressly mandated by European regulation or international agreement, but also at common law ('*commuun recht*').[428] By way of illustration, the Amsterdam Court of Appeal in *Yukos* held that, the absence of a Netherlands-Russia agreement on the topic notwithstanding, Russian judgments are recognised in the Netherlands, subject to certain conditions and exceptions:

> The starting point is that a foreign judgment, irrespective of its nature and purport, is recognised if a number of minimum requirements have been satisfied, including the requirement that the foreign judgment was arrived at following a proper administration of justice.[429]

Along the same lines, the Amsterdam District Court in *International Flavors & Fragrances* recognised a Californian judgment, notwithstanding that the Netherlands

[425] See Chapter 5, text to n 57ff.
[426] (n 97).
[427] (n 98).
[428] General Provisions Act 1829 (*Wet van 15 mei 1829, houdende algemeene bepalingen der wetgeving van het Koningrijk*) (entered into force 1 October 1838) Stb 1829, 28 (as amended), Art 13 ("The judge who refuses to render justice for reasons of the lack, unclarity or incompleteness of the law, can be prosecuted for a denial of justice.") ("De regter die weigert regt te spreken, onder voorwendsel van het stilzwijgen, de duisterheid of de onvolledigheid der wet, kan uit hoofde van regtsweigering vervolgd worden.").
[429] Hof Amsterdam 28 April 2009 (Chapter 1 n 426) (*Yukos Capital Sarl/OAO Rosneft*) [3.6] ("Als uitgangspunt geldt daarbij dat een vreemd vonnis, ongeacht zijn aard en strekking, wordt erkend indien aan een aantal minimumvereisten is voldaan, waartoe behoort dat het vreemde vonnis tot stand is gekomen na een behoorlijke rechtspleging. Van behoorlijke rechtspleging is geen sprake indien aangenomen moet worden dat het vreemde vonnis is gewezen door een rechterlijke instantie die niet onpartijdig en onafhankelijk is.").

and the United States never concluded an agreement to this effect.[430] The court identified the following conditions: "(i) the Californian court had jurisdiction on an acceptable basis, (ii) the procedure in the US was consistent with the principles of a fair trial, and (iii) recognition of that judgment does not violate Dutch public policy."[431]

The basis for foreign judgment recognition as common law—the question why parties are bound to comply with a foreign judgment in the Netherlands—has historically been the subject of some confusion: two competing views are that recognition implies accepting the *jurisdiction* of the foreign court or, alternatively, that recognition is based on the parties' *private law obligation* to comply with the foreign judgment, based on their (implied) agreement to submit their dispute to the foreign court.

A further complicating factor is that the (mis)interpretation of Art 431 Rv has had a devisive influence on the common law of foreign judgment recognition. Article 431(2) Rv was (erroneously) treated as a bar to the recognition of foreign judgments *for the claimant*, meaning, as Vlas put it, that a Dutch court "will have to ignore those judgments",[432] while courts carefully carved out from the reach of the provision foreign judgments *for the defendant* and foreign *status*-judgments, which do not require execution and thus could not be affected by Art 431 Rv.[433]

(i) A doctrine of good faith?

Against the background of the principle of territoriality, the Dutch Supreme Court in *The Prins Hendrik* held that attaching legal consequences to a foreign judgment (e.g. execution or preclusive effects) involves accepting the *jurisdiction* of the foreign

[430] Rb Amsterdam 21 February 2007, ECLI:NL:RBAMS:2007:BA4506, JBPr 2007, 71 mnt GSCM van Roeyen [2.13] (*A International BV/International Flavors & Fragrances IFF BV*) [2.13].

[431] ibid ("Vast staat dat geen executieverdrag van toepassing is op basis waarvan de uitspraak van de Californische rechter in Nederland na een exequaturprocedure kan worden geëxecuteerd. Erkenning van die beslissing is buiten verdrag wel mogelijk, indien (i) de Californische rechter bevoegd was op aanvaardbare grondslag, (ii) de procedure in de VS voldoet aan beginselen van fair trial, en (iii) erkenning van de uitspraak niet strijdig is met de Nederlandse openbare orde. Geen van partijen heeft aangevoerd dat niet aan die eisen zou kunnen worden voldaan. De uitspraak van de Californische rechter zal na erkenning (op de onderdelen die daarvoor in aanmerking komen) gezag van gewijsde krijgen tussen partijen. Bovendien is het mogelijk om op de voet van artikel 431 lid 2 Rv een executoriale titel te verkrijgen. In het geval van een voor erkenning vatbare buitenlandse uitspraak verschilt die procedure niet wezenlijk van een exequaturprocedure omdat de rechter ook daarin niet zal toekomen aan een inhoudelijke behandeling van de zaak."). ("Fact is that there is no convention based on which the judgment of the Californian court can be executed in the Netherlands following its enforcement by exequatur. Recognition of that judgment is possible outside of the framework of a convention where (i) the Californian court had jurisdiction on an acceptable basis, (ii) the procedure in the US was consistent with the principles of a fair trial, and (iii) recognition of that judgment does not violate Dutch public policy. The parties have not alleged that any of these conditions is not met. The decision of the Californian court will upon its recognition be attributed preclusive effect between the parties (insofar as appropriate). Furthermore an enforceable judgment can be obtained on the basis of Article 431(2) Rv. In case a foreign judgment is capable of recognition, this procedure is not fundamentally different from the exequatur procedure, because in both procedures the court does not proceed to determine the case on its merits.").

[432] *Groene Serie* (n 213) Article 985 Rv [5].

[433] See, respectively, HR 14 November 1924 (n 323) (*Kühne/Platt* (*Bontmantel*)) and HR 24 November 1916 (n 325) (*ENVM/M*).

judgment-rendering court.[434] On this view, 'recognition' implies that a foreign judgment acquires validity in the Netherlands and the force of law between the parties. This view aligns with the fact that the only real condition for recognition in Dutch private international law is that the foreign judgment-rendering court exercised jurisdiction on an internationally accepted basis.[435]

Nevertheless, a competing view is that 'recognition' a foreign judgment involves keeping the parties to their bargain to comply with the foreign court's decision. This view of the basis for compelling the parties' compliance with a foreign judgment is not entirely incomprehensible, since the idea that parties by their own conduct may incur a 'good faith' obligation to comply with a foreign judgment derives from the Supreme Court's case law on jurisdiction agreements; in particular, the Court in *Société Anonyme Manufacture Générale de Caoutchoucs/Van Vliet* held that:

> [A] clause that determines that disputes arising from the parties' agreement will be determined by other persons or tribunals than by Dutch court adjudication [in this case a Belgian State court], does not preclude, after the alternative route is followed and a decision has been given by those other persons or tribunals, the filing of a claim at the Dutch court with competent jurisdiction for a judgment regarding the agreement in light of that decision, which the parties have in advance accepted as binding and which therefore forms part of the agreement.[436]

On the basis of this decision, Kollewijn observed that:

> The loosing party, *by virtue of the agreement*, is bound to comply with the foreign judgment. The winning party cannot ask the Dutch court to enforce the foreign judgment, but he may request enforcement of the agreement. The agreement imposes upon the parties the obligation to perform it according to *bona fides* (articles 1374 and 1375 of the Civil Code), and *bona fides* obligates the losing party to comply with the judgment of the court designated by the agreement.[437]

Kollewijn added:

> No special form is required for such agreement. It may even be implied from certain conduct—always on the assumption that the foreign court will consider itself competent. Thus, any person, by consenting to being sued, may submit voluntarily to the jurisdiction of the foreign court and, in this way, become bound to comply with the foreign judgment. The Dutch court will have to decide in each case whether the circumstances are such as to warrant the conclusion that a '*contrat judiciaire*' has been entered into.[438]

However, this 'good faith' doctrine of recognition, based on the parties' (implied) agreement to comply with a foreign judgment, no longer informs modern Dutch private international law; even in the context of *exclusive choice of court agreements*, the Dutch Supreme Court in *Esmil/Enka* held that "in a claim … based on a foreign judgment given by a court having *jurisdiction* by virtue of an exclusive choice of

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[434] HR 31 January 1902 (n 348) (*Breadhead/Stoomvaartmaatschappij Zeeland*). cf HR 31 May 1907 (n 347) (*Pezzella/Casseres*). See text to n 348ff.
[435] See text to n 454ff.
[436] HR 26 April 1918, NJ 1918, 578.
[437] Kollewijn (n 213) 35 (emphasis added).
[438] ibid 35-36.

court agreement", the starting point is that "the parties are bound *by the judgment*."[439] Accordingly, recognition implies that the parties, by virtue of the acceptance of a foreign court's *jurisdiction*, are bound to comply with the foreign *judgment*.

A final observation should be made on the case of *The Fur Coat Case*.[440] According to Kollewijn, the Supreme Court in this case held that "a Dutch court must decide in each case whether and to what extent a foreign judgment will be *recognised*".[441] But this reading of the Court's decision is doubtful, since the case did not concern the *recognition of* foreign judgments but the problem of *preclusion by* foreign judgments; the issue was whether a claimant who was unsuccessful in England and Wales could have another bite at the cherry in the Netherlands.

The Court of Appeal in this case, in a decision affirmed by the Supreme Court, ruled that "[w]hile Dutch law contains no rule that attributes a foreign judgment res judicata effect, it neither contains a rule that requires that such judgment must be denied any significance."[442] The Court then added that "it would violate principles of good faith, fairness and legal equality, which also apply as part of unwritten private international law, if the claimant was permitted to pursue the defendant again in this country as if he is not bound by the judgment of the English court that rejected his claim".[443] Though the Court referred to principles of "good faith" and the like, the Court cited those principles in justification for attributing res judicata effect to the English judgment; as Meijers rightly pointed out in his assessment of the case:

> Res judicata effect is a legal consequence of a judgment; good faith and fairness are sources of law. In this case, res judicata effect was attributed on the basis of unwritten rules of law, instead of a statutory rule; the Court of Appeal therefore expressly referred to unwritten principles of private international law.[444]

Similarly, Offerhaus accepted in 1934 that *The Fur Coat Case* concerned "res judicata effect".[445] Against this background, a proper reading of the Supreme Court's

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[439] HR 13 December 1993, NJ 1994, 348 [3.3.6] (*Esmil/Enka*) (emphasis added) ("Voorts verdient opmerking dat aangenomen moet worden dat bij het instellen van een vordering op de voet van artikel 431 lid 2 op grondslag van een uitspraak van een buitenlandse rechter die op grond van de jurisdictieclausule uitsluitend bevoegd is, in beginsel kan worden volstaan met het stellen van deze clausule en de op basis daarvan verkregen uitspraak, terwijl de vordering in beginsel slechts behoeft te strekken tot veroordeling tot hetgeen waartoe de wederpartij bij die uitspraak is veroordeeld. In het geding zal, zo deze stellingen juist bevonden zijn, de gebondenheid van partijen aan deze uitspraak als uitgangspunt moeten worden genomen.").

[440] HR 14 November 1924 (n 323) (*Kühne/Platt* (*Bontmantel*)). See in more detail Chapter 4, text to n 222ff.

[441] Kollewijn (n 213) 37-8.

[442] HR 14 November 1924 (n 323) (*Kühne/Platt (Bontmantel)*) ("…dat weliswaar in de Nederlandsche wetgeving geen bepaling voorkomt die aan een buitenlandsch vonnis hier te lande kracht van gewijsde zaak toekent, doch zij evenmin eene bepaling bevat, op grond waarvan zoodanig vonnis alle betekenis zou moeten worden ontzegd….).

[443] ibid ("…dat het Hof met de Rechtbank van oordeel is dat het in strijd zou zijn met de ook in het ongeschreven internationaal privaatrecht toe te passen beginselen van goede trouw en billijkheid en met de rechtsgelijkheid, indien appellante, die, wanneer zij in hare actie bij den Engelschen rechter geslaagd ware, een tegen geïntimeerden uitvoerbaar vonnis zou hebben gekregen, waaraan geïntimeerden gebonden zouden zijn, thans, nu zij door dien rechter in het ongelijk is gesteld, aan diens vonnis niet zou zijn gebonden en, alsof het Engelsche vonnis niet bestond, geïntimeerden nogmaals met dezelfde actie nog eens hier te lande zou kunnen gaan vervolgen….").

[444] Meijers, 'Het Bontmantelarrest' (n 213) 98.

[445] Offerhaus (n 320) 512.

decision in this case is that "the rule proposed in the decision under appeal, that a Dutch court must decide in each particular case whether and to what extent it should attribute a foreign judgment res judicata effect, does not violate … Articles 1953 and 1954 OBW [now Article 236 Rv]".[446] The implications of the Court's decision for how Dutch courts approach the problem of preclusion by foreign judgments is discussed separately below.[447]

(ii) A single doctrine of recognition

Article 431(1) Rv bars the *execution* of foreign judgments in the Netherlands (save for the exceptions provided by statute or international instrument). This provision logically entails, as Art 431(2) Rv expressly provides, that the original cause of action can be reconsidered and the claim redetermined by a Dutch court. However, Art 431(2) Rv does not bar the recognition of foreign judgments *for the claimant*; the Dutch Supreme Court confirmed this in *Esmil v Enka* regarding a foreign judgment rendered by a court that exercises jurisdiction based on the parties' exclusive choice of court agreement:

> [I]n a claim under Article 431(2) Rv based on a foreign judgment given by a court having jurisdiction by virtue of an exclusive choice of court agreement, as a rule it is sufficient to state this agreement and the judgment obtained pursuant to it, while the claim need only be for an order imposing that what the judgment debtor was ordered in that judgment. The starting point in these proceedings is, if those matters are established, that the parties are bound by the judgment.[448]

The Court in this case addressed the relevance of a foreign judgment in the context of proceedings in the sense of Art 431(2) Rv. The relevance of the Court's decision cannot then be restricted by noting that the foreign court's jurisdiction in this case was based on the parties' *exclusive* choice of court agreement, so as to exclude the application of Art 431(2) Rv in the first place. Schultsz observed similarly that "this simplified way of recovering an enforceable Dutch judgment is generally not restricted to the situation where the foreign court derived its jurisdiction from a choice of court agreement."[449] Article 431 Rv, it may be recalled, is but an expression of the principle of territoriality, which principle is not incompatible with and does not

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[446] HR 14 November 1924 (n 323) (*Kühne/Platt* (*Bontmantel*)) ("dat de in het bestreden arrest voorgestelde regel, dat de Nederlandsche rechter in elk bijzonder geval heeft te beoordelen of en in hoeverre aan een vreemd vonnis door hem gezag moet worden toegekend, met geen der in het middel aangehaalde wetsbepalingen in strijd is, in het bijzonder niet met de artt. 1953 en 1954 B.W. …."). But see Verheul (n 213) 67, who defines 'recognition' as the 'attribution of preclusive effect'. He notes, for example, that application of what is now Article 236 Rv to a foreign judgment would impy "automatic recognition".

[447] See Chapter 4, text to n 222ff.

[448] HR 13 December 1993 (n 439) [3.3.6] (*Esmil/Enka*) ("Voorts verdient opmerking dat aangenomen moet worden dat bij het instellen van een vordering op de voet van artikel 431 lid 2 op grondslag van een uitspraak van een buitenlandse rechter die op grond van de jurisdictieclausule uitsluitend bevoegd is, in beginsel kan worden volstaan met het stellen van deze clausule en de op basis daarvan verkregen uitspraak, terwijl de vordering in beginsel slechts behoeft te strekken tot veroordeling tot hetgeen waartoe de wederpartij bij die uitspraak is veroordeeld. In het geding zal, zo deze stellingen juist bevonden zijn, de gebondenheid van partijen aan deze uitspraak als uitgangspunt moeten worden genomen.").

[449] HR 17 December 1993, NJ 1994, 350 mnt JC Schultsz [8] (*Esmil/PGSP*) ("Toepassing van de vereenvoudigde wijze van verkrijging van een Nederlandse executoriale titel is in beginsel niet beperkt tot het geval waarin de buitenlandse rechter zijn bevoegdheid ontleent aan een jurisdictieclausule.").

exclude the recognition and enforcement of foreign judgments.[450] In this sense, the Hague Court of Appeal recently held in respect of a judgment for the claimant from a court that had exercised jurisdiction that:

> There is no treaty between the Netherlands and the Russian Federation pursuant to which the Russian judgment can be recognised and enforced in the Netherlands. [Claimant] therefore relies on Article 431(2) Rv. According to this provision, the matter can be considered and determined anew by the Dutch court. However, in this regard, it is assumed that the court can refrain from a determination on the merits if it finds that the foreign judgment meets the common law requirements for recognition; in that case, the court can simply order the defendant to do what he was already ordered to do by the foreign judgment. This approach is also called the 'concealed exequaturprocedure'.[451]

Accordingly, the common law of foreign judgment recognition, which initially developed in relation to foreign judgments for the defendant and foreign status-judgments, actually has *general* application in any case where a foreign judgment is invoked in Dutch proceedings, including in circumstances where the foreign judgment was *for the claimant* (i.e. granted the claim). The Government was (broadly) accurate them in stating as a matter of *general* application that "according to modern Dutch law, recognition is possible if the foreign court based its jurisdiction on internationally accepted rules, applied proper rules of procedure and the decision does not violate public policy."[452] Similarly, the Hague Court of Appeal in the immediately aforementioned case restated the common law as follows:

> [T]he judgment is recognised if three minimum requirements developed in case-law are met (cf. the Hague Court of Appeal 14 January 1925, W 11150; HR 14 November 1924, NJ 1925, 91). First, the foreign court must have based its jurisdiction on an internationally generally accepted ground of jurisdiction. Second,

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[450] See, eg, Rb Middelburg 5 April 2006, ECLI:NL:RBMID:2006:AY7069, NJF 2006, 517 (*New Card Inc*). cf ThM de Boer, Note on HR 3 July 1995' (1997) NJ 1997, 54 [3] ("Nowadays, our approach to foreign judgments is far less one-dimensional. … In relation to judgments for the claimant, the 'new determination' in the sense of Article 431(2) Rv does not mean more than that the Dutch court verifies whether the foreign judgment satisfies a number of procedural requirements and whether the foreign decision (which is to be adopted in the Dutch judgment) does not violate public policy.") ("Tegenwoordig is onze houding tegenover buitenlandse beslissingen heel wat minder eenkennig. … Gaat het om een veroordelend vonnis, dan betekent de 'nieuwe behandeling' op de voet van artikel 431 lid 2 Rv niet veel meer dan dat de Nederlandse rechter toetst of de buitenlandse beslissing voldoet aan een aantal procesrechtelijke voorwaarden en of het effect van de (in het Nederlandse vonnis over te nemen) buitenlandse beslissing geen strijd met de openbare orde oplevert.").

[451] Hof Den Haag 28 May 2013, ECLI:NL:GHDHA:2013:CA1195 [7] ("Nu geen verdrag bestaat tussen Nederland en de Russische Federatie op grond waarvan het Russische vonnis voor erkenning en tenuitvoerlegging in Nederland in aanmerking komt, bewandelt Gazprombank de weg van artikel 431 lid 2 Rv. Volgens deze bepaling kan het geding opnieuw bij de Nederlandse rechter worden behandeld en afgedaan. In dat kader wordt evenwel aangenomen dat de rechter een behandeling ten gronde achterwege kan laten indien hij heeft vastgesteld dat het buitenlandse vonnis voldoet aan de eisen die het commune recht stelt aan erkenning; alsdan kan worden volstaan met veroordeling van de gedaagde tot datgene waartoe hij ook reeds bij het buitenlandse vonnis was veroordeeld. Deze benadering wordt ook wel de 'verkapte exequaturprocedure' genoemd.").

[452] Civil Procedure Code Revision Act (Explanatory Memorandum) (*Herziening van het procesrecht voor burgerlijke zaken, in het bijzonder de wijze van procederen in eerste aanleg*) 26855 No 3, 45 (*MvT*) ("Naar huidig Nederlands recht kan erkenning volgen indien de buitenlandse rechter zijn bevoegdheid op internationaal aanvaarde regels heeft gebaseerd, hij behoorlijke regels van procesvoering heeft toegepast en de beslissing niet in strijd is met de openbare orde.").

> the judgment must be the product of a fair trial. Finally, the judgment must not violate public policy.[453]

It is presently suggested that the "three minimum requirements" to which the Court refers, actually involve one precondition for recognition (*jurisdiction*), and one exception to recognition (*public policy*).

(iii) The precondition: Jurisdiction based on internationally acceptable grounds

The only real condition for the recognition at common law is that the foreign court exercised *jurisdiction* on the basis of "an internationally accepted ground".[454] The emphasis on the international acceptability of the foreign court's exercise of jurisdiction implies that the question is irrelevant whether the foreign court had jurisdiction under the law of the judgment-rendering State; the same applies to the question whether the foreign court had jurisdiction by Dutch standards of jurisdiction; rather, in evaluating the foreign court's jurisdiction, the Dutch court is likely to look at widely used bases for jurisdiction, as well as international instruments.[455]

Some courts require additionally that a foreign judgment has acquired the status of res judicata under the law of the rendering court.[456] But, while (the prospect of) an appeal or other means of recourse against a judgment can be a reason for a stay of proceedings, it provides no sound reason to deny a foreign judgment recognition. Along similar lines, the enforceability of a foreign judgment under the law of the State of rendition is not a requirement for recognition, even though a Dutch court in proceedings under Art 431(2) Rv will deny a claim for an enforceable judgment on the basis of foreign judgment that proves to be unenforceable under the law of the rendering State.[457]

(iv) The exception: Public policy

The Supreme Court in *The Fur Coat* held regarding an English judgment, which formed the basis for a plea of res judicata, that "the Dutch court should *only* ignore

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[453] Hof Den Haag 28 May 2013 (n 451) [8] ("Daarbij geldt als uitgangspunt dat het vonnis wordt erkend indien is voldaan aan drie in de jurisprudentie ontwikkelde minimumvereisten (vgl. Gerechtshof 's-Gravenhage 14 januari 1924, W 11150; HR 14 november 1924, NJ 1925, 91). In de eerste plaats geldt het vereiste dat de buitenlandse rechter zijn internationale bevoegdheid heeft ontleend aan een internationaal algemeen aanvaarde bevoegdheidsgrond. In de tweede plaats dient het buitenlandse vonnis tot stand te zijn gekomen na een behoorlijke rechtspleging. In de derde plaats mag het buitenlandse vonnis niet in strijd zijn met de openbare orde."). cf Hof Arnhem 24 May 2011, ECLI:NL:GHARN:2011:BQ5765 [4.5]; and Hof Den Haag 30 November 2010, ECLI:NL:GHSGR:2010:BO6505 [4.2].

[454] See Hof Arnhem 24 May 2011, ECLI:NL:GHARN:2011:BQ5765 [4.5]-[4.8]; and Rb Arnhem 21 June 2010, ECLI:NL:RBARN:2010:BM8462, RFR 2010, 103, JPF 2010, 109. cf Rb Amsterdam 31 October 2007 (Chapter 3 n 294) (*Godfrey/Rebgun*); Rb Amsterdam 21 February 2007 (n 430) [2.13] (*A International BV/International Flavors & Fragrances IFF BV*); Rb Rotterdam 21 November 2006, ECLI:NL:RBROT:2006:AZ5357 (*Aquila Shipping Company Ltd/Rohden Bereedung GMBH*); and Rb Middelburg 5 April 2006 (n 450) [2.3] (*New Card Inc*).

[455] See, eg, Hof Arnhem 24 May 2011 (n 453) [4.5]-[4.8].

[456] Rb Zwolle 16 August 1995, NIPR 1996, 143 (*Batu/Witteveen & Bos Raadgevende Ingenieurs BV*). cf Rosner (n 213) 51. But see (correctly) Van het Kaar (n 213) 230.

[457] Hof Den Haag 28 May 2013 (n 451) [10].

this judgment if it violates *Dutch principles of public policy*".[458] Dutch public policy is thus a ground for refusing recognition, not a condition for recognition. Advocate General Strikwerda in his opinion in *LBIO v W* observed that "the public policy exception relates to either the *outcome* (as in the result) of the foreign judgment or the *manner in which the judgment came about* (the fundamental requirements of a sound administration of justice)."[459] Accordingly, the requirement of a fair trial, though sometimes presented as a separate ground for refusing recognition,[460] actually forms part of the principles of public policy upheld by Dutch courts.

Examples of a violation of Dutch public policy include the partiality and dependence of the foreign judgment-rendering court,[461] the fact that the foreign court adopted an order against a non-party who had not been able to defend themselves,[462] or violation of mandatory rules of law such as competition law[463]. In assessing a violation of public policy, Dutch courts look primarily at facts at the time of the rendition of judgment (*ex tunc*) but will not ignore later circumstances (*ex nunc*) which render the recognition of a foreign judgment inappropriate.[464]

3.3 The Brussels and Lugano Regime

Introduction

For the EU, the principle of 'mutual recognition' forms a "cornerstone" of the EU civil justice area.[465] That principle is now expressed in the Treaty.[466] It is

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[458] HR 14 November 1924 (n 323) (*Kühne/Platt* (*Bontmantel*)) ("…dat het Hof geheel in overeenstemming met den vooropgestelden regel, niet besliste, dat de eischeresse in ieder geval aan het Engelsche vonnis gebonden zou zijn, maar die gebondenheid in dit geval aannam, op grond dat het in strijd zou zijn met goede trouw en billijkheid, zoo aan de eischeresse werd toegestaan hare vordering nadat en omdat deze door den Engelschen rechter, wiens tusschenkomst zij geheel vrijwillig had ingeroepen, was ontzegd, opnieuw aan het oordeel van den Nederlandschen rechter te onderwerpen, eene beslissing, waardoor geen der in het middel aangehaalde wetsbepalingen, inzonderheid niet de artt. 1373 en 1375 B. W., kunnen zijn geschonden; O. verder, naar aanleiding van de grief onder b omschreven, dat ook ten aanzien van dit punt 's Hofs beslissing is juist, daar vaststaande, dat de eischeres geheel vrijwillig het oordeel van den Engelschen rechter inriep en naar goede trouw en billijkheid daaraan was gebonden, ook met het Hof moet worden aangenomen, dat de Nederlandsche rechter slechts dan dat oordeel heeft ter zijde te stellen indien het indruischt tegen Nederlandsche beginselen van openbare orde, waarvan ten deze niets is gebleken….").

[459] HR 2 April 2002 (Chapter 2 n 139) (*LBIO v W*) [15] ("Op het terrein van de erkenning en tenuitvoerlegging van buitenlandse beslissingen heeft de openbare orde-exceptie betrekking op de uitkomst (in de zin van het resultaat) van de vreemde beslissing of op de wijze waarop deze tot stand is gekomen (de fundamentele eisen van een goede procesorde).").

[460] See, eg, Rb Amsterdam 31 October 2007 (Chapter 3 n 294) [3.4] (*Godfrey/Rebgun*). However, at [3.21], the court concluded that infringement of the right to a fair trial (partiality and dependence of the judiciary) violates Dutch public policy, thereby reassociating the two aspects that it initially presented separately.

[461] Hof Amsterdam 28 April 2009(Chapter 1 n 426) (*Yukos Capital Sarl/OAO Rosneft*).

[462] Rb Utrecht 9 June 2010, ECLI:NL:RBUTR:2010:BM7168 (*Spectranetics*).

[463] Hof 's-Gravenhage 24 March 2005, ECLI:NL:GHSGR:2005:AT4660 (*Marketing Displays International Inc*).

[464] Rb Arnhem 21 June 2010 (n 454).

[465] TEU, Art 3(2) ("The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.") in conjunction with Art 67(1) TFEU ("The Union shall constitute an area of

implemented inter alia by the 'automatic recognition'-regime for judgments in civil and commercial matters under Art 33 of the Brussels I Regulation[467]. Before this regulation, the principle found expression in the Brussels Convention and the Lugano Convention[468] (the latter was recently revised—the Revised Lugano Convention)[469]. Though the principle as well as its implementing legislation fail to define 'recognition', the CJEU clarified in *Hoffmann v Krieg*[470] that the aim of automatic recognition is "to facilitate […] *free movement of judgments*."[471] Recognition (and enforcement) implies that a judgment is "incorporated into the legal order of the Member State in which [recognition or] enforcement is sought".[472]

This 'Brussels Regime', which by separate international agreements basically extends to Denmark and the EFTA-Member States (jointly referred to as 'Brussels and Lugano Regime'),[473] qualifies as a 'permissive rule' under international law, by which the EU, which the Member States have conferred the necessary legislative powers,[474] extends the sphere of validity of Member State judgments throughout the territory of the Union. Automatic recognition therefore implies "[a] presumption of validity of the foreign judgment."[475] In this sense, Moore-Bick LJ in *National Navigation Co v Endesa Generacion SA (The Wadi Sudr)* observed:

> Recognition as such is not defined in the Regulation…. In my view it means no more than accepting the judgment as an effective decision of the court in question and thus as conferring on it the same authority as would be accorded to it in the Member State in which it was given: see *Hoffmann v Krieg* (145/86) [1988] E.C.R. 645….[476]

Mutual recognition in the EU is (and will remain)[477] subject to a public policy exception.[478] This exception signals that the principle of mutual recognition was not

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freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.").

[466] TFEU, Art 67(4) ("The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.").

[467] "A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required." cf Brussels I Regulation, Recital 16 ("Mutual trust in the administration of justice in the Community justifies judgments given in a Member State being recognised automatically without the need for any procedure except in cases of dispute"), and Recital 17 ("By virtue of the same principle of mutual trust, the procedure for making enforceable in one Member State a judgment given in another must be efficient and rapid. To that end, the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents supplied, without there being any possibility for the court to raise of its own motion any of the grounds for non-enforcement provided for by this Regulation").

[468] (Introduction n 43).

[469] Revised Lugano Convention (Introduction n 43).

[470] Case 145/86 *Horst Ludwig Martin Hoffmann v Adelheid Krieg* [1988] ECR 645.

[471] ibid [11].

[472] Case 139/10 *Prism Investments BV v Jaap Anne van der Meer* [2011] ECR I-9511 [40].

[473] See Introduction n 44.

[474] See Chapter 5, text to n 127ff.

[475] Jenard Report (Part II, Introduction n 18) 53.

[476] [2009] EWCA Civ 1397, [2010] 2 All ER (Comm) 1243, [2010] 1 Lloyd's Rep 193, [2009] 2 CLC 1004, [2010] ILPr 10 [107].

[477] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Brussels I Regulation recast) [2012] OJ L 351/1, Art 45(1)(a).

[478] See Brussels I Regulation, Art 34 ("A judgment shall not be recognised: 1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought; 2. where it was given in default of appearance, if the defendant was not served with the document which instituted the

intended to help forge a single nation out of an aggregation of sovereign States, in the same way as, for instance, the U.S. Full Faith and Credit Clause.[479] The EU aims to create an "ever closer union among the peoples of Europe",[480] as confirmed by the TEU's preamble, and thus to advance European (legal) integration[481]. However, the stated destiny of the Union is not to become a federal *State*; in fact, the TEU expressly prohibits the Union from impinging on its Members States' "essential State functions".[482] The legitimate aim of the principle of mutual recognition is therefore first and foremost to further the *private* interest in justice and finality of those who seek to use judgments abroad.

But mutual recognition is not, as a rule,[483] subject to review of the jurisdiction of the judgment-rendering court, unlike, for instance, under the U.S. Full Faith and Credit Clause[484]. Under the Brussels Regime, the common rules of direct jurisdiction and the rules on the recognition and enforcement of judgments, "do not constitute distinct and autonomous systems but are closely linked",[485] since "[i]t is on that link that rests the simplified mechanism of recognition and enforcement … and which leads… to there being no review of the jurisdiction of the courts of the Member State of origin"[486]. In this regard, it should be noted that the system's prohibition of a judgment's review as to its substance implies "complete confidence [mutual trust] in the court of the State in which judgment was given; it is similarly to be assumed that that court correctly applied the [harmonised] rules of jurisdiction".[487]

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proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so; 3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought; 4. if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.").

[479] See text to n 488ff.

[480] See TEU, Preamble ("RESOLVED to continue the process of creating an ever closer union among the peoples of Europe.") and Art 1, second paragraph ("This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.").

[481] See TEU, Preamble ("IN VIEW of further steps to be taken in order to advance European integration."). cf TEU, Art 20(1), second paragraph ("Enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process.").

[482] TEU, Art 4(2). The Member States, as demonstrated by the Brussels I Regulation (recast) (Introduction n 44), rejected the European Commission's proposal to abolish public policy as exception to recognition in the Brussels I Regulation (see Commission, 'Proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast)' COM (2010) 748 final 6). Indeed, elimination of the public policy-exception would have been tantamount to renouncing the core of State sovereignty.

[483] See Brussels I Regulation, Art 35(1) ("a judgment shall not be recognised if it conflicts with Sections 3, 4 or 6 of Chapter II, or in a case provided for in Article 72.").

[484] See text to n 488ff.

[485] *Gothaer* (Part I, Introduction n 1) [35]. cf Case C‑514/10 *Wolf Naturprodukte GmbH v SEWAR spol s ro* [2012] ECR I‑0000 [25].

[486] ibid [35]. cf Opinion 1/03 *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* [2006] ECR I-1145 [163].

[487] Jenard Report 46. cf *Gothaer* (Part I, Introduction n 1) [37]. In Case C-7/98 *Dieter Krombach v André Bamberski* [2000] ECR I-1935, at [31]-[33], the Court referred to this prohibition of review as a "fundamental principle", with the effect that "that the public policy of the State in which enforcement is sought cannot be raised as a bar to recognition or enforcement of a judgment given in another Contracting State solely on the ground that the court of origin failed to comply with the rules of the

A. Comparison: Full Faith and Credit in the U.S.

By way of brief comparison, the Full Faith and Credit Clause of United States Constitution—Art IV, § 1—demands that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." The clause further provides that "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." In 1790, Congress exercised this power by enacting the full faith and credit statute.[488] That statute—28 U.S.C. § 1738—has remained virtually unchanged to this date,[489] and stipulates that "judicial proceedings [...] shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State."[490]

'Full faith and credit' implies that "[a] final judgment in one State… qualifies for *recognition throughout the land*." [491] 'Recognition' essentially means that a judgment gains local validity[492] and force[493] in the sense of (a) compelling the parties' compliance[494] and (b) being capable of triggering (preclusive) effects—that is, the judgment "may be grounds for an action (or a defense to one)"[495]. In other words, "[a sister-state judgment] is… put upon the footing of a domestic judgment; by which is meant, not having the operation and force of a domestic judgment beyond the jurisdiction declaring it to be a judgment, but a domestic judgment as to the merits of the claim, or subject matter of the suit." [496] Full faith and credit does not then guarantee *execution*, which additionally requires 'enforcement' by registration or

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Convention which relate to jurisdiction", and that "[this] statement of the law must be regarded as being, in principle, applicable even where the court of the State of origin wrongly founded its jurisdiction, in regard to a defendant domiciled in the territory of the State in which enforcement is sought, on a rule which has recourse to a criterion of nationality."

[488] Act of May 26, 1790, ch 11, 1 Stat 122. *San Remo Hotel, LP v City and County of San Francisco, Cal*, 545 US 323, 336 (2005).

[489] *Allen* (Introduction n 82) 96, n 8 (1980) ("This statute has existed in essentially unchanged form since its enactment just after the ratification of the Constitution ....").

[490] 28 USC § 1738.

[491] *Baker* (Introduction n 82) 233 (emphasis added).

[492] *Hampton v McConnel*, 16 US 234, 235 (1818) ("The doctrine [of full faith and credit] there held was that the judgment of a state court should have the same credit, validity and effect, in every other court of the United States, which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaed in any other court in the United States.").

[493] *Baker* (Introduction n 82) 233. See, conflating force and effect, Restatement (Second) of Conflict of Laws, § 93 comment b (1971) ("A foreign judgment is recognized when it is given the same conclusive effect that it has in the state of rendition with respect to the persons, the subject matter of the action and the issues involved. The extent to which a judgment must be held conclusive under full faith and credit is stated in §§ 94-97.").

[494] The scope of recognition is limited; full faith and credit does not extend to "[o]rders … [purporting] to accomplish an official act within the exclusive province of that other State or interfered with litigation over which the ordering State had no authority." *Baker* (Introduction n 82) 235 (citing *Fall v Eastin*, 215 US 1 (1909) (holding that a sister State's decree concerning land ownership in another State was ineffective to transfer title)) (emphasis added). For instance, antisuit injunctions regarding litigation in a sister-state, though consistent with due process as an order constraining parties, *see Cole v Cunningham*, 133 US 107 (1890), cannot control the sister-state court's actions, and sanctions for violation of an injunction are generally left to the injunction issuing court. *Baker* (Introduction n 82) 235 (citing *James v Grand Trunk Western R Co*, 152 NE2d 858, 867 (1958).

[495] *Baker* (Introduction n 82) 242 (Scalia J concurring).

[496] *McElmoyle, for Use of Bailey v Cohen*, 38 US 312, 326 (1839).

action on the judgment,[497] and execution remains subject to the law of the state addressed,[498] which controls in particular "the time, manner, and mechanisms for enforcing judgments."[499]

Unlike under the Brussels and Lugano Regime, public policy is no ground for refusing recognition under the Full Faith and Credit Clause.[500] The absence of the exception signals that, beyond the private interest in finality and justice, the Full Faith and Credit Clause serves the public interest in forging a single nation out of an aggregation of sovereign states.[501] The clause thus reflects that "the wise men of that day, [saw] that the powers necessary to be given to the confederacy [and later the federation], and the rights to be given to the citizens of each state, in all the states, would produce such intimate relations between the states and persons, that the former would no longer be foreign to each other in the sense that they had been, as dependent provinces."[502]

The sole exception is for lack of jurisdiction, which is not strictly an 'exception', because a judgment given without personal or subject matter jurisdiction is *invalid* and thus has never existed in the eyes of the law, including the Full Faith and Credit Clause and its implementing statute.[503] Nevertheless, the fundamental

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[497] ibid 241 (citing *Thompson v Whitman*, 18 Wall 457, 462–63 (1873) ("[The Full Faith and Credit Clause] did not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them, as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other States.") (quoting Joseph Story, *Commentaries on the conflict of laws, foreign and domestic: in regard to contracts, rights, and remedies, and especially in regard to marriages, divorces, wills, successions, and judgments* (7th ed Little, Brown, Boston 1872) § 609).

[498] ibid 235 ("[e]nforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the evenhanded control of forum law") (citing *McElmoyle, for Use of Bailey v Cohen* (n 496) 325 (1839) (judgment may be enforced only as "laws [of enforcing forum] may permit"); Restatement (Second) of Conflict of Laws § 99 (1971) ("The local law of the forum determines the methods by which a judgment of another state is enforced.")).

[499] ibid.

[500] ibid 223 ("this Court's decisions support no roving 'public policy exception' to the full faith and credit due judgments.") (citing *Estin v Estin*, 334 US 541, 546 (1948)). See also *Magnolia Petroleum Co v Hunt*, 320 US 430, 438 (1943) ("[no] considerations of local policy or law [] could rightly be deemed to impair the force and effect which the full faith and credit clause and the Act of Congress require to be given to [a money] judgment outside the state of its rendition."). cf *Roche v McDonald*, 275 US 449, 452 (1928) ("the judgment, if valid where rendered, must be enforced in such other State although repugnant to its own statutes.").

[501] ibid at 234 ("The full faith and credit clause is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation.") (quoting *Sherrer* (Introduction n 84) 355).

[502] *McElmoyle, for Use of Bailey v Cohen* (n 496) 325 (1839).

[503] Personal jurisdiction is required under the Due Process Clause of the Fourteenth Amendment to the United States Constitution (or the Fifth Amendment as the case may be) ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."). See *Pennoyer v Neff*, 95 US 714, 733 (1877) ("Since the adoption of the Fourteenth Amendment to the Federal Constitution [or the Fifth Amendment, as the case may be], the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.").

Subject matter jurisdiction relies on a court's judicial authority as specified by state or federal law, like Art III, §2, of the U.S. Constitution ("The judicial Power shall extend to all Cases, in Law and

nature of jurisdiction notwithstanding, the Supreme Court in *North Carolina Life*[504] held that "[t]he need for finality within [the] federal system… applies with equal force to questions of jurisdiction."[505] The issue of jurisdiction therefore becomes res judicata once it is waived or fully and fairly litigated in the rendering court.[506]

(1) Why Member States mutually recognise judgments

The international law principle of territoriality as the root cause of the problem of foreign judgment recognition was clearly identified by the Commission of the European Economic Community in a note sent to the Member States on 22 October 1959 inviting them to commence negotiations in accordance with Art 220 of the Treaty establishing the European Economic Community, by which the Member States agreed to enter into negotiations with each other, so far as necessary, 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:[507]

> As jurisdiction in both civil and commercial matters is derived from the sovereignty of Member States, and since the effect of judicial acts is confined to each national territory, legal protection and, hence, legal certainty in the common market are

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Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."). See *Pennoyer v Neff*, 95 US 714, 733 (1877) ("To give such proceedings any validity, there must be a tribunal competent by its constitution-that is, by the law of its creation-to pass upon the subject-matter of the suit."). Also *see Stoll v Gottlieb*, 305 US 165, 171 (1938) ("[a] court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators.").

[504] *Underwriters Nat Assur Co v North Carolina Life and Acc and Health Ins Guaranty Ass'n*, 455 US 691 (1982).

[505] ibid (citing *Stoll v Gottlieb*, 305 US 165, 172 (1938) ("After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first.")).

[506] ibid.

[507] The Brussels Convention (Introduction n 44) was an implementation of Art 220 EEC by virtue of which the original six Member States (ie Belgium, France, Germany, Italy, Luxembourg and the Netherlands) undertook to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals. See the Preamble to the convention. cf Jenard Report 3. cf Lugano Convention (Introduction n 43) Preamble ("CONSIDERING that it is necessary for this purpose to determine the international jurisdiction of their courts, to facilitate recognition and to introduce an expeditious procedure for securing the enforcement of judgments, authentic instruments and court settlements"); Brussels I Regulation, preamble, recital 2 ("[c]ertain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation are essential"); and Revised Lugano Convention, Preamble ("CONSIDERING that it is necessary for this purpose to determine the international jurisdiction of the courts, to facilitate recognition, and to introduce an expeditious procedure for securing the enforcement of judgments, authentic instruments and court settlements").

> essentially dependent on the adoption by the Member States of a satisfactory solution to the problem of recognition and enforcement of judgments.[508]

The Commission also identified the rationale for addressing the problem that the validity, or "effect", of judicial acts is confined territorially, by providing for the recognition and enforcement of judgments, namely, to offer legal protection and, hence, *legal certainty* within the common market. In fact, the Commission started its plea for mutual recognition and enforcement by pointing out that "a true internal market between the [then] six States will be achieved only if adequate legal protection can be secured", whereas absent the recognition of judgments between the Member States, "[t]he economic life of the Community may be subject to disturbances and difficulties".[509]

(2) Recognition: The doctrine of automatic local validity

Article 33(1) of the Brussels I Regulation provides that "[a] judgment given in a Member State shall be recognised in the other Member States without any special procedure being required."[510] The absence of any formality applies despite the fact that an interested party who raises the recognition of a judgment as the principal issue in a dispute may apply for a decision that the judgment be recognised.[511] Moreover, if the outcome of proceedings in a Member State court depends on the determination of an incidental issue of recognition, that court has jurisdiction to determine that issue.[512]

Recognition therefore occurs 'automatically'—without prior formality (e.g. a declaratory or constitutive judicial or administrative decision or 'act of recognition').[513] This system rests on the 'mutual trust' that is presumed between the Member States[514] and, in particular, by the trust placed in the judgment-rendering court of the State of origin by the court of the State where a judgment is subsequently invoked, taking account in particular of the rules of direct jurisdiction set out in Chapter II of the regulation.[515] As a result, a party in whose favour a judgment has been given can invoke that judgment in any other Member State against any party concerned (including an administrative authority) in the same way as a judgment given in that State.[516] The interested party need only produce a copy of the judgment that satisfies the conditions necessary to establish its authenticity.[517]

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[508] Jenard Report (Part II, Introduction n 18) 3.
[509] ibid.
[510] cf Brussels Convention, Art 26, first paragraph; Lugano Convention, Art 26, first paragraph; and Revised Lugano Convention, Art 33(1). On the Regime see text to Introduction n 44.
[511] Regulation, Art 33(2), which refers to the procedures provided for in Sections 2 and 3 of Chapter III (ie the procedure for enforcement).
[512] Regulation, Art 33(3).
[513] Jenard Report (Part II, Introduction n 18) 43 (emphasis added).
[514] Regulation, Recital 16 ("Mutual trust in the administration of justice in the Community justifies judgments given in a Member State being recognised automatically without the need for any procedure except in cases of dispute."). cf Brussels I Regulation (recast) (Introduction n 44) Recital 26.
[515] Opinion 1/03 *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* (n 486) [163] (emphasis added).
[516] Jenard Report (Part II, Introduction n 18) 43.
[517] Brussels Convention (Introduction n 44) Art 46(1); Lugano Convention (Introduction n 43) Art 46(1); Brussels I Regulation (Introduction n 43) Art 53(1); and Revised Lugano Convention (Introduction n 43)

(i) Condition: A judgment covered by the Regime

The only preconditions for automatic recognition under Art 33 of the Brussels I Regulation, is that the judgment invoked is a judgment in the sense of Art 32 of the regulation on a matter within the scope of the regulation (i.e. a civil and commercial matter in the sense of Art 1). Without delving into the tricky question of when a judgment is 'in a civil and commercial matter',[518] it should be noted that the concept of 'judgment' covers "'any' judgment given by a court of a Member State, without any distinction being drawn according to the content of the judgment in question" (i.e. the concept comprises a judgment declining jurisdiction on the basis of a jurisdiction clause),[519] and "is not limited to decisions which terminate a dispute in whole or in part, but also applies to provisional or interlocutory decisions" [520].[521]

In particular, while requirements that a judgment be 'final' or have 'res judicata status' tend to condition the attribution of (preclusive) effects to a judgment, they are not conditions for the recognition under Art 33. As regards the requirement of 'finality', the Jenard Report is clear: "[J]udgments given in *interlocutory* proceedings […] may be recognized."[522] For instance, the CJEU in *Mietz*[523] held that provisional measures like Dutch judgments for an interim measure ('*kort geding vonnissen*'), must be recognized and enforced, despite lacking 'finality' in that such judgments are "without prejudice to the main proceedings".[524] Article 46(1) of the regulation confirms that recognition extends to judgments lacking res judicata status (i.e. judgments which are under appeal or for which the time for an ordinary means of recourse has not expired), even if the proceedings for their enforcement may be stayed.[525]

(ii) Exceptions: Rebutting the presumption in favour of recognition

Under Art 33 of the Brussels I Regulation there is a presumption in favour of recognition: a judgment is presumed to have validity in the Member State addressed. As the Jenard Report clarifies, "this system is the opposite of that adopted in numerous conventions, according to which foreign judgments are recognized only if

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Art 53(1). Under the Brussels Convention and the Lugano Convention, in the case of a judgment given in default, a party seeking recognition is further required to produce 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 (see Art 46(2)).

[518] See, most recently, Case C-49/12 *The Commissioners for Her Majesty's Revenue & Customs v Sunico ApS and Others* [2013] ECR I-0000 [33] ("It follows from settled case-law of the Court that that scope is defined essentially by the elements which characterise the nature of the legal relationships between the parties to the dispute or the subject-matter thereof….").

[519] *Gothaer* (Part I, Introduction n 1) [23].

[520] ibid [24].

[521] But judgments on the recognition or enforcement of third State judgments are excluded. Case C-129/92 *Owens Bank Ltd v Fulvio Bracco and Bracco Industria Chimica SpA* [1994] ECR I-177 [17]-[25]. However, by extension of the CJEU's reasoning in *Gothaer* (Part I, Introduction n 1) [24]-[31], judgments on the recognition and enforcement of Member State judgments are likely to be included.

[522] Jenard Report (Part II, Introduction n 18) 43.

[523] Case C-99/96 *Hans-Hermann Mietz v Intership Yachting Sneek BV* [1999] ECR I-2277.

[524] Articles 289 to 297 Rv.

[525] "The court with which an appeal is lodged under Article 43 or Article 44 may, on the application of the party against whom enforcement is sought, stay the proceedings if an ordinary appeal has been lodged against the judgment in the Member State of origin or if the time for such an appeal has not yet expired; in the latter case, the court may specify the time within which such an appeal is to be lodged."

they fulfil a certain number of conditions."[526] The presumption under Art 33 can be rebutted only if one of the grounds for refusal listed in Arts 34 or 35 is present,[527] while Art 36 excludes a review of the foreign judgment as to its substance.

Article 34 of the regulation bars recognition in four circumstances: first, recognition is manifestly contrary to public policy in the Member State addressed; second, the defendant who defaulted was not served in sufficient time and in such a way as to enable him to arrange for his defence, unless he failed to challenge the judgment when this was possible; third, irreconcilability with a judgment given in a dispute between the same parties in the Member State addressed; or, finally, irreconcilability with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties that fulfils the conditions necessary for its recognition in the Member State addressed.

The Jenard Report acknowledges that irreconcilability is widely treated as a matter of public policy, but that as a practical matter, "to treat this as a matter of public policy would involve the danger that the concept of public policy would be interpreted too widely."[528] The same applies to the rights of the defendant, though the choice to deal with this separately may have been inspired by the desire to draw special emphasis to the safeguarding of these rights; the CJEU in *Krombach* defined 'public policy' as referring to situations where "recognition or enforcement of the judgment delivered in another Contracting State … infringes a fundamental principle",[529] including a fair trial as protected by Art 6(1) ECHR, in the sense of being "at variance to an unacceptable degree with the legal order of the State [addressed]".[530]

Article 35 of the regulation adds that a judgment will also not be recognised if it conflicts with the grounds of jurisdiction specified in Sections 3, 4 or 6 of Chapter II of the regulation, or in a case provided for in Art 72[531]. Apart from this jurisdictional review, no review of the jurisdiction of the judgment-rendering court is permitted; neither directly, nor as part of the public policy test under Art 34(1) of the regulation.[532] Moreover, the provision clarifies a court or authority that reviews the jurisdiction of the judgment-rendering court, is bound by the findings of fact on which that court based its jurisdiction.[533]

(iii) Implications of the Brussels I Recast

[526] Jenard Report (Part II, Introduction n 18) 43.
[527] ibid.
[528] Jenard Report (Part II, Introduction n 18) 45.
[529] Case C-7/98 *Dieter Krombach v André Bamberski* (n 487) [37].
[530] ibid.
[531] The provision concerns agreements by which Member States undertook, prior to the entry into force of the regulation, pursuant to Art 59 of the Brussels Convention (Introduction n 44), not to recognise judgments given, in particular in other Contracting States to that Convention, against defendants domiciled or habitually resident in a third country where, in cases provided for in Art 4 of that Convention, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of Art 3 of that Convention.
[532] Regulation, Art 35(3).
[533] ibid.

In the 50-year process of promoting the free movement of judgments in Europe, the Brussels I Regulation (recast)[534] marks the latest step.[535] The revised regulation will apply from 10 January 2015.[536] Under the instrument makes, the principle of automatic recognition stands unchanged, though the recast clarifies that the recognition of a judgment can only be refused "*[o]n the application of any interested party*"[537].

The instrument further clarifies the distinction between the problem of *recognition of* foreign judgments and the problem of *preclusion by* foreign judgments; it does so in at least two ways. First, Art 54(1) introduces the requirement to *adapt* to the extent possible a measure or an order in a judgment that is unknown in the law of the Member State addressed, "to a measure or an order known in the law of that Member State *which has equivalent effects attached to it* and which pursues similar aims and interests."[538] The instrument further stipulates that "adaptation shall not result in effects going beyond those provided for in the law of the Member State of origin",[539] and that "[a]ny party may challenge the adaptation of the measure or order before a court."[540] The provision signals that recognition of a judgment is one thing, while giving effect to a recognised judgment and determining its legal consequences is quite another thing.

Second, Art 65 makes clear that the requirement that "[a]ny effects which judgments given in the Member States included in the list referred to in paragraph 1 may have, *in accordance with the law of those Member States*, on third parties by application of paragraph 1 shall be recognised in all Member States",[541] means that, apart from the requirement to recognise judgments in the sense of Art 65, a court must apply the law of the judgment-rendering State to determine the legal consequences of such judgments. In this regard, Art 65(3) specifies that Member States concerned must within the framework of the European Judicial Network in civil and commercial matters[542] "provide information on how to determine, in accordance with their national law, the effects of the judgments referred to in the second sentence of paragraph 2",[543] which pursuant to Art 65(2) must be recognised. The problem then is one of the *legal consequences of* judgments recognised pursuant to Art 65(2), not of foreign judgment *recognition*; consequently, the grounds for

[534] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1.
[535] See, for an overview of the Brussels and Lugano Regime, Introduction n 44.
[536] Brussels I Regulation (recast) (Introduction n 44) Art 81.
[537] ibid Art 45(1).
[538] (emphasis added).
[539] Brussels I Regulation (recast) (Introduction n 44) Art 54(2).
[540] ibid Art 54(3).
[541] cf Article 65(2) of the Brussels I Regulation ("Judgments given in other Member States by virtue of Art 6(2), or Article 11 shall be recognised and enforced in Germany, Austria and Hungary in accordance with Chapter III. Any effects which judgments given in these States may have on third parties by application of the provisions in paragraph 1 shall also be recognised in the other Member States.").
[542] Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters (2001/470/EC) [2001] OJ L174/25.
[543] Judgments in actions on a warranty or guarantee or in any other third-party proceedings in the Member States included in the list established by the Commission pursuant to point (b) of Art 76(1) and Art 76(2) only in so far as permitted under national law. See Art 65(2).

refusing recognition in Art 45 of the recast are irrelevant where the application of the law of the judgment-rendering State violates the public policy of the forum.[544]

Summary and Conclusions

Regarding the problem of recognition of foreign judgments two questions must be distinguished: first, why the problem arises in the first place; and, second, why legal systems address the problem the way they do. The first question goes to the *root* of the problem of foreign judgment recognition, whereas the second question concerns the *rationale* for foreign judgment recognition. The first question has a straightforward answer: the problem of foreign judgment recognition arises because international law imposes limits on the sphere of validity of a state's legal order, by excluding from that sphere the territory of other states (the principle of territoriality).

Both English and Dutch law on foreign judgments is founded on the territorial limits that affect, beyond laws, also individual norms that a State enacts through its courts—i.e. *judgments*.[545] International law does not exclude that a judgment acquires validity *abroad*, in the territory of another State, but whether it does, depends on the State addressed. A state can agree to accept a foreign judgment into its legal order by conferring it *local* validity; a process that in private international law speech is habitually called 'recognition' ('*erkenning*'). A foreign judgment has local 'validity' ('*geldigheid*') if has the *legal status of judgment* in the legal order of the State addressed, which implies that the court's decision or order acquires *force of law* ('*rechtskracht*') between the parties, and that the judgment can trigger *legal consequences* ('*rechtsgevolgen*') that can attach to a judgment, in particular, execution (to effect justice) and preclusion (to impose finality).

Recognition in the sense described concerns only the issue of a foreign judgment's validity *within the State addressed* according to the law of that State. This is but one of three distinct issues of validity that arise in respect of a foreign judgment, and more generally, regarding any act of state: first, a foreign judgment's validity *within the territory of the enacting State* according to the law of that State; second, a foreign judgment's validity *within the State addressed* according to the law of that State; and, finally, a foreign judgment's validity *within the international community* (whether defined regionally or globally) according to international law.

The answer to the second question is also fairly straightforward: legal systems recognise foreign judgments in the interest of justice and finality of litigation (and more generally legal certainty and a sound administration of justice between legal systems) after a court of competent jurisdiction has determined a claim or issue. Whereas in English law, the courts' main concern appears to have been the *private* interest, the statutory framework on foreign judgment recognition developed in the *public* interest in ensuring that English judgments are recognised abroad. By contrast, in Dutch law, the public interest in a proper administration of justice and, thus, legal certainty, among legal systems seems to have been the principal motivator. Similarly, the development of the Brussels and Lugano Regime is underpinned first and

[544] For a different view as regards the Brussels I Regulation, see Burkhard Hess, Thomas Pfeiffer and Peter Schlosser, 'Report on the Application of Regulation Brussels I in the Member States' (Study JLS/C4/2005/03, 2007) 113 fn 367 <http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf> accessed 1 June 2012.
[545] See, respectively, Chapter 3, text to n 16ff (English law), and Chapter 3, text to n 347ff. (Dutch law).

foremost by the aim to establish a proper functioning common market and justice area, which, in turn, requires adequate cross-border legal protection and, hence, *legal certainty*, because without it, the economic life would be subject to disturbances and difficulties.

In both English and Dutch private international law, recognition at common law ('*commuun recht*') is essentially subject to a single basic condition: the foreign judgment-rendering court must have been a court of competent jurisdiction. However, the standard applied varies: English courts require that jurisdiction was based on grounds acceptable by *English* standards, whereas Dutch courts merely insist that jurisdiction was based on *internationally acceptable* standards. Under the Brussels and Lugano Regime, the combination of harmonization of jurisdictional rules and the principle of mutual trust imply as a rule a prohibition of a review of jurisdiction.

The fundamental link between jurisdiction and recognition should be obvious: a judgment is the manifestation of jurisdiction (from the Latin *ius, iuris* meaning 'law' and *dicere* meaning 'to speak') the judicial power of the State; hence, according to English courts, a lack of jurisdiction negatives the existence of the obligation to comply with a judgment (or force of law), while the Dutch approach is that by recognising a foreign judgment, a court accepts the jurisdiction of the judgment-rendering court. At the same time, until a judgment has been successfully challenged in the enacting State (in which case there is no foreign judgment to recognise), neither English nor Dutch courts concern themselves with the question whether the rendering court had jurisdiction under its own law, since that question concerns a different issue of validity, namely, the foreign judgment's validity *within the enacting State* under the (constitutional or procedural) law of that State, not its validity *within the State addressed* under the (private international) law of that State.

Finally, even if the conditions for recognition are met (i.e. the foreign court was by reference to the relevant standard, if any, a court of competent jurisdiction), English and Dutch law, as well as the Brussels and Lugano Regime, provide for an *exception* to recognition, based on what can broadly be referred to as "public policy", which category is variously subdivided in separate grounds that essentially all relate to the same thing, namely to safeguard the fundamental principles of the State addressed in circumstances where those principles would be endangered by accepting the validity of a foreign judgment within the legal order.

Chapter 4. Preclusion by Foreign Judgments

Introduction

Within a legal system, preclusion law can serve to prevent the reassertion of a cause of action for which a judgment has been recovered, the contradiction of judicial findings, and certain forms of procedural abuse (among other things)[1].[2] Beyond the domestic sphere, some courts will police finality of litigation also extraterritorially, by granting anti-suit injunctions to restrain vexatious attempts to relitigate abroad matters which have already been determined locally (or elsewhere).[3] This chapter addresses the international context, involving the situation where a court is asked to impose finality of litigation locally after judgment is given abroad—the problem of *preclusion by foreign judgments*—which problem arises where a party attempts to litigate locally matters (which could have been) determined abroad.

A couple of recent cases show that the inverse situation can also arise: the English Court of Appeal considered whether the preclusive effect of a local (i.e. English) judgment abroad should influence a decision whether to allow service out pending foreign proceedings.[4] In *Faraday Reinsurance Co Ltd v Howden North America Inc*, the Court dismissed as "misplaced" an argument that "the judge should have resolved the conflict of evidence as to 'issue preclusion' of an English decision in Pennsylvania", because "[i]t is inappropriate to have set battles about foreign law resolved at an interim stage of the proceedings. It only increases unnecessary expense and delay when the parties should be concentrating on getting a determination of the substance of the issues between them."[5] According to the Court, the English proceedings could also serve a useful purpose without the certainty that an English judgment would be preclusive abroad. Conversely, in the later case of *Ace European Ltd v Howden Group Ltd*, the Court suggested that the preclusive effect of an English judgment abroad can be relevant in deciding on whether to permit service out, by

[1] See, respectively, Chapter 1 on English preclusion law and Chapter 2 on Dutch preclusion law.

[2] In English law the doctrine of merger bars reassertion (see Chapter 1, text to n 92ff), the doctrine of estoppel precludes contradiction (see Chapter 1, text to n 264ff), and the doctrine of abuse of process serves to prevent various forms of abuse like relitigation abuse, *Henderson v Henderson*-abuse, and collateral attack-abuse (see Chapter 1, text to n 470ff). In Dutch law, Art 3:303 BW may bar reassertion (see Chapter 2, text to n 160ff), Art 236 Rv precludes contradiction (see Chapter 2, text to n 318ff), and Art 3:13(1) BW in conjunction with Art 3:15 BW may serve to prevent certain forms of relitigation abuse (see Chapter 2, text to n 568ff), while another doctrine—*gesloten stelsel van rechtsmiddelen*—excludes collateral attacks on judgments (see Chapter 2, text to n 224ff).

[3] *Masri v Consolidated Contractors International Co SAL* [2008] EWCA Civ 625, [2009] QB 503, [2009] 2 WLR 669, [2008] 2 All ER (Comm) 1146, [2009] Bus LR 216, [2008] 2 Lloyd's Rep 301, [2008] 1 CLC 887, [2008] BLR 391, [2008] ILPr 48, revd [2009] UKHL 43, [2010] 1 AC 90, [2009] 3 WLR 385, [2009] Bus LR 1269, [2009] 4 All ER 847, [2010] 1 All ER (Comm) 220, [2009] 2 Lloyd's Rep 473, [2009] CP Rep 47, [2010] BCC 25, [2009] 2 BCLC 382, [2009] 2 CLC 366, [2009] BPIR 1029, (2009) 159 NLJ 1137, (2009) 159 NLJ 1250 [82] (Collins LJ) ("…the fact that the respondent is seeking to relitigate in a foreign jurisdiction matters which are already res judicata between himself and the applicant by reason of an English judgment can be a sufficient ground for the grant of an anti-suit injunction.").

[4] *Ace European Ltd v Howden Group Ltd* [2012] EWCA Civ 1624, [2012] 2 CLC 969, [2013] Lloyd's Rep IR 512 (service out disallowed because it was not argued that a decision of the English court would establish issue preclusion in the Pennsylvania proceedings. Rather, it was argued that an English decision would merely be of assistance in the foreign court).

[5] [2012] EWCA Civ 980, [2012] 2 CLC 956, [2012] Lloyd's Rep IR 631 [33] (Longmore LJ).

observing that "whereas in the *Faraday* case, the Insurers argued that a decision of the English court would have 'preclusive effect' in the Pennsylvania proceedings, that argument is not advanced in the present case. It is simply argued that the present proceedings would complement and assist the Pennsylvania judge."[6]

Against this background, a more accurate description of the problem is perhaps 'interjurisdictional preclusion'—a term proposed by Erichson.[7] Semantics aside, the question addressed is two-fold: first, whether English and Dutch courts actually attribute foreign judgments preclusive effects; and second, if the first question is to be answered in the affirmative, how courts go about determining the preclusive effects they attach to a foreign judgment. Whereas the answer to the first question is relatively straightforward (both English and Dutch attribute preclusive effects once a foreign judgment has by recognition gained local validity), the second question draws diverging answers; the English and Dutch approaches to the problem of preclusion by foreign judgments differ in significant respects.

4.1 England and Wales

Introduction

The Civil Jurisdiction and Judgments Act 1982,[8] s 34, bars the reassertion of a cause of action for which judgment has been recovered abroad.[9] However, though the provision tackles reassertion, it fails to address other issues of preclusion that arise in respect of foreign judgments; for instance, the High Court in *Shami v Shami*[10] held that the provision is irrelevant where a claimant invokes the preclusive effect of a foreign declaratory judgment in support of a claim. More generally, the provision does not bar the contradiction of foreign judicial findings, or attempts at the litigation of claims, defences, or issues which could and should have been raised abroad.

The Foreign Judgments (Reciprocal Enforcement) Act 1933[11] states in general terms that a judgment subject to the act "shall be recognised … 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 counter-claim in any such proceedings".[12] A judgment recognised under the Act can therefore trigger a cause of action estoppel in English proceedings. The Act further clarifies that nothing in the Act prevents a court "recognising any judgment as conclusive of any matter of law or fact decided therein if that judgment would have been so recognised before the passing of this Act".[13] Accordingly, if a court could at common law attribute a foreign judgment issue preclusive effect in the form of an issue estoppel, it can still do so. The Act signals that in 1933 it was unclear whether a foreign judgment can form the basis for an issue estoppel; in 1967, the House of Lords in *Carl Zeiss* confirmed that it can.[14]

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[6] (n 4) [37] (Aikens LJ).
[7] See HM Erichson, 'Interjurisdictional Preclusion' (1998) 96 Michigan Law Review 945-1017.
[8] c 27.
[9] Section 34. See text to n 40ff.
[10] [2012] EWHC 664 (Ch) [26] (David Donaldson QC).
[11] 23 and 24 Geo 5 c 13.
[12] ibid s 8(1).
[13] ibid s 8(3).
[14] See *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (Introduction n 32) 867 (Lord Wilberforce). Recently, David Donaldson QC in *Shami v Shami* (n 10) [30] (Ch) said that, though s 8(3) is concerned with issue

However, though the Act confirms that a foreign judgment recognised under the 1933 Act *can* be conclusive in English proceedings, the act does not specify an approach to resolving issues of preclusion that arise in respect of a recognised foreign judgment. The House of Lords in *Carl Zeiss* also offered guidance in this respect, by holding that issues of interjurisdictional preclusion are to be resolved by application of forum law, or '*lex fori*', in a manner consistent with good sense,[15] which means that an English courts will take account of foreign preclusion law, if duly pleaded and, if contested, proven by the parties, so as not to impose finality in circumstances where parties would be permitted to litigate in the foreign judgment-rendering State.

English courts doubt the relevance of the CJEU's decision in *Hoffmann*[16] for resolving preclusion issues raised by judgments recognized under the Brussels and Lugano Regime. To illustrate, Waller LJ in *National Navigation Co v Endesa Generacion SA (The Wadi Sudr)*[17] considered that "considerable reliance is … on … *Hoffmann v Krieg*"[18] but noted that "[t]hat case was not concerned with any question as to whether a decision of one court was res judicata in proceedings in another court."[19] Moore-Bick LJ said similarly that "[t]here was no discussion of the effect of recognition as giving rise to estoppel by record, which is the question that we have to decide, and the judgment does not contain any clear indication of how that question should be decided."[20] Consequently, in the absence of clear CJEU authority on the question, English courts tend to use the common law 'cautious *lex fori*' approach adopted by the House of Lords in *Carl Zeiss.*[21]

(1) The finality of a foreign judgment

A collateral attack on a foreign judgment amenable to recognition is liable to be struck out as an abuse of process. Blackburn J in *Castrique v Imrie* explained why: "[T]o sit as a Court of Appeal from [the foreign] Court… is not the province of an English court."[22] This restriction of an English court's power to review a foreign judgment recognised at common law extends not only to alleged mistakes of fact or law, but also to procedural irregularities short of a violation of natural justice.[23] Its rationale is as *Hughes v Cornelius* clarified that otherwise "merchants would be in a pleasant condition",[24] considering the instability of judicially determined legal relations if a judgment can be set aside in any other State where its use is required.

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estoppel rather than cause of action estoppel, "the difference is either non-existent or academic in the case of a foreign declaratory judgment to the same effect as a declaration sought in the English action."

[15] See text to n 85ff.

[16] Case 145/86 *Horst Ludwig Martin Hoffmann v Adelheid Krieg* (Chapter 3 n 470).

[17] (Chapter 3 n 476).

[18] ibid [68].

[19] ibid.

[20] ibid [114].

[21] *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (Introduction n 32) 919 (Lord Reid). See Van de Velden (Introduction n 26) 525.

[22] (1869-70) LR 4 HL 414, 437.

[23] *Henderson v Henderson* (n 275) 113-14, and 117-18 (Sir James Wigram V-C). Note however that the judge addressed the position in relation to *colonial* judgments from which an appeal lay to the "mother country". The judge, at 118, expressly did not give his final opinion on the situation where proceedings had taken place in a foreign court from which there was no appeal to any superior jurisdiction which an English court could regard as certain to administer justice in the case.

[24] (Chapter 3 n 71) 908.

Regarding judgments recognised under the Brussels and Lugano Regime, courts apply a similar reasoning, against the background of the prohibition that "[u]nder no circumstances may a foreign judgment be reviewed as to its substance."[25] For instance, in *Irish Response Ltd v Direct Beauty Products*,[26] the claimant alleged facts inconsistent with the findings underlying a Danish judgment, while those same facts also formed the basis of an appeal against the judgment in Denmark. According to the High Court, it would be contrary to the spirit of the Brussels I Regulation to entertain, in advance of a hearing of an appeal in the state of rendition, a claim that is based on the proposition that the findings in the foreign judgment are wrong.[27] The court therefore stayed the claim as an abuse of the process.[28]

(i) Allegations of fraud

Unlike mistakes of fact or law or minor procedural irregulaties, fraud in the procurement of a judgment is a ground for refusing *recognition*. At common law, a foreign judgment may be impeached for fraud by original action or in defence to an claim for enforcement of that judgment.[29]

Nevertheless, Lord Templeman in *Owens Bank v Etoile Commerciale* considered that, apart from the possibility of founding an issue estoppel on a foreign judgment that rejects allegations of fraud in relation to the judgment whose recognition is sought, the abuse of process doctrine may serve to cut short a frivolous attempt to attack a foreign judgment for fraud: "There is nothing in the authorities which precludes a party from obtaining summary judgment or an order striking out a pleading on the grounds of abuse of process where a fraud is alleged. It is axiomatic that where fraud is alleged full particulars should be given."[30]

His Lordship further suggested that English law should be changed such that a foreign judgment is recognised *unless it is set aside for fraud in the rendering State*, at least for judgments that the UK has agreed to enforce by registration.[31] Lord Collins in *AK Investment*[32] also considered the question whether the law should be changed. According to His Lordship, such change might require a nuanced approach depending on the "reliability of the foreign legal system", the scope for challenge in the foreign court, and the type of fraud alleged.[33] Phillips J (as he then was) in *Interdesco SA v Nullifire Ltd* said that the approach of deferring to the courts of the rendering state to judge allegations of fraud is at any rate appropriate in relation to Brussels and Lugano Regime judgments:[34]

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[25] Regulation, Art 36.
[26] [2011] EWHC 37 (QB) (Judge Richard Seymour QC).
[27] ibid [66].
[28] The court held that staying the claim was the proper course, "bearing in mind that the parties to this action are not identical to the parties to the Danish Proceedings". In case the same parties (or their privies) are involved the proper course would be to strike out the claim.
[29] *Abouloff v Oppenheimer* (Chapter 3 n 113) 1882-83) LR 10 QBD 295. cf *Owens Bank Ltd v Bracco* [1992] 2 AC 443, [1992] 2 WLR 621, [1992] 2 All ER 193, [1993] ILPr 24; and *Yukos English Court of Appeal* (Introduction n 28) [154].
[30] [1995] 1 WLR 44, 51.
[31] ibid 50.
[32] *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804, [2011] 4 All ER 1027, [2012] 1 All ER (Comm) 319, [2011] 1 CLC 205.
[33] ibid [116].
[34] [1992] 1 Lloyd's Rep 180, 187, [1992] ILPr 97.

> [W]here registration of a Convention judgment is challenged on the ground that the foreign Court has been fraudulently deceived, the English Court should first consider whether a remedy lies in such a case in the foreign jurisdiction in question. If so it will normally be appropriate to leave the defendant to pursue his remedy in that jurisdiction.[35]

Consequently, an English court is unliley to entertain a challenge to a Brussels or Lugano Regime-judgment in circumstances where it would not permit a challenge to an English judgment. According to the judge, two reasons favour this approach: "First it accords with the spirit of the Convention that all issues should, so far as possible, be dealt with by the State enjoying the original jurisdiction. Secondly, the Courts of that State are likely to be better able to assess whether the original judgment was procured by fraud."[36] The approach also follows logically from the principle of mutual trust that underpins the regime. It also speaks from how the regime deals with exceptions to the recognition of default judgments in case the defendant was not served with the document instituting proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence.[37] An English court may refuse recognition, "*unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so*",[38] which signals that jurisdiction of the courts of the judgment-rendering State prevails, at least, regarding an alleged failure of adequate service.

(ii) The role of the act of State doctrine

The English Court of Appeal in the recent case of *Yukos Capital Sarl v OJSC Rosneft Oil Co* held that the act of State doctrine lacks application to judgments; according to the Court, "[o]nly the more normal restraints of judicial comity hold sway in that judicial context, as well of course as other principles, such as principles of estoppel, and all the rules which govern the recognition or enforcement of foreign judgments."[39] But by unnecessarily excluding judgments from the scope of the doctrine, the Court, it is respectfully suggested *erroneously*, deprived English courts of an appropriate instrument to strike out claims that challenge the accuracy or legality of a foreign judgment that is amenable to recognition in England and Wales, whose subject-matter is essentially to obtain an English court's declaration on the foreign judgment's validity *in the rendering State*.

[35] ibid 188.
[36] ibid.
[37] Regulation, Art 34(2).
[38] ibid.
[39] *Yukos English Court of Appeal* (Introduction n 28) [128].

(2) Finality in another case

(i) Claim preclusion

a. Reassertion: Section 34 of the Civil Jurisdiction and Judgments Act 1982

A proper understanding of s 34 of the Civil Jurisdiction and Judgments Act 1982, which bars the reassertion of a cause of action for which judgment has been recovered abroad, requires the preliminary observation that a foreign judgment cannot be 'enforced' at common law in the sense of being granted the status of 'enforceable judgment' (i.e. a judgment capable of execution)[40] in England and Wales.[41] Instead, foreign judgment creditors used to have two alternative modes of enforcement at common law: first, filing a claim based on the foreign judgment (the 'action on the foreign judgment'); and, second, reasserting the original cause of action.[42]

The first mode of enforcement is based on the idea that a decision by a court of competent jurisdiction imposes a legal obligation that can be enforced by an English court through a action on the foreign judgment,[43] in which the defendant is

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[40] CPR r 70.2(1) refers to PD 70, which sets out methods of enforcing judgments or orders for the payment of money as follows: "1.1 A judgment creditor may enforce a judgment or order for the payment of money by any of the following methods: (1) a writ of fieri facias or warrant of execution (see RSC Orders 46 and 47 and CCR Order 26); (2) a third party debt order (see Part 72); (3) a charging order, stop order or stop notice (see Part 73); (4) in a county court, an attachment of earnings order (see CCR Order 27); (5) the appointment of a receiver (see Part 69). 1.2 In addition the court may make the following orders against a judgment debtor –(1) an order of committal, but only if permitted by –(a) a rule; and (b) the Debtors Acts 1869 and 1878 (See RSC Order 45 rule 5 and CCR Order 28. Practice Direction RSC 52 and CCR 29 applies to an application for committal of a judgment debtor); and (2)in the High Court, a writ of sequestration, but only if permitted by RSC Order 45 rule 5."

[41] The situation is different for judgments falling under the 1920 Act, the 1933 Act, or the 1982 Act (including the Brussels and Lugano Regime), which are *per se* enforceable by registration. See CPR Part 74.

[42] c.27. See *Flynn (Deceased), Re (No.2)* [1969] 2 Ch 403, 412, [1969] 2 WLR 1148, [1969] 2 All ER 557, (1969) 113 SJ 428 (Buckley J) ("Where a judgment is obtained in a foreign court the cause of action does not merge in the judgment. Thereafter the successful party can either re-litigate his original cause of action in this jurisdiction, or he can bring an action in this jurisdiction upon the foreign judgment, those being, as I understand the law, two distinct causes of action available to him in this country.") But see *NML Capital Ltd v Argentina* (n 13) [88] (Lord Mance JSC), who noted that: "Even before the enactment of section 34 of the Civil Jurisdiction and Judgments Act 1982, it is extremely doubtful whether the principle that a cause of action did not merge in a foreign judgment survived in English law…." (referring to *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (Introduction n 32) 966 (Lord Wilberforce)).

[43] *Owens Bank Ltd v Bracco* (n 29) 484 (Lord Bridge). Lord Bridge refers to the action on the judgment as a way in which English court "enforce" a "legal obligation" imposed on a judgment debtor by a foreign court of competent jurisdiction. An action on a foreign judgment cannot therefore properly be characterised as a process of "enforcement" of a foreign judgment, because the action, if successful, culminates in the rendition of an English judgment. The foreign judgment or rather the foreign court's order (e.g. for payment), if recognised, technically is a new cause of action, distinct from the judgment creditor's original cause of action for which they recovered the foreign judgment itself, and actionable as a matter of English law. cf *Showlag v Mansour* (Chapter 3 n 210) 317 (Lord Keith); and *NML Capital Ltd v Argentina* [2009] EWHC 110 (Comm), [2009] QB 579, [2009] 2 WLR 1332, [2009] 1 All ER (Comm) 697, [2009] 1 Lloyd's Rep 378, [2009] 1 CLC 60, (2009) 159 NLJ 199, revd [2010] EWCA Civ 41, [2011] QB 8, [2010] 3 WLR 874, [2010] 2 All ER (Comm) 1206, [2010] 2 Lloyd's Rep 442, [2010] 1 CLC 38, revd [2011] UKSC 31, [2011] 2 AC 495, [2011] 3 WLR 273, [2011] 4 All ER 1191, [2012] 1

precluded from relitigating issues determined by the foreign court[44]. The giving of a judgment by a court is deemed to alter the rights of the parties in that their rights thereafter derive from, or can be based upon, the judgment rather than upon the right which they had before the judgment and which gave rise to the judgment.[45]

Some foreign judgments can still be enforced this way;[46] for example, the action on the judgment remains available for judgments covered by the scope of the Administration of Justice Act 1920.[47] Nevertheless, this mode of enforcement is excluded for foreign judgments covered by the Foreign Judgments (Reciprocal Enforcement) Act 1933,[48] as well as for judgments that fall within the scope of the Brussels and Lugano Regime[49]. These judgments can only be enforced by 'registration' in the High Court, after which they can be executed like an English judgment. To this effect, s 6 of the 1933 Act provides that:

> No proceedings for the recovery of a sum payable under a foreign judgment, being a judgment to which this Part of this Act applies, other than proceedings by way of registration of the judgment, shall be entertained by any court in the United Kingdom.

Similarly, for the Brussels and Lugano Regime, the CJEU in *De Wolf v Cox BV*[50] held that this mode of enforcement by action on the judgment is incompatible with the regime's autonomous enforcement scheme;[51] hence, a Brussels and Lugano Regime-judgment creditor cannot file a claim based on the foreign judgment for a judgment in the terms of the foreign judgment.[52]

The second remedy—reasserting the original cause of action that formed the bases for the successful claim and thus the recovery of judgment abroad—was abolished by s 34 of the Civil Jurisdiction and Judgments Act 1982. Prior to the

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All ER (Comm) 1081, [2011] 2 Lloyd's Rep 628, [2011] 2 CLC 373, (2011) 155(27) SJLB 39 [10] (Blair J) ("As is well known, there are no statutory provisions allowing for the mutual recognition and enforcement of judgments of the courts of England and the United States. Such a claim brought in the English courts is in the form of a common law action on the foreign judgment, here the New York judgment of 18 December 2006. … On 14 March 2008, NML applied to the Commercial Court (as I have said on the papers and without notice in the usual way) for permission to serve on Argentina a claim claiming the amount of the New York judgment. The jurisdictional basis of the claim was that it was a claim to enforce a judgment, under the provisions of what was then CPR rule 6.20(9).").

[44] (Chapter 3 n 35) 150 (Blackburn J) ("If, on the other hand, there is a primâ facie obligation to obey the judgment of a tribunal having jurisdiction over the party and the cause, and to pay the sum decreed, the question would be, whether it was open to the unsuccessful party to try the cause over again in a court, not sitting as a court of appeal from that which gave the judgment. It is quite clear this could not be done where the action is brought on the judgment of an English tribunal; and, on principle, it seems the same rule should apply, where it is brought on that of a foreign tribunal.").

[45] *Dallal v Bank Mellat* (Chapter 1 n 333) 452 (Hobhouse J).

[46] See *New Cap Reinsurance Corp Ltd (In Liquidation) v Grant* [2011] EWCA Civ 971, [2012] Ch 538, [2012] 2 WLR 1095, [2012] 1 All ER 755, [2012] 1 All ER (Comm) 1207, [2012] Bus LR 772, [2011] CP Rep 48, [2011] BCC 937, [2011] BPIR 1428 [7] (Lloyd LJ).

[47] 10 & 11 Geo 5 c 81, s 9(5). Nevertheless, the same section discourages such actions by denying a claim for costs of the action ("In any action brought in any court in the United Kingdom on any judgment which might be ordered to be registered under this section, the plaintiff shall not be entitled to recover any costs of the action unless an application to register the judgment under this section has previously been refused or unless the court otherwise orders.").

[48] 23 and 24 Geo 5 c 13.

[49] See Introduction n 44.

[50] *De Wolf v Cox* (Part I, Introduction n 2).

[51] See Chapter 5, text to 57ff.

[52] ibid.

provision's enactment, a successful claimant's right of action on the original cause of action survived the rendition of judgment abroad, because the rule of merger lacked application to foreign judgments.[53] Section 34 removes this right,[54] and explicitly bars the reassertion of a cause of action for which judgment has been recovered abroad:

> 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.

1. Nature and rationale

Section 34 aims to achieve "the requisite result of giving effect to the policy underlying the principle to res judicata"[55]—*finality of litigation*, or "the avoidance of relitigation"[56]. The idea is that after a claimant has recovered abroad a judgment that is enforceable or entitled to recognition in England and Wales, "it is neither necessary nor appropriate to litigate again [in England and Wales]".[57] The provision merely creates a defence, which a defendant may choose not to invoke; it does not deprive the court of jurisdiction.[58] In other words, the provision remains subject to party disposition, so that even in circumstances where the provision is technically applicable, its application may be the subject of a waiver or estoppel or contrary agreement by the parties concerned.[59] This characteristic, Lord Goff explained in *The Indian Grace*, "enables practical justice to be done in rare cases, without any harm being done to the rule of public policy [that there be finality of litigation]."[60]

2. Effect

Section 34 of the 1982 Act renders *inactionable* a cause of action for which judgment is recovered abroad; the provision denies the claimant a right of action in respect of the original cause of action.

The provision therefore confers on a foreign judgment an effect equivalent to the effect that the merger doctrine attaches to a domestic judgment that grants a claim.[61] But, as Lord Goff noted in *The Indian Grace*, "there was no need for Parliament to invoke the highly technical doctrine of merger in judgment; the same practical result could be achieved by the simple words chosen in the section."[62]

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[53] (Chapter 3 n 13) [14]. cf *The Indian Grace (No 1)* (Introduction n 60) 417-18 (Lord Goff); *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (Introduction n 32); and *Godard v Gray* (Chapter 3 n 35). See Briggs and Rees (Chapter 3 n 13) [7.74].
[54] Briggs and Rees (Chapter 3 n 13) [7.74] (emphasis added).
[55] *The Indian Grace (No 1)* (Introduction n 60) 424 (Lord Goff).
[56] *Alliance Bank JSC v Aquanta Corp* [2011] EWHC 3281 (Comm), [2012] 1 Lloyd's Rep 181, (2012) 109(4) LSG 19 [64] (Burton J).
[57] ibid.
[58] *The Indian Grace (No 1)* (Introduction n 60) 421ff. cf *Shami v Shami* (n 10) [26] (David Donaldson QC).
[59] ibid. See further *India v India Steamship Co Ltd (The Indian Endurance and The Indian Grace) (No 2)* (Chapter 1 n 254) 913ff (Lord Steyn).
[60] *The Indian Grace (No 1)* (Introduction n 60) 424.
[61] See Chapter 1, text to n 92ff.
[62] ibid (emphasis added).

3. Conditions

The provision has general application to any judgment rendered in another part of the United Kingdom or in a court of overseas, unless the judgment in question is not enforceable or entitled to recognition in England and Wales.

A foreign judgment must therefore first acquire validity in England and Wales before it can have the legal consequences by triggering application of the provision.[63] Moreover, considering its aim—to achieve the same practical result for foreign judgments as the merger doctrine accomplishes in respect of domestic judgments—the provision is restricted in scope by four conditions: the provision only applies to proceedings (1) "on a cause of action" in respect of which a judgment (2) "has been given" (3) "in his favour" in proceedings (4) "between the same parties, or their privies".

First, s 34 is *claim* preclusive and only bars proceedings "on a cause of action";[64] the provision is irrelevant for questions of *issue* preclusion that arise in relation to a foreign judgment. Instead, such questions fall to the rule of issue estoppel, which forms part of the overarching English doctrine of estoppel *per rem judicatam*.[65]

Second, application of the provision requires that judgment "has been given" on the cause of action in question. Consequently, the rule has no application to claims based on causes of action which could (and should) have been raised abroad, but were not. The abuse of process doctrine may bar such claims.[66] Similarly, if the foreign judgment has been set aside, the provision lacks application, since there is nothing to recognise in those circumstances.[67] A discrete point is whether it matters that, though the foreign proceedings are pending, no foreign judgment has (yet) been recovered when the English claim is filed. In *The Indian Grace (No.2)* the House of Lords that the word "brought" in s 34 includes English proceedings which are continued, and thus the section covers the situation where the foreign proceedings are pending when the English claim is brought, and the foreign judgment is then obtained.[68]

Third, s 34 only bars the claim of a person on a cause of action for which judgment has been given "in his favour". This clarifies that the provision bars claims of *successful* claimants, whose cause of action was established. An unsuccessful claimant—a claimant whose cause of action was negated—may find a new claim for the same cause of action barred by cause of action estoppel.[69]

Finally, the new proceedings must be "between the same parties, or their privies". This condition marks an difference with merger doctrine, which does not require an identity of parties.[70] *The Indian Grace (No.2)*[71] suggests that the condition has complicated the application of s 34, by forcing the House of Lords into twist and turns in the law of admiralty to enable the provision to attain its intended effect.

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[63] See Chapter 3, text to n 13ff.
[64] On the meaning of the concept of 'cause of action' see Chapter 1, text to n 180ff.
[65] See Chapter 1, text to n 319ff.
[66] See Chapter 1, text to n 526ff.
[67] *Alliance Bank JSC v Aquanta Corp* (n 56) [65] (Burton J).
[68] *India v India Steamship Co Ltd (The Indian Endurance and The Indian Grace) (No 2)* (Chapter 1 n 254) 912 (Lord Steyn). See Briggs (Part I, Chapter 1 n 258) 357 (nothing that this expansive interpretation—or "muscular misapplication of section 34"—turns the provision into a mechanism for controlling *lis alibi pendens*).
[69] See Chapter 1, text to n 407ff.
[70] See Chapter 1, text to n 240ff.
[71] (Chapter 1 n 254).

The case related to a consignment of artillery shells shipped from Sweden to Cochin (India). A fire broke out on board the ship. The fire was extinguished and 51 shells were jettisoned. On arrival at Cochin, the consignees determined that the fire had rendered the remaining cargo useless. They first filed a claim in India for around GBP6,000 for non-delivery of the jettisoned shells (eventually they recovered judgment). In the interim, the consignees also filed a claim in England for total loss of the cargo, asserting damages of GBP2.6 million.

The defendant pleaded the Indian judgment and argued that s 34 barred a new claim for the same cause of action between the same parties (or their privies). The claimant responded that the English claim was *in rem* (i.e. against the ship) and, thus, involved other parties than the Indian claim, which was *in personam* against the owners of the ship.

Clarke J ruled for the claimant on the basis that "an analysis of the authorities shows that the two actions do involve the same cause of action but that historically they have been regarded as being between *different* parties."[72] The Court of Appeal reversed on the ground that "section 34 must have been intended… to prevent the same cause of action being tried twice over between those who are, *in reality*, the same parties."[73]

The House of Lords agreed. Lord Steyn confessed that given the legalisative objective of s 34, "it would … be wrong to permit an action *in rem* to proceed despite a foreign judgment *in personam* obtained on the same cause of action."[74] His Lordship reasoned that developments in the law of admiralty, "stripped away the form and revealed that in substance the owners were parties to the action in rem."[75]

4. Application: The Indian Grace

The question crops up whether s 34 applies notwithstanding that a cause of action remains actionable in the foreign judgment-rendering state. The provision fails to provide an answer. Briggs, in a critical note on *The Indian Grace*-saga,[76] suggested that the provision may be overly preclusive if it prevents an English court from taking account of foreign preclusion law, by allowing a claim when the law of the foreign judgment-rendering State would:

> "It is all very well to make the 'one bite' rule part of English domestic 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."[77]

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[72] *India v India Steamship Co Ltd (The Indian Endurance and The Indian Grace) (No 2)* (Chapter 1 n 255) 990 (emphasis added).
[73] *India v India Steamship Co Ltd (The Indian Endurance and The Indian Grace) (No 2)* (Chapter 1 n 256) 554 (emphasis added).
[74] *India v India Steamship Co Ltd (The Indian Endurance and The Indian Grace) (No2)* (Chapter 1 n 254) 910.
[75] ibid 909.
[76] The case reached the House of Lords twice in *The Indian Grace (No 1)* (Introduction n 60); and *India v India Steamship Co Ltd (The Indian Endurance and The Indian Grace) (No2)* (Chapter 1 n 254). See Briggs and Rees (Chapter 3 n 13) [7.74]; Barnett (Introduction n 24) [4.33]ff; and Briggs (Part I, Chapter 1 n 258).
[77] Briggs (Part I, Chapter 1 n 258) 357.

Lord Goff in *India v India Steamship Co Ltd (The Indian Endurance and The Indian Grace) (No.1)* conceded that "the effect, in financial terms, of the decision of the courts below [to strike out the claim] is most striking".[78] His Lordship also acknowledged the lower courts' dismay at the outcome, but emphasised that "[section 34 is] founded on the public interest in *finality of litigation* rather than the achievement of *justice* as between the individual litigants."[79] The case was remitted because the Court of Appeal had misconstrued of the nature of s 34, but ultimately, on a second appeal, the House of Lords upheld the Court of Appeal's decision to strike out the claim based on the provision.[80]

Briggs has questioned "whether the operation of section 34 should not take more account of whether the claimant's behaviour in not bringing an omnibus claim was reasonable by reference to the law of the court hearing the first claim".[81] In his assessment "the decision is clear".[82]

Nevertheless, *The Indian Grace* does not as such rule out reference to foreign preclusion law in the operation of s 34. The relevance of foreign law was simply not before the Court; the claimants never asserted that Indian preclusion law permitted another claim. If anything, the case demonstrates that English courts do not of their own motion consider foreign law. Conversely, if a party actually pleads and proves foreign law, nothing prevents a court from taking it into account. In fact, the approach of English courts to other issues of preclusion clearly indicates their willingness to acknowledge that "[e]ven if the English approach to finality in litigation is desirable in principle, it is nevertheless only an English approach."[83]

b. Contradiction: Cause of action estoppel

Section 34 of the 1982 Act is the only English rule of preclusion that applies specifically to foreign judgments. However, as noted, the provision has a limited scope of application and addresses solely the problem of reassertion of cause of action for which judgment has been recovered abroad; to illustrate, according to McCombe J in *Blyth-Whitelock v de Meyer*, "[this limited scope of section 34 is] simply a matter of the plain words of the statute".[84]

In the absence of other specific rules for foreign judgments, courts have developed a practice of applying domestic preclusion law for the purpose of determining the preclusive effects of foreign judgments, not because this law is deemed on balance the proper law of preclusion, but because preclusion is regarded as a procedural issue that is insusceptible to choice-of-law analysis and that is thus governed by forum law as a matter of course.[85]

The idea is that by imposing a procedural bar, a court gives effect to a procedural remedy in respect of a procedural complaint that is recognised by English

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[78] *The Indian Grace (No 1)* (Introduction n 60) 415.
[79] ibid.
[80] See n 76.
[81] Briggs and Rees (Chapter 3 n 13) [7.74].
[82] ibid.
[83] Briggs (Part I, Chapter 1 n 258) 357.
[84] [2009] EWHC 2839 (Ch) [113].
[85] See generally on the procedural question exception *Harding v Wealands* [2006] UKHL 32, [2007] 2 AC 1, [2006] 3 WLR 83, [2006] 4 All ER 1, [2006] 2 CLC 193, [2006] RTR 35, (2006) 156 NLJ 1136, (2006) 150 SJLB 917. cf *Castrique v Imrie* (n 22) 427 (Blackburn J); and *Dallal v Bank Mellat* (Chapter 1 n 333) (Hobhouse J). On this approach see Szászy (Introduction n 25) 436ff.

law on the basis of the foreign judgment.[86] At the same time, even though English law technically governs, courts exercise caution, by taking account of foreign preclusion law, if pleaded and, where contested, proved, so as not to impose finality of litigation in circumstances where the matter can be (re)litigated abroad, under the law of the foreign judgment-rendering State. This approach is can be described as the "cautious *lex fori*" approach to the problem of preclusion by foreign judgments.[87]

1. The cautious lex fori approach: Basis and elements

The cautious *lex fori* approach to preclusion by foreign judgments in its modern form derives from *Carl Zeiss Stiftung v Rayner & Keeler Ltd.*[88] Though the case concerned issue preclusion, the ruling of the House of Lords is equally relevant for claim preclusion.[89]

The dispute related to the right to sell optical instruments under the name "Carl Zeiss". An English law firm purported to act for Carl Zeiss Stiftung, an entity established in Jena (former East Germany), and claimed an injunction restraining a number of English and West German corporations from using the Carl Zeiss trademark. The defendants responded by disputing the law firm's authority to file the claim. In support, the defendants invoked a West German judgment that determined the issue in their favour. This foreign judgment had been rendered between the defendants and Carl Zeiss Stiftung's board; the English law firm had not been a party to these proceedings.

The House of Lords considered the significance of the West German judgment in the context of the English case.

2. Equal treatment of foreign and domestic judgments

According to the Court, foreign and domestic judgments, as a rule, have the same preclusive effect in England and Wales. Lord Reid, with whom Lords Hodson, Upjohn and Wilberforce agreed on this point, emphasised that ever since *Godard v Gray*, [90] English and foreign judgments are treated as equally conclusive, notwithstanding that the merger doctrine lacks application to foreign judgments.[91] The preclusive effects of a foreign judgment therefore depend on the same conditions as applied to domestic judgments, and are subject to the same exceptions (e.g. fraud or lack of jurisdiction, which negate the local validity of the foreign judgment).[92]

The decisive point in *Carl Zeiss* was that English law attributes a judgment issue preclusive effect in the form of an issue estoppel only between the same parties (or their privies); the German en English proceedings involved different parties, and according to English standards, the law firm was no privy of the Carl Zeiss Stiftung

[86] *Dallal v Bank Mellat* (Chapter 1 n 333) (Hobhouse J).
[87] See Van de Velden (Introduction n 26).
[88] *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (Introduction n 32).
[89] See text to n 108ff. On the approach to wider preclusion, see text to n 171ff.
[90] (Chapter 3 n 35).
[91] *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (Introduction n 32) 917.
[92] See, eg, *Godard v Gray* (Chapter 3 n 35) 150 (Blackburn J) ("It is quite clear this [ie to try a cause of action over again in a court not sitting as a court of appeal] could not be done where the action is brought on the judgment of an English tribunal; and, on principle, it seems the same rule should apply, where it is brought on that of a foreign tribunal.").

board. The Court therefore ruled that the issue of the authority to represent the Carl Zeiss Stiftung could be relitigated in England and Wales.[93]

3. Good sense: the need to take account of foreign preclusion law

Lord Reid in *Carl Zeiss* acknowledged that preclusion laws vary: "[I]t would be remarkable if German law had reached precisely the same stage of development on issue estoppel as the law of England has, and there are some indications in the German judgments that it has not."[94] His Lordship therefore emphasised the need for caution: "It is quite true that estoppel is a matter for the lex fori *but the lex fori ought to be developed in a manner consistent with good sense*."[95] He explained that 'good sense' implies that "we should have to be satisfied that the issues in question cannot be relitigated in the foreign country",[96] because, he added, "it seems to me to verge on absurdity that we should regard as conclusive something in a [foreign] judgment which the [foreign] courts themselves would not regard as conclusive."[97] Similarly, Lord Wilberforce warned that "it would seem *unacceptable* to give to a foreign judgment a more conclusive force in this country than it has where it was given."[98]

A good sense application of English preclusion law does not mean *application* of foreign preclusion law; good sense requires that an English court takes account of foreign preclusion law in the process of applying English preclusion law if foreign law properly is actually pleaded and, if contested, proved. Along these lines, Popplewell J in *Naraji v Shelbourne* said that the only question on which foreign law experts can opine is "whether the foreign judgment is final and conclusive on the merits in the country in which it was given",[99] but that "[i]t is for the English court to decide whether the ingredients of the English doctrine of res judicata are fulfilled by a foreign judgment which has that effect in the jurisdiction in which it was given."[100]

4. Pleading foreign law

Unfamiliarity with foreign modes of procedure complicates a good sense application of English preclusion law in two ways. First, the court may have trouble to verify that the English requirements for preclusion are fulfilled by the foreign judgment and the proceedings in the foreign court. Second, even if the court can establish that all English requirements are met, the court will normally lack knowledge of foreign preclusion law, which causes uncertainty regarding the question whether (re)litigation is also precluded in the foreign judgment-rendering State. However, if none of the parties actually pleads foreign law, a presumption applies that foreign law is the same

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[93] See Chapter 1, text to n 399ff.
[94] *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (Introduction n 32) 919.
[95] ibid (emphasis added).
[96] ibid.
[97] ibid.
[98] ibid 970. cf *Black Clawson International Ltd v Papierwerke AG* (Chapter 1 n 309) 633 (Lord Wilberforce) ("Why should we give to the judgment a greater force than it receives by the law of the country where it is given?").
[99] (Chapter 1 n 280) [131].
[100] ibid. cf *Castrique v Imrie* (n 22) 427 (Blackburn J)—a case involving a French judgment, which predates *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (Introduction n 32) by about a century and signals that the approach of English courts has remained stable over time—("What were the nature and effect of the proceedings in France… are all questions depending on the French law, and it must be ascertained as a fact what that French law is. When once that fact is ascertained, it becomes a question of English law to determine what effect is to be given to it in an English Court.").

as English law unless the contrary is proved.[101] Lord Reid in *Carl Zeiss* made this painfully clear, by noting that the need to prove West German law "[had] escaped the notice of the appellants' advisers", which implied that the presumption applied that foreign law is identical to English law.[102]

Unclear is whether the same failure to plead foreign law arose in the later case of *The Sennar*.[103] Mance QC (as he then was) for the claimant cited *Carl Zeiss* and the need for caution identified in that case in the application of the doctrine of issue estoppel in cases where the estoppel that is pleaded is to be founded on a foreign judgment. Yet Lord Brandon, in rejecting this argument, said summarily that "the reasons given [in *Carl Zeiss*] for the need for such caution do not apply in any way to the present case."[104] His Lordship offered no explanation; it is unclear whether Dutch law was pleaded and whether evidence on Dutch preclusion law was heard in the case. Perhaps Mance knew that Dutch preclusion law would bar relitigation of the issue, but nevertheless wished to mark the difference between domestic preclusion and interjurisdictional preclusion.

Blyth-Whitelock v de Meyer[105] further illustrates the importance of pleading foreign law in an English case.[106] McCombe J noted that certain of the issues sought to be raised in the English proceedings had already been before a French court in proceedings between the same parties, among other things the issue whether a prior contract between the parties was novated and substituted by a new agreement, and that those issues were determined by the French court. However, despite the fact that French law does not recognise issue preclusive effect,[107] the judge ruled that the French judgment gave rise to an issue estoppel, which implied that the claimant's claim under the prior contract lacked any prospect of success.

5. Cause of action estoppel

Henderson v Henderson[108] confirmed that a foreign judgment (at the judgment of Colonial Court) can form the basis for a cause of action estoppel in English proceedings. *Carl Zeiss*[109] confirmed the same for issue estoppel.

Under the cautious *lex fori* approach, the English estoppel doctrine[110] applies to foreign and domestic judgments alike (as Lord Reid put it, "estoppel is a matter for the *lex fori*").[111] *The Sennar*[112] subsequently restated three requirements for founding an estoppel on a foreign judgment, which mirror those for domestic judgments:[113] first, the foreign judgment must be (a) of a court of competent Jurisdiction, (b) final and conclusive and (c) on the merits; second, the parties (or privies) in the earlier action and those in the later action must be the same; and, finally, the matter in

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[101] *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (Introduction n 32) 919.
[102] ibid.
[103] *The Sennar (No 2)* (Chapter 1 n 58). For the facts see Chapter 1, text to n 383ff.
[104] ibid 500.
[105] (n 84) (McCombe J).
[106] The *Yukos* case demonstrates the dangers of getting foreign preclusion law wrong when it is pleaded. See *Yukos English High Court* (Introduction n 26). See Chapter 1, text to n 415ff.
[107] cf AG Bot in *Gothaer* (Part I, Introduction n 1) fn 39 (with further reference).
[108] (Chapter 1 n 275).
[109] *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (Introduction n 32) 918.
[110] See Chapter 1, text to n 264ff.
[111] *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (Introduction n 32) 919.
[112] [1985] 1 WLR. 490, 499.
[113] See Chapter 1, text to n 365ff.

dispute in the later action must be the same as that decided by the foreign judgment.[114]

A significant point should be made before proceeding with a discussion of the application the estoppel doctrine to foreign judgments, in both its cause of action estoppel and issue estoppel forms. A careful reader will have noted a requirement that is on its face identical for the recognition and preclusion purposes, namely, that the foreign judgment-rendering court is of "competent jurisdiction". However, for purposes of recognition, on the one hand, and preclusion, on the other hand, the requirement means materially different things. First, different laws are determinative: for preclusion purposes, the law of the judgment-rendering State should be taken into account to determine whether the rendering court was of competent jurisdiction.[115] By contrast, for purposes of recognition, English standards of jurisdiction determine whether a foreign judgment-rendering court was of competent jurisdiction.[116]

Further, 'jurisdiction' for purposes of preclusion refers to the adjudicatory authority as shared by domestic courts and tribunals,[117] whereas for recognition purposes the concept refers to the authority of a foreign court over the parties and the dispute so as to make its exercise of adjudicatory power acceptable in the eyes of English private international law[118].

Finally, the conditions are tested at different stages of proceedings: verification whether the foreign judgment-rendering court was of competent jurisdiction by English standards occurs when the foreign judgment's recognition is sought in English proceedings. Recognition does not require that the foreign judgment is also preclusive. Conversely, when a plea of finality is made on the basis of a foreign judgment, this plea presumes that the foreign judgment is amenable to recognition in England and Wales.

A foreign judgment's cause of action estoppel effect cannot attach in a case where a claimant seeks enforcement at common law, by action on the foreign judgment.[119] In such a case, the cause of action is different, since the foreign judgment forms the cause of action underlying the English claim. Admittedly, Blackburn J in *Godard v Gray* held it is not open to an unsuccessful defendant to try a cause of action over again in an English court not sitting as a foreign court of appeal, because "this could not be done where the action is brought on the judgment of an English tribunal; and, on principle, it seems the same rule should apply, where it is brought on that of a foreign tribunal."[120] However, the circumstances to which the judge referred—i.e. "that a foreign judgment can be impeached on the ground that it

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[114] *The Sennar (No 2)* (Chapter 1 n 58) 499.
[115] See Chapter 1, text to n 394ff.
[116] See Chapter 3, text to n 143ff. But see Pippa Rogerson, 'Issue Estoppel and Abuse of Process in Foreign Judgments' (1998) 17 CJQ 91, 93 (conflating the requirement of competent jurisdiction for purposes of preclusion with the requirement for purposes of recognition, by suggesting that the foreign court's jurisdiction for purposes of founding an estoppel, "may be founded upon the presence of the defendant within the territory of the foreign court at the commencement of proceedings; the defendant's voluntary appearance in the foreign court,either as plaintiff, counterclaimant, or by arguing as to the merits of the case; or the defendant's agreement to submit disputes to that foreign court.").
[117] See Chapter 1, text to n 394ff.
[118] See Chapter 3, text to n 143ff.
[119] See, eg, *Godard v Gray* (Chapter 3 n 35) 150 (Blackburn J).
[120] (Chapter 3 n 35) 150.

was erroneous on the merits; or to set up as a defence to an action on it, that the tribunal mistook either the facts or the law"—qualify as a collateral attack-abuse.[121]

Nevertheless, this type of estoppel may be relevant where a claimant who failed to recover abroad tries again in England and Wales by filing a claim based on the same cause of action. In those circumstances, a cause of action estoppel serves as a shield, and assists the defendant to successfully ward off a new claim. The case of *Naraji v Shelbourne* illustrates the situation.[122] The case concerned a claim for alleged medical malpractice. The claimant first filed a claim in tort for negligence in Indiana (U.S.). That claim was dismissed with prejudice after being voluntarily withdrawn. The claimant then sued in England and Wales for the same medical malpractice by means of claim alleging, in the alternative, a tort (negligence) and breach of contract.

Popplewell J in the High Court dismissed the tort claim on grounds of res judicata after the defendant pleaded cause of action estoppel, but allowed the claim for breach of contract. The judge first established on the basis of expert evidence that under Indiana law a dismissal with prejudice is a determination on the merits and is conclusive of the parties' rights, so as to preclude a claimant from filing another claim in Indiana relating to his allegations of medical malpractice.[123]

Then the judge reviewed whether the requirements for a cause of action estoppel under English law were fulfilled, in particular, the requirement of an identity of the cause of action underlying the claims in question in the Indiana and English proceedings.[124] In this regard, he distinguished between the tortious cause of action (also alleged in Indiana) and the contractual cause of action (put forward for the first time in England); for the former, he found the required identity of the cause of action between the two sets of proceedings, but for the latter, he concluded, the required identity was absent. The Indiana judgment could therefore found a cause of action estoppel precluding the same claim in tort, but not a cause of action estoppel barring the claim for breach of contract. (The defendant further invoked issue estoppel and *Henderson v Henderson*-abuse, which pleas are discussed separately.)[125]

(ii) Issue preclusion

Issue estoppel by foreign judgments has proved complex and contentious. As noted before, a foreign judgment can form the basis for an issue estoppel; Lord Reid in *Carl Zeiss* saw "no reason in principle why we should deny the possibility of issue estoppel based on a foreign judgment".[126] *The Sennar* later confirmed this, with Lord Diplock recognising that "[i]t 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".[127] Today, though well-established, issue estoppel by foreign judgments causes various difficulties, which can be illustrated by reference to cases like *House of*

[121] See Chapter 1, text to n 536ff.
[122] (Chapter 1 n 280).
[123] ibid [129].
[124] ibid [131].
[125] See, respectively, text to n 126ff and text to n 171ff.
[126] *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (Introduction n 32) 918.
[127] *The Sennar (No 2)* (Chapter 1 n 58) 493.

Spring Gardens (No.2),[128] *Good Challenger Navegante*,[129] *Yukos*,[130] and *Naraji v Shelbourne*[131].[132] These cases are discussed in turn.

a. Identity of parties (or their privies): Carl Zeiss

The House of Lords in *Carl Zeiss*[133] rejected a plea of issue estoppel based on a foreign (German) judgment, because the English law requirement of identity of the parties (or privies) between the foreign and English proceedings was not met. The question arises whether the court's response would have been different in the (unlikely)[134] event that German law would attribute issue preclusive effect in the circumstances.

The starting point of an English court is to apply the English conditions for preclusion; if those conditions are met, the court will impose finality of litigation *unless* the party to be precluded pleads and, if contested, proves that the issue can be (re)litigated in the foreign judgment-rendering state. This approach seems to exclude the prospect of attributing issue preclusive effect to a foreign judgment in circumstances where the English conditions are not met—like in *Carl Zeiss*[135]—and a party pleads and proves that the law of the foreign judgment-rendering state would attach issue preclusive effect. If the English court ignores the position under foreign law, a party may be able to litigate an issue in England that is precluded in the jurisdiction where it was previously determined.

b. On the merits; identity of issues: The Sennar

The Sennar[136] illustrates the requirements that the foreign judgment was 'on the merits' and that is an 'identity of issues' between the foreign and the English proceedings. The case involved a string of contracts for the sale of goods transported by ship from Sudan to The Netherlands. Two things happened: first, the market price of the goods fell sharply, making the transaction commercially unattractive for the final purchaser, and, second, the loading date on the bill of lading proved to be false, allowing the purchaser as well as their predecessors to reject the document and claim back their money. Further, the insolvency of one of the sellers prevented one of the buyers from recovering. This buyer sued the original seller in The Netherlands for fraud, breach of duty and negligence.

The Dutch court denied jurisdiction on the basis of an exclusive jurisdiction clause for the courts of Sudan, which was contained in the bill of lading. According to the Dutch court, the claim in question was contractual in nature and thus covered by the jurisdiction clause. The disappointed claimant then filed essentially the same

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[128] *House of Spring Gardens Ltd v Waite (No2)* (Chapter 1 n 514).
[129] *Good Challenger Navegante SA v Metalexportimport SA* (Chapter 1 n 390).
[130] *Yukos English High Court* (Introduction n 26).
[131] (Chapter 1 n 280).
[132] See also *HJ Heinz Co Ltd v EFL Inc* [2010] 1 CLC 868, [2010] EWHC 1203 (Comm) (Burton J).
[133] See text to n 88ff.
[134] German law does not recognise issue preclusion. See CA Heinze, 'The Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, Res Judicata and Abuse of Process—Report for Germany' (British Institute of International and Comparative Law, London 2008) 37 <www.biicl.org/files/3482_germany_final_c.pdf > accessed 1 June 2013.
[135] See text to n 88ff.
[136] *The Sennar (No 2)* (Chapter 1 n 58).

claim in England. However, the defendant pleaded res judicata, arguing that the Dutch judgment gave rise to an issue estoppel precluding the claimant from disputing that the jurisdiction clause was binding upon the parties and covered the claim.

The claimant disputed the fulfilment of two requirements for an issue estoppel restated by Lord Brandon. First, the Dutch court's decision on jurisdiction was procedural in nature and not "on the merits". Lord Brandon rejected this contention; according to His Lordship, "a decision on procedure alone is not a decision on the merits"[137] for purposes of issue estoppel. Conversely, he added, "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."[138] Against this standard, he concluded, "there can be no doubt whatever that the decision of the Dutch Court … was a decision on the merits for the purposes of the application of the doctrine of issue estoppel."[139]

Second, the claimant contended that there was no identity of issues between that Dutch and English proceedings. According to the claimant, the issue in the Dutch Court was whether the claim could be founded on tort as distinct from contract, and, if not, whether the jurisdiction clause applied to it, while the issue in the English Court was whether, even if the claim was framed in tort, it would still come within the jurisdiction clause (the issue was not whether the claim could be founded in tort as distinct from contract—it was undisputed that it could). Lord Brandon also rejected this argument, by noting that the issue in both proceedings was whether the claim—based in either case on the same facts—framed in tort rather than in contract was covered by the jurisdiction clause, which was the same issue as that presented in the Dutch case.[140]

c. Preclusion of the issue of fraud in the procurement of a foreign judgment; identity of parties: House of Spring Gardens (No.2)

A foreign judgment on the issue of fraud in the procurement of a judgment can form the basis for an issue estoppel. Moreover, 'privy' is a flexible concept and may include a person who was well aware of the foreign proceedings, could have applied to be joined in those proceedings, while no one could have opposed this application, who would have benefited from a decision setting aside the judgment, and who sat back and left others to fight his battle, at no expense to himself. *House of Spring Gardens Ltd v Waite (No.2)*[141] illustrates this. The case involved a claim for the enforcement in England and Wales of an Irish judgment. The Irish judgment held three defendants jointly and severally liable for breach of the duty of confidence regarding information imparted to the defendants, as well as in breach of the claimant's copyright in the cutting patterns for a bullet-free vest.

Prior to the English proceedings, two of the three original defendants unsuccessfully filed a claim in Ireland to set the Irish judgment aside for fraud. The English enforcement proceedings were against the third defendant, who had not been

[137] ibid 499.
[138] ibid.
[139] ibid.
[140] ibid 499-500.
[141] (Chapter 1 n 514).

a party in the Irish setting aside proceedings. He now alleged fraud in the procurement of the Irish judgment establishing his liability. The claimant responded by pleading an issue estoppel based on the Irish judgment in the setting aside proceedings. In reply, the defendant cited a couple of late nineteenth century judgments in *Abouloff v Oppenheimer & Co.*[142] and *Vadala v Lawes*,[143] which held that a foreign judgment can be impeached for fraud even though no newly discovered fraud is relied upon and the fraud might have been, and was, relied upon in the foreign proceedings.

According to Stuart-Smith LJ for the Court of Appeal, these cases were distinguishable because "[i]n none of these cases was the question, whether the judgment sued upon here was obtained by fraud, litigated in a separate and second action in the foreign jurisdiction."[144] In the actual case the issue of fraud had been litigated abroad in a second and separate set of proceedings in the judgment-rendering state; His Lordship therefore concluded that the judgment in those proceedings could form the basis for an estoppel in proceedings for the enforcement of the foreign judgment that originally determined the claim on its merits and established liability.

The defendant then disputed fulfilment of the requirement for an issue estoppel that the Irish and English proceedings involved the same parties. The defendant had been held liable jointly and severally with two other defendants in the original Irish proceedings, but had not participated in the Irish setting aside proceedings. However, Stuart-Smith LJ ruled that an estoppel also binds those who are privy to the parties bound, not only the parties. According to His Lordship, the defendant qualified as a privy because he (a) was well aware of the Irish setting aside proceedings; (b) could have applied to be joined in those proceedings, while no one could have opposed this application; (c) would have benefited from a decision setting aside the judgment; (d) sat back and left others to fight his battle, at no expense to himself.[145]

Considering that English law imposes a restriction on privity by requiring a relevant connection of blood, title or interest,[146] the privity applied by His Lordship could only be privity of interest, and he cited[147] with approval the opinion of Lord Penzance in *Wytcherley v Andrews*:[148]

> [T]here is a practice in this court, by which any person having an interest may make himself a party to the suit by intervening; and it was because of the existence of that practice that the judges of the Prerogative Court held, that if a person, knowing what

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[142] (Chapter 3 n 113). cf *Owens Bank Ltd v Bracco* (n 29). See *Yukos English Court of Appeal* (Introduction n 28) [154] ("English law could, of course, be different and say that a foreign judgment is to be recognised unless it is set aside for fraud in the country where it is given."). The Court of Appeal in *Yukos* referred to the opinion of Lord Templeman in *Owens Bank v Etoile Commerciale* (n 30) 50, that which should indeed be the law in relation, at least, to those countries whose judgments the United Kingdom had agreed to register and enforce. Further see *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* (n 32) [116] (Lord Collins) (stating that on any view the question whether the law should be altered might require a nuanced approach depending on the "the reliability of the foreign legal system, the scope for challenge in the foreign court and the type of fraud alleged.").

[143] (1890) 25 QBD 310.

[144] *House of Spring Gardens Ltd v Waite (No2)* (Chapter 1 n 514) 251.

[145] ibid 253-54.

[146] *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (Introduction n 32) 910 (Lord Reid).

[147] *House of Spring Gardens Ltd v Waite (No2)* (Chapter 1 n 514) 252-53 (citing *Nana Ofori Atta II v Nana Abu Bonsra II* [1958] AC 95, 102-03, [1957] 3 WLR 830, [1957] 3 All ER 559, (1957) 101 SJ 882 (Lord Denning)).

[148] (1871) L R2 P & D 327.

> was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to re-open the case. That principle is founded on justice and common sense….[149]

Obviously, caution is required here; the law of the judgment-rendering state might prevent a person having an interest in litigation from intervening as a party, or might not recognise a similar extension of the preclusive effect to persons who know what is passing, are content to stand by and see their battle fought by somebody else in the same interest. If Irish law was indeed so restricted, however, as explained elsewhere,[150] the defendant should have pleaded and proven this legal position to the English court.

d. The finding necessary for the decision; twin ratio problems: Good Challenger Navegante

Only findings necessary to the final decision can found an estoppel, and the so-called 'appealability-test' can serve to distinguish such findings from collateral findings. *Good Challenger Navegante* serves as illustration.[151] The case concerned the enforcement of an arbitral award. One of the questions was whether the award creditors were precluded by a judgment of the Romanian Supreme Court from disputing that their claim to enforce the award had become time barred under English law when the action was brought.

The Romanian Supreme Court as part of its judgment refusing enforcement concluded that the claim was indeed time barred under English law when the proceedings in Romania were commenced. According to the English Court of Appeal this decision was erroneous; as a matter of English law the claim was not time barred. However, the Court ruled that whether a foreign court was wrong in fact or English law is irrelevant.[152]

Clarke LJ for the English Court of Appeal considered that the relevant question was whether the Court could be confident that the finding of the Romanian Supreme Court on the question of the English time bar was necessary for that court's decision on the enforcement of the arbitral award, and not merely collateral or *obiter*.[153] (The issue arguably arose under Romanian law on foreign judgment enforcement, which requires that a foreign judgment is enforceable under the law of the judgment-rendering court.)

According to His Lordship, that question implied an inquiry into whether "the determination of the issue … was necessary for the decision."[154] As clarified elsewhere,[155] the proper inquiry is rather to ask whether the determination of the legal consequences under English law of the passage of time since the accrual of the right to enforce the award was necessary for the Romanian Supreme Court's decision on the claim for enforcement of the award in Romania. In other words, the appropriate

[149] ibid 328-29.
[150] See text to n 101ff.
[151] *Good Challenger Navegante SA v Metalexportimport SA* (Chapter 1 n 390).
[152] ibid [54].
[153] ibid [61].
[154] ibid [62].
[155] See Chapter 1, text to n 415ff.

question is whether the English time bar question was an issue at all in the Romanian case.

In the particular case this inquiry was complicated by the fact that to deny enforcement in Romania, the Supreme Court did not have to decide the question of the English time bar, but could have limited itself to answering another question, namely, whether the right to request enforcement was prescribed *as a matter of Romanian* law.[156] A finding on either question could support the decision. But the Romanian Court had answered both questions, which according to Clarke LJ meant that "each [finding] forms the basis of the decision so that (in the old parlance) there are two *rationes decidendi*, even though the court could have decided the case on one or other basis."[157]

His Lordship did not resolve this problem of a twin ratio-case.[158] Instead, he agreed with the lower court's decision that the finding on the question of English law was a secondary or collateral or obiter reason for the Romanian Supreme Court decision. He added that a further pointer to the finding's secondary or collateral or obiter nature was that the Romanian Supreme Court's decision contained no reasons for rejecting the point made by the award creditors that the English limitation period had been extended by certain acts of the award debtors (i.e. part payments and acknowledgments), noting that "[t]he reader of the judgment is left to speculate as to the reasons which led the court to reach the conclusion it did."[159]

The court below had applied the appealability-test, by means of which an English court determines whether a finding is necessary for the final decision by asking whether the party said to be precluded could have appealed from that finding.[160] If no appeal was available from the finding because the finding did not affect the final decision, the question is deemed only an incidental matter, not necessary to the decision.[161] Applying this test, the court found that it would not have availed the claimants to seek revision of the Supreme Court's finding on the question of English law unless they also succeeded in achieving a revision of that court's "primary ruling on prescription under Romanian law". On this basis, the court concluded that it would be unjust to shut out the claimants from litigating the limitation issue in the English enforcement proceedings, because there was "a strong

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[156] The key provision of Romanian law is Art 174 of Law No 105/1992, which provides, according to the translation used before the judge: "The execution of the foreign decision is consented in keeping with the conditions stipulated under article 167 and the following: (a) the decision is executory according to the law of the instance which pronounced it; (b) the right to request an unwilling execution is not prescribed according to the Romanian law. The provisions under Articles 168 and 169 are correspondingly applicable to the request of consent of the execution as well."

[157] *Good Challenger Navegante SA v Metalexportimport SA* (Chapter 1 n 390) [65].

[158] On the problem of twin ratios, see *Littman v Aspen Oil (Broking) Ltd* [2005] EWCA Civ 1579, [2006] 2 P & CR 2, [2006] L & TR 9, (2006) 103(5) LSG 29, [2005] NPC 150 [32] (Longmore LJ) ("Having reached a definite conclusion on construction, I would prefer to express no opinion on the Landlord's alternative case on rectification. I would merely point out that if May L.J. were to agree with Jacob L.J. on this question and our decision were thus to have two rationes decidendi (both of which are equally binding) it will, so far as the researches of counsel went, be the first time that this court has held (as a matter of ratio) that a written document can be rectified for unilateral mistake when there was no antecedent agreement about the content of the clause sought to be rectified."). This suggests that the issue preclusive effect of the judgment extends to both findings as a matter of English law.

[159] *Good Challenger Navegante SA v Metalexportimport SA* (Chapter 1 n 390) [86].

[160] ibid [73] (citing *Penn-Texas Corp v Anstalt (Murat)* (Chapter 1 n 391) 660-61 (Lord Denning MR)).

[161] ibid.

indication that the Supreme Court's decision on English law limitation was not conclusive in the sense of being fundamental or essential to its judgment".

Overall, Clarke LJ concluded that the lack of clarity as to the role played by the question of English limitation law and the finding on that question of the Supreme Court led to the conclusion that "it would be unjust to the owners to hold that its decision gives rise to an issue estoppel."[162] In this regard, however, he emphasised that the plea of issue estoppel failed because the defendants failed to demonstrate that the finding of the Romanian Supreme Court was necessary to the decision as opposed to collateral to it, not due to what is called the special circumstances exception to an issue estoppel that is actually established.[163]

e. The court actually determined the issue: Naraji v Shelbourne

To found an issue estoppel, the foreign court must have actually determined the issue. In the aforementioned case of *Naraji v Shelbourne*, [164] the defendant argued that the Indiana judgment gave rise to an estoppel on the issue of the standard of care, so as to preclude the claimant from alleging that the defendant had been negligent, which would also be fatal to the contractual claim, which involved application of the same standard of care.

Popplewell J rejected the plea on the ground that it was unclear whether the dismissal judgment conclusively determined the issue of negligence, which had not been pleaded out, so that the caution practiced in relation to preclusion by foreign judgments weighed against imposing finality.

Apart from the fact that the issue of negligence had not been fully litigated due to the dismissal, the judge considered that he was not in a position to determine the issues that would have emerged had the matter been fully pleaded out and evidence on the issues adduced. In fact, the judge concluded that submitting to a dismissal was consistent with a concession that negligence could not be established, but also with being able to establish negligence but unable to establish causation, or with being able to establish negligence and causation but finding the damages cap a sufficient disincentive to continuing with the claim.

f. Identity of the issues: Yukos

Yukos is a recurring case.[165] It illustrates that an estoppel requires identify of the issues between the prior (foreign) and the new (local) set of proceedings. In short, the Amsterdam Court of Appeal found that Russian judgments annulling a number of Russian arbitral awards were the product of a partial and dependent judiciary. The Dutch court therefore denied the annulment judgments recognition on grounds of public policy.

In subsequent English proceedings for enforcement of the same arbitral awards, the identical factual question of partiality and dependence of the Russian judiciary cropped up when the defendant once more invoked the Russian annulment

[162] ibid [89].
[163] ibid. On the special circumstances-exception, see Chapter 1, text to n 450ff.
[164] (Chapter 1 n 280). See text to n 122ff.
[165] See, in particular, Chapter 1, text to n 415.

judgments to defeat the enforcement claim.[166] According to the claimant, English courts were bound to recognise the Dutch judgment, which would then trigger an issue estoppel under English law. The defendant argued that the conditions for an issue estoppel under English law were not met since the issue in question was different, and, alternatively, that the fact of partiality and dependence could be disputed again as a matter of Dutch law.

Hamblen J in the High Court acknowledged the implications of the claimant's plea of finality as follows: "If [the court] decides not to do so [i.e. to recognize the Russian judgments] which will be consistent with the decision reached by the Court of Appeal and it is in the interests of finality that the underlying factual issue decided by that court should not have to be relitigated."[167] The judge then applied English preclusion law to the Dutch judgment and concluded that the conditions for an issue estoppel were fulfilled. Heeding to the call for caution in *Carl Zeiss*,[168] the judge also heard evidence on Dutch preclusion law when the defendant argued that the fact of partiality and dependence could be disputed afresh in new proceedings in The Netherlands. Based on expert evidence the judge found that the judgment also triggered preclusion by Dutch law standards and barred the defendant from disputing that the Russian judiciary was dependent and partial.

The defendant appealed. The Court of Appeal reversed, citing an error of English preclusion law; according to the Court, the Dutch judgment could not give rise to an issue estoppel, because the issue in both sets of proceedings was different, notwithstanding that the factual question of partiality and dependence was the same.[169] Indeed, the issue in the Dutch proceedings was Dutch public policy, whereas in the English proceedings the issue was English public policy.[170] Nevertheless, despite this error, the High Court's *approach* to resolving the preclusion issue raised by the Dutch judgment accords with established practice among English courts.

(iii) Wider preclusion

Prior litigation abroad is a fact that may be relevant to establishing an abuse of process.[171] In particular, an abuse of process may consist of attempts to (a) relitigate matters determined abroad in circumstances where the English res judicata doctrine is inapplicable; (b) litigate claims, issues, or defences which could and should have been raised abroad; or (c) challenge a foreign judgment by means other than an appeal.[172]

In establishing abuse, English courts appear not to apply a cautious *lex fori* approach, like that mandated for issues of estoppel triggered by foreign judgments. A court does not then consider whether a party's conduct in English proceedings would also constitute an abuse of process in the foreign judgment-rendering State. Instead, the inquiry tends to be fact-based and to weigh merely the English public interest and the parties' private interests. Nevertheless, as pointed out below, for instance

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[166] *Pemberton v Hughes* (Chapter 3 n 150) 790 (Lord Lindley). cf *Adams v Cape Industries Plc* (Chapter 3 n 45). See *Dicey, Morris & Collins* (Part II, Introduction n 9) r 45.
[167] (Chapter 1 n 280) [105].
[168] See text to n 88ff.
[169] *Yukos English Court of Appeal* (Introduction n 28) [150]ff.
[170] ibid [151].
[171] *House of Spring Gardens Ltd v Waite (No2)* (Chapter 1 n 514) 251; and *Owens Bank v Etoile Commerciale* (n 30) 51.
[172] See Chapter 1, text to n 470ff.

regarding *Henderson v Henderson*-abuse, which involves a party seeks to litigate a matter which could and should have been litigated abroad, an English court can usefully take account of foreign law in answering the question whether the matter in question *could* have been litigated abroad.

a. Relitigation-abuse

Abuse of process doctrine can serve to bar an attempt to relitigate matters determined abroad in circumstances where a res judicata plea fails;[173] for instance, Clarke LJ in *Good Challenger Navigante* observed that "[relitigation abuse] has a close relationship with issue estoppel, although there are of course cases in which an allegation of abuse of process has succeeded where an allegation of issue estoppel has failed."[174]

In that case, the Romanian judgment relied on could not found an issue estoppel. However, the defendants then argued that the owners' attempt to relitigate the question of the English time bar constituted relitigation-abuse, because the matter could have had decided in England a decade ago, but the claimants had sought to bypass the English court and has so tried to circumvent "the insurmountable hurdle of limitation" by claiming enforcement in the Romanian courts.

Clarke LJ rejected this argument. Applying the required broad merits-based approach, His Lordship found that the claimants had always intended to enforce the award, had refrained from litigating the time limitation issue in England on the advice of their Romanian lawyers, and could not have anticipated that the Romanian proceedings took much longer than expected. He further noted that the claimants would have prevailed on the issue and concluded that nothing made it manifestly unfair to allow them to relitigate the issue in England after it had been determined in Romania.

The case shows that, though Stuart-Smith LJ in *House of Spring Gardens Ltd v Waite (No.2)* said that the doctrine of abuse of process is "untrammelled by the technicalities of estoppel",[175] which is true, an attempt at relitigation not barred by an estoppel *per rem judicatam* is not invariably an abuse of process.

1. Foreign interlocutory judgments subject to appeal invoked against a defendant in a claim for Mareva-type relief

If an issue has been litigated abroad, but the foreign judgment cannot found an estoppel, an English court has to take all circumstances of the case into consideration before upholding a plea of relitigation-abuse of process; *Motorola Credit Corp v Uzan (No.6)* serves as an example.[176]

Claimants filed a claim for Mareva injunctions in support of U.S. proceedings involving various billion dollar fraud claims. The U.S. District Court for the Southern District of New York had granted a preliminary injunction and attachment order to secure the claims, holding that: "The plaintiffs have clearly demonstrated that they

[173] *House of Spring Gardens Ltd v Waite (No2)* (Chapter 1 n 514). cf *Desert Sun Loan Corp v Hill* (Chapter 1 n 513).
[174] *Good Challenger Navegante SA v Metalexportimport SA* (Chapter 1 n 390) [93].
[175] (Chapter 1 n 514) 254.
[176] [2003] EWCA Civ 752, [2004] 1 WLR 113, [2003] CP Rep 56, [2003] 2 CLC 1026, (2003) 100(32) LSG 34, (2003) 147 SJLB 752.

are substantially likely to succeed on the merits of their claims, and have further demonstrated that very serious damage is likely to result if the requested relief is not granted."[177] In the English proceedings, the claimant pleaded relitigation-abuse when a defendant disputed that there was 'a good arguable case' for injunctive relief, because that issue had already been decided by the U.S. court.

The High Court upheld the plea based on in particular the following considerations: first, the U.S. court was the natural forum for determining the strength of the claims; second, the U.S. court's findings were *inter partes* and followed an extensive hearing where each party had an opportunity make their case; and, finally, the whole purpose of attempting to relitigate the arguable case issue in England was to achieve inconsistent judgments between the English and U.S. courts. The defendants appealed.

The Court of Appeal reversed on the abuse of process point, citing "doubt that it is in principle appropriate to invoke the doctrine of abuse of process in relation to arguments advanced by a defendant by way of challenge to the matters necessary to be established by the claimant as a pre-condition of Mareva-type relief". Potter LJ restated that the prohibition of relitigation-abuse is "principally based upon the consideration that there ought to be finality to litigation and on the idea that a party who has litigated a matter to a conclusion ought not to be oppressed by the renewal of a dispute which he had cause to believe had been finally disposed of".[178] Against this background, His Lordship reasoned, the doctrine should not ordinarily be applied in circumstances like in the case in question, where "matters [in New York] are still at the interlocutory stage with appeals pending."[179]

His Lordship noted that the plea of finality was in this case raised offensively (i.e. by the claimant against the defendant), as opposed to defensively. In this regard, he pointed to the statement of Lord Bingham in *Johnson v Gore Wood & Co* that "there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party",[180] and found that "it is difficult to see that it can be regarded as an 'unjust harassment' of the claimant to permit the defendant to raise any point before the court which is relevant to its consideration of the claimant's entitlement to the ancillary relief sought."[181] Finally, he denied that in the context of "interlocutory skirmishing on both sides of the Atlantic" where the right to freeze the worldwide assets of a defendant, the defendant's interest to relitigate the issue is outweighed by the public interest and the claimant's interest in finality in litigation.

b. Henderson v Henderson-abuse

Henderson v Henderson,[182] the case now associated with abuse, actually concerned cause of action estoppel,[183] and clarified that a cause of action estoppel bars a party from raising points which could have been made in the prior case, but were not made

[177] ibid [12].
[178] ibid [98].
[179] ibid.
[180] *Johnson* (Introduction n 12) 31.
[181] [2003] CP Rep 56 CA (Civ Div) [99].
[182] (Chapter 1 n 275).
[183] See Chapter 1, text to n 275ff.

out of negligence, inadvertence, or mere accident.[184] Today, *Henderson v Henderson*-abuse refers to the situation where a party could and should have raised a matter, but failed to do so, so that it is manifestly unfair or contrary to a sound administration of justice (i.e. an abuse of process) to allow the party to raise the matter now.[185]

The confusion is illustrated by *Naraji v Shelbourne*.[186] The facts are stated elsewhere.[187] In this case, Popplewell J characterised as a plea of cause of action estoppel the defendant's argument that the claimant failed to raise in the prior U.S. proceedings, the cause of action that now underpinned the English claim:

> [F]or the purposes of cause of action estoppel the ingredient of identity of causes of action means just that: identity, not substantial similarity. … If there are different facts which are necessary ingredients of the second cause of action, there will not be identity of causes of action. This will not, however prevent the doctrine of cause of action estoppel applying in many cases of substantial but not true identity, because of the principle in Henderson v Henderson, which extends the doctrine to causes of action which ought to have been brought before the court in the first proceedings.[188]

This is conflating the res judicata doctrine and abuse of process doctrine. According to the judge, *Henderson v Henderson* extended the estoppel doctrine to cover the situation where a professional negligence claim is first unsuccessfully pursued solely in tort, and a subsequent claim for the same negligence is then brought in contract.

But, *Henderson v Henderson* addressed unraised *points*, not a cause of action whose existence was neither pleaded nor determined in a prior case.[189] The situation, if anything, involved an abuse of process (now confusingly called *Henderson v Henderson*-abuse) if the claimant could and should have pleaded the cause of action (or raised an issue) in the prior case that the claimant now seeks to raise in English proceedings.

Still, the judge rightly rejected the plea of finality based on the foreign (Indiana) judgment. He found that as a matter of Indiana law, no contract claim *could* (let alone *should*) have been pursued in the Indiana proceedings or could have been included in the complaint filed by the claimant. Moreover, he established that the parties contract was no part of the necessary ingredients of the cause of action pleaded in support of the claim in Indiana and that none was in fact asserted. There was then no basis *in fact* for finding *Henderson v Henderson*-abuse.

4.2 The Netherlands

Introduction

The suggestion has been made that Dutch courts refuse to give foreign judgments preclusive effects; for instance, Von Mehren and Trautman observed that "[n]ear one extreme is the Dutch approach, which in principle seems to deny preclusive effects to foreign judgments."[190] In his 1980 Hague Academy lectures, Von Mehren retreated

[184] ibid.
[185] See Chapter 1, text to n 526ff.
[186] (Chapter 1 n 280).
[187] See text to n 122ff.
[188] (Chapter 1 n 280) [149].
[189] See Chapter 1, text to n 275ff.
[190] Von Mehren and Trautman (Introduction n 9) 1602.

slightly from this position, by noting that the Netherlands was "[a]mong the contemporary legal systems that accord only minimal preclusive effects to foreign adjudications".[191]

The true position is this: courts habitually attach preclusive effects to recognised foreign judgments. The right question to ask then is not *whether* but *how* courts attribute foreign judgments preclusive effects.

Admittedly, the Netherlands never enacted a provision like the English s 34 of the 1982 Civil Jurisdiction and Judgments Act—a general bar of claims reasserting a cause of action for which judgment has been recovered abroad.[192] In fact, Art 431(2) Rv expressly offers successful claimants the option of reasserting the original cause of action. However, this provision only applies to foreign judgments recognised *at common law*,[193] and even though Art 236 Rv lacks application to foreign judgments,[194] a court will assess in each case what res judicata effect properly attaches in light of all the circumstances.[195] An Art 431(2) Rv-claim can therefore be cut short by invoking the res judicata effect of the foreign judgment recovered abroad.

A fundamentally different approach applies for judgments recognised *under the Brussels and Lugano Regime* (or another EU instrument that implements the principle of mutual recognition); the court addressed is required to apply the law of the judgment-rendering State to determine the preclusive effects. The position is unclear regarding judgments recognised pursuant to a *specific domestic statute* or *other international agreements*. Some bi-lateral agreements explicitly address the problem of preclusion by judgments recognised under the agreement and refer to the preclusion law of the rendering State. Other agreements do not regulate the matter and require interpretation to the determine the proper approach. Finally, for judgments recognised pursuant to a specific statute, arguably the same approach applies as for judgments recognised at common law, and a court will assess in each case what res judicata effect properly attaches in light of all the circumstances.

(1) The finality of a foreign judgment

Upon recognition, a foreign judgment has validity in the Netherlands. Under the doctrine of *gesloten stelsel van rechtsmiddelen*, which arguably applies to any judgment with validity in the Netherlands, those bound by the judgment are barred from challenging its validity (including its accuracy) in any other court than the (foreign) court of competent appellate or revocation jurisdiction.

For judgments subject to automatic recognition under the Brussels and Lugano Regime, the bar of a collateral attack derives directly from the prohibition under any circumstance of a review of a judgment as to its substance,[196] which means, as CJEU clarified in *Salzgitter*,[197] that the courts of the rendering State in

[191] Von Mehren (Introduction n 21) 35.
[192] See text to n 40ff.
[193] See Chapter 3, text to n 396ff.
[194] See text to n 222ff. cf Verheul (Chapter 3 n 213) 67 (defnining 'recognition' as the 'attribution of preclusive effect'. He notes, for example, that application of what is now Art 236 Rv to a foreign judgment would impy "automatic recognition").
[195] ibid.
[196] See Chapter 5, text to n 40ff.
[197] Case C-157/12 *Salzgitter Mannesmann Handel GmbH v SC Laminorul SA* [2013] ECR I-0000.

principle have exclusive jurisdiction to assess, through means of recourse available in that State, the validity of the judgment, and that the final outcome of that review cannot be called into question.[198] In turn, the parties bound by a recognised judgment can only avail themselves of the means of recourse against the judgment available in the legal system of the rendering State.[199]

(2) Finality in another case

(i) Claim preclusion

a. Reassertion

The reassertion of a cause of action for which judgment has been recovered abroad is not generally barred; for judgments recognised at common, Art 431(2) Rv expressly offers successful claimants the option of reasserting the original cause of action.[200] Kokkini-Iatridou and Verheul characterised the provision as an exception to the maxim *ne bis in idem* with the aim of avoiding a denial of justice,[201] though this maxim forms no part of the Dutch civil justice system as such[202]. Still, a question that has been neither raised nor addressed in practice is whether this right of reassertion is subject to the requirement of a sufficient interest in the claim under Art 3:303 BW.[203] If so, a defendant can defeat a claim for the same remedy based on the same cause of action as for which the claimant already recovered a judgment abroad that is amenable to recognition at common law.[204] In those circumstances, the proper course of action for the foreign judgment creditor is to bring an action on the foreign judgment instead.[205] A further question is whether Art 3:303 BW might bar an inappropriately split claim. Again, there is no reason why the provision should not apply.

Conversely, Art 431(2) Rv lacks application to judgments recognised by domestic statute, European instrument, or international agreement, with the effect of barring any claim for the same remedy based on the same cause of action as for which the claimant already recovered a judgment; since the specific enforcement procedure of Arts 985-990 Rv takes precedence over the general mode of enforcement that has developed in practice under the flag of Art 431(2) Rv, the judgment creditor can only apply for enforcement by *exequatur* in accordance with the procedure specified in Arts 985-990 Rv (to the extent the relevant convention or regulation does not derogate from these rules).[206] Moreover, Art 3:303 BW is likely to condition a claim seeking a different remedy for the same cause of action, and bar inappropriate claim splitting.

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[198] ibid [33].
[199] ibid (emphasis added).
[200] See Chapter 3, text to n 269ff.
[201] Kokkini-Iatridou and Verheul (Chapter 3 n 213) 136.
[202] See Chapter 2, text at n 160ff.
[203] ibid.
[204] See Chapter 3, text at n 428ff.
[205] See Chapter 3, text to n 448ff.
[206] Article 992 Rv. The CJEU in *De Wolf v Cox* made this explicit for judgments covered by the Brussels and Lugano Regime. See Chapter 5, text to n 57ff.

b. Contradiction

In circumstances where a party invokes a foreign judgment to preclude an opponent from (successfully) contradicting the findings of the rendering court, the approach of a Dutch court varies according to the applicable recognition regime. Insofar as relevant, a distinction applies between the following regimes: first, the Brussels and Lugano Regime; second, specific domestic statutes; third, international agreements; and, finally, common law.

1. Brussels and Lugano Regime

The question how Dutch courts have construed the requirements of the Brussels and Lugano Regime is addressed elsewhere in some detail. Here, it can be briefly noted that as a general rule, the Supreme Court in *IDAT*[207] ruled that the CJEU's decision in *Hoffmann v Krieg*[208] implies that the effects of a judgment recognised under the Brussels and Lugano regime, including its preclusive effects, must be determined by reference to the law of the judgment-rendering state.[209] This approach applies for judgments recognised under the Brussels and Lugano Regime, but arguably also for any other EU instrument that implements the principle of mutual recognition.

2. International agreements

The position is unclear regarding judgments recognised pursuant to a specific domestic statute or other international agreements. Some bi-lateral agreements explicitly address the problem of preclusion by judgments recognised under the agreement and refer to the preclusion law of the rendering State. Other agreements do not regulate the matter and require interpretation to the determine the proper approach.

Compared to the Brussels and Lugano Regime approach formulated by the Supreme Court in *IDAT* and *Diesel SPA/MAKRO*,[210] the position is a lot more uncertain for judgments recognised on the basis of one of the various bilateral conventions that the Netherlands has historically negotiated and concluded, to the extent that these conventions have not been superseded by the Brussels and Lugano Regime.[211] Most conventions address only the issue of recognition, and fail to address the consequences of recognition, in particular preclusion by a recognised judgment.[212] In this sense, the explanatory memorandum on the most 'recent' convention—the 1976 Agreement between Netherlands and Suriname providing for the reciprocal recognition and enforcement of judicial decisions and authentic acts in civil matters[213]—states that the agreement aligns with the "form traditionally used in

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[207] HR 12 March 2004, ECLI:NL:HR:2004:AO1332, NJ 2004, 284 mnt P Vlas, RvdW 2004, 47, JBPr 2004, 44 mnt M Freudenthal (*IDAT*).
[208] Case 145/86 *Horst Ludwig Martin Hoffmann v Adelheid Krieg* (Chapter 3 n 470).
[209] Van Hoek (Chapter 3 n 213) 339.
[210] See Chapter 6, text to n 74ff.
[211] See Chapter 3, text to n 411ff.
[212] See Verheul (Chapter 3 n 213) 103ff for an overview of the relevant conventions.
[213] (*Overeenkomst tussen het Koninkrijk der Nederlanden en de Republiek Suriname betreffende de wederzijdse erkenning en de tenuitvoerlegging van rechterlijke beslissingen en authentieke akten in burgerlijke zaken*) (adopted on 27 August 1976, entered into force 10 January 1979) 1135 UNTS 432, Trb 1976, 144, 1979, 7.

international procedural law"[214]. The convention provides for recognition and does not address the issue of preclusion.

Exceptionally, the 1962 convention between The Netherlands and Germany on the mutual recognition of judgments in civil matters and other enforceable titles[215] provides explicitly, in Art 1(1), second sentence, that a recognised judgment is to be attributed the conclusive effect that attaches in the state of rendition.[216] The convention, then, directs courts to determine a recognised judgment's conclusive effects by reference to the law of the rendering state. Surprisingly, the explanatory memorandum on the convention states that the implication of this provision is that:

> As a result, a Dutch judgment that remains subject to an ordinary means of recourse, but which in The Netherlands already has a certain conclusive effect (*gezag van gewijsde zaak*), can be invoked in the German courts and preclude among other things that the same issue is relitigated.[217]

This statement is surprising because no Dutch judgment has res judicata effect (*gezag van gewijsde*) before the judgment has acquired the status of res judicata (*kracht van gewijsde*), which it acquires when no ordinary means of recourse remain available.[218] The report therefore misstates a fundamental condition for conclusive effect as a matter of Dutch law. Nevertheless, the idea is clear: the law of the rendering state governs a recognised judgment's conclusive effect in proceedings in the state of recognition.

Also the 1967 United Kingdom and The Netherlands Convention on the reciprocal recognition and enforcement of judgments in civil matters regulates "*the effect of* the recognition". Article III(1) provides:

> For the purposes of this Convention, the effect of the recognition of a judgment shall be that it shall be treated as *conclusive* between the parties thereto in all proceedings founded on the same cause of action and it may be relied on by way of defence or counter-claim in any such proceedings.[219]

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[214] Agreement between Netherlands and Suriname providing for the reciprocal recognition and enforcement of judicial decisions and authentic acts in civil matters (Explanatory Note) (*Overeenkomst tussen het Koninkrijk der Nederlanden en de Republiek Suriname betreffende de wederzijdse erkenning en de tenuitvoerlegging van rechterlijke beslissingen en authentieke akten in burgerlijke zaken; 's-Gravenhage, 27 augustus 1976 (Trb. 1976,144)*) Kamerstukken II (1976-1977) 14473 (R 1072) No 1, 2 (*Toelichtende Nota*).

[215] Convention between Netherlands and Germany on the mutual recognition and enforcement of judgments and other enforceable instruments in civil and commercial matters (*Verdrag tussen het Koninkrijk der Nederlanden en de Bondsrepubliek Duitsland betreffende de wederzijdse erkenning en tenuitvoerlegging van rechterlijke beslissingen en andere executoriale titels in burgerlijke zaken*) (adopted 30 August 1962, entered into force 15 September 1965) 547 UNTS 173, Stb 1965, 91.

[216] ibid Art 1(1).

[217] Act on Ratification of the Convention between Netherlands and Germany on the mutual recognition and enforcement of judgments and other enforceable instruments in civil and commercial matters (*Goedkeuring van het op 30 augustus 1962 te 's-Gravenhage gesloten Verdrag tussen het Koninkrijk der Nederlanden en de Bondsrepubliek Duitsland betreffende de wederzijdse erkenning en tenuitvoerlegging van rechterlijke beslissingen en andere executoriale titels in burgerlijke zaken*) Kamerstukken II (1963-1963) 7670 No3, 4 (*MvT*).

[218] See Chapter 2, text to n 462ff.

[219] Convention, Art III(1) (emphasis added). The Dutch language version of the convention, which under Art XI is equally authoritative, reads: "Voor de toepassing van dit Verdrag heeft erkenning van een vonnis tot gevolg, dat dit wordt geacht gezag van gewijsde te bezitten tussen de betrokken partijen in all

Unlike the 1962 Netherlands-Germany Convention, however, the 1967 Netherlands-United Kingdom Convention does not require courts to apply foreign preclusion law to a recognised judgment. In fact, the intended meaning of Art III(1) is somewhat unclear. The first question that arises is whether the Contracting Parties intended to restrict the effects of recognition to the attribution of *claim* preclusion, as the text of the convention implies. Arguably, the provision should be construed agains the background of the fact that the convention's negotiators could not be aware of the most recent developments in case law on preclusion by foreign judgments, in particular, the 1966 judgment of the House of Lords in *Carl Zeiss*,[220] which confirmed that foreign judgments could trigger issue preclusion. Accordingly, the convention confirms that a recognised foreign judgment can be relied on as a shield and a sword, but does not exclude the attribution of issue preclusive effect.

Another question is whether the Convention sets forth a uniform preclusion law by providing that recognised judgments are to be treated as conclusive (a) between the same parties, (b) in all proceedings founded on the same cause of action. For instance, the Convention does not mention the extension of claim preclusive effect to privies. Does this mean that the preclusive effects of a judgments recognised under the Convention is limited to the same parties, excluding privies? Arguably not; it is suggested that the convention in fact aims to regulate only the issue of recognition, while leaving the complex problem of preclusion to the laws of the Contracting States, though the drafting of the Convention triggers confusion on this point. On this view, the Convention merely serves to confirm that recognised judgments *can* trigger preclusion, in addition to execution. If this view of the 1967 Convention is correct, and the Convention is limited to providing for the mutual recognition of judgments, while the consequences of recognition are to be determined in accordance with municipal law, including principles of private international law.

3. Specific domestic statutes

For judgments recognised pursuant to a specific statute, arguably the same approach applies as for judgments recognised at common law, and a court will assess in each case what res judicata effect properly attaches in light of all the circumstances.[221]

4. Common law

Pursuant to general principles of good faith, fairness and legal equality, which apply as part of Dutch unwritten private international law, a Dutch court will assess in each case in light of all the circumstances whether and to what extent res judicata effect properly attaches to a foreign judgment recognised at common law.[222] This approach derives from the Supreme Court's 1924 decision in *The Fur Coat Case*,[223] in which the Court sanctioned the principle developed by the court below that "a Dutch court must in each particular case determine whether and to what extent it should attribute a

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gedingen berustende op dezelfde oorzaak; in deze gedingen kan op de beslissing een beroep worden gedaan bij wijze van verweer of als grondslag voor een tegenvordering."

[220] *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (Introduction n 32). See text at n 126ff.

[221] See text to n 223ff.

[222] Arguably the same approach applies for judgments recognised pursuant to international agreements that do not mandate a different approach.

[223] HR 14 November 1924 (Chapter 3 n 323) (*Kühne/Platt* (*Bontmantel*)).

foreign judgment res judicata effect".[224] In a more recent case, the Court restated the principle as follows:

> According to Dutch private international law a Dutch court may, after a claim has been rejected by a foreign court, to attribute the judgment, assuming it meets the conditions for recognition, the res judicata effect the court deems appropriate in the particular case.[225]

The Fur Coat Case clarified that the Dutch statutory provisions on the res judicata effect of judgments, now Art 236 Rv, lack application to foreign judgments, and that the res judicata effect attributed to the English judgment in the particular case derived from general principles of good faith, fairness and legal equality, which apply as part of Dutch unwritten private international law.[226] Meijers rightly observed in this regard: res judicata effect is a legal consequence of a judgment, while good faith and fairness are sources of law, in this case uncodified principles of private international law.[227]

In the case, a claimant who was unsuccessful in England and Wales, filed a new claim for the same cause of action in the Netherlands. That claim was dismissed on grounds of res judicata. In the later French divorce case, the claimant after losing a claim for divorce in France, filed a new claim for divorce in the Netherlands. That claim was allowed as it was based on a different cause of action. It transpires that the Court is in the process of developing a common law on the res judicata effect of foreign judgments.

Until recently, the Court had not addressed the question whether as part of the common law approach, foreign preclusion law should be taken into account. But in a recent instalment of *Yukos*-related litigation, the Court developed the common law to that effect:

> In the absence of any indication to the contrary, the starting point is that, alike in Dutch private international law, in Russian private international law a foreign judgment—in this case Dutch—cannot be attributed more effects than attributed under the law of the judgment-rendering State (cf. HR 12 March 2004, LJN:AO1332, NJ 2004/284; HR 11 July 2008, LJN: BC9766, NJ 2008/417).

This decision should not immediately be construed as mandating the application of the preclusion law of the foreign judgment-rendering State, alike the approach the Supreme Court specified for judgments recognised under the Brussels and Lugano Regime. Nevertheless, considering the Court's explicit references to cases determined under this regime—*IDAT* and *Diesel SPA/MAKRO*—the decision does significantly align both approaches, at least in terms of result in the great majority of cases.

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[224] ibid ("…dat de in het bestreden arrest vooropgestelde regel, dat de Nederlandsche rechter in elk bijzonder geval heeft te beoordeelen of en in hoeverre aan een vreemd vonnis door hem gezag moet worden toegekend, met geen der in het middel aangehaalde wetsbepalingen in strijd is…."). cf HR 26 January 1996, NJ 1997, 258 mnt ThM de Boer [3.2].

[225] HR 26 January 1996, NJ 1997, 258 mnt ThM de Boer [3.2] ("Naar Nederlands internationaal privaatrecht staat het de Nederlandse rechter vrij om, wanneer een voor een buitenlandse rechter ingestelde vordering door deze is ontzegd, aan diens uitspraak, aangenomen dat zij aan de voorwaarden voor erkenning van een uitspraak van een buitenlandse rechter voldoet, het gezag toe te kennen, dat hem in het bijzondere geval geraden voorkomt.").

[226] HR 14 November 1924 (Chapter 3 n 323) (*Kühne/Platt* (*Bontmantel*)).

[227] Meijers, 'Het Bontmantelarrest' (Chapter 3 n 213) 98.

Meijers in commenting on *The Fur Coat Case* criticised the distinction between domestic and foreign judgments that the Supreme Court adopted; in his view, the Court attempted—unsuccessfully and undesirably—to keep apart in words what is in substance the same, by holding that the res judicata effect of a domestic judgment is determined by law, whereas the res judicata effect of a foreign judgment is governed by unwritten principles of law.[228] However, it is suggested that this criticism gives the Court insufficient credit, since in many circumstances, applying Art 236 Rv as defining the res judicata effect of a foreign judgments will lead either to under- or overpreclusion, whereas a tailormade res judicata effect enables the court to fully take into account the fact that the judgment in question was rendered in a system with a significantly different preclusion law.

To further specify the background of this approach, the reasoning of the courts in *The Fur Coat Case* can be considered in some more detail. The facts are not restated.[229] Following a plea of res judicata based on the judgment of the English court that had rejected the claim, the District Court dismissed the new claim, which was based on the same cause of action. The Court of Appeal affirmed, and reasoned as follows:

> While Dutch law contains no rule that attributes a foreign judgment res judicata effect, it neither contains a rule that requires that such judgment must be denied any significance. This does not follow at any rate from Article 431 Rv which provides that judgments of foreign courts cannot be executed in the Kingdom.[230]

The court reasoned further:

> The court agrees with the District Court that it would violate the principles of good faith, fairness and legal equality, which also apply as part of unwritten private international law, if the claimant was permitted to pursue the defendant again in this country as if he is not bound by the judgment of the English court that rejected his claim, and as if the English judgment does not exist, while if his claim in England had succeeded, he would have recovered a judgment enforceable against and conclusive upon the defendant.[231]

The principles of good faith, fairness, and legal equality are not cited in the judgment as forming the basis for recognition of the English judgment, but for attributing it res judicata effect. Indeed, the issue in this case was whether the seller of the fur coat was

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[228] EM Meijers, 'Noot onder HR 20 maart 1932' (1932) 7 NJB 626, 627 ("Dit alles wil dan toch slechts dit zeggen, dat bij een Nederlandsch vonnis de grenzen van het gezag van gewijsde door de wet bepaald zijn, terwijl de grenzen der bindende kracht van een buitenlandsch vonnis in ons land door regels van ongeschreven recht bepaald worden. Aldus in woorden uiteen te houden, wat in begrip volkomen overeenstemt, verdient m.i. geen aanbeveling.").

[229] See text to n 226ff.

[230] Reported in HR 14 November 1924 (Chapter 3 n 323) (*Kühne/Platt* (*Bontmantel*)) ("…dat weliswaar in de Nederlandsche wetgeving geen bepaling voorkomt die aan een buitenlandsch vonnis hier te lande kracht van gewijsde zaak toekent, doch zij evenmin eene bepaling bevat, op grond waarvan zoodanig vonnis alle betekenis zou moeten worden ontzegd….").

[231] ibid ("…dat het Hof met de Rechtbank van oordeel is dat het in strijd zou zijn met de ook in het ongeschreven internationaal privaatrecht toe te passen beginselen van goede trouw en billijkheid en met de rechtsgelijkheid, indien appellante, die, wanneer zij in hare actie bij den Engelschen rechter geslaagd ware, een tegen geïntimeerden uitvoerbaar vonnis zou hebben gekregen, waaraan geïntimeerden gebonden zouden zijn, thans, nu zij door dien rechter in het ongelijk is gesteld, aan diens vonnis niet zou zijn gebonden en, alsof het Engelsche vonnis niet bestond, geïntimeerden nogmaals met dezelfde actie nog eens hier te lande zou kunnen gaan vervolgen….").

barred after loosing in England and Wales from filing the same claim in The Netherlands.

On appeal in cassation, the seller's grievances were twofold: first, that the decision of the Court of Appeal to attribute the English judgment preclusive effect violated Arts 1953 and 1954 of the Civil Code (now Art 236 Rv) and, second, that the decision violated Art 431(2) Rv, which provides that a dispute can be heard and determined anew.

The Supreme Court rejected both grievances. On the first grievance, the Court ruled alike the lower courts that Arts 1953 and 1954 of the Civil Code, though inapplicable to foreign judgments, did not prohibit the attribution of res judicata effect to foreign judgments. On the second grievance, the Court ruled curtly that Art 431 Rv applies only to judgments *requiring execution*, not also to judgments *rejecting a claim*.

The Court then reviewed the Court of Appeal's decision:

> The Court of Appeal in line with the rule advanced, has not decided that the claimant was generally precluded by the English judgment; the court only held them precluded in this case, because it would be in violation of good faith and fairness if the claimant were allowed to bring the claim again in a Dutch court, after it was rejected by the English court, whose intervention the claimant freely sought…. …[I]t must further be accepted with the Court of Appeal that the Dutch court should only ignore this judgment if it violates Dutch principles of public policy….[232]

According to the Court, the Court of Appeal correctly applied the rule by deciding in the particular circumstances of the case, that good faith, fairness and legal equality opposed a new claim, specifically because (a) the English court had already determined the claim (b) by judgment amenable to recognition in the Netherlands (the English court had jurisdiction—i.e. had been freely seized by the party who now sought to make the same claim—and the judgment did not violate Dutch public policy).

The later case of HR 24 June 1932, NJ 1932, 1262, W 12487 mnt SB *NV Burgers and Co's Bank/Van Asch van Wijk qq* (*The Hungarian Mortgage Case*)[233] built on *The Fur Coat Case* and offers a further illustration of the res judicata effect attributed to recognised foreign judgments pursuant to general principles of good faith, fairness and legal equality, which apply as part of Dutch unwritten private international law.

The dispute arose from insolvency proceedings of a bond holding entity in The Netherlands. The administrator of the entity obtained an interim judgment

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[232] ibid ("…dat het Hof geheel in overeenstemming met den vooropgestelden regel, niet besliste, dat de eischeresse in ieder geval aan het Engelsche vonnis gebonden zou zijn, maar die gebondenheid in dit geval aannam, op grond dat het in strijd zou zijn met goede trouw en billijkheid, zoo aan de eischeresse werd toegestaan hare vordering nadat en omdat deze door den Engelschen rechter, wiens tusschenkomst zij geheel vrijwillig had ingeroepen, was ontzegd, opnieuw aan het oordeel van den Nederlandschen rechter te onderwerpen, eene beslissing, waardoor geen der in het middel aangehaalde wetsbepalingen, inzonderheid niet de artt. 1373 en 1375 B. W., kunnen zijn geschonden; O. verder, naar aanleiding van de grief onder b omschreven, dat ook ten aanzien van dit punt 's Hofs beslissing is juist, daar vaststaande, dat de eischeres geheel vrijwillig het oordeel van den Engelschen rechter inriep en naar goede trouw en billijkheid daaraan was gebonden, ook met het Hof moet worden aangenomen, dat de Nederlandsche rechter slechts dan dat oordeel heeft ter zijde te stellen indien het indruischt tegen Nederlandsche beginselen van openbare orde, waarvan ten deze niets is gebleken….").

[233] HR 24 June 1932, NJ 1932, 1262, W 12487 mnt SB (*NV Burgers and Co's Bank/Van Asch van Wijk qq* (*Hongaarse hypotheek*)).

ordering a Dutch bank to transfer to a independent third party the title to a mortage on Hungarian real estate given by a Hungarian borrower as security for the repayment of bonds issued by him. At the same time the administrator filed a claim with the Budapest District Court and obtained an order that the title to the mortgage be transferred in his name. The bank unsuccessfully challenged this decision in the Budapest Court of Appeal. Then the bank filed another claim in The Netherlands for an order that the administrator transfer back the title so that the bank could comply with the original order of the Dutch court.

The District Court granted the claim and ordered the transfer of title, albeit directly to the independent third party. However, the Court of Appeal quashed this decision and dismissed the claim. According to the court "the decision of the Budapest Court of Appeal is conclusive upon the parties, who participated in the proceedings and argued their case, and the transfer of the mortgage … cannot be undone by the Dutch court". The bank appealed on the ground that the Hungarian judgment could not be conclusive in the Dutch proceedings upon parties resident in the Netherlands.

The Supreme Court rejected the appeal in line with its decision in *The Fur Court Case*:

> The grievance is based on the assumption that according to Dutch law a foreign judgment is not conclusive upon the parties, at least not parties resident in The Netherlands. This assumption is wrong; subject to the Dutch principles of public policy, none of the cited provisions bars a Dutch court from deciding in each specific case whether and to what extent a foreign judgment should be attributed res judicata effect. This applies regardless whether or not the parties are resident in The Netherlands.[234]

The approach defined in *The Fur Coat Case* therefore has general application, and does not discriminate on the basis of residence.

The Court continued by holding that nothing prevents a Dutch court from denying a recognised foreign judgment res judicata effect in an appropriate case; to be precise, the Court clarified that the decision of the Court of Appeal to attribute the Hungarian judgment res judicata effect in the particular circumstances of the case (i.e. the proceedings were not ex parte, the parties were able to present their case, and the judgment was extensively reasoned) "does not imply that the Court will in all circumstances consider itself bound by a foreign judgment."[235]

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[234] ibid ("dat het middel berust op de stelling, dat volgens de daarin aangehaalde wetsartikelen een vonnis, door eene buitenlandschen rechter gewezen, de partijen in Nederland niet bindt, althans niet de in Nederland wonende of gevestigde partijen; dat deze stelling onjuist is; dat toch geen der aangehaalde wetsbepalingen zich verzet tegen de bevoegdheid van den Nederlanschen rechter om, onder eerbiediging van de Nederlandsche beginselen van openbare orde, in elk bijzonder geval te beoordelen of en in hoeverre aan een vreemd vonnis gezag moet worden toegekend; dat hierbij de vraag, of en in hoever partijen al dan niet in Nederland wonen of gevestigd zijn, niets afdoet ….").

[235] ibid ("dat het hier betreft de beslissing van den Hongaarschen rechter, vaststellende, hoe volgens de Hongaarsche wet de onderwerpelijke hypotheek in het Hongaarsche Grondboek moet worden ingeschreven; dat, gelijk boven nader is vermeld, het Hof in het bestreden arrest eerst heeft vastgesteld, dat het Hongaarsche Hof, na een uitvoerig onderzoek, waarbij aan de door de Bank tegen de beschikking van den eersten Hongaarsche rechter aangevoerde grieven all aandacht is geschonken, in contradictoir geding heeft beslist en in eene uitvoerig gemotiveerde beschikking heeft verklaard, dat de inschrijving, gelijk zij wordt gelast, ook ambtshalve door den Hongaarschen rechter had moeten zijn bevolen; dat, wanneer het Hof dan verder oordeelt, dat de beslissing van den Hongaarschen rechter voor de betrokkenen, welke daarbij partij waren en hunne belangen hebben voorgedragen, bindend is, en de

Smit, in commenting on the case, said that "the Supreme Court has said time and again that foreign judgments have no res judicata effect, but in appropriate cases it has permitted lower courts nonetheless to grant such judgments conclusive effect."[236] However, the author tried unsuccessfully, as Meijers put it, to separate in words what is the same in substance. The Court actually made clear that what is now Art 236 Rv cannot form the basis for attributing res judicata effect to a foreign judgment; this is far from saying that foreign judgments cannot be attributed res judicata effect in The Netherlands. Foreign judgments, the Court said, are attributed the res judicata effect in The Netherlands that is appropriate in the circumstances of each case. The Court did not devise "a formula giving *discretionary* power",[237] but imposed a duty based on general principles of good faith, fairness and legal equality, which apply as part of Dutch unwritten private international law, on lower courts to grant foreign judgments amenable to recognition the res judicata effect that is appropriate in the circumstances of the case, taking account of the particularities of the foreign civil justice system and proceedings from which the judgment originates, including the preclusion law of the judgment-rendering state.

(ii) Issue preclusion

The approach developed in *The Fur Coat Case* regarding the res judicata effect to be attributed to foreign judgments amenable to recognition, which has been discussed in detail in relation to the problem of claim preclusion by foreign judgments,[238] equally applies to issue preclusion.

(iii) Wider preclusion

The primary focus of Dutch courts is on the parties' litigation *conduct*, as illustrated by the role of abuse of process doctrines in this context. Against this background, it is unlikely that a Dutch court would directly apply foreign law to determine whether litigation should be permitted.

Nevertheless, a Dutch court will take account of foreign litigation conduct and foreign procedural law in the process of determining whether procedural conduct in the Netherlands amounts to an abuse of process as a matter of Dutch law. So, if following the rendition of an English judgment, English abuse of process doctrine would bar a party from (re)litigating a certain matter in England and Wales on the basis that the attempt amounts to relitigation-abuse or *Henderson v Henderson*-abuse, this fact can be taken into account by a Dutch court when the party who is barred in England and Wales then pursues the same conduct in the Netherlands.

Along these lines, for instance, in *Norfolk International Holding Inc. v Skipapol SP Zoo,*[239] the Den Bosch Court of Appeal—after first applying *Polish* law to determine the res judicata effect of a Polish judgment on a claim for a protective

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krachtens die beslissing verrichte inschrijving der hypotheek niet door den Nederlandschen rechter ongedaan kan worden gemaakt, het Hof de onaantastbaarheid der inschrijving enkel aanneemt in verband met het voorgaande en op grond der omstandigheden van het onderwerpelijk geval, zonder daarmede uit te drukken, dat het Hof zich steeds en onder alle omstandigheden aan eene vreemde beslissing gebonden acht….")

[236] Smit (Chapter 3 n 213) 201.

[237] ibid.

[238] See text to n 223ff.

[239] Hof Den Bosch 29 December 2009, ECLI:NL:GHSHE:2009:BK8024, NJF 2010, 160.

measure in Poland—considered the implications of the Polish proceedings for application of *Dutch* abuse of process doctrine, which, as the Breda District Court had held,[240] could bar a claim for a protective measure after similar relief was denied on the same factual grounds abroad.

In another case, *Spectranetics Corp.*,[241] the Utrecht district considered that filing a claim without any prospect of success can amount to an abuse of process. In its evaluation, the court would take account of a foreign judgment that is amenable to recognition in the Netherlands, for instance, a foreign injunction against the filing of a claim in The Netherlands. However, in the particular case, the court denied recognition of the foreign (American) judgment in question on grounds of Dutch public policy. The court advanced several reasons, including the fact that the foreign court enjoined a person that had not been a party to the foreign proceedings, that the foreign judgment was inadequately reasoned, and that the rendering court had exceeded its jurisdiction by granting too general and restrictive injunctive relief, which, if accepted, prevented the claimant from filing *any* claim against the defendant. In those circumstances, the foreign judgment lacked existence in the eyes of Dutch law, including abuse of process doctrine.

Summary and Conclusions

The three paradigmatic situations aspects of finality of litigation identified in part one—first, finality of a judgment; second, finality within the same case; and, third, finality in another case—play out quite differently *interjurisdictionally*; in fact, finality *within the same case* is a problem that does not present itself in this context, since proceedings abroad after the rendition of judgment locally invariably imply another case.

The problem of finality of a judgment arises interjurisdictionally where a party challenges the accuracy or legality of a foreign judgment that is amenable to recognition. Such collateral attack goes to the judgment's validity *in the rendering State*. An English court can strike out a claim that makes the validity of a foreign judgment *in the rendering State* the subject-matter of a claim. In other circumstances where a party challenges the accuracy or legality of a foreign judgment, the court can strike out for abuse of process. Similarly, a Dutch court is likely to strike out such collateral claim as a violation of the principle of a sound administration of justice (specifically the doctrine of *gesloten stelsel van rechtsmiddelen* which applies to any judgment with validity in the Dutch legal order). Under the Brussels and Lugano Regime, the bar of collateral attack derives from the prohibition of the review of a judgment as to its substance, which signals that the courts of the rendering State retain exclusive jurisdiction to rule on the judgment's accuracy and legality, and which implies that the parties are barred from any means of recourse other than available in the legal system of the rendering State.

Finality of litigation locally after the rendition of judgment abroad operates differently in English and Dutch courts. Unlike the Netherlands, England and Wales has a specific claim preclusive rule for foreign judgments: s 34 of the Civil Jurisdiction and Judgments Act 1982 *categorically* bars a successful claimant from reasserting the cause of action for which he recovered judgment abroad. The

[240] Rb Breda 11 March 2009, ECLI:NL:RBBRE:2009:BH6152, SES 2013, 20.
[241] Rb Utrecht 9 June 2010 (Chapter 3 n 462) (*Spectranetics*).

Netherlands does not generally bar reassertion; in fact, Art 431(2) Rv expressly permits reassertion. Then again, the provision applies exclusively to judgments recognised at common law. Moreover, Art 3:303 BW may serve to bar reassertion under the provision if the claimant lacks a sufficient interest to file another claim for the same cause of action, since Art 431(2) Rv also allows for enforcement by action on the judgment the claimant recovered abroad. Use of Art 431(2) Rv is at any rate excluded for judgments subject to the Brussels and Lugano Regime, an international agreement, or a specific domestic statutory provision mandating recognition. The Brussels and Lugano Regime, more specifically, prohibits reassertion as incompatible with the requirement to recognise the prior judgment between the parties and contrary to the prohibition of a substantive review of that judgment.

Another aspect of claim preclusion is the bar of contradiction of a court's findings on the (non)existence of a cause of action. In both English and Dutch courts, an unsuccessful claimant or defendant can be precluded from contradicting such findings. English courts *invariably* apply the domestic estoppel doctrine to determine a recognised foreign judgment's preclusive effect, although account will be taken of foreign preclusion law if duly pleaded and, if contested, proved, so as not to 'overpreclude' (i.e. the preclusion of matters that can be (re)litigated in the judgment-rendering State). Subject to fulfillment of the English conditions, then, a recognised foreign judgment can found a *cause of action estoppel*. At least until the CJEU's recent decision in *Gothaer*,[242] English courts applied the same approach to judgments recognised under the Brussels and Lugano Regime. By contrast, Dutch courts *never* apply the provision on the res judicata effect of domestic judgments (Art 236 Rv) to a recognised foreign judgment. Instead, for judgments recognised at common law, domestic (unwritten) principles of private international law require that a court determines in each particular case what res judicata effect properly attaches to the foreign judgment in question, meaning that the court will take account of foreign preclusion law so as not to over- or underpreclude. For judgments recognised under the Brussels and Lugano Regime, Dutch courts generally apply the preclusion law of the judgment-rendering State.

The story regarding issue preclusion—the bar of contradiction of a court's findings regarding an issue—is identical to that for claim preclusion in the form of a bar of contradiction of a court's findings on the (non)existence of a cause of action. In both English and Dutch courts, both parties can be precluded from contradicting a foreign court's findings regarding an issue. English courts again always apply domestic estoppel doctrine, though account is taken of foreign preclusion law if pleaded and, if contested, proved, so as not to overpreclude. Hence, subject to fulfillment of the English conditions, a recognised foreign judgment can found an *issue estoppel*. English courts have generally applied this approach also to judgments recognised under the Brussels and Lugano Regime, at least until the CJEU's recent decision in *Gothaer*.[243] Dutch courts, by contrast, never apply Art 236 Rv to a recognised foreign judgment; instead, for judgments recognised at common law, domestic (unwritten) principles of private international law imply that a court will determines in each particular case what issue preclusive effect properly attaches to the foreign judgment in question, meaning that the court will take account of foreign preclusion law so as not to over- or underpreclude. For judgments recognised under

[242] *Gothaer* (Part I, Introduction n 1). See Chapter 6, text to n 55ff.
[243] ibid.

the Brussels and Lugano Regime, Dutch courts generally apply the preclusion law of the judgment-rendering State.

On wider preclusion, Dutch courts, alike their English counterparts, do not directly apply foreign law, since abuse of process doctrine—the doctrine most relevant in this context—concerns the parties' litigation *conduct*, rather than a judgment's (preclusive) *effects*. Nevertheless, both English and Dutch courts tend to take account of relevant prior *conduct* abroad as well as foreign procedural law as factual circumstances in the process of determining whether the parties' conduct in local proceedings amounts to abuse and should be struck out. For purposes of the Brussels and Lugano Regime, wider preclusion is not concerned with the effects of a judgment but the parties' litigation conduct, which means that the *Hoffmann* principle lacks (direct) application.

Concluding Remarks

(1) General observations

The problem of foreign judgment *recognition* can be significantly rationalised, by distinguishing the problem from *preclusion* by foreign judgments. That distinction is possible, because 'recognition' concerns the *local validity* of a foreign judgment, whereas 'preclusion' implicates a judgment's *legal consequences*. Against this background, foreign judgment recognition boils down to a problem of the enacting State's jurisdiction, and the recognising State's public policy. Preclusion by foreign judgments, in turn, presents itself as a problem about implementing the principle of finality of litigation between legal systems that tend to attach diverging preclusive effects to judgments, and that use varying approaches to determining the preclusive effects of recognised foreign judgments.

(2) Two distinct problems

(3) Recognition of foreign judgments

Local validity—the legal status a foreign judgment acquires by recognition in accordance with the (private international) law of the State addressed—is but one aspect of the validity of a judgment, and, in fact, of *any* act of State: two additional aspects include, first, the judgment's validity *in the enacting State* under the (constitutional or procedural) law of that State; and, second, the judgment's validity *in the international community of States* (whether defined regionally or globally) as a matter of international law.

This observation explains why a judgment that has been annulled in the rendering State can still be recognised and thus acquire validity in another State, or why a judgment that remains valid in the rendering State may be refused recognition in another State on ground of domestic public policy, or why a State may be required on grounds of international public policy to refuse recognition of a judgment that remains valid in the rendering State.

(i) Why courts recognise foreign judgments

Territoriality is the root cause of the problem of foreign judgment recognition. However, this international law restriction on the sphere of validity of acts of State, including judgments, merely explains why in the absence of recognition a foreign judgment lacks local validity; the principle does not not explain why States have developed the practice of recognising foreign judgments—the rationale for foreign judgment recognition—namely, the public and private interest in ensuring justice and finality between legal systems.

a. The root cause: Territoriality

Both English and Dutch law on foreign judgments is founded on territoriality. The idea is that international law does not exclude the prospect of a judgment acquiring

validity *abroad*, in the territory of another State, but whether it does, depends on the State addressed; a State can incorporate a foreign judgment in its legal order by granting it 'recognition' ('*erkenning*')—that is to say, by conferring the foreign judgment local 'validity' ('*geldigheid*'): the *legal status of judgment*, which generally implies the *force of law* ('*rechtskracht*') and further permits the attribution of *legal consequences* ('*rechtsgevolgen*'), in particular, execution (justice) and preclusion (finality).

In England and Wales as well as in the Netherlands, recognition at common law ('*commuun recht*') is essentially subject to a single condition: the foreign judgment must have been rendered by a court of competent jurisdiction. The defining standard for 'competent jurisdiction' varies significantly: English courts require that jurisdiction was based on grounds acceptable by *English* standards, whereas Dutch courts insist that jurisdiction was based on *internationally acceptable* standards. The Brussels and Lugano Regime is an illustration how the two countries have established common jurisdictional terms subject to which there is mutual recognition. The special feature is that the regime implies mutual trust that courts will indeed abide by the agreed jurisdictional terms, as demonstrated by the prohibition, as a rule, of a review of a rendering court's jurisdiction.

Jurisdiction and recognition are inherently linked in that a judgment manifests the jurisdiction—the judicial power—of a State. According to English courts, then, a lack of jurisdiction negatives the obligation the foreign court imposed, while Dutch courts view recognition as the act of accepting the rendering court's jurisdiction. At the same time, neither English nor Dutch courts concern themselves with the question whether the rendering court had jurisdiction under its own (constitutional or procedural) law until a judgment has been successfully challenged in the enacting State, in which case there is no foreign judgment to recognise (assuming, of course, the annulment or revocation judgment can be recognised). That question goes to a different issue of validity, namely, the foreign judgment's validity *in the enacting State* under the (constitutional or procedural) law of that State, not its validity *in the State addressed* under the (private international) law of that State.

Finally, even if the basic condition for recognition is met—the rendering court was of competent jurisdiction—both English and Dutch private international law reserves the power to refuse if recognition is against a State interest. This 'public policy' exception signals that in exceptional circumstances, a State's interest in recognising a foreign judgment (the 'rationale' for foreign judgment recognition) is outweighed by another interest, namely, the need to safeguard the State's fundamental principles or vital economic or social concerns, which would be endangered by incorporating the foreign judgment in question into the legal order.

b. Recognition rationale: Finality and justice

States recognise foreign judgments in the interest of justice, and finality of litigation (and more generally legal certainty and a sound administration of justice between legal systems) after a court of competent jurisdiction has determined a claim or issue. Depending on the level at which the problem of foreign judgment recognition is addressed—the national, regional, or international level—the question whether recognition serves first and foremost the private interest or the public interest will have varying answers. In English law, the principal concern appears to be protection of the *private* interest, whereas in Dutch law, the main concern has been the public

interest in a proper administration of justice and, thus, legal certainty, among legal systems. By comparison the Brussels and Lugano Regime was motivated firstly by the public interest in establishing and maintaining a proper functioning common market and civil justice area.

Obviously, the private and public interest in justice and finality are closely associated, and furtherance of one typically favors the other, but the emphasis may still imply different choices in substance. For example, the varying standards of jurisdiction as condition for recognition in English and Dutch law—the former imposing stricter conditions than the latter—can arguably be explained by reference to the fact that a more liberal recognition policy tends to favour the public interest in justice and finality potentially to some extent at the cost of risks to the interest of individuals in particular cases.

(4) Preclusion by foreign judgments

Interjurisdictionally, finality of litigation raises two principal concerns: first, the finality of a judgment and, second, finality in another case. Conversely, the concern of finality within the same case, which forms an integral aspect of preclusion in domestic law, does not arise, since proceedings abroad after the rendition of judgment invariably imply another case.

(i) The finality of a judgment

The problem of finality of a judgment arises interjurisdictionally in case a party challenges the accuracy or legality of a foreign judgment that is amenable to recognition. Such collateral attack essentially goes to the judgment's validity *in the rendering State*.

An English court can strike out a claim that (in effect) makes the validity of a foreign judgment *in the rendering State* the subject-matter of the action. In other circumstances where a party challenges the accuracy or legality of a foreign judgment, the court can strike out for abuse of process. Similarly, a Dutch court is likely to strike out such collateral claim as a violation of the principle of a sound administration of justice (specifically the doctrine of *gesloten stelsel van rechtsmiddelen* which applies to any judgment with validity in the Dutch legal order).

Under the Brussels and Lugano Regime, the bar of collateral attack derives from the prohibition of the review of a judgment as to its substance, which means that the courts of the rendering State have *exclusive* jurisdiction to rule on the judgment's accuracy and legality, and which implies that the parties can only avail themselves of the means of recourse available in the legal system of the rendering State.

(ii) Finality in another case

The problem of finality in another case case present itself interjurisdictionally in essentially three forms: first, a successful claimant reasserts the cause of action for which he already recovered judgment abroad; second, an unsuccessful claimant or defendant contradicts a foreign court's findings regarding a claim or issue; and, finally, a party's litigation conduct otherwise appears inappropriate in light of the

prior proceedings (e.g. a party raises a claim or issue that was not but could and should have been raised and determined in those prior proceedings).

a. Claim preclusion

Unlike the Netherlands, England and Wales has a *specific* statute barring categorically any reassertion of a cause of action for which a claimant has recovered judgment abroad; courts do not consider whether reassertion of the cause of action would be permitted in the judgment-rendering State. The Netherlands does not generally bar reassertion. Reassertion is precluded if the judgment recovered abroad is amenable to recognition under the Brussels and Lugano Regime, an international agreement, or a specific domestic statutory provision mandating recognition. However, for judgments recognised at common law, reassertion is expressly allowed by statute, unless the court finds that the claimant lacks a sufficient interest to claim again for the same cause of action, which is not unlikely, because the claimant also has the option of seeking enforcement by action on the foreign judgment. The Brussels and Lugano Regime clearly prohibits reassertion as incompatible with the requirement to recognise the prior judgment between the parties and contrary to the prohibition of a substantive review of that judgment.

Contradiction of a foreign court's findings on the (non)existence of a cause of action is another aspect of interjurisdictional claim preclusion. English courts *invariably* apply the domestic estoppel doctrine to determine a recognised foreign judgment's preclusive effect, but will take account of foreign preclusion law if duly pleaded and, if contested, proved, so as not to overpreclude. A recognised foreign judgment can therefore found a *cause of action estoppel*. English courts have to date applied the same approach to judgments recognised under the Brussels and Lugano Regime. By contrast, Dutch courts *never* apply the provision on the res judicata effect of domestic judgments (Art 236 Rv) to a recognised foreign judgment. Instead, for judgments recognised at common law, domestic (unwritten) principles of private international law require that a court determines in each particular case what res judicata effect properly attaches to the foreign judgment in question, meaning that the court will take account of foreign preclusion law so as not to over- or underpreclude. Further, for judgments recognised under the Brussels and Lugano Regime, Dutch courts generally apply the preclusion law of the judgment-rendering State.

b. Issue preclusion

In terms of English and Dutch courts' *approach*, issue preclusion—the bar of contradiction of a foreign court's findings regarding an *issue*—operates in precisely the same way as the bar of contradiction in the context of claim preclusion of a foreign court's findings regarding the (non)existence of a cause of action. This statement on the approach of courts in determining the applicable preclusion law says nothing about the substance of the rule of preclusion which will applied where a party contradicts a foreign court's findings regarding an issue; for instance, unlike a cause of action estoppel, an issue estoppel is subject to an exception for special circumstances, which may very well exist in case the issue was litigated and determined abroad.

c. Wider preclusion

On wider preclusion, Dutch courts, alike their English counterparts, do not directly apply foreign law, since abuse of process doctrine—the doctrine most relevant in this context—concerns the parties' litigation *conduct*, rather than a judgment's (preclusive) *effects*. Nevertheless, both English and Dutch courts tend to take account of relevant prior *conduct* abroad as well as foreign procedural law as factual circumstances in the process of determining whether the parties' conduct in local proceedings amounts to abuse and should be struck out. For purposes of the Brussels and Lugano Regime, wider preclusion is not concerned with the effects of a judgment but the parties' litigation conduct, which means that the *Hoffmann* principle lacks (direct) application.

Part III. A Suggested Approach

Introduction

Part I identified three paradigmatic situations where the problem of finality of litigation presents itself: first, the finality of a judgment; second, finality within the same case; and, finally, finality in another case. That part further evaluated how two different legal systems address that same problem. Part II, apart from confirming the need to distinguish between the problems of foreign judgment recognition and preclusion by foreign judgments, established that the problem of finality within the same case does not present itself interjurisdictionally, and that the problem of finality of a judgment goes to a judgment's validity (not its effects) and arises interjurisdictionally when a court in the State addressed reviews the accuracy or legality of a foreign judgment or allows the parties to challenge the judgment collaterally.

This final part suggests an approach to the problem of preclusion by foreign judgments. The part proceeds in two parties. First, Chapter 5 evaluates the extent to which the EU has addressed the problem at the EU-level through (the CJEU's interpretation of) the Brussels and Lugano Regime. EU preclusion law has a limited reach, in two ways: first, EU law offers no comprehensive preclusion law for judgments recognised under the Brussels and Lugano Regime; and, second, insofar as EU law addresses the problem of preclusion by foreign judgments, it does not (yet) reach foreign judgments recognised outside the Brussels and Lugano Regime, for which domestic private international law—discussed in Part II—remains determinative.

Second, Chapter 6 considers how the problem of preclusion by foreign judgments should be addressed for judgments recognised under the Brussels and Lugano Regime (the 'European Approach' which applies insofar as the problem has not already been addressed by EU-level preclusion law as discussed in Chapter 5). This chapter also considers separately how the same problem should be tackled in relation to civil and commercial judgments recognised at common law (the 'Common Law Approach'). To this end the relative merits of the English and the Dutch approaches as identified in Chapter 4 are assessed, and the question is asked and answered whether and, if so, in what respects the approach at common law should differ from the European approach.

Chapter 5. The Harmonization of Preclusion Law

Introduction

It should be an illusion to think that EU law has not already affected EU Member States' preclusion laws; the CJEU in *Hoffmann v Krieg*[1] construed Art 36 of the Brussels Convention (Art 43 of the Brussels I Regulation) as meaning that a party who has not appealed against the enforcement order (i.e. a declaration of enforceability) is thereafter *precluded*, at the stage of the execution of the judgment, from relying on a valid ground which he could have pleaded in such an appeal, and that that rule must be applied of their own motion by the courts of the State in which enforcement is sought.[2] On that basis, an English court should, as a rule,[3] strike out of its own motion any plea that advances a ground for non-recognition of a judgment under Arts 27 or 28 of the Convention (Arts 34 and 35 of the Brussels Regulation).

Nevertheless, the preclusive effects of recognised *foreign* judgments in civil and commercial matters is traditionally governed by *State* law. Apart from the uncertain status of the CJEU's decision in *De Wolf v Cox*[4] as possibly introducing some form of European claim preclusion principle,[5] the CJEU in *Hoffmann v Krieg*[6] confirmed that "a foreign judgment which has been recognised [under the Brussels Convention] … must in principle have the same effects in the State in which enforcement is sought as it does *in the State* in which judgment was given."[7] No one then doubted the applicability of *State law* (whether the law of the rendering state, the law of the state addressed, or some combination of laws). Further, though preclusion laws diverge, the Schlosser Report was explicit: "The [drafting committee] did *not* consider it to be its task to find a general solution to the problems arising from these differences."[8]

Until 15 November 2012, the general assumption was: *De Wolf*[9] aside (as uncertain outlier), European preclusion law reaches CJEU judgments.[10] This is when the CJEU in *Gothaer*[11] held that the "res judicata" effect of Member State court judgments on jurisdiction in civil and commercial matters "must be defined *at European Union level* rather than vary according to different national rules."[12] Moreover, the Court in the recent case of *Salzgitter*[13] outlined an EU bar of collateral

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[1] Case 145/86 (Chapter 3 n 470).
[2] ibid [34].
[3] See the proviso at [34] ("That rule does not apply when it has the result of obliging the national court to make the effects of a national judgment which lies outside the scope of the Convention conditional on its recognition in the state in which the foreign judgment whose enforcement is at issue was given.").
[4] *De Wolf v Cox* (Part I, Introduction n 2). See text to n 57ff.
[5] ibid.
[6] Case 145/86 *Horst Ludwig Martin Hoffmann v Adelheid Krieg* (Chapter 3 n 470).
[7] ibid [11] (emphasis added).
[8] (Part II, Introduction n 18) 127-28 (emphasis added).
[9] *De Wolf v Cox* (Part I, Introduction n 2). See text to n 57ff.
[10] See, eg, Joined Cases C‑442/03 P and C‑471/03 P *P & O European Ferries (Vizcaya) and Diputación Foral de Vizcaya v Commission* [2006] ECR I‑4845 [44]; Case C‑221/10 P *Artegodan v Commission* [2012] ECR I-0000 [87].
[11] *Gothaer* (Part I, Introduction n 1).
[12] ibid at [39] (emphasis added).
[13] Case C-157/12 *Salzgitter Mannesmann Handel GmbH v SC Laminorul SA* (Chapter 4 n 197).

attacks on judgments amenable to recognition under the Brussels I Regulation by interpreting the implications of the prohibition of review of a judgment as to its substance, which is implied in the principle of mutual trust that underpins the regulation.[14]

After *De Wolf*,[15] then *Gothaer*,[16] and now *Salzgitter*,[17] no one can seriously contest that the Member States' rules and doctrines that implement finality of litigation have—at least to some extent—been harmonised at the EU-level, by the development of EU principles on finality in other cases, in the form of (arguably) claim preclusion[18] and (certainly) issue preclusion,[19] and on finality of judgments, in the form of a bar of collateral attacks on judgments[20]. This process of harmonisation, of creation of EU preclusion law for judgments in civil and commercial matters continues to be driven by the CJEU, through its interpretation of the Brussels Regime.

As a precliminary point, which is of interest to comparative lawyers, the Court's understanding of the proper scope of a judgment's res judicata effect, especially as pronounced in *Gothaer*,[21] should be contrasted with the position adopted by the ALI / UNIDROIT Principles on Transnational Civil Procedure[22]. The principles recognize finality of litigation as general principle, but the drafters identified significant differences between existing res judicata doctrines, in particular the availability of *issue* preclusion, let alone more generally between preclusion laws. The end result is what purports to be a compromise, but which actually gives preference to what is described as "the continental European concept."[23] Accordingly, the principles provide for claim preclusion,[24] but *exclude* issue preclusion other than in exceptional cases.[25] Apart from the fact that most if not all common law and various civil law systems do not reflect these principles, the CJEU decision in *Gothaer* confirms that the Principles do *not* reflect European law,[26] and that issue preclusion is, in fact, an integral part of the EU concept of res judicata.[27]

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[14] Regulation, Art 36. cf Regulation, Art 45(2) (in the context of enforcement).
[15] *De Wolf v Cox* (Part I, Introduction n 2). See text to n 57ff.
[16] *Gothaer* (Part I, Introduction n 1). See text to n 91ff.
[17] Case C-157/12 *Salzgitter Mannesmann Handel GmbH v SC Laminorul SA* (Chapter 4 n 197). See text to n 44ff.
[18] See text to n 57ff.
[19] See text to n 91ff.
[20] See text to n 40ff.
[21] *Gothaer* (Part I, Introduction n 1). See text to n 44ff.
[22] (adopted by the ALI in May 2004 and by UNIDROIT in April 2004) <www.unidroit.org/english/principles/civilprocedure/main.htm> accessed 1 July 2012.
[23] Rolf Stürner, 'The Principles of Transnational Civil Procedure: An Introduction to Their Basic Conceptions' (2005) 69 RabelsZ 201, 250-51.
[24] Principle 28.2.
[25] ibid 28.3.
[26] *Gothaer* (Part I, Introduction n 1). See text to n 91ff.
[27] See Rolf Stürner, 'Preclusive Effects of Foreign Judgments—The European Tradition' in Rolf Stürner and Masanori Kawano, *Current topics of international litigation Current Topics of International Litigation* (Mohr Siebeck, Tübingen 2009) 239, 254 ("It is true that the solution of the Principles does neither harmonize with the jurisprudence of the ECJ nor with the most recent American Uniform Law on Jurisdiction and Recognition as affirmed by the ALI in 2005. ...[T]he better arguments struggle for the Principles. It is indeed not recommendable to complicate transnational disputes as did especially the ECJ with its unclear innovations. This may be of interest of international law firms, not of their clients. A broad scope of res iudicata in transnational disputes could be a threatening machinery for a worldwide dissemination of judicial errors. The quality of courts is not equal all over the world and it is one of the fundamental errors of the EU and its ECJ to take the equality of all courts of the individual states of the Union for granted.").

A. Comparative Perspective

The process of 'federalization' of the res judicata effect in the EU can be usefully compared with the position in the U.S., where states remain free to define the contents of their own preclusion laws.[28] State law *exclusively* governs preclusion by *state* court judgments, subject only to the requirements of federal due process and full faith and credit.[29] The absence of federal interference echoes concerns of comity and federalism, and, even though adjudicatory jurisdiction in the United States is not determined by federal law like in the EU, and limited solely by federal due process, the prevailing view is that state preclusion law holds sway even where a state court exercises 'federal-question'-jurisdiction.[30]

State law even governs the preclusive effect of *federal* court *diversity* judgments; the Supreme Court held in *Semtek*[31] that, though preclusion by federal judgments is a matter of federal common law, the federally prescribed rule of decision is the law of the *state* where the federal court sits.[32] The rationale for this alignment is that state and federal courts sitting in diversity apply state law to the substance of a claim, so that diverging state and federal preclusion laws, "produce the sort of 'forum-shopping […] and […] inequitable administration of the laws' that *Erie* seeks to avoid",[33] while applying the same preclusion law (state law) to federal and state diversity judgments advances the aim of "nationwide uniformity."[34] Even though federal preclusion law does exist, it applies solely to federal-court *federal-question* judgments.[35]

Finality on jurisdictional issues is achieved, not by federalizing res judicata, but by requiring that states give full faith and credit[36] to sister-state judgments on

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[28] *Marrese v American Academy of Orthopaedic Surgeons*, 470 US 373, 380 (1985) (citing *Allen* (Introduction n 82) 96). cf *Richards v Jefferson County, Ala*, 517 US 793, 797 (1996) ("State courts are generally free to develop their own rules for protecting against the relitigation of common issues or the piecemeal resolution of disputes.").

[29] See Chapter 3, text to n 488ff.

[30] SB Burbank, 'Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach' (1986) 71 Cornell L Rev 733, 763ff. Note that the state and federal courts have concurrent jurisdiction of suits of a civil nature arising under the Constitution and laws of the United States, save in exceptional instances where the jurisdiction has been restricted by Congress to the federal courts. *Grubb v Public Utilities Commission of Ohio*, 281 US 470, 476 (1930). Litigation in a particular case can be of such a nature that it could proceed simultaneously in state and federal courts, in virtue of their concurrent jurisdiction, until there is a final judgment in one, when that judgment becomes conclusive in the other as res judicata. *Kline v Burke Construction Co*, 260 US 226, 230 (1922) ("Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of res adjudicata by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case. The rule, therefore, has become generally established that where the action first brought is in personam and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded.").

[31] *Semtek Intern Inc v Lockheed Martin Corp*, 531 US 497 (2001).

[32] ibid 508-09.

[33] ibid.

[34] ibid.

[35] *Taylor v Sturgell*, 553 US 880, 891 (2008) ("federal courts participate in developing 'uniform federal rule[s]' of res judicata.").

[36] *Underwriters Nat Assur Co v North Carolina Life and Acc and Health Ins Guaranty Ass'n* (Chapter 3 n 504) 706 n13 (1982) (citing *Durfee v Duke*, 375 US 106 (1963)).

jurisdiction,[37] which means that once jurisdiction is fully and fairly litigated (or waived) and finally decided,[38] the judgment can be challenged only in its state of rendition.[39]

5.1 The finality of a judgment

A judgment subject to recognition under the Brussels and Lugano Regime may "[u]nder no circumstances … be reviewed as to its substance."[40] The Jenard Report on the Brussels Convention clarifies that this prohibition of review implies "implies complete confidence in the court of the State in which judgment was given".[41] Accordingly, the report adds, "[t]he court of a State in which recognition of a foreign judgment is sought is not to examine the correctness of that judgment; it may not substitute its own discretion for that of the foreign court nor refuse recognition if it considers that a point of fact or of law has been wrongly decided."[42] This prohibition is inherent in the principle mutual trust in the administration of justice that underpins the regime's system of automatic recognition.[43] The CJEU in *Salzgitter*[44] stated the following implications:

> [M]utual trust implies that the courts of the Member State of origin retain jurisdiction to assess, in the context of the legal remedies established by the legal system of that Member State, the lawfulness of the judgment to be enforced, *to the exclusion*, in principle, of the court of the Member State in which enforcement is sought, and that the final outcome of the assessment of the lawfulness of that judgment will not be called into question.[45]

In other words, a Member State court lacks jurisdiction in relation to a judgment subject to automatic jurisdiction under the regime to consider the accuracy and legality of a judgment under the law of the judgment-rendering State; the court must assume that the judgment is valid until and unless the judgment has been set aside by the competent court in the State of rendition. In the regard, in relation to judgments

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[37] *Durfee v Duke*, 375 US 106, 111 (1963). See also *Underwriters Nat Assur Co v North Carolina Life and Acc and Health Ins Guaranty Ass'n* (Chapter 3 n 504) 706 n13 (1982) ("The need for finality within our federal system … applies with equal force to questions of jurisdiction.") (emphasis added).

[38] *Underwriters Nat Assur Co v North Carolina Life and Acc and Health Ins Guaranty Ass'n* (Chapter 3 n 504) 706 n13 (1982).

[39] ibid (quoting *Stoll v Gottlieb*, 305 US 165, 172 (1938) ("After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first.")).

[40] Regulation, Art 36. cf Regulation, Art 45(2) (in the context of enforcement).

[41] Jenard Report (Part II, Introduction n 18) 36.

[42] ibid. cf Case C-619/10 *Trade Agency Ltd v Seramico Investments Ltd* [2012] ECR I-0000 [50] ("In that connection, it must be observed that, by disallowing any review of a foreign judgment as to its substance, Arts 36 and 45(2) of Regulation No 44/2001 prohibit the court of the State in which enforcement is sought from refusing to recognise or enforce that judgment solely on the ground that there is a discrepancy between the legal rule applied by the court of the State of origin and that which would have been applied by the court of the State in which enforcement is sought had it been seised of the dispute. Similarly, the court of the State in which enforcement is sought cannot review the correctness of the findings of law or fact made by the court of the State of origin (see, Krombach, paragraph 36; Renault, paragraph 29; and Apostolides, paragraph 58).").

[43] Regulation, Recital 16.

[44] Case C-157/12 *Salzgitter Mannesmann Handel GmbH v SC Laminorul SA* (Chapter 4 n 197).

[45] ibid [33].

which have not yet acquired res judicata status, the regime explicitly provides the option to a court of a Member State in which recognition is sought to stay the proceedings if an ordinary appeal against the judgment has been lodged.[46]

(1) Exclusion of collateral attack on judgments

In effect then, the regime, including the prohibition of a review of a judgment as to its substance prior to its recognition, which occurs automatically, effectively excludes any collateral attack on a judgments; in this sense, the CJEU in *De Wolf v Cox*[47] ruled that "[w]hen an application for a review as to substance is declared *admissible*, the court before which the application is heard is required to decide whether it is well founded, a situation which could lead that court to conflict with a previous foreign judgment and, therefore, to fail in its duty to recognize the latter."[48] Along the same lines, the CJEU in the aforementioned case of *Salzgitter*[49] clarified that: "It is for the party to the proceedings to avail himself of *the legal remedies provided for by the legal system in the Member State in which the proceedings take place*";[50] in other words, a party cannot challenge the judgment in any other Member State than the judgment-rendering State, using the means available in that State.

In *Salzgitter*, a Romanian company sued a German company for payment for a delivery of steel products. The defendant argued that the wrong party had been sued. On that ground, the Romanian court dismissed the claim. That judgment acquired res judicata status. However, the Romanian company sued the German company again for the same cause of action, and recovered a default judgment ordering payment. The German company applied in Romania for a set aside of the second, irreconcilable judgment, but failed. The Romanian company then sought enforcement of the second judgment in Germany. The German company challenged the enforcement of the judgment and in support it invoked Art 34(4) of the Brussels I Regulation, which permits a refusal of recognition of (certain) irreconcilable judgments.

The CJEU concluded that this attempt should be dismissed, because the interpretation of Art 34(4) of the regulation as covering irreconcilability of two judgments given in the same State (i.e. "conflicts between two judgments given in one Member State") would conflict with the principle of mutual trust; a refusal of recognition would allow the court of the Member State addressed to substitute its own assessment for that of the court in the Member Sate of origin, in violation of the prohibition of a review of judgments as to its substance. In effect, the Court observed:

> Such a possibility of review as to the substance would *de facto* constitute an additional means of redress against a judgment which has become final in the Member Sate of origin. In that regard, it is not disputed that… the grounds for non-enforcement provided for in Regulation No 44/2001 do not create additional remedies against national judgments which have become final.[51]

[46] Regulation, Art 37(1).
[47] *De Wolf v Cox* (Part I, Introduction n 2).
[48] ibid [9] (emphasis added).
[49] Case C-157/12 *Salzgitter Mannesmann Handel GmbH v SC Laminorul SA* (Chapter 4 n 197).
[50] ibid [35] (emphasis added).
[51] ibid [38].

In the absence of remedies in the judgment-rendering State, a party cannot challenge the validity of a judgment (including its accuracy) in another Member State. Obviously, this restriction does not exclude that a judgment is refused recognition on one of the grounds in Art 34 or Art 35 of the regulation. However, also in the context of application of these provisions, the prohibition of a review of a judgment as to its substance under Art 36 applies; for example, regarding the public policy exception under Art 34(1), the CJEU in *Krombach* held that "[i]n order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a *manifest* breach",[52] which implies that there is in fact very little scope for inquiry.

This is further illustrated by *Trade Agency*,[53] where the Court ruled that a Member State court may refuse to recognise a default judgment that lacks any assessment of the subject-matter or the basis of the claim, as well as any argument of its merits, "only if it appears to the court, after an overall assessment of the proceedings and in the light of all the relevant circumstances, that that judgment is a manifest and disproportionate breach of the defendant's right to a fair trial referred to in the second paragraph of Article 47 of the Charter, *on account of the impossibility of bringing an appropriate and effective appeal against it*."[54]

(i) Infringements of EU law

In this regard, it should be noted that the CJEU in *Kapferer*[55] addressed the question whether a Member State court is required to disapply domestic rules that implement finality of litigation, in particular the finality of a judgment, and to review or set aside a domestic judgment that violates EU law; in other words, the Court had to strike a balance between the need for effectiveness of EU law, on the one hand, and the need for finality of litigation, on the other hand. The Court acknowledged the importance of finality of litigation, and struck the balance between in favour of the finality of a judgment: "Community law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, *even if to do so would enable it to remedy an infringement of Community law by the decision at issue*".[56]

5.2 Finality in another case

(1) Claim Preclusion: Reassertion

Views diverge on the significance of the CJEU's decision in *De Wolf v Cox*.[57] This significance can be construed narrowly or broadly (a feature of more CJEU decisions). On a narrow view, the decision confirmed merely the *exclusive nature* of

[52] ibid [37].
[53] Case C-619/10 *Trade Agency Ltd v Seramico Investments Ltd* (n 42).
[54] ibid [62].
[55] *Kapferer* (Introduction n 8).
[56] ibid [20]. cf Case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR I-10239 [38]. See also the opinion of AG Geelhoed in *Lucchini* (Part I, Introduction n 4) [36] ("The national legal systems of all the Member States include the principle of res judicata. It is in the interests of legal certainty that court decisions which can no longer be appealed should be inviolable in societal relations, in other words, become a legal fact. That legal fact should be respected. This means that the lodging of a fresh appeal with the same subject-matter, the same parties and the same arguments is ruled out.")
[57] *De Wolf v Cox* (Part I, Introduction n 2).

the enforcement procedure under the Brussels (an Lugano) Regime, so that a Member State court must dismiss a claim by a successful claimant for enforcement at common law, whenever the regime's enforcement procedure is available.[58] In support of this view, reference can be made to the narrow question submitted to the Court's jurisdiction:

> Whether the Convention prevents a plaintiff 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 State for a judgment against the other party in the same terms as the judgment delivered in the first State.[59]

On a broader view, "[i]n effect, if not in express words, the Regulation enacts a principle of merger of the cause of action in the judgment. … [J]udges [are directed] to accept that the judgment of another Member State makes the issues determined res judicata, and the judgment creditor as loosing the cause of action which he formerly had."[60] On this view, the Court pronounced a *European merger doctrine*, which bars another claim for a cause of action for which a claimant has previously recovered judgment.[61] In this sense, too, Advocate General Léger in *ASML*[62] restated:

> [T]he Court has held [in *De Wolf v Cox*] that an applicant who has obtained a judgment in his favour in one Contracting State, for which an enforcement order may be issued in another Contracting State, may not institute fresh proceedings against his debtor concerning the same subject-matter in that State.[63]

In support of this view, reference is made to the Court's following statements in *De Wolf v Cox*:

> 7. The first paragraph of Article 26 of the Convention provides: 'a judgment given in a Contracting State shall be recognized in the other Contracting States without any special procedure being required'.
>
> 8. Although Articles 27 and 28 lay down certain exceptions to this duty of recognition, Article 29 nevertheless provides that 'under no circumstances may a foreign judgment be reviewed as to its substance'.
>
> 9. *When an application for a review as to substance is declared admissible, the court before which the application is heard is required to decide whether it is well founded,*

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[58] Dickinson (Chapter I n 11) 54. See, in this limited sense, AG La Pergola in Case C-267/97 *Eric Coursier v Fortis Bank and Martine Coursier, née Bellami* [1999] ECR I-02543 [15] fn 33 ("However, a party who has obtained judgment in his favour in a Contracting State, being a judgment for which an order for enforcement under Art 31 of the Convention may be issued in another Contracting State, is prevented from making an application to a court in that other State for a judgment against the other party in the same terms as the judgment delivered in the first State, even if such ordinary proceedings may be simpler and less costly, from the procedural point of view, than the recognition procedure (see Case 42/76 *De Wolf v Cox* [1976] ECR 1759).").

[59] *De Wolf v Cox* (Part I, Introduction n 2) [6].

[60] Adrian Briggs, *Agreements on jurisdiction and choice of law* (OUP, Oxford 2008) [9.46].

[61] cf the English position under s 34 of the 1982 Act. See Chapter 4, text to n 40ff.

[62] Case C-283/05 *ASML Netherlands BV v Semiconductor Industry Services GmbH (SEMIS)* [2006] ECR I-12041.

[63] ibid [57]. cf AG Darmon in Case 145/86 *Horst Ludwig Martin Hoffmann v Adelheid Krieg* (Chapter 3 n 470) [35].

> *a situation which could lead that court to conflict with a previous foreign judgment and, therefore, to fail in its duty to recognize the latter*.[64]

This part of the judgment—on the prohibition of review (apart from the limited review allowed for purposes of applying the grounds for refusing recognition)—goes to the finality of a judgment that is subject to recognition under the Brussels and Lugano Regime in the sense that a Member State court is barred from deciding on that judgment's accuracy and legality; it is today well-established that the regime excludes collateral attacks on judgments which are subject to automatic recognition under the regime.[65]

The Court had no reason to reach this issue on the facts of the case.[66] The claimant in the Dutch Art 431(2) Rv proceedings sought enforcement *by action on the Belgian judgment* and thus invoked the Belgian judgment delivered in his favour, which the court acknowledged was subject to automatic recognition, and thus claimed that the court deliver judgment ordering the Harry Cox undertaking in terms of the Belgian judgment to pay the principal sums due and interest.[67] Accordingly, there was no risk of the court engaging in prohibited review of the Belgian judgment, since that judgment formed the basis for the claim. The real issue was whether the availability of enforcement under the Brussels Convention excluded enforcement by action on the foreign judgment under Art 431(2) Rv.

The prohibition of review-issue only arises where a defendant argues that a judgment subject to recognition under the regime is erroneous or unlawful, or where the court seized of a claim for enforcement by action on the judgment would inquire into those matters of its own motion, and thus indeed fail in its duty to recognise the foreign judgment without such review. Conversely, the Court assumed that a claim under Art 431(2) Rv based on the foreign judgment implies that a court engages in *révision au fond*. But that assumption is unfounded; Article 431(2) allows either (1) reassertion of the original cause of action for which judgment was recovered abroad, in which case a party can invoke the foreign judgment, which the court seized can recognise and attribute res judicata effect, or (2) a claim based on the foreign judgment, in which case, if that judgment is amendable to recognition, the Dutch court enforces the foreign court's order by rendering an enforceable Dutch judgment in its terms.[68]

Against this background of the Court's confusion of the issue central to the preliminary reference, the first point that can be taken from the decision is that a court must strike out as inadmissible a claim that requires it to sit in judgment on the accuracy or legality of a judgment that is subject to recognition under the regime, because if a court were to decide the merits of such "application for a review as to substance" (i.e. whether the application is "well-founded"), the court would be liabile to conflict with the judgment and thus to fail in its duty to recognise that judgment. Again, this issue did not present itself for decision, but this is what the Court made of it. The Court could have limited itself to deciding that the enforcement procedure under the regime is exclusive of any other mode of enforcement available in the States bound by the regime.

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[64] *De Wolf v Cox* (Part I, Introduction n 2) [7]-[9].
[65] See text to n 40ff.
[66] cf Sepperer (Introduction n 39) 86.
[67] AG Mayras in *De Wolf v Cox* (Part I, Introduction n 2) 1770.
[68] See Chapter 4, text to n 200ff.

If a broader view of the Court's decision is justified, the view noted above is arguably not broad enough. On broad view, the decision implies a general European principle of claim preclusion, which bars *any* new claim with the same subject-matter regarding the same cause of action and involving the same parties, not merely claims aimed at recovering another judgment, but also, as noted below, claims of unsuccessful claimants or defendants.[69] The second—broader—point to take from the decision derives more clearly from the Court's following observations:

> 10/11 To accept the admissibility of an application concerning the same subject-matter and brought between the same parties as an application upon which judgment has already been delivered by a court in another contracting state would therefore be incompatible with the meaning of the provisions quoted. It also results from article 21 of the convention, which covers cases in which proceedings 'involving the same cause of action and between the same parties are brought in the courts of different contracting states' and requires that a court other than the first seised shall decline jurisdiction in favour of that court, that proceedings such as those brought before the Kantonrechter of Boxmeer are incompatible with the objectives of the Convention .
>
> 12 That provision is evidence of the concern to prevent the courts of two Contracting States from giving judgment in the same case.
>
> 13 Finally, to accept the duplication of main actions such as has occurred in the present case might result in a creditor's possessing two orders for enforcement on the basis of the same debt.[70]

The Court, by referring to "the concern *to prevent the courts of two Contracting States from giving judgment in the same case*",[71] posits the idea that under the regime there is always a single court—the court first seized—that has (in a special sense)[72] 'exclusive' jurisdiction to determine a claim for a particular cause of action between certain parties, meaning that other courts of the Member States courts should (1) decline jurisdiction when they are seized later (*les pendens*)[73] *and* (2) refuse to determine the claim again after the first court determined the claim (res judicata). In relation to the res judicata-aspect, the Court warns specifically that "the *duplication* of main actions such as has occurred in the present case might result in a creditor's possessing two orders for enforcement on the basis of the same debt."[74]

In the subsequent case of *Gubisch v Palumbo*—a case on the concept of '*lis pendens*'—the Court cited its judgment in *De Wolf v Cox*,[75] noting that "the Court [in that case] acknowledged the importance of those objectives of the Convention *even outside the narrow field of lis pendens*".[76] Those objectives are:

> 8 According to its preamble, which incorporates in part the terms of Article 220, the Convention seeks in particular to facilitate the recognition and enforcement of judgments of courts or tribunals and to strengthen in the community the legal protection of persons therein established. Article 21, together with Article 22 on

[69] See, eg, Sepperer (Introduction n 39) 86.
[70] *De Wolf v Cox* (Part I, Introduction n 2).
[71] ibid [11] (emphasis added).
[72] Not in the sense of Art 22 but Art 27 of the Regulation.
[73] See Brussels I Regulation, Art 27(1).
[74] *De Wolf v Cox* (Part I, Introduction n 2) [13] (emphasis added).
[75] ibid.
[76] Case 144/86 *Gubisch Maschinenfabrik KG v Giulio Palumbo* [1987] ECR 4861 [9].

> related actions, is contained in Section 8 of Title II of the Convention; that section is intended, in the interests of the proper administration of justice within the Community, to prevent parallel proceedings before the courts of different Contracting States and to avoid conflicts between decisions which might result therefrom. Those rules are therefore designed to preclude, in so far as is possible and from the outset, the possibility of a situation arising such as that referred to in Article 27(3), that is to say the non-recognition of a judgment on account of its irreconcilability with a judgment given in a dispute between the same parties in the State in which recognition is sought.[77]

Both sections supports the conclusion that the Court interprets the regime as excluding the reassertion of a cause of action with a view to (a) avoiding conflicts between decisions which might result therefrom and (b) precluding the possibility of non-recognition of a judgment on account of its irreconcilability with a judgment given in a dispute between the same parties in the State in which recognition is sought.[78]

The concept of 'reassertion' (of a cause of action) obviously includes principally the situation where a *successful* claimant tries to recover another judgment for the same cause of action. Technically, however, the exclusion further includes the situation where an *unsuccessful* claimant files a new claim on the basis of the same cause of action. Moreover, considering that claims for negative declaratory relief are within a court's jurisdiction under the regime,[79] this exclusion could also include the situation where an *unsuccessful* defendant subsequently sues for a declaration that there is no valid claim for the same cause of action. In all three scenarios, if the claim is allowed, the courts of two Member States are giving judgment in what is essentially the same case: the same cause of action, the same parties and the same subject-matter.

(i) The scope of preclusion

Assuming the CJEU in *De Wolf v Cox*[80] pronounced a principle of claim preclusion, which bars the reassertion of a cause of action (including subsequent claims by unsuccessful defendants for negative declaratory relief), a relevant follow-up question concerns the scope of this bar. Some who would accept that the Court enacted a form of claim preclusion, conclude that the Court never defined the scope of that effect.[81] Others reject that the Court suggested in *De Wolf v Cox* a link with the concepts that determine what constitutes "the same cause of action and between the same parties" for application of the regime's rules on *lis pendens.*[82] However, if anything, the Court defined a common core—a *minimum*—of claim preclusion; a narrowly tailored res

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[77] ibid [8].
[78] cf Sepperer (Introduction n 39) 86.
[79] Case C-133/11 *Folien Fischer AG and Fofitec AG v Ritrama SpA* [2012] ECR I-0000. The Court restated, at [49], that "an action seeking to have the defendant held liable for causing loss and ordered to pay damages has the same cause of action as an action brought by that defendant seeking a declaration that he is not liable for that loss."
[80] *De Wolf v Cox* (Part I, Introduction n 2). See text to n 57ff.
[81] cf Marie-Laure Niboyet, 'Les règles de procédure: l'acquis et les propositions. Les interactions entre les règles nationales de procédure et les « règles judiciaires européennes »' in Marc Fallon, Paul Lagarde and Sylvaine Poillot-Peruzzetto, *Quelle architecture pour un code européen de droit international privé?* (Peter Lang, Brussels 2011) 281, 292.
[82] *De Wolf v Cox* (Part I, Introduction n 2) [10/11].

judicata principle that does not prevent the Member States from attributing a judgment recognised under the Brussels and Lugano Regime broader claim preclusive effects, as long as those effects are consistent with the *Hoffmann* principle and the right to a fair trial.[83]

If the relevance of the concepts of "same cause of action" and "same parties" is accepted (or established in future), the application of these scope defining concepts in practice implies that the scope of claim preclusion may prove not to be relatively narrow compared to the scope of claim preclusion in some of the Member States' legal systems, including English and Dutch law, considering that the CJEU defines the concept of 'cause of action' as comprising "comprises the facts *and* the legal rule invoked as the basis for the application".[84] So, for instance, in *Mærsk*,[85] the Court held that a claim for damages based on the law governing non-contractual liability involves a different cause of action than a claim *alleging identical facts* but that is based on the International Convention of 10 October 1957 relating to the Limitation of the Liability of Owners of Sea-Going Shipsand on the Dutch legislation giving it effect.[86] Nevertheless, a claim seeking to have the defendant held liable for causing loss and ordered to pay damages can subject to the limitations mentioned be based on the "same cause of action" as a claim brought by that defendant seeking a declaration that he is not liable for that same loss.[87]

Moreover, apart from the requirement that the new claim must be based on the same cause of action (defined as strictly as noted) and must be between the same parties, the new claim must further involve the same '*subject-matter*'.[88] In *Mærsk*,[89] for example, the Court ruled that a claim for damages (i.e. an action aimed at establishing the defendant's liability) involves a different subject-matter that a claim to limit liability under a limitation of liability (i.e. an action aimed at ensure that *if* the person is declared liable, such liability is limited to certain amount), if under the limitation of liability-regime in question the act of invoking limitation of liability does not constitute an admission of liability.[90]

(2) Issue Preclusion: Issues that go to the effectiveness of the Brussels and Lugano Regime

The CJEU's decision in *Gothaer Allgemeine Versicherung AG and Others v Samskip GmbH*[91] is unquestionably the most explicit statement of European preclusion law in

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[83] See Chapter 6, text to n 55ff.
[84] Case C-406/92 *The owners of the cargo lately laden on board the ship 'Tatry' v the owners of the ship 'Maciej Rataj'* [1994] ECR I-5439 [39]. cf Case C-39/02 *Mærsk Olie & Gas A/S v Firma M de Haan en W de Boer* [2004] ECR I-9657 [38].
[85] Case C-39/02 *Mærsk Olie & Gas A/S v Firma M de Haan en W de Boer* [2004] ECR I-9657.
[86] ibid [38].
[87] Case C-406/92 *The owners of the cargo lately laden on board the ship 'Tatry' v the owners of the ship 'Maciej Rataj'* (n 84) [45]. cf Case C-133/11 *Folien Fischer AG and Fofitec AG v Ritrama SpA* (n 79) [49].
[88] Case C-39/02 *Mærsk Olie & Gas A/S v Firma M de Haan en W de Boer* (n 85) [34].
[89] ibid.
[90] ibid [35]. Further, to determine whether two claims involve the same subject-matter account must be taken only of the parties' respective claims in each of the sets of proceedings, and not of the defence that may be raised by a defendant. Case C-111/01 *Gantner Electronic GmbH v Basch Exploitatie Maatschappij BV* [2003] ECR I‑4207 [26].
[91] (Part I, Introduction n 1).

civil and commercial matters. After ruling that a judgment on jurisdiction is a 'judgment' subject to recognition (because to allow a refusal of recognition would be liable to compromise the effective operation of the uniform EU rules on direct jurisdiction),[92] the Court held that "*the concept of* res judicata *under European Union law* is relevant for determining the effects produced by a judgment by which a court of a Member State has declined jurisdiction on the basis of a jurisdiction clause."[93]

The Court defined that res judicata concept for purposes of issue preclusion as follows: "[T]he concept of res judicata under European Union law does not attach only to the operative part of the judgment in question, but also attaches to the *ratio decidendi* of that judgment, which provides the necessary underpinning for the operative part and is inseparable from it."[94] This is really a point of form: what matters is that the judgment-rendering court determined the issue; it is irrelevant in what part of the judgment. Consequently, the Court concluded:

> Thus, a judgment by which a court of a Member State has declined jurisdiction on the basis of a jurisdiction clause, on the ground that that clause is valid, binds the courts of the other Member States both as regards that court's decision to decline jurisdiction, contained in the operative part of the judgment, and as regards the finding on the validity of that clause, contained in the *ratio decidendi* which provides the necessary underpinning for that operative part.[95]

The facts of *Gothaer* can be shortly stated. A German company (Krones AG) sold a brewing installation to a Mexican business, and hired another German company (Samskip GmbH) for the transport of the machine from Belgium to Mexico under a bill of lading containing a jurisdiction clause designating the courts of Iceland. Damage to the installation allegedly occurred during transport, and Krones and its insurers (including Gothaer) sued Samskip in Belgium. But the Antwerpen Court of Appeal rejected jurisdiction after confirming the validity of the jurisdiction clause. The claimants then sued in Germany, in the Bremen first instance court. The court was uncertain what effects to attribute the Belgian judgment, and referred among others the following question to the CJEU for a preliminary ruling:[96]

> Are Articles 32 and 33 of [the Brussels I Regulation] to be interpreted, in the light of the case-law of the Court of Justice on the principle of extended effect (Case 145/88 Hoffmann [1988] E.C.R. 645), as meaning that each Member State is required to recognise the judgments of a court or tribunal of another Member State on the effectiveness of an agreement between the parties on jurisdiction, where the finding as to the effectiveness of the agreement on jurisdiction has become final under the national law of the first court, even where that decision forms part of a procedural judgment dismissing the action?[97]

In response, in formulating the answer set out, the Court's reasoning is built on two pillars. First, *the principle of mutual trust between EU courts* (implied by the prohibition of a review of a judgment as to its substance—Art 36 of the Brussels I

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[92] ibid [22]-[32].
[93] ibid [40].
[94] The Court, at [40], cited these cases in illustration: Joined Cases C‑442/03 P and C‑471/03 P *P & O European Ferries (Vizcaya) and Diputación Foral de Vizcaya v Commission* (n 10) [44]; and Case C‑221/10 P *Artegodan v Commission* (n 10) [87].
[95] ibid [41].
[96] TFEU, Art 267 grants the CJEU jurisdiction to hear and rule on such questions.
[97] AG Bot in *Gothaer* (Part I, Introduction n 1) [13].

Regulation) precludes a court of the Member State in which recognition is sought of a judgment in which the court of judgment-rendering State, in the assessment of its own jurisdiction, has held such a jurisdiction clause to be valid, to review that very same issue of validity. Mutual trust between EU courts, so the Court, is "all the more necessary" where an EU court is called upon to apply the *common rules of direct jurisdiction provided for by EU law* (no review of jurisdiction is the rule—Art 35(3) of the Brussels I Regulation).

Second, *the requirement of the uniform application of EU law* implies that the scope of the restriction of the power of the court in the recognising State to ascertain its own jurisdiction because it is bound by what was decided by the judgment-rendering court (pursuant to the abovementioned principle of mutual trust in conjunction with the exclusion of review of the jurisdiction of the judgment-rendering court) must be defined at the EU-level rather than vary according to different national rules on res judicata.[98]

The reasoning of the Court is not terribly convincing;[99] the second pillar of its reasoning (the requirement of the uniform application of EU law and thus the need for a European issue preclusion principle) leans on the first pillar (the principle of mutual trust and thus the implication that the State addressed is bound by the finding on the validity of a jurisdiction clause that underpins the other court's decision on its own jurisdiction); however, upon closer inspection, the first pillar proves to be built on sand.

Two aspects of the Court's reasoning are revealing. First, Arts 36 and 35 of the Brussels I Regulation relate to the *recognition of* a judgment, not the *preclusion by* a judgment; recognition precedes the attribution of preclusive effects, and so, a decision not to attribute issue preclusive effect to a judgment on jurisdiction, which is based on the finding on the validity of a jurisdiction clause, does not imply a refusal to recognise that judgment. The duty to recognise implies that the court addressed must accept that the other court had jurisdiction. But by determining for its own purposes—deciding on its own jurisdiction—the validity of a jurisdiction clause, a court does not review the other court's judgment as to its substance; the court may wel render a conflicting decision, based on a finding that the jurisdiction clause is invalid, but it is not deciding on the accuracy or legality of the other court's decision.

Second, the Court was certainly right to hold that a judgment denying jurisdiction is a 'judgment' in the sense of Art 32 and thus subject to automatic recognition; as the Court explained, "a refusal [to recognize a judgment on jurisdiction] would be liable to compromise the effective operation of the rules set out in Chapter II of that regulation on the distribution of jurisdiction as between the courts of the Member States."[100] The Schlosser Report makes this point indisputable: "If a German court declares that it has no jurisdiction, an English court cannot disclaim its own jurisdiction on the ground that the German court was in fact competent."[101] However, the exclusion of review of jurisdiction under Art 35(3) in conjunction with Art 36 of the regulation is *irrelevant* to this conclusion. Namely, the regulation only excludes review in situations where the foreign court *positively*

[98] *Gothaer* (Part I, Introduction n 1) [39]-[40].
[99] cf Ivo Bach, 'Deine Rechtskraft? Meine Rechtskraft! Zur Entscheidung des EuGH, den unionsrechtlichen Rechtskraftbegriff auf zivilrechtliche Entscheidungen nationaler Gerichte anzuwenden' (2013) 24 EuZW 56.
[100] *Gothaer* (Part I, Introduction n 1) [29].
[101] (Part II, Introduction n 18) 128.

asserted jurisdiction on the basis of the regulation or its municipal law, not where the court *declined* jurisdiction pursuant to its inherent jurisdiction to determine its own jurisdiction.

A stronger basis for the Court's decision refers to the objective of the regime to prevent the rendition of conflicting decisions and the situation where judgments are denied recognition on ground of irreconcilability with a judgment in the Member State addressed—the stated rationale for *De Wolf v Cox*.[102] As is well known, the concept of 'irreconcilability' in Art 34(3) and (4) means that two judgments "entail *legal consequences* which are mutually exclusive".[103] Accordingly, Advocate as General Bot in *Gothaer* noted, "a judgment declining jurisdiction is binding on the court of the Member State addressed in so far as that court cannot, without giving a judgment that is *irreconcilable* with the first one, declare that it lacks jurisdiction on the ground that the court of the Member State of origin has jurisdiction."[104]

Indeed, a judgment accepting jurisdiction based partly on a finding that a jurisdiction clause is invalid is irreconcilable with a judgment declining jurisdiction based on the finding that a jurisdiction clause is valid, albeit *only* insofar as the *issue preclusive effect* of the first judgment and the second judgment is mutually exclusive,[105] which is not imaginary in the EU where already English law and Dutch law would attribute issue preclusive effect regarding the finding on validity of the jurisdiction clause. (The decisions on jurisdiction as such are not irreconcilable.)

Advocate General Bot advances another rationale for establishing a European issue preclusion principle: the principle of effective judicial protection, which he rightly notes governs the interpretation and application of the Brussels I Regulation. He warns of the "serious risk of a negative conflict of jurisdiction leading to a complete lack of judicial protection",[106] which can materialise in case preclusive effect is denied to a judgment on jurisdiction that includes a finding on the validity (or scope) of a jurisdiction clause, if a court declined jurisdiction because of the existence of a term conferring jurisdiction on another court, the latter court could also decline jurisdiction if it regarded the term as void.[107]

However, a negative conflict of jurisdiction is implausible in these circumstances; under the *Hoffmann* principle (i.e. in the absence of the European rule of preclusion) two scenarios are likely: first, the finding on the validity of the jurisdiction agreement has preclusive effect in the rendering court, in which case the issue cannot be relitigated in the second court; or, second, the finding lacks preclusive effect in the rendering court, in which case the issue can be relitigated in the second court. In the first scenario, the second court cannot hold the jurisdiction agreement void; in the second scenario, the issue can be relitigated in the first court in light of the decision of the second court.

(i) The scope of preclusion

Apart from the question whether a Member State court must apply the European issue preclusion principle of its own motion (in the case referred to in the Court's

[102] *De Wolf v Cox* (Part I, Introduction n 2). See text to n 57ff.
[103] Case 145/86 *Horst Ludwig Martin Hoffmann v Adelheid Krieg* (Chapter 3 n 470) [22]. cf Case C-80/00 *Italian Leather SpA v WECO Polstermöbel GmbH & Co* [2002] ECR I-4995 [40].
[104] *Gothaer* (Part I, Introduction n 1) [67] (emphasis added).
[105] See text to n 103ff.
[106] ibid [88].
[107] ibid.

reasoning,[108] the Court held that "the question of the force of res judicata with absolute effect is a matter of public policy, which must, consequently, be raised by the Court of its own motion")[109] a number of questions arise as to the scope of the principle.

First, does the principle apply solely after the exhaustion of all ordinary remedies against the foreign judgment (i.e. the judgment has res judicata status), or already when the judgment is still subject to appeal or other ordinary means of recourse? Second, does the principle apply only to findings regarding jurisdiction, or more generally to findings on any common issue of EU law, or, even more generally, any finding subject to the prohibition of review under Art 36 of the Brussels I Regulation? Finally, does the principle apply only when a judgment is invoked in another Member State, or also when the judgment is invoked in another case within the same Member State?

a. Final judgments only?

The judgment in question in *Gothaer*—the Belgian judgment upholding the validity of the jurisdiction clause and rejecting jurisdiction in favour of the Icelandic courts—had become 'final' by the time it was invoked in the German proceedings; the judgment had acquired res judicata status (i.e. the judgment was no longer subject to an appeal or other ordinary means of recourse—all ordinary remedies had been exhausted).

The question arises whether the issue preclusion principle pronounced by the CJEU applies solely to judgments which have acquired res judicata status according to the law of the judgment-rendering State (or some autonomous standard to be defined by the Court), or whether it applies to any judgment that finally and conclusively determines the court's jurisdiction.

The Court's dictum refers explicitly (as does its reasoning) to "a judgment, *which has since become final* [in the sense of res judicata status], declaring the action inadmissible".[110] However, it is suggested that the principle cannot logically be so limited; as Advocate General Bot correctly observes, a judgment on jurisdiction that remains subject to an appeal would have to be recognised under the regime ("the term 'judgment' can cover [judgments] which are final, and judgments which have become irrevocable and those against which an appeal may still be brought.").[111] A court of a Member State in which recognition is sought *may stay the proceedings* if an ordinary appeal against the judgment has been lodged,[112] but the issue preclusion principle applies.

b. Findings regarding jurisdiction only?

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[108] ibid [40].

[109] Joined Cases C‑442/03 P and C‑471/03 P *P & O European Ferries (Vizcaya) and Diputación Foral de Vizcaya v Commission* (n 10) [45]. To some extent, there is a difference between a judgment on a claim whose subject-matter is the annulment of a legal act, and a judgment on jurisdiction which involves a determination of the validity of a jurisdiction clause; the one could be characterised as an exercise of *in rem* jurisdiction, whereas the other involves *in personam* jurisdiction.

[110] *Gothaer* (Part I, Introduction n 1) [43].

[111] ibid [39].

[112] Regulation, Art 37(1).

Another open question is whether the European issue preclusion principle applies exclusively to findings regarding jurisdiction (including findings on the validity of a jurisdiction clause) pursuant to the common rules of direct jurisdiction provided for by EU law, or also to findings on other matters.

One of the ideas in *Gothaer* is obviously that when a Member State court determines the validity of a choice of court agreement under the Brussels and Lugano Regime, it decides a *European Union law-question*;[113] a 'choice of court agreement' under Art 23 of the Brussels I Regulation and the Lugano Convention[114] is an *autonomous* concept that is ultimately defined by the CJEU, not by any national law.[115] Consequently, in spite of the fact that the Brussels I Regulation on its face harmonizes only the *formal* requirements applicable to agreements conferring jurisdiction[116] (and the validity of choice of court agreements that violate the protective or exclusive grounds of jurisdiction under the regime),[117] also the substantive validity (and scope) of a choice of court agreement under the regime are questions of European Union law, common to all Member State courts.[118]

Consider the likely situation involving a finding regarding the recognition of judgments pursuant to the common rules of recognition provided for by EU law; for

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[113] In *Gothaer* (Part I, Introduction n 1), Art 23 of the Brussels I Regulation, relating to contractual agreements as to jurisdiction, lacked application because the jurisdiction clause conferred jurisdiction on the courts in the Republic of Iceland, not an EU Member State. Nevertheless, the CJEU ruled at [36], "as observed by the Advocate General in point 76 of his Opinion, the Lugano Convention, to which the Republic of Iceland is a party, contains in Article 23 a provision corresponding to Article 23 of that regulation. If a court of the Member State of origin, in the assessment of its own jurisdiction, has held such a jurisdiction clause to be valid, it would in principle be contrary to the principle of mutual trust between the courts of the European Union to allow a court of the Member State in which recognition is sought to review that very same issue of validity."

[114] (Introduction n 44).

[115] Case C‑214/89 *Powell Duffryn plc v Wolfgang Petereit* [1992] ECR I‑1745 [13]-[14].

[116] Regulation, Art 23(1) ("Such an agreement conferring jurisdiction shall be either: (a) in writing or evidenced in writing; or (b) in a form which accords with practices which the parties have established between themselves; or (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned. 2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'."). See Case C-387/98 *Coreck Maritime GmbH v Handelsveem BV and Others* [2000] ECR I-9337; Case C-159/97 *Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA* [1999] ECR I-1597; Case C-106/95 *Mainschiffahrts-Genossenschaft eG (MSG) v Les Gravières Rhénanes SARL* [1997] ECR I‑911; Case 24/76 *Estasis Salotti v Ruewa* [1976] ECR 1831 [7] (the purpose of the formal requirements imposed by Art 17 is to ensure that the consensus between the parties is in fact established).

[117] Regulation, Art 23(5) ("Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22.").

[118] In terms of substantive validity, the Court in MSG held that under the provision on prorogation of jurisdiction, the validity of a jurisdiction agreement is subject to the existence of an 'agreement' between the parties, so that the Brussels Convention (Introduction n 44) and now the regulation imposes on a court the duty of examining, first, whether the clause conferring jurisdiction upon it was in fact the subject of consensus between the parties. Case C‑106/95, *MSG*, 1997 E.C.R. I‑911, at [15]. And the Court recently explained in Case C-543/10 *Refcomp SpA v Axa Corporate Solutions Assurance SA and Others* [2013] ECR I-0000, at [26], that "it is that consensus between the parties which justifies the primacy granted, in the name of the principle of the freedom of choice, to the choice of a court other than that which may have had jurisdiction under the regulation." The same applies to the scope of the agreement, including its personal scope. See, eg, Case C‑214/89 *Powell Duffryn plc v Wolfgang Petereit* (n 115) [17]-[20].

instance, a Dutch court refuses the recognition of an English judgment under Art 34(4) of the Brussels I Regulation on the ground that English judgment is 'irreconcilable' with an earlier judgment given in, say, Russia, involving the same cause of action and between the same parties, which fulfils the conditions necessary for its recognition in the Netherlands. Does the Dutch court's finding on irreconcilability bind the English court? It would, if one applies the Court's logic.

For instance, where a Member State court in its capacity of 'European Union court', or a special EU court, exercises EU-wide jurisdiction on an EU-law issue (i.e. what American lawyers would call 'federal question'-jurisdiction), like in situations involving so-called EU Trade Mark Courts,[119] or the EU Unified Patent Court established by the 2013 Agreement on a Unified Patent Court,[120] which effectively founded a federal civil court common to EU Member States. For the purpose of illustration, the CJEU in *DHL Express France SAS v Chronopost SA* held that a prohibition against further infringement or threatened infringement by a competent Union trade mark court must as a rule "extend to the entire area of the European Union."[121]

The Court added that if the aim is the uniform protection throughout the entire area of the EU, of the right conferred by the trade mark against the risk of infringement, "the effects of decisions regarding the validity and infringement of Community trade marks must cover the entire area of the European Union, in order to prevent inconsistent decisions",[122] and "contradictory judgments should be avoided in actions which involve the same acts and the same parties and which are brought on the basis of a Community trade mark and parallel national trade marks."[123] So, when such court imposes an injunction pursuant to common rules under the relevant EU trade mark law, after finding an infringement, the court's finding regarding the infringement could well trigger issue preclusion as a matter of EU law.

But, more generally, considering the justification advanced by the Court for adopting the European issue preclusion principle—essentially, the prohibition of review under Art 36—it is unclear why on that basis the scope of the principle would not extend to any 'reviewable' finding, and extend also to matters which are not governed by EU law.

c. Preclusion by foreign judgments only?

A final question is whether the European issue preclusion principle displaces municipal preclusion law in circumstances where, for instance, in *Gothaer*, one of the parties tries again in Belgian, but this time in the court of Antwerp. Does EU law determine the issue preclusive effect of a Belgian judgment in Belgium? If not, and if Belgian law does not recognise issue preclusion, a Belgian judgment has more

[119] Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, 1994 O.J. (L11) 1 (as amended). The regulation has been repealed by Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark, 2009 O.J. (L 78) 1.
[120] Agreement on a Unified Patent Court (adopted 11 January 2013) [2013] OJ C175/1.
[121] Case C-235/09 [2011] ECR I-2801 [44].
[122] Fifteenth and sixteenth recitals in the preamble to Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark [1994] OJ L11/1 (repealed by Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark [2009] OJ L78/1). See Case C-235/09 *DHL Express France SAS v Chronopost SA* (n 121) [42].
[123] ibid.

preclusive effect abroad than domestically, and two conflicting judgments may issue from one and the same Member State, while the CJEU recently held in *Salzgitter*[124] that irreconcilability of two judgments originating in the same Member State is no ground for refusing recognition. In light of these complications, it is suggested that the 'scope' of European preclusion in the sense described will probably reach beyond the boundaries of preclusion by foreign judgments, to preclusion by domestic judgments on common rules of EU law; the response of courts in France, Germany and other Member States that do not recognise issue preclusion to the same extent can be fathomed.

5.3 Limits of European preclusion law

The development of European preclusion law in civil matters has to date been driven by the CJEU, which has justified intervening in the area by reference to the need to avoid conflicts between decisions so as to preclude the possibility of non-recognition of a judgment on account of its irreconcilability with a judgment given in a dispute between the same parties in the State in which recognition is sought (*De Wolf v Cox*),[125] and the principle of mutual trust in issues arising under common rules of EU law in conjunction with the requirement of a uniform application of EU law (*Gothaer*)[126].

However, as a general matter, the development of European preclusion law has limits both in terms of what the EU can legally do within the constitutional limits of its competences, and in terms of the extent of what is appropriate and necessary for the EU to do in this area.

(1) Constitutional limits

Under the principle of conferral,[127] the Union can act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein, and competences not conferred, remain with the Member States.[128] Furthermore, the *use* of Union competences is limited by the principles of subsidiarity (in areas which do not fall within its exclusive competence, like the present) and proportionality.[129]

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[124] Case C-157/12 *Salzgitter Mannesmann Handel GmbH v SC Laminorul SA* (Chapter 4 n 197). See text to n 44ff.
[125] *De Wolf v Cox* (Part I, Introduction n 2) [9].
[126] *Gothaer* (Part I, Introduction n 1) [39].
[127] TEU, Art 5(1).
[128] ibid Art 5(2).
[129] ibid Art 5(1). Under the principle of subsidiarity (Art 5(3)), the Union can act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The principle of proportionality (Art 5(4)) implies that the content and form of Union action must not exceed what is necessary to achieve the Treaties' objectives. See, eg, Brussels I Regulation (recast) (Introduction n 44) Recital 39 ("Since the objective of this Regulation cannot be sufficiently achieved by the Member States and can be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union (TEU). In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.").

Regarding the EU's area of freedom, security and justice, the Treaties confer on the Union a competence *shared* with the Member States,[130] which implies that the Union and the Member States may legislate and adopt legally binding acts in which area, and Member States can exercise their competence to the extent that the Union has not exercised its competence, and can again exercise their competence to the extent that the Union has decided to cease exercising its competence[131]. Insofar as relevant here, for the purpose of developing judicial cooperation in *civil* matters having cross-border implications,[132] the Member States have conferred the Union the power to adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:

1. *mutual recognition of judgments*;[133]
2. *compatibility of the rules concerning jurisdiction*;[134]
3. *effective access to justice*;[135] and
4. *elimination of obstacles to the proper functioning of civil proceedings* (if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States)[136]

In terms of these competences, the EU's power to regulate the area of freedom, security and justice, by eliminating obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States,[137] *in theory* enables the organisation to address a lack of finality of litigation in civil matters having cross-border implications, particularly when necessary for the proper functioning of the internal market. At any rate, the measure cannot be justified well on the basis of the power to ensure the mutual *recognition* of judgments between Member States, [138] since preclusion relates to the legal consequences of a judgment *after* its recognition.[139] Similarly, the power to ensure compatibility of the Member States' rules concerning *jurisdiction* relates to the situation that precedes even the rendition of judgment. The concept 'effective access to justice' is a broad one, but appears to relate first and foremost to the the ability to recover judgment and then to ensure its effectiveness in terms of securing execution.

Quite another question is as noted whether the use of this power by the creation of European preclusion law for judgments in civil and commercial matters having cross-border implications is consistent with the principles of subsidiarity and proportionality.[140] Under the principle of subsidiarity, the Union can act only if and in

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[130] TFEU, Art 4(2)(j).
[131] ibid Art 2(2).
[132] For an example of how the European Commission interprets the concept of "matters having cross-border implications", see Commission, 'Proposal for a Regulation of the European Parliament and of the Council Creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters' COM (2011) 445 final, Art 3 ("For the purposes of this Regulation, a matter is considered to have cross-border implications unless the court seised with the application for an EAPO, all bank accounts to be preserved by the order and the parties are located or domiciled in the same Member State.").
[133] TFEU, Art 81(2)(a).
[134] ibid Art 81(2)(c).
[135] ibid Art 81(2)(e).
[136] ibid Art 81(2)(f).
[137] ibid Art 81(2)(f).
[138] ibid Art 81(2)(a).
[139] See Part II, Introduction, text to n 17ff.
[140] See n 129.

so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.[141] Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality[142] lays down guidelines for determining whether those conditions are met (e.g., the reasons for concluding that a Union objective can be better achieved at Union level must be substantiated by qualitative and, wherever possible, quantitative indicators; and draft legislative acts must take account of the need for any burden, whether financial or administrative, to be minimised and commensurate with the objective to be achieved).[143]

The principle of proportionality implies that the content and form of Union action must not exceed what is necessary to achieve the Treaties' objectives; in particular, measures implemented through provisions of European Union law must be *appropriate* for attaining the legitimate objectives pursued by the legislation at issue and must not go beyond what is *necessary* to achieve them.[144] In reviewing a measure, the question is relevant whether in the area of judicial cooperation in civil justice, the EU legislature has a broad or narrow legislative power; if the power is broad, the lawfulness of a measure adopted can be affected only if the measure is *manifestly* inappropriate, having regard to the objective which the competent institutions are seeking to pursue.[145]

This not the place to fully engage this institutional (and political) issue. However, it is suggested that looking at matters objectively, the case for uniform preclusion law may not be strong enough. Measures at the EU level that intrude less in the civil justice systems of the Member States, like the introduction of a certification procedure for questions on state law, combined with the requirement to apply the preclusion law of the judgment-rendering State, have arguably been insufficiently or inadequately explored. Moreover, as noted before, the argument that the divergence of preclusion laws among the Member States endangers the effectiveness of the Brussels and Lugano Regime is weak and misses the distinction between the problem of recognition of foreign judgments on recognition and the problem of preclusion by foreign jdugments on recognition, which are two different things.

Another point to note is that the Court should carefully consider its proper role in this process. First, in the absence of any legislative initiative, the Court should be mindful of the limits of the powers conferred on it by the Treaties, which is principally to ensure that in the interpretation and application of the Treaties the law is observed,[146] and, specifically, to interpret the Treaties,[147] and rule on the validity and interpretation of Union acts,[148] not to make new law. Second, even where it acts in a harmonizing fashion, the Court should bear in mind that Protocol (No 2) on the

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[141] ibid.
[142] [2012] OJ C 326/206.
[143] ibid, Art 5. Case C-58/08 *The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECR I-04999 [51].
[144] Case C-58/08 *The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform* (n 143) [51].
[145] Case C-176/09 *Grand Duchy of Luxemburg v European Parliament and Council of the European Union* [2011] ECR I-3727 [62].
[146] TEU, Art 19(1).
[147] TFEU, Art 267(a).
[148] TFEU, Art 267(b).

Application of the Principles of Subsidiarity and Proportionality[149] specifies that "*[e]ach institution* shall ensure constant respect for the principles of subsidiarity and proportionality",[150] which obviously includes the Court.

Accordingly, it is doubtful whether, in the absence of any legislative initiative in this area of the law to date, the CJEU is the right actor to drive this development of res judicata doctrine in Europe. For the Court to devise a res judicata doctrine in light of its own procedural system is one thing;[151] another thing is to transplant the Court's own concept of res judicata to the civil justice systems of the Member States, which strike their own balance between justice and repose, and where the factors of preclusion may be entirely different.

(i) Procedural autonomy

The Court has on various occasions emphasised that "[i]n the absence of [Union] legislation in this area, the rules implementing the principle of res judicata are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States."[152] This autonomy is obviously subject to the standard proviso that domestic procedural rules governing claims arising under Union law "must not be less favourable than those governing similar domestic actions (principle of equivalence); nor may they be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by [Union] law (principle of effectiveness)".[153]

This general limitation of the Member States' procedural autonomy does not, however, offer a sound legal basis for the Court on which to create European preclusion law. In this respect, it is significant to note that the CJEU in *Kongress Agentur Hagen* conceded that "*the object of the Convention is not to unify procedural rules* but to determine which court has jurisdiction in disputes relating to civil and commercial matters in intra-Community relations and to facilitate the enforcement of judgments."[154] Accordingly, reflecting the essentially *negative* nature of the principle, the Court merely repeated the general proviso governing the principle of procedural autonomy just identified that "the application of national procedural rules may not impair the effectiveness of the Convention."[155]

5.4 Remaining scope for divergence

For purposes of the Brussels and Lugano Regime, alike for English and Dutch law on the finality of judgments, *contradicting* a judgment (i.e. pleading inconsistently with a court's findings in an existing judgment) is *not* the same thing as *challenging* a judgment (i.e. calling into question the accuracy or legality of a judgment); whereas the regime bars any challenge of a judgment other than necessary to establish a ground for refusing recognition under Art 34 or Art 35 and within the limits of the

[149] [2012] OJ C 326/206.
[150] ibid Art 1.
[151] cf *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) (Introduction n 7).
[152] *Olimpiclub* (Part I, Introduction n 3) [24]; and *Asturcom* (Part I, Introduction n 3) [38].
[153] ibid. But see *Lucchini* (Part I, Introduction n 4) [63]; and *Olimpiclub* (Part I, Introduction n 3) [27]ff.
[154] Case C-365/88 *Kongress Agentur Hagen GmbH v Zeehaghe BV* [1990] ECR I-1845 [17].
[155] ibid [20].

prohibition of a review of a judgment as to its substance under Art 36,[156] it does *not* bar parties from contradicting a judgment, even a judgment subject to automatic recognition.

The regime aims to avoid the rendition of conflicting decisions by Member State courts,[157] by regulating *lis pendens*,[158] and by providing for consolidated jurisdiction over related claims[159]. However, the regime does not prohibit the rendition or the recognition of a conflicting judgment; in fact, recognition occurs automatically,[160] and, against this background, a refusal on grounds of irreconcilability should occur only on application of a party who resists recognition (or enforcement).[161] Accordingly, after a judgment has been given, a party can only by invoking the judgment's res judicata effect (if any) prevent contradictory pleading and the rendition of a conflicting judgment. In this regard, the regime—as interpreted by the CJEU—provides for a minimum of finality of litigation by core principles of claim and issue preclusion.[162]

But, nothing in the regime or generally EU law prohibits the Member States pursuant to the principle of procedural autonomy from attaching by law more extensive preclusive effects to the judgments of their own courts, nor does it prevent a Member State court from attaching, pursuant to the *Hoffmann* principle, more extensive effects to a judgment given in another Member State. As noted, the CJEU in *Kongress Agentur Hagen* expressly acknowledged that "the object of the Convention is *not* to unify procedural rules but to determine which court has jurisdiction … and to facilitate the enforcement of judgments."[163] Though preclusive effects of judgments are likely then to diverge between legal systems, the regime does not in response impose uniform preclusion law; according to the Schlosser Report, "[t]he [drafting committee] did *not* consider it to be its task to find a general solution to the problems arising from these differences."[164]

The sole restrictions are the requirements under Art 6(1) ECHR and Art 47 of the EU Charter[165] within the framework of the implementation of EU-law,[166] which

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[156] See text to n 40ff.

[157] Case C-39/02 *Mærsk Olie & Gas A/S v Firma M de Haan en W de Boer* (n 85) [31]. cf Case 144/86 *Gubisch Maschinenfabrik KG v Giulio Palumbo* (n 76) [8]; and Case C-116/02 *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-14693 [41].

[158] Regulation, Arts 27 and 28.

[159] Regulation, Art 6(1).

[160] Regulation, Art 33(1).

[161] cf Regulation, Recital 17 ("By virtue of the same principle of mutual trust, the procedure for making enforceable in one Member State a judgment given in another must be efficient and rapid. To that end, the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents supplied, *without there being any possibility for the court to raise of its own motion any of the grounds for non-enforcement provided for by this Regulation*.") (emphasis added). See further Brussels I Regulation (recast), Article 45(1) ("On the application of any interested party, the recognition of a judgment shall be refused….").

[162] See, respectively, text to n 57ff and text to n 91ff.

[163] Case C-365/88 *Kongress Agentur Hagen GmbH v Zeehaghe BV* (n 154) [17] (emphasis added).

[164] (Part II, Introduction n 18) 127-28 (emphasis added).

[165] Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

[166] Note the role in this context of the Charter of Fundamental Rights of the European Union [2012] OJ C 326/391, Art 47, second paragraph, which, according to Art 51(1) of the Charter, is addressed to the EU institutions (agencies etc.) as well as the EU Member States when they are implementing Union law (ie when States act within the scope of EU law—see Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECR I-0000 [19]-[20]). According to the Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17, 29, the provision does *not* alter this principle, but confirms that

prevent the Member States from enacting rules which are overly or insufficiently preclusive of litigation, or from attaching preclusive effects to a foreign judgment that in light of the circumstances are overly or insufficiently preclusive of litigation, in violation of the right to a fair trial.[167] Further, the general EU law proviso applies regarding the Member States' procedural autonomy, namely, the principles of equivalence and the effectiveness of EU law; as regards the latter principle (e.g. the CJEU said in *Kongress Agentur Hagen*: "[T]he application of national procedural rules may not impair the effectiveness of the Convention").[168]

(1) The scope of claim and issue preclusion

The principles of claim preclusion—arguably—pronounced by the CJEU in *De Wolf v Cox*[169] and issue preclusion formulated by the Court in *Gothaer*[170] have a more limited scope of application than the preclusion rules and doctrines in, at any rate, English and Dutch law.[171] To the extent that those rules and doctrines attach more extensive preclusive effects to judgments, the problem of conflict of preclusion laws remains, also within the context of the Brussels and Lugano Regime.

(2) Wider preclusion

Another area where EU law has not (as yet) intervened is wider preclusion by such doctrines as, in particular, abuse of process. This form of preclusion is not actually concerned with the the effects of a judgment, but with the legal consequences of *conduct* of parties to litigation.

By way of illustration, for the English abuse of process doctrine, in particular *Henderson v Henderson*-abuse, the judgment is but a *fact* material in the broad merits-based assessment of all the circumstances required to establish an abuse; the doctrine's application technically does not hinge on recognition of the foreign judgment that ended the litigation abroad.[172] The doctrine looks principally at a party's conduct of proceedings; for instance, a party's *failure* to raise certain claims or issues when the party could and should have raised those matters. In those circumstances, where a preclusion doctrine is not concerned with the effects of a judgment, but with the conduct of parties, even the *Hoffmann* principle (discussed below) arguably lacks application.

(3) Third State judgments

A fact of general knowledge is that the Brussels and Lugano Regime applies only to judgments *given in Member/Contracting States*; for instance, Art 32 of the Brussels I

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the guarantee under Art 6(1) ECHR applies in a similar way but with a wider scope of application to the Union institutions, the right to a fair hearing not being confined to disputes regarding civil law rights and obligations, thus reflecting that the EU is a Union based on the rule of law (on the interpretative value of the explanations see Art 52(7) of the Chater). Pursuant to Art 6(1) TEU, first subparagraph, the Charter has "the same legal value as the Treaties".

[167] See Chapter 6, text to n 109ff.

[168] Case C-365/88 *Kongress Agentur Hagen GmbH v Zeehaghe BV* (n 154) [20].

[169] *De Wolf v Cox* (Part I, Introduction n 2). See text to n 57ff.

[170] *Gothaer* (Part I, Introduction n 1). See text to n 91.

[171] See, respectively, Chapter 1 on English preclusion law and Chapter 2 on Dutch preclusion law.

[172] See Chapter 1, text to n 526ff.

Regulation makes this chrystal clear: "For the purposes of this Regulation, 'judgment' means any judgment *given by a court or tribunal of a Member State*".[173] The problem of preclusion by third State judgments is therefore subject to Member States' municipal private international law (international agreements, statute, and common law).

The *status quo* will persist for the foreseeable future, following failed negotiations at the Hague Conference on Private International Law on a convention on jurisdiction and foreign Judgments in civil and commercial matters.[174] Negotiations eventually produced a downscaled convention on choice of court agreements,[175] which has not yet entered into effect[176]. (The European Union has signed the convention but there are no signs that before long it will also conclude it).[177]

At the EU-level, the European Commission refrained from proposing legislation on foreign judgment recognition and enforcement, only after having considered the option of harmonising the laws of the Member States as part of Brussels I Regulation (recast).[178] Initially it noted that "harmonisation of the effect of third State judgments would enhance legal certainty, in particular for Community defendants who are involved in proceedings before the courts of third States."[179] However, after comments of stakeholders to the effect that the recognition and enforcement of third State judgments was best left to a multilateral framework, which could ensure reciprocity, the Commission dropped the initiative.[180]

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[173] cf Brussels Convention (Introduction n 44) Art 26 first paragraph; Lugano Convention (Introduction n 43) Art 26 first paragraph; Brussels I Regulation (Introduction n 43) Art 33(1); and Revised Lugano Convention (Introduction n 43) Art 33(1).

[174] New initiatives are being undertaken at present to relaunch 'The Judgments Project' <www.hcch.net/index_en.php?act=text.display&tid=149>.

[175] Convention on Choice of Court Agreements (Hague Choice of Court Convention) (adopted 30 June 2005) [2009] OJ L133/3 <www.hcch.net/index_en.php?act=conventions.text&cid=98> accessed 1 September 2013.

[176] See the status table for the convention: <http://www.hcch.net/index_en.php?act=conventions.status&cid=98> accessed 1 September 2013.

[177] Commission, 'Green Paper on the review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters' COM (2009) 175 final 6.

[178] (Introduction n 44).

[179] Commission, 'Green Paper on the review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters' COM (2009) 175 final 4. cf Commission, 'Impact Assessment accompanying document to the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters' SEC (2010) 1547 final 21-2 ("The absence of common rules in the EU on the effect of third State judgments leads to a situation where such judgments may enter the EU in some Member States and not in others. Some Member States are very open to recognise and enforce third State judgments, others are very strict, yet others do not recognise and enforce third State judgments at all except in the event of a bilateral convention with the third State concerned. This creates unequal protection of EU citizens and companies against third State judgments, in particular when the third State court has taken jurisdiction on the basis of exorbitant grounds of jurisdiction … or on the basis of grounds which violate the exclusive jurisdiction of Member States' courts. It may also lead to market distortions.").

[180] Commission, 'Proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast)' COM (2010) 748 final 6.

Summary and Conclusions

European preclusion law is a fact after such cases as *De Wolf v Cox*,[181] *Gothaer*,[182] and *Salzgitter*,[183] and regulates both the finality of judgments (by excluding both the review of and collateral attacks on judgments) and finality in another case (by imposing claim and issue preclusion).

The precise contours of this coordinated field—the scope of harmonization at the EU-level—remain unclear.

Moreover, the legitimacy of the development, driven by the CJEU, is debatable. However, fact is that the harmonisation of the Member States' preclusion laws is incomplete and limited in scope. Accordingly, the need for a proper approach to conflicts of preclusion laws exists, not merely as regards third State judgments, but also within the context of the EU in relation to judgments recognised under the Brussels and Lugano Regime.

[181] *De Wolf v Cox* (Part I, Introduction n 2). See text to n 57ff.
[182] *Gothaer* (Part I, Introduction n 1). See text to n 91ff.
[183] *Salzgitter* (Chapter 4 n 197). See text to n 44ff.

Chapter 6. Choice of Preclusion Law

Introduction

In the recent CJEU case of *Gothaer*,[1] Advocate General Bot observed that "determining the quality of res judicata attached by each national law to the grounds of a judgment is an exercise which may prove to be difficult."[2] To mark his point, he noted blithely: "[T]he assertion in the Commission's observations that in France binding effect 'is not limited to the operative part of the judgment but extends to all the elements in the reasoning which are inseparably linked thereto' is not correct, in view of the recent case-law of the Court of Cassation, which, in a judgment of the plenary court of 13 March 2009, abandoned the theory of decisive reasons and held that res judicata applies only with respect to what was decided in the operative part."[3]

Indeed, despite the universality of finality of litigation as a general principle of law, legal systems implement the principle divergently. Part I highlighted some of the differences between English and Dutch law.[4] Apart from (perhaps surprising) convergences (e.g. on issue preclusion), differences tend to be more subtle than the mere fact that a certain doctrine is 'absent' in one legal system compared to another; finality of litigation implicates different doctrines in different legal systems (e.g. in Dutch law, the requirement that a judgment must have res judicata status to be attributed res judicata effect caused courts to develop various supplementary doctrines to achieve the desired degree of finality in practice, whereas in English law, the res judicata doctrine applies to any final and conclusive judgment, regardless whether it is subject to appeal). Von Mehren and Trautman called this 'functional equivalence', signaling that one of the most dangerous aspects of comparing legal systems is to take mere differences in *technique* as differences in *basic policies*.[5]

Nevertheless, despite existing differences, Bot's argument citing to the "difficulty" of ascertaining and applying foreign law is a weak basis on which to justify the creation of European preclusion law; while there may be good reasons why this development might be desirable—the Advocate General purports to advance some[6]—Bot's argument, if accepted, negates the justification for the EU's system of

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[1] *Gothaer* (Part I, Introduction n 1).

[2] ibid [79]. Bot added, at n39, that the European Commission's submissions illustrated the difficulties ("I note as an example that the assertion in the Commission's observations that in France binding effect 'is not limited to the operative part of the judgment but extends to all the elements in the reasoning which are inseparably linked thereto' is not correct, in view of the recent case-law of the Court of Cassation, which, in a judgment of the plenary court of 13 March 2009, abandoned the theory of decisive reasons and held that res judicata applies only with respect to what was decided in the operative part.").

[3] ibid fn 39.

[4] Rolf Stürner, 'Rechtskraft in Europa' in Reinhold Geimer (ed), *Wege Zur Globalisierung de Rechts: Festschrift für Rolf A. Schütze zum 65. Geburtstag* (Beck, München 1999) 912, 933 ("Die objektiven Grenzen der Rechtskraft sind nach Gegenstand (Urteilsausspruch—Urteilselemente) under Umfang (alle denkbaren Rechtsfolgen eines Sachverhalts—Beschränkung auf Anträge oder geltend gemachte Rechtsnormen) völlig unterschiedlich bestimmt, mögen die nationalen Traditionen auch auf gleichen historischen Quellen beruhen.") ("The limitations of res judicata are determined entirely divergently in terms of both object (decision—findings) and scope (any right and remedy for the facts pleaded as cause of action—restriction to the relief claimed or the rights enforced), notwithstanding that the domestic legal traditions refer to common historical sources.") (translation by the author).

[5] Von Mehren and Trautman (Introduction n 9) 1681.

[6] See Chapter 5, text to n 106ff.

private international law, which has been built up in recent years to address the conflict of laws that arise in areas where harmonisation of the law is not forthcoming or undesirable. Furthermore, the argument underestimates the ability of Member State courts, which have for centuries applied foreign law.

Perhaps the EU should do more to facilitate courts' ability to access objective information on the preclusion laws of Europe, and the rest of the world. The EU could draw inspiration from developments in the U.S., where most states have—under influence of the Uniform Certification of Questions of Law Act (1995) promulgated by the National Conference of Commissioners on Uniform State Laws[7]—adopted legislation empowering a state Supreme Court to answer questions of law certified to it by the U.S. Supreme Court, a U.S. Court of Appeals, a U.S. District Court, or the highest appellate or intermediate appellate court of any other state. The U.S. Supreme Court in *Lehman Bros v Schein* described the importance of this instrument as follows: "[This procedure] does, or course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism."[8]

At any rate, until complete harmonisation of civil justice in Europe, preclusion laws will continue to diverge. Moreover, in light of the principles that govern the use of EU competences, the case for complete harmonisation of Member States' preclusion laws is shaky (at best),[9] though steps can be undertaken to facilitate gradual convergence[10]. Hence, in light of persistent divergences, a more viable solution is to establish a uniform approach to the conflict of laws problem inherent in the problem of preclusion by judgments recognised under the Brussels and Lugano Regime. By extension, it can then be assessed whether and, if so, to what extent the approach to the problem of preclusion by third State judgments should diverge from the approach under the Brussels and Lugano Regime.

At this early stage it can noted that the proposed approach is not that advanced by the ALI / UNIDROIT Principles on Transnational Civil Procedure.[11] Principle 30 on 'Recognition' provides in relevant part: "A final judgment awarded in another forum in a proceeding substantially compatible with these Principles must be recognized and enforced unless substantive public policy requires otherwise." The commentary changes the aspect of this Principle on recognition by specifying that "a judgment given in a proceeding substantially compatible with these Principles ordinarily should have *the same effect as judgments rendered after a proceeding under the laws of the recognizing state*. Principle 30 is therefore a principle of equal treatment."[12]

The commentary adds that "[t]he Principles establish international standards of international jurisdiction, sufficient notice to the judgment debtor, procedural fairness, *and the effects of* res judicata." [13] On that basis—i.e. on the assumption that

[7] <www.uniformlaws.org/shared/docs/certification_of_questions_of_law/ucqla_final_95.pdf> accessed 1 September 2013.
[8] 416 US 386, 391 (1974).
[9] See Chapter 5, text to n 127ff.
[10] For example, by such interesting projects as undertaken by the joint European Law Institute and UNIDROIT project entitled 'From Transnational Principles to European Rules of Civil Procedure', which is being undertaken In cooperation with the American Law Institute (ALI) <www.europeanlawinstitute.eu/news-events/events/> accessed 1 September 2013.
[11] (adopted by the ALI in May 2004 and by UNIDROIT in April 2004) <www.unidroit.org/english/principles/civilprocedure/main.htm> accessed 1 September 2013.
[12] ibid P-30B (emphasis added).
[13] ibid Commentary P-30B.

no conflict of preclusion laws arise—this approach is obviously acceptable, though the Principles could then refer randomly to any law. However, in the real world, conflicts of preclusion laws are a fact, for which private international law must cater, if possible in a manner consistent with its overall objectives, namely, by securing the stability of legal relations as determined by judgment also between legal systems, irrespective of the forum where a matter previously determined is subsequently heard.[14]

A. Comparative perspective

In the U.S., full faith and credit acts as "vehicle for exporting local res judicata policy."[15] In this regard, the clause was a response to "how unsettled the doctrine was upon the effect of foreign judgments, or the effect, *rei judicatae*, throughout Europe, in England, and in [the confederate] States,"[16] and reflects the general principle that "parties should not be permitted to relitigate issues which have been resolved by courts of competent jurisdiction," because "without it, an end could never be put to litigation."[17] Accordingly, the clause mandates state and federal courts alike[18] to attribute a sister-state judgment the (preclusive) effect it has in the rendering state,[19]

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[14] Erik Jayme, 'Identité culturelle et intégration: le droit international privé postmoderne' (1995) 251 Recueil des cours 9, 89ff (international decisional harmony). But see Peter Hay, 'Flexibility versus predictability and uniformity in choice of law: reflections on current European and United States conflicts law' (1991) 226 Recueil de cours 282, 338 ("romantic utopia"). See also EG Lorenzen, 'The qualification, classification, or characterization problem in the conflict of laws' (1941) 50 Yale Law Journal 743, 760 ("[t]he very object of the rules of the Conflict of Laws is to keep the rights of parties the same, regardless of the state or country in which litigation may take place.").

[15] *Federal Practice and Procedure (Wright & Miller)* (St Paul, West Group, 1969-) § 4467.

[16] *McElmoyle, for Use of Bailey v Cohen* (Chapter 3 n 496) 325 (1839).

[17] *San Remo Hotel, LP v City and County of San Francisco, Cal* (Chapter 3 n 488) 336-37. The Court further emphasized that this principle "predates the Republic" (citing *Washington, Alexandria, & Georgetown Steam–Packet Co v Sickles*, 24 How 333, 341 (1861) ("The authority of the res judicata, with the limitations under which it is admitted, is derived by us from the Roman law and the Canonists."); and "has found its way into every system of jurisprudence" (quoting *Hopkins v Lee*, 6 Wheat 109, 114 (1821)). See, also, *Southern Pacific R Co v United States*, 168 US 1, 49 (1897) ("[the rule] is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them.").

[18] *Kremer v Chemical Construction Corp*, 456 US 461, 481–82 (1982) ("§ 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken."). See, on the preclusive effect of a state court judgment relating to an exclusively federal claim, *Matsushita Elec Indus Co, Ltd v Epstein*, 516 US 367, 375 (1996) ("When faced with a state court judgment relating to an exclusively federal claim, a federal court must first look to the law of the rendering State to ascertain the effect of the judgment. … If state law indicates that the particular claim or issue would be barred from litigation in a court of that state, then the federal court must next decide whether, "as an exception to § 1738", it "should refuse to give preclusive effect to [the] state court judgment." (quoting *Migra v Warren City School Dist Bd of Ed*, 465 US 75, 80 (1984) ("in the absence of federal law modifying the operation of § 1738, the preclusive effect in federal court of [a] state court judgment is determined by [state] law.").

[19] *Durfee v Duke* (Chapter 5 n 37) 109 (1963) ("[E]very State [must] give to a judgment at least the res judicata effect which the judgment would be accorded in the State which rendered it."). See Restatement (Second) of Conflict of Laws (1971) § 93; Restatement (Second) of Judgments (1982) § 18 comment d ("under current constitutional interpretation, a sister state may deny all effect to a judgment for support

whereas the implementing statute squarely refers those courts to the rendering state's preclusion law[20]. As a result, the states' various preclusion laws have become "a part of national jurisprudence;"[21] a decision on the effect of a sister-state judgment is subject to constitutional scrutiny.

Under full faith an credit, no court is required to give *greater* effect than a judgment has in the rendering state.[22] Some authors even contest that full faith and credit extends to all aspects of preclusion,[23] or argue that certain aspects of preclusion are not "attributes" of the judgment or of the judicial proceeding, but matters of local procedural law, properly governed by the *lex fori*[24]. Others suggest that "[p]reclusion doctrine has evolved too far, into too many intricate and at times dubious rules, to pretend that all of it must be embraced by constitutional and statutory provisions drafted in an era when the rules were simpler and hewed closer to the central values of reliance, repose, and finality."[25] On this view, the law of the rendering state governs only issues going directly to "effective stability and enforcement", while a degree of "flexibility" and "compromise" is appropriate for other matters,[26] thus permitting a court to apply its own law to narrow or broaden the effect of a judgment subject to full faith and credit.

The call for flexibility in respect of preclusion by sister-state judgments is most relevant where preclusion laws vary significantly; in fact, despite broad agreement on the core elements of res judicata,[27] U.S. states' preclusion laws vary considerably, in particular, on the scope of issue preclusion,[28] merger,[29] privity,[30]

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or the like insofar as it remains subject to modification in the state of rendition either as to sums which have accrued and are unpaid or as to sums which will accrue in the future; on the other hand, the sister state may elect to accord to such judgments the res judicata consequences that would attach in the respective states where rendered. … So also a judgment which involves an improper interference with important interests of a sister state may be denied res judicata effects by that sister state. … A judgment denying equitable relief is entitled to effect in a sister state under the rules of bar. And a judgment ordering the doing of an act other than payment of money or enjoining the doing of the act is entitled to effect in a sister state by way of issue preclusion; arguably the Constitution does not require that such a judgment be given effect in a sister state by way of merger, but the current tendency is to accord that effect also.").

[20] *Marrese v American Academy of Orthopaedic Surgeons* (Chapter 5 n 28) 380 ("This statute [ie 28 USC § 1738] directs a federal court to refer to the preclusion law of the State in which judgment was rendered.").

[21] *Riley v New York Trust Co*, 315 US 343, 349 (1942).

[22] *Ford v Ford*, 371 US 187, 192 (1962) ("The Full Faith and Credit Clause, if applicable to a custody dE.C.R.ee, would require South Carolina to recognize the Virginia order as binding only if a Virginia court would be bound by it."); *People ex rel Halvey v Halvey*, 330 US 610, 614 (1947) ("a judgment has no constitutional claim to a more conclusive or final effect in the State of the forum than it has in the State where rendered."). cf, e.g., *Attorney Discipline Matter, In re*, 98 F3d 1082, 1086-87 (8th Cir1996).

[23] *Wright & Miller* (n 15) § 4467.

[24] PD Carrington, 'Collateral Estoppel and Foreign Judgments' (1963) 24 Ohio St L J 381. cf Note, 'Collateral Estoppel in Multistate Litigation' (1968) 68 Col L Rev 1590.

[25] *Wright & Miller* (n 15) § 4467.

[26] ibid.

[27] See Introduction, text at n 80ff.

[28] *Wright & Miller* (n 15) § 4467 (some courts preclude contestation of findings which are independently sufficient to support the judgment, while other courts require that the finding be necessary as in indispensable for the final decision. Furthermore, some courts preclude contestation of findings of "ultimate fact", while others require that the new case involve the same legal question).

[29] ibid (some courts allow a claim for personal injuries by a plaintiff who recovered for property damage, while others preclude the claim).

[30] ibid (some courts apply expansive concepts of privity, while other courts refer to the substantive law governing the relationship).

mutuality,[31] and the types of judgment that can trigger preclusion[32]. For instance, allowing flexibility as regards merger means that a court in the state addressed where the claim would be barred, "should be free to dismiss the second action, but not to purport to preclude further proceedings in [the rendering forum] or any other state that is willing to proceed."[33] Another example is in response to differences as to the types of judgment that trigger preclusion, the view has been supported that a court may, without violating full faith and credit, attach preclusive effect to a non-final judgment that triggers no preclusion in the rendering state, "[a]t least so long as it is willing to hold its own judgment open to modification if the original finding should eventually be set aside."[34]

(i) Due Process

To receive full faith and credit, a judgment must comply with federal due process.[35] Apart from requiring personal jurisdiction,[36] and a full and fair opportunity to litigate,[37] the Due Process Clause sets minimum and maximum levels of preclusion; the clause imposes a minimum by prohibiting a complete abandonment of the principle of finality of litigation,[38] and enforces a maximum by invalidating state preclusion laws that involve "extreme applications of the doctrine of res judicata,"[39] for instance, when a state law attaches preclusive effect to a judgment vis-à-vis a person who was not a party to the prior litigation[40].

Other issues may arise under the Equal Protection Clause,[41] which invalidates preclusion rules that irrationally discriminate between (classes of) litigation or litigants,[42] and under the Supremacy Clause, in case federal law preempts a state

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[31] ibid (some courts allow for nonmutual issue preclusion, while other courts reject the same).
[32] ibid (some but by no means all courts attribute (issue) preclusive effects to default judgments, and penalty dismissals).
[33] ibid.
[34] ibid
[35] *Kremer v Chemical Construction Corp* (n 18) 480-81 (1982) ("the judicially created doctrine of collateral estoppel does not apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate the claim or issue") (citing *Allen* (Introduction n 82) 95); *Montana v United States*, 440 US 147, 153 (1979); *Blonder-Tongue Laboratories, Inc v University of Illinois Foundation*, 402 US 313, 328–29 (1971)). Also *see Gooch v Life Investors Ins Co of America*, 672 F3d 402 (6th Cir2012).
[36] *Pennoyer v Neff* (Chapter 3 n 503) 733 ("Since the adoption of the Fourteenth Amendment to the Federal Constitution [or the Fifth Amendment, as the case may be], the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.").
[37] *Kremer v Chemical Construction Corp* (n 18) 480-81 (1982) ("the judicially created doctrine of collateral estoppel does not apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate the claim or issue").
[38] *Wright & Miller* (n 15) § 4467. cf *Kremer v Chemical Construction Corp* (n 18) 485 (1982) ("In our system of jurisprudence the usual rule is that merits of a legal claim once decided in a court of competent jurisdiction are not subject to redetermination in another forum. Such a fundamental departure from traditional rules of preclusion, enacted into federal law, can be justified only if plainly stated by Congress.)."
[39] *Richards v Jefferson County, Ala* (Chapter 5 n 28) 797 (1996).
[40] *Postal Telegraph Cable Co v City of Newport, Ky*, 247 US 464 (1918).
[41] Constitution, Fourteenth Amendment, §1.
[42] *Wright & Miller* (n 15) § 4467.

court's jurisdiction,[43] which is said to "defeat state res judicata rules",[44] or when federal law attaches or denies a particular preclusive effect to a state court judgment on federal issues, which supersedes any contrary result under state preclusion law.[45]

(ii) Foreign judgments—The American Law Institute: Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute

Among many other things, the American Law Institute (ALI) project entitled 'Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute', adopted and promulgated at Philadelphia, Pennsylvania, on 17 May 2005,[46] addressed the problem that no consistent pattern can be discerned from American court decisions when the problem has been raised of preclusion by foreign judgments (i.e. non-U.S. state judgments).[47]

The proposed federal statute, § 4. on 'Claim and Issue Preclusion; Effect of Challenge to Jurisdiction in the Court of Origin', provides:

> (a) Except as provided in § 3, a foreign judgment that meets the standards set out in this Act shall be given the same preclusive effect by a court in the United States that the judgment would be accorded in the state of origin, unless the rule of preclusion applicable in the state of origin would be manifestly incompatible with a superior interest in the United States in adjudicating or not adjudicating the claim or issue in question. The party seeking to rely on the preclusive effect of a foreign judgment shall have the burden to establish that the claim or issue is precluded.
>
> (b) If the judgment debtor challenged the jurisdiction of the rendering court in the foreign proceeding,
>
> > (i) findings of fact pertinent to the determination of jurisdiction of the rendering court are conclusive in the proceeding in the United States,
> >
> > (ii) legal determinations as to the jurisdiction of the rendering court under the law of the state of origin are conclusive in the proceeding in the United States, but the judgment debtor or other party resisting recognition or enforcement may show that such jurisdiction is unacceptable under § 6.
>
> (c) If the judgment debtor has appeared in the foreign action without challenging the jurisdiction of the rendering court, the judgment debtor or other party resisting recognition or enforcement may not challenge the jurisdiction of the rendering court under the law of the state of origin in the proceeding in the United States, but may show that such jurisdiction is unacceptable under § 6.

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[43] Article VI, cl 2, Constitution ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").
[44] *Wright & Miller* (n 15) § 4467 n7.
[45] ibid
[46] American Law Institute, 'Recognition and enforcement of foreign judgments: analysis and proposed federal statute: adopted and promulgated by the American Law Institute at Philadelphia, Pennsylvania, May 17, 2005' (American Law Institute, Philadelphia, PA, 2006). See, LJ Silberman and AF Lowenfeld, 'A different challenge for the ALI: herein of foreign country judgments, an international treaty, and an American statute' (2000) 75 Ind LJ 635.
[47] ALI Proposed federal statute (n 46) §4, Reporters Notes [3].

The Reporters' Comments explain that the basic rule of preclusion is the same as the rule required in the domestic context by the Full Faith and Credit Clause of the Constitution and the implementing statute, 28 U.S.C. § 1738.[48] Accordingly, §4(a) provides that a foreign judgment must be given the same preclusive effect that the judgment would be accorded under the law of the judgment-rendering State.[49] The party invoking the preclusive effect has the burden to establish that the claim or issue is indeed so precluded.

Logically, the provision lacks application if a foreign judgment is not entitled to recognition in the first place.[50] Moreover, there is an exception to the application of the general rule for situations where the rule of preclusion applicable in the judgment-rendering State would be manifestly incompatible with a "superior interest" in the U.S. in adjudicating or not adjudicating the claim or issue in question. This exception allows an American court to depart from the general rule, "to take account of the many variations and uncertainties in the preclusion rules of foreign states."[51] The commentary states three situations where this exception might apply:

1. where the judgment-rendering State lacks formal rules or doctrines of preclusion
2. where the rendering State's preclusion rules are difficult to ascertain and a reference to foreign law may impose burdens on parties relying or opposing preclusion; and
3. where the claim asserted in the U.S. is based on American law, and the U.S. or the state addressed has an interest in determining, by its own standards, the impact of the foreign judgment.

In addition, the commentary states a number of guiding "factors" to determine whether superior interests in the U.S. are manifestly incompatible with looking to the preclusion law of the rendering state:

a. whether greater or lesser preclusion than would be given in the rendering State is justified, given the context or the amount at issue;
b. whether substantial differences in procedural opportunities in the rendering State justify departing from the preclusion rule of that State;
c. whether the U.S. or the particular U.S. state has a strong interest in adjudicating or not adjudicating the claim or issue;
d. whether the law applied by the rendering state is significantly different from the law to be applied in the proceeding in the U.S..

The Commentary generally notes that, while the proposed rule leaves "some discretion", "[§4(a)] is intended to establish substantial uniformity within the United States by setting forth the basic presumption that the law of the state of origin will ordinarily be applied."[52]

The Reporters' Notes provide an example of a situation where the exception under §4(a) might apply. It concerns the situation where a claimant initially sued in

[48] ibid §4, Comment [a].
[49] cf Restatement (Third) Foreign Relations Law of the United States (1987) § 481 comment c ("[a] foreign judgment is generally entitled to recognition by courts in the United States to the same extent as a judgment of a court of one State in the courts of another State.").
[50] ALI Proposed federal statute (n 46) §4(a) ("Except as provided in § 3, a foreign judgment that meets the standards set out in this Act). See, in particular, §§5-7.
[51] ibid §4, Comment [c].
[52] ibid §4, Comment [b].

France for fraud and based his claim on the French Civil Code, and, subsequently, he sues in the U.S. for violation of U.S. securities laws. On these facts, the notes indicate, "[e]ven if a French court would have entertained such a claim and French law would now preclude the claim because it was not asserted in the initial action, *the interest of the United States in providing a forum in the United States might justify an exception to claim preclusion*." The notes clarify that "[w]hile the choice of applicable law is not a limitation on recognition and enforcement generally…, it is an appropriate factor to take into account in determining the preclusive effect of a judgment."[53] In effect, the solution implies a refusal to apply foreign prelusion law on ground of an American superior interest in the matter's litigation; though an American court would not call it this way, this looks much like a 'public policy' exception to the application of foreign preclusion law.

This example refers to a situation where an American court could attribute a foreign judgment *lesser* preclusive effect than is attached in the judgment-rendering State. The Reporters' Notes do not expressly endorse but report support for the view that an American court could under §4(a) attach *greater* preclusive effect on the ground of the burden associated with additional U.S.-based litigation.[54]

6.1 The European approach

(1) The Hoffmann princ*iple*

The CJEU's decision in *Gothaer*[55] is important, not merely because it pronounced a European issue preclusion principle, but also because it confirmed the general applicability to any effect attributed to a Member State judgment of the *Hoffmann* principle: "a foreign judgment which has been recognised … must in principle have the same effects in the State in which *recognition* is sought as it does in the State of origin".[56]

English courts have expressed doubt as to the scope of the principle, because *Hoffmann* concerned *enforcement*, not preclusion; indeed, the Court held that "a foreign judgment which has been recognized … must in principle have the same effects in the State in which *enforcement* is sought as it does in the State in which judgment was given."[57] After *Gothaer*, there can no longer be any doubt that the principle has wider application, including at least the situation where a Member State court needs to determine the *preclusive* effects of a judgment recognised pursuant to the Brussels and Lugano Regime.

(i) Significance

Hoffmann offers a statement of principle on *what law determines the legal consequences—the "effects"—of a judgment recognised pursuant to the Brussels Convention*. (It may be noted that the referring court—the Dutch Supreme Court—eventually decided the case without the using the principle,[58] because the CJEU also

[53] ibid §4(a), Reporters Notes [2].
[54] ibid.
[55] *Gothaer* (Part I, Introduction n 1).
[56] ibid [34] (emphasis added).
[57] *Hoffmann* (Chapter 3 n 470) [11] (emphasis added).
[58] HR 4 November 1988, NJ 1990, 210.

ruled that the foreign judgment in question could be denied recognition in the Netherlands.)[59]

The case involved a German couple of whom the husband ('H') left his wife ('W') and moved to the Netherlands in 1978 where in 1980 he obtained a Dutch divorce decree (falling *outside* the scope of the Brussels Convention and not recognised in Germany). In the interim, in 1979, W had obtained a German maintenance order (falling *inside* the scope of the Brussels Convention and thus subject to automatic recognition), which she sought to enforce in the Netherlands in 1981. Under German law, the German maintenance order remained enforceable (the Dutch divorce decree not having been recognised there). Under Dutch law, the German order was not enforceable (the order was irreconcilable with the Dutch divorce decree).

Advocate General Darmon [60] —unlike the CJEU [61] —concluded that the German judgment could no longer be refused recognition and thus had validity in the Netherlands, since the Husband had failed to appeal the Dutch enforcement order when he had the chance to do so in accordance with the procedure provided by Art 36 of the Convention.[62] In these circumstances, so Darmon observed, "[i]t is therefore essential to ascertain whether the effects of a judgment which has been recognized are to be determined *by the law of the State of origin or the law of the State in which enforcement is sought*",[63] which formulation confirms the issue of governing law before the Court.

a. The English approach: The cautious lex fori approach

At least prior to the CJEU's decision in *Gothaer*,[64] English courts doubted the relevance of the CJEU's ruling in *Hoffmann v Krieg*[65] for preclusion by foreign judgments recognised under the Brussels and Lugano Regime;[66] for instance, according to Waller LJ in *National Navigation Co v Endesa Generacion SA (The Wadi Sudr)*,[67] "considerable reliance is placed … on … *Hoffmann v Krieg* …."[68] But,

[59] Note further that the Court held that a party who has not appealed against the enforcement order in accordance with the procedure provided for under the Brussels Convention (Introduction n 44) is thereafter precluded, at the stage of the execution of the judgment, from relying on a valid ground which he could have pleaded in such an appeal against the enforcement order (ie irreconcilability as a ground for non-recognition) and that that rule must be applied of their own motion by the courts of the State in which enforcement is sought. However, the Court added in relation to a particular feature of the case that this rule does not apply when it has the result of obliging a national court to make the effects of a national judgment which lies *outside* the scope of the Convention conditional on its recognition in the State in which the foreign judgment whose enforcement is at issue was given. In other words, H got his second bite at the cherry (after failing to bite at his first—and normally only—chance). *Hoffmann* (Chapter 3 n 470) [34].

[60] *Hoffmann* (Chapter 3 n 470).

[61] See text to n 59.

[62] In his view the Husband could have raised the irreconcilability the Germain order to challenge its recognition in the Netherlands, but had failed to do so by entering an appeal against the order for enforcement.

[63] *Hoffmann* (Chapter 3 n 470) [19] (emphasis added).

[64] *Gothaer* (Part I, Introduction n 1).

[65] *Hoffmann* (Chapter 3 n 470).

[66] cf as regards issue preclusion, Briggs and Rees (Chapter 3 n 13) [7.26] ("the applicable principles will be those of English law, and not of European law.").

[67] (Chapter 3 n 476).

[68] ibid [68].

he noted (rightly), "[t]hat case was not concerned with any question as to whether a decision of one court was res judicata in proceedings in another court."[69] Similarly, Moore-Bick LJ in the same case said that "[t]here was no discussion of the effect of recognition as giving rise to estoppel by record, which is the question that we have to decide, and the judgment does not contain any clear indication of how that question should be decided."[70] In the absence of clear CJEU-authority, English courts have therefore continued to use the common law cautious *lex fori* approach.[71]

The English approach, which limits the preclusive effects that can be attributed a foreign judgment to those available under English preclusion law, while English court are willing to take foreign preclusion law into account, so as not to 'overpreclude', is unlikely in practice to give rise to many results which are inconsistent with the *Hoffmann* principle, because English preclusion law is more extensive in scope than most if not all other preclusion laws represented in the Europe. Nevertheless, the approach is inefficient; it involves the simultaneous consideration of two legal systems.[72] Moreover, the situation cannot be excluded where English preclusion law allows litigation of a matter that would be precluded under the law of the judgment-rendering state.[73]

b. The Dutch approach: Law of the rendering court

Dutch courts have read much more into *Hoffmann*. According to the Supreme Court in *IDAT*[74] the CJEU held that *generally* the effects of a judgment recognised under the Brussels and Lugano regime, including the judgment's preclusive effects, must be determined by reference to the law of the judgment-rendering state.[75] The case involved a claim in tort by a Belgian company ('A') against a Belgian national ('B'), who was the director and sole shareholder of another Belgian company ('C'). *A* alleged that defendant *B* made the third party *C* breach its obligation to pay under a contract with *A* for the sale of a business. *B* replied that *C's* could not pay because the bank refused to fund the deal after discovering that *A* had misrepresentated the business's gross profit. *A* then invoked a Belgian judgment between *A* and *C* that that rejected an allegation of misrepresentation. (*C* had claimed annulment of the contract with *A* for sale of the business due to *A*'s alleged misrepresentation of the business's gross profit, while *A* had counterclaimed payment of the purchase price. The Belgian court rejected the claim and granted the counterclaim.)

In the Dutch proceedings, the Den Bosch Court of Appeal found that Belgian law determined whether the Belgian judgment between *A* and *C* should be attributed preclusive effect. According to the court, *A* could rely on the Belgian judgment against *B*, because *B* in his capacity of director and sole shareholder was a privy of *C*.

Nevertheless, the court rejected the plea of *res judicate* due to the absence of the required identity of issues between the Belgian and Dutch proceedings (the issue in the Belgian proceedings was *misrepresentation*, while in the Dutch proceedings the issue was whether the breach of contract was attributable to *C*). Though the Court

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[69] ibid at [68].
[70] ibid at [114].
[71] See Chapter 4, text to n 88ff.
[72] See text to n 179ff.
[73] *Carl Zeiss* (Introduction n 32). On the approach, see Chapter 4, text to n 88ff.
[74] HR 12 March 2004 (Chapter 4 n 207) (*IDAT*).
[75] Van Hoek (Chapter 3 n 213) 339.

purported to apply Belgian preclusion law, its reasoning contains not a single reference to Belgian preclusion law, nor a discussion of Belgian law expert evidence. Did the court apply Dutch law on the assumption that Belgian law is broadly the same?

B appealed arguing that the Court of Appeal's judgment was irreconcilable with the Belgian judgment, because the court's finding that the Bank had in fact refused funding due to *A*'s misrepresentation was inconsistent with the Belgian court's finding rejecting *C*'s allegation of misrepresentation by *A*.

The appeal failed. The Supreme Court explained the appropriate method for determining the Belgian judgment's significance in the context of subsequent Dutch proceedings, and confirmed that a foreign judgment recognised under the Brussels Convention can be attributed res judicata effect. However, unlike the House of Lords in *Carl Zeiss*,[76] the Court held that the *lex fori* cannot determine that effect:

> Article 26 of the Brussels Convention applicable in this case, the judgment of the Brussels Court of Appeal must be recognised without any special procedure being required. The scope of the res judicata effect of this judgment and the legal consequences of this are not determined by the law of the state of recognition, but by the law of the State where the judgment was rendered (Case 145/86 *Horst Ludwig Martin Hoffmann v Adelheid Krieg* [1988] ECR 645, NJ 1990, 209) thus, in the present case, by Belgian law.[77]

The Court therefore construed *Hoffmann* as imposing the obligation to determine the res judicata effect of a convention judgment by application of the law of the judgment-rendering State, not the law of the recognising State. The Court's approach implied the end of the case, because the Court lacks appellate jurisdiction over decisions of lower courts based on foreign law.[78]

In *Diesel SPA/MAKRO*,[79] the Supreme Court confirmed its approach in *IDAT*. The dispute involved a claim by Diesel for violation of its trademark by MAKRO. The Dutch claim followed proceedings in Spain, where the Valencia Court of Appeal had rejected a claim by Diesel against among others Cosmos, a Spanish company, for producing and marketing goods that infringed the same trademark. MAKRO had purchased its goods (indirectly) from Cosmos and argued that the Spanish judgment precluded Diesel from alleging that the goods infringed its trademark.

The lower court, without citing Spanish preclusion law, rejected the plea of res judicata for a lack of identity of the parties involved in the Spanish and the Dutch proceedings. On appeal in cassation, the Supreme Court once again set out its approach to preclusion by foreign judgments, this time judgments recognised under the Brussels I Regulation:

> [T]he first point to be emphasised is that the question to what extent the res judicata effect attributed to the Spanish judgment can be successfully invoked in the present case, must be answered in the first place by reference to Articles 33 and 36 of the

[76] *Carl Zeiss* (Introduction n 32) 919 (Lord Reid).
[77] HR 12 March 2004 (Chapter 4 n 207) [3.6] (*IDAT*).
[78] Judicial Administration Act 1827 (*Wet van den 18den April 1827, op de zamenstelling der Regterlijke magt en het beleid der Justitie*) (entered into force 17 May 1827) Stb 1827, 20 (as amended), Art 79(1)(b) (emphasis added).
[79] HR 11 July 2008, ECLI:NL:HR:2008:BC9766, NJ 2008, 417, RvdW 2008, 736, IER 2008, 68 mnt ChG (*Diesel SPA/MAKRO*).

> Brussels I Regulation. These provisions require the recognition of a judgment given in a Member State without any special procedure being required and in no circumstance allow a review of such judgment as to its substance. However, these provisions do not aim at attaching to judgments elsewhere more effects than attributed in the Member State of origin. It is not subject to reasonable doubt that the question about the scope of the res judicata effect due to the Spanish judgment and the legal implications of this effect, is governed by the law of Spain as the judgment-rendering State (see *Hoffmann v Krieg* and *IDAT v B.J.G.*). The res judicata effect of the Spanish judgment in the Netherlands is therefore determined, in the first place, by Spanish law.[80]

The Court links the problem of preclusion by judgments recognised under the Brussels I Regulation to Arts 33 and 36 of regulation. However, these provisions concern recognition, not a judgment's legal consequences, and therefore cannot explain why the regulation implies an obligation to apply the preclusion law of the judgment-rendering State.

Alike in *IDAT*, the court below made no express reference to foreign preclusion law. The Supreme Court's assessment of the lower court's decision is telling: "*Apparently*, this conclusion is based on the Court's interpretation of Spanish law. This interpretation cannot be reviewed for its accuracy on appeal in Cassation due to Art 79(1)(b) of the Judicial Administration Act 1827[81] ('RO'). The grievances do not attack the decision for lack of reasoning."[82] Dissatisfied parties can therefore

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[80] ibid [3.4.4] ("3.4.4 Bij de beoordeling van deze klachten moet worden vooropgesteld dat de vraag in hoeverre het gezag van gewijsde (bindende kracht) dat wordt toegekend aan de uitspraak van de Spaanse rechter, met vrucht kan worden ingeroepen in de onderhavige procedure, in de eerste plaats moet worden beantwoord aan de hand van art. 33 en 36 EEX-Verordening. Deze artikelen bepalen weliswaar dat in een lidstaat gegeven beslissingen in de overige lidstaten zonder vorm van proces worden erkend en dat in geen geval wordt overgegaan tot een onderzoek van de juistheid van de in den vreemde gegeven beslissing. Zij beogen echter niet elders méér werking aan rechterlijke beslissingen te geven dan deze hebben in de lidstaat van herkomst. Niet voor redelijke twijfel vatbaar is dat de vraag naar de omvang van het gezag van gewijsde dat aan de beslissing van de Spaanse rechter toekomt en het rechtsgevolg daarvan, wordt bepaald door het recht van Spanje als het land waarin de beslissing is gegeven (vgl. HvJEG 4 februari 1988, 145/86, Jur. 1988, blz. 645, NJ 1990, 209 en HR 12 maart 2004, nr. C02/275, NJ 2004, 284). De bindende kracht die de Spaanse uitspraak in Nederland heeft, wordt dus in de eerste plaats door het Spaanse recht bepaald. Uit de aangevallen rov. 4.10 van het bestreden arrest blijkt dat het hof een oordeel heeft gegeven over de omvang van het gezag van gewijsde van het arrest van het hof te Valencia en tot uitdrukking heeft gebracht dat dit gezag van gewijsde niet kan worden ingeroepen in een procedure waarin (deels) andere partijen procederen dan die welke partij zijn bij de uitspraak van de Spaanse rechter. Klaarblijkelijk berust dit oordeel op de uitleg die het hof geeft aan het Spaanse recht. Die uitleg kan ingevolge art. 79 lid 1, aanhef en onder b, RO in cassatie niet op juistheid worden onderzocht. Het middel bevat geen motiveringsklachten over dit oordeel.").

[81] *Wet van den 18den April 1827, op de zamenstelling der Regterlijke magt en het beleid der Justitie*) (entered into force 17 May 1827) Stb 1827, 20 (as amended).

[82] HR 11 July 2008 (n 79) [3.4.4] (*Diesel SPA/MAKRO*) ("Bij de beoordeling van deze klachten moet worden vooropgesteld dat de vraag in hoeverre het gezag van gewijsde (bindende kracht) dat wordt toegekend aan de uitspraak van de Spaanse rechter, met vrucht kan worden ingeroepen in de onderhavige procedure, in de eerste plaats moet worden beantwoord aan de hand van art. 33 en 36 EEX-Verordening. Deze artikelen bepalen weliswaar dat in een lidstaat gegeven beslissingen in de overige lidstaten zonder vorm van proces worden erkend en dat in geen geval wordt overgegaan tot een onderzoek van de juistheid van de in den vreemde gegeven beslissing. Zij beogen echter niet elders méér werking aan rechterlijke beslissingen te geven dan deze hebben in de lidstaat van herkomst. Niet voor redelijke twijfel vatbaar is dat de vraag naar de omvang van het gezag van gewijsde dat aan de beslissing van de Spaanse rechter toekomt en het rechtsgevolg daarvan, wordt bepaald door het recht van Spanje als het land waarin de beslissing is gegeven (vgl. HvJEG 4 februari 1988, 145/86, Jur. 1988, blz. 645, NJ 1990, 209 en HR 12 maart 2004, nr. C02/275, NJ 2004, 284). De bindende kracht die de Spaanse

appeal for failure to offer reasons based on the applicable preclusion law. Advocate General Verkade in his opinion in the case explained the problem of preclusion by judgments recognised under the Brussels and Lugano Regime. After noting that res judicata effect is not uniform between the Member States, he observed:

> The Brussels I Regulation does not aim to resolve in a general manner the conflicts of preclusion laws of the Member States on this issue. For that reason, one cannot escape the question by reference to what law this issue needs to resolved. German doctrine has developed three recognition theories: (1) the lex fori of the court of the judgment-rendering State ('Wirkungerstreckungstheory'); (2) the lex fori of the judgment-recognising court ('Wirkungsgleichstellungstheorie'); and (3) the restricting cumulative application of the lex fori of the court of the judgment-rendering state ('Kumulationstheory').[83]

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uitspraak in Nederland heeft, wordt dus in de eerste plaats door het Spaanse recht bepaald. Uit de aangevallen rov. 4.10 van het bestreden arrest blijkt dat het hof een oordeel heeft gegeven over de omvang van het gezag van gewijsde van het arrest van het hof te Valencia en tot uitdrukking heeft gebracht dat dit gezag van gewijsde niet kan worden ingeroepen in een procedure waarin (deels) andere partijen procederen dan die welke partij zijn bij de uitspraak van de Spaanse rechter. Klaarblijkelijk berust dit oordeel op de uitleg die het hof geeft aan het Spaanse recht. Die uitleg kan ingevolge art. 79 lid 1, aanhef en onder b, RO in cassatie niet op juistheid worden onderzocht. Het middel bevat geen motiveringsklachten over dit oordeel.").

[83] ibid [4.53]-[4.56] ("4.53. Ik dien thans in te gaan op de criteria die in het formele i.p.r. vigeren op het gebied van de erkenning van vreemde beslissingen. Het gezag van gewijsde waar het gaat om het effect van een ('vreemde') rechterlijke beslissing, in dit geval de subjectieve draagwijdte ervan, wordt in het recht van de lidstaten niet identiek geregeld. De EEX-Verordening strekt er niet toe de verschillen tussen de nationale rechtsstelsels op dit punt op algemene wijze op te lossen.(59) Men ontkomt dan ook niet aan de vraag naar welk recht een en ander moet worden beoordeeld. In met name de Duitse literatuur zijn ten deze een drietal erkenningstheorieën in omloop: (i) de lex fori van de rechter van het land waar de beslissing is gegeven ('Wirkungserstreckungstheorie'), (ii) de lex fori van de tweede rechter ('Wirkungsgleichstellungstheorie'), en (iii) de beperkende cumulatieve toepassing van de lex fori van de rechter van het land waar de beslissing is gegeven ('Kumulationstheorie').(60) 4.54. Het toelichtende rapport-Jenard bij het EEX-Verdrag (Pb 1979, C59, p. 43) vermeldt dat de erkenning ten gevolge dient te hebben 'dat de beslissingen het gezag en het effect worden verleend die zij genieten in het land waar zij zijn gewezen'. Het Hof van Justitie heeft zich in zijn arrest van 4 februari 1988 inzake Hoffmann/Krieg(61) hierbij aangesloten en beslist dat een krachtens art. 26 EEX-Verdrag (thans art. 33 EEX-Vo) erkende buitenlandse beslissing in de aangezochte (lid)staat in beginsel dezelfde werking heeft als zij in de (lid)staat van herkomst heeft.(62) Derhalve wordt uitgegaan van de 'Wirkungserstreckungstheorie', zodat de lex fori van de rechter van het land waar de beslissing is gegeven, moet bepalen wat het effect - de objectieve en, in dit geval, de subjectieve draagwijdte - van die beslissing is.(63) 4.55. Nu noch de EEX-Vo, noch enige andere regeling van communautair recht (bijvoorbeeld het EG-Verdrag zélf) bepalingen geven omtrent (de omvang van) het effect van vreemde vonnissen, kan er in cassatie vervolgens van worden uitgegaan dat 's hofs in rov. 4.10 van het bestreden arrest gegeven oordeel omtrent de bindende kracht van de Spaanse beslissing klaarblijkelijk berust op zijn uitleg van het Spaanse recht te dezen.(64) Een dergelijk oordeel kan in cassatie niet op juistheid kan worden getoetst (art. 79 lid 1, aanhef en onder b, RO). De klachten houden niet in dat het hof Amsterdam zijn oordeel omtrent het Spaanse recht te dezen niet voldoende heeft gemotiveerd. 4.56. De centrale klacht van de (sub-)onderdelen 2.2 tot en met 2.2.9 strekt er veeleer toe te verdedigen dat deze toepassing van de lex fori van de rechter van het land waar de beslissing is gegeven, zou kunnen leiden tot een beperking van de intracommunautaire handel. De middelonderdelen betogen daarmee in wezen dat de - overeenkomstig de onder de vigeur van de EEX-Vo geldende 'Wirkungserstreckungstheorie' - door het hof kennelijk toegepaste Spaanse regel die tussen de huidige procespartijen in Nederland geen bindende kracht aan de beslissing van het Gerechtshof te Valencia toekent, onder de werkingssfeer valt van de artikelen 28 EG en 30, laatste volzin, EG.(65) Dat het Spaanse recht in een geval als het onderhavige geen bindende kracht aan de Spaanse beslissing toekent ten aanzien van Makro c.s., zou volgens hen dan ook neerkomen op een verboden respectievelijk verkapte beperking van het in de EER geldende vrij verkeer van goederen.").

Verkade concludes that the Jenard Report and the CJEU's decision in *Hoffmann v Krieg* both support the extension of effects approach ('*Wirkungserstreckundstheory*'), so that the law of the judgment-rendering State governs the scope of the res judicata effect of a recognised judgment. Lower courts have clearly taken note of the Supreme Court's decisions in *IDAT* and *Diesel SPA/MAKRO*; in recent cases, courts address the choice of law-question and apply with more vigor the applicable foreign preclusion law. Two recent decisions illustrate this emerging practice. The first case is *Norfolk International Holding Inc. v Skipapol SP Zoo,*[84] which concerned the conclusive effect of a Polish judgment, and the second case is *Allround Cargo BV v Exel Nederland BV,*[85] which involved the issue of the conclusive effect to be attributed a German judgment.

Both courts apply the choice of law approach outlined in *IDAT* and *Diesel SPA/MAKRO*. However, when it comes to the application of foreign preclusion law, the courts use different approaches; the Den Bosch Court of Appeal in *Norfolk* heard expert evidence on Polish preclusion law, whereas the Utrecht District Court submitted a question on German preclusion law to the *Internationaal Juridisch Instituut*, a Dutch research institute that produces expert opinions and advice on foreign law and private international law, and the court then allowed the parties to express their views on the answer received.

c. Limitation of effects under Apostolides?

Advocate General Darmon in *Hoffmann*,[86] in answer to his question what law should govern the effects of a judgment, offered no clearcut answer; instead, he proposed that "a *dual limit* should be imposed: the judgment cannot have greater effects in the State in which enforcement is sought than it would have in the State in which it was delivered, nor can it produce greater effects than similar local judgments would",[87] while adding that "[t]hat second limitation is founded on the need to harmonize interpretations and the desirability of preventing excessive recourse to the public policy exception."[88]

The CJEU in *Hoffmann* did not expressly incorporate the second limit formulated by Darmon; nevertheless, the Court added a proviso to the principle it pronounced by holding that "a foreign judgment which has been recognized … must *in principle* have the same effects in the State in which enforcement is sought as it does in the State in which judgment was given."[89]

Subsequently, in *Apostolides*, the Court highlighted the '*in principle*' proviso and supplemented *Hoffmann* for situations where a judgment is *executed* against a judgment debtor or his assets, by holding that "there is however no reason for granting to a judgment, *when it is enforced*, rights which it does not have in the Member State of origin … or effects that a similar judgment given directly in the Member State in which enforcement is sought would not have."[90]

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[84] Hof Den Bosch 29 December 2009 (Chapter 4 n 239).
[85] Rb Utrecht 15 April 2009, ECLI:NL:RBUTR:2009:BI1254.
[86] *Hoffmann* (Chapter 3 n 470).
[87] ibid [20].
[88] ibid.
[89] ibid [11] (emphasis added).
[90] Case C-420/07 *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams* [2009] ECR I-3571 [66] (emphasis added).

Regarding the first restriction—there is no reason for granting to a judgment, when it is enforced, "rights" which it does not have in the Member State of origin—the Court referred to the Jenard Report, which states that "[i]f a judgment from which an appeal still lies or against which an appeal has been lodged in the State in which it was given cannot be provisionally enforced in that State, it cannot be enforced in the State in which enforcement is sought. It is an essential requirement of the instrument whose enforcement is sought that it should be enforceable in the State in which it originates."[91] The 'rights' the Court refers to therefore refer in the first place a judgment's *enforceability* under the law of the judgment-rendering State. This restriction is codified for enforcement in Art 54(1) of the Brussels I Regulation (recast):[92] "adaptation [of an unknown measure or order to a local measure or order known in the law of that Member State which has equivalent effects attached to it and which pursues similar aims and interests] *shall not result in effects going beyond those provided for in the law of the Member State of origin*."[93]

Regarding the second restriction—there is no reason for granting to a judgment, when it is enforced, "*effects* that a similar judgment given directly in the Member State in which enforcement is sought would not have"—the Court has to date not specified whether it also curtails the *preclusion* effects that must be attributed to a recognised judgment, or only the *execution* effects.

It is suggested that the restriction only extends to a judgment's execution effects, because the '*execution*' of a judgment refers to a process governed by the law of State of execution[94] that is only complete when a judgment is *effective*—an absolute concept referring to the situation where the judgment debtor has complied with the court's order, if necessary, following encouragement of local authorities. Arguably, it refers to the situation now addressed by Art 54(1) of the Brussels I Regulation (recast),[95] which provides only for enforcement, that "[i]f a judgment contains a measure or an order which is not known in the law of the Member State addressed, that measure or order shall, to the extent possible, be adapted to a measure or an order known in the law of that Member State which has *equivalent effects* attached to it and which pursues similar aims and interests."[96]

Conversely, unlike execution, '*preclusion*' by a judgment—as demonstrated by Part I of this thesis—is no absolute concept; the meaning of 'preclusion' varies according to the preclusion law applied. Accordingly, whereas it does not matter *de facto* that in the context of execution a foreign judgment is not given execution effects that a similar local judgment would not have, because the aim of both the law of the State of rendition and the law of the State of enforcement is invariably in substance the same: *effectiveness of the judgment*. Conversely, it matters considerably whether in the context of a new case a foreign judgment is not given preclusive effects that a similar local judgment would not have, because the aim of the law of the State of rendition and the law of the State of recognition is not invariably the same: in the same circumstances, in relation to a similar judgment, the law of one State will impose finality whereas the law of another State will condone litigation.

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[91] Jenard Report (Part II, Introduction n 18) 48.
[92] (Introduction n 44).
[93] (emphasis added).
[94] Case 148/84 *Deutsche Genossenschaftsbank v SA Brasserie du Pêcheur* [1985] ECR 1981 [13].
[95] (Introduction n 44).
[96] (emphasis added).

Any other interpretation of *Apostolides* deprives the *Hoffmann* principle of any practical relevance, because it would mean that, for instance, an English judgment which under English preclusion law has issue preclusive effect, would in France never have issue preclusive effect, because no similar French judgment has issue preclusive effect, notwithstanding that the *Hoffmann* principle seems to mandate that the English judgment must in principle have the same (issue preclusive) effect in France as it has under the law of England and Wales.

(ii) Scope

Gothaer[97] clarified that the *Hoffmann* principle is relevant *residually*; the principle applies in the absence of pertinent European preclusion principles, which take precedence over contrary municipal preclusion law of the Member States.[98] European preclusion law in its narrowest possible interpretation includes merely a (merger-like) claim preclusion principle under *De Wolf v Cox*,[99] barring a successful claimant who can obtain enforcement through the procedures of the Brussels and Lugano Regime from seeking enforcement by action on the judgment at common law, and an issue preclusion principle under *Gothaer*, [100] barring relitigation of issues necessarily determined to decide on jurisdiction by judgment subject to recognition under the regime. In reality, on a more likely interpretation, the scope of European preclusion law is probably broader, along the lines described before.[101]

An area where EU law has not intervened is wider preclusion by such doctrines as, in particular, abuse of process.[102] This form of preclusion is not actually concerned with the *effects* of a judgment, but with the legal consequences of *conduct* of parties to litigation, which excludes application of the *Hoffmann* principle.

(iv) Public policy

The restrictions to the *Hoffmann* principle formulated in *Apostolides* are relevant only in the context of *execution. Apostolides* does not then imply a rejection of the *Hoffmann* principle for the purpose of *preclusion.* In light of this point, the question arises whether the *Hoffmann* principle is subject to any exceptions, in particular on ground that application of the preclusion law of the judgment-rendering State amounts to a manifest violation of the public policy of the State of recognition.

It bears repeating in this regard that, at the stage of attributing effects, a judgment *has* been recognised, so a court's refusal to apply the law of the judgment-rendering State and attach certain effects does *not* imply a refusal of recognition. (A refusal of recognition at that stage can occur only if the court concludes that the preclusive effects of the judgment under the law of State of rendition and the preclusive effects of another judgment in the State addressed are mutually exclusive,[103] thus rendering the judgments irreconcilable.[104])

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[97] *Gothaer* (Part I, Introduction n 1). See Chapter 5, text to n 91ff.
[98] Case 6-64 *Flaminio Costa v ENEL* [1964] ECR 585, 593-94.
[99] *De Wolf v Cox* (Part I, Introduction n 2). See Chapter 5, text to n 57ff.
[100] *Gothaer* (Part I, Introduction n 1). See Chapter 5, text to n 91ff.
[101] See Chapter 5, text to n 57ff.
[102] ibid text to n 172.
[103] See Chapter 6, text to n 103ff.
[104] ibid.

The Court in *Apostolides* repeated the '*in principle*' proviso that formed part from the start of the *Hoffmann* principle,[105] and introduced two qualifications of the principle for the context of execution.[106] However, when the Court in *Gothaer* confirmed the application of the *Hoffmann* principle in the context of preclusion,[107] the Court also restated the '*in principle*' proviso for that particular context. It is suggested that this proviso provides enough interpretative space to allow the Member States to refuse the application of the preclusion law of the judgment-rendering State where this would manifestly violate public policy of the State addressed.

The public policy exception discussed here is not the exception to recognition on grounds of public policy under Art 34 of the Brussels I Regulation, in which case the question of effects to be attributed in the state addressed does not arise;[108] the relevant exception concerns the application pursuant to the *Hoffmann* principle of the preclusion law of the judgment-rendering State. It is suggested that a court in the State of recognition may require recourse to this public policy exception in circumstances where the court may risk violating the principle of legal certainty inherent in Art 6(1) ECHR by attaching inappropriate preclusive effects to a judgment recognised pursuant to the Brussels (or Lugano) Regime; 'inappropriate' can denote one of two things in this context: first, *under*preclusion (i.e. not enough preclusive effect); or, second, *over*preclusion (i.e. too much preclusive effect).

As a general matter, the EU's principle of mutual recognition, along with its implementing acts—e.g. the Brussels Convention, the Brussels I Regulation, and the Revised Lugano Convention (concluded by the EU in the exercise of its exclusive external competence),[109] must be interpreted and applied in a manner consistent with the principle of finality of litigation as guaranteed by Art 6(1) ECHR[110],[111] which forms an integral part of the general principles of EU law[112].[113] To this effect, the ECtHR (*Grand Chamber*) in *Brumărescu v Romania* held that:

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[105] See text to n 56ff.

[106] Case 145/86 *Horst Ludwig Martin Hoffmann v Adelheid Krieg* (Chapter 3 n 470) [11] (emphasis added).

[107] *Gothaer* (Part I, Introduction n 1) [34]. See text to n 56ff.

[108] Case C-619/10 *Trade Agency Ltd v Seramico Investments Ltd* [2012] ECR I-0000 [52]ff.

[109] (Introduction n 44).

[110] 213 UNTS 222, entered into force Sept. 3, 1953 (as amended) ("In the determination of his civil rights and obligations… everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.").

[111] See Brussels I Regulation (recast) (Introduction n 44) Recital 38 ("This Regulation respects fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union, in particular the right to an effective remedy and to a fair trial guaranteed in Article 47 of the Charter."). cf Case C-325/11 *Krystyna Alder and Ewald Alder v Sabina Orlowska and Czeslaw Orlowski* [2012] ECR I-0000 [35] ("those objectives [of Regulation (EC) No 1393/2007 on the service of documents] cannot be attained by undermining in any way the rights of the defence of the addressees, which derive from the right to a fair hearing, enshrined in the second paragraph of Article 47 of the Charter of Fundamental Rights and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.").

[112] TEU, Art 6(3) provides that fundamental rights, as guaranteed by the Convention and as they result from the constitutional traditions common to the Member States, constitute general principles of Union law.

[113] Note the role in this context of the Charter of Fundamental Rights of the European Union [2012] OJ C 326/391, Art 47, second paragraph, which, according to Art 51(1) of the Charter, is addressed to the EU institutions (agencies etc.) as well as the EU Member States when they are implementing Union law (ie when States act within the scope of EU law—see Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECR I-0000 [19]-[20]). According to the Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17, 29, the provision does *not* alter this principle, but confirms that

> The right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which declares, among other things, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, *inter alia*, that where the courts have finally determined an issue, their ruling should not be called into question.[114]

Building on this principle, the Court has added, for instance in *Gridan*:[115]

> Legal certainty presupposes respect for the principle of res judicata …, that is the principle of the finality of judgments. This principle underlines that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. Higher courts' power of review should be exercised to correct judicial errors and miscarriages of justice, but not to carry out a fresh examination. The review should not be treated as an appeal in disguise, and the mere possibility of there being two views on the subject is not a ground for re-examination. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character….[116]

Most cases under Art 6(1) ECHR concern the *finality of judgments* (i.e. the grounds on which a final judgment can be reopened).[117] Nevertheless, Art 6(1) ECHR *unquestionably* also guarantees *finality in another case*; for instance, the Court in *Kehaya v Bulgaria* found a violation of Art 6(1) on the basis that "[a final judgment] was rendered devoid of any legal effect… as *in separate proceedings* the [issue previously determined] was re-examined and decided differently."[118] The Court in *Esertas v Lithuania* reasoned similarly:

> [A] situation where the facts already determined by a final decision in one case are later overruled by the courts in a new case between the same parties, is similar to the one where, following a re-opening of the proceedings, a binding and enforceable decision is quashed in its entirety. Consequently, such a situation may also amount to a breach of the principle of legal certainty in violation of Article 6 § 1 of the Convention.[119]

At the same time, Art 6(1) ECHR requires not just finality of litigation; in the first place, the provision requires *court access*, and guards against overpreclusion. In this sense, Lord Millett in *Johnson v Gore Wood & Co* explained:

> It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first

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the guarantee under Art 6(1) ECHR applies in a similar way but with a wider scope of application to the Union institutions, the right to a fair hearing not being confined to disputes regarding civil law rights and obligations, thus reflecting that the EU is a Union based on the rule of law (on the interpretative value of the explanations see Art 52(7) of the Chater). Pursuant to Art 6(1) TEU, first subparagraph, the Charter has "the same legal value as the Treaties".

[114] (Introduction n 46) [61].

[115] *Gridan and others v Romania* App nos 28237/03, 24386/04, 46124/07 and 33488/10 (ECtHR, 4 June 2013).

[116] ibid [13].

[117] See Part I, Conclusive remarks, text to n 2ff. The application of Art 6(1) to the finality of judgments indicates the provision's relevance in cases where a court permits a collateral challenge of a judgment subject to recognition under the Brussels and Lugano Regime.

[118] *Kehaya and others v Bulgaria* App nos 47797/99 and 68698/01 [62] (ECtHR, 14 June 2007).

[119] App no 50208/06 [25] (ECtHR, 31 May 2012).

> time a question which has not previously been adjudicated upon. This latter (though not the former) is *prima facie* a denial of the citizen's right of access to the court.[120]

The ECtHR confirmed so much in *Ferenčíková v Slovakia*,[121] where the violation of Art 6(1) consisted in the preclusion of a claim that had never been rendered res judicata. Accordingly, the sword of Art 6(1) ECHR cuts on both sides; a court that considers what preclusive effect to attribute a judgment subject to recognition under the Brussels I Regulation can act in breach of the principle of Art 6(1) by attaching *too little* preclusive effect to the judgment ('underpreclusion'), but also by attaching *too much* preclusive effect ('overpreclusion').

a. Underpreclusion

In an interjurisdictional setting, *underpreclusion* can present itself in two situations: first, the law of the rendering State attaches too little preclusive effect; and, second, the court of the State of recognition fails to attach the preclusive effect that a judgment has under the law of the rendering State. Consider the following two corresponding examples:

1. an English court faced with a French judgment may violate Art 6(1) by failing to attach issue preclusive effect to the judgment, even though under French law the judgment has no issue preclusive effect—Art 6(1) may compel the English court to attach issue preclusive effect to the French judgment *regardless* of the position under French law, because the provision requires the attribution of a minimum of preclusive effect, which in appropriate circumstances includes issue preclusive effect; and
2. a French court may violate Art 6(1) by failing to attach issue preclusive effect to an English judgment, even though under French law issue preclusive effect is unknown—Art 6(1) prohibits the French court from depriving the English judgment from the preclusive effect it has under English preclusion law.

1. Too little preclusive effect under the law of the rendering State

Underpreclusion in the first example reflects the abovementioned ECtHR decision in *Kehaya v Bulgaria*.[122] Though the case did not involve preclusion by a *foreign* judgment, the Court's approach extends in the same way to an interjurisdictional case arsing under the Brussels and Lugano Regime, by reason of the implications of the *Hoffmann* principle.

Kehaya involved two succeeding cases in which Bulgarian courts determined the same property rights of the same legal subjects—the State and the applicants—and both sets of proceedings involved the same issues: whether the person from whom the applicants had inherited had owned land prior to collectivisation of agricultural land in the 1950s and whether or not the statutory conditions for restitution under the 1991 Agricultural Land Act had been fulfilled. In the first case, a claim for restitution of property, the issues were determined in favour of the applicants. However, in the second case, involving a claim for *rei vindicatio* by a State authority, the issues were re-examined and determined against the applicants.

[120] *Johnson* (Introduction n 12) 58.
[121] (Introduction n 12).
[122] *Kehaya and others v Bulgaria* App nos 47797/99 and 68698/01 (ECtHR, 14 June 2007).

Under Bulgarian law, the judgment in the first case (arguably) lacked res judicata effect.

The ECtHR established that (a) both sets of proceedings determined the rights of the same legal subjects, (b) the core of the dispute was the same (i.e. the courts examined the same *issues* that arose in the process of determining the claim),[123] and (c) the final judgment was the result of contentious proceedings with the effect of determining civil rights and obligations. Consequently, though the Court acknowledged that "in all legal systems the res judicata effects of judgments have limitations *ad personam* and as to material scope",[124] it found that on these facts, "[t]he principle of legal certainty *dictates* that where a civil dispute is examined on the merits by the courts, it should be decided once and for all."[125]

Article 6(1) may therefore compel attribution of (issue) preclusive effect to a judgment, *regardless* whether the law of the judgment-rendering State attaches such effect to the judgment; the provision enforces a minimum of finality of litigation that any court bound by the provision is bound to uphold by precluding subsequent attempts at relitigation. For instance, in *Kehaya*, the Court rejected the argument that no res judicata effect attached under Bulgarian law due to the fact that "special lenient evidentiary rules applied" in the first set of proceedings; in the Court's view, this "was matter of legislative choice and cannot in itself justify such a far reaching exception from the fundamental rule that final judgments are a res judicata."[126]

2. A judgment deprived of its preclusive effect under domestic law

Underpreclusion in the sense of the second example reflects the abovementioned ECtHR decision in *Esertas*.[127] Again, this case did not involve preclusion by a *foreign* judgment, but the Court's approach extends in the same way to an interjurisdictional case arsing under the Brussels and Lugano Regime, by reason of the implications of the *Hoffmann* principle.

Esertas concerned the situation where a court in violation with Art 6(1) failed to attribute the res judicata effect that properly attached at law. The case involved two successive sets of proceedings involving same parties—a heating provider and the applicant—that raised the same issues: whether there was a contract and whether that contract was performed (by the supply of heating to the applicant's flat). In the first case, a claim for payment of a heating bill for a certain time period, the court denied the claim after it determined the issues in favour of the applicant by holding that no contract existed and that the contract had not been performed. Conversely, in the second case, another claim for payment of a heating bill for another time period, the court granted the claim after determining the issues in favour of the heating provider, regardless of the applicant's res judicata plea. *Under Lithuanian law, the judgment in case one (arguably) had* res judicata effect.

The Court acknowledged that the two claims were based on different causes of action—two different breaches of the alleged contract. However, the Court then established that both claims concerned exactly the same contract and the same

[123] Whether the person from whom the applicants had inherited had owned land prior to the collectivisation and whether or not the statutory conditions for restitution under the Agricultural Land Act had been fulfilled. See ibid at [15]-[18] and [20]-[25].
[124] ibid [66].
[125] ibid [63] (emphasis added).
[126] ibid [68].
[127] *Esertas v Lithuania* App no 50208/06 (ECtHR, 31 May 2012). See text to n 119.

circumstances, which were crucial for deciding the claim. Accordingly, the Court found that "[a] significant part of [the first judgment] was rendered devoid of any legal effect… as in new separate proceedings the question concerning contractual relations and the supply of the heating was re-examined and decided differently." The Court concluded that by not enforcing finality in those circumstances, also in breach of domestic preclusion law (Art 279 § 4 of the Lithuanian Code of Civil Procedure provides that the facts and legal relations that had been established by a court in one case may not be contested in another case), the situation was "similar to the one where, following a re-opening of the proceedings, a binding and enforceable decision is quashed in its entirety."[128]

b. Overpreclusion

Alike in cases involving underpreclusion, *overpreclusion* in an interjurisdictional setting can occur in two situations: first, the law of the rendering State attaches too much preclusive effect; and, second, the court of the State of recognition attaches preclusive effect that a judgment lacks under the law of the rendering State. In this regard, the ECtHR in *Ferenčíková v Slovakia*[129] confirmed that overpreclusion may violate the right to a court guaranteed by Art 6(1) ECHR, which, the Court reiterated, implies that "all litigants should have an effective judicial remedy enabling them to assert their civil rights".[130] This "right to court",[131] the Court clarified, implies that "everyone has the right to have any claim relating to his civil rights and obligations brought before a court or tribunal".[132]

On the facts in *Ferenčíková*—the same claim had previously been 'dismissed' not on the merits, but because the claimant provided a wrong address for the defendant—the right of court access guaranteed by Art 6(1) had been violated by the domestic court's attribution of res judicata effect to a judgment in a first set of proceedings that did not actually determine the claim filed in the second case. In those circumstances, claim preclusion implied a denial of the right to access a court.

1. Effects that would exceed the limits of the jurisdiction of the judgment-rendering court

Whereas the CJEU in *Kapferer* held that "[Union] law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would enable it to remedy an infringement of [Union] law by the decision at issue",[133] the Court in *Lucchini*[134] ruled that Union law excludes the situation "that

[128] ibid [25].
[129] (Introduction n 12).
[130] ibid [50].
[131] ibid.
[132] ibid.
[133] *Kapferer* (Introduction n 8) [21]. cf Case C-224/01 *Gerhard Köbler v Republik Österreich* (Chapter 5 n 56) [38]. See also the opinion of AG Geelhoed in *Lucchini* (Part I, Introduction n 4) [36] ("The national legal systems of all the Member States include the principle of res judicata. It is in the interests of legal certainty that court decisions which can no longer be appealed should be inviolable in societal relations, in other words, become a legal fact. That legal fact should be respected. This means that the lodging of a fresh appeal with the same subject-matter, the same parties and the same arguments is ruled out.")
[134] *Lucchini* (Part I, Introduction n 4).

effects are attributed to a decision of a national court which exceed the limits of the jurisdiction of the court in question as laid down in [Union] law."[135] The distinction is subtle, but of clear practical importance.

In *Lucchini*, an Italian court decided that the Italian State was required under national law to disburse State aid pledged conditionally, notwithstanding that the European Commission had already taken a decision declaring that aid to be incompatible with the common market, thus in violation of EU law. In those proceedings, the Italian State could and should have invoked the Commission decision, but failed to do so. In subsequent proceedings by the Italian State for the recovery of the aid, the aid beneficiary relied on the prior judgment between the parties; the Italian res judicata doctrine (Art 2909 of the Civil Code) precludes not merely the raising of points which have already been raised and definitively determined, but also points which could have been raised in prior proceedings, but were not.[136]

The CJEU ruled that in these circumstances, the domestic court was barred from applying the Italian res judicata *pro*vision, because "the effect of applying that provision, interpreted in such a manner, in the present case would be to frustrate the application of [Union] law in so far as it would make it impossible to recover State aid that was granted in breach of [Union] law."[137] Attribution of preclusive effect to the judgment on the disbursement of State aid would imply that effects are attributed to that decision that exceed the limits of the court's jurisdiction under Union law, which provides for the European Commission's jurisdiction to decide on the recovery of State aid granted in breach of Union law.

It follows, a Member State court faced with a plea of finality must disapply—it would seem on grounds of public policy—the preclusion law of the judgment-rendering State if application of that law would imply the attribution of preclusive effect to a judgment that exceed the limits of the rendering court's jurisdiction under Union law.

(2) Preclusion process

The *Hoffmann* principle determines the law that governs the *effects* of a judgment recognised pursuant to the Brussels and Lugano Regime, including—as clarified by *Gothaer* [138]—such judgment's *preclusive effects*. However, while the *Hoffmann* principle specifies the law applicable to preclusive effects, neither the principle, nor the regime at large, deals with '*preclusion*' itself, which continus to be governed by the domestic law of the court in which preclusion is sought.

The CJEU has not expressed this position in so many words. Nevertheless, the position follows, by analogy, from the equivalent approach the Court outlined for '*execution*' in *Deutsche Genossenschaftsbank v SA Brasserie du Pêcheur*.[139] In that case, the Court clarified that the Brussels 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

[135] ibid [59].
[136] Article 2909 of the Italian Civil Code.
[137] *Lucchini* (Part I, Introduction n 4) [59].
[138] *Gothaer* (Part I, Introduction n 1). See Chapter 5, text to n 91ff.
[139] (n 94).

by the domestic law of the court in which execution is sought".[140] Similarly, the Brussels and Lugano Regime merely regulates recognition—and since *Hoffmann* the choice of the law governing the effects of a recognised judgment, not preclusion.

The fact that—in the absence of contrary indication by the Court—preclusion is governed by the law of the forum addressed implies that a party will need to look to local law to establish the conditions for a plea of finality. In practice, this point will be significant mostly for the question when a plea of finality can and must be raised (e.g. to prevent a waiver or estoppel); the question whether a court should of its own motion raise finality is mostly theoretical, because *no* court is aware of the judgments of courts elsewhere in the EU. The point becomes relevant only when a court in the course of proceedings becomes aware that a prior judgment subject to recognition under the regime was given between the parties (or their privies). In those circumstances, some legal systems, like Dutch law, expressly prohibit a court from applying res judicata effect in the absence of an sufficiently clear res judicata *plea*, whereas in other systems, a court is required to enforce finality of its own motion.[141]

6.2 A suggested approach

(1) Statement of principle

The objective of private international law—the resolution of conflicts of laws[142]—holds equally true for issues of preclusion; the problem of conflicts of preclusion laws is a fact for which private international law must cater: whereas preclusion serves the need for finality of litigation after the rendition of justice, it also implicates the right to a court, which should not vary from one forum to another, or else there will be neither justice nor finality. The general principle of legal certainty further mandates harmonisation of choice of law-results in this area, so that issues are resolved consistently, regardless the forum, thereby ensuring stability of legal relations.[143]

It has been suggested that the manner in which countries are associated should influence choice of law-analysis, and that this principle applies both in a regional context and an international context.[144] On this view:

> [T]he justification for applying foreign law is proportionate to the level of association with the other country; the stronger countries are associated and their societies have become 'legal communities' characterised by shared values and goals, the less self-evident the conclusion is that forum law prevails over the law of the other country.

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[140] ibid [18].
[141] See Sepperer (Introduction n 39).
[142] cf *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579, [2012] QB 549, [2012] 2 WLR 199, [2011] 1 All ER 190, [2011] 1 All ER (Comm) 985, [2012] Bus LR 1, [2010] 1 CLC 770 [38] (Aikens LJ) ("The objective of conflict of laws rules is to enable a court to decide which system of law is to be applied to resolve a legal question when there is a foreign, ie. non-English, element, involved in an issue.").
[143] See (n 14).
[144] MH ten Wolde, 'Simplex sigillium veri: (Vrij)denken over grondslagen van conflictenrecht en over krijspunten van conflictenrechtelijke methoden' in ThM de Boer and others, *Strikwerda's conclusies* (Kluwer, Deventer 2011) 603. See also MH ten Wolde, 'The Relativity of Legal Positions in Cross-Border Situations. The foundations of private interregional law, private intra-community law and private international law' in The Permanent Bureau of the Hague Conference on Private International Law (ed), *A commitment to private international law: Essays in honour of Hans van Loon* (Intersentia, Cambridge 2013) 569.

> One can imagine a gliding schale with on one side of the schale (left) the complete and exclusive application of forum law (since there is little cross-border activity) and on the other side of the schale (right) a neutral vantage point of forum and foreign law (since societies are so intertwined and values and goals are common).[145]

In other words, the justification for applying a neutral choice of law approach depends on *de facto* association of societies as much as on *de jure* common values and goals, which means that there may be better grounds for such approach in the relation England and Wales—Scotland (or Northern-Ireland) than in the relation Netherlands—Aruba (or Curaçao, or Sint Maarten), considering that the latter relation is characterised by thousands of miles distance between the countries' societies.[146]

These varying *contexts* for conflicts of laws—reflecting different levels of integration of societies and shared values and goals—should influence the selection of a choice of law-method; traditionally, however, the choice of method is presented as a principled 'winner takes all'-election between either rule-orientation (the scope of application of rules) or relationship-orientation (the seat of the relationship).[147] In actuality, rule-orientation is more suitable towards the left on the scale of association of countries, while on the right of that scale, relationship-orientation offers a better approach.[148] Accordingly, in case the association with other countries is uncertain—short of a basis for a neutral vantage point of forum and foreign law—forum law should be the starting point, and rule-orientation offers a superior choice of law-method; aimed at defining the proper scope of application of the forum's own law.[149]

(i) Particular features of conflicts of preclusion laws

This theory applied to conflicts of preclusion laws arguably infers that *as a general approach*—regardless whether the problem arises between closely intertwined societies or between deeply integrated legal systems—a neutral, relationship-oriented choice of law-method is appropriate. This solution, which further aligns with the International Law Institute (Institute de Droit International) Resolution on '*Equality of Treatment of the Law of the Forum and of Foreign Law*' adopted at its 1989 session in Santiago de Compostela,[150] follows naturally from two particular features

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[145] ibid 614-15.
[146] cf ibid.
[147] ibid 616.
[148] ibid 616-17.
[149] ibid 617.
[150] See Art I ("I. In Shaping Choice of Law Rules 1. It is recommended that States : a) unless their essential interests require otherwise, adopt choice of law rules based on connecting factors which lead to the application of foreign law under the same conditions as lead to the application of the law of the forum; and, consequently, b) refrain from adopting choice of law rules which broaden the scope of the application of the law of the forum as against that of foreign law; and, in particular, exclude such rules whenever their application would result in discrimination between parties based on factors under which one of them is personally connected to the state of the forum, such as nationality or religion. 2) It is recommended that States, when it seems necessary to them to adopt subsidiary choice of law rules, use connecting factors which lead to the application of foreign law under the same conditions as lead to the application of the law of the forum. 3) It is recommended that States, when introducing choice of law rules whose objective is to achieve a particular substantive result, such as alternative reference rules, use connecting factors which lead to the application of foreign law under the same conditions as lead to the application of the law of the forum.") <www.idi-iil.org/idiE/resolutionsE/1989_comp_02_en.PDF> accessed 1 August 2013.

of the problem of preclusion by foreign judgments that indicate that the problem arises within a framework of a close *de jure* and *de facto* association of jurisdictions.

a. The problem arises after recognition of the underlying judgment

The problem of preclusion by a foreign judgment arises after that judgment has been recognised—granted local validity—by the State addressed. Fact is then that the foreign judgment, the product of a foreign State that may well lack *any* association with the State addressed, has been incorporated *as judgment* in that State's legal order; a closer *de facto* association is hardly imaginable. Fundamental issues like the integrity of the foreign judicial system, or the assertion of jurisdiction over the matter now sought to be precluded should be addressed at the stage of recognition, not at the stage involving a determination of the effects of a judgment that has attained local validity. This is not to say that foreign preclusion law will invariably govern every issue of preclusion arising in respect of a recognised foreign judgment; yet, the starting point is a neutral vantage point of forum and foreign preclusion law.

Von Mehren rejects tendencies to treat sister-state and third-state judgments alike.[151] He points to the fact that internationally there is no comparable degree of coordination characteristic of most federal systems where, like in the U.S., cross-border recognition of judgments typically has a constitutional dimension involving, firstly, the pursuit of common aims comparable to that of a single jurisdiction and, secondly, the imposition of common standards (e.g. full faith and credit) and limits (i.e. due process) which are subject to judicial review.[152] In the absence of shared procedures and standards along with common traditions and experiences, and the administration of justice remains the charge of individual states, there is no basis for trusting the quality of justice administered in a third state, justifying restraints in according preclusive effects to the resulting judgments.[153]

However, by distinguishing the problems of recognition and preclusion, which the author treats as one and the same, two things are achieved: first, the problem of recognition is simplified; and, second, the lack of trust in the quality of justice administered in a third state is no longer a reason for not attributing a foreign judgment preclusive effects—in fact, the lack of trust is a problem to be addressed at the stage of recognition, which can be subject to lesser or more restraints, subject to the level of association of State. Against this background, upon recognition, the absence of shared procedures and standards along with common traditions and experiences, and the administration of justice, which remains the charge of individual States, is actually a very sound reason for referring to foreign law, to be precise, the law of the rendering State.

b. Finality of litigation is a common value and goal

Finality of litigation is a general principle of law.[154] This means that finality of litigation is a value shared by all legal systems based on the Rule of Law, which must all in the administration of justice balance the interests of correctness and repose,

[151] Von Mehren and Trautman (Introduction n 9) 1607.
[152] ibid 1606ff.
[153] ibid 1607. cf Von Mehren (Introduction n 21) 35.
[154] See Introduction, text to n 45ff.

which balance must in the public and private interest invariably be struck—at some point—in favour of repose. Accordingly, though legal systems diverge in terms of the detailed implementation of the principle (by preclusion law), the underlying value is shared and the ultimate goal is the same. Also from this angle then, there is every reason to take a neutral viewpoint of forum and foreign preclusion law.

(2) Devising a choice of law approach

If the preclusive effects of a judgment are indeed the legal attributes of a judgment, the problem of preclusion by a foreign judgment logically raises a question of applicable law, calling for a choice of law.[155] Amongst authors who share this view, discussion centres on identifying the proper preclusion law. Some favour application of foreign law such as the law of the judgment-rendering State,[156] or the law governing the original controversy ('foreign law')[157]. Others defend the option of resolving preclusion issues under the law of the judgment-recognising state ('forum law').[158] Finally, another group distinguishes various smaller issues as part of the

[155] See the ALI proposed federal statute (n 46) §4; Casad and Clermont (Introduction n 83) 211ff; Barnett (Introduction n 24); Erichson (Chapter 4 n 7); GC Lilly, 'The symmetry of preclusion' (1993) 54 Ohio State Law Journal 289; SN Caust-Ellenbogen, 'False conflicts and interstate preclusion: moving beyond a wooden reading of the full faith and credit statute' (1990) 58 Fordham Law Review 593; GS Getschow, 'If at first you do succeed: recognition of state preclusive laws in subsequent multistate actions' (1990) 35 Villanova Law Review 253; C von Bar, *Internationales Privatrecht* (Beck, München 1987) 335-36; Burbank (n 30); RC Casad, 'Issue preclusion and foreign country judgments: whose law?' (1984) 70 Iowa Law Review 70; PD Carrington, 'Collateral estoppel and foreign judgments' (1963) 24 Ohio State Law Journal 381; RE Degnan, 'Federalized Res Judicata' (1976) 85 Yale Law Journal 741; WL Reese, 'The status in this country of judgments rendered abroad' (1950) 50 Columbia Law Review 783; EE Cheatham, 'Res Judicata and the Full Faith and Credit Clause: Magnolia Petroleum Co. v Hunt' (1944) 44 Columbia Law Review 330; and HE Yntema, 'The enforcement of foreign judgments in Anglo-American law' (1935) 33 Michigan Law Review 1129.

[156] See, eg, Szászy (Introduction n 25) 453; *Geimer & Schütze* (Introduction n 18) 511 (advocating the application of the law of the rendering State including its rules of private international law) ("Der Umfang der Wirkungen eines ausländischen Urteils, das im Inland anerkannt wird, ist daher grundsätzlich nach dem Recht des Erststaates zu beurteilen: Die Gerichte und Behörden des Zweitstaates haben zu ermitteln, welchen Inhalt die Urteilswirkungen des ausländischen Urteils nach dem Recht des Urteilstaates haben. Verweist dieser auf die Rechtsordnung eines dritten Staates, ist also nach dem Recht des Urteilstaates der Inhalt der Urteilswirkung nach dem Recht eines dritten Staates zu beurteilen, so ist diese Weiterverweisung auch von den deutschen Gerichten zu beachten"); and the ALI proposed federal statute (n 46) §4 (see text to n 46ff).

[157] See Wolfgang Grunsky, 'Lex fori und Verfahrensrecht' (1976) 89 Zeitschrift für Zivilprozeß 241, 258ff.

[158] Hans Smit 'International Res Judicata and Collateral Estoppel in the United States' (1962) 9 UCLA L Rev 44, 63 ("Clearly, if in granting effect to foreign judgments a domestic policy of res judicata is promoted, it is unwarranted to defer to foreign principles in determining the actual effect of such judgments. Such deference is not only illogical, but imposes on every person relying on a foreign judgment the often difficult and expensive burden of proving the foreign law of res judicata. In addition, it saddles the courts with the sometimes pioneering and always difficult task of construing the applicable foreign law"); Franz Matscher, 'Zur Theorie der Anerkennung ausländischer Entscheidungen nach österreichischen Recht' in Hans Schima, Hans Walter Fasching and Winfried Kralik, *Festschrift für Hans Schima zum 75. Geburtstag* (Manz, Wien 1969) 265, 277-79. See also C von Bar, *Internationales Privatrecht* (Beck, München 1987) 335-36 (forum law must necessarily apply though it is sensible, and nothing prevents a court, to take foreign law into account—'*Mitberücksichtigung*'). cf Gerfried Fischer, 'Objektive Grenzen der Rechtskraft im internationalen Zivilprozeßrecht', in Walter Gerhardt (ed), *Festschrift für Wolfram Henckel zum 70. Geburtstag am 21. April 1995* (W de Gruyter, Berlin/New York 1995) 204-05 (recognition involves the attribution of legal effects, including the scope of such effects, in accordance with the law of the judgment recognising State, although it is typically sensible to

problem of preclusion by a foreign judgment, referring for some sub-issues to one law and for others to another law ('combination of laws').[159]

For purposes of devising a choice of law approach, it is suggested to refer to the principles governing the identification of the appropriate law—i.e. forum law *or* foreign law as appropriate—as explained by Mance LJ (as he then was) in *Raiffeisen Zentralbank.*[160] His Lordship identified a three-stage process for the identification of the appropriate law, which, he adds, "falls to be undertaken in a broad internationalist spirit in accordance with the principles of conflict of laws of the forum":

(1) characterisation of the relevant issue;
(2) selection of the conflicts-rule providing the connecting factor; and
(3) identification of the law tied by that connecting factor to the issue.[161]

In administering this process, account is to be taken of what he called the "element of interplay or even circularity in the three-stage process",[162] and the fact that "conflict of laws does not depend (like a game or even an election) upon the application of

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derive what those effects are from the law of the judgment rendering State); Peter Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments* (Professional Books, Abingdon, Oxon, 1987) 1408 (noting on the Brussels Convention that "[i]t seems far more simple and in conformity with practice, therefore, for courts and parties to assess the judgment's effects in accordance with the rules of their own legal system, with which they are entirely familiar, while application of foreign rules of a procedural nature might furthermore lead to an increase in the level of resort made to public policy as a ground for non-recognition … with the consequence of undesirable uncertainty."); and Péroz (Introduction n 41) 129-34. But see Gottwald (Introduction n 18) 260-61 (pointing out that while a sensible approach in the context of international relations, regarding foreign judgments the approach causes more difficulty than it solves, in that equalisation is possible only in the event of two judgments having the same substance and effects, not where the effect of a foreign judgment diverges from that of the most equivalent domestic judgment; the attribution of novel effects due to the equalisation process implies that a foreign judgment has diverging effects from one country to another, confronting the persons implicated by the foreign judgment with unfamiliar and unexpected effects); and ; *Geimer & Schütze* (Introduction n 18) (arguing that equalisation is appropriate only in the context of enforcement) ("Diese [*Gleichstellungs- oder Nostrifizierungstheorie*] is zutreffend nur für die Vollstreckbarerklärung ausländischer Titel: Denn dabei geht er gerade nicht um *Anerkennung* (keine Erstreckung der erststaatlichen Volstreckbarkeit auf das Inland), sondern um die *originäre Verleihung der Vollstreckbarkeit* nach inländischenm Recht.").

[159] GA Droz, *La compétence judiciaire et l'effet des jugements dans la Communauté économique européenne selon la Convention de Bruxelles du 27 septembre 1968* (Dalloz, Paris 1972) 280 (contending as a matter of general application that the effects of a recognised foreign judgment should extend neither beyond those attributed in the State of origin nor beyond those attributed in the State of recognition); and Verheul (Chapter 3 n 213) 70. cf Holleaux (Introduction n 19) 428 (pointing to the division of case law on the matter—some judgments pointing to the law of the judgment rendering State, other judgments applying the law of the State addressed, which can be understood as signalling both laws' equal claim to application, which might justify their combined application. Alternatively, 'extension of effect' could be viewed as the transposition of the foreign (preclusive) effect into a comparable local effect, which appears to be the common practice; the foreign judgment is attributed the preclusive effect of a comparable local judgment, while the possibility of adjusting the result due to the account taken of foreign law.)

[160] *Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC (The Mount I)* [2001] EWCA Civ 68, [2001] QB 825, 840, [2001] 2 WLR 1344, [2001] 3 All ER 257, [2001] 1 All ER (Comm) 961, [2001] 1 Lloyd's Rep 597, [2001] CLC 843, [2001] Lloyd's Rep IR 460, (2001) 98(9) LSG 38, (2001) 145 SJLB 45 ("(1) characterisation of the relevant issue; (2) selection of the rule of conflict of laws which lays down a connecting factor for that issue; and (3) identification of the system of law which is tied by that connecting factor to that issue….").

[161] ibid 840. cf *Macmillan Inc v Bishopsgate Investment Trust Plc (No3)* [1996] 1 WLR 387, 391-92, [1996] 1 All ER 585, [1996] BCC 453, (1995) 139 SJLB 225 (Staughton LJ).

[162] ibid 841.

rigid rules, but upon a search for appropriate principles to meet particular situations."[163] Accordingly:

> While it is convenient to identify this three-stage process, it does not follow that courts, at the first stage, can or should ignore the effect at the second stage of characterising an issue in a particular way. The overall aim is to identify the most appropriate law to govern a particular issue. The classes or categories of issue which the law recognises at the first stage are man-made, not natural. They have no inherent value, beyond their purpose in assisting to select the most appropriate law. A mechanistic application, without regard to the consequences, would conflict with the purpose for which they were conceived. They may require redefinition or modification, or new categories may have to be recognised accompanied by new rules at stage 2, if this is necessary to achieve the overall aim of identifying the most appropriate law….[164]

Accordingly, the construction of categories of issue should involve consideration to the implications for the accompanying choice of law-rules, and, in turn, the formulation of choice of law-rules should take in the consequences of the application of that rule, which is to determine the applicable law, which must be the *appropriate* law for the particular issue; in other words, each element of the choice of law approach must be defined in consideration of its implications for the other.

(i) Characterisation of the issues: An autonomous international view

For purpose of characterisation, three relevant categories of issue can be distinguished: (1) claim and issue preclusion; (2) wider preclusion; and (3) preclusion procedure, which correspond to the true issues thrown up by a plea of finality of litigation based on a foreign judgment amenable to recognition in the forum State. Category (1) 'claim and issue preclusion' comprises issues resolved in English law by the res judicata doctrine, including merger *in rem judicatam* and estoppel *per rem judicatam*, and in Dutch law by the res judicata doctrine under Art 236 ('*gezag van gewijsde*') and the sufficient interest-requirement under Art 3:303 BW ('*gebrek aan belang*'). The category refers to issues arising where (a) a successful claimant reasserts the cause of action for which he already recovered judgment abroad; (b) an unsuccessful claimant or defendant contradicts a foreign court's findings regarding a claim; or (c) a party contradicts a foreign court's findings regarding an issue.

Category (2) 'wider preclusion' involves issues addressed in English law by the doctrine of abuse of process, involving instances of relitigation-abuse and *Henderson v Henderson*-abuse, and in Dutch law by abuse of process doctrine under Art 3:13 BW in conjunction with Art 3:15 BW ('*misbruik van procesrecht*'). The category refers to issues that arise where a party's litigation conduct is inappropriate in light of prior proceedings, for instance, because (a) a party raises a claim or issue that was not but could and should have been raised and determined in those prior proceedings; (b) a party seeks to relitigate a matter that he previously determined against him, but in proceedings against a stranger, not against the same party or a privy; or (c) a party seeks to relitigate a matter that has been judicially determined but not so as to trigger res judicata effect).

[163] ibid.
[164] ibid 840.

Category (3) 'preclusion procedure', finally, includes typical 'housekeeping' issues resolved in English law generally under the CPR on the striking out of statements of case or on summary judgment, or in accordance with the general adversarial principle that when a particular point has not been taken by a party, the court will not normally be justified in raising it of his own motion, unless the point goes to his jurisdiction to make the ruling in question, and in Dutch law under the general procedural rules on the raising of and implications of procedural pleas, as well as Art 236(3) Rv, which prohibits a court from applying the res judicata doctrine of its own motion. The category concerns issues on (a) how the preclusion process operates and (b) what legal effect preclusion has.

The proposed categories of issue are admittedly "man-made, not natural", and have "no inherent value, beyond their purpose in assisting to select the most appropriate law",[165] and may well in time as the law develops require redefinition or modification, or new categories may have to be conceived accompanied by new rules at the stage of selecting (or creation) of suitable conflicts-rules at the second stage.

Nevertheless, all three categories are defined autonomously at an adequate level of abstraction from domestic legal systems to allow for adequate and efficient characterisation, without being set up too narrowly, which may occur if the categories had been defined solely by reference to the law of a single jurisdiction, in which case the category is likely to attract only a particular domestic rule under forum law that may not have any equivalent in the foreign legal system.

(ii) Proposed conflicts-rules

a. Claim and issue preclusion

The law of the judgment-rendering State determines the claim and issue preclusive effects of a judgment.

This "*lex processualis loci actus*"[166]-rule is justified by the fact that the judgment that forms the basis for the preclusion plea is the product of rendering State's civil justice system, with its various factors of preclusion, including but not limited to pleading practice (e.g. fact-based or form-based pleading), rules on the scope of a claim (e.g. the ability to add parties or to add or amend claims or defenses), rules regulating litigation conduct of litigation, the role of the court in the process of adjudication (i.e. whether a system is adversarial or inquisitorial), and the available means of recourse against a judgment. Hence, what a judgment properly rendered res judicata can only be ascertained by reference to the law of the judgment-rendering State.

The preclusion law of the judgment-rendering State influences critical decisions of parties (e.g. on joinder of claims or parties, resource allocation, and the decision (not) to appeal), as well as nonparties (e.g. on intervention), which decisions become impossible if the applicable law is uncertain; no other conflicts-rule can offer this certainty (e.g. the law of the recognising State obviously is inherently variable), because the only certain thing is where the parties obtain their judgment.

Moreover, the local policies of the judgment-rendering State will be undermined, if the law which will determine the claim and issue preclusive effect of a

[165] ibid.
[166] See Szászy (Introduction n 25) 453.

judgment is designated by any other factor than the jurisdiction from which the judgment issued, since parties will not necessarily (*in any event*) base their litigation decisions on the law of that State.[167]

A controversial question has been to what extent preclusive effects should be attributed that exceed those normally conferred on local judgments in the recognising State (or are unknown in that State);[168] some authors support a restrictive approach which limits the effects to limits set by the *lex fori* (a sort of 'combination of laws' approach),[169] while others support the effects exceeding those attributed to domestic judgments[170]. There are two reasons for granting the effect as attributed under the law of the judgment-rendering State. First, a court may be compelled to attribute preclusive effects that exceed domestic law, or effects which are entirely unknown (in particular, as a matter of procedural justice under Art 6(1) ECHR).[171] Second, the refusal to confer a foreign judgment effects it has under the law of the rendering state, as Schlosser noted, "is not sound in theory": "It is an empty thinking in categories of prestige: how can we hold a foreign judgment to have more weight than our own judgments?"[172] The approach undermines the objectives of private international law: decisional harmony, regardless that a judgment is used in varying legal systems.

1. Public policy exception

The court seized shall apply its own law to the extent that the law of the judgment-rendering State leads to under- or overpreclusion in manifest violation of public policy, including Art 6(1) ECHR.

To some extent, Art 6(1) ECHR imposes a minimum level of preclusion (implicating the principle of legal certainty) and a maximum level of preclusion (implicating the right of court access).[173] A court must refuse to apply the law of the

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[167] See Erichson (Chapter 4 n 7) 999.

[168] cf Fischer (n 158) 204-05 ("More profound are the objections against the recognition of effects which are unknown to the law of the recognising State, and which are not reconcilable with domestic law.") ("Gewichtiger sind die Bedenken gegen die Anerkennung von Urteilsbindungen, die dem Recht des Anerkennungsstaates fremd sind, die sich also nicht mit inlämdischen Rechtsregeln vereinbaren lassen.")

[169] See Gottwald (Introduction n 18) 262 (with reference to Hans Hoyer, *Die Anerkennung ausländischer Eheentscheidungen in Österreich* (Manz, Vienna 1972) 79ff; Rainer Hausmann, *Die kollisionsrechtlichen Schranken der Gestaltungskraft von Scheidungsurteilen* (Beck, München 1980) 180ff; Heinrich Nagel, *Internationales Zivilprozeßrecht* (3rd ed Aschendorff, Münster 1991) [638]; Haimo Schack, *Internationales Zivilverfahrensrecht* (Beck, München 1991) [795]ff; Reinhold Geimer, *Internationales Zivilprozeßrecht* (2nd ed O Schmidt, Köln 1993) [2780]; and Hugo Heidecker, 'Über die materielle Rechtskraft ausländischer Urteile, insbesondere ausländischer Ehescheidungsurteile in Deutschland' (1893) 18 ZZP 453, 468ff).

[170] ibid (citing CL von Bar, *Theorie und Praxis des internationalen Privatrechts: Vol II* (2nd ed Hahn, Hannover 1889) 459; Helmuth Gesler, *§328 ZPO: ein Beitrag zu der Lehre von der zwingenden Natur der Kollisionsnormen* (Bensheimer, Mannheim 1933) 21; Arthur Nussbaum, *Deutsches internationales Privatrecht unter besonder Berücksichtigung des österreichen und schweizerischen Rechts* (Mohr, Tübingen 1932) 427 fn 4; Erwin Riezler, *Internationales Zivilprozessrecht und prozessuales Fremdenrecht* (W de Gruyter, Berlin 1949) 520ff; Ulrich Spellenberg, '[Review of] Internationales Zivilprozeßrecht. 2., neubearbeitete und erweiterte Auflage. (Aschendorffs juristische Handbücher, Bd. 85.)' (1987) JuristenZeitung 1116-17).

[171] See text to n 109ff..

[172] Schlosser (Chapter 3 n 3) 41-2 ("Whenever recognition of a foreign judgment is justified, there is no reason to slavishly assimilate it to a comparable domestic judgment. Transnational co-operation requires that the foreign judgment be given the same effect as it would have in its country of origin, 'no more, but surely no less'.").

[173] See text to n 109ff.

judgment-rendering State insofar as that law undercuts the minimum or exceeds the maximum level of preclusion.[174]

Moreover, the attribution of preclusive effect to a judgment may prevent the effectiveness of local rules of a public policy nature, in which case the court should also refuse to apply to that extent the law of the judgment-rendering State.[175]

b. Wider preclusion

The law of the forum determines whether litigation conduct in the forum is to be precluded in light of prior litigation abroad. In the application of forum law, account must be taken of the rules of conduct and procedure of the judgment-rendering State.

This form of preclusion is not concerned with the *effects* of a judgment, but with the *conduct* of parties in the forum that is asked to intervene in the private interest and impose finality of litigation in light of prior litigation abroad. A court should judge the lawfulness of local litigation conduct by local standards of conduct, but in deciding, the court should take account of the rules of conduct and procedure of the judgment-rendering State where the prior litigation took place that is alleged as foundation for the wider preclusion plea, because without a norm violation abroad, there is no basis for that plea. The situation is comparable to where a traffic accident occurs in State X and the tort claim for negligence due to speeding is then filed in State Y and governed by the law of that State. In the application of the law of State Y, everyone expects that the traffic rules of State X are taken into account to establish whether the defendant was speeding. So too, for instance, if a party was not required under Dutch procedural law to join a certain claim in the prior case in the Netherlands, there is no basis for finding *Henderson v Henderson*-abuse in England and Wales, even if by English standards, such claim should be joined in English proceedings.

The inverse is also true; a Dutch court should normally strike out a claim as an abuse of process ('*misbruik van procesrecht*'), if according to English law that claim could and should have been made during the prior proceedings in England and Wales.

c. Preclusion procedure

The law of the forum determines the process of preclusion and the implications of an effective preclusion plea.

This is a basic proposition that procedural housekeeping issues are governed by the law of the court addressed. These issues do not form part of the parties' critical

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[174] See Gottwald (Introduction n 18) 262 (noting two acceptable limitations: first, effects that contravene public policy and, second, effects which are cannot be 'incorporated' in the recognising State's legal order.) ("Nur Entscheidungswirkungen, die dem Inland gänzlich unbekannt sind order dem ordre public widersprechen und damit nicht in die inländische Rechtsordnung eingepast werden können, werden einheitlich nicht anerkannt."). cf Fischer (n 158) 204-11 (problems should be dealt with by refusing to recognise particular aspects of a judgment's preclusive effects on grounds of public policy rather than taking general recourse to an equalisation of effects-approach or by a refusal to attribute the foreign judgment any effects. In this respect, the parties involved in foreign litigation should generally expect foreign preclusion law to determine the preclusive effects of a foreign judgment, and the party invoking the public policy exception of the forum should be required to provide the necessary proof to substantiate that plea).

[175] See text to n 133ff.

decisions in the conduct of the litigation that led to the judgment that is relied upon locally to effect finality, nor do such issues in any relevant way affect the policies of the judgment-rendering State; in fact, by forcing a court to step into the shoes of the judgment-rendering court, nothing is gained in terms of ensuring international decisional harmony, which in this context requires a uniform level and effectiveness of finality of litigation.

The comparison can be made with the execution of a foreign judgment; the modes and procedure of execution are invariably governed internationally by the law of the State of execution.[176] Unlike in the context of execution of a foreign court's orders or measures, however, it is unlikely that provision needs to be made for the adaptation of a foreign judgment's preclusive effects so as to reach "equivalent effects", which may be necessary in relation to execution.[177]

(iii) Recap and assessment

a. Common law approaches

Preclusion by foreign judgments recognised at common law operates differently in English and Dutch courts. Unlike the Netherlands, England and Wales applies a specific claim preclusive rule to foreign judgments—s 34 of the Civil Jurisdiction and Judgments Act 1982—which categorically bars a successful claimant from reasserting the cause of action for which he recovered judgment abroad. The Netherlands expressly permits reassertion under Art 431(2) Rv, though Art 3:303 BW may bar reassertion if a claimant lacks a sufficient interest to file another claim for the same cause of action, which is not unlikely, since Art 431(2) Rv permits enforcement by action on a foreign judgment amenable to recognition at common law, much like enforcement at common law in England and Wales (and in any event, the foreign judgment can be recognised and attributed preclusive effect).

Regarding claim and issue preclusion, the English 'cautious *lex fori*' approach strikes a middle ground between dogma and good sense: the English res judicata doctrine (read: merger and estoppel doctrines) applies, not because English law is thought on balance to be the proper law of preclusion, but because the issues of preclusion are deemed procedural and thus excluded from choice of law-analysis altogether; at the same time, foreign law is taken into account—if pleaded and proved (if contested)—so as to avoid injustice by overpreclusion. By contrast, the Dutch res judicata doctrine (read: Art 236 Rv) never applies to a foreign judgment; instead, unwritten principles of private international law (including good faith and fairness) mandate a court to determine for each recognised foreign judgment what res judicata effect properly attaches in the circumstances of the case, and to this end the court

[176] cf Institute de Droit International, Resolution on 'Exécution des jugements' (Paris 1878) Art 5 ("Les voies ou modes d'exécution doivent être déterminés par la loi du pays où l'exécution a lieu. Toutefois la contrainte par corps ne doit être applicable nulle part, si elle n'a pas été prononcée par le tribunal qui a rendu le jugement étranger.") (available at : www.idi-iil.org/idiE/resolutionsE/2007_san_01_en.pdf. Last access 1 August 2013).

[177] See, eg, Brussels I Regulation (recast) (Introduction n 44) Art 54(1) ("If a judgment contains a measure or an order which is not known in the law of the Member State addressed, that measure or order shall, to the extent possible, be adapted to a measure or an order known in the law of that Member State which has equivalent effects attached to it and which pursues similar aims and interests. Such adaptation shall not result in effects going beyond those provided for in the law of the Member State of origin.").

takes account of foreign law, because a foreign judgment cannot be attributed more effects than attach under the law of the rendering State.

On issues of wider preclusion, English and Dutch courts do not apply foreign law (directly), because wider preclusion is based on the parties' litigation *conduct* abroad, not a foreign judgment's preclusive effects. The matter is of greater relevance in England and Wales considering that English law on wider preclusion (read: abuse of process doctrine) is more developed than the equivalent Dutch law. Nevertheless, both English and Dutch courts take account *as facts* of prior conduct abroad and foreign procedural law in the process of determining whether current litigation conduct should be struck out.

The preclusion process regarding foreign judgments in England and Wales is identical to that for domestic judgment, apart from the prospect of hearing of foreign law expert witness testimony. Conversely, in the Netherlands, the strictures of Art 236 Rv—a court is barred from raising res judicata effect of its own motion—are inapplicable, so it has more flexibility to raise and administer the matter once it learns of the existence of a foreign judgment that is potentially relevant. Otherwise, in terms of the requirements regarding when a res judicata *plea* can or must be made, the law of the forum will apply on grounds that the issue is *ordinaria litis*.

Public policy plays no role for preclusion by foreign judgments, because foreign preclusion law is (technically) not applied in England and Wales and the Netherlands, even though it is taken into account.

1. Assessment

The English and Dutch common law approaches take in fundamentally contrary positions in comparison with the choice of law approach suggested for implementing finality of litigation between jurisdictions; both approaches exclude the application of foreign preclusion law, though—certainly as an expression of good sense—both English and Dutch courts will take foreign preclusion law into account. However, this good sense does not go all the way; for instance, under English law, s 34 of the Civil Jurisdiction and Judgments Act 1982 categorically bars a successful claimant from reasserting the cause of action for which he recovered judgment abroad, notwithstanding that reassertion would be permissible under the law of the judgment-rendering. This approach can cause *over*preclusion and serious injustice.[178]

Moreover, by insisting on the application of forum law, which thus forms a ceiling on the preclusive effects that can be attributed to a foreign judgment, English courts run the risk of *under*preclusion, in circumstances where the scope of preclusion under the law of the judgment-rendering court is wider than in English law.[179] Good sense might require preclusion beyond English standards of finality.[180] This risk is less imminent in the Dutch approach, which does not require the application of Dutch preclusion law. On the other hand, the Dutch approach has been formulated so loosely and is misunderstood to such extent that in practice, Dutch courts have developed less sensitivity to foreign preclusion law than their English counterparts.

[178] See Chapter 4, text to n 61ff.

[179] It is unclear, for instance, how an English court would be able to take proper account of the law of certain U.S. States allowing for non-mutual preclusion in certain well-defined circumstances. See H Erichson (Chapter 4 n 7) 965 with further references.

[180] It is suggested that an English court might seek to reach an equivalent result though its inherent power to prevent an abuse of process. On the so-called 'functional equivalence' approach see text to n 197ff.

The requirement (or even mere discretion) for courts to attribute the preclusive effect that is 'appropriate' in the circumstances, offers no real guidance and thus causes uncertainty. More recently, the Dutch Supreme Court appears to be addressing this issue by making direct reference to the preclusion law of the judgment-rendering State as providing the natural ceiling for a foreign judgment's preclusive effects.[181]

Finally, the approach of invariably applying forum law is inefficient, since it forces both court and parties to consider two legal systems cumulatively, while the application of a single law—the law of the judgment-rendering court—would (in theory) suffice to do justice. Two points can be made in this regard. First, should it matter that application of the law of the judgment-rendering court is tantamount to *applying* foreign law? Of course not—English courts are well able to make findings on the meaning of foreign law. It is something they do all the time.[182] The fact that they do so by reference to expert evidence and that this evidence may occasionally be wrong[183] does not outweigh the benefits of international decisional harmony when it comes to the implementation of the principle of finality of litigation between legal systems.[184]

Second, should it matter that application of foreign preclusion law involves applying foreign *procedural* law? Of course not, the belief that for reasons of convenience questions of procedure are always best governed by English law is mistaken, as demonstrated in the present context: [185] whereas English courts theoretically apply only English preclusion law, in truth they have foregone the comfort of the *lex fori* by accommodating foreign law through the back door by taking it into account so as to avoid injustice. What then is left of the legitimacy of the procedural question exception? It is submitted that much is to be said for the approach recommended by Arden LJ in *Harding v Wealands* that "a reference to the law of the forum must be the exception, and it must be justified by some imperative which, relative to the imperative of applying the proper law, has priority. It may, for instance, be appropriate to apply the law of the forum where the court cannot put itself into the shoes of the foreign court".[186]

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[181] See Chapter 4, text at n 222ff.

[182] *Al-Jedda v Secretary of State for Defence* [2010] EWCA Civ 758, [2011] QB 773, [2011] 2 WLR 225 [191] (Elias LJ).

[183] See Chapter 2, text at n 488. See Van de Velden (Introduction n 26).

[184] Gottwald (Introduction n 18) 262 (noting that practical difficulties in the application of foreign law are no reason to reject the application of foreign preclusion law, because such difficulties arise equally in relation to the application of foreign substantive laws, and a lack of knowledge of foreign law can be addressed. Only if the law of the rendering State is applied, a judgment will have universal effects.) ("Entscheidungswirkungen treten in der Form ein, die der Entscheidungsstaat vorsieht. Nur dadurch wird erreicht, daß eine gerichtliche Entscheidung jedenfalls im Regelfall einheitliche universelle Wirkungen hat. Daß manche Entscheidungswirkungen des ausländischen Prozeßrechts im Detail unbekannt sind, ist kein schlagendes Gegenargument. Wissensdefizite im Inland kann man überwinden. Sie haben auch im materiellen IPR Grundsatz nie gehindert, ausländisches Recht trotz aller praktischen Unschärfen anzuwenden.").

[185] cf Fischer (n 158) 204 (emphasising that in international civil procedural law, a legal relationship should not be governed by a legal system which could not be anticipated by the parties. In both areas, he notes, the argument of convenience in favour of reference to the law of the forum, which is obviously more expedient and less costly, provides insufficient justification for its preference over referring to foreign law, since this argument favours universal application of the lex fori, and thus it affects private international law more generally). cf Gottwald (Introduction n 18) 263.

[186] *Harding v Wealands* [2004] EWCA Civ 1735, [2005] 1 WLR 1539, [2005] 1 All ER 415, [2005] 2 CLC 411, [2005] RTR 20, (2005) 155 NLJ 59, revd [2006] UKHL 32, [2007] 2 AC 1, [2006] 3 WLR 83, [2006] 4 All ER 1, [2006] 2 CLC 193, [2006] RTR 35, (2006) 156 NLJ 1136, (2006) 150 SJLB 917 [52].

This approach was not accepted by the House of Lords in the context of international tort law when it comes to the quantification of damages.[187] However, in this context it may well be preferable. English courts have shown themselves more than capable to step into the shoes of the foreign judgment-rendering court. Accordingly, the application of English preclusion law as the law of the forum cannot be justified relative to the imperative of applying the proper law of preclusion.

This dogmatic shift away from excluding any choice of law analysis in respect of issues of preclusion with a foreign element (here the *judgment*) need not imply that all issues are necessarily governed by foreign law; the proposed conflicts-rules reflect the overall aim to identify the most appropriate law to govern *a particular issue*,[188] but do so in a more internationalist spirit,[189] by designating foreign law or forum law on the foot of neutrality, and *as appropriate* to issues categorised as concerned with (1) claim and issue preclusion; (2) wider preclusion; or (3) preclusion procedure.

b. The European approach

Aspects of the problem of claim and issue preclusion by judgments recognised under the Brussels and Lugano Regime are harmonised at the EU-level.[190]

The clarification of the precise extent of this development, and its limits, require further intervention by the CJEU, which has taken the lead in the creation of EU preclusion law through cases like (certainly) *Gothaer*[191] and (arguably) *De Wolf v Cox*[192]. For aspects of preclusion untouched by harmonisation, the *Hoffmann* principle unquestionably refers to the law of the judgment-rendering State, though this principle extends merely to the effects of judgments, and does not address the problem of wider preclusion, which relates to the litigation *conduct* of parties, not a judgment's preclusive *effects*.[193] A parallel development is taking place at the ECtHR, which has interpreted Art 6(1) ECHR as imposes both minimum and maximum levels of preclusion by judgments generally.[194] This development influences EU preclusion law, but may also impact on how Member State courts resolve issues of preclusion by foreign judgments, including judgments recognised under the Brussels and Lugano Regime.

1. Assessment

The European approach to the problem of preclusion by foreign judgments is characterised, like many other areas of EU law, by a tendency to harmonise the law; the idea clearly being that harmonisation is a good thing. That process is not being undertaken on proposal of the European Commission following extensive consultation in the Member States by act of Parliament and the Council, but by the Court of Justice. Apart from the question of legitimacy, this intervention may turn out to be misguided.

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[187] *Harding v Wealands* (Chapter 4 n 85).
[188] ibid (emphasis added).
[189] ibid.
[190] See Chapter 5, text to n 40ff.
[191] *Gothaer* (Part I, Introduction n 1). See Chapter 5, text to n 91ff.
[192] *De Wolf v Cox* (Part I, Introduction n 2). See Chapter 5, text to n 57ff.
[193] See text to n 55ff.
[194] See text to n 113ff.

At present, the extent of harmonisation of preclusion law at the EU-level is uncertain, but certainly incomplete. The harmonisation is inherently incomplete because preclusion by third State judgments (i.e. non-Brussels and Lugano Regime judgments) is not regulated (yet) at the EU-level. Harmonisation may further prove to be incomplete if the CJEU retracts and by further intervention—which will no doubt be necessary—clarifies that too much has been read into its judgments in *De Wolf v Cox*[195] and *Gothaer*[196].

At any rate, at present, there is fragmentation in the law on preclusion by foreign judgments: the *Hoffmann* principle directs to the law of the judgment-rendering State, while aspects of preclusion are governed by EU law. Moreover, as a third factor, the ECtHR is increasingly active in the area of preclusion law under the flag of Art 6(1) ECHR, which the Court has held imposes minimum and maximum levels of preclusion, which may cause tension between the new principles of preclusion as specificed at EU-level.

(3) Applying the applicable law: The principle of functional equivalence

As illustrated by Part I on English and Dutch preclusion law, preclusion law is complex. This inherent complexity is exacerbated by the need to apply foreign preclusion law (for claim and issue preclusion) or take account of foreign preclusion law (for wider preclusion). Part I also demonstrated that a functional approach is required in the analysis of the question how legal systems address the problem of finality of litigation; legal systems use different rules and doctrines to achieve the same result—rule and doctrines, though labeled differently, are functionally equivalent.

For that reason, for the purpose of applying or taking account of the law of the judgment-rendering State, a functional approach in the form of an analytical principle of 'functional equivalence' is appropriate;[197] along these lines the International Law Institute in its Santiago Resolution of 27 October 2007 entitled 'Substitution and Equivalence in Private International Law',[198] held, albeit in a different context concerned with substitution in private international law,[199] which is inappropriate for preclusion by foreign judgments, that 'equivalence' is based on "a functional comparison between the rules of the law governing the effects of the legal relationship or act and the rules of the law under which the legal relationship or act was created."[200] Equivalence, according to the resolution, goes to the "the aims and interests respectively pursued" by the laws compared.[201] The resolution further clarifies that "[e]quivalence is determined according to the law applicable to the effects of the legal relationship or act which is the object of the comparison."[202]

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[195] *De Wolf v Cox* (Part I, Introduction n 2). See Chapter 5, text to 57ff.
[196] *Gothaer* (Part I, Introduction n 1). See Chapter 5, text to n 91ff.
[197] cf Von Mehren and Trautman (Introduction n 19) 847.
[198] <www.idi-iil.org/idiE/resolutionsE/2007_san_01_en.pdf> accessed 1 June 2013.
[199] ibid Art 1 ('Substitution allows a legal relationship or act originating in a given State to entail all or part of the effects attached to a similar relationship or act under the law of another State.").
[200] ibid Art 2.
[201] ibid Art 3.
[202] ibid Art 4.

Accordingly, the court of the State addressed, which has to resolve an issue of preclusion triggered by a foreign judgment amenable to recognition, should not trap itself in an analysis of the law of the judgment-rendering State through the glasses of domestic preclusion law (e.g. by reasoning as follows: under domestic law, this issue is one addressed by the res judicata doctrine, so let us look for and apply the res judicata doctrine under the law of the judgment-rendering State); rather, the court's inquiry should be issue-focused, with an emphasis on evaluating how under the law of the judgment-rendering State that issue is resolved, regardless of the characterisation of the issue—if any—under forum law of the restrictions upon the effect of judgments under domestic law, and only subject to correction pursuant to the requirements of the forum's public policy.[203]

(4) Jurisdiction to determine a claim or issue with finality

A foreign judgment amenable to recognition should not be attributed preclusive effects as to a claim or issue that the rendering court lacked jurisdiction to determine *with finality*. Jurisdiction in the narrow sense used here, has various aspects, as Diplock LJ (as he then was) explained in *Garthwaite v Garthwaite*:

> In its narrow and strict sense, the 'jurisdiction' of a validly constituted court connotes the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its process by reference (1) to the subject-matter of the issue or (2) to the persons between whom the issue is joined or (3) to the kind of relief sought, or to any combination of these factors.[204]

Against this background, for instance, the Court of Appeal in the later case of *Buck v Attorney General*,[205] that an English court lacks (subject-matter) jurisdiction on the validity of a law of a another State within the legal order of that State; according to Diplock LJ in that case:

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[203] cf Von Mehren and Trautman (Introduction n 19) 847 ("...so far as domestic recognition policies are relevant, they permit the according of preclusive effects equivalent to those that could be achieved domestically, though through the use of different techniques. Otherwise, mere differences in technique are taken as differences in basic policies. … The same test – functional rather than technical equivalence – should determine the implications of domestic recognition policies for the recognition of foreign judgments."). Note that the authors, at 848, were, at first, persuaded by arguments of convenience and ease into accepting "outer limits of recognition" as far as foreign judgments are concerned (sister-state judgments being subject to other considerations), meaning that a foreign judgment ought not to accorded broader preclusive effects than justified under the functional equivalence-test, at least not until the moment that the international order has become more stable and unified. However, subsequently—see Von Mehren and Trautman (Introduction n 9) 1682—the authors accepted that that *in particular circumstances* going beyond the effects allowed under the functional equivalence-test can be justified, for instance, where the recognising State "has no concern with either the parties or the underlying transaction". In those circumstances, there is no important reason for denying preclusive effects that exceed those attributed under domestic law, in particular if the rules of preclusion (or functionally equivalent rules) of the rendering jurisdiction are easily ascertained and administered. Going beyond the limits set by the test can even be justified in other circumstances (e.g. where the state of recognition is concerned with one or more of the parties or with the underlying situation and where the rendering jurisdiction's domestic rules are not easily ascertained or administered), they add, if "the avoidance of undue harassment of the successful party, whose strategy was shaped by the domestic binding effects of the litigation in the rendering jurisdiction, coupled with a determined effort to foster greater stability and unification in the international order than now exists".

[204] [1964] P 356, 387, [1964] 2 WLR 1108, [1964] 2 All ER 233, (1964) 108 SJ 276.

[205] [1965] Ch 745, [1965] 2 WLR 1033, [1965] 1 All ER 882, (1965) 109 SJ 291.

> For the English court to pronounce upon the validity of a law of a foreign sovereign state within its own territory, so that the validity of that law became the *res* of the res judicata in the suit, would be to assert jurisdiction over the internal affairs of that state. That would be a breach of the rules of comity. In my view, this court has no jurisdiction so to do.[206]

The Court added that on the facts of that particular case:

> The only subject-matter of this appeal is an issue as to the validity of a law of a foreign independent sovereign state, in fact, the basic law containing its constitution. *The validity of this law does not come in question incidentally in proceedings in which the High Court has undoubted jurisdiction, as, for instance, the validity of a foreign law might come in question incidentally in an action upon a contract to be performed abroad.* The validity of the foreign law is what this appeal is about; it is about nothing else.[207]

The obvious follow-up question is whether a foreign judgment amenable to recognition should be attributed issue preclusive effect in case the validity of a law of a foreign sovereign State (or any other matter beyond the ordinary subject-matter jurisdiction of an English court) *did* come incidentally in question, for instance, in an action upon a contract to be performed abroad over which the judgment-rendering court has unquestionable jurisdiction. Arguably not, because the rendering court did not have jurisdiction to render the matter res judicata, at least not beyond the limits of the English legal order, not for purposes of the legal order of the enacting State, nor for the legal order of any other foreign State.

Along these lines the Court of Appeal in *Yukos* observed on the question whether a finding of a Dutch court on the partiality and dependence of the Russian judiciary could be preclusive in England and Wales (the Court held not, because the issues were different—the issue in the English proceedings was whether recognition of Russian judgments violated English public policy, while the issue in the Dutch proceedings was whether those same judgments violated Dutch public policy):

> [I]f we had decided that there was an issue estoppel in this case on the basis that in truth the issue in the Dutch proceedings was the same as the issue in these English proceedings, we would be inclined to invoke the exception for rather the same reasons as we have already decided that the issue for the English court is that of English public order. It must ultimately be for the English court to decide whether the recognition of a foreign judgment should be withheld on the grounds that that foreign judgment is a partial and dependent judgment in favour of the state where it was pronounced. *That is a question so central to the respect and comity normally due from one court to another that to accept the decision of a court of a third country on the matter would be an abdication of responsibility on the part of the English court. On matters of this kind, we should accept our own responsibilities just as we would expect courts of other countries to accept theirs.*[208]

At this point it bears reemphasis that this inquiry into the foreign judgment-rendering court's jurisdiction occurs *after* the foreign judgment's recognition, which process itself (typically)[209] involves an assessment of the basis on which the foreign court

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[206] ibid 770.
[207] ibid.
[208] *Yukos English Court of Appeal* (Introduction n 28) [160].
[209] But see Chapter 3, text to n 526ff.

assumed jurisdiction. However, as the example shows, the present jurisdictional inquiry is a different one, and goes to the question whether a court that determines a matter and whose judgment *is* amendable to recognition has jurisdiction to determine the matter with finality.

This jurisdictional inquiry has two aspects: first, did the rendering court have jurisdiction to determine the matter with finality for purposes of the legal order of the State of rendition; and, second, did the rendering court have jurisdiction to determine the matter with finality for purposes of the legal order of the State addressed. The distinction can be illustrated by the following example. Under Art 31 of the Brussels I Regulation, a Dutch court has jurisdiction to rule on the validity of a European patent in an action for infringement in which the patent's invalidity in England and Wales has been raised, *at an interim stage*, as a defence to the adoption of a provisional measure concerning cross-border prohibition against infringement.[210] The resulting judgment is a judgment in the sense of Art 32 of the regulation and subject to automatic recognition under Art 33. However in a subsequent case in England and Wales, the judgment *cannot* be attributed preclusive effect on the issue of validity. In the first place, *as a matter of Dutch law* the judgment-rendering court lacked jurisdiction to determine the issue with finality, because under Dutch procedural law, a court in interim proceedings can only make provisional findings and its judgment cannot be attributed res judicata effect under Art 236 Rv.

In the second place, *as a matter of English private international law*, the rendering court lacked jurisdiction to determine the issue with finality; Article 22(4) of the Brussels I Regulation, which displaced English common law jurisdictional principles for matters in its scope, denies the Dutch court jurisdiction to determine the issue *with finality*, irrespective of whether the issue is raised by way of an action or a plea in objection,[211] and a judgment that falls foul of that provision, is not subject to automatic recognition under Art 33[212]. Accordingly, though an English court must recognise the Dutch judgment as long as it does not purport to determine with finality the issue of validity,[213] the court cannot attribute the judgment issue preclusive effect, because the Dutch court lacked jurisdiction to render the issue res judicata.

In addition to this discussion, it may be noted that Von Mehren and Trautman have identified several factors which should influence a court's decision whether to attribute a foreign judgment preclusive effect:

(1) some court decisions express policies or concerns having only *domestic* implications, while other decisions express policies or concerns with *multistate* implications (e.g. some decisions may well be preclusive in the

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[210] Case C-616/10 *Solvay SA v Honeywell Fluorine Products Europe BV and Others* [2012] ECR I-0000 [48]-[51].

[211] Case C-4/03 *Gesellschaft für Antriebstechnik mbH & Co. KG v Lamellen und Kupplungsbau Beteiligungs KG* [2006] ECR I-6509 [31].

[212] ibid [24].

[213] ibid [49]-[50] ("49. According to the referring court, the court before which the interim proceedings have been brought *does not make a final decision* on the validity of the patent invoked but makes an assessment as to how the court having jurisdiction under Article 22(4) of the regulation would rule in that regard, and will refuse to adopt the provisional measure sought if it considers that there is a reasonable, non-negligible possibility that the patent invoked would be declared invalid by the competent court. 50. In those circumstances, it is apparent that there is no risk of conflicting decisions as mentioned in paragraph 47 above, since the provisional decision taken by the court before which the interim proceedings have been brought *will not in any way prejudice* the decision to be taken on the substance by the court having jurisdiction under Article 22(4) of Regulation No 44/2001.") (emphasis added).

rendering State, but implement strictly domestic policies or concerns, like a dismissal on the ground of late filing, or a dismissal because the requested remedy is unknown in the forum, and should are properly preclusive only within that State);[214]

(2) some court decisions are aimed at effects, in whole or in part, specifically *limited* to the rendering jurisdiction (e.g. an order for the attachment of assets), whereas others are *not* so limited, in which case, as regards another jurisdiction, the court addressed should render its proper decision;[215] and

(3) some decisions are rendered in typical two-party litigation, whereas other decisions involve *atypical parties* or concern *non-parties* who are not subject to the court's jurisdiction but whose interests are implicated by the litigation if the resulting judgment is given preclusive effect *against them* outside the rendering State.[216]

As regards the last consideration, Von Mehren and Trautman observed that it may be appropriate to accord broader preclusive effects against claimants, who usually have a choice among forums, than against defendants, who cannot select the court. Moreover, the authors argue that the litigational advantage inherent in the choice of forum could even justify a lack of 'mutuality' (i.e. wider preclusion), and illustrate this point by discussing the situation where a person not involved in (or privy to) the original litigation invokes the foreign judgment to his advantage against the person who was the claimant in the foreign proceedings culminating in the foreign judgment. In the situation where the foreign judgment would have no preclusive effect in litigation involving the nonparty under the law of the rendering state, but would be accorded such effect under the law of the recognising state. In those circumstances, they argue, there can be justifications for the recognising state to accord broader preclusive effects, thus breaking through the "natural ceiling" set by the law of the rendering state.

In the approach suggested in this thesis, this situation involves an issue of *wider preclusion*, which remains subject to the law of the State addressed, though the court addressed should take foreign law into account. The litigational advantage of the claimant (i.e. the choice of forum) is, it is respectfully suggested, no justification for attaching lesser preclusive effects to the resulting judgment in relation to the defendant; if the foreign judgment is amenable to recognition, and no other reason for allowing litigation applies, the law of the rendering State should be applied and finality, if it attaches under that law, upheld.

Another factor identified by Von Mehren and Trautman is that some judgments are rendered by an 'appropriate forum', while others are rendered by a

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[214] Von Mehren and Trautman (Introduction n 19) 849. Other decisions, he admits, are more difficult to qualify in this manner, for instance, dismissals on statute-of-frauds, statute-of-limitations, and public-policy grounds. The relevant question here is whether the adjudication's rationale is "a purely domestic one – for example, a local procedural concern against burdening the local courts with difficult evidentiary questions – or does the adjudication also express a policy with multistate implications?" Answering this question, however, "is rendered difficult because the significant distinctions are ordinarily irrelevant for, and consequently are articulated only rarely if at all in, the rendering jurisdiction's jurisprudence."

[215] Von Mehren and Trautman (Introduction n 19) 854. In support, the authors refer to the U.S. Supreme Court's decision in *Industrial Commission of Wisconsin v McCartin* 330 US 622, 630 (1947) ("Since this Illinois award is final and conclusive only as to rights arising in Illinois, Wisconsin is free under the full faith and credit clause to grant an award of compensation in accord with its own laws.").

[216] Von Mehren and Trautman (Introduction n 19) 927; and (Introduction n 9) 1681, and 1685ff.

relatively 'inappropriate forum'.[217] In this regard the authors note that a defendant who participated in a foreign proceeding in a relatively inappropriate forum in order to protect his assets there seems to be in a different position from that of an indemnitee, not an original party, defending a local proceeding on the basis of a foreign judgment holding that the plaintiff had no claim against the indemnitor. They argue that in the latter case, the arguments are strong for according preclusive effects beyond what they call "the natural minimum" (i.e. the court's dictum), and for allowing the indemnitee, though not a party to the original proceeding, to rely on the judgment defensively, while the propriety in the first case of according broader effects (i.e. effects analogous to domestic direct and collateral estoppel) is much more doubtful. Von Mehren later added:

> Whether to accord broader preclusive effects [i.e. more than the absolute minimum] in international practice could, moreover, well turn upon the jurisdictional basis asserted in the original action; a distinction might be taken, for example, between a defendant sued at his domicile and one brought into court by use of a 'long-arm' statute.[218]

This consideration too is inappropriate; after the court addressed determines that a foreign judgment must be recognised, which implies that the basis for jurisdiction of the rendering court was acceptable, the court should proceed to determine the judgment's claim and issue preclusive effects by application of the law of the judgment-rendering State. There is no scope in this process of determining the foreign judgment's preclusive effects for a review of whether the rendering court was a more or less appropriate forum; the sole question is whether the rendering court had jurisdiction as a matter of its own law and according to the law of the State addressed to determine the matter with finality so as to make it appropriate to attach preclusive effects to its judgment in the current proceedings.

(5) Comparison with the ALI proposed federal statute, § 4 on claim and issue preclusion

(i) The principle: the law of the judgment-rendering State

The approach put forward in this chapter is 'functionally equivalent'—to use familiar terms—to the method proposed under the ALI proposed federal statute on the recognition and enforcement of foreign judgments; as outlined in detail elsewhere,[219] § 4(a) of the ALI proposal (on 'Claim and Issue Preclusion') provides that, "a foreign judgment that meets the standards set out in this Act" (i.e. is amenable to recognition in the U.S.) "shall be given the same preclusive effect by a court in the United States that the judgment would be accorded in the state of origin". The proposal thus rightly distinguishes between the problems of *recognition* of foreign judgments and *preclusion* by foreign judgments, and closely aligns with the first choice of law principle suggested in this chapter that *the law of the judgment-rendering State determines the claim and issue preclusive effects of a judgment*.

(ii) Exceptions

[217] Von Mehren and Trautman (Introduction n 19) 920-922; and (Introduction n 9) 1682.
[218] Von Mehren and Trautman (Introduction n 9) 1682.
[219] See text to n 46ff.

Alike the approach suggested in this chapter—i.e. the court seized should apply its own law to the extent that the law of the judgment-rendering State leads to under- or overpreclusion in manifest violation of public policy, including Art 6(1) ECHR—the ALI proposed federal statute's reference to the law of the judgment-rendering State is not unqualified; § 4(a) further provides that a foreign judgment that meets the standards set out in the act need *not* be given the same preclusive effect by a U.S. court that the judgment would be accorded in the State of origin if the rule of preclusion applicable in the State of origin would be manifestly incompatible with a superior interest in the U.S. in adjudicating or not adjudicating the claim or issue that arises in the U.S. proceedings. The Reporters' Comments refer to a number of relevant circumstances that may trigger the exception. First, in circumstances where where the judgment-rendering State lacks formal rules or doctrines of preclusion, the ALI proposed federal statute would allow an American court to apply the 'superior interest' in the U.S. in not adjudicating the claim or issue. In those circumstances, similarly, it is likely that a court applying the approach suggested in this chapter would apply the public policy exception.

A difference applies regarding the second situation identified by the Reporters' Comments to the ALI proposal, which allows for an exception where the rendering State's preclusion rules are difficult to ascertain and a reference to foreign law may impose burdens on parties relying or opposing preclusion. Under the approach proposed in this chapter, difficulty in ascertaining foreign law is not a valid reason for an exception to its application; rather, the court addressed should use its best judgement based on the information (the parties put) at its disposal.

The two approaches do align again in response to the situation where the claim asserted in the U.S. is based on American law, and the U.S. or the state addressed has an interest in determining, by its own standards, the impact of the foreign judgment. The Reporters' Notes provide the example involving a claimant who initially sued in France for fraud and based his claim on the French Civil Code, and, subsequently, sues in the U.S. for violation of U.S. securities laws. On these facts, the notes indicate, "[e]ven if a French court would have entertained such a claim and French law would now preclude the claim because it was not asserted in the initial action, *the interest of the United States in providing a forum in the United States might justify an exception to claim preclusion*." The notes clarify that "[w]hile the choice of applicable law is not a limitation on recognition and enforcement generally…, it is an appropriate factor to take into account in determining the preclusive effect of a judgment."[220] The solution implies a refusal to apply foreign prelusion law on ground of an American superior interest in the matter's litigation; though an American court would not call it this way, this looks much like a 'public policy' exception to the application of foreign preclusion law, like that which is proposed as part of the approach outlined in this chapter.

More divergence between the approaches is to be expected regarding the guiding "factors" the commentary on the ALI proposed federal statute states for the purpose of determining whether superior interests in the U.S. are manifestly incompatible with looking to the preclusion law of the rendering state. Under the approach suggested in this chapter, the context or the amount at issue normally will not justify a departure from the law of the judgment-rendering State, whereas the ALI

[220] ibid §4(a), Reporters Notes [2].

proposal allows a court to consider in those circumstances whether greater or lesser preclusion than would be given in the rendering State is justified.

Similarly, substantial differences in procedural opportunities in the judgment-rendering State will not under the approach suggested in this chapter justify departing from the preclusion law of that State, unless, for instance, the scope of preclusion is entirely out of sync with the procedural opportunities, in which case application of the preclusion law of the judgment-rendering State may be contrary to public policy.

Regarding the factor referring to the strong interest of the U.S. or the particular U.S. state in adjudicating or not adjudicating the claim or issue, it is suggested that this goes rather to the judgment-rendering court's jurisdiction to determine the claim or issue with finality.[221]

The factor that refers to whether the law applied by the rendering state is significantly different from the law to be applied in the proceeding in the U.S. is irrelevant under the approach set out in this chapter; the situation will normally be addressed under the law of the judgment-rendering State, or, if the forum has a strong interest in the matter in question, the forum judgment-rendering State may as a matter of the law of the forum lack jurisdiction to determine the matter with finality.

Finally, though the Reporters' Notes do not expressly endorse the view that an American court could under § 4(a) attach *greater* preclusive effect on the ground of the burden associated with additional U.S.-based litigation,[222] the burden associated with additional litigation in the forum in case the law of the judgment-rendering State permits the litigation does not weigh up against the injustice that imposing finality by preclusion would entail.

(iii) Wider preclusion

The ALI proposal does not specifically address wider preclusion, which is proposed as a separate choice of law-category in this chapter. Nevertheless, the broad concept of 'res judicata' in American preclusion laws covers most if not all issues that this chapter would characterise as issues of wider preclusion. In terms of the category of 'claim and issue preclusion' subject to rule of § 4(a) of the ALI proposal, the Reporters' Notes specify:

> The law of judgments distinguishes between claim preclusion and issue preclusion. Claim preclusion means that a party that has raised a claim in the first forum that resulted in a judgment on the merits entitled to recognition is precluded from raising the same claim against the same opposing party in a second forum. Issue preclusion, also known as collateral estoppel, refers to a doctrine, not universally accepted outside the United States, that determination of an issue after contest may be deemed conclusive in a second action between the same parties, even when the claim raised in the second action is different from the claim raised in the first action, and in some instances even when asserted by one who was not a party to the first action.

Will an American court applying the ALI proposed rule on that basis also apply English *abuse of process doctrine*? This doctrine has nothing to do with the (preclusive) effect accorded to a judgment in the State of origin to which § 4(a) of the ALI proposal refers, but with the litigation conduct of parties. Under the doctrine, inappropriate conduct that in light of prior litigation amounts to an abuse of process

[221] See text to n 204ff.
[222] ibid § 4(a), Reporters Notes [2].

can be struck out; for instance, the raising of a claim or issue that is not res judicata between the parties may still amount to relitigation-abuse (e.g. in the situation highlighted by the reporters, where asserted by one who was not a party to the first action) or *Henderson v Henderson*-abuse (i.e. where a party raises matters that were not but which could and should have been raised and determined in the prior case).

It is suggested that American court are likely to approve of the approach put forward in this chapter for the purpose of resolving issues of wider preclusion—that is, the court will apply forum law to determine whether litigation conduct in the forum is to be precluded in light of prior litigation abroad, while taking account of the rules of conduct and procedure of the judgment-rendering State. Take the example of *RA Global Services, Inc v Avicenna Overseas Corp*.[223] In this case in the U.S. District Court, Southern District of New York, a borrower and guarantor brought a claim against a lender and others alleging breach of contract, breach of fiduciary duty, fraudulent inducement, and conspiracy. The defendants moved to dismiss on grounds of res judicata and relied in support on a judgment of the English High Court, noting that the claimants could and should in the English proceedings the claim they now raised in the New York court.

Naomi Reice Buchwald J for the District Court allowed the motion and dismissed the claim. Outlining the New York state court approach to preclusion by foreign judgments in proceedings based solely on state law where the Court's jurisdiction rests solely on diversity grounds, the judge observed as follows that:

> When determining the preclusive effect of a judgment from a foreign country, rather than applying the law of that country, 'a federal court should normally apply either federal or state law, depending on the nature of the claim.' *Alfadda v Fenn*, 966 F.Supp. 1317, 1329 (S.D.N.Y.1997).[224]

However, she added that:

> Nevertheless, New York law does not 'give more conclusive effect to a foreign judgment than it would be accorded by the courts of the jurisdiction which rendered it.' *Schoenbrod v Siegler*, 20 N.Y.2d 403, 409, 283 N.Y.S.2d 881, 230 N.E.2d 638 (1967). It thus incorporates to a limited extent the foreign jurisdiction's law.[225]

As regards New York res judicata, the judge noted by reference to *New York v Applied Card Sys, Inc*,[226] where the New York Court of Appeals held that the doctrine bars "successive litigation based upon the same transaction or series of connected transactions if: (i) there is a judgment on the merits rendered by a court of competent jurisdiction, and (ii) the party against whom the doctrine is invoked was a party to the previous action, or in privity with a party who was",[227] while adding that "[a] claim is part of the 'same transaction' as another claim if they stem from the 'same factual grouping[,] even if the claims involve materially different elements of proof, and even if the claims would call for different measures of liability or different kinds of relief.'"[228]

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[223] 843 FSupp2d 386 (SDNY 2012).
[224] ibid 389.
[225] ibid.
[226] 11 NY3d 105, 122 (2008).
[227] (n 223) 389.
[228] ibid (citing *Fifty CPW Tenants Corp v Epstein*, 792 NYS2d 58, 59 (1st Dep't 2005)).

The judge concluded that New York law would not ordinarily bar the claimants' claim even though it could have been raised in a prior case, because, "though a defense need not have actually been raised in the earlier proceeding to be subject to res judicata, so long as it could have been raised",[229] "the failure to interpose a counterclaim does not prevent subsequent maintenance of an action based on that claim because '[i]n New York all counterclaims are permissive.'"[230] However, she then observed that "this reasoning does not apply when the forum in which the prior litigation occurred was a compulsory counterclaim jurisdiction",[231] in which case "notions of judicial economy and fairness require that a party be precluded from bringing all claims that it earlier had the opportunity—exercised or not—to assert as counterclaims."[232]

According to the judge, who relied soley on a party submission, England and Wales is a compulsory counterclaim jurisdiction, in the sense that "in England, a failure to raise counter claims is an abuse of process which will preclude later litigation of those issues if the counterclaims should have been raised in the earlier proceeding."[233] In support she referred to *Henderson v Henderson*[234] and *Johnson v Gore Wood & Co*[235]. Hence, she found that "[c]laims which should have been brought in a prior proceeding in England are therefore equivalent to claims not brought in a domestic compulsory counterclaim jurisdiction. Thus any such claims would be barred in a later proceeding under New York state res judicata law."[236]

The judge's decision is wrong; in fact, England and Wales is not a compulsory counterclaim jurisdiction[237] and the court's assessment of the relevance of *Henderson v Henderson*[238] and *Johnson v Gore Wood & Co*[239] is erroneous[240]. Nevertheless, the court's approach in resolving the issue of wider preclusion is appropriate; the court applied forum law to determine whether litigation conduct in the forum is to be precluded in light of prior litigation abroad, while taking account of the rules of conduct and procedure of the judgment-rendering State.

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[229] ibid.
[230] ibid 390.
[231] ibid.
[232] ibid.
[233] ibid 391.
[234] (Chapter 1 n 275).
[235] *Johnson* (Introduction n 12).
[236] (n 223) 391.
[237] See CPR r 20.4(1) ("A defendant *may* make a counterclaim against a claimant by filing particulars of the counterclaim.").
[238] (Chapter 1 n 275). See Chapter 1, text to n 526ff.
[239] *Johnson* (Introduction n 12).
[240] *Henderson v Henderson* (Chapter 1 n 275) concerned points that could have been made in relation to a claim actually made, which points must be made; the case did not concern claims that could and should have been raised. *Johnson* (Introduction n 12) equally is no authority for characterising England and Wales as a compulsory counterclaim jurisdiction; as Lord Bingham said, at 31, "[i]t is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before." See further Chapter 1, text to n 483ff.

Summary and Conclusions

For aspects of the law of preclusion untouched by EU-level harmonisation—the precise extent of which is unclear—the *Hoffmann* principle (as confirmed in *Gothaer* for the context of preclusion) unquestionably refers to the law of the judgment-rendering State for the purpose of determining the preclusive effects of a judgment amenable to recognition under the Brussels and Lugano Regime. This principle extends to the effects of judgments, and, accordingly, addresses neither the problem of wider preclusion, which concerns the legal consequences of the litigation *conduct* of parties (not the effects of a judgment), nor the preclusion procedure itself.

The *Hoffmann* principle is not absolute and arguably limited by the public policy of the State addressed, which obviously includes Art 6(1) ECHR. This provision imposes minimum and maximum levels of preclusion by judgments, which a court must enforce regardless the applicable preclusion law, and thus may trigger the public policy exception. Similarly, though EU law does not require the court of the State addressed to disapply the preclusion law of the judgment-rendering State even if to do so would enable it to remedy an infringement of EU law by the judgment in question, Union law prohibits the court of the State addressed from attributing effects that exceed the limits of the jurisdiction of rendering court as specified by Union law.

In terms of a suggested (choice of law) approach, the principal point is that two particular features of the problem of conflicts of preclusion laws—(1) the problem arises after the recognition of a judgment and (2) finality of litigation is a general principle of law—imply that a *general* approach presents itself for which a neutral, relationship (or judgment)-oriented choice of law-method is appropriate, regardless whether the problem arises between closely intertwined societies or between deeply integrated legal systems. For the purpose of devising a choice of law approach, three categories of issue are proposed: (1) claim and issue preclusion; (2) wider preclusion; and (3) preclusion procedure, which correspond to the true issues thrown up by a plea of finality of litigation based on a foreign judgment amenable to recognition in the forum State. Corresponding to these categories are the following conflicts-rules:

(1) *The law of the judgment-rendering State determines the claim and issue preclusive effects of a judgment. The court seized shall apply its own law to the extent that the law of the judgment-rendering State leads to under- or overpreclusion in manifest violation of public policy, including Article 6(1) ECHR*;
(2) *The law of the forum determines whether litigation conduct in the forum is to be precluded in light of prior litigation abroad. In the application of forum law, account must be taken of the rules of conduct and procedure of the judgment-rendering State*; and
(3) *The law of the forum determines the process of preclusion and the implications of an effective preclusion plea.*

Compared with the suggested approach, English and Dutch law occupy fundamentally contrary positions; both approaches exclude the application of foreign preclusion law, though both English and Dutch courts allow foreign preclusion in by the back door, by accepting the duty to take foreign preclusion law into account, as a matter of “good sense”. However, good sense does not go all the way in practice, to

avert unnecessary risks of over- and under preclusion. This risk is inherent in the English approach as illustrated by the practical operation of s 34 of the Civil Jurisdiction and Judgments Act 1982 categorically bars a successful claimant from reasserting the cause of action for which he recovered judgment abroad, notwithstanding that reassertion would be permissible under the law of the judgment-rendering.

Moreover, by insisting on the application of English preclusion law, there is a ceiling on the extent of preclusion in English proceedings, while the preclusive effects under the law of the law of the judgment-rendering State may be more extensive. While this risk is not inherent in the Dutch approach, which does not require the application of Dutch preclusion law, the Dutch approach itself has been formulated so loosely and is misunderstood to such extent that in practice, Dutch courts have developed less sensitivity to foreign preclusion law than their English counterparts.

Apart from the risk of over- and underpreclusion, the English approach of invariably applying forum law is inefficient, since it forces both court and parties to consider two legal systems cumulatively, while the application of a single law—the law of the judgment-rendering State—suffices to do justice. It is no valid objection that application of the law of the judgment-rendering State is tantamount to *applying* foreign law; courts are well able to make findings on of foreign law; it is something courts do all the time,[241] and the fact that expert evidence occasionally gets it wrong, does not outweigh the benefits of international decisional harmony when it comes to the implementation of the principle of finality of litigation between legal systems.

A final point relates to the fact that application of foreign preclusion law involves applying foreign *procedural* law. The dogma that for reasons of convenience issues traditionally characterised as 'procedure' are always best governed by forum law is mistaken, as demonstrated in the present context: whereas courts theoretically apply domestic preclusion law (or domestic general principles of law), in truth they have foregone the comfort of the *lex fori* by accommodating foreign law through the back door by 'taking it into account' so as to avoid injustice.

As regards the European approach, a current tendency in the EU judiciary is to harmonise preclusion law at the EU-level. The question of legitimacy aside, this intervention seems undesirable, since the extent of harmonisation is uncertain and certainly incomplete, which results in fragmentation of the law on preclusion by foreign judgments. An additional complicating factor is that the CJEU is not the only judicial institution occupying itself with the principle of finality of litigation; also the ECtHR is increasingly active in the area by holding that Art 6(1) ECHR imposes both minimum and maximum levels of preclusion. The upshot is that the law is left obscure. Ascertaining foreign law may be a challenge, but that problem can be addressed by practical measures; inability even to identify the pertinent legal principle, which is a risk of the current fragmentation of the law, is a problem that may prove far more difficult to remedy.

[241] *Al-Jedda v Secretary of State for Defence* [2010] EWCA Civ 758, [2011] QB 773, [2011] 2 WLR 225 [191] (Elias LJ).

Concluding Remarks

The harmonisation of the EU Member States' preclusion laws by judicial activism at the EU-level is of debatable legitimacy and, at any rate, of uncertain scope. The resulting fragmentation of the law, strengthened by the increasing role given to Art 6(1) ECHR as imposing minimum and maximum levels of preclusion, causes unnecessary legal uncertainty. A better approach is to properly clarify the implications of the *Hoffmann* principle that a judgment should in principle have the same effects in the State of recognition as in the State of rendition, and facilitate its proper application, for instance, by the introduction of an adequate procedure for the certification of questions of foreign law. At the same time, the recent development of a clear EU position on the finality of judgments—that a judgment can only be reviewed and challenged in the judgment-rendering State—is welcome.

A proper (choice of law) approach reflects that two particular features of the problem of conflicts of preclusion laws—(1) the problem arises after the recognition of a judgment and (2) finality of litigation is a general principle of law—imply that a *general* approach presents itself for which a neutral, relationship (or judgment)-oriented choice of law-method is appropriate, regardless whether (or not) the problem arises between closely intertwined societies or between deeply integrated legal systems. In other words, the proposed approach is valid both for issues raised by judgments subject to recognition under the Brussels and Lugano Regime and judgments recognised at common law. Three categories of issue are proposed for the purpose of devising a choice of law approach: (1) claim and issue preclusion; (2) wider preclusion; and (3) preclusion procedure, which correspond to the true issues thrown up by a plea of finality of litigation based on a foreign judgment amenable to recognition in the forum State. Corresponding to these categories of issue are the following conflicts-rules:

(1) *The law of the judgment-rendering State determines the claim and issue preclusive effects of a judgment. The court seized shall apply its own law to the extent that the law of the judgment-rendering State leads to under- or overpreclusion in manifest violation of public policy, including Article 6(1) ECHR*;
(2) *The law of the forum determines whether litigation conduct in the forum is to be precluded in light of prior litigation abroad. In the application of forum law, account must be taken of the rules of conduct and procedure of the judgment-rendering State*; and
(3) *The law of the forum determines the process of preclusion and the implications of an effective preclusion plea.*

These conflicts rules address some of the problems inherent in current approaches at common law, which reject the application of foreign preclusion law, though courts applying those approaches seek to avoid (not always successfully) the risk of injustice by taking foreign law into account. The proposed rules also account for the fact that (a) the application of foreign preclusion law remains subject to the public policy of the State addressed; (b) that issues of wider preclusion (issues that closely correlate with conduct that qualifies as abuse of process in light of prior litigation abroad) are properly subject to forum law, though foreign the rules of conduct and procedure of

the judgment-rendering State should be taken into account; and, finally, (c) issues of preclusion *process* should be governed by the law of the forum.

Summary

This thesis does three things: first, Part I clarifies by reference to English law (Chapter 1) and Dutch law (Chapter 2) how different legal systems implement the principle of finality of litigation—a process called 'preclusion'; second, Part II rationalises the problem of preclusion between jurisdictions, by distinguishing two often conflated but fundamentally distinct problems: first, recognition of foreign judgments and, second, preclusion by foreign judgments (Chapter 3), and by analysing how English and Dutch courts resolve issues of preclusion raised by foreign judgments which are amenable to recognition (Chapter 4); and, finally, Part III evaluates the recent process of harmonisation of preclusion law at the EU level (Chapter 5) and suggests an approach to resolving the issues which arise upon recognition in case a foreign judgment is invoked for purposes of preclusion—to achieve finality of litigation locally after justice has been done abroad (Chapter 6).

Part I on finality of litigation in English law (Chapter 1) and Dutch law (Chapter 2) confirms that the principle forms an integral part of the two legal systems; English courts habitually cite two maxims in justification for imposing finality of litigation: first, "*interest reipublicæ ut sit finis litium*" ('it is in the public interest that there should be finality of litigation') and, second, "*nemo debet bis vexari pro eâdem causâ*" ('one should not be vexed twice for the same cause'). Dutch courts refer generally to "*lites finiri oportet*" ('litigation should end at some point'), without further specification, but practice indicates that the same division of interests served applies.

The nature of preclusion rules diverges accordingly; for instance, in both English and Dutch law, the res judicata doctrine applies only when a party makes an explicit plea of res judicata, and a court is barred from applying the doctrine of its own motion. So, even though finality of litigation is surely a matter of public concern, the res judicata doctrine serves first and foremost the *private* interest in finality of litigation. Conversely, the English doctrine of abuse of process, alike the doctrine on the finality of judgments, can be applied by a court, if necessary, of its own motion, because such matters as relitigation-abuse, *Henderson v Henderson*-abuse and collateral attack-abuse are deemed to affect principally the *public* interest. By contrast, the Dutch doctrine on abuse of right, including abuse of process, applies only on application of a party, which suggests that, insofar as this doctrine is used as an agent of finality (e.g. in response to vexatious litigation, or unreasonable attempts to relitigate a claim or to raise a matter which could have been previously raised) the doctrine serves firstly the *private* interest. On the other hand, Dutch preclusion rules which are based on the principle of a sound administration of justice (i.e., first, Art 3:303 BW on the exclusion of a right of action in the absence of a sufficient interest in a claim; second, the doctrines on finality within the same case; third, the prohibition of collateral attacks on judgments; and, finally, the rule of alignment in proceedings for an interim measure after judgment in a main case) can all be applied, if necessary, by the court of its own motion, and thus emphasise the *public* interest in finality.

At a high level of abstraction, the implementation of finality of litigation involves three paradigmatic situations. First, the '*finality of a judgment*', where a legal system provides that no court without competent appellate jurisdiction can pronounce on the accuracy or legality of a valid judgment, so that parties are barred

from collaterally attacking the judgment. Second, '*finality within a case*', where a legal system prohibits a court from reopening in the remainder of the case matters which the court has finally determined, or prohibits courts of appeal from reopening matters finally determined by the court below which have not been challenged on appeal, or prohibits courts of referral from reopening matters finally determined by a court of appeal, and (in effect) bars parties from relitigating such matters within that same case. Third, and finally, '*finality in another case*', where a legal system bars the (re)litigation of matters that were previously determined or which could and should have been so determined. Three sub-scenarios arise in relation to finality in another case: first, '*claim preclusion*', where a legal system bars relitigation regarding a cause of action that formed the basis of a prior (un)successful claim (i.e. a demand of a remedy from a court), which includes but is not limited to the situation where the legal system bars another claim for the same cause of action; second, '*issue preclusion*', where a legal system bars relitigation regarding an issue which was previously determined; and, finally, '*wider preclusion*', where a legal system bars the litigation of claims or issues which were not, but which could and should have been raised and determined in the prior case.

Both English and Dutch law enforce the *finality of judgments* and prohibit a court without competent appellate or revocation jurisdiction from pronouncing on the accuracy or legality of a valid judgment. In effect this prohibition implies a bar against any collateral attack by parties on judgments, by means other than ordinary recourse. English law does so through the abuse of process doctrine, which excludes collateral attack-abuse. Dutch law achieves the same result by means of a separate, judge-made doctrine which is distinct from the abuse of process doctrine and entitled '*gesloten stelsel van rechtsmiddelen*'. Despite these formal differences, a common aim of the doctrines is safeguarding a sound administration of justice, which could be brought into disrepute if any court could endlessly pronounce on the validity of any existing judgment. The doctrines are further equivalent in that the prohibition to pronounce on the validity of a judgment of a court of coordinate jurisdiction is deemed to go to the *jurisdiction* of the court addressed, and is thus a matter of public policy so that a court must strike out a collateral attack, if necessary, of its own motion. A shared limitation is that the doctrines do not prohibit the rendition of a conflicting judgment, and do not then bar a party from seeking a different, more favourable decision on the same matter by pleading in a manner which contradicts an existing judgment.

Finality within a case is imposed in English and Dutch law by the prohibition on the reopening of matters which have already been finally determined in the same case. Both legal systems do so by restricting the *jurisdiction* of the judgment-rendering court, the competent appellate court, and any court to which the case is referred back following an appeal. In English law, a final judgment exhausts the jurisdiction of the rendering court; the court is '*functus officio*' after finally determining the matter in question. Moreover, an appellate court's jurisdiction is limited to the parties' grounds of appeal, which define the outer limits of review, while the judgment of the appellate court determines the scope of any subsequent referral to a lower court, which (obviously) excludes matters which have gone unchallenged on appeal or which have already been finally determined by the court of appeal. Dutch law, similarly, bars a court in the remainder of the case from reopening an issue which the court has already finally and unconditionally determined ('*leer van de bindende eindbeslissing*'). Two further doctrines in Dutch law are equivalent in

nature and effect, but apply on appeal (‘*grievenstelsel’*), and following an appeal (‘*grenzen van de rechtstrijd na cassatie en verwijzing*’). The former doctrine is inherent in the law of civil appeals and prohibits an appelate court from reviewing findings of a lower court which are ‘irreversible’ (findings which are not challenged in the grounds of appeal); the latter doctrine is summarily condified in Art 424 Rv implies that upon referral after cassation, the scope of litigation is defined by the Supreme Court’s judgment, and the court of referral lacks the power to revisit final findings in the case which have not been (successfully) challenged and that thus have become irreversible.

The English and Dutch doctrines on finality within a case are also equivalent in nature and rationale; the limitation of a court’s jurisdiction is in both systems a matter of public policy, which must be enforced by a court, if necessary, of its own motion. The doctrines generally serve the public interest in ensuring a sound administration of justice, which requires that finality is imposed also within a case, in order to streamline litigation and avoid delays. Certain differences exist in terms of the conditions for application and regarding limitations and exceptions. In English law, a first instance court’s jurisdiction is exhausted after its *judgment* becomes ‘final’ (when the judgment is perfected by sealing after which the judgment cannot be varied, re-opened or set aside by the rendering court or any other court of co-ordinate jurisdiction, even though it may be still subject to appeal). Conversely, the focus in Dutch law is on when a court’s *finding* becomes ‘final’ (after the unequivocal and unconditional determination of an issue), in which regard should be noted that a final finding can be contained in an interlocutory judgment, which in the absence of leave to appeal can only be appealed together with the ‘final judgment’ (the court’s decision which determines (part of) the claim and can immediately be appealed). Finality within the same case can therefore technically attach at an earlier stage in Dutch law, though in practice the difference is marginal considering that the power of an English court to recall and alter its judgment after it is given but before it is perfected (‘*Barrell*’-jurisdiction) is restricted to exceptional circumstances. Moreover, the finality imposed in Dutch law in respect of a first instance court’s final finding on an issue is less absolute than under English law; apart from a general exception for special circumstances, if a Dutch first instance court concludes that one of its earlier final findings in an interlocutory judgment is wrong in law or fact, the court has the power, after hearing the parties, to revisit that finding to prevent giving a final judgment on the wrong basis.

Finality in another case is achieved in English and Dutch law by a bar on the (re)litigation of matters which were previously determined, or of matters which could and should have been so determined. To this end, both systems have rules on claim, issue, and wider preclusion. *Claim preclusion* in English law operates through the res judicata doctrine, which comprises two doctrines: first, ‘merger *in rem judicatam*’ (‘merger doctrine’), which bars reassertion of a cause of action for which a judgment has been previously recovered; and, second, ‘estoppel *per rem judicatam*’ (‘estoppel doctrine’), which in its ‘cause of action estoppel’ form precludes the contradiction of judicial findings regarding claims. In Dutch law, claim preclusion operates in part by res judicata doctrine as codified in Art 236 Rv (‘*gezag van gewijsde*’), which is more limited in function than the English res judicata doctrine, and more akin to estoppel doctrine (Art 236 Rv bars parties from (successfully) contradicting judicial findings regarding a claim, but does not bar reassertion of the same cause of action). Another aspect of claim preclusion is Art 3:303 BW, which potentially bars reassertion by

denying a claimant a right of action if he lacks a sufficient interest in his claim, which may be the case where the claimant has previously recovered judgment for the cause of action which he now reasserts. On claim preclusion, certain differences between English and Dutch law are notable. First, the English res judicata doctrine applies to final judgments, whereas the Dutch res judicata doctrine applies only to final judgments with, in addition, res judicata status (when the judgment is not or no longer subject to ordinary means of recourse). Dutch courts have in various ways addressed this restriction of the res judicata doctrine. A Dutch court can, firstly, stay the proceedings in case a party contradicts the findings in an existing judgment which lacks res judicata status until that judgment either acquires res judicata status or is reversed. The court has this power pursuant to the principle of a sound administration of justice. Moreover, a judge-made rule of alignment ('*afstemmingsregel*') requires a court in interim proceedings ('*kort geding*') to align its judgment with any judgment in main proceedings ('*bodemprocedure*'), even if that judgment still lacks res judicata status.

A second difference relates to the English merger doctrine, which is (to some extent) comparable to the Dutch Art 3:303 BW. Both concern a claimant's right of action, and are similar in terms of their effect: a claimant is denied a right of action in respect of a cause of action. However, the English merger doctrine is more limited, since it applies only to preclude reassertion by *successful* claimants, whereas Art 3:303 BW can additionally preclude reassertion by unsuccessful claimants. (An English court can instead strike out a claim or give summary judgment if the new claim has not real prospect of success, like when the defendant successfully invokes a cause of action estoppel.) Further, Dutch law is less hostile to *claim splitting* (a successful claimant seeks a further remedy for the same cause of action) and does not deny a right of action if the claimant has a sufficient interest in another claim for the same cause of action, even after having recovered judgment. By contrast, the English merger doctrine *mechanically* denies any further right of action upon the recovery of judgment for a cause of action, thus forcing a claimant to recover once and for all for his cause of action.

Issue preclusion exists in English and Dutch law. In English law, the res judicata doctrine may imply an issue estoppel, which bars the contradiction of prior judicial findings regarding issues. Further, the abuse of process doctrine may bar an attempt to relitigate an issue in circumstances where the res judicata doctrine lacks application, for instance, between different parties, or where the prior judgment is not final and conclusive ('relitigation-abuse'). In Dutch law, issue preclusion also operates first and foremost via res judicata doctrine (Art 236 Rv precludes (successful) contradiction of irreversible judicial findings regarding an issue in another case). Though the prohibition of abuse of process (Art 3:13 BW in conjunction with Art 3:15 BW) could in theory serve a role equivalent to the English abuse of process doctrine and serve to bar 'relitigation-abuse', Dutch courts have not to-date extended abuse of process doctrine to such far reaching extent.

Wider preclusion certainly exists in English law. The English abuse of process doctrine may bar an attempt to raise a claim or issue which could have been raised in a prior case where the court decided some closely related matter and that, on a broad, merits-based judgment, *should* have been raised before, because in light of all circumstances of the case and on balance of the private and public interests involved, the attempt to raise it now is manifestly unfair to the other party or otherwise brings the administration of justice into disrepute ('*Henderson v*

Henderson-abuse'). As noted, the doctrine also complements the res judicata doctrine by barring relitigation-abuse. Dutch law does not recognise wider preclusion to the same extent. Art 3:13 BW in conjunction with Art 3:15 BW bars abuse of process. In theory, the provision could bar the filing of a claim or the raising of an issue which could have been filed or raised in a prior case. At any rate, the holding back of a claim or issue with the aim of harassing the other party in new proceedings constitutes an abuse. Moreover, there is (high) authority that it may be an abuse of process to seek to raise a matter which was without reasonable cause not brought up in the prior case, while the opponent had a reasonable interest in the immediate determination of the matter in that case, so that to allow the matter now would, despite its legitimate aim, disproportionally affect the opponent's interests.

Part II rationalises the problem of preclusion between jurisdictions, by distinguishing two often conflated but fundamentally distinct problems of recognition of foreign judgments (Chapter 3) and preclusion by foreign judgments, or 'interjurisdictional preclusion' (Chapter 4). Whereas the problem of 'recognition' concerns the *local validity* of a foreign judgment and goes to the judgment-rendering State's international jurisdiction and the recognising State's public policy, the problem of 'preclusion' relates to a judgment's *legal consequences*, and as regards preclusion, specifically the preclusive effects which a legal system attaches to a judgment in the process of implementing finality of litigation.

'Local validity'—the legal status a foreign judgment acquires by recognition in the State addressed—is but one aspect of a foreign judgment's validity; two additional aspects include, firstly, the judgment's validity *in the rendering State*, under the (constitutional or procedural) law of that State and, secondly, the judgment's validity *in the international legal order*, whether regionally or globally, as a matter of international law. This distinction explains why a judgment which has been annulled in the rendering State can still acquire validity in another State, or why a judgment that remains valid in the rendering State may be refused recognition and thus lack validity in another State, or why all States may be required to refuse recognition of a judgment that remains valid in the rendering State (i.e. because the judgment lacks validity as a matter of international law).

The recognition problem is rooted in territoriality, which international law principle both English and Dutch law follow. Territoriality implies a restriction on the sphere of validity of any act of State, including judgments, so that, in the absence of recognition, a foreign judgment lacks local validity. Whether a judgment acquires validity abroad, in the territory of another State, depends on the law of the State addressed; a State can incorporate a foreign judgment into its legal order by granting it 'recognition', by conferring the foreign judgment local 'validity'—the *legal status* of 'judgment', a decision with the *force of law* between the parties capable of triggering the *legal consequences* of a judgment, in particular, execution and preclusion, and thus to effect justice and finality.

Territoriality does not explain *why* States have developed a practice of recognising foreign judgments; in other words, international law does not provide the rationale for granting a foreign judgment local validity. It is suggested that the recognition rationale is twofold: the need between legal systems of, first, justice and, second, finality of litigation.

Recognition at common law is essentially subject to a single condition in both England and Wales and in the Netherlands: the foreign judgment must have been rendered by a court of competent international jurisdiction. However, between

English and Dutch law, the defining standard for establishing whether a foreign court was of 'competent (international) jurisdiction' varies significantly: English courts require that jurisdiction was based on grounds acceptable by *English* standards for recognition, whereas Dutch courts consider whether the rendering court's jurisdiction was based on *internationally acceptable* standards. The Brussels and Lugano Regime illustrates how the two countries have established common jurisdictional terms subject to which there is automatic mutual recognition, which regime further implies a principle of mutual trust that courts will indeed abide by the agreed jurisdictional terms, as demonstrated by the prohibition, as a rule, of a review of a rendering court's jurisdiction.

Jurisdiction and recognition then are inherently linked; a judgment manifests the judicial power—the 'jurisdiction'—of a State. According to English courts, a lack of jurisdiction negatives the obligation imposed by the foreign court, while Dutch courts view recognition as the act of accepting the rendering court's jurisdiction. At the same time, neither English nor Dutch courts concern themselves with the question whether the rendering court had jurisdiction under its own law, until a judgment has been successfully challenged in the enacting State, in which case there simply is no foreign judgment to recognise (assuming, of course, the annulment or revocation judgment can be recognised). This latter question goes to a different issue of validity, namely, the foreign judgment's validity *in the rendering State* under the (constitutional or procedural) law of that State, not its validity *in the State addressed* under the (private international) law of that State.

English courts cite first and foremost the *private* interest in justice and finality for the purpose of justifying the recognition of foreign judgments, while Dutch courts have traditionally emphasised the *public* interest in a proper administration of justice and, thus, legal certainty, among legal systems. The Brussels and Lugano Regime was motivate principally by the public interest in establishing and maintaining a proper functioning common market and civil justice area. Though the private and public interest in justice and finality are closely linked—furtherance of one interest typically equally furthers the other—the emphasis of one or the other interest may imply differences; for instance, English law imposes much stricter standards of jurisdiction as a precondition for recognition than Dutch law, which difference can be explained by reference to the fact that a more liberal recognition policy like in the Netherlands tends to favour the public interest in justice and finality, in some cases at cost of justice to individuals.

Ultimately, even if the basic condition for recognition is met (i.e. the rendering court had international jurisdiction), both England and Wales and the Netherlands reserve the power to refuse recognition on grounds of 'public policy' for the protection of the State's fundamental principles, or crucial economic or social interests. The need to protect the State's public policy, which could be endangered by incorporating a foreign judgment into the domestic legal order, may therefore outweigh the State's competing interest in recognising foreign judgments (i.e. the need for justice and finality of litigation between jurisdictions).

Between legal systems, finality of litigation raises two main concerns—unlike in the domestic context, the problem of finality *within the same case* does not arise interjurisdictionally: first, *finality of a judgment* and, second, *finality in another case*. First, the problem of finality of a judgment arises when a party challenges the accuracy or legality of a foreign judgment which is amenable to recognition. Such a collateral attack goes to a foreign judgment's validity *in the rendering State*. In

English law, the act of State doctrine debars a court from determining a claim that makes a foreign judgment's validity in the rendering State the subject-matter of the action, while in other circumstances where a party challenges the accuracy or legality of a foreign judgment, the court can strike out for abuse of process. Similarly, a Dutch court will strike out such collateral attack as a violation of the principle of a sound administration of justice, specifically, the doctrine of *gesloten stelsel van rechtsmiddelen*, which doctrine applies to any judgment which has validity in the Dutch legal order, including recognised foreign judgments. Under the Brussels and Lugano Regime, the bar of collateral attack derives from the prohibition of review of a judgment as to its substance. This prohibition implies that the courts of the judgment-rendering State have *exclusive* jurisdiction to rule on the judgment's validity as a matter of the law of that State, so that the parties can only avail themselves of means of recourse available in that State.

Second, the problem of finality in another case presents itself in three ways interjurisdictionally: first, a successful claimant *reasserts* the cause of action for which he has already recovered judgment abroad; second, an unsuccessful claimant or defendant *contradicts* a foreign court's findings regarding a claim or issue; or, finally, a party's litigation conduct is *otherwise inappropriate* in light of the prior proceedings (e.g. a party raises a claim or issue that was not but could and should have been raised and determined in those prior proceedings). On *reassertion*, England and Wales has a specific statute—s 34 of the 1982 Act—which categorically bars any reassertion of a cause of action for which a claimant has recovered judgment abroad; a court does not then consider whether reassertion of the cause of action is permitted under the law of the judgment-rendering State. In the Netherlands, reassertion is barred if the judgment which has been recovered abroad is amenable to recognition under the Brussels and Lugano Regime, an international agreement, or some specific domestic statutory provision; however, reassertion is expressly allowed by statute in respect of judgments which are recognised at common law, unless the court finds that the claimant lacks a sufficient interest to claim again for the same cause of action, which is not unlikely, because a claimant also has the option of seeking enforcement by action on the foreign judgment. The Brussels and Lugano Regime clearly prohibits reassertion as incompatible with the requirement to recognise the prior judgment between the parties and contrary to the prohibition of a substantive review of that judgment.

As regards *contradiction*, the second aspect of finality in another case, English courts invariably apply the domestic estoppel doctrine to determine a recognised foreign judgment's preclusive effect. Nevertheless, as a matter of caution against overpreclusion, English courts will take account of foreign preclusion law, if the contents of that law is duly pleaded and, if contested, proved. A recognised foreign judgment can therefore found an English-style *cause of action estoppel*. To date, English courts have applied the same approach to judgments recognised pursuant to the Brussels and Lugano Regime. By contrast, Dutch courts *never* apply domestic preclusion law to a recognised foreign judgment; Art 236 Rv (the res judicata effect of judgments) is never applied to determine the preclusive effects of a foreign judgment which has acquired local validity in the Netherlands. Instead, for judgments recognised at common law, domestic (unwritten) principles of private international law require that a court determines in each particular case what res judicata effect properly attaches to a foreign judgment; the court will therefore take account of foreign preclusion law, so as not to over- or underpreclude. For Brussels

and Lugano Regime judgments, Dutch courts generally apply the preclusion law of the judgment-rendering State.

As regards issue preclusion—the bar of contradiction of a foreign court's findings regarding an *issue*—the English and Dutch courts' approaches are broadly identical to those for claim preclusion, though English courts tend to exercise even more caution before attaching issue preclusive effect.

On wider preclusion, Dutch courts, alike their English counterparts, do not directly apply foreign law, since abuse of process doctrine—the doctrine most relevant in this context—concerns the parties' litigation *conduct*, rather than a judgment's (preclusive) *effects*. Nevertheless, both English and Dutch courts tend to take account of relevant prior *conduct* abroad as well as foreign procedural law as factual circumstances in the process of determining whether the parties' conduct in local proceedings amounts to abuse and should be struck out. For the same reason, for purposes of the Brussels and Lugano Regime, issues of wider preclusion are not directly subject to the *Hoffmann* principle that a recognised judgment should in principle have the same effects in the State addressed as under the law of the judgment-rendering State.

Part III examines the recent process of harmonisation of preclusion law at the European level (Chapter 5) and puts forward an approach for addressing the choice of preclusion law problem which will continue to crop up in areas which remain unharmonised (Chapter 6). The current trend of European court-driven harmonisation of preclusion law on finality in another case is of debatable legitimacy and, at any rate, of uncertain scope. The resulting fragmentation of the law causes undesirable and, it is suggested, unnecessary legal uncertainty. Rather than seek to harmonise preclusion law at the EU level, the CJEU should clarify the implications of the *Hoffmann* principle, while the EU should facilitate its proper application, for instance, by introducing an adequate procedure for certifying questions of foreign law between EU Member State courts. The current fragmentation process is only reinforced by the increasing role of the ECtHR, which, through Art 6(1) ECHR, has ventured dangerously far into a technical and complex legal area where it has no experience or expertise, by imposing certain minimum and maximum levels of preclusion regardless of the applicable preclusion law.

One area where the CJEU has usefully intervened is on the problem of finality of judgments. The Court held recently that the Brussels and Lugano Regime prohibition to review a judgment as to its substance implies that the judgment can only be reviewed and challenged in the judgment-rendering State, which thus has exclusive jurisdiction to pronounce on its validity. This approach is crucial in a European civil justice area with different legal systems and will serve to avoid unnecessary tensions between these systems, though, ultimately, the success of the approach will depend on adequate measures to strengthen and maintain mutual trust among EU Member State courts.

It is suggested that a general approach can be developed to resolving conflicts of preclusion laws which is equally valid for judgments recognised at common law as for Brussels and Lugano Regime judgments. The approach can be general, without providing for a special approach for situations arising between closely intertwined societies and deeply integrated legal systems, essentially for two reasons: first, conflicts of preclusion laws arise *after* a foreign judgment is recognised, and, second, preclusion relates to finality of litigation—a general principle of law, and a value common to all legal systems based on the rule of law. These same two reasons further

imply that the proposed choice of law method can be neutral, and relationship (judgment)-oriented.

Three categories of preclusion issues can be usefully distinguished for the purpose of devising an adequate choice of law approach: first, claim and issue preclusion; second, wider preclusion; and, finally, preclusion procedure. These categories correspond to the issues as they are actually presented by a plea of finality of litigation based on a foreign judgment which is amenable to recognition in the forum State. The proposed, corresponding choice of law rules are as follows:

(1) *The law of the judgment-rendering State determines the claim and issue preclusive effects of a judgment. The court seized shall apply its own law to the extent that the law of the judgment-rendering State leads to under- or overpreclusion in manifest violation of public policy, including Article 6(1) ECHR*;
(2) *The law of the forum determines whether litigation conduct in the forum is to be precluded in light of prior litigation abroad. In the application of forum law, account must be taken of the rules of conduct and procedure of the judgment-rendering State*; and
(3) *The law of the forum determines the process of preclusion and the implications of an effective preclusion plea.*

These rules address some of the problems inherent in approaches, like the English approach, which reject the application of foreign preclusion law for the purpose of determining the preclusive effects of a recognised foreign judgment. Moreover, the proposed rules account for three things: first, the application of foreign preclusion law should always remain subject to the public policy of the State addressed; second, issues of wider preclusion, which closely correlate with conduct which qualifies as abuse of process in light of prior litigation abroad, are properly subject to forum law, even though foreign the rules of conduct and procedure of the judgment-rendering State should be taken into account; and, finally, issues of preclusion process can be governed by forum law without affecting the effectiveness of the principle of finality of litigation between legal systems.

Samenvatting

Dit proefschrift doet naar de kern genomen drie dingen:

1) Deel I verduidelijkt via een analyse van Engels recht (Hoofdstuk 1) en Nederlands recht (Hoofdstuk 2), de implementatie van het beginsel van eindigheid van het rechtsgeding (finality of litigation) in verschillende rechtstelsels;

2) Deel II vereenvoudigt de problematiek van de implementatie van het beginsel tussen rechtstelsels door een onderscheid te maken tussen twee al te vaak verwarde maar fundamenteel verschillende kwesties: de erkenning van buitenlandse vonnissen aan de ene kant, en aan de andere kant, het bepalen van de rechtsgevolgen van buitenlandse vonnissen die voor erkenning in aanmerking komen (Hoofdstuk 3), en analyseert hoe deze kwesties worden opgelost naar Engels en Nederlands recht (Hoofdstuk 4); en, tot slot

3) Deel III analyseert de recente harmonisatie op Europees niveau van het recht dat dient ter implementatie van het beginsel van eindigheid van het rechtsgeding ("preclusierecht") (Hoofdstuk 5), en stelt een conflictenrechtelijke methode voor om rechtsvragen te beantwoorden die opkomen zodra een buitenlands vonnis lokaal wordt ingeroepen om de eindigheid van het rechtsgeding te effectueren (Hoofdstuk 6).

Deel I over Engels recht (Hoofdstuk 1) en Nederlands recht (Hoofdstuk 2) stelt vast dat het beginsel van eindigheid van het rechtsgeding een integraal onderdeel vormt van de twee rechtstelsels. Engelse rechters hanteren gebruikelijk twee maximes: interest reipublicæ ut sit finis litium (in het algemeen belang moet aan het rechtsgeding een einde komen) en nemo debet bis vexari pro eâdem causâ (men moet niet tweemaal worden lastiggevallen voor hetzelfde feit). Nederlandse rechters houden het bij een spreuk: lites finiri oportet (rechtsgedingen moeten eindigen). Toch wijst de praktijk uit dat ook Nederlandse rechters zich laten leiden door zowel het publieke belang als het private belang bij eindigheid van het rechtsgeding.

De aard van preclusierecht varieert naarmate het recht primair gericht is op het publieke dan wel het private belang. Bijvoorbeeld, in zowel Engels als Nederlands recht is het gezag van gewijsde van een vonnis slechts toepasselijk wanneer een partij zich uitdrukkelijk op het gezag van gewijsde beroept. Deze beperking geeft aan dat het gezag van gewijsde in de eerste plaats dient ter bescherming van het private belang bij de eindigheid van het rechtsgeding. De Engelse doctrine van misbruik van procesrecht (abuse of process), daarentegen, net als de doctrine die ziet op de onaantastbaarheid van vonnissen (finality of judgments), kan door rechters zo nodig ambtshalve worden toegepast; hier staat het publieke belang bij de eindigheid van het rechtsgeding voorop. Ter vergelijking, een Nederlandse rechter zal doorgaans slechts op aandringen van een partij bepalen dat sprake is van misbruik van procesrecht. Tegelijkertijd moet een Nederlandse rechter preclusieregels die geënt zijn op het beginsel van de goede procesorde (artikel 3:303 BW; de verschillende doctrines die zien op eindigheid in hetzelfde geding; het gesloten stelsel van rechtsmiddelen; en de afstemmingsregel) zo nodig ambtshalve toepassen.

Het beginsel van eindigheid van het rechtsgeding doet zich gelden in drie paradigmatische situaties:

1) de onaantastbaarheid van vonnissen (finality of judgments); de situatie waarin een rechtssysteem bepaalt dat geen andere rechter dan de bevoegde rechter in hogere voorziening kan oordelen over de juistheid of geldigheid van een vonnis, met de implicatie dat de partijen ervan zijn weerhouden om het vonnis op andere wijze te bestrijden;

2) de eindigheid in hetzelfde geding (finality within the same case), waar een rechtssysteem een rechter in hetzelfde geding verbiedt om kwesties te heropenen die reeds zijn beslist, met de consequentie dat partijen effectief worden belemmerd om die kwesties nogmaals ter discussie te stellen; en, tot slot

3) de eindigheid in een ander geding (finality in another case); de situatie waarin een rechtssysteem de heropening uitsluit van kwesties die reeds in een ander geding zijn beslist. De laatstgenoemde situatie kent drie varianten:

   a) ‘eis-preclusie' (claim preclusion): een rechtssysteem sluit uit dat een partij met succes procedeert over een vordering die reeds is beslist;

   b) 'geschilpunt-preclusie' (issue preclusion): een rechtssysteem sluit uit dat een partij met succes procedeert over een geschilpunt dat reeds is beslist); en

   c) 'ruimere preclusie' (wider preclusion): een rechtssysteem sluit uit dat een partij met success procedeert over vorderingen of geschilpunten die niet reeds zijn beslist maar die eerder konden en hadden moeten worden beslist).

De onaantastbaarheid van vonnissen waarborgt zowel Engels als Nederlands recht door andere dan de bevoegde hogere rechter te verbieden om te oordelen over de juistheid of geldigheid van een vonnis. Dit verbod belet effectief ook partijen om anders dan in het kader van een hogere voorziening de juistheid of geldigheid van een vonnis te betwisten. Engels recht bereikt dit doel door middel van het verbod op misbruik van procesrecht (collateral attack abuse). Nederlands recht gebuikt hiervoor niet het verbod op misbruik van procesrecht, maar het gesloten stelsel van rechtsmiddelen. Niettegenstaande deze verschillen in vorm, ligt aan beide doctrines hetzelfde doel ten grondslag: de goede procesorde (de sound administration of justice), die in het geding komt als iedere rechter eindeloos kan oordelen over de juistheid of geldigheid van het vonnis van een andere rechter. De doctrines komen ook overigens overeen, aangezien zij beide de bevoegdheid betreffen van de aangezochte rechter, wat meebrengt dat de rechter desnoods ambtshalve de onaantastbaarheid van een vonnis moet handhaven. Een gemeenschappelijke beperking is dat beide doctrines er niet aan in de weg staan dat een rechter een met een bestaand vonnis tegenstrijdig of zelfs onverenigbaar vonnis wijst.

Eindigheid in hetzelfde geding garandeert zowel Engels als Nederlands recht door middel van een verbod voor een rechter om kwesties te heropenen die in dezelfde procedure al zijn beslist. Beide rechtssystemen bereiken dit doel door beperking van de bevoegdheid van de rechter die een kwestie heeft beslist, de rechter in hoger beroep, en de rechter naar wie de zaak na vernietiging (of cassatie) wordt verwezen. Naar Engels recht is de bevoegdheid van de rechter uitgeput nadat deze vonnis heeft gewezen; de rechter is 'functus officio'. De bevoegdheid van de rechter

in hoger beroep is verder beperkt door de grieven van partijen, die de grenzen bepalen van de rechtsstrijd in hoger beroep. De beslissing van de rechter in hoger beroep bepaalt vervolgens de grenzen van de rechtsstrijd na verwijzing, die niet omvat kwesties die niet zijn bestreden of kwesties die in hoger beroep al zijn beslist. Naar Nederlands recht is een rechter in beginsel in hetzelfde geding gebonden aan zijn eigen uitdrukkelijke en onvoorwaardelijke beslissingen (de 'leer van de bindende eindbeslissing'). In hoger beroep (of cassatie) is de rechter verder gebonden aan beslissingen die onaantastbaar zijn geworden (het 'grievenstelsel'). Na cassatie en verwijzing, tot slot, ontbeert de rechter naar wie de zaak wordt verwezen de bevoegdheid om af te wijken van de in cassatie tevergeefs bestreden beslissingen die door verwerping van het daarop betrekking hebbende onderdeel van het cassatiemiddel in zoverre onaantastbaar zijn geworden.

De Engelse en Nederlandse regels en doctrines over eindigheid in hetzelfde geding komen grotendeels overeen naar aard en doel. In beide rechtsstelsels is dit een zaak van openbare orde; rechters moeten zo nodig ambtshalve optreden. Zij dienen primair het publieke belang bij een goede procesorde, die eist in het kader van efficiëntie en het voorkomen van vertraging dat de eindigheid van het rechtsgeding ook wordt gehandhaafd in hetzelfde geding. Er zijn bepaalde verschillen tussen de twee rechtsstelsels op het vlak van beperkingen en uitzonderingen. Bijvoorbeeld, naar Engels recht is een rechter functus officio zodra zijn vonnis ‘final’ is, dat wil zeggen, wanneer het vonnis is ‘perfected by sealing’ en niet langer kan worden veranderd, heropend, of herroepen door de rechter die het heeft gewezen of enig andere dan de bevoegde appèlrechter. Een Engels vonnis kan dus final zijn terwijl hoger beroep nog open staat. De focus in Nederlands richt zich op de vraag wanneer sprake is van een eindbeslissing – een uitdrukkelijke en onvoorwaardelijke beslissing. Een eindbeslissing kan voorkomen in een tussenvonnis, waartegen zonder verlof hoger beroep slechts open staat samen met het eindvonnis (de beslissing die ten aanzien van een deel van het gevorderde een eind maakt aan het geding). Eindigheid in hetzelfde geding kan dus technisch eerder intreden naar Nederlands recht. Echter, het verschil tussen Nederlands en Engels recht op dit punt is marginaal, aangezien de bevoegdheid van een Engelse rechter om zijn eigen vonnis te herroepen en veranderen voor het moment waarop het is perfected by sealing (‘Barrell-jurisdiction’) beperkt is tot uitzonderlijke omstandigheden. Bovendien is de eindigheid in hetzelfde geding binnen dezelfde instantie naar Nederlands recht minder strikt dan naar Engels recht; afgezien van een algemene uitzondering voor bijzondere omstandigheden, heeft een Nederlandse rechter in dezelfde instantie die vaststelt dat een van zijn eindbeslissingen feitelijk of rechtens onjuist is de bevoegdheid om nadat hij de partijen heeft gehoord, de eindbeslissing te heroverwegen om een ondeugdelijk eindvonnis te voorkomen.

Eindigheid in een ander geding bereiken Engels en Nederlands recht door een beperking van de mogelijkheid om (succesvol) opnieuw te procederen over kwesties die al eerder zijn beslist, of kwesties die beslist hadden kunnen en moeten worden. Om dit doel te bereiken kennen beide rechtssystemen regels over eis-preclusie, geschilpunt-preclusie en ruimere-preclusie.

Eis-preclusie naar Engels recht werkt volgens twee doctrines: ten eerste, ‘merger in rem judicatam’ (de “merger doctrine”) en, ten tweede, ‘estoppel per rem judicatam’ (“estoppel doctrine”). Tezamen vormen de merger doctrine en de estoppel doctrine de Engelse ‘res judicata doctrine’. De merger doctrine is een beperking van

de mogelijkheid om een nieuw vonnis te verkrijgen voor dezelfde feitelijke grondslag waarvoor reeds een vonnis is verkregen. De estoppel doctrine in de vorm van ‘cause of action estoppel’, vormt een beperking van de mogelijkheid om (succesvol) bestaande beslissingen over een vordering voor een specifieke feitelijke grondslag te weerspreken. Naar Nederlands recht werkt eis-preclusie deels via het gezag van gewijsde van vonnissen (artikel 236 Rv), dat beperkter is in reikwijdte dan de Engelse res judicata doctrine en veel lijkt op de Engelse estoppel doctrine. Een ander deel van eis-preclusie naar Nederlands recht gaat via het vereiste van een voldoende belang bij een rechtsvordering (artikel 3:303 BW). Het belangvereiste impliceert dat een eiser geen rechtsvordering toekomt als hij geen belang heeft bij zijn vordering, wat het geval kan zijn wanneer hij voor dezelfde feitelijke grondslag voor die vordering reeds een vonnis heeft verkregen.

Gewezen kan worden op verscheidene verschillen tussen de Engelse en de Nederlandse regels voor eis-preclusie. In de eerste plaats, de Engelse res judicata doctrine (dus zowel de merger doctrine als de estoppel doctrine) is toepasselijk zodra sprake is van een einsvonnis (final judgment). Het Nederlandse gezag van gewijsde wordt slechts toegekend aan vonnissen die in kracht van gewijsde zijn gegaan. Op dit punt treedt eis-preclusie dus sneller in naar Engels recht dan naar Nederlands recht. Nederlandse rechters hebben echter verschillende aanvullende doctrines ontwikkeld waardoor in de praktijk het verschil tussen de beide rechtsstelsels minder groot is dan lijkt. Een Nederlandse rechter kan op grond van de goede procesorde een zaak aanhouden wanneer een partij een vonnis weerspreekt dat nog niet in kracht van gewijsde is gegaan, totdat dit vonnis in kracht van gewijsde gaat of wordt vernietigd. Een Nederlandse rechter in kort geding moet verder op grond van de ‘afstemmingsregel’ zijn vonnis afstemmen op een eerder gewezen vonnis in een bodemprocedure, zelfs als dat vonnis nog niet in kracht van gewijsde is gegaan.

Een tweede verschil houdt verband met de Engelse merger doctrine. De merger doctrine is tot op zekere hoogte vergelijkbaar met het Nederlandse belangvereiste op grond van artikel 3:303 BW. Beide houden verband met het vorderingsrecht van de eiser. Echter, de Engelse merger doctrine is beperkter in reikwijdte dan het Nederlandse belangvereiste. De merger doctrine heeft slechts implicaties voor een succesvolle eiser, die voor zijn vordering een toewijzend vonnis heeft verkregen, terwijl het belangvereiste naar Nederlands recht ook gevolgen kan hebben voor een falende eiser, wiens vordering is afgewezen. Daartegenover staat dan weer de procedurele bevoegdheid van een Engelse rechter om een vordering die geen enkel vooruitzicht heeft op succes, niet-ontvankelijk te verklaren (‘strike out’). Nederlands recht staat verder minder negatief tegenover de situatie waarin een eiser voor dezelfde feitelijke grondslag een nieuwe vordering instelt nadat hij reeds een toewijzend vonnis heeft verkregen, mits de eiser een voldoende belang heeft bij zijn vordering. De Engelse merger doctrine werkt mechanisch; zodra een eiser een vonnis verkrijgt voor zijn vordering, verliest hij onverbiddelijk zijn vorderingsrecht ten aanzien van dezelfde feitelijke grondslag voor de vordering. Een eiser is als gevolg gedwongen om in een en dezelfde procedure alles wat hij kan te vorderen.

Geschilpunt-preclusie bestaat in zowel Engels als Nederlands recht. De Engelse estoppel doctrine in de vorm van ‘issue estoppel’, beperkt de mogelijkheid van partijen om tegenover dezelfde partij (succesvol) beslissingen aangaande een geschilpunt te weerspreken in een ander geding waarin hetzelfde geschilpunt opkomt. Bovendien kan de Engelse abuse of process doctrine een partij belemmeren in een

poging om opnieuw te procederen over een geschilpunt dat reeds is beslist ("relitigation abuse"), in omstandigheden waarin de estoppel doctrine niet toepasselijk is, bijvoorbeeld in een situatie waarin de partijen die in de procedure betrokken niet hetzelfde zijn. Naar Nederlands recht kan het gezag van gewijsde (artikel 236 Rv) leiden tot geschilpunt-preclusie; wanneer een beroep wordt gedaan op het gezag van gewijsde van een vonnis dat een bepaald geschilpunt heeft afgedaan, dan kan een partij tegenover dezelfde partij niet met succes een beslissing aangaande dat geschilpunt weerspreken, mits in de nieuwe procedure hetzelfde geschilpunt in geding is. Het Nederlandse verbod op misbruik van procesrecht (artikel 3:13 jo. artikel 3:15 BW) zou in theorie dezelfde rol kunnen spelen als de Engelse abuse of proces doctrine. Nederlandse rechters zijn echter tot op heden terughoudend op dit punt.

Ruimere-preclusie bestaat in ieder geval in het Engelse recht. De Engelse abuse of proces doctrine kan een poging in de weg staan om te procederen over vorderingen of geschilpunten die in een eerder geding hadden kunnen worden aangedragen en beslist en die op basis van een weging van alle belangen en omstandigheden van het geval ook hadden moeten worden aangedragen en beslist, zodat het alsnog aandragen van die vorderingen of geschilpunten kennelijk onredelijk is of op een andere wijze afbreuk doet aan de goede procesorde ("Henderson v. Henderson abuse of process"). Nederlands recht kent niet een vergelijkbaar ruime vorm van preclusie. In theorie kan sprake zijn van misbruik van procesrecht in zo'n situatie. In ieder geval is sprake van misbruik wanneer een partij een vordering of geschilpunt achterhoudt met als enige doel om de andere partij te schaden middels een nieuwe procedure. Bovendien kan worden aangenomen dat sprake is van misbruik van procesrecht wanneer een partij een kwestie opbrengt die zonder goede reden niet is opgeworpen in een eerder geding, terwijl de wederpartij een redelijk belang had om die kwestie meteen in dat eerdere geding afgedaan te zien worden, zodat het toestaan van de kwestie in de nieuwe procedure, niettegenstaande het legitieme doel van de poging, onevenredig veel schade zou toebrengen aan de belangen van de wederpartij.

Deel II vereenvoudigt de problematiek van de implementatie van het beginsel van eindigheid van het rechtsgeding tussen rechtstelsels door onderscheid te maken tussen twee al te vaak verwarde maar fundamenteel verschillende kwesties: de erkenning van buitenlandse vonnissen aan de ene kant (Hoofdstuk 3), en aan de andere kant, het bepalen van de (preclusieve) rechtsgevolgen van buitenlandse vonnissen die voor erkenning in aanmerking komen (Hoofdstuk 4). Het probleem van erkenning betreft de lokale geldigheid van een buitenlands vonnis. Rechtsmacht is de enige echt fundamentele voorwaarde voor erkenning, en de openbare orde de enige acceptabele uitzondering op erkenning. Het probleem van preclusie tussen verschillende jurisdicties, daarentegen, gaat over de rechtsgevolgen van een buitenlands vonnis dat voor erkenning in aanmerking komt.

Lokale geldigheid – de status die een buitenlands vonnis verkrijgt door erkenning – is slechts een aspect van de geldigheid van een buitenlands vonnis. Twee aanvullende aspecten zijn (1) de geldigheid in de staat waar het vonnis is gewezen naar het (procedurele of constitutionele) recht van die staat; en (2) de geldigheid van het vonnis in de internationale rechtsorde – regionaal of mondiaal – naar de

maatstaven van internationaal recht. Dit onderscheid verklaart waarom een vonnis dat is vernietigd in de staat waar het is gewezen toch kan worden erkend in een andere staat. Het onderscheid verklaart verder waarom een vonnis dat geldig blijft in de staat waar het is gewezen erkenning kan worden geweigerd in een andere staat. Tot slot verklaart het onderscheid waarom als een vonnis geldigheid mist naar internationaal recht, staten verplicht kunnen zijn om een buitenlands vonnis erkenning te weigeren, terwijl dat vonnis geldig is in de staat waar het is gewezen.

Het probleem van erkenning is geworteld in het internationaalrechtelijke beginsel van territorialiteit. Zowel Engelse als Nederlandse rechters hanteren dit beginsel als grondslag voor de noodzaak van erkenning voordat een buitenlands vonnis lokale geldigheid verkrijgt. Territorialiteit impliceert een beperking van de reikwijdte van de geldigheid van iedere handeling van een staat, inclusief een vonnis. Zonder voorafgaande erkenning ontbeert een buitenlands vonnis dus lokale geldigheid. Of een vonnis geldigheid verkrijgt in het territoir van een andere staat hangt af van het recht van die staat; een staat kan door erkenning een buitenlands vonnis opnemen in zijn eigen rechtsorde, door het toekennen van lokale geldigheid, waarmee het buitenlandse vonnis lokaal de status verkrijgt van 'vonnis' – een beslissing met rechtskracht tussen partijen die rechtsgevolgen kan hebben, zoals executie en preclusie, om zo gerechtigheid en eindigheid te effectueren.

Het beginsel van territorialiteit verklaart niet waarom staten over en weer elkaars vonnissen erkennen. Met andere woorden, territorialiteit vormt niet de ratio voor de erkenning van buitenlandse vonnissen. De ratio die ten grondslag ligt aan deze praktijk is tweevoudig: ten eerste, het belang van gerechtigheid en, ten tweede, het belang van eindigheid van het rechtsgeding.

Erkenning naar Engels en Nederlands recht hangt fundamenteel af van één voorwaarde: het buitenlandse vonnis moet zijn gewezen door een rechter met rechtsmacht. Een belangrijk verschil tussen de beide rechtstelsels is echter de gehanteerde standaard waaraan de rechtsmacht van de buitenlandse rechter wordt getoetst. Een Engelse rechter vereist dat de buitenlandse rechter zijn rechtsmacht baseerde op een naar Engelse maatstaven voor erkenning acceptabele grondslag. Een Nederlandse rechter, daarentegen, gaat na of de buitenlandse rechter zijn rechtsmacht baseerde op een naar internationale maatstaven acceptabele grondslag. Het EEX en EVEX Regime illustreert hoe Engeland en Nederland gezamenlijk gemeenschappelijke rechtsmachtmaatstaven hebben vastgesteld, op grond waarvan elkaars vonnissen automatisch worden erkend ("wederzijdse erkenning"). Dat regime impliceert bovendien het wederzijds vertrouwen dat deze maatstaven over een weer juist worden toegepast, zodat Engelse en Nederlandse rechter in beginsel elkaars rechtsmacht niet mogen toetsen.

Zowel naar Engels als Nederlands recht is de openbare orde overigens een grond voor het maken van een uitzondering op de erkenning van een buitenlands vonnis. Daaraan doet de rechtsmacht van de buitenlandse rechter niet af. De fundamentele rechtsbeginselen of essentiële economische of sociale belangen krijgen dan voorrang op het belang bij gerechtigheid en de eindigheid van het rechtsgeding.

Rechtsmacht en erkenning zijn dus intrinsiek verbonden; een vonnis is een uitoefening van de rechterlijke macht van de staat. Erkenning van een vonnis houdt in wezen in dat de ene staat de (rechterlijke) macht van de andere staat aanvaardt. Volgens Engelse rechters betekent een gebrek aan rechtsmacht dat een buitenlands

vonnis geen gelding kan verkrijgen in Engeland. Nederlandse rechters zien erkenning als een daad van acceptatie van de rechtsmacht van de rechter in de staat waar een buitenlands vonnis is gewezen. Noch Engelse noch Nederlandse rechters laten erkenning afhangen van de vraag of de rechter die het buitenlandse vonnis heeft gewezen bevoegd was naar maatstaven van zijn eigen recht; totdat een vonnis is vernietigd in de staat waar het is gewezen – dan is er in beginsel geen vonnis meer dat voor erkenning in aanmerking komt. Deze vraag betreft een ander aspect van de geldigheid van het buitenlandse vonnis: de geldigheid van het vonnis in de staat waar het is gewezen naar het recht van die staat. Deze vraag is een andere dan de vraag of het buitenlandse vonnis geldigheid verkrijgt in een andere staat naar het (internationaal privaat)recht van die staat.

Gerechtigheid en eindigheid van het rechtsgeding gelden voor zowel Engelse als Nederlandse als ratio voor de erkenning van buitenlandse vonnissen. Engelse rechters wijzen in dit kader primair op het private belang bij gerechtigheid en eindigheid. Nederlandse rechters, daarentegen, wijzen traditioneel op het publieke belang van een goede internationale procesorde en daarmee de rechtszekerheid tussen rechtsstelsels. De ratio van het EEX en EVEX Regime is in de eerste plaats het publieke belang bij het instellen en goed functioneren van een aan de lidstaten gemeenschappelijke markt en rechtsruimte. Het publieke belang en private belang bij gerechtigheid en eindigheid van het rechtsgeding zijn nauw verbonden; de behartiging van het ene belang draagt doorgaans bij aan behartiging van het andere belang. Niettemin liggen verschillen tussen rechtstelsels voor de hand naarmate de nadruk in een rechtstelsel ligt op het publieke belang en de nadruk in een ander rechtstelsel ligt op het private belang. Bijvoorbeeld, naar Engels recht gelden in het kader van erkenning veel strengere eisen dan naar Nederlands recht voor rechtsmacht. Dit verschil kan worden verklaard omdat een liberaler regime zoals in Nederland in het publieke belang van gerechtigheid en eindigheid is, al gaat dit liberale regime in individuele gevallen soms ten koste van het private belang.

Aangezien het probleem van eindigheid in hetzelfde geding zich slechts aandient in de context van hetzelfde geding dat zich noodzakelijkerwijs afspeelt in een rechtstelsel, is het van belang om vast te stellen dat internationaal de problematiek die verband houdt met het beginsel van eindigheid van het rechtsgeding zich slechts doet gelden in twee van de drie paradigmatische situaties:

1) de onaantastbaarheid van het vonnis; en

2) de eindigheid in een ander geding;

Wat betreft de onaantastbaarheid van buitenlandse vonnissen geldt het volgende. Dit probleem steekt de kop op wanneer een partij in een lokale procedure een aanval opent op een buitenlands vonnis dat voor erkenning in aanmerking komt, bijvoorbeeld op de grond dat het vonnis onjuist of ongeldig is. Naar Engels recht sluit de zogeheten ‘Act of State doctrine’ uit dat een Engelse rechter op de stoel van de buitenlandse appèlrechter gaat zitten en oordeelt over de juistheid of geldigheid van een vonnis van een andere staat, mits die kwestie het voorwerp vormt van de procedure. In andere gevallen kan een Engelse rechter een aanval op de juistheid of geldigheid van een erkend buitenlands vonnis uitsluit op grond van de abuse of process doctrine. Een Nederlandse rechter zal een dergelijke aanval uitsluiten op grond van het beginsel van de goede procesorde, in het bijzonder de doctrine van het gesloten stelsel van rechtsmiddelen, die geldt voor alle vonnissen met geldigheid in

de Nederlandse rechtsorde. Onder het EEX en EVEX Regime zijn dergelijk aanvallen uitgesloten door het verbod om de juistheid te toetsen van een vonnis dat voor erkenning in aanmerking komt. Dit verbod houdt in dat de rechters van de staat waar het vonnis is gewezen exclusief bevoegd zijn om te oordelen over de geldigheid van het vonnis naar het recht van die staat. Als gevolg kan een partij die het niet eens is met het vonnis zich slechts bedienen van de rechtsmiddelen die hem ter beschikking staan in de staat van oorsprong.

Het tweede probleem – eindigheid in een ander geding – doet zich internationaal op drie manieren voor:

1) een succesvolle eiser stelt lokaal een nieuwe vordering in op basis van dezelfde feitelijke grondslag waarvoor eerder al een vordering is toegewezen in een andere jurisdictie;

2) een falende eiser of verweerder weerspreekt de beslissing van een buitenlandse rechter die een reeds besliste kwestie betreft; en

3) het gedrag van een partij in een geding is ongepast in het licht van een eerder geschil in het buitenland.

Voor de eerste situatie, waarin een succesvolle eiser lokaal een nieuwe vordering instelt op basis van dezelfde feitelijke grondslag waarvoor eerder al een vordering is toegewezen in een andere jurisdictie, kent Engels recht een specifieke bepaling: Section 34 van de 1982 Act. Deze bepaling sluit elke nieuwe vordering uit. Een Engelse rechter gaat bij de toepassing van Section 34 dus niet na of een nieuwe eis is toegestaan in de staat waar het eerdere vonnis is gewezen. In Nederland is een nieuwe vordering voor dezelfde feitelijke grondslag uitdrukkelijk toegestaan, tenzij de aangezochte Nederlandse rechter oordeelt dat de eiser onvoldoende belang heeft bij zijn vordering, hetgeen voor de hand ligt, aangezien de eiser tevens een vordering kan instellen die is gebaseerd op het buitenlandse vonnis. Deze situatie is slechts anders indien het buitenlandse vonnis voor tenuitvoerlegging in aanmerking komt op grond van het EEX en EVEX Regime, een ander verdrag, of een specifieke wettelijke bepaling. Het EEX en EVEX Regime sluit overigens een nieuwe vordering uit tegen de achtergrond van de verplichting tot automatische erkenning en het verbod van een onderzoek naar de juistheid van het buitenlandse vonnis.

In de tweede situatie, waarin een falende eiser of verweerder de beslissing van een buitenlandse rechter die een reeds besliste kwestie betreft weerspreekt, past een Engelse rechter steevast de Engelse estoppel doctrine toe om het preclusieve effect van het buitenlandse vonnis te bepalen. Niettemin neemt een Engelse rechter wel het buitenlandse preclusierecht in acht, ter voorkoming van ‘overpreclusie’ – de situatie waarin de rechter een partij belet om met succes over een kwestie te procederen, terwijl opnieuw procederen over de kwestie is toegestaan naar het recht van de staat waar het buitenlandse vonnis werd gewezen. Engelse rechters hanteren deze methode ook ten aanzien van vonnissen die vallen onder het EEX en EVEX Regime. Nederlandse rechters daarentegen passen nooit Nederlands preclusierecht toe op een buitenlands vonnis. Ten aanzien van vonnissen die worden erkend naar commuun recht, schrijven ongeschreven beginselen van internationaal privaatrecht voor dat een rechter in elk concreet geval bepaalt welk gezag van gewijsde toekomt aan een buitenlands vonnis; een rechter neemt buitenlands preclusierecht in aanmerking om over- of onderpreclusie te voorkomen. Voor vonnissen die vallen

onder het EEX en EVEX Regime geldt dat een Nederlandse rechter in beginsel het preclusierecht toepast van het land waar het buitenlandse vonnis werd gewezen.

De zojuist genoemde benadering passen Engelse en Nederlandse rechters toe op vragen van eis-preclusie en geschilpunt-preclusie. Bij vragen van ruimere-preclusie passen zowel Engelse als Nederlandse rechters hun eigen recht toe, aangezien bij deze vorm van preclusie niet zozeer de rechtsgevolgen van een vonnis betreft, maar het gedrag van partijen in de nieuwe procedure tegen de achtergrond van de eerdere procedure in het buitenland. Zowel Engelse als Nederlandse rechters nemen de eerdere procedure in het buitenland in aanmerking als feitelijke omstandigheid bij de toepassing van de eigen regels over misbruik van procesrecht. Om dezelfde reden is in het kader van het EEX en EVEX Regime het Hoffmann-beginsel – dat een vonnis dat voor erkenning in aanmerking komt in beginsel dezelfde rechtsgevolgen moet hebben in de staat van erkenning als in de staat waar het vonnis is gewezen – niet toepasselijk op vragen van ruimere-preclusie.

Deel III analyseert de recente harmonisatie van preclusierecht op Europees niveau (Hoofdstuk 5) en stelt een conflictenrechtelijke methode voor het beantwoorden van rechtsvragen die opkomen zodra een partij een beroep doet op een buitenlands vonnis om een einde te maken aan het rechtsgeding (Hoofdstuk 6).

De huidige trend van harmonisatie van het preclusierecht die wordt aangedreven door het HvJEU heeft een wankele basis in het VWEU. Bovendien is de reikwijdte van de harmonisatie onzeker. De resulterende fragmentatie van het recht leidt onnodig tot rechtsonzekerheid. In plaats van de harmonisatie van het preclusierecht op Europees niveau, zou het HvJEU de implicaties van het Hoffmann-beginsel moeten verduidelijken. Vervolgens kan de EU de juiste toepassing van het Hoffmann-beginsel faciliteren door, bijvoorbeeld, de introductie van een procedure voor het stellen van vragen over buitenlands recht tussen de lidstaten. De fragmentatie van het recht wordt versterkt door de groeiende rol op dit terrein van het EHRM. Het EHRM heeft zich in het kader van artikel 6 lid 1 EVRM gemengd in een zeer technisch en gevaarlijk terrein waar het Hof geen sprekende ervaring heeft, door minimum en maximum eisen te stellen aan preclusie, ongeacht het toepasselijke preclusierecht.

Een terrein waar het HvJEU wel een nuttige interventie heeft geplaatst is ten aanzien van het probleem van de onaantastbaarheid van vonnissen. Het Hof heeft beslist dat het verbod om over te gaan tot een onderzoek van de juistheid van een beslissing die voor erkenning in aanmerking komt op grond van het EEX (en EVEX) impliceert dat de rechter in de staat waar het vonnis is gewezen exclusief bevoegd is om te oordelen over de geldigheid van het vonnis. Deze interventie is essentieel voor het goed functioneren van de Europese rechtsruimte die verschillende rechtsstelsel omvat en de interventie zal onnodige spanningen tussen deze rechtsstelsels helpen voorkomen. Uiteindelijk zal het succes van dit systeem afhangen van de nodige maatregelen om het wederzijds vertrouwen te versterken dat nu als beginsel wordt opgelegd aan rechters in de EU.

Deel III sluit af met een voorstel van een conflictenrechtelijke methode voor het oplossen van rechtsvragen die opkomen zodra een buitenlands vonnis dat voor erkenning in aanmerking komt lokaal wordt ingeroepen ter effectuering van het

beginsel van eindigheid van het rechtsgeding. Deze methode kan worden gehanteerd voor alle buitenlandse vonnissen, ongeacht of die vonnissen worden erkend op grond van het commune recht, het EEX en EVEX Regime, of een bi- of multilateraal verdrag. Er zijn twee redenen waarom de methode algemeen toepasselijk kan zijn, zonder een bijzonder regime te bepalen voor verregaand geïntegreerde samenlevingen en rechtstelsels (zoals die van de EU lidstaten): in de eerste plaats komen vragen van preclusierecht ten aanzien van een buitenlands vonnis pas op nadat reeds vaststaat dat het vonnis voor erkenning in aanmerking komt; en, in de tweede plaats, het probleem van preclusie betreft de eindigheid van het rechtsgeding, een algemeen rechtsbeginsel, en een waarde die wordt gedeeld door alle rechtstatelijke systemen. Deze twee redenen impliceren tevens dat bij de keuze voor een conflictenrechtelijke methode een neutraal, rechtsverhouding(vonnis)-georiënteerd systeem kan worden gehanteerd.

Bij het opstellen van de conflictenrechtelijke methode kunnen op basis van rechtsvergelijkend onderzoek drie categorieën van rechtsvragen worden onderscheiden:

1) eis- en geschilpunt-preclusie;

2) ruimere-preclusie; en

3) procedurele aspecten van preclusie.

Deze drie categorieën corresponderen met de rechtsvragen die daadwerkelijk opkomen door een beroep op eindigheid van het rechtsgeding op grond van een buitenlands vonnis dat voor erkenning in aanmerking komt. De voorgestelde conflictregels zijn als volgt:

> *1) het recht van het land waar het vonnis is gewezen dat voor erkenning in aanmerking komt bepaalt de eis- en geschilpunt-preclusieve gevolgen van het vonnis.*
>
> > *a) de aangezocht rechter past zijn eigen recht toe voor zover het recht van het recht van het land waar het vonnis is gewezen dat voor erkenning in aanmerking komt leidt tot over- of onderpreclusie, kennelijk in strijd met de openbare orde, inclusief artikel 6 lid 1 EVRM;*
>
> *2) forum recht bepaalt of procedureel gedrag moet worden uitgesloten in het licht van een eerdere procedure in het buitenland. In het kader van de toepassing van forum recht, houdt de rechter rekening met het procesrecht van het land waar het vonnis is gewezen dat voor erkenning in aanmerking komst; en*
>
> *3) forum recht bepaalt de procedure van preclusie alsmede de implicaties van een succesvol beroep op het beginsel van eindigheid van het rechtsgeding.*

Deze conflictregels bieden een oplossing voor de problemen die kenmerkend zijn voor de methodes, zoals die gehanteerd door Engelse rechters, die toepassing van buitenlands preclusierecht afwijzen. De conflictregels regelen verder drie belangrijke punten: ten eerste, de toepasselijkheid van buitenlands preclusierecht moet altijd onder voorbehoud zijn van de openbare orde van de aangezochte rechter; ten tweede,

kwesties van ruimere-preclusie, die nauw verband houden met gedrag dat kwalificeert als misbruik van procesrecht in het licht van het eerdere geding in het buitenland, moeten worden bepaald door het recht van het land waar het gedrag plaatsvindt, terwijl het belangrijk is dat een rechter rekening houdt met de procesregels van he land waar het eerdere geding plaatsvond; tot slot, kwesties die de procedure of effecten van preclusie betreffen kunnen zonder probleem worden bepaald door forum recht, zonder de effectiviteit aan te tasten van het beginsel van eindigheid van het rechtsgeding.

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