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von

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and – as a subsidiary criterion – the grounds of convenience. Qualification of a case to a given mode should result from juxtaposing all these criteria with the character of a concrete group of cases.

By formulating these criteria, a specific content was attached to each of them. As a matter of fact, protection granted in non-litigious mode concerns not only the individual interest of participants but also – to a greater extent than in the litigious mode – the supra-individual interest (general, public, social). Consequently, contrary to the litigious mode (*nemo iudex sine actore; nemo iudex ultra petita partium*), exceptions to the principle of participants' autonomy to manage the course and the subject matter scope of the proceedings are admissible in the non-litigious mode. Concentrating procedural material based on the principle of adversarial proceedings is typical to the litigious mode. However, it may entail exceptions and adjustments in the non-litigious mode. These exceptions may vary and may include elements of inquisitorial principle, which should occur in cases instigated *ex officio* or, to a lesser extent, may involve a slight increase in a judge's activity in cases designed to protect the pecuniary interest of the interested persons (property law, depository cases). Finally, due to the *inter partes* structure of the litigious mode, it was decided that cases connected with bilateral legal relations, in which the parties' conflicting interests are subject to polarization, should be delegated to the above-mentioned mode. By contrast, the non-litigious proceedings are adequate in cases when only one person seeks legal protection and in cases involving multilateral legal relations. Such cases require a flexible structure of proceedings, which is not always guaranteed by the litigious mode.

6. A significant number of so-called separate proceedings i.e. specific proceedings designed to examine a narrow group of cases within the litigious mode is considered to be one of the major shortcomings of the present code. Depending on a counting method, the number of these proceedings varies from several to a dozen or so. *De lege lata* these proceedings tend to overlap, which leads to interpretational difficulties. Moreover, the existence of certain proceedings lacks sufficient substantial justification and it leads to the reversal of a model relation, in which the "ordinary" proceedings should play a basic role, and separate proceedings constitute merely an exception to the rule. Therefore, it was agreed upon that the number of the so-called separate proceedings should be radically limited in the future code. This course of action should be applauded – the optimal codification should regulate the proceedings which are uniform and, at the same time, flexible enough so that they can meet diversity of social relations. This direction of change has already been expressed in the aforementioned Act of 16 September 2011, which repealed separate provisions regulating proceedings in commercial cases.

However, a set of specific procedures that will be included in the new code remains to be conclusively decided. It is generally agreed that the order for payment procedure should stay as it enables the parties to effectively pursue claims based on documents. As far as the procedure by writ of payment is concerned, it may be transformed into an obligatory, preliminary phase in cases regarding pecuniary claims. It would allow to maintain good solutions without excessively burdening the structure of a new code. It also seems that the small claims procedure should also be sustained. Small claims procedures successfully operate in many countries. However, this solution should be accompanied with the introduction of a set of specific rules allowing to accelerate the examination of cases and to renounce certain procedural guarantees such as passing a verdict at a public session and forgoing appellate measures. However, if the negative stance of the Constitutional Tribunal regarding these issues is sustained in the future, the legislator's leeway in this respect would be limited. Therefore the present state of affairs calls into question the effectiveness of this procedure. As far as the separate procedure in marital affairs is concerned, as well as the separate procedure regarding cases ensuing from relations between children and parents, the question whether to include them in the new code would be irrelevant if the provisions

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regarding these two procedures were switched to the non-litigious mode. Otherwise, this issue will also be raised for debate.

In conclusion, if the most far-reaching solution is adopted, the future code will encompass only two separate proceedings – the group action procedure[28] and the order for payment procedure.

7. Last but not least, the Codification Commission discussed the issue of participants and parties to the proceedings, including the protection of third parties' interests affected by the proceedings' result. The public prosecutor's role in the civil proceedings most certainly should be reviewed. Provisions regarding this issue have remained practically intact since the adoption of the Code in 1964. The public prosecutor presently wields too much power, which is incompatible with the contemporary model of civil proceedings. Nonetheless, the complete elimination of a public prosecutor's role in civil proceedings would be precipitate. One should also bear in mind that the provisions regulating the status of a public prosecutor are applied *mutatis mutandis* to other bodies representing either the interests of the parties or the supra-individual interest, especially the Polish Ombudsman and, to some extent, non-governmental organizations.

The Codification Commission also debates whether the differentiation between the procedural concept of "judicial capacity" as opposed to the "legal capacity" defined in material law, should be sustained. Despite the common origin of both concepts, it seems that the differentiation adopted in the Code of 1964 should be sustained. However, the scope of persons and entities that do not cherish legal capacity, but would be endowed with judicial capacity remains to be defined. Another issue which requires careful consideration is the participation of third parties in the proceedings. The Commission will have to analyze the institutions of intervention and third party notice, which were influenced by German and Austrian solutions, and evaluate the level of their effectiveness in the present Code. Roman solutions such as intervention (*l'intervention*) and guarantee (*la garantie*) lawsuits, as well as an opposition of a third party (*tierce opposition*) may be considered as an alternative to the abovementioned institutions. When analyzing this issue, the solutions recently adopted in the Swiss Code of Civil Procedure referring to both German and Roman codifications must be taken into consideration, as well as the English institution of *third party procedure*.

8. As yet, the discussion within the Codification Commission has not embraced the issues regarding the appellate measures. However, the need to deliberate whether the presently existing model of appeal *ex novo* (*rehearing*) is an optimal solution for the future codification, has already been raised in literature. European trends seem to be heading in the opposite direction. A series of precise postulates regarding the claim to reopen civil proceedings has also been put forward in literature, although the presently existing model of this claim – i.e. an extraordinary appellate measure based on narrowly formulated grounds limited to the validity of the proceedings and the errors in the factual base of the case casting doubt on the correctness of the judgment – was not called into question.

IV.

The works regarding the new Polish Code of Civil Procedure are presently *in statu nascendi*. Undoubtedly, as the more advanced works on the new Polish Civil Code have amply demonstrated, this process will take many years. However, one should hope that the new code will finally be adopted and that it will link the best procedural traditions with the requirements of modern times. Considering the efforts of the Polish Codification Commission and civil procedure lawyers contributing to the discussion on the new code,

[28] During the debate, it was also suggested that the group action procedure should constitute a separate mode – along with the litigious and non-litigious modes – and therefore it should be elevated to a higher level in the code's structure.

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it should be hoped that the high quality of the proposed solutions will not be disturbed by the amendments introduced to the draft in the course of the legislative works in the Parliament. The recent experiences in reforming civil procedure in Poland sadly demonstrate that the final shape of legal acts may be unfavorably altered despite the most elaborate and considerate efforts of the experts.

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FRÉDÉRIQUE FERRAND

Res Judicata
From National Law to a Possible European Harmonisation?

I. Introduction

Lis pendens and *Res Judicata* rules both aim at avoiding contradictory court decisions.[1] The purpose of *lis pendens* is, in the interest of the harmonious administration of justice, to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given by different courts.[2] While *lis pendens* rules deal with possible parallel concurrent proceedings, the *res judicata* doctrine considers two successive proceedings and is a manifestation of the bindingness of decisions between the parties on matters decided by a court; it bars successive litigation of the same claim or issues between the same parties. It is therefore a consequence of the principle of finality which is not only in the public interest but also in the winning partie's interest. In the English case *Smith v. Brough* (2005)[3] decided by the civil division of the Court of Appeal, Lady Justice Arden expressed this view: "*Interest in the closure of litigation is not only the interest of the public. Successful claimants also have an interest in finality and they are entitled to expect that if they have won at trial, and the time for appeal has passed, that that is the end of the matter*". Also the victorious defendant has interest in the judgment not being open to reconsideration.[4] Also the more and more prevailing principle of effectiveness requires that the civil process and the judgment given must not be undermined by litigants and their counsels. Abuse of process is also to be discouraged and *res judicata* as well as other mechanisms can be a useful tool in this respect. While *lis pendens* has already been subject to EU provisions, especially in the Regulation no 44/2001 of 22 December 2001 (*Brussels 1*),[5] *res judicata* and its scope are not directly covered by the different EU-regulations even if the provisions on recognition and enforcement are linked with this concept.

However, the European Court of Justice does not only acknowledge the broad scope of the European *lis pendens* rules in order to avoid non-recognition of confliction court decisions within the European Union. It has also insisted[6] already in 1976 (case *Jozef de Wolf v. Harry Cox BV)* upon the relevance of the principle of *res judicata*: it would be

[1] See also Comment P 29-A of the ALI/Unidroit Principles of Transnational Civil Procedure: "This Principle is designed to avoid repetitive litigation, whether concurrent (*lis pendens*) or successive *(res judicata)*".

[2] Comp. Recital 21 of EU-Regulation no 1215–2012 of 12 December 2012, Official Journal of the European Union 20.12.2012, L 351/1.

[3] [2005] EWCA Civ 261.

[4] See *N. Andrews*, Res judicata and finality: Estoppel in the context of judicial decisions and arbitration awards, in K. Makridou/G. Diamantopoulos (ed.), Issues of Estoppel and Res Judicata in Anglo-American and Greek Law, 2013., p. 21.

[5] See also the revised version of the regulation (Reg. no 1215–2012 of 12 December 2012, Brussels 1 bis), art. 29 et seq and Art. 16 and 19 of Regulation no 2201/2003 of 27 November 2003 (Brussels 2 bis). See also the EU-Maintenance regulation no 4/2009 of 18 December 2008, Art. 12 and 13.

[6] See ECJ, 30 November 1976, Jozef de Wolf v. Harry Cox BV, case 42–76. The ECJ held that "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

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incompatible with the purpose of the provisions relating to the recognition of judgments[7] rendered in other Member States to admit a new action that would be identical (as to the parties and with regard to its object) to another one already decided by a court in another Member State.[8] However, academics seem to refuse to deduce from the *Wolf* judgment that the court second seized shall apply *sua sponte* the *res judicata* doctrine and dismiss the new claim on this ground because this is a procedural issue left to national law.[9] Therefore, it can be argued that in order to determine whether *res judicata* leads to the inadmissibility of the claim brought before a court of a Member State, this court shall apply its national rules on *res judicata* and not the European case law on identity of cause of action developed in the context of *lis pendens*.[10]

II. The Underlying Principle of Res Judicata: Finality

The "principle of finality" formulated in English and American civil procedure means that there should be an end to litigation and that matters that have been adjudicated or resolved should not be re-opened in other litigation. In common law, it also means that parties should not be allowed to raise points in subsequent proceedings "which properly belonged to the subject of [earlier] litigation and which the parties, exercising reasonable diligence, might have brought forward at the time".[11] This principle has "strong roots in public policy" and is "abundantly supported and acknowledged by various rules and legal institutions"[12] in common law. In *The Ampthill Peerage* case (1976),[13] Lord Simon of Glaisdale expresses the contents of the finality principle in the following way: "*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*". "*Limits must be placed upon the right of the citizens to open or reopen disputes*".[14]

meaning" of Art. 29 that prohibits the review of a foreign judgment as to its substance (points 8 and 9). Article 21 of the Convention "is evidence of the concern to prevent the courts of two contracting States from giving judgment in the same case".

[7] See *H. Gaudemet-Tallon*, Compétence et exécution des jugements en Europe, 4th ed. 2010, no 373: "*La reconnaissance, si elle ne se confond pas avec l'autorité de chose jugée, englobe bien évidemment cette notion. Elle recouvre donc et l'autorité positive de chose jugée (dite aussi force obligatoire) et l'autorité négative de chose jugée. Il résulte en particulier de cette autorité négative qu'une décision régulière émanant d'un État communautaire interdit de remettre en question dans un autre État communautaire ce qui a été jugé dans le premier État. La décision étrangère servira donc de base à une exception de chose jugée*".

[8] Comp. Jenard Report on the Brussels Convention 1968, OJEC 5 March 1979, C 59, p. 43: "Recognition must have the result of conferring judgments the authority and effectiveness accorded to them in the State in which they were given. The words *res judicata* which appear in a number of conventions have expressly been omitted since judgments given in interlocutory proceedings and parte may be recognized, and these do not always have the force of res judicata".

[9] For a different opinion, see *H. Gaudemet-Tallon*, Compétence et exécution des jugements en Europe, no 373: "*On pourrait toutefois soutenir qu'obliger le juge, en un tel cas, à soulever d'office l'autorité de chose jugée ne serait qu'une conséquence du principe d'application d'office des textes communautaires*".

[10] See *M.L. Niboyet/G. Geouffre de la Pradelle*, Droit international privé, 2011, no 741; *J. van de Velden/J. Stefanelli*, Comparative Report: The Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, *Res Judicata* and Abuse of Process, BIICL 2008, p. 63.

[11] See Henderson v. Henderson (1843) 3 Hare 100, 115 (Wigram V.C).

[12] See *N. Andrews*, English Civil Procedure, 2003, no 40.01.

[13] [1977] AC 547, 576 (Committee for Privileges, House of Lords).

[14] See *Lord Wilberforce*, in The Ampthill Peerage, [1977] AC 547, 569.

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The principle of finality does exist in all national legal systems even if it is known under another terminology. In *France* and in *Spain*[15] for example, the *res judicata* doctrine is not justified by a *principe de finalité* but by two aims related to public policy considerations that are the same as finality in common law: "*sécurité juridique"* and "*paix sociale*".[16] The same applies in *Germany*[17] where *res judicata* (*Rechtskraft*) is based on the constitutional principles of legal protection by the court (*Rechtsschutz durch die Gerichte*) and of the State governed by the rule of law (*Rechtsstaat*): social peace requires that litigation should take an end and normally not be re-opened except via the legal means of recourse. It seems impossible to realize law without finality and legal certainty.[18] In France, Article 1351 C. civil classifies the "*autorité de chose jugée*" as a non rebuttable presumption of truth but this view has been abandoned by the French modern scholars[19] who now mainly consider the "*autorité de chose jugée"* as a procedural attribute of the judgment aiming at strengthening the finality ("*incontestabilité*") of the court decision once no mean of recourse is available anymore.[20] What is called in French law "*autorité* négative *de la chose jugée*" aims to prevent re-litigation and a new judgment on what has already been subject to a first one; therefore, it is a tool protecting the litigants by consolidating the legal situation arisen from the first judgment and guaranteeing legal certainty. *Res judicata* is also an instrument regulating the case load of the courts.[21]

Since *res judicata* is closely connected with public policy considerations, it should be considered by the court on its own motion. This is the case for example in *Austria,*[22] *England*, in *France,*[23] in *Germany,*[24] in *Greece*[25] and seemingly in *Italy*[26] and

[15] See *C. Esplugues-Mota/S. Barona-Vilar*, Civil Justice in Spain, Nagoya Univ. Comp. Study of Civil Justice, vol. 3, 2009, p. 182 et seq. and the distinction made by some authors between finality and *res judicata*.

[16] See *S. Guinchard/C. Chainais/F. Ferrand*, Procédure civile, Droit interne et droit de l'Union européenne, 31rst ed. 2012, no 1112. For *Spain,* see *C. Esplugues-Mota/S. Barona-Vilar*, Civil Justice in Spain, Nagoya Univ. Comp. Study of Civil Justice, vol. 3, 2009, p. 181 et seq.

[17] S. *L. Rosenberg/K.H. Schwab/P. Gottwald*, Zivilprozessrecht, 17th ed. 2010, § 151, no 1: „*Die materielle Rechtskraft ist die notwendige Folge des Rechts auf Rechtsschutz durch die Gerichte. Sie findet ihre verfassungsgemäße Verankerung im Rechtsstaatsprinzip. Die Bewahrung des Rechtsfriedens unter den Parteien fordert, dass jeder Streit einmal ein Ende hat*"; *P. Murray/R. Stürner*, German Civil Justice, 2004, p. 355.

[18] See *R. Stürner*, Preclusive Effects of Foreign Judgments – The European Tradition, in R. Stürner/M. Kawano (ed.), Current Topics of International Litigation, 2009, p. 239.

[19] See *G. Widerkehr*, Sens, signifiance et signification de l'autorité de chose jugée, in Études offertes à Jacques Normand, Justices et droits fondamentaux, 2003, p. 510 et seq. This scholar suggests that the *"autorité de chose jugée*" is related to the role of justice and the function of judgments, especially the judge's duty to "*dire le droit*"; *N. Fricero*, Le fabuleux destin de l'autorité de la chose jugée, in Mélanges J.-F. Burgelin, 2008, p. 199.

[20] *N. Fricero*, Le fabuleux destin de l'autorité de la chose jugée, in Mélanges J.-F. Burgelin, p. 199: "*l'autorité de la chose jugée est un instrument processuel permettant d'assurer la stabilité des situations juridiques établies par un jugement, et de rationaliser et moraliser les stratégies judiciaires*".

[21] See *N. Fricero*, Le fabuleux destin de l'autorité de la chose jugée, p. 200: "*l'irrecevabilité tirée de la chose jugée constitue aussi un instrument de régulation des flux judiciaires et […] conduit à considérer le procès sous un angle économique, et à penser le service public en termes de rationalisation des coûts et de gestion des ressources*".

[22] § 411 para 2 Austrian ZPO: *Die Rechtskraft des Urtheiles ist von amtswegen zu berücksichtigen*".

[23] See Art. 125 French CPC, which was amended by décret no 2004–836 of 20 August 2004 that came into force on 1 January 2005. For an example, see Cass. civ. 2, 17 September 2005, Procédures 2005, comm. no 248 obs. *Perrot*. Before 2005 French case law held that the judge was not allowed to consider *res judicata sua sponte* so that the parties and third parties could agree to waive a *res judicata* plea, see e.g. Cass. Civ. 2, 10 February 1960, Bull. Civ. II, no 108.

[24] See BGH (Bundesgerichshof) NJW 1993, p. 3204 et seq. See also *L. Rosenberg/K.H. Schwab/P. Gottwald, Zivilprozessrecht*, § 152, no 17.

[25] See Art. 332 Greek CPC and *M. Makridou*, Principles of preclusion and res judicata: Reflexions from the perspectives of Greek and American law, in K. Makridou/G. Diamantopoulos (ed.), Issues of Estoppel and Res Judicata in Anglo-American and Greek Law, p. 64. A waiver of *res judicata* plea is not valid.

[26] *A. Zeuner/H. Koch*, Effects of Judgments (Res Judicata), Vol. XVI Civil procedure, Encyclopedia of Comparative Law, 2012, no 36, p. 14.

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Spain.[27] In some countries it is a duty for the court whereas in others it is only a possibility (as in *France* and in *Spain*).

Res judicata is also closely connected with the notion of possible *abuse of process* in the meaning of several proceedings being brought successively before court although it could have been possible and would have been reasonable to raise all the points in the same proceedings. This is well known in common law under the terminology "abuse of process" and leads to preclusion of the points that should have been raised in earlier proceedings.[28] In *France* this doctrine early developed in English law by the decision *Henderson v. Henderson* (1843) has been adopted by the Cour de cassation in a very important decision of its plenary assembly in 2006.[29]

Comparative law of *res judicata* has been the subject of two important publications (one in English, the other in German) by Prof. Stürner[30] and of a study ordered by the French *Cour de cassation* to the Institut de droit comparé Édouard Lambert of Lyon[31] in 2006 before the court changed its case law related to the scope of res judicata and the new principles of "*concentration des moyens*". Also the International Encyclopedia of Comparative Law contains in its volume XVI on civil procedure a detailed chapter 9 dedicated to Effects of Judgments (*Res Judicata*).[32] All show that the topic is difficult[33] and is often closely linked to the mission of the judge, the scope of appellate proceedings and the national conception of what finality should mean. The extent of *res judicata* is a sensitive issue that depends on a subtle balance in national civil procedure between the right to access to justice and the principle of finality as well as the principle of procedural fairness.[34] R. Stürner describes the differences in the following way: "restrictive understanding [of *res judicata*] of the German legal family" opposed to the "generous English Concept" and "the cautious expansions of the *res judicata* doctrine" in France.[35] This study will

[27] See *M. Ortells Ramos*, Derecho Procesal Civil, 8h éd. 2008, p. 573 with a distinction: the Court has to consider *ex officio* "*la apreciación de la cosa juzgada pare que se produzca su efecto negativo*", but "*la apreciación de la cosa juzgada para su efecto positivo o prejudicial*" requires that the parties have alleged the points on which *res judicata* should apply.

[28] However, it is not a direct issue of *res judicata* but "an adjunct to res judicata" and "it should not be confused as an aspect of *res judicata*", see *N. Andrews*, Res judicata and finality: Estoppel in the context of judicial decisions and arbitration awards, p. 39.

[29] Cass. Ass. plén., 7 July 2006, Cesareo, no 04–10672, Bull. Ass. Plén. 2006, no 8; JCP G 2007, II, 10 070 obs. *Wiederkehr*; D. 2006, p. 2137 obs. *Weiller*; Dr. et Procédures 2006, p. 348 obs. *Fricero*; RTDCiv. 2006, p. 825 obs. *Perrot*: "*Mais attendu qu'il incombe au demandeur de présenter dès l'instance relative à la première demande l'ensemble des moyens qu'il estime de nature à fonder celle-ci*". This new obligation of the parties (it was first imposed on the claimant but was extended to the defendants in later decisions, see Cass. Com. 20 February 2007, Bull. Civ. IV, no 49) is called "*principe de concentration des moyens*".

[30] *R. Stürner*, Preclusive Effects of Foreign Judgments – The European Tradition, in R. Stürner/M. Kawano (ed.), Current Topics of International Litigation, p. 239 et seq.; *R. Stürner*, Rechtskraft in Europa, in Festschrift Schütze, 1999, p. 913.

[31] L'autorité de chose jugée en droit comparé, Étude réalisée par l'Institut de droit comparé Édouard Lambert de l'Université Jean Moulin Lyon 3, available at http://www.courdecassation.fr/IMG/File/Plen-06–07-07–0410672-rapport-definitif-anonymise-annexe-2.pdf.

[32] *A. Zeuner/H. Koch*, Chapter 9 Effects of Judgments (Res Judicata), vol. XVI Civil Procedure, International Encyclopedia of Comparative Law, 2012.

[33] See also *G. Wiederkehr*, Sens, signifiance et signification de l'autorité de chose jugée, in Études offertes à Jacques Normand, Justices et droits fondamentaux, p. 507 et seq. who describes the divergences among scholars with respect to the definition of "*autorité de chose jugée*" and asserts "*flottements doctrinaux*". Especially a distinction should be made between *autorité de chose jugée* and *effet substantiel du jugement*.

[34] The principle of procedural fairness (*principe de loyauté*) has given rise to new developments in French case law and tends to become in many contexts a leading principle of civil procedure, see *F. Ferrand*, Preuve, débats et principe de loyauté dans le procès civil français, ZZPInt. 17 (2012), p. 1 et seq.

[35] *R. Stürner*, Preclusive Effects of Foreign Judgments – The European Tradition, in R. Stürner/M. Kawano (ed.), Current Topics of International Litigation, p. 242.