THE EFFECTS OF RECOGNIZED FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS

Abstract This article investigates what effects a recognized foreign judgment in civil and commercial matters has in English proceedings. Does the judgment have the effects that it has in the foreign country (extension of effects) or the effects that a comparable English judgment would have (equalization of effects), or a combination of these? After a review of the current law, it will be discussed what approach is preferable on principle. The suggested approach will then be illustrated by considering whether a foreign decision on one legal basis of a certain claim ought to preclude English proceedings involving another legal basis of the same claim. Finally, it will be discussed whether and how the effects of a recognized foreign judgment in England are affected by interests of a third country.

Keywords: cause-of-action estoppel, foreign judgment, issue estoppel, *res judicata*, rule in *Henderson v Henderson*.

I. INTRODUCTION

English courts routinely recognize foreign judgments. Much attention has been devoted to the requirements of recognition. Far less attention has been devoted to the effects of recognition, at least where recognition for purposes other than enforcement is sought.

The effects of a *domestic* judgment in subsequent English proceedings between the same parties or their privies are settled. The judgment creates an estoppel *per rem judicatam*. It precludes a reconsideration of the same cause of action (cause-of-action estoppel),[1] and it generally precludes the reconsideration of any issue of fact or law that the court determined as a necessary part of its decision (issue estoppel).[2] In the absence of special circumstances, a party is also precluded from raising causes of action or issues which that party failed to raise in the previous proceedings even though it was possible to do so. This rule, established in *Henderson v Henderson*,[3] is based on the precluded

[1] *Thoday v Thoday* [1964] P 181 (CA) 197–98; *Arnold v National Westminster Bank plc* [1991] 2 AC 93 (HL) 104; *Zurich Insurance Co plc v Hayward* [2011] EWCA Civ 641, [2011] CP Rep 39 [45]–[47].

[2] *R v Hartington Middle Quarter Inhabitants* (1855) 4 E & B 780, 794; 119 ER 288, 293; *Thoday v Thoday* [1964] P 181 (CA) 198; *Arnold v National Westminster Bank plc* [1991] 2 AC 93 (HL) 105, 111–12.

[3] (1843) 3 Hare 100, 114–15; 67 ER 313, 319. Followed in *Ord v Ord* [1923] 2 KB 432 (KB) 443; *Brisbane City Council v Attorney-General for Queensland* [1979] AC 411 (PC) 425; *Arnold v National Westminster Bank plc* [1991] 2 AC 93 (HL) 104–07, 111–12.

[*ICLQ* vol 62, April 2013 pp 441–461] doi:10.1017/S0020589313000018

party's conduct in earlier proceedings rather than an existing judgment. It may therefore apply, at least in a purely domestic context, even though the previous proceedings between the parties did not culminate in a judgment.[4] Nevertheless, the preclusion by virtue of the rule in *Henderson v Henderson* is closely linked with estoppel *per rem judicatam* and shall conveniently, if imprecisely, be included in the effects of a judgment.

The same rules have in principle been applied where the judgment was rendered in foreign proceedings. Foreign judgments have been considered capable of raising a cause-of-action estoppel,[5] an issue estoppel,[6] and a preclusion by virtue of the rule in *Henderson v Henderson*.[7] There has rarely been an investigation into the effects of the foreign judgment in the foreign country, since parties have rarely argued that those effects are relevant. It is therefore not settled what effects recognized foreign judgments have in English proceedings if such an argument is raised. Scholarly debate is equally scant.

The question of whether the effects of recognized foreign judgments in England ought to be governed by the same rules that govern the effects of domestic judgments is by no means academic. For example, under the law of many civil law countries, such as France and Germany,[8] *res judicata* effects apply only to the dispositive part (conclusions) of a domestic judgment but not to the factual determinations upon which the judgment is based. A judgment from such a country could not create an issue estoppel in English proceedings if a foreign judgment had the same effects in England as it does in the country in which it was rendered.

This article investigates the effects of recognized foreign judgments in England and Wales. The discussion is confined to judgments in civil and commercial matters and excludes, for example, judgments in family law or insolvency matters. This article focuses on the common law, although other recognition regimes are also considered.

After a review of the current law, it will be discussed what approach is preferable on principle. The suggested approach will then be illustrated by considering whether a foreign decision on one legal basis of a certain claim ought to preclude English proceedings involving another legal basis of the same claim. That discussion involves a

[4] *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] ICR 1170 (CA) 1180–81; *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 (HL) 32–33.

[5] *Vervaeke v Smith* [1983] 1 AC 145 (HL) 162; *Charm Maritime Inc v Kyriakou* [1987] 1 Lloyd's Rep 433 (CA) 441, 450; *Relfo Ltd (in liquidation) v Varsani* [2009] EWHC 2297 (Ch) [37]–[38].

[6] *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853 (HL) 918, 926, 967; *The Sennar (No 2)* [1985] 1 WLR 490 (HL) 493, 499; *Desert Sun Loan Corp v Hill* [1996] 2 All ER 847 (CA) 854, 862–63. Again, the finding must have been fundamental and not collateral: *Joint Stock Asset Management Co Ingosstrakh-Investments v BNP Paribas SA* [2012] EWCA Civ 644, [2012] 1 Lloyd's Rep 649 [61].

[7] *Vervaeke v Smith* [1983] 1 AC 145 (HL) 163; *Desert Sun Loan Corp v Hill* [1996] 2 All ER 847 (CA) 854, 863; *Fennoscandia Ltd v Clarke* [1999] 1 All ER (Comm) 365 (CA) 372–74. Indeed, *Henderson v Henderson* itself involved a foreign judgment. It has been held, unconvincingly, that conduct in foreign proceedings can lead to preclusion under the rule in *Henderson v Henderson* only if the proceedings culminated in a judgment on the merits: *Charm Maritime Inc v Kyriakou* [1987] 1 Lloyd's Rep 433 (CA) 442, 449–50.

[8] RC Casad, 'Issue Preclusion and Foreign Country Judgments: Whose Law?' (1984–85) 70 IowaLRev 53, 63–5; AT von Mehren and DT Trautman, 'Recognition of Foreign Adjudications: A Survey and a Suggested Approach' (1968) 81 HarvLRev 1601, 1674–7.

critical examination of the recent decision in *Naraji v Shelbourne*.[9] Finally, it will be discussed whether and how the effects of a recognized foreign judgment in England and Wales are affected by the interests of a third country. That discussion involves a review of the recent decisions in *Yukos Capital Sarl v OJSC Rosneft Oil Co*.[10]

II. THE CURRENT LAW OF ENGLAND AND WALES

A. The Possible Approaches

Where the effects of a foreign judgment in the foreign country differ from the effects of a comparable domestic judgment in the recognizing forum,[11] the two basic approaches of the equalization of effects and the extension of effects must be distinguished.[12] Equalization of effects means that the effects of a recognized foreign judgment in the forum are the same as those of a comparable domestic judgment. The foreign judgment is 'equalized' with a comparable domestic judgment. Extension of effects means that a recognized foreign judgment has the same effects in the forum that it has in the foreign country, subject to practical feasibility and the forum's public policy.[13] Its effects are extended to the forum. Either of these basic approaches can be taken in a pure form, but the two approaches can also be combined, in two different ways. A foreign judgment can have both the effects that it has in the foreign country and the effects that a comparable domestic judgment would have in the forum. This approach, which shall be called the 'maximum-effect approach', affords foreign judgments the greatest effect possible. By contrast, a foreign judgment can have only those effects that equally obtain in the foreign country under the foreign judgment and in the forum under a comparable domestic judgment. This approach, which shall be called the 'minimum-effect approach', affords foreign judgments the narrowest effect possible.

B. Common Law

The position at common law is not entirely clear. In the vast majority of cases in which the effects of a recognized foreign judgment in English proceedings at common law have been considered, the court applied the same rules that apply to domestic judgments, and said nothing on the effects of the foreign judgment in the foreign country. It might therefore be thought that the English courts have prescribed to a pure equalization approach. However, in none of those cases did either party argue that the effects of the foreign judgment in English proceedings depended upon its effects in the

[9] [2011] EWHC 3298 (QB).

[10] [2011] EWHC 1461 (Comm), [2012] 1 All ER (Comm) 479; [2012] EWCA Civ 855, [2012] 2 Lloyd's Rep 208.

[11] In this article, the term 'forum' denotes the jurisdiction in which the recognition of a judgment is being sought, and the term 'domestic judgment' denotes a judgment rendered by a court in the forum.

[12] P Barnett, 'The Prevention of Abusive Cross-Border Re-Litigation' (2002) 51 ICLQ 943, 954; H Linke, 'Selected Problems Relating to Lis Alibi Pendens and the Recognition of Judgments' in Court of Justice of the European Communities (ed), *Civil Jurisdiction and Judgments in Europe* (Butterworths 1992) 178.

[13] See A Layton and H Mercer, *European Civil Practice* (2nd edn, Sweet & Maxwell 2004) paras 24.009–24.010.

foreign country. The court was thus bound by the parties' tacit agreement that the effects of the foreign judgment in English proceedings were governed by the same rules of English law that govern the effects of domestic judgments.

An example is *Good Challenger Navegante SA v Metalexportimport SA*,[14] where the parties joined issue on whether a judgment by the Supreme Court of Romania created an issue estoppel in English proceedings between the same parties. Each party provided expert evidence on matters of Romanian law, but only insofar as it related to the requirements of issue estoppel in English law. Neither party contended that the alleged preclusionary effect of the Romanian judgment in English proceedings could only obtain if the same effect would obtain in new Romanian proceedings between the parties. Neither the trial judge nor the Court of Appeal mentioned even the possibility of the Romanian law on preclusion being relevant. But it cannot be inferred that the Romanian law on preclusion would have been held irrelevant had either party contended its relevance.

An English court might apply the English domestic rules on *res judicata* even where a party argues that the foreign law is relevant but fails to prove its content. As a general rule, English law is applied where a party who relies on foreign law for a claim or defence has not proved the content of the foreign law with sufficient specificity.[15] However, where it would be wholly artificial to apply English law to an issue governed by foreign law, the court may simply reject the claim or defence.[16] In *Carl Zeiss Stiftung v Rayner & Keeler Ltd*,[17] Lord Reid and Lord Wilberforce seriously doubted that the English domestic rules on *res judicata* can be applied where the effect of a foreign judgment under the foreign law is relevant.

A clear indication as to the approach taken by the English courts with regard to the effects of foreign judgments at common law can be derived only from cases in which a party argued that the effects of the foreign judgment in English proceedings depended upon its effects in the foreign country, and that party was prepared to prove the content of the foreign law. There have been some cases in which one party argued that a foreign judgment created an issue estoppel in English proceedings, and the other party argued that an issue estoppel could not operate because it was unknown in the foreign country.

Indeed, this argument was made in *Carl Zeiss Stiftung v Rayner & Keeler Ltd*,[18] the very case in which the House of Lords laid down that a foreign judgment, like a domestic judgment, can create an issue estoppel in English proceedings. It was argued that the German judgment *in casu* could not create an issue estoppel in English proceedings since German law had no comparable concept. Only two law lords

[14] [2003] EWHC 10 (Comm); [2003] EWCA Civ 1668, [2004] 1 Lloyd's Rep 67. Another example is *Naraji v Shelbourne* [2011] EWHC 3298 (QB), discussed in Part IV below.

[15] This rule has been expressed in the form of a presumption that foreign law is the same as English law unless the contrary is established: *The Parchim* [1918] AC 157 (PC) 161; *Ertel Bieber & Co v Rio Tinto Co Ltd* [1918] AC 260 (HL) 295; *Royal Boskalis Westminster NV v Mountain* [1999] QB 674 (CA) 693, 724–26, 732. However, it is better to say that where foreign law is not proved the court applies English law: *Global Multimedia International Ltd v ARA Media Services* [2006] EWHC 3612 (Ch) [38].

[16] *Shaker v Al-Bedrawi* [2002] EWCA Civ 1452, [2003] Ch 350 [64]–[67]; *Fourie v Le Roux* [2005] EWCA Civ 204, [2006] 2 BCLC 531 [65]; *MA (Ethiopia) v Secretary of State for the Home Department* [2009] EWCA Civ 289, [2010] INLR 1 [63]. See also R Fentiman, *Foreign Law in English Courts: Pleading, Proof and Choice of Law* (OUP 1998) 143–53.

[17] [1967] 1 AC 853 (HL) 919 (Lord Reid), 970–71 (Lord Wilberforce).

[18] [1967] 1 AC 853.

addressed the argument (the other three law lords rejected an estoppel on the ground that the parties to the two sets of proceedings were not identical). Lord Wilberforce said: 'generally, it would seem unacceptable to give a foreign judgment a more conclusive force in this country than it has where it was given'.[19] To the same effect, Lord Reid said:

> [I]t seems to me to verge on absurdity that we should regard as conclusive something in a German judgment which the German courts themselves would not regard as conclusive. 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.[20]

These dicta have been followed in subsequent cases. In *Helmville Ltd v Astilleros Espanoles SA* (*The Jocelyne*),[21] Lloyd J observed that the Belgian judgment *in casu* could create an issue estoppel in English proceedings only if it would do so in subsequent Belgian proceedings,[22] which was found to be the case.[23] In *Yukos Capital Sarl v OJSC Rosneft Oil Co*,[24] Hamblen J observed that the Dutch judgment *in casu* could create an issue estoppel in English proceedings only if it would do so in subsequent Dutch proceedings,[25] which again was found to be the case.[26] It should be noted that both cases were decided under the common law, not the Brussels regime or domestic legislation.[27]

There is thus a consistent line of dicta spanning 45 years to the effect that a recognized foreign judgment can create an issue estoppel in English proceedings at common law only if it would create an issue estoppel in new proceedings in the foreign country.[28] Where the foreign judgment would not create an issue estoppel in new proceedings in the foreign country, it cannot create an issue estoppel in English proceedings even though a comparable English judgment would do so. This line of dicta is incompatible with both the pure equalization approach and the maximum-effect approach. It is compatible with both the pure extension approach and the minimum-effect approach. A choice between those two approaches will have to be made in a case in which a party argues that a foreign judgment creates an effect in English proceedings that it has in the foreign country but that a comparable English judgment would not have. No such case seems to have arisen at common law so far.[29]

[19] ibid 970.
[20] ibid 919.
[21] [1984] 2 Lloyd's Rep 569 (QB).
[22] ibid 573.
[23] ibid.
[24] [2011] EWHC 1461 (Comm), [2012] 1 All ER (Comm) 479; reversed on other grounds [2012] EWCA Civ 855, [2012] 2 Lloyd's Rep 208. Another aspect of that case is discussed in Part V below.
[25] [2011] EWHC 1461 (Comm), [2012] 1 All ER (Comm) 479 [56]–[58].
[26] ibid [77]–[79].
[27] *The Jocelyne* was decided before the Brussels Convention became applicable to the UK. The Dutch judgment in *Yukos* fell outside the scope of the Brussels I Regulation since it concerned arbitration: art 1(2)(d) of the Regulation. The Foreign Judgments (Reciprocal Enforcement) Act 1933 should have been applied in both cases, but it would not have made a difference compared to the position at common law: J van de Velden, 'The "Cautious Lex Fori" Approach to Foreign Judgments and Preclusion' (2012) 61 ICLQ 519, 523–5.
[28] This approach is called the 'cautious *lex fori*' approach by van de Velden, ibid.
[29] A possible exception is *Fennoscandia Ltd v Clarke* [1999] 1 All ER (Comm) 365 (CA) 372–74, where one (but possibly not the sole) reason for applying the rule in *Henderson v Henderson* was the fact that the claim in question was precluded in the foreign country.

C. Domestic Statutes

Section 9(3)(a) of the Administration of Justice Act 1920 prescribes a pure equalization approach by providing that a foreign judgment registered in the High Court under that Act shall 'be of the same force and effect' as if it had been originally obtained in the High Court. However, it is unclear whether that provision concerns only the execution of the foreign judgment in England or whether it extends to wider (possible) effects of the judgment such as an issue estoppel in English proceedings between the same parties involving a different cause of action. If the scope of the provision is limited, the common law will govern other effects of the foreign judgment.[30]

Section 2(2) of the Foreign Judgments (Reciprocal Enforcement) Act 1933 prescribes a pure equalization approach, in the same manner as section 9(3)(a) of the 1920 Act, for the purposes of execution of a foreign judgment registered under the 1933 Act.[31] Section 8(1) of the 1933 provides that a judgment that has been, or could be, registered under that Act (and the registration of which could not be set aside) 'shall be recognized in any court in the United Kingdom as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied on by way of defence or counter-claim in any such proceedings'. The House of Lords has effectively interpreted that phrase as giving the judgment the same effects as at common law.[32]

D. Brussels I Regulation and Lugano Convention

Under the Brussels I Regulation,[33] the effects of a recognized foreign judgment may depend upon whether recognition occurs by way of enforcement or otherwise. In the context of enforcement, domestic legislation prescribes the pure equalization approach.[34] However, where the effects of the foreign judgment in the rendering Member State are lesser than the effects of a comparable English judgment in England, the equalization approach may not comply with the Regulation since the European

[30] The residual application of common law rules in the context of the 1920 Act was recognized in *Owens Bank Ltd v Bracco* [1992] 2 AC 443 (HL) 464.

[31] A very similar provision is contained in the European Communities (Enforcement of Community Judgments) Order 1972, section 4.

[32] *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 (HL). Section 8(3) provides that the Act does not deprive any judgment of any effect that it would have in the absence of the Act.

[33] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1. Everything said in this article on the Brussels I Regulation applies *mutatis mutandis* to the Lugano Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[34] Civil Jurisdiction and Judgments Order, SI 2001/3929, art 3 and Sch 1, para 2(2): 'A judgment registered under the Regulation 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 judgment had been originally given by the registering court and had (where relevant) been entered'. An identical provision exists for the Lugano Convention 2007: Civil Jurisdiction and Judgments Act 1982, section 4A(2).

Court of Justice has favoured the minimum-effect approach in the context of enforcement. In *Apostolides v Orams*, the court said:

> [A]lthough recognition must have the effect in principle of conferring on judgments the authority and effectiveness accorded to them in the member state in which they were given, 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.[35]

Outside the context of enforcement, the pure extension approach probably applies to judgments recognized under the Brussels I Regulation.[36] The maximum-effect approach or the pure equalization approach might seem to have been adopted in cases in which the Court of Appeal gave a judgment from another Member State an effect that a comparable English judgment would have had, without investigating whether the foreign judgment had that effect in the rendering Member State.[37] However, it was not argued in any of those cases that the effects of the foreign judgment in England depended upon its effects in the rendering Member State.

Indeed, in *Boss Group Ltd v Boss France SA*,[38] the Court of Appeal held that a French judgment rendered in 'provisional' proceedings and not binding on any French court could not create an issue estoppel in English proceedings, even though an English interlocutory order can create an issue estoppel.[39] In subsequent cases, the High Court denied a judgment from another Member State an effect which it did not have in the rendering Member State but which a comparable English judgment would have had.[40] These decisions are consistent only with the pure extension approach and the minimum-effect approach. Outside the context of enforcement, the Brussels I the Regulation probably excludes the minimum-effect approach. Under the prevailing view,[41] the

[35] Case C-420/07 *Apostolides v Orams* [2009] ECR I-3571, para 66; citations omitted.

[36] Layton and Mercer (n 13) para 24.010. A pure equalization approach seems to be favoured by A Briggs and P Rees, *Civil Jurisdiction and Judgments* (5th edn, Informa 2009) para 7.26. A pure extension approach for cause-of-action preclusion and a pure equalization approach otherwise is favoured by PR Barnett, *Res Judicata, Estoppel, and Foreign Judgments* (OUP 2001) paras 7.58–7.105.

[37] *Marc Rich & Co AG v Societa Italiana Impianti PA (No 2)* [1992] 1 Lloyd's Rep 624 (CA); *Berkeley Administration Inc v McClelland* [1995] I L Pr 201 (CA) 214, 221; *Berkeley Administration Inc v McClelland (No 2)* [1996] I L Pr 772 (CA) 781–2. In *Calyon v Michailaidis* [2009] UKPC 34 [22], it was submitted that a Greek judgment 'enjoys no less a status in Gibraltar than an equivalent judgment of the Gibraltar court itself'. The Privy Council expressed no view on the correctness of that submission.

[38] [1997] 1 WLR 351 (CA) 359.

[39] *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630 (CA) 642; *R v Governor of Brixton Prison* [1991] 1 WLR 281 (Div Ct) 291; *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2)* [2006] EWCA Civ 1529, [2007] QB 886 [109].

[40] *ABCI v Banque Franco-Tunisienne* [2002] 1 Lloyd's Rep 511 (Com Ct) 538; *Air Foyle Ltd v Center Capital Ltd* [2002] EWHC 2535 (Comm), [2003] 2 Lloyd's Rep 753 [44].

[41] Case 145/86 *Hoffmann v Krieg* [1988] ECR 645, paras 10–11; Case C-420/07 *Apostolides v Orams* [2009] ECR I-3571, para 66; Case C-456/11 *Gothaer Allgemeine Versicherung AG v Samskip GmbH* (ECJ, 15 November 2012), para 34; P Jenard, 'Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters' [1979] OJ C59/43; JJ Fawcett and JM Carruthers, *Cheshire, North & Fawcett on Private International Law* (14th edn, OUP 2008) 604; H Linke, 'Selected Problems Relating to Lis Alibi Pendens and the Recognition of Judgments' in Court of Justice of the European Communities (ed), *Civil Jurisdiction and Judgments in Europe* (Butterworths 1992) 178; P Stone, *Civil Jurisdiction and Judgments in Europe* (Longman 1998) 152; P Wautelet in U Magnus and P Mankowski (eds),

recognizing Member State must in principle accord a recognized judgment at least the effects that it has in the rendering Member State.[42]

III. THE PREFERABLE APPROACH

A. Policy Considerations and Theories Underlying the Recognition of Foreign Judgments

After reviewing the effects that recognized foreign judgments in civil and commercial matters have in fact been given in England, it shall now be discussed, as a matter of principle, what effects a foreign judgment ought to have in the recognizing forum. This requires a review of the policy considerations and theories underlying the recognition of foreign judgments, since the effects of a recognized foreign judgment ought to depend upon the reasons for recognizing the judgment in the first place. Several not mutually exclusive policy considerations and theories have been suggested as the basis for the recognition of foreign judgments. Two of them are 'clearly indefensible',[43] namely the concept of an implied contract to pay the judgment debt,[44] and the idea that the judgment-debtor owes allegiance to the foreign sovereign.[45] Three policy considerations and theories have found significant support: the doctrine of obligation, comity, and the interest in finality of litigation. The impact of interests of a third country (a country other than the forum or the judgment-rendering country) will be examined in Part V and is ignored at present.

1. The doctrine of obligation

The English decisions of the nineteeenth century that established the common-law framework for the recognition of foreign judgments adopted the doctrine of obligation, under which, if certain conditions are satisfied, a foreign judgment creates an obligation enforceable in the forum. In *Russell v Smyth*, for example, Parke B said: '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.'[46]

Brussels I Regulation (2nd edn, Sellier 2012) art 33 notes 3–9. An extension of effects is expressly envisaged by Recital 22 in the Preamble of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.

[42] In addition, the Regulation accords findings a binding effect where this is necessary for the uniform application of its jurisdiction rules. Where a court in a Member State declines jurisdiction based on the finding that there is an exclusive jurisdiction agreement in favour of another Member State, that finding is binding upon the court of a third Member State in deciding on its own jurisdiction, even if neither the law of the judgment-rendering state nor the law of the recognizing state has a doctrine comparable to the common law doctrine of issue estoppel: Case C-456/11 *Gothaer Allgemeine Versicherung AG v Samskip GmbH* (ECJ, 15 November 2012), paras 33–43.

[43] HL Ho, 'Policies Underlying the Enforcement of Foreign Commercial Judgments' (1997) 46 ICLQ 443, 445.

[44] This concept was used in *Grant v Easton* (1883) 13 QBD 302 (CA) 303. It was described as 'pure fiction' by EG Lorenzen, 'The Enforcement of American Judgments Abroad' (1919–20) 29 YaleLJ 188, 190.

[45] This idea was rejected in *Adams v Cape Industries plc* [1990] Ch 433 (CA) 553.

[46] (1842) 9 M & W 810, 819; 152 ER 343, 347. See also *Williams v Jones* (1845) 13 M & W 628, 633; 153 ER 262, 265; *Godard v Gray* (1870) LR 6 QB 139 (QB) 148; *Schibsby v Westenholz* (1870) LR 6 QB 155 (QB) 159.

This doctrine of obligation is a facet of the theory of vested rights,[47] and shares the circularity of that theory.[48] It presupposes what it purports to explain, namely the recognition of the obligation under the foreign law.[49] The doctrine of obligation is also unable to explain the recognition of foreign judgments that impose no obligation but make a declaration of status, for example the dissolution of a marriage. It is more accurate to say that an obligation by the judgment-debtor to the judgment-creditor enforceable in the forum cannot exist unless the foreign judgment actually imposes an obligation, and that the obligation is the consequence, rather than the basis, of the judgment's recognition.[50]

Nevertheless, the doctrine of obligation still enjoys support from the Court of Appeal[51] and cannot be ignored altogether.[52] It militates in favour of affording a foreign judgment in the forum at least the effects that the judgment has in the foreign country. In the language of the vested-rights theory, rights vested in the judgment-creditor by the foreign legal system ought to be enforced in the forum. The forum will fail to achieve this if it gives the foreign judgment a lesser effect than it has in the foreign country. The doctrine of obligation does not require affording a foreign judgment a wider effect than it has in the foreign country. But the doctrine of obligation is compatible with such an approach. Thus, the doctrine is compatible with both the pure extension approach and the maximum-effect approach.

2. Comity

Another suggested basis for the recognition of foreign judgments is the idea of the comity of nations.[53] It entails the notion that due respect ought to be given to the legal processes and systems of other countries,[54] although there is no strict duty to do so (in the absence of a treaty).[55] As Gray J in the US Supreme Court famously said in *Hilton v Guyot*:

> '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

[47] This theory was supported by, eg, JH Beale, *A Treatise on the Conflict of Laws or, Private International Law* (Harvard University Press 1916) 105–13; AV Dicey, *A Digest of the Law of England With Reference to the Conflict of Laws* (Stevens & Sons 1896) 22–30, 413.

[48] RD Carswell, 'The Doctrine of Vested Rights in Private International Law' (1959) 8 ICLQ 268, 279–80; O Kahn-Freund, 'General Problems of Private International Law' [1974] III Recueil des cours 139, 465; K Lipstein, 'Conflict of Laws 1921–1971: The Way Ahead' (1972) 31 CambLJ 67, 68–9.

[49] J Harris, 'Recognition of Foreign Judgments at Common Law – The Anti-Suit Injunction Link' (1997) 17 OJLS 480.

[50] *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26, [2007] 1 AC 508 [13].

[51] *Adams v Cape Industries plc* [1990] Ch 433 (CA) 513; *Lewis v Eliades* [2003] EWCA Civ 1758, [2004] 1 WLR 692 [48]; *Rubin v Eurofinance SA* [2010] EWCA Civ 895, [2011] Ch 133 [34]–[35]. See also *Owens Bank Ltd v Bracco* [1992] 2 AC 443 (HL) 484.

[52] A Briggs, Recognition of Foreign Judgments: A Matter of Obligation' (2013) 129 LQR 87, criticizing the description of the doctrine of obligation as 'purely theoretical and historical' in *Rubin v Eurofinance SA* [2012] UKSC 46, [2012] 3 WLR 1019 [9] (Lord Collins, with whom Lord Walker and Lord Sumption JJSC agreed).

[53] *Geyer v Aguilar* (1798) 7 Term Rep 681, 695–96; 101 ER 1196, 1204; *Belize Telecom Ltd v Government of Belize*, 528 F 3d 1298, 1304–05 (11th Cir, 2008); *Jenton Overseas Investment Pte Ltd v Townsing* [2008] VSC 470, (2008) 21 VR 241 [20]; H Barry, 'Comity' (1926) 12 VaLRev 353; Harris (n 49) 481–2.

[54] Ho (n 43) 451.

[55] Kahn-Freund (n 48) 464.

> allows within its territory to the legislative, executive or judicial acts of another nation, 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.[56]

The idea of comity has been criticized as simply expressing an attitude but not the reasons for taking that attitude.[57] Nevertheless, English courts routinely invoke comity as an important basis for the recognition of foreign judgments at common law,[58] and the Supreme Court of Canada has used comity as the key reason for altering the common law rules so as to allow the recognition of more foreign judgments.[59] Comity, like the doctrine of obligation, militates in favour of affording a foreign judgment in the forum at least the effects that the judgment has in the foreign country. If respect for the foreign country is the basis of recognizing its judgment, that respect should generally extend to all the effects that the judgment has in the foreign country. Comity neither requires nor prohibits affording a foreign judgment a wider effect than it has in the foreign country. Comity is thus compatible with both the pure extension approach and the maximum-effect approach.

3. The interest in finality of litigation

The third and final suggested basis for the recognition of foreign judgments is the same reason that stands behind the doctrine of *res judicata* in a purely domestic context, namely the interest in finality of litigation.[60] This interest has a private and a public aspect.[61] Its private aspect is the protection of the judgment-creditor's legitimate interest. A successful plaintiff should not have to prove the claim again, and a successful defendant should not have to defend the same claim again ('*nemo debet bis vexari pro una et eadem causa*').[62] The public aspect of the interest in finality of litigation is a state's interest in not expending its judicial resources on re-litigating matters that have already been fairly adjudicated ('*interest rei publicae ut sit finis litium*').[63] This demonstrates that the recognition of foreign judgments is in the forum's own interest and not just deference to the interest of the foreign country or of the judgment-creditor.

Indeed, a country may recognize the judgments of other countries for the purpose of facilitating the recognition of its own judgments by those other countries.[64] Some

[56] 159 US 113, 163–64 (1895). This definition was elaborated in *Mast, Foos & Co v Stover Manufacturing Co*, 177 US 485, 488–89 (1900).

[57] WLM Reese, 'The Status in This Country of Judgments Rendered Abroad' (1950) 50 ColumLRev 783, 784; von Mehren and Trautman (n 8) 1603.

[58] *Re D (a child) (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619 [82]; *Long Beach Ltd v Global Witness Ltd* [2007] EWHC 1980 (QB) [26]; *Agbaje v Agbaje* [2010] UKSC 13, [2010] 1 AC 628 [54]; *Yukos Capital Sarl v OJSC Rosneft Oil Co* [2012] EWCA Civ 855, [2012] 2 Lloyd's Rep 208 [151].

[59] *Beals v Saldanha* [2003] SCC 72, [2003] 3 SCR 416.

[60] *MacDonald v Grand Trunk Ry Co*, 71 NH 448 (1902); *Baldwin v Iowa State Travelling Men's Ass'n*, 283 US 522, 525–26 (1931); WLM Reese (n 57) 784–5; HE Yntema, 'The Enforcement of Foreign Judgments in Anglo-American Law' (1935) 33 MichLRev 1129, 1145–6.

[61] *Charm Maritime Inc v Kyriakou* [1987] 1 Lloyd's Rep 433 (CA) 440; N Gal-Or, 'The Concept of Appeal in International Dispute Settlement' (2008) 19 EJIL 43, 49–50.

[62] Yntema (n 60) 1145–6. [63] Casad (n 8) 460. [64] Ho (n 43) 453–8.

countries, for example, Germany[65] and Japan[66] recognize (certain) foreign judgments only from those countries that 'return the favour'.[67] The recognition of a foreign judgment from a country that applies this rule of reciprocity enables the foreign country to recognize judgments from the forum. More generally, the recognition of foreign judgments by the forum may encourage other countries to recognize judgments from the forum, which facilitates cross-border commerce. Treaties on the mutual recognition of judgments are invariably motivated by the expectation that this would be to the economic advantage of all countries involved. As Slade LJ said in *Adams v Cape Industries plc*:

> [T]he society of nations will work better if some foreign judgments are taken to create rights which supersede the underlying cause of action, and which may be directly enforced in countries where the defendant or his assets are to be found.[68]

The interest in finality of litigation militates in favour of affording foreign judgments the widest possible effect, as is achieved by the maximum-effect approach. This benefits the judgment-creditor, and saves the forum from expending court resources, to the greatest extent possible. In this respect, the maximum-effect approach is superior to the pure extension approach, under which a judgment-creditor who is unable to prove the content of the foreign law cannot invoke even those (alleged) effects of the foreign judgment under the foreign law that a comparable domestic judgment would have.

B. The Preferability of the Maximum-Effect Approach

The maximum-effect approach, under which a foreign judgment has, in the forum, both the effects that it has in the foreign country and the effects that a comparable domestic judgment would have, is compatible with all policy considerations and theories underlying the recognition of foreign judgments, and it is the only approach compatible with them. Subject to feasibility and the forum's public policy, it is indeed difficult to justify not affording a foreign judgment all the effects in the forum that it has in the foreign country, even if those effects are wider than the effects of a comparable domestic judgment.[69] Any alleged effect under the foreign law must be proved by the party relying on it. The English court should not resolve uncertainties in the foreign law.[70]

Conversely, affording a foreign judgment effects in the forum which it does not have in the foreign country (but which a comparable domestic judgment would have) may unduly affect the judgment-debtor's legitimate interests. During the foreign litigation, the judgment-debtor may not have foreseen the potential recognition of an adverse judgment in other countries, and may have made strategic decisions based solely on the effects of such a judgment in the foreign country itself. It does not follow, however, that

[65] D Martiny, 'Federal Republic of Germany' in C Platto and WG Horton (eds), *Enforcement of Foreign Judgments Worldwide* (2nd edn, Graham & Trotman 1993) 188–9.

[66] T Takehara, 'Japan' in Platto and Horton, ibid 58.

[67] See KH Nadelmann, 'Non-Recognition of American Money Judgments Abroad and What To Do about It' (1956–7) 42 IowaLRev 236, 249–50.

[68] [1990] Ch 433 (CA) 552.

[69] A similar view is taken by van de Velden (n 27) 529–30.

[70] See *Baker v Ian McCall International Ltd* [2000] CLC 189 (Com Ct) 202. In that case, Toulson J (at 202–03) further held that an effect that a foreign judgment has in the foreign country can obtain in English proceedings only if the foreign law so provides. With respect, this is wrong. The foreign country lacks the competence to make provisions in respect of English proceedings.

a foreign judgment can never have a wider effect in the forum than it does in the foreign country. It is necessary and sufficient that such a wider effect is compatible with the judgment-debtor's legitimate interests.

Subject to the protection of the judgment-debtor's legitimate interests, therefore, the maximum-effect approach ought to prevail.[71] In particular, a foreign judgment ought to create an issue estoppel in English proceedings whenever the requirements of an issue estoppel in English law are satisfied, even though the foreign law has no comparable concept. It might be objected that the recognition of an issue estoppel (or a comparable concept) by the foreign law must be additionally required in order to protect a judgment-debtor who, in reliance on the absence of such a concept in the foreign law, may not have firmly contested the issue in the foreign proceedings because, for example, the contestation of other issues promised a higher chance of overall success.[72] This argument requires two responses.

First, the argument is irrelevant where the judgment-debtor did in fact fully contest the issue in the foreign proceedings. In those circumstances, it is difficult to explain why the forum ought to expend court resources on the re-litigation of that issue. Second, the English law on issue estoppel already protects the interests of a judgment-debtor who, for legitimate reasons, failed to fully contest the issue in the previous proceedings. This is true even where the previous proceedings took place in England. Lord Reid recognized the problem in *Carl Zeiss Stiftung v Rayner & Keeler Ltd*:

> 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?[73]

For this reason, it is established that, even in respect of a domestic judgment, the doctrine of issue estoppel must be applied with caution,[74] and the operation of the doctrine can be prevented in special circumstances.[75] The same has been said with regard to the preclusion of issues that were not, but ought to have been, raised in the previous litigation.[76] It is also recognized that there is even more reason for caution in the case of a foreign judgment because the English courts are not familiar with foreign civil procedure.[77] An application of those principles in the context of a foreign judgment affords sufficient protection to the judgment-debtor.

[71] The maximum-effect approach was taken, with regard to a sister-state judgment, in *Hart v American Airlines Inc*, 304 NYS 2d 810 (Sup Ct, 1969). However, a pure extension approach with regard to US sister-state judgments is favoured by HM Erichson, 'Interjurisdictional Preclusion' (1998) 96 MichLRev 945.

[72] The view that the doctrine of issue estoppel should not apply to foreign judgments at all was taken by Lord Guest in *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853 (HL) 937–38.

[73] ibid 917. A similar argument was made, in the context of a foreign judgment, in *Owens Bank Ltd v Bracco* [1992] 2 AC 443 (HL) 471–72.

[74] *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853 (HL) 917, 947; *Turner v London Transport Executive* [1977] ICR 952 (CA) 966.

[75] *Arnold v National Westminster Bank plc* [1991] 2 AC 93 (HL).

[76] *Coflexip SA v Stolt Offshore MS Ltd* [2004] EWCA Civ 213, [2004] FSR 34 [51], [143].

[77] *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853 (HL) 918, 967; *Good Challenger Navegante SA v Metalexportimport SA* [2003] EWCA Civ 1668, [2004] 1 Lloyd's Rep 67 [54], [59]–[60], [86].

IV. PRECLUSION OF ARGUING AN ALTERNATIVE BASIS OF LIABILITY

The principles just discussed shall now be applied to circumstances in which a party brought an action in a foreign court, arguing the claim on a certain legal basis (eg breach of contract) and, after having lost, commenced an action in England against the same defendant, arguing a different legal basis (eg tort) for the same claim. Is the new action precluded on the ground of *res judicata*? Under the maximum-effect approach advocated in this article, the new action ought to be precluded if a comparable action is precluded in the foreign country or, subject to the protection of the judgment-debtor's legitimate interests, if the new action would be precluded had the first proceedings taken place in England (or both). This approach shall be explained by examining the decision in the recent case *Naraji v Shelbourne*.[78]

Beforehand, it shall be briefly reviewed how English law deals with the question of preclusion where the first proceedings took place in England. A cause-of-action estoppel by virtue of the judgment requires that the two sets of proceedings involve the same cause of action or subject matter. English courts have yet to establish a settled approach as to how to identify the subject matter of civil proceedings. 'Cause of action' has generally been defined as the material facts that the plaintiff must prove in order to succeed.[79] In the specific context of *res judicata*, it has been said that two causes of action are identical if the same evidence maintains both actions.[80] A claim for breach of a statutory duty of care and a claim for breach of a tortious duty of care with regard to the same injury are regarded as belonging to the same cause of action for the purpose of *res judicata*.[81]

In other instances of concurrent liability, the various bases of liability are treated as independent causes of action for the purpose of *res judicata* but a preclusive effect is still recognized on the ground that, under the rule in *Henderson v Henderson*, the basis of liability argued in the second action could and should have been argued in the first action.[82] Thus, the dismissal of an employee's action against his employer for unfair dismissal barred a subsequent action for racial discrimination based on the same facts,[83] and the settlement of an employee's action against his employer for racial discrimination barred a subsequent action for common law negligence based on the same facts.[84] In circumstances of (alleged) concurrent liability in contract and tort,[85] the

[78] [2011] EWHC 3298 (QB).

[79] *Cooke v Gill* (1873) LR 8 CP 107, 116; *Read v Brown* (1888) 22 QBD 128 (CA) 129; *Dipple v Dipple* [1942] P 65 (P, D & A) 67–68; *Trower & Sons Ltd v Ripstein* [1944] AC 254 (PC) 263.

[80] *Hitchin [or Kitchen] v Campbell* (1772) 2 W Bl 827, 831; 96 ER 487, 489; *Hunter v Stewart* (1861) 4 D F & J 168, 178; 45 ER 1148, 1152; *Brunsden v Humphrey* (1884) 14 QBD 141 (CA) 147; *Ord v Ord* [1923] 2 KB 432 (KB) 443; *Bell v Holmes* [1956] 1 WLR 1359 (QB) 1366; *Wood v Luscombe* [1966] 1 QB 169 (QB) 175.

[81] *Hills v Co-Operative Wholesale Society Ltd* [1940] 2 KB 435 (CA). The same is true for Scots law: *Reynolds v North Lanarkshire Council* [2011] CSOH 211, [2012] GWD 2–19.

[82] eg *Green v Weatherill* [1929] 2 Ch 213 (Ch) 221–22.

[83] *Divine-Bortey v Brent London Borough Council* [1998] ICR 886 (CA).

[84] *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] ICR 1170 (CA) 1180–81.

[85] Those circumstances have rarely arisen in the context of preclusion, which may be due to the fact that concurrent liability in contract and tort was not recognized across the board before *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL).

resolution of an action on one legal basis must therefore bar a subsequent action on the other legal basis,[86] at least by virtue of the rule in *Henderson v Henderson*.

These rules of English law were applied in the context of a foreign judgment in *Naraji v Shelbourne*.[87] Mr Naraji injured his right knee while playing professional football for the Sheffield United Football Club. After an unsuccessful operation in England, he underwent reconstructive surgery performed by Dr Shelbourne in Indianapolis. When his knee did not improve, Mr Naraji filed a complaint of tortious negligence with the Department of Insurance for the State of Indiana against Dr Shelbourne.[88] The filing of such a complaint is a precondition for bringing an action for medical malpractice in the Indiana courts. When Dr Shelbourne applied to an Indiana court to strike out the complaint, Mr Naraji decided to sue Dr Shelbourne in England. On the joint application by the parties, the Indiana court made an order that Mr Naraji's claim against Dr Shelbourne be dismissed with prejudice. Subsequently, Mr Naraji brought an action against Dr Shelbourne in England,[89] arguing breach of contract and tortious negligence. Dr Shelbourne argued that the action was precluded on the ground that the order by the Indiana court created an estoppel *per rem judicatam*.

Popplewell J started by observing that Indiana law governed the question of whether the order by the Indiana court was a final and conclusive judgment on the merits whereas English law governed the scope of the Indiana court order's *res judicata* effect.[90] After reviewing the opinion of experts on Indiana law, Popplewell J found that the order by the Indiana court was akin to a final and conclusive judgment dismissing Mr Naraji's claim on the merits,[91] but did not entail a waiver by Mr Naraji of his right to bring an action on the same matter in England.[92] Popplewell J went on to observe that the Indiana court had been a court of competent jurisdiction in the eyes of English law since Mr Naraji had submitted to the jurisdiction of the Indiana courts by choosing to bring his claim there.[93] Popplewell J concluded that the order by the Indiana court created an estoppel *per rem judicatam*, precluding Mr Naraji's from bringing another claim in tort against Dr Shelbourne.[94]

However, Popplewell J did not regard Mr Naraji's claim in contract as precluded by an estoppel *per rem judicatam*.[95] Popplewell J observed that Mr Naraji's complaint in the Indiana proceedings had been solely based on tort. A concurrent claim in contract would have been unsuccessful since Indiana law, which the Indiana court would have applied, prohibits a contractual claim for medical malpractice unless the contract in question was written and signed by the doctor,[96] and Dr Shelbourne had not signed his contract with Mr Naraji. Popplewell J rejected a plea of cause-of-action estoppel on the

[86] KR Handley, *Spencer Bower and Handley on Res Judicata* (4th edn, LexisNexis 2009) para 7.05.

[87] [2011] EWHC 3298 (QB).

[88] The company through which Dr Shelbourne had conducted the treatment was joined as a second defendant in both the Indiana proceedings and the English proceedings. The issues involved in the claim against this company were the same as those in the claim against Dr Shelbourne personally. For this reason, the following discussion will only refer to Dr Shelbourne.

[89] An English doctor was joined as a defendant, but Mr Naraji's claim against the English doctor is irrelevant for present purposes.

[90] [2011] EWHC 3298 (QB) [131].

[91] ibid [129]–[134].

[92] ibid [136].

[93] ibid [135].

[94] ibid [154].

[95] The contractual claim was still struck out on the ground that it was time-barred: ibid [172]–[178].

[96] This was the common opinion of the experts on Indiana law, as noted by Popplewell J, ibid [169]. Popplewell J (at [169]) classified this form requirement as procedural rather than substantial.

ground that English law requires the two causes of action to be identical, not just substantially similar.[97] He did not regard contractual liability and tortious liability as identical since liability in tort, while it may require an assumption of responsibility, does not require a valid contract.[98] He acknowledged that the alternative cause of action would normally still be precluded by the rule in *Henderson v Henderson* because it ought to have been raised in the previous proceedings.[99] But he thought that this rule did not preclude the contractual claim *in casu*, as Mr Naraji could not have pursued it in Indiana.[100]

Popplewell J's reasoning with regard to the claim in contract provokes three comments. First, his statement that a case of concurrent liability in contract and tort involves two causes of action for the purpose of *res judicata* under English law seems to be correct. Second, his explanation as to why the rule in *Henderson v Henderson* did not preclude Mr Naraji's claim in contract is at best unclear. It is not correct to say that Mr Naraji was unable to pursue that claim in Indiana. Rather, it would have been futile for him to do so because of Indiana law's form requirement. Perhaps Popplewell J meant to say that since it would have been futile to pursue the contractual claim in Indiana, Mr Naraji had a good reason not to pursue it and thus was not subject to preclusion by virtue of the rule in *Henderson v Henderson*. But this would amount to the proposition that the rule in *Henderson v Henderson* is confined to the failure to raise a cause of action (or an issue) *that would have been successful in the previous proceedings*. Such a proposition would be novel and without merit, for it would require the present court to investigate the hypothetical success of the cause of action (or issue) in the first proceedings, even though it is the very purpose of the rule in *Henderson v Henderson* to bar an investigation into the cause of action (or issue) in question.

Third, Popplewell J proceeded on the basis that the claim in contract was precluded only if it was precluded under the rules of English law as applying in a purely domestic context. He was entitled to proceed on that basis since Dr Shelbourne had not argued that Mr Naraji's contractual claim was precluded in English proceedings if either it was precluded under the rules of English law as applying in a purely domestic context or if Indiana law would have precluded it in new proceedings in Indiana. Such an argument ought to have been successful, reflecting the maximum-effect approach advocated in this article. If Indiana law 'punished' Mr Naraji for his failure to bring the claim in contract together with the claim in negligence, there is no reason why English law ought to have been more generous. True, it would have been futile to raise the contractual claim in the Indiana proceedings. But it was Mr Naraji who chose Indiana as the place of the first litigation. He could have chosen England instead.

Would Mr Naraji's claim in contract have been precluded in new proceedings in Indiana? The Indiana Court of Appeals has repeatedly said that the identity of the subject matter of two actions depends on whether identical evidence will support the issues involved in both actions.[101] However, federal courts applying Indiana law have

[97] ibid [149]. [98] ibid [149]. [99] ibid [149].

[100] ibid [150]. Popplewell J (at [153]) also rejected an issue estoppel, precluding Mr Naraji from asserting that Dr Shelbourne had been careless, on the ground that since there had been no pleadings in the Indiana proceedings, it was impossible to determine whether the order by the Indiana court determined any issues and, if so, which issues.

[101] *Fairwood Bluffs Conservancy District v Imel*, 146 Ind App 352, 362 (1970); *Indiana State Highway Commission v Speidel*, 181 Ind App 448, 452–3 (1979); *Biggs v Marsh*, 446 NE 2d 977, 982 (1983); *Hoffman v Dunn*, 496 NE 2d 818, 821 (1986); *Bojrab v John Carr Agency*, 597 NE 2d

said that the evidence needs to be substantially, but not completely, identical.[102] Federal actions by demoted or dismissed employees asserting a violation of their rights under the US Constitution have been dismissed on the ground that the employees' previous state actions challenging the demotion or dismissal under state law had created *res judicata*.[103]

The Indiana Court of Appeals itself has taken this more extensive approach. In *Small v Centocor Inc*,[104] which was cited by Popplewell J in *Naraji v Shelbourne*,[105] the plaintiff, as the representative of his deceased father's estate, brought an action for medical malpractice in treating his father shortly before his death. The action was dismissed with prejudice based upon the plaintiff's failure to comply with discovery requests. After an unsuccessful appeal, the plaintiff, on his own behalf, brought an action against the same defendant for fraud and deceit in connection with his father's medical treatment. The Indiana Court of Appeals held that the second action was barred on the ground of *res judicata* since the claims of fraud and deceit were 'inextricably woven' to the first claim and ought to have been raised in the first action.[106]

It seems clear that Indiana law precluded Mr Naraji from bringing a fresh action for breach of contract against Dr Shelbourne. Indeed, one of the experts on Indiana law in the English proceedings said as much.[107] Thus, the failure to raise a concurrent contractual claim in an Indiana action for negligence did not preclude the raising of the contractual claim in England even though Indiana law precluded a fresh contractual action in Indiana, and even though English law would have precluded a fresh contractual action in England had the action in negligence taken place in England. This is an awkward outcome. It is hoped that parties in similar future cases will argue for an application of the maximum-effect approach and have success with that argument.

V. THE IMPACT OF A THIRD COUNTRY'S INTERESTS

It has been assumed so far that the only interests at stake in deciding on the effects of a foreign judgment in the recognizing forum are the interests of the forum, of the judgment-rendering country and of the parties. In certain circumstances, interests of a third country can also be relevant. Take the following example. A court in country X finds that the government of country Y engaged in certain improper conduct. This finding would be binding upon the court in subsequent proceedings between the same parties in country X, and the judgment is generally entitled to recognition in country Z. In subsequent proceedings between the same parties in country Z, it becomes relevant to determine whether the government of country Y engaged in the conduct in

376, 378 (1992); *Indiana State Department of Health v Legacy Healthcare Inc*, 752 NE 2d 185, 191 (2001); *Richter v Asbestos Insulating & Roofing*, 790 NE 2d 1000, 1003 (2003); *Indianapolis Downs LLC v Herr*, 834 NE 2d 699, 703 (2005); *MicroVote General Corp v Indiana Election Commission*, 924 NE 2d 184, 192 (2010).

[102] *Paniaguas v Aldon Companies Inc* (ND Ind, No 04-CV-468-PRC, 31 July 2007) slip op 9; *Ingalls v Aes Corp* (SD Ind, No 07-CV-0104-DFH-TAB, 26 March 2009) slip op 2.

[103] *Leal v Krajewski* 803 F 2d 332, 335 (7th Cir, 1986); *Atkins v Hancock County Sheriff's Merit Board* 910 F 2d 403, 404-5 (7th Cir, 1990).

[104] 731 NE 2d 22 (2000).

[105] [2011] EWHC 3298 (QB) [134].

[106] 731 NE 2d 22, 27 (2000). This is akin to the rule in *Henderson v Henderson* in English law.

[107] As noted in [2011] EWHC 3298 (QB) [129].

question. Is the court in country Z bound by the finding made by the court in country X on that issue? If the interests of country Y are ignored, the interest of country Z in finality of litigation will generally require an affirmative answer, as argued earlier in this article. But things may be different if the interests of country Y are taken into account.

The issue arose at common law in *Yukos Capital Sarl v OJSC Rosneft Oil Co*.[108] Yukos Capital Sarl ('Yukos'), a Luxembourg company, lent money to the predecessor of the OJSC Rosneft Oil Company ('Rosneft'), which was controlled by the Russian state. When Rosneft's predecessor failed to repay the loan, Yukos commenced arbitral proceedings in Russia. The arbitral tribunal issued four awards, which required Rosneft to pay about US$425 million to Yukos. Rosneft failed to comply with the awards, and Yukos sought their enforcement in the Netherlands under the 1958 New York Convention.[109] Simultaneously, on Rosneft's application, the Russian Arbitrazh Courts annulled the awards even though Rosneft had approached the courts after the expiry of the three-months' period in which an arbitral award could be challenged. Yukos's appeal against those decisions was unsuccessful.

In the Dutch enforcement proceedings, Yukos contended that the Russian annulment decisions could not be recognized in the Netherlands since the Russian judges had been partial and dependent, being influenced by the Russian government. The Amsterdam Court of Appeal found that allegation to be made out, and refused to recognize the Russian decisions on grounds of public policy. The court ordered the enforcement of the arbitral awards, and Rosneft paid US$425 million to Yukos. However, Yukos demanded payment of post-award interest of more than US$160 million and, for that purpose, sought an enforcement of the arbitral awards in England. In the English enforcement proceedings, Yukos contended that the Russian annulment decisions could not be recognized in England since the Russian judges had been partial and dependent. Yukos further argued that an issue estoppel precluded Rosneft from contesting that allegation since the Amsterdam Court of Appeal had already found it to be true.

Hamblen J at first instance recognized an issue estoppel.[110] He found that the ruling by the Amsterdam Court of Appeal as to the bias of the Russian courts was necessary for that court's decision on whether to recognize the Russian judgments,[111] and was binding upon other Dutch courts.[112] He said that an issue estoppel could arise even though the Dutch court had considered the issue (the bias of the Russian courts) in the

[108] [2011] EWHC 1461 (Comm), [2012] 1 All ER (Comm) 479; [2012] EWCA Civ 855, [2012] 2 Lloyd's Rep 208. For the application of the common law, instead of the Brussels I Regulation or the Foreign Judgments (Reciprocal Enforcement) Act 1933, see footnote 27. The case also involved a consideration of the act-of-state doctrine, under which English courts do not adjudicate upon the act of a foreign government in its own territory, and the limitations on that doctrine. That aspect of the case, which is irrelevant for present purposes, is discussed by A Mills, 'From Russia with Prejudice? The Act of State Doctrine and the Effect of Foreign Proceedings Setting Aside an Arbitral Award' (2012) 71 Camb LJ 465.

[109] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (signed in New York on 10 June 1958), 330 UNTS 4739. The Netherlands, the Russian Federation and the United Kingdom are among the countries that have acceded to that Convention.

[110] His decision has been welcomed by J Hill, 'The Significance of Foreign Judgments Relating to an Arbitral Award in the Context of an Application to Enforce the Award in England' (2012) 8 JPrivIntL 159, 186–7.

[111] [2011] EWHC 1461 (Comm), [2012] 1 All ER (Comm) 479 [90]–[93].

[112] ibid [77]–[79]. The Dutch law on issue preclusion is outlined by van de Velden (n 27) 526–8.

context of a legal question (whether a recognition of the Russian judgments by the Dutch court would violate Dutch public policy) that differed from the legal question before the English courts (whether a recognition of the Russian judgments by the English court would violate English public policy).[113] On Rosneft's argument that an issue estoppel would oblige the English courts to refuse to recognize judgments of a friendly country on the basis not of the English court's own analysis but merely because a court of a third country had refused to recognize the judgments, Hamblen J replied that it was in the interest of finality of litigation that the factual issue decided by the Dutch court not be re-litigated.[114]

Hamblen J's ruling on issue estoppel was overturned on appeal. The Court of Appeal held that the issue before the English courts was not the same as that before the Dutch courts since the standards of public policy may be different.[115] The court said:

> 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. 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. It is our own public order which defines the framework of any assessment of this difficult question; whether such decisions are truly to be regarded as dependent and partial as a matter of English law is not the same question as whether such decisions are to be regarded as dependent and partial in the view of some other court according to that court's notions of what is acceptable or otherwise according to its law.[116]

So far, the Court of Appeal merely held that an established requirement of issue estoppel in English law, namely the identity of issues, was not satisfied *in casu*. That ruling did not impact upon the scope of issue estoppel. But the court went on to effectively confine the scope of issue estoppel. The court added *obiter* that it would still have denied an issue estoppel on the ground of 'special circumstances' had the issues before the Dutch court and the English court been identical. That is because comity required English courts to conduct their own investigation before imputing improper conduct to a foreign government.[117] The court said:

> 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.[118]

[113] [2011] EWHC 1461 (Comm), [2012] 1 All ER (Comm) 479 [94]. In general, issue estoppel can operate even though the foreign court applied a law different from the one that the English court would apply: *Tracomin SA v Sudan Oil Seeds Co Ltd* [1983] 1 WLR 662 (Com Ct) 673–74.

[114] [2011] EWHC 1461 (Comm), [2012] 1 All ER (Comm) 479 [105].

[115] [2012] EWCA Civ 855, [2012] 2 Lloyd's Rep 208 [151], [156].

[116] ibid [151] (Rix, Longmore and Davis LJJ).

[117] ibid [160].

[118] ibid (Rix, Longmore and Davis LJJ). It has been said that 'comity considerations require the court not to pass judgment on the foreign court system without adequate evidence. Evidence of

The decisions by Hamblen J and the Court of Appeal vividly demonstrate the two conflicting policy considerations involved. On the one hand, there is the recognizing forum's interest in finality of litigation. It should generally be avoided to waste the resources of the English court system on the re-litigation of an issue that the parties have already contested in fair proceedings abroad. On the other hand, the comity of nations prevents the English courts from imputing improper conduct to a foreign government without cogent evidence. While Hamblen J preferred finality of litigation, the Court of Appeal preferred comity.

On principle, the tension between the two conflicting policy considerations ought to be resolved by considering the ramifications of each approach in extreme cases. Where the judgment by an English court imputes improper conduct to a foreign government, there may be a hostile reaction by that government and diplomatic exchanges. This must be accepted in the interest of justice where a ruling on that issue is necessary for the English court's decision and is based on a review of the evidence by the English court itself. It is much less acceptable where the English court is forced to adopt the finding of a court from a third country that is based on scant evidence. Preferring finality of litigation to comity may thus create problems. Preferring comity to finality of litigation does not produce comparable problems. It may lead to a waste of court resources, but this can be combated to some extent by the English court choosing to consider the foreign court's reasoning and deriving assistance from it where appropriate.

In conclusion, the Court of Appeal was, with respect, right to prefer comity over finality of litigation in the circumstances. It should be noted that this did not mean that the Dutch judgment was not entitled to recognition in England or could not found any issue estoppel in English proceedings. The Dutch judgment was still entitled to recognition in England, and it could still give rise to an issue estoppel. It precluded Rosneft from contending in English proceedings that Dutch public policy permitted the recognition of the Russian judgments in the Netherlands. The English Court of Appeal merely excluded one particular (potential) effect of the Dutch judgment.

The foregoing discussion concerned foreign judgments the recognition of which are governed by the common law. There is no reason why things ought to be different for foreign judgments entitled to recognition under the Foreign Judgments (Reciprocal Enforcement) Act 1933.[119] There is also no reason why things ought to be different for foreign judgments entitled to recognition under the Brussels I Regulation or the Lugano Convention. True, as seen before, those instruments probably enshrine the extension approach in respect of the recognition (other than enforcement) of foreign judgments, requiring the English court to afford the foreign judgment the same effects in England

corruption in the foreign court system is admissible … but it must go beyond generalised, anecdotal material': *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804 [102] (Lord Collins).

[119] Section 8(3) of the Act preserves the effects that the judgment has at common law, and the effects of a judgment on the merits pursuant to section 8(1) of the Act are the same as those at common law: *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 (HL).

(as far as possible) as it has in the foreign country. One of those effects may be the binding nature of a finding of fact, and that finding may concern the conduct of a third country's government. However, the recognition of foreign judgments under the Brussels I Regulation or the Lugano Convention 2007 can be refused where such recognition would be manifestly contrary to English public policy,[120] and it is a consequence of the previous arguments that English public policy, being anxious to foster comity, prevents the adoption of a foreign court's finding of improper conduct by a third country's government.[121]

VI. CONCLUSION

The recognition of a foreign judgment protects legitimate interests of the recognizing forum, the judgment-creditor and the foreign country. A recognized foreign judgment should in principle have the widest possible effect in the forum. It should have the same effects that it has in the foreign country, subject to feasibility and the forum's public policy. A foreign judgment should also have the effects that a comparable domestic judgment would have, subject to the protection of the judgment-debtor's legitimate interests. It follows that, contrary to the approach taken by the English courts, a recognized foreign judgment ought to be able to create an issue estoppel in English proceedings, where appropriate, even though the foreign law has no comparable concept.

It also follows that a recognized foreign judgment should in principle preclude a particular claim in English proceedings if it precludes a comparable claim in the foreign country or if a comparable English judgment would preclude the claim in English proceedings (or both). A different outcome was achieved in *Naraji v Shelbourne*, although this may have resulted from the judgment-creditor's failure to argue that the effects of a foreign judgment in England may depend upon its effects in the foreign country.

It is not suggested, however, that an English court asked to give effect to a recognized foreign judgment ought to determine the effects of the judgment in the foreign country on its own motion. Determining the content of foreign law is costly, and that expense should not be incurred where both parties are content with an application of English law as it applies to a domestic judgment. Foreign law ought to be considered only when it is pleaded and proved by a party.

As an exception to the suggested approach of affording recognized foreign judgments the widest effect possible, a foreign judgment should not have an effect in England that would impact upon comity as between England and a third country. This may occur where the foreign judgment contains a finding of improper conduct by the third country's government and the English court would be bound by that finding under the

[120] Art 34(1) in both instruments. Art 35 contains one exception. When the English court reviews the jurisdiction of the foreign court, which is permitted only to a limited extent, the English court is bound by the findings of fact on which the foreign court based its jurisdiction and cannot invoke English public policy.

[121] Similarly, where registration of a foreign judgment under the Administration of Justice Act 1920 is sought, the High Court may use its discretion under section 9 of that Act and refuse registration.

general rules. The respect for other countries prevents an English court from making a decision based on the finding of improper conduct on the part of a foreign government unless the English court has made the finding after its own examination of the evidence. This principle has recently been recognized by the Court of Appeal in *Yukos Capital Sarl v OJSC Rosneft Oil Co*.

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* Senior Lecturer, Monash Law School. I am grateful to Professor Jonathan Hill and two anonymous reviewers for helpful comments. This article was presented at the Journal of Private International Law Colloquium held at the University of Auckland on 14 December 2012.