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JAPANESE JUDGMENTS AND THE COMMON LAW OF PRECLUSION

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I. INTRODUCTION

Cross-border enforcement of judgments is a central topic in international commercial litigation, since judgment enforcement can be a critical means of securing payment in cross-border transactions. However, a judgment entered in one jurisdiction also has the potential to preclude relitigation of the same claims or issues in other jurisdictions. Precisely what sort of preclusive effect a foreign judgment has within the forum is a matter that remains undecided in many jurisdictions. The United States Court of Appeals for the Seventh Circuit most recently highlighted the disagreement between American courts on this issue, but fell short of resolving it.¹⁾ The disagreement is ultimately whether a foreign judgment retains its foreign preclusive effect within the forum, or whether it takes on the preclusive effect of a judgment of the forum. The disagreement arises because although the notion of judgment preclusion (also referred to

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¹⁾ See *U.S. v. Kashamu*, 656 F.3d 679, 683 (7th Cir. 2011).

as *non bis in idem*) exists to some degree in nearly all legal systems,²⁾ the extent and effect of preclusion can differ quite dramatically between jurisdictions. Consequently, while legislation and jurisprudence relating to recognition of foreign judgments attempts to cast a spell of homogeneity over judgments of all courts, to some extent a judgment from one jurisdiction is not really the same as a judgment from another according to their respective laws.

This article addresses the preclusive effect of Japanese judgments abroad, as distinct from the issue of their actual enforcement overseas. Judgment preclusion prevents relitigation of certain claims and issues in either serial litigation or parallel litigation in multiple jurisdictions. This effect of judgments on parallel litigation has given rise to the “race to judgment,” in which a party tries to obtain a judgment in its favor in a more advantageous jurisdiction, in order to end all other pending lawsuits over the same dispute.³⁾ The filing of multiple suits for the same dispute in the Japanese courts is forbidden.⁴⁾ However, Japanese law has no consistent antidote for the problem of parallel litigation in multiple countries.⁵⁾ Across many legal systems, judgment preclusion remains a consistent remedy against parallel or successive lawsuits over the same issues, between the same parties.⁶⁾

This article will focus on the preclusive effect of final money judgments rendered by Japanese courts in three key common law jurisdictions: California, New York, and England and Wales.⁷⁾ Japan is a major trading nation and her businesses are

²⁾ RICHARD H. KREINDLER, *TRANSNATIONAL LITIGATION: A BASIC PRIMER* 203 (Oceania Pub. 1998).

³⁾ See Justin Markel, *Efficacy of Contractual Solutions in the Interstate Enforcement of Covenants Not to Compete*, 51 S. TEX. L. REV. 783, 787 (2010).

⁴⁾ *Minji Soshou Hou* [Civil Procedure Code] (Law No. 109 of 1996) art. 142 (Japan) [hereinafter “JCPC”].

⁵⁾ See Yoshimasa Furuta, *International Parallel Litigation: Disposition of Duplicative Civil Proceedings in the United States and Japan*, 5 PAC. RIM. L. & POL. J. 1, 36 (1995) (courts and scholars in Japan beginning to use “recognizability rule” to allow for dismissal of later-filed Japanese actions if foreign litigation is likely to result in judgment enforceable under Japanese law).

⁶⁾ This is not, however, universal. For example, Scandinavian countries, together with the Netherlands and Austria, can be quite hostile to the recognition of foreign judgments. See Samuel P. Baumgartner, *How Well Do U.S. Judgments Fare in Europe?*, 40 GEO. WASH. INT’LL. REV. 173, 184 – 85 (2008).

⁷⁾ Properly entered judgments should generally be recognized between American, Japanese, and English courts. See e.g. *Burroughs Corp. v. Chung*, 37 MINSHU 611 (Jun. 7, 1983) (Washington, D.C. judgment); *Barclays Bank plc v. Japan Planning Ass’n Co., Ltd.*, 837 HANTA 300 (D. Tokyo 1994) (English judgment); *Israel Discount Bank of N.Y. v. Hadjipateras*, [1983] 3 All E.R. 129 (C.A.) (N.Y. judgment); and *Nippon Emo-Trans Co., Ltd. v. Emo Trans., Inc.*, 744 F. Supp. 1215, 1230 – 31 (E.D.N.Y. 1990) (Japanese judgment).

engaged in commercial relations with many American and European enterprises. Although certain aspects of the Japanese legal system have come under American influence,⁸⁾ Japanese procedural law is still largely an adaptation of the German legal tradition.⁹⁾ Japan's law of preclusion remains thoroughly Germanic, making Japanese judgments an excellent example of contrast with the treatment of judgments in common law jurisdictions. Yet, the rules of judgment preclusion can differ quite substantially between common law jurisdictions as well.

This article specifies the laws of the States of New York and California and the jurisdiction of England and Wales,¹⁰⁾ both to highlight the differences between common law countries, and to show some of the differences within each country. It is not possible to simply compare the law of Japan with that of the United States or United Kingdom. To begin with, English law is rarely the same thing as the law of the overall United Kingdom. While, for example, the Companies Acts create a fairly uniform corporate law throughout the U.K.,¹¹⁾ the English and Scottish laws of judgment preclusion differ quite substantially.¹²⁾ Similarly, in the United States, it is usually the law of a specific state that governs the preclusive effect to be given to a foreign judgment.¹³⁾ To the extent it is applicable, U.S. federal law provides another interesting point of comparison, but will rarely in practice be applied to foreign judgment preclusion. It may be that a judgment creditor can invoke federal judgment preclusion rules in the event a foreign maritime judgment is to be enforced using specifically maritime procedures in a federal district court. However, this point is not yet entirely settled.

In spite of legislation, the problem of disparate judgment preclusion rules arises because legislative efforts in the nineteenth and twentieth centuries concentrated on the

⁸⁾ Takeshi Kojima, *Japanese Civil Procedure in Comparative Law Perspective*, 46 U. KAN. L. REV. 687, 693 (1998) (American influence on Japanese law).

⁹⁾ HIROSHI ODA, *JAPANESE LAW* 129 – 131 (Oxford 2d ed. 1999) (German origin of commercial code and part of civil code); and Kojima, *supra* note 7, p. 689 (German origin of civil procedure code).

¹⁰⁾ The Civil Jurisdiction and Judgments Act 1982 (c. 27) divides the United Kingdom into three “parts:” (1) England and Wales, (2) Scotland, and (3) Northern Ireland.

¹¹⁾ See Companies Act 2006 (c. 46).

¹²⁾ The Scots law of judgment preclusion (*res judicata*) is much narrower than the English law. See *Primary Health Care Ctrs. (Broadford) Ltd. v. Ravangave*, [2009] S.L.T. 673 (Ct. Sess.) (Scots *res judicata* confined to claims actually decided).

¹³⁾ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 cmt. a (1987); and *Ohno v. Yasuma*, 723 F.3d 984, 990 (9th Cir. 2013) (Japanese judgment).

cross-border enforcement (as opposed to preclusive effect) of foreign money judgments. The U.K.'s Foreign Judgments (Reciprocal Enforcement) Act 1933¹⁴⁾ applies only to judgments rendered in specified countries, which are usually former British colonies. Its section 8 provides that once registered, a qualifying foreign judgment will have preclusive effect, but does not specify what sort of effect.¹⁵⁾ For most other foreign judgments, English common law is applied to both recognition and enforcement.¹⁶⁾ In the United States, many states have adopted the 1962 Uniform Foreign Money Judgments Recognition Act ("Uniform Act")¹⁷⁾ or its 2005 update.¹⁸⁾ The Uniform Act does not specify what preclusive effect a foreign judgment has in the forum.¹⁹⁾ Accordingly, as with courts in the U.K., courts in the U.S. must each look to their own body of jurisprudence to determine what preclusive effect foreign judgments should have in the forum.²⁰⁾ This situation is not unique to the common law world, as the foreign judgment recognition statute of Japan, in line with similar statutes in Germany,²¹⁾ Taiwan,²²⁾ and Korea,²³⁾ does not give direct guidance to domestic courts on the preclusive effect to be given.²⁴⁾ In Germany, while the majority of authorities hold that a foreign judgment's preclusive effect follows it into the recognizing forum, this viewpoint is not universal.²⁵⁾ Consequently, across the common law/civil law divide, there is no uniform statutory guidance on the preclusive effect of foreign judgments. Courts in both types of systems have been left to work out the extent of such effect in each forum.

¹⁴⁾ Foreign Judgments (Reciprocal Enforcement) Act 1933 (23 & 24 Geo. 5, c. 13).

¹⁵⁾ Similar statutes exist in Hong Kong and Singapore. *See* Foreign Judgments (Reciprocal Enforcement) Ordinance (cap. 319) (H.K.); Reciprocal Enforcement of Foreign Judgments Act (cap. 265) (Sing.); and Reciprocal Enforcement of Commonwealth Judgments Act (cap. 264) (Sing.).

¹⁶⁾ *Grant v. Easton*, [1883] 13 Q.B.D. 302, 303 (C.A.).

¹⁷⁾ *See* N.Y. C.P.L.R. 5301. The 1962 Act was modeled in part on the English Act of 1933. *See Nippon Emo-Trans Co., Ltd. v. Emo-Trans, Inc.*, 744 F. Supp. 1215, 1223 n. 15 (E.D.N.Y. 1990) (also surveying English cases applying the 1933 Act).

¹⁸⁾ *See* CAL. CODE CIV. PROC. § 1713.

¹⁹⁾ *See* CAL. CODE CIV. PROC. § 1719(a); and N.Y. C.P.L.R. 5303.

²⁰⁾ *Kashamu*, 656 F.3d at 683.

²¹⁾ *See Zivilprozessordnung* [Civil Procedure Code] § 328 (F.R.G.) [hereinafter "ZPO"].

²²⁾ *See Minshì Sùsòng Fǎ* [Civil Procedure Code] art. 402 (Taiwan) [hereinafter "TCPC"].

²³⁾ *See Min-sa-so-song-beop* [Civil Procedure Code] (Act No. 547 of 1960) art. 217 (R.O.K.) [hereinafter "KCPC"].

²⁴⁾ *See* JCPC art. 118.

²⁵⁾ Wolfgang Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 BERKELEY J. OF INT'L L. 175, 186 – 87 (2005).

II. WHAT YOU THINK YOU HAVE

In Japan, like other judicial systems, judges issue different types of orders and directions throughout the course of litigation.²⁶⁾ However, only a judgment (*hanketsu*) has preclusive effect (*kihanryoku*), and only to the extent of its final decisions on the claims actually tried.²⁷⁾ Finality is, therefore, probably the single most significant characteristic of a Japanese judgment. Yet, in Japan, a judgment is not preclusive simply because it has been entered. Rather, the time for appealing the judgment must expire before the judgment is considered binding and final.²⁸⁾ A judgment is also not *enforceable* until the time for appeal has expired.²⁹⁾ However, in order to dissuade an unsuccessful litigant from appealing, which can allow the loser to try the entire case over again,³⁰⁾ a Japanese court can issue a declaration of provisional execution (*karishikkou no sengen*), allowing the judgment to be enforced prior to the deadline for an appeal.³¹⁾ Japanese courts can also enter summary payment orders on negotiable instruments³²⁾ and other liquidated claims,³³⁾ which are provisionally enforceable

²⁶⁾ The Japanese division of judicial decisions (*saiban*) into judgments (*hanketsu*), orders (*kettei*), and directions (*meirei*), roughly corresponds with the three types of German decisions: judgments (*Urteile*), orders (*Beschlüsse*), and directions (*Verfügungen*). Compare JCPC arts. 328 & 329 with ZPO §§ 313 & 329. Korean civil procedure also retains this tripartite distinction, although Taiwanese civil procedure allows for only judgments (*pànjué*) and rulings (*cáidìng*). Compare KCPC art. 224 with TCPC art. 220. On the other hand, American procedural law usually regards judgments as a subset of the more general category of court orders. See e.g. FED. R. CIV. P. 54(a). English procedural rules refer to judgments and orders separately, without defining them. See e.g. ENG. CIV. PROC. R. 40.1. English judges continue to distinguish a “judgment” from other types of orders based on its finality. *Knight v Rochdale Healthcare NHS Trust* [2003] EWHC 1831 (Q.B.) ¶¶ 19 – 22. However, a purely procedural order is separately termed a “direction.” See e.g. ENG. CIV. PROC. R. 27.7.

²⁷⁾ See JCPC art. 114.

²⁸⁾ See JCPC art. 116; and ZPO § 705 (same).

²⁹⁾ See *Minji Shikkou Hou* [Civil Execution Act] (Law No. 4 of 1979) art. 22 (Japan) [hereinafter “JCEA”].

³⁰⁾ See JCPC art. 297 (applying trial procedure to *kouso* appeals); but see art. 296 (limiting oral argument to points raised on appeal).

³¹⁾ See JCEA art. 22; and JCPC arts. 259, 294, 310 & 323; see also ZPO § 708 (list of judgments not requiring security for provisional enforcement); and KONRAD ZWEIGERT & ULRICH DROBNIG, 16 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 20 (Martinus Nijhoff Pub. 1982) (use of provisional execution to deter appeals).

³²⁾ JCPC art. 350 *et seq.* sets out the procedure for abbreviated claims on negotiable instruments (*tegatasoshou*).

³³⁾ JCPC art. 382 *et seq.* sets out the procedure for summary payment orders on liquidated claims (*tokusoku tetsuzuki*).

without the need of a trial, if there are no objections from the debtor.³⁴⁾ Although this Germanic distinction between “final” and “provisional” is unknown in the common law world,³⁵⁾ American and English courts have determined that a foreign “provisional” judgment is not “final” for purposes of cross-border recognition until any objections or appeals have been resolved.³⁶⁾

Once final, a Japanese judgment is preclusive to the extent of the claims actually decided.³⁷⁾ In the Germanic tradition, Japanese judgments provide claim preclusion but not issue preclusion.³⁸⁾ In other words, the preclusive effect of a final Japanese judgment is considered “narrow” in comparison to the effect of the common law *res judicata* doctrine.³⁹⁾ This can allow an unsuccessful Japanese claimant to litigate unasserted claims in a later lawsuit.⁴⁰⁾ However, to aid in maintaining judicial efficiency and avoid repetitive litigation, Japanese courts rely upon the doctrine of abuse of process (*soken no ran'you*).⁴¹⁾ Accordingly, a claimant’s right to split causes of action arising out of the same transaction or series of transactions is not unlimited in Japan. For example, if a claimant files suit for fewer than all possible claims arising out of a transaction, and wins the first lawsuit, that claimant may be precluded from bringing the unasserted

³⁴⁾ See JCPC art. 396; see also ZPO § 688 *et seq.* (German payment order procedure).

³⁵⁾ See John A. Baum, *The Evolution of the Summary Judgment Procedure: An Essay Commemorating the Centennial Anniversary of Keating*, 31 IND. L.J. 329, 337 (1956); and see also JCEA art. 22; and ZPO § 704.

³⁶⁾ *Nouvion v. Freeman* (1889) 15 App. Cas. 1 (U.K.H.L.) (addressing Spanish *remate* decision); and *Mayekawa Mfg. Co., Ltd. v. Sasaki*, 888 P.2d 183 (Wash. App. 1995) (addressing Japanese “provisional” judgment).

³⁷⁾ See JCPC art. 114. Technically, *res judicata* effect is limited to the “main text” (*shubun*) which states the disposition of the case. This is the first of three parts required in a judgment. JCPC art. 253. Japanese three-part judgments are similar to their Continental European counterparts. See ZPO § 313 (three parts in German judgments); and N.C.P.C. art. 455 (Fr.) (same). To common law audiences, these distinctions are roughly equivalent to the distinctions between claims actually made and decided, and claims that would be collateral but related or necessary to the decision.

³⁸⁾ See Akihiro Hironaka, *Jurisdictional Theory “Made in Japan”: Convergence of U.S. and Continental European Approaches*, 37 VAND. J. OF TRANSNATIONAL L. 1317, 1348 (2004); and ZPO § 322(1) (German preclusion limited to claims in suit).

³⁹⁾ Yuval Sinai, *Reconsidering Res Judicata: A Comparative Perspective*, 21 DUKE J. OF COMP. & INT’L L. 353, 384 (2011) (describing “narrow” Germanic *res judicata*).

⁴⁰⁾ See *Yamada v. Sakakura*, 9 MINSHU 1903 (Dec. 1, 1955) (earlier decision regarding cancellation of title registration did not preclude later litigation of underlying title). This narrow doctrine of preclusion may partially be explained by the statutory restriction on judges not to decide issues that the parties have not raised in the proceedings. See JCPC art. 246; and see also ZPO § 308; and N.C.P.C. art. 5 (Fr.).

⁴¹⁾ *Hirata v. Takeuchi*, 13 MINSHU 493 (Mar. 26, 1959) (citing *Fujita v. Sano*, 18 TAIHAN MINSHU 1083 (Sept. 14, 1939)).

claims in a later lawsuit unless the defense had fair notice during the first suit of the potential for further liability.⁴²⁾ On a general level, Japanese judgment preclusion relies on a narrow automatic *res judicata* principle that applies only to the claims decided, and utilizes a more flexible, discretionary abuse of process standard for previously unasserted claims arising out of the same events or transactions.

III. WHAT YOU ACTUALLY HAVE

Different legal systems view judgments differently, and as will be seen, these differences in views will impact how each system interprets foreign judgments. Consequently, when considering the treatment of Japanese judgments in common law jurisdictions, it is necessary to understand how each domestic system regards its own courts' judgments.

A. The English Law of Judgments

In distinction to the law in Japanese courts, an English judgment in a civil or commercial matter is final and conclusive once it has been entered,⁴³⁾ regardless of whether an appeal has been filed against it.⁴⁴⁾ Similarly, an English judgment is also enforceable as soon as it has been entered.⁴⁵⁾ An unsuccessful party in English proceedings must apply to the courts and provide good reason for a stay of enforcement pending an appeal, in addition to providing security for the amount of the judgment.⁴⁶⁾

The preclusive effect of English judgments is also wider than in Japanese courts. A judgment rendered by an English court gives rise to an estoppel *per rem judicatam* in

⁴²⁾ See *Shiga Sokotochi K.K. v. Maekawa*, 16 MINSHU 1720 (Aug. 10, 1962) (allowing second suit but warning of bad faith restriction); and see *Taisei Kensetsu K.K. v. Toshu Gaihatsu GmbH*, 52 MINSHU 1147 (Jun. 12, 1998) (second action dismissed for bad faith).

⁴³⁾ ENG. CIV. PROC. R. 40.7.

⁴⁴⁾ *Huntly v. Gaskell*, [1905] 2 Ch. 656 (C.A.); and *Colt Indus. Inc. v. Sarlie (No 2)*, [1966] 3 All E.R. 85 (C.A.).

⁴⁵⁾ ENG. CIV. PROC. R. 52.7.

⁴⁶⁾ See *Barker v. Lavery*, (1885) 14 Q.B.D. 769; and ENG. R. SUP. CT. Ord. 45 r. 11 & Ord. 47 r. 1 (reprinted in ENG. CIV. PROC. R., Sch. 1).

later proceedings between the same parties on the same claims or issues.⁴⁷⁾ Strictly speaking, the doctrine of *res judicata* in England has been categorized as a substantive rule of the law of evidence.⁴⁸⁾ The English doctrine of *res judicata* has three main aspects: (1) cause of action estoppel; (2) issue estoppel; and (3) abuse of process (more specifically described as the rule of *Henderson v. Henderson*).⁴⁹⁾ An English judgment absolutely precludes relitigation of the same causes of action in later proceedings by the same parties.⁵⁰⁾ This cause of action estoppel has also been extended to apply to claims that could or should have been raised in the prior proceedings.⁵¹⁾ An English judgment additionally gives rise to issue estoppel, which precludes parties from seeking to dispute or controvert issues that were decided as part of the judgment. Issue estoppel can apply to issues that should have been raised in the prior litigation, but a party can persuade a court to disregard issue estoppel if new facts or circumstances develop after the prior litigation was resolved.⁵²⁾ For example, a shareholder who prevails in a suit against a company regarding ownership of his shares might be precluded from later raising a defense against the same company's breach of contract claim, if he were to argue in later proceedings that the company had not validly existed at the time.

The third aspect of judgment preclusion in English law is the rule of *Henderson v. Henderson*.⁵³⁾ This rule holds that a party should bring all claims and theories in a single action, wherever possible.⁵⁴⁾ It has historically been referred to as an aspect of the doctrine of *res judicata*, but has more recently been characterized as an equitable doctrine designed to avoid abuse of process.⁵⁵⁾ Thus, unlike cause of action estoppel, which is absolute, and issue estoppel, which is presumed to apply unless a court is provided convincing justification not to apply it, a litigant must demonstrate how and why the rule in *Henderson* applies to bar an issue that had not actually been litigated

⁴⁷⁾ *Arnold v. Nat'l Westminster Bank plc*, [1991] 2 A.C. 93 (H.L.); and see *Berliner Industriebank AG v. Jost*, [1971] 2 All E.R. 1513, 1521 (C.A.) (preclusive effect of foreign judgments recognized in English law).

⁴⁸⁾ *Vervaeka (formerly Messina) v. Smith*, [1983] 1 A.C. 145, 161 – 62 (H.L.).

⁴⁹⁾ *Coflexip S.A. v. Stolt Offshore MS Ltd.*, [2004] EWCA Civ 213, ¶ 39.

⁵⁰⁾ *Virgin Atlantic Airways Ltd. v. Zodiac Seats UK Ltd.*, [2013] UKSC 46, ¶ 20.

⁵¹⁾ *Arnold*, *supra* note 47.

⁵²⁾ *Arnold*, *supra* note 47.

⁵³⁾ (1843) 3 Hare 100.

⁵⁴⁾ *Barrow v. Bankside Agency*, [1996] 1 W.L.R. 257, 260 (C.A.).

⁵⁵⁾ PETER BARNETT, *RES JUDICATA, ESTOPPEL & FOREIGN JUDGMENTS* 23 (Oxford 2001).

before.⁵⁶⁾

The English doctrine of *res judicata* provides parties to judgments with broader preclusive power over their opponents than the corresponding Japanese doctrine. English preclusion rules prevent parties from relitigating claims and issues that were expressly and impliedly decided in the original proceeding. Like in Japan, English courts employ a discretionary standard to preclude claims that were not raised or impliedly included in the prior litigation. Yet, in England, the operative presumption is that all claims, theories, and issues should have been raised in the first litigation. In Japan, this presumption does not normally apply unless a claimant's conduct is shown somehow to have been in bad faith.

B. The American Law of Judgments

As in England, judgments of American courts are typically enforceable as soon as they are entered.⁵⁷⁾ To avoid enforcement during an appeal, an unsuccessful litigant does not normally need to show exigent circumstances, but it must ordinarily provide a bond to secure the amount of the judgment and its accruing interest that is acceptable to the court or the successful party.⁵⁸⁾ This American deference to the *supersedeas* bond can make enforcement by the successful party during an appeal less likely than in England where suspension of a judgment's effect during the appellate process is less favored.

Also similar to English judgments, the filing of an appeal does not suspend the preclusive effect of judgments rendered in federal district courts or New York state courts.⁵⁹⁾ Judgments of California state courts, on the other hand, are more similar to Japanese judgments in this respect in that California law suspends a judgment's preclusive effect during the pendency of an appeal.⁶⁰⁾

The law of preclusion in the United States has evolved somewhat differently

⁵⁶⁾ English courts further distinguish between the substantive rule of *res judicata* and the procedural rule of *Henderson*. *Johnson v. Gore Wood & Co.*, [2002] 2 A.C. 1 (H.L.).

⁵⁷⁾ See CAL. CODE CIV. PROC. § 699.510(a); and N.Y. C.P.L.R. 5230(b).

⁵⁸⁾ See FED. R. APP. P. 8; N.Y. C.P.L.R. 5519(a); and CAL. CODE CIV. PROC. § 917.1.

⁵⁹⁾ *Roche Palo Alto LLC v. Apotex, Inc.*, 526 F. Supp.2d 985, 998 (N.D. Cal. 2007); and *Franklin Dev. Co., Inc. v. Atlantic Mut. Ins. Co.*, 60 A.D.3d 897, 899 (N.Y. App. Dept. 2009).

⁶⁰⁾ CAL. CODE CIV. PROC. § 1049; and *Sullivan v. Delta Air Lines, Inc.*, 935 P.2d 781, 790 n. 7 (Cal. 1997).

from that of England and Wales. American preclusion doctrines distinguish between “claim preclusion” (also called *res judicata*) and “collateral estoppel.”⁶¹⁾ As will be seen, these aspects of preclusion correspond to the English law concepts of cause of action estoppel and issue estoppel, respectively. With respect to *res judicata* or “claim preclusion,” a judgment of a New York court is preclusive between the parties as to all claims that were decided in the underlying lawsuit and as to claims that could have been included in that lawsuit.⁶²⁾ In other words, a second lawsuit between the same parties is barred if it includes claims that arise from the same transaction or series of transactions that comprised the subject of the first lawsuit, regardless of whether the parties pled all of the potential claims in the first suit. This is known as the “transactional” test for *res judicata* and became popular with American courts after the publication of the Restatement (Second) of Judgments in the 1980’s.⁶³⁾ The transactional test is also used in the federal courts.⁶⁴⁾

California law is an exception to the general American trend. California courts use a much older test for deciding if a later claim between the same parties is *res judicata*: the primary rights doctrine.⁶⁵⁾ According to the primary rights doctrine, a cause of action, as opposed to a remedy, derives from the primary right that has been violated.⁶⁶⁾ For example, the victim of a car accident may have claims for violations of two primary rights: the right to be free of personal injury and the right to be free of property damage (to the vehicle).⁶⁷⁾ The victim is permitted to bring separate lawsuits

⁶¹⁾ See e.g. *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201 n. 2 (9th Cir. 1982).

⁶²⁾ *Reilly v. Reid*, 45 N.Y.2d 24, 30 (1978). However, if the evidence for a new claim “varies materially” from the evidence in the first action, New York courts may decline to apply preclusive effect in the second action. *Melillo v. County of Nassau*, 307 A.D.2d 356, 358 (N.Y. Sup. Ct. 2003).

⁶³⁾ See e.g. *U.S. v. Tohono O’Odham Nation*, 131 S. Ct. 1723, 1730 (2011) (citing RESTATEMENT (SECOND) OF JUDGMENTS (1980)).

⁶⁴⁾ *Id.*; *Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985, 987 (9th Cir. 2005); and *NML Capital, Ltd. v. Banco Central Rep. Arg.*, 652 F.3d 172, 180 (2d Cir. 2011).

⁶⁵⁾ *Boeken v. Philip Morris USA*, 48 Cal.4th 788, 797 – 98 (2010). Certain American states, such as Arizona, use an intermediate test for preclusion, known as the “same evidence test,” introduced by the Restatement (First) of Judgments (1942). See *Phoenix Newspapers, Inc. v. Dept. of Corrections*, 188 Ariz. 237, 240 (App. 1997) (*res judicata* only attaches if “no additional evidence is needed to prevail in the second action than that needed in the first”); and *Ross v. Int’l Bhd. of Elec. Workers*, 634 F.2d 453, 457 – 58 (9th Cir. 1980) (contrasting “same evidence” and “transactional” tests).

⁶⁶⁾ *Bay Cities Paving & Grading, Inc. v. Lawyers’ Mut. Ins. Co.*, 5 Cal.4th 854, 860 (1993).

⁶⁷⁾ Walter W. Heiser, *California’s Unpredictable Res Judicata (Claim Preclusion) Doctrine*, 35 SAN DIEGO L. REV. 559, 578 n. 60 (1998).

for each primary right, since a cause of action is only precluded in subsequent litigation if it arises from the same primary right that was decided in the first lawsuit.

Effectively, this means that judgment preclusion in California is narrower than that of New York or England, although it still applies to preclude claims that were not pled in the original action. In practice, it is difficult to determine which causes of action relate to the same primary rights, since California's courts have given somewhat conflicting and confusing answers to this question.⁶⁸⁾ Ultimately, the California courts may permit serial litigation between the same parties regarding the same transaction, as long as the same primary right is not being relitigated. This is more generous to claimants than the preclusive effect of federal and New York judgments, which do not generally permit litigation of any claims that arose out of the original transaction. Still, the California approach is less generous to claimants than Japanese preclusion law, which precludes only claims that were actually decided in the first suit.

Judgments of New York and California courts will create collateral estoppel, which precludes relitigation of issues that were necessarily decided as part of the original proceeding (even if they were not decided in the actual judgment).⁶⁹⁾ As previously stated, the American doctrine of collateral estoppel is similar to the English notion of issue estoppel. This corollary effect of *res judicata* does not exist in Japanese law.⁷⁰⁾ As in England, American judges apply collateral estoppel in a more flexible manner than the mechanical, automatic claim preclusion. Collateral estoppel can be avoided on equitable grounds, based upon fairness to the defending party.⁷¹⁾

The American law of judgments differs from the English with respect to the use of collateral estoppel by new parties. American courts allow new parties, who were not parties to the original litigation, to use collateral estoppel to preclude relitigation of issues by a party who was.⁷²⁾ English law maintains the requirement that a party wishing

⁶⁸⁾ See Heiser, *supra* note 67, at pp. 570 – 71.

⁶⁹⁾ *Teitelbaum Furs, Inc. v. Dominion Ins. Co. Ltd.*, 58 Cal.2d 601, 604 (1962); and *Vincent v. Thompson*, 50 A.D.2d 211, 217 (N.Y. Sup. Ct. 1975).

⁷⁰⁾ The concept has been rendered in Japanese as *soten-ko*. See Hironaka, *supra* note 38, p. 1348.

⁷¹⁾ *Bostick v. Flex Equip. Co., Inc.*, 147 Cal. App.4th 80, 97 (2007); *Buechel v. Bain*, 97 N.Y.2d 295, 303 (2001); and *PenneCom V.B. v. Merrill Lynch & Co., Inc.*, 372 F.3d 488, 493 (2d Cir. 2004).

⁷²⁾ *Vendenberg v. Superior Court*, 21 Cal.4th 815, 828 (1999); *Koch v. Consol. Edison Co. of N.Y.*, 62 N.Y.2d 548, 557 (1984); *Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 350 (1971) (use as defense); and *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979) (use as part of claim).

to use issue estoppel must have been a “party or privy” to the original action.⁷³⁾ Thus, American courts are apparently more willing than their English counterparts to restrict subsequent litigation of previously unasserted claims, even when new parties are involved in the subsequent litigation.

American courts have also adopted the concept of “judicial estoppel,” by which a party who was successful in arguing a position in previous proceedings, regardless of whether a judgment was entered to that effect, can be precluded from taking a contrary position in later proceedings.⁷⁴⁾ For example, a person who claims (validly or not) to have had actionable personal injuries prior to filing a bankruptcy petition, but failed to include the claim as part of his or her bankruptcy estate (thereby succeeding in withholding an asset from creditors), can be precluded from later bringing the personal injury claim in civil proceedings.⁷⁵⁾ English courts have not yet adopted the specific concept of “judicial estoppel,” opting instead to apply the broader abuse of process doctrine to litigants who take inconsistent positions to the detriment of others.⁷⁶⁾ As in Japan,⁷⁷⁾ an English litigant’s abuse of process is grounds for dismissal of an action.⁷⁸⁾ American courts do not have such a broad, flexible concept as abuse of process. Rather, that term is reserved for a specific affirmative claim for damages against a party who makes improper use of legal proceedings.⁷⁹⁾ In this way, the American concept of judicial estoppel takes the place of the English and Japanese notion of abuse of process, insofar as the abuse of process doctrine is used outside the United States to curb repetitive litigation.

⁷³⁾ See *Hunter v. Chief Constable of the West Midlands*, [1982] A.C. 529, 541 (H.L.); and *House of Spring Gardens Ltd. v. Waite*, [1991] 1 Q.B. 241, 252 (C.A.) (determination of privity unclear). In Japan, Article 115 of the Code of Civil Procedure similarly restricts non-mutual collateral estoppel.

⁷⁴⁾ *Int’l Engine Parts, Inc. v. Feddersen & Co.*, 64 Cal. App.4th 345, 351 (1998); *Edson v. Southold Town Zoning Bd. of App.*, 102 A.D.3d 687, 688 (2013); and *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001).

⁷⁵⁾ *Berge v. Mader*, 957 N.E.2d 968, 972 (Ill. App. 2011); and *Int’l Engine Parts, Inc. v. Feddersen & Co.*, 64 Cal. App.4th 345, 352 (1998).

⁷⁶⁾ *OJSC Oil Co. Yugraneft v. Abramovich*, [2008] EWHC 2613 (Comm.) ¶ 429.

⁷⁷⁾ See Yasuhei Taniguchi, *Good Faith & Abuse of Procedural Rights in Japanese Civil Procedure*, 8 TUL. J. INT’L & COMP. L. 167, 175 (2000) (abuse of process is the Japanese equivalent of estoppel or *kinhangen*).

⁷⁸⁾ See *Arthur J.S. Hall & Co. v. Simons*, [2000] 3 W.L.R. 543 (U.K.H.L.).

⁷⁹⁾ *Cantu v. Resol. Trust*, 4 Cal. App.4th 857, 880 (1992); and *Marks v. Marks*, 113 A.D.2d 744, 745 (N.Y. Sup. Ct. 1985).

IV. THE IMPORTANCE OF CONFLICTS ANALYSIS

A. Substantive Rules for Foreign Preclusion

Ostensibly, California and New York courts are required to give Japanese preclusive effect to Japanese judgments being recognized in California or New York proceedings.⁸⁰⁾ In other words, a Japanese judgment's "narrow" preclusive effect is supposed to follow it into the California and New York courts. Federal courts sitting in California or New York must apply California or New York law, since judgment recognition and enforcement is still considered a matter of state law in the United States.⁸¹⁾ Unlike decisions rendered by California and New York courts, the Japanese judgment should not create issue preclusion, but should preclude only the claims expressly decided in the judgment.

It is not yet clear if a different rule of decision applies to the curious case of Japanese maritime judgments being enforced by U.S. federal courts sitting in admiralty. A judgment creditor apparently may invoke federal admiralty jurisdiction to enforce a foreign maritime judgment.⁸²⁾ However, no federal decision has even sought to establish whether federal courts should give foreign maritime judgments the preclusive effect of their jurisdiction of origin, or broader federal preclusive effect.⁸³⁾ Maritime enforcement devices can be enormously useful to judgment creditors, as they include the arrest of vessels and attachment of assets, even against debtors who do not reside within the forum.⁸⁴⁾ Traditionally, American courts have considered the maritime rules they follow to be the general law of all nations and not the law of any particular country,⁸⁵⁾ so there

⁸⁰⁾ *Ramm v. Ramm*, 34 A.D.2d 667, 669 (N.Y. Sup. Ct. 1970); *Beroiz v. Wahl*, 84 Cal. App.4th 485, 494 (2000) (foreign country judgment); and *Krofcheck v. Ensign Co.*, 112 Cal. App.3d 558, 564 (1980) (sister state judgment). The Tokyo District Court has also come to the conclusion that California law requires that Japanese preclusive effect be given to Japanese judgments in California. *Toho K.K. v. Hachisuka*, 179 HANTA 147 (Tokyo D. May 27, 1965).

⁸¹⁾ *Bank of Montreal v. Kough*, 612 F.2d 467, 469 (9th Cir. 1980).

⁸²⁾ *Int'l Sea Food Ltd. v. M/V Campeche*, 566 F.2d 482, 484 (5th Cir. 1978); and *Vitol, S.A. v. Primerose Shipping Co. Ltd.*, 708 F.3d 527, 533 (4th Cir. 2013).

⁸³⁾ See *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713 (2d Cir. 1987) (finding no conflict between federal comity and state statutory standards of recognition and enforcement).

⁸⁴⁾ See THOMAS J. SCHOENBAUM, ADMIRALTY & MARITIME LAW 882, 895 (West 5th ed. 2012).

⁸⁵⁾ *Yeaton v. Fry*, 9 U.S. 335, 343 (1809) (foreign maritime judgment rendered under law of nations not requiring additional authentication); and *The Nanking*, 292 F. 642, 649 (N.D. Cal. 1923) (admiralty law

is some reason to believe that federal preclusion doctrines would apply to a Japanese maritime judgment whose recognition is sought in federal admiralty proceedings. If that is the case, Japanese maritime judgments may have much broader preclusive effect in the United States than they do in their country of origin.

Unlike their American counterparts, English courts will defer to Japanese law only to decide *if* a Japanese decision is entitled to preclusive effect.⁸⁶⁾ English courts will look to their own law to determine the extent of a Japanese judgment's preclusive effect in England.⁸⁷⁾ The understanding among English jurists is that *res judicata* is a rule of evidence, and under general conflict of laws principles is controlled by the law of the forum.⁸⁸⁾ This ultimately means that judgments of Japanese courts will always be given broader preclusive effect in England than they have in Japan.

B. Procedural Rules for Foreign Law

Regardless of the law that *should* be applied, the broad American form of *res judicata* will likely be applied in many cases involving Japanese judgments. This is because a party invoking foreign law has the burden of identifying the content of foreign law and demonstrating that it should apply in the particular case.⁸⁹⁾ If the party invoking foreign law fails to prove the point of foreign law, the California or New York court will presume that the foreign law is the same as the law of the forum.⁹⁰⁾ Since Japan is a civil law jurisdiction, and not a common law one, New York courts will not *presume* that Japanese law is the same as New York law.⁹¹⁾ Yet, if no evidence is presented⁹²⁾ showing that it differs, a New York court will still apply New York legal rules in a case

as general law of nations and not specific to any country).

⁸⁶⁾ *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853, 919 (H.L.).

⁸⁷⁾ *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853, 933 (H.L.).

⁸⁸⁾ See BARNETT, *supra* note 55, p.49.

⁸⁹⁾ *Am. Home Assur. Co. v. Soc. Com. Totélectric*, 104 Cal. App.4th 406, 427 (2002).

⁹⁰⁾ *Glasband v. Hussong*, 146 Cal. App.2d 677, 686 (1956); and *Stein v. Siegel*, 50 A.D.2d 916, 917 (N.Y. App. Div. 1975).

⁹¹⁾ *Arams v. Arams*, 182 Misc. 328, 332 (N.Y. Sup. Ct. 1943).

⁹²⁾ It has been common for American lawyers to hire foreign legal experts to testify regarding foreign law in American courts. See e.g. *Mineabea Co., Ltd. v. Papst*, 444 F. Supp.2d 68, 182 (D.D.C. 2006) (purpose of expert is to prove content of foreign law, not apply it to facts). However, one prominent federal judge has urged lawyers to rely on English translations of foreign laws rather than biased experts. *Bodum USA, Inc. v. La Cafetière, Inc.*, 621 F.3d 624, 629 (7th Cir. 2010).

admittedly controlled by Japanese law.⁹³⁾

The procedural rules for proof of foreign law in American courts are pragmatic. The judge normally has no duty to independently inquire into the content of foreign law,⁹⁴⁾ so the burden of proof rests with the parties. It is natural for the holder of a Japanese judgment to assume that the judgment will be given the same effect in California or New York as it is at home. It is also understandable for Japanese lawyers to make the same assumption, based upon the stated legal requirements in California and New York that foreign judgments must be given their original, foreign preclusive effect. However, the evidentiary presumptions in American courts dictate that American preclusive effect is given to Japanese judgments until a party proves that the court must apply a different, Japanese rule to the judgment.

Proceedings in English courts are more straightforward. As stated above, English courts will give Japanese judgments the same preclusive effect as an English judgment. The only relevant inquiry into Japanese law is whether the judgment is entitled to preclusive effect at all. This last point may come as a surprise to some Japanese litigants. As we have seen, a Japanese judgment is not final and preclusive, until the expiration of the time for appeal (or until appeals have been exhausted). However, under English law, a judgment is final and preclusive from the time it is entered, regardless of any pending appeals. Like American courts, English courts will presume that English law applies to all cases before them,⁹⁵⁾ and even if foreign law is invoked by a party, the courts are free to presume that the foreign law is identical to English law until a party proves otherwise.⁹⁶⁾ Thus, a Japanese judgment, which Japanese law does not regard as final because the time for appeal has not yet expired or because an appeal is pending, could be recognized as final in England⁹⁷⁾ if no evidence of Japanese law is provided.⁹⁸⁾ This risk similarly exists in New York and federal courts

⁹³⁾ *Watts v. Swiss Bank Corp.*, 27 N.Y.2d 270, 276 (1970); and *Loebig v. Larucci*, 572 F.2d 81, 85- 86 (2d Cir. 1978).

⁹⁴⁾ *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150, 155 n. 3 (2d Cir. 1968).

⁹⁵⁾ *See F. & K. Jabbour v. Custodian of Israeli Absentee Property*, [1954] 1 All E.R. 145, 153 (Q.B.D.) (if no evidence to contrary, English law used to construe foreign statutes).

⁹⁶⁾ *Shaker v. Al-Bedrawi (No. 2)*, [2002] EWCA Civ 1452.

⁹⁷⁾ *India v. India S.S. Co. Ltd.*, [1998] A.C. 878 (H.L.) (assuming Indian judgment preclusive pending Indian appeal).

⁹⁸⁾ Unlike in American courts, English courts regard the issue of foreign law as one of *fact*, requiring

in the U.S. for the same reasons. The risk does not exist in California, where, like Japan, a judgment's preclusive effect does not arise until the exhaustion of the appellate process.

V. CONCLUSION

In the absence of admissible evidence to the contrary, a Japanese judgment will usually be given wider preclusive effect in the common law jurisdictions examined in this article, beginning at an earlier point in the life of the judgment, than would be the case under Japanese law. The doctrine of *res judicata* is understood to be one of public policy.⁹⁹⁾ Japan's legislature has elected to permit parties to assert additional claims from the same relationships and transactions in different lawsuits. This public policy decision is less likely to be hindered where litigants from Japanese courts resume their disputes in the courts of like-minded civil law jurisdictions. However, in the major commercial jurisdictions of England, New York, and California, the common law view of *res judicata* restricts the freedom of parties to an existing judgment to litigate previously unasserted claims, to a greater extent than the original parties to a Japanese judgment might expect.

This state of affairs provides a choice to litigants in foreign jurisdictions to whom Japanese judgments apply. Whether the victorious or defeated party will have more interest in invoking broader or narrower judgment preclusion will depend upon the case. A victorious party in Japanese proceedings may wish to terminate a wider array of parallel lawsuits in common law jurisdictions using the broader interpretation of preclusion in those overseas courts. However, a defeated party may also wish to avail itself of broader preclusion in order to avoid multiple judgments on the same or similar issues in future overseas litigation. On the other hand, applying Japanese law to judgments being recognized in common law jurisdictions, may allow a party to raise

proof through witnesses or properly authenticated documents. Civil Evidence Act 1972 (c. 30) s. 4; and see *Lazard Bros. & Co. v. Midland Bank Ltd.*, [1933] A.C. 289 (H.L.).

⁹⁹⁾ See e.g. *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917); and Robert von Moschzisker, *Res Judicata*, 38 YALE L.J. 299, 300 (1929).

new claims or defenses that would otherwise be barred if local preclusion law were applied to the same judgment.

For Japanese businesses engaged in international trade, general knowledge of the reception given to Japanese judgments abroad is useful in formulating a global approach to enforcement and collection of debts and obligations incurred in cross-border transactions. This is because judgment preclusion can be a powerful tool in controlling the landscape of litigation, even across national borders. Yet, unlike in the context of enforcement, where a judgment creditor's ultimate entitlement to payment is assumed, the existence and extent of preclusion will differ from jurisdiction to jurisdiction. In the common law world, the preclusive effect of judgments varies by country. Solving the problems created by this variation requires an understanding not only of the law of preclusion in the recognizing jurisdiction, but also of the conflict of laws rules and associated evidentiary presumptions in that jurisdiction. Even so, parties bound by Japanese judgments can often use these legal rules to choose whether or not to be bound by Japanese preclusion law abroad.