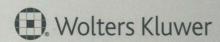
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THE LAW AND PRACTICE
OF PRECLUSION - RES JUDICATA
(MERGER AND ESTOPPEL), ABUSE OF
PROCESS AND RECOGNITION
OF FOREIGN JUDGMENTS

JACOB B. VAN DE VELDEN



Finality in Litigation

The Law and Practice of Preclusion – Res Judicata (Merger and Estoppel), Abuse of Process and Recognition of Foreign Judgments

Jacob B. van de Velden



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Introduction

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

Finality in litigation is a 'principle' in the sense that finality in litigation is a value that, though not a rule of law, provides the rationale for rules of law ('preclusion law').¹ The principle is 'general' in that most (if not all) legal systems based on the rule of law – municipal, international and supranational systems alike – recognise the value of finality in litigation.² Consequently, finality in litigation is rightly characterised as a *general principle of law* – a principle of law common to all legal systems 'internationally as nationally', as the International Court of Justice (ICJ) put it in the *Genocide case*.³ In that limited sense, the CJEU in *Kapferer* also reiterated 'the importance, both for the Community legal order and national legal systems, of the principle of res judicata'.⁴ (Conversely, unlike suggestions of some to the contrary, the mere fact that finality in litigation is a general principle of law does not make it a general principle of international law (in the sense of binding upon States).)⁵

^{1.} G Fitzmaurice, "The General Principles of International Law Considered from the Standpoint of the Rule of Law" (1957) Recueil des cours 1, 7.

^{2.} See text to n. 49. cf. Pious Fund of the Californias (USA v. Mexico, 1902) GG Wilson, The Hague Arbitration Cases (Ginn, Boston & London 1915) 2 ('this rule applies not only to judgments of tribunals created by the State, but equally to arbitral awards rendered within the limits of the jurisdiction established by compromise; considering that this same principle should, for an even stronger reason, be applied to international arbitration').

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) ('Genocide Case') (Judgment) [2007] ICJ 43 [116].
 Case C-234/04 Rosmarie Kapferer v. Schlank & Schick GmbH ('Kapferer') [2006] ECR I-2585 [20].

^{5.} cf. G Schwarzenberger, 'The Fundamental Principles of International Law' (1955) 87 Recueil des cours 191, 205. But see B Cheng, General Principles of Law as Applied by International Courts and Tribunals (Stephens & Sons, London 1953) 336ff, who refers, for instance, to Interpretation of Judgments Nos 7 and 8 (Germany v. Poland) [1927] PCIJ Rep Series A No 13, 27 (Anzilotti, dissenting) ('It appears to me that if there be a case in which it is legitimate to have recourse, in the absence of conventions and custom, to 'the general principles of law recognised by civilised nations,' mentioned in No. 3 of Article 38 of the Statute, that case is assuredly the present one. Not without reason was the binding effect of res judicata expressly

The need for finality clearly extends beyond borders; as one English judge put it, '[i]t would be impossible to carry on the business of the world if Courts refused to act upon what had been done by other Courts of competent jurisdiction'. Similarly, Juenger, a well-known commentator, observed that '[t]o retry cases which have been authoritatively decided violates fundamental tenets of judicial economy. [...] Such duplication is not only wasteful; it punishes private litigants and exacts a toll from international commerce.' However, national borders diminish the principle's efficacy. This has two main causes.

The first cause for this diminished efficacy of the principle of finality in litigation in cross-border cases is that, despite the general acceptance of the need for finality in litigation, significant divergences exist between preclusion laws through which the principle of finality in litigation is implemented. The preclusive effects of judgments therefore differ from one legal system to another. This 'conflict of preclusion laws' causes both inefficiency and injustice. Inefficiency results from uncertainty as to the risk of relitigation abroad. Parties involved in litigation are unable to clearly predict the preclusive effects that a judgment will have throughout the world, from one legal system to another. This information deficit leads to inefficient court strategies and decisions.

Injustice results either from a failure to impose finality in litigation after the rendition of justice or from imposition of finality absent a prior, adequate opportunity to litigate. The concern of injustice due to finality being imposed absent a prior, adequate opportunity to litigate, is felt most acutely among legal systems that share fundamental rules of justice such as Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms (*ECHR*). Article 6(1) ECHR can be violated not only by a failure to impose finality, but also by the imposition of finality in circumstances where a party had no prior, adequate opportunity to litigate. This

mentioned by the Committee of Jurists entrusted with the preparation of a plan for the establishment of a Permanent Court of International Justice, amongst the principles included in the abovementioned Article (Minutes, p.335).').

^{6. (1872-73)} LR 15 Eq 383, 386 (James LJ). See FT Piggott, Foreign judgments: their effects in the English Court (Stevens and Sons, London 1879) 28.

^{7.} FK Juenger, 'The Recognition of Money Judgments in Civil and Commercial Matters' (1988) 36 The American Journal of Comparative Law 1, 4.

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^{9.} See, for instance, R Stürner, 'Rechtskraft in Europa' inr Geimer (ed), Wege Zur Globalisierung de Rechts: Festschrift für Rolf A Schütze zum 65 Geburtstag (Beck, München 1999) 912 et seg.

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

^{11.} Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

^{12.} See Rosca v. Moldova App No 6267/02 [25] (EctHR, 22 March 2005) ('it is the State's responsibility to organise the legal system in such a way as to identify related proceedings and where necessary to join them or prohibit further institution of new proceedings related to the same matter, in order to circumvent reviewing final adjudications treated as an appeal in disguise, in the ambit of parallel sets of proceedings') (emphasis added). See further text to Chapter 6 n. 74 and, specifically, n. 82.

^{13.} See, in this specific context, Ferenčíková v. Slovakia App No 39912/09 (ECtHR, 25 September 2012) [50] ('the right to a fair hearing, as guaranteed by Article 6 § 1 of the Convention, must be construed in the light of the principle of the rule of law, which requires that all litigants should