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THE APPLICATION OF THE DOCTRINE OF RES JUDICATA TO DERIVATIVE CLAIMS

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ABSTRACT

'The great preponderance of derivative suits are unfounded and speculative'.

Franklin Wood, 1944[1]

The aim of this research is to critically reexamine the approach to derivative suits and the res judicata doctrine. It is almost commonplace amongst commentators to observe that shareholders and executive boards' current approach to derivative suits are neither functional nor perfectly efficient. In the face of these problematic aspects, this work is an attempt to critically reconceptualizes res judicata in terms of its scope and breadth via its potential applicability in derivative claims across different common law and civil law jurisdictions. More specifically, I intend to demonstrate the potentially significant impact of res judicata in the context of derivative actions, which is an almost unexplored path of research. Furthermore, from a methodological point of view, by deploying a comparative perspective, the dissertation aims to elucidate that, despite the still persisting disinclination towards comparative studies in civil procedure, the intersection between the two fields is promising as to the results it can achieve.

The key to the revival of derivative actions resides in the following factors: the development of minority activism, the study of new conceptions of the absolute and compensational models of derivative actions and the critical rethinking of the doctrine of res judicata. In addition, the implementation of opportunities for minorities to protect their interests in the corporation limited by res judicata will open up new opportunities for derivative actions.

[1] F.S. WOOD SURVEY AND REPORT REGARDING STOCKHOLDERS' DERIVATIVE SUITS, New York: Chamber of Commerce New York State (1944).

LIST OF ABBREVIATIONS:

CC – the Civil Code

ComC – the Commercial Code

ICC – the Italian Civil Code

FCC – the French Civil Code

RCC – the Russian Civil Code

CivPC – the Civil Procedural Code.

ComPC – the Commercial Procedure Code.

CPC – the Civil procedure code.

CPC 1923 – the New Civil Procedure Ccode.

CPC 1964 – the Civil Procedure Ccode 1964.

CPR – the Civil Procedure Rules 1998.

FRCP – Federal Rules of Civil Procedure.

SC – Supreme court.

SCC – Supreme commercial court

The Charter – the Charter of Civil Procedure 1864.

CA – Companies Act 2006.

INTRODUCTION

DERIVATIVE ACTIONS: THE RELEVANCE TO THE REALITY OF RES JUDICATA

1. The Relevance and Limits of the Research

The present study explores the res judicata doctrine and considers it in a new light by critically revisiting the boundaries of res judicata through examining the possibility of its application to derivative actions from a comparative perspective. The field of research addressed in this dissertation is the intersection of two legal institutions: on the one hand, the ancient mechanism of procedural law with its deep dogmatic roots; on the other, the relatively new institution of corporate law. This work is an attempt to expand the use of the former by means of the latter. Thus, the synergy between derivative actions and res judicata will not only expand the theoretical understanding of res judicata but also change the practice of applying derivative actions. This connection lends the present dissertation theoretical and practical significance.

As a preliminary remark, it may be observed that the object of this dissertation represents an almost unexplored field of research. This does not however imply an absence of literature on the subject. Rather, it entails that very few studies have been conducted on this specific topic, with two notable exceptions: the first is the article written by Debra Pulenskey Drescher in 1982,[2] while the second is a paper by Robert N. Randall, which dates back to 1960[3] and is descriptive rather than critical and forward-looking in nature. It is true that a recent wave of legislative reforms and some major *revirements* in case law have stimulated scholarly debate. Undoubtedly, considerable research attention has been directed toward derivative actions in corporate disputes. The role of the doctrine of res judicata in such disputes, however, has been largely neglected. To date, no study has explicitly examined legal issues arising from the duplication of derivative actions or the filing of double/triple derivative actions. Few attempts have been made to investigate the role and changing nature of the preclusion effect of court decisions. Thus, the scientific goal of this dissertation is to conduct a more comprehensive comparative analysis of the application of the doctrine of res judicata to corporate disputes, with a particular focus on derivative claims, in order to shed some light on the role of res judicata in derivative actions. It follows that this thesis intends to critically reconsider the scope and breadth of res judicata through its application in derivative actions across different civil law and common law jurisdictions.

Comparative analysis was used to conduct an in-depth study of these two complex institutions. In some countries (such as the US, UK, Italy and France), derivative actions and the res judicata doctrine have gained popularity separately; in others (such as Russia), they have received relatively modest attention. Moreover, in Italy and France, res judicata and derivative actions are the objects of much more detailed disclosure in the provisions of the legislation and far more substantial elaboration within the framework of civil law theory, including the doctrine of corporate law. Any further development of the doctrine of res judicata in general and its application in a derivative action, in particular, should, without a doubt, consider and critically comprehend the specific experience of foreign legal systems. Indeed, one of the key tasks of this study is to develop a coherent mechanism of application of res judicata in derivative actions, taking into account the doctrinal developments of foreign legal systems. At the same time, for these purposes, we will pay attention not only to Russian, Italian and French law (as the law of

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[2] D. P. Drescher, *The effect of res judicata on shareholder derivative actions in New York: Parkoff v. General Telephone & (and) Electronics Corp.*, 47 ALB. L. REV. 145 (1982).

[3] R. N. Randall, *Corporations – Settlement of stockholders' derivative actions, Res judicata*, 38 N. C. L. REV. 391 (1960).

continental legal systems is perhaps the closest to Russian civil law) but also to the law of some other foreign countries, including English and US law.

The uncertainty in common and civil law regarding the key problems of applying derivative actions and res judicata inevitably leads to significant difficulties in resolving several issues that lie at the intersection of theory and practice. For example, is res judicata applicable to persons who were not parties to the proceedings? What is the company's position in the derivative litigation process? How do different legal systems explain the fact that any proceeds of a successful action are awarded to the company if it is not a party to the proceedings? How do jurisdictions explain the litigation costs in derivative actions regarding the substantial and procedural position of the person who is required to cover litigation costs? Are the company, its shareholders, directors, and officers considered as parties in privity? What happens to derivative litigation when a shareholder leaves the company or sells shares, or when the company is undergoing a merger? What if the minimum of shares no longer meets the requirements of the law but derivative action has already been brought? What happens to a derivative action if a merger occurs during the derivative litigation (as a result of which the company may no longer exist or the shares have been converted, meaning that the minimum quorum is no longer applicable)? Is the triple identity test applicable to derivative actions?

The core concept underpinning this thesis is that an understanding of different approaches in various jurisdictions is hampered by the differences between categories, assumptions and legal orders, all of which are undoubtedly necessary. The application of claim preclusion and issue preclusion to the derivative actions should be studied in order to:

1) evaluate the perspective of derivative action itself; observe its legal nature, the legal status of the parties and the remedy model of derivative actions in the jurisdiction under study;

2) evaluate the perspective of res judicata itself (including the prospects for the development of the doctrine of res judicata in jurisdictions where the res judicata is not sufficiently developed and needs to be modernised—particularly in Russia, where the rules on res judicata were not properly adapted following the transition away from the Soviet legal system);

3) develop an approach to solve the issues arising from double litigation in the sphere of derivative actions and find a comparative model for adaptation to legal reality. Most countries (such as France, Italy, Russia, England and the US) have been challenged or may be challenged by the issue of applying res judicata in derivative actions, meaning that this conclusion is therefore relevant.

The doctrine of res judicata bars the litigation of a claim if, in former litigation between the parties, or those in privity with them, in which there was a final decision made, the subject matter and the causes of action are identical or substantially identical, as long as the claim asserted in a derivative action brought by the shareholder constitutes an action brought on behalf of the company. A judgment established in such a derivative claim will commonly preclude other claims that are based on the same wrong done and initiated by other shareholders.

The main substantial and procedural problem is that of how to bind all participants of the company with the preclusive effect on the following situations:

a) Several derivative actions brought by shareholders, the executive body, a subsidiary (if applicable in some jurisdictions), or its shareholders against the director, officer, or member of the executive body,

b) Several derivative actions brought by shareholders, the executive body, a subsidiary (if applicable in some jurisdictions), or its shareholders against third parties (if applicable in some jurisdictions),

c) Direct claims brought by the shareholder (after or before derivative action).

In the present study, we also discuss other combinations of litigation in which there may be a risk of preclusive effects, such as filing a class derivative claim or a derivative claim by third parties.

In this thesis, I attempt to defend the view that the countries under study may be divided into jurisdictions with absolute and compensatory models of derivative actions. The formula for applying the doctrine of res judicata to the derivative actions can be distinguished with reference to these categories. This paper compares the different ways in which it is recommended to apply the doctrine of res judicata. Taken together, a best practice formula that may be applicable to each of the jurisdictions studied can be derived.

Moreover, we will try to show that the rejection on the merits of a derivative action brought by one shareholder against corporate directors should operate as a res judicata bar to a similar action instituted by another shareholder or by a member of the executive body, depending on the following criteria:

a) whether the model of the claim is absolute (in Russia and the US) or compensational (in France and Italy),

b) whether the action is a group or individual action,

c) whether the action is traditional, double or triple derivative action, and

d) the place of the company, director, shareholder or officer in the proceedings (the substantial and procedural status of the plaintiff).

2. Structure of the Thesis

In terms of the overall structure, the present study is divided into four chapters.

The Introduction establishes the subject and general statements of the thesis, outlining the importance of the topic and providing relevant background information and necessary terminology.

Chapter 1 presents a theoretical framework for derivative actions to provide arguments supporting the extension of the preclusive effect (a foundation for applying the ‘triple identity’ test). This chapter analyses the main substantial and procedural features, legal nature, suggested classification and possible variations of derivative claims in common and civil law.

Chapter 2 describes the problematic aspects of the res judicata doctrine from a historical and theoretical perspective to shed some light on the scope of the doctrine and the triple identity test.

The concept of res judicata with respect to judgements on derivative actions is outlined in Chapter 3 . The common denominators identified in Chapter 1 will be used to determine whether the identity test analysed in Chapter 2 can be applied in civil and common law jurisdictions.

In order to respond to the leading question of this study – i.e., whether claim preclusion or issue preclusion may be applied to derivative claims and, in particular, whether its scope may be extended – and to understand and explain the implications thereof, it is necessary to build the following thread of arguments, which entails an in-depth analysis of the following:

1. The reasons behind the research and the theoretical and practical context in which it was carried out (see Chapters 1 and 2);

2. The stages of development and the nature of derivative actions in common and civil law; the legal status of the parties, in order to evaluate the possibility of applying the so-called 'identity test' to derivative claims, which in turn implies the study of the qualification of derivative actions as belonging to the categories of representation or substitution; the concept of dualism of the plaintiff in derivative actions; essential insights into the concept of the interest of the group of shareholders; the possibility of bringing a double/triple derivative action and the differences between class actions and collective derivative actions; the causes of derivative actions, together with the remedial models (see Chapter 1);

3. The study of the historical aspects of res judicata in order to: a) determine the diachronic developments of the doctrine in the jurisdictions considered; b) analyse how scholarly thought (and debate) developed post-Roman law; c) determine the tendencies of academic thought on the subject; d) demonstrate whether a doctrinal uniformity exists in the conceptions of formal and substantial res judicata; e) adopt a comprehensive approach to the substantial res judicata issues (to understand whether it is possible to expand its scope) (see Subchapter 2, Chapter 2). The overall aim of this section is not to write a comprehensive history of legal thought but rather to examine the interrelation between the doctrine of res judicata and the economic and political views in the past to facilitate reading it anew through a comparative integrated lens.

4. The analysis of the current doctrine of res judicata as elaborated in the different legal formants (legislation, case law, doctrine) within the jurisdictions studied in order to: a) compare the concepts of substantial res judicata effects; b) illustrate its dogmatic boundaries; c) rationalise its limitations; d) identify an international trend towards the gradual extension of res judicata; e) identify a comparative model among the legal systems considered (the analysis of the substantial res judicata is essential to define the limits of application of res judicata in the area of derivative actions) (see para. 3, Chapter 2). Subsequently, drawing a conclusion from the analysis of the abovementioned aspects (in particular, the concept of substantial res judicata), the study turns to the issue of the scope of substantial res judicata and its criteria.

5. The study of the scope of res judicata to determine and evaluate the possibility of extending the application of substantial res judicata to derivative actions. This aspect is crucial to an analysis of: a) the main criteria, characteristics and boundaries of the scope of res judicata; b) possible general trends towards a gradual expansion/restriction of the scope of res judicata; c) the impact of scholarly works and reflections on case law, as well as on legislative interventions, d) the arguments for and against its extension in scope and breadth (see Chapter 2).

6. Finally, the research flows into the conclusion – the answer to the core question and aim of the PhD thesis, namely that of whether res judicata may be applied to derivative actions (Chapter 3).

3. Terminology

This paper provides an overview of the res judicata theory and its application to derivative actions. Since the res judicata doctrine and derivative actions are somewhat broad notions in the compared jurisdictions, it is necessary to make a few initial remarks.

First, common law jurisdictions adopt a more comprehensive approach to res judicata (both claim and issue preclusion are contemplated), whereas the scope of res judicata in the civil law world is rather narrow and usually encompasses only claim preclusion. Moreover, res judicata in civil law is characterised by two phenomena of the same essence: namely, the negative and positive effects of preclusion. The negative aspect is referred to as the claim preclusive effect. Meanwhile, the positive effect is close to but not the same as issue preclusion. In this study, it is particularly important to determine who can be bound by the preclusive effect.

Second, in this paper, the terms *action sociale* (in French) and *azione sociale di responsabilità* (in Italian) are used to refer to derivative actions (in some cases to corporate actions), due to the common features of concepts and considering the comparative method. We contest the term 'corporate actions' in Subchapter 2.2.2 (Chapter 1); specifically, we argue that in jurisdictions where this is relevant (France and Italy), such 'corporate actions' should be considered as derivative actions, since both are consequences of legal/statute representation (*mandat*), and both are filed on behalf of another person (legal entity). Moreover, the fact that *action sociale ut singuli* is a French equivalent to the derivative action in common law does not mean that derivative actions must be limited by *action sociale ut singuli*; this is a feature of the particular jurisdiction. For the same reason, we believe that oblique action should be recognised in connection with or as a type of derivative action. Although this is not the subject and purpose of this dissertation, we would, however, wish to note that the distinction can be drawn as follows: corporate derivative claims are actions brought by members of the executive body and by shareholders on behalf of the company, while derivative claims are brought by creditors on behalf of the company.

It is necessary here to clarify what exactly is meant by derivative action in the current thesis. The terms 'derivative actions', 'derivative claims,' and 'indirect claims' are used interchangeably to indicate a derivative claim in the broadest sense, referring to all actions brought by shareholders, members of executive bodies, and subsidiaries (if applicable). Meanwhile, in this thesis, we use the term 'derivative action' rather than 'derivative claim'. We consider this relevant because we analyse the right to bring the action in a substantial sense and then examine the regulation of the proceedings. However, the chapters relating to the proceedings assume that the right to bring an action already exists. In some cases, we refer to the proceedings rather than conferring the right to bring them. Consistent with this approach, we will use the term 'action' rather than 'claim' herein except when otherwise is more appropriate.

In addition, in this dissertation, the term 'collective action' is used to refer to a joinder device brought together by a group of shareholders that share certain characteristics who are bringing a claim against one or more defendants. The term 'collective derivative actions' is distinct from class actions; this is because, regardless of the number of shareholders initiating the proceedings, they act on behalf of the company and not in their own interests.

4. Methodology

The present research was conducted using several research methods: namely, text-by-text comparative study; point-by-point comparative analysis; case study; doctrinal methodology; economic and legal study; historical and doctrinal theory; institutional theory and narrative.

First, the 'text-by-text' method was used to present the differences between categories, assumptions and statutes. Then, where possible, the 'point-by-point' method was used to compare several jurisdictions so as to make the tertium comparationis clear to the reader. The central methodology of this thesis is that differences in scholarly approach hamper the understanding of different approaches across different jurisdictions. The conclusion that seems to suggest itself at this point is that the application of res judicata to derivative actions should be studied to determine the trends of res judicata.

Second, the 'case study' method was used to provide the reader with a more comprehensive evaluation of corporate litigation. Among many factors relevant to the analysis, the present work scrutinises the director's responsibility, the rights of the minority shareholders, the interests of the company, the interests of the shareholders and the relationship between shareholder and director. The lawyer's task is to solve the case, understand its twists and turns

and offer the best way out; that is why it is so important to use this method to construct the best practice formula. What can be surmised is that shareholders' rights in states where corporate law is still developing have made adequate use of the procedures to benefit within their companies. According to The Economist,[4] claims against members of the board of directors have increased in both number and cost. Thus, the case law on the responsibility of top managers, as one of the elements of the corporate conflict resolution system, is inextricably linked with the need for effective procedural rules.

The third technique used is a historical approach conducted within the context of corporate and procedural development with case law as a research object. In this context, different historical prerequisites or dominant theories in the jurisdiction have led to the creation of terminologically different tools with different doctrinal justifications, which nevertheless perform similar functions. Such institutions include, for example, the development of res judicata doctrine, the director's liability, derivative actions and shareholder rights. These methods allow for results regarding the legal systems to be obtained by comparing various judicial responses to similar situations. The historical method helps to develop concepts that can be used to precisely estimate the level of shareholder activism and its effect on corporate litigation in Europe and the Anglo-American legal system.

Another methodological tool employed herein is the institutional theory. The conceptual foundations of corporate litigation, which have been developed based on the transformation of the classical institutional matrix, serve as the basis for the further development of the institution of corporate control by improving the quality of the interaction between the company, shareholders and directors as a result of the institutionalisation of methods and forms of corporate interaction and control.

The content of this thesis in its originality has demonstrated that there are indeed various concepts generated by corporate law regarding derivative actions and res judicata separately. This has arisen as a result of procedures and practices crystallising within the development of corporate law.

[4] Is torture ever justified? The Economist. Jan. 11th 61–63 (2003) .

CHAPTER ONE

THE LEGAL NATURE OF DERIVATIVE ACTIONS. CONCEPTS AND EVOLUTION IN CONTINENTAL EUROPE: COMPARATIVE LEGAL APPROACH.

1. Introduction

The protection of shareholders is not only implemented due to considerations of fairness, but it also improves the economic performance of companies, as it provides a certain degree of trust necessary for the operation and development of a market economy. Such protections attract business. They accordingly have significant value; if shareholders do not seek to invest, it may be difficult for the company to grow. Implementing these protections entails the need for directors and large shareholders to act transparently and accountably – in other words, to contribute to both the trust of shareholders and the legitimate functioning of the business. The distortion of corporate control caused by the peculiarities of national privatisation has led to a situation in which the actions of large owners and managers are virtually uncontrolled from the outside. Therefore, the development of methods to protect the company and its minority shareholders, which balance the advantages possessed by majorities, has the potential to meet the goal of increasing investment attractiveness. One of the ways in which this protection can be guaranteed is the right to bring a derivative action. Derivative actions (*actio pro socio*) are known throughout many jurisdictions, both in civil law (in Russia, France, Italy, Germany etc.) and in common law (in England and the US). However, in this thesis, we are referencing the work of Prof. Hopt, who relates the right of *actio pro socio* as a 'subspecies of the derivative action'. According to him, the unique character of the *actio pro socio* dwells in the fact that 'it has its basis in membership.'[5]

This chapter traces the development of derivative actions and attempts to demonstrate that a formula has been developed for applying the res judicata doctrine with regard to a certain jurisdiction. For that reason, in this chapter, I assess the significance of the main points of the identity test in derivative actions. I classify the models of derivative actions based on general principles, which act as as the main denominator in the formula of res judicata. It is generally accepted that the scope of res judicata in civil law is identified by the triple identity test. This test usually consists of assessing the identity of the object, identity of the cause and identity of the parties. In common law jurisdictions, these are usually the same parties, the same subject matter and the same legal grounds (an in-depth analysis of res judicata is provided in Chapter 2). In the pages that follow, I will examine the identity of the cause, parties and relief of the derivative actions to argue for the possibility of applying the doctrine of res judicata in Chapter 3 .

The problem of avoiding specious derivative claims is not new, although it is amplified by legitimate threats to mitigate harassing serial litigation. The legal nature of derivative actions has come under the scrutiny of substantial research analysis. While derivative claims are found in many European systems, as noted above, the legal systems of the European Union regulate the level of political and legal support for a derivative action in different ways. In this chapter, the stages of development, legal nature, substantial and procedural issues, and historical roots of the derivative claims are studied.

Based on the research and analysis results, it should be noted that derivative actions may be considered from three points of view:

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[5] See in X. Li, A COMPARATIVE STUDY OF SHAREHOLDERS' DERIVATIVE ACTIONS: ENGLAND, THE UNITED STATES, GERMANY AND CHINA (Kluwer) 90 (2007); K. J. Hopt, COMPARATIVE CORPORATE GOVERNANCE (Clarendon Press, Oxford) 272–273 (1997).

- Derivative claims brought by the director on behalf of the company that are contractual in nature;
- Claims against the director brought by the creditors (creditor's action) that are extra-contractual in nature;
- Derivative claims brought by the shareholder could be contractual, extra-contractual or quasi-contractual (*negotiorum gestio*) in nature, depending on the doctrine and jurisdiction under study.

In addition, in this chapter, I attempt to defend the view that several possible constituents of the 'parties' element' of a derivative claim and two remedy models are the basis for explaining the scope of derivative claims. By analysing what model of legal remedy can be attributed to the rights of shareholders in protecting the company's interests, we may arrive at a thought-provoking observation. On the one hand, France (as an example of the approach stating that the derivative action is an individual right of the shareholder to bring an action) and Italy (as an example of the approach holding that the derivative action is a collective right of the shareholder to bring an action) follow the path of the compensational model. On the other hand, jurisdictions such as Russia and the US (in certain cases) allow absolute protection of the shareholder, allowing them to challenge the agreement themselves without resorting to the director's actions.

In some jurisdictions (France, Italy), the company's creditors (along with the director and creditor) may bring a derivative action (also known as an *oblique action* in French or *azione di responsabilità sociale e dei creditori sociali* in Italian). This type of action will be considered to a lesser extent. The reason for this relates to the importance of the analysis of derivative action brought by the director or shareholder in the context of the application of preclusion to a derivative action. Analysis of this type of action cannot be excluded from this paper, since it affects the qualification of a derivative action; however, an in-depth analysis of derivative actions brought by creditors falls outside the scope of this thesis.

My hypothesis here is that different models for a derivative claim (*actio pro socio*) exist in common law and civil law countries. In some countries, the application of preclusivity might be narrow, since the subject and causal model restrict its application; in others, preclusivity might be broader for the same reasons.

2. Concept and Reception of Derivative Actions

Before diving into the substantial and procedural issues related to applying derivative claims, it is necessary to consider them from the point of view of historical digression.

According to Julio de la Morandiere, the derivative claim comes from Roman law, specifically from the *actio Pauliana*. This is a compelling claim for creditors, protecting them from the unfair transactions of a debtor in bankruptcy who, in order to establish some advantage for one of their creditors, seeks to hide the remainder of their assets from foreclosure.[6]

As a response to fraud and the frequent misconduct of debtors, Praetorian practice formed two remedies for creditors against unscrupulous debtors: the *interdictum fraudatorum* and *actio Pauliana*. The *actio Pauliana* aimed mainly to address the fact that the bankruptcy administrator, as a representative of a legal entity, was authorised to bring claims to challenge an insolvent

[6] J. De La Morandiere, *Traité de droit civil,* TOME II (Paris) 213 (1959).

company's transactions that had been concluded before the opening of the bankruptcy procedure.[7]

Under Justinian law, the *actio Pauliana* resulted from a fusion of two ideas: *restitutio in integrum* (return to the original form of restitution)[8] and *interdictum fraudatorioum*.[9] The first consisted of the debtor's promise to invalidate transactions entered into by deceiving the creditor. The second claim was meant to be levelled against an unscrupulous third party (buyer) to return what was received from the debtor. In general, the essence of such a claim was to restore the property title of the legal entity. This means that any claim filed on behalf of the company by the bankruptcy administrator was filed in favour of the legal entity and creditors.[10]

An *actio Pauliana* under Roman law was brought by the bankruptcy administrator and creditors in case of insolvency of the debtor, after consideration of which special proceedings were commenced for collective settlements with all creditors under the direction of the *syndic* (representative of legal entities in Roman law). Such representatives also filed claims against third parties. Both Italian and French law recognise the concept of a derivative claim not only as a claim filed by a shareholder and the executive body of the company but also as one filed by a creditor; this shows the similarity between modern derivative action and *actio Pauliana* brought by the bankruptcy administrator in Roman law on behalf of the company. This is why we assume that the *syndic* in the *actio Pauliana* is an analogue of the statutory representative in corporate law in a derivative claim. Modern derivative claims brought by creditors could be a result of the reception of the *actio Pauliana*. This view is also shared by Julio de la Morandiere, referring to the fact that filing a claim by a representative on behalf of creditors has much in common with filing derivative claims by a representative of a legal entity in the interests of the company. It cannot be claimed that this connection is obvious. The history does not reveal any other sources of the emergence of a derivative claim, other than the appearance of this institution in American case law in 1832. Meanwhile, such a record of the antecedent of derivative action constitutes an exclusive representative action to protect the shareholder's interests rather than a derivative action. It would accordingly appear that the closest to a derivative claim in Roman law is the *actio Pauliana*, which originated the idea of protecting the rights of society, participants and creditors.[11]

However, scholars such as Derrida and Sortis have contested the similarity between these two actions, claiming that the *ut singuli* action is a dismemberment of the collective action's nature. The *actio Pauliana* is an action originally individual in nature;[12] the derivative action is an individual fraction of collective damage. The derivative action can be considered close to the *actio Pauliana* only if all creditors may invoke an action against a third party in case of fraud. The damage then results from individual damages rather than collective damages.

Moreover, the derivative action is generally justified only to a fault of the third party contracting the debtor bringing *ipso facto* reparation in the field of civil liability, while the Paulian action requires third-party fraud.[13] At the same time, it is quite obvious that in the modern understanding of the *actio Pauliana*, the claim cannot be attributed to a derivative

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[7] S. Vėlyvis & V. Mikuckienė, *Origin of bankruptcy procedure in Roman law*, 117 JURISPRUDENCIJA: MOKSLO DARBU ŽURNALAS, No. 3. 294 (2009).

[8] C. Hunter and J. Ashton, *SYSTEMATIC AND HISTORICAL EXPOSITION OF ROMAN LAW IN THE ORDER OF A CODE.* (London : W. Maxwell & son; etc., etc. Second edition) 991 (1844–1898).

[9] Ibid. 1042.

[10] Ibid. 1042–1043.

[11] Today, in France and Italy, this function is performed either by a representative elected from among those shareholders (participants) who initiated the claim or appointed from the shareholders' association (particularly in France).

[12] C. Pizzio-Delaporte, *L'action paulienne dans les procédures collectives*. (RTD COM.) 714–715 (1995).

[13] Ibid.

action. However, if there are no other historically similar analogues, and if we consider the fact that almost all such claims originated from the *actio Pauliana*, we may presume that a connection exists between these two descendants.

However, when investigating the origin of the very nature of derivative actions, it can be determined that the modern derivative action results from statutory reforms in corporate and procedural law (even in England, after being a common law tool, it became a statutory mechanism for shareholder protection). The legal essence of such an instrument thus acquired a new form and new implementation aims.

Thus, it is clear that we are simultaneously bound to note the imperative influence of American law on the law of continental Europe since the first derivative action filed was considered in the case of *Robinson v. Smith* (1832);[14] the essence of this can also be seen in the discussion by an American judge in another case, namely *Attorney General v. Utica Ins. Co.* in 1817.[15] However, France, Russia and Italy have developed their own features of the mechanism of derivative claims, elaborating upon the ideas of American authors who have studied Roman law (as we assume) based on their case law.

Another point of view that may also be proposed is that derivative claims are rooted in the Anglo-Saxon tradition of trust. This point of view is shared in doctrine from that period and found little evidence for the existence of derivative litigation prior to the nineteenth century.[16] The representative litigation was used on behalf of charitable organisations to contest trustees' operational decisions in the context of a breach of duty.[17] According to G. Thomas and A. Hudson, the modern rights of companies were derived from the trust property and the right partnership.[18] It is noteworthy that even though the institution of trust has been in existence for quite a long time, lawyers still face the question of the legal qualification of the beneficiary's right (*centui que use*). Undoubtedly, the development of derivative actions to protect the interest of a legal entity is not accidental, since the appearance of corporations and companies in the countries following the *actio-ius* paradigm was prepared using the trust model for their construction, while relations within the legal entity were considered 'quasi-legal'.[19]

Despite the above, we are still inclined to believe that the predecessor of a derivative action is precisely the *actio Pauliana* brought by the bankruptcy administrator in Roman law on behalf of the company.

2.1. Common Law

England

The first period of development of common law derivative actions. In common law, it is generally accepted that only the company may sue for damage caused to it (by its proper organ, which is *prima facie* the board of directors and sometimes the general meeting).[20] It does not

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[14] For an attempt to file a derivative claim, see in *Robinson v. Smith*, 3 Paige Ch. 222. N.Y. 1832. It is generally accepted, however, that the first derivative action was brought in the case *Foss v. Harbottle* (1843) 67 ER 189 in 1843.

[15] *Attorney-General v. Utica Ins Co.*, 2 Johns, Ch. 379. (1817).

[16] See in D. A. Demott, *Shareholder derivative actions.* L. AND PRAC. Chap. 1, 7 (1993).

[17] Ibid.

[18] A. Hudson, EQUITY AND TRUSTS (Routedge-Cavendish) 43–44 (2009).

[19] S. Williston, *The History of Law of Business Corporations before 1800,* SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, Vol. 3 (Little, Brown and Company, Boston) 217–223 (1908).

[20] R. Hollington & R. Hollington, HOLLINGTON ON SHAREHOLDERS' RIGHTS (Sweet & Maxwell) 10 (2020).

matter whether the nature of the claim is tort or contract – only the company has the right to bring an action to protect the value of its shares.[21]

The following rule provides the two core exceptions: 1) what has been done is equal to fraud, and 2) the wrongdoers are in corporate control of the company.

Therefore, the case of *Foss v. Harbottle* is an exception to the abovementioned rule and is a reflection of a derivative action under common law that affects the protection of the shareholders' corporate rights. In the *Foss v. Harbottle* case, the claim was brought by two shareholders of the Victoria Park company (R. Foss and E. S. Turton), on their own behalf and on behalf of other company shareholders, against five directors, a non-director shareholder, a lawyer and the company's architect. The plaintiffs referred to numerous violations committed by the defendants, which had caused damages to the company.[22]

The reasoning on the admissibility of a derivative action revolved around one crucial question: whether the company and the combination of shareholders are the same persons. An affirmative answer to this question would mean recognition and validity of the derivative actions brought by the shareholders. However, J. Wigram stated that a corporation and a combination of persons are not the same. J. Wigram further questioned whether the facts justified a deviation from the rule according to which a corporation must file a claim on its own behalf in defence of its interests or that such a claim is brought by a legal representative of the specified company.

According to Lord Davey: 'A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property or advantages which belong to the company, or in which the other shareholders are entitled to participate.'[23] In other words, the fraud on the minority is established when the conduct constitutes fraud and the wrongdoers are *de facto* or *de jure* managing the company, in the sense of being in corporate control of the company.

Under such circumstances, a shareholder was able to bring a claim in common law on behalf of and for the company's benefit in respect of a wrong done to the company. This claim was called a derivative claim, as the shareholder's right derived from the company's right to seek relief in respect of a wrong done to it.[24]

The company was joined to the proceedings as a nominal defendant so that relief could be ordered in its favour. A derivative claim was brought as a representative claim: the company participated in the proceedings as a defendant, to be bound by any judgment and to receive the fruits of it. Lawton LJ went even further, noting in *Nurcombe v. Nurcombe* that 'a minority shareholder's action in form is nothing more than a procedural device for enabling the court to do justice to a company.'[25]

The second period of development of statutory derivative actions. Later, the statutory derivative claim was accepted. This may now be found in Part 11 of CA 2006. According to CA 2006, s. 260(1), a 'derivative claim' is defined as proceedings by a member of a company: (a) in respect of a cause of action vested in the company; (b) seeking relief on behalf of the company.

Since 2007, a derivative claim as defined by s. 260(1) may only be brought under Part 11 or in pursuance of the court's order in proceedings under CA 2006, s. 994. According to Part 11

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[21] The rule was established in *Foss v. Harbottle* (1843) 2 Hare 461. See also in V. Joffe QC, MINORITY SHAREHOLDERS (Oxford University Press) 32–33 (2011). See also A. J Boyle, MINORITY SHAREHOLDERS' REMEDIES (Cambridge University Press) 5–24 (2011).

[22] *Foss v. Harbottle* (1843) 67 ER 189.

[23] *Burland v. Earle* (1902) AC 83, 93 Lord Davey (PC).

[24] Ibid. V. Joffe QC et al., MINORITY SHAREHOLDERS 32–33.

[25] *Nurcombe v. Nurcombe* (1985) 1 WLR 370, 376. See also V. Joffe QC et al., MINORITY SHAREHOLDERS. 33.

of CA 2006, a shareholder may, with the court's permission, bring an action for the benefit of the company to redress a wrong done to the company by its director. The Law Commission has suggested that the common law derivative action should be replaced by the statutory derivative claim. Some scholars have expressed the view that CA 2006 did indeed have the effect of eliminating the common law derivative claim.[26] However, the common law regime continues to apply to derivative actions that fall outside the statutory regime;[27] specifically, the common law regime was deemed applicable to derivative actions in special cases where the statutory rule did not apply (for example, double derivative actions).

The court's consideration of giving permission is of particular importance for this thesis. Such a court's selection of derivative actions essentially prevents the duplication of derivative actions; examples include cases in which several independent shareholders file a derivative claim or when the same shareholder has brought prior action according to s. 263(2) and s. 263(3). The judicial filter of derivative actions is governed by §§ 19.9–19.9F CPR and Practice Direction 19C.[28]

Such filtering is convenient because it allows for the problem of duplication or hazard derivative claims to be solved in cases where unfair prejudice is absent. Nevertheless, the court's grant to bring a derivative action is a two-level *ex parte* filter provided by the statutory regime that can cause more harm than good.[29] If the purpose of English law was to minimise the filing of a derivative action, then such a filter is indeed useful for such purposes. Filtering of this kind makes derivative litigation a highly time-consuming, expensive and complex process. In cases where it is necessary to make quick corporate decisions, such rules may simply not trigger the mechanism of protection of the shareholder's corporate rights. It is therefore foreseeable that derivative claims are not used in practice under English law.[30]

Under the statutory regime, the main defendant will usually be a director, although third parties can be sued in exceptional circumstances under the statutory regime of derivative actions outlined under s. 260(3) CA 2006. However, a claim against a third party must arise from the director's breach; if it does not, the shareholder may only bring a derivative action following court sanction.[31] Accordingly, in the case of a shareholder complaint about the company's failure to bring an action against third parties, the court's power would be to order the company to bring a claim.

The USA

The first period of development of derivative actions. American law first experienced the derivative action in 1817[32] (before the case of *Foss v. Harbottle*). Subsequently, the tendency of derivative action policy changed in isolation from English law. The approach adopted emerged as highly pro-shareholder compared with that implemented by the English courts.

At the time, there was a very active application of the derivative claim without the burdensome and restrictive provisions provided for in English law. This gave rise to the beginning of the judges' interpretation of the legal nature of derivative claims. Recognition of

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[26] See in V. Joffe QC, MINORITY SHAREHOLDERS (Oxford University Press) 35–36 (2019); L. Millett, *Multiple derivative actions*, THE GORE-BROWNE BULLETIN 1–4 (2010); S. Girvin, S. Frisby, A. Hudson, *Charlesworth's company law* (Sweet & Maxwell, UK) 518 (2010); A. Reisberg and D. D. Prentice, *Multiple derivative actions*, 125 LQR 209 (2009); P. Koh, *Derivative Actions Once Removed,* JBL (2010).

[27] R. Hollington & R. Hollington, HOLLINGTON ON SHAREHOLDERS' RIGHTS (Sweet & Maxwell) 154 (2020).

[28] Ibid. 12.

[29] Ibid. 166.

[30] Law Commission, *Shareholder remedies*, Final Report No. 246 (1997).

[31] See in R. Hollington & R. Hollington, HOLLINGTON ON SHAREHOLDERS' RIGHTS (Sweet & Maxwell) 160 (2020).

[32] *Attorney General v. Utica Insurance Co.,* 2 Johns. Ch. 371 (N. Y. 1817).

the derivative action's dual aspects is one example of the court's broad interpretation of the first derivative actions applied. For example, in *Dodge v. Woolsey*, it was claimed that the derivative action was *de facto* a combination of two claims: the first one enforced the company's right to bring an action against misconduct, while the second enforced the obligation owed by the company to the plaintiff and all shareholders in equity. Thus, the shareholder was granted an equitable right to bring an action against the directors or other wrongdoers if the management wrongfully refused to initiate the litigation.

The second period of development of derivative actions. The effect on the case law of the English *Foss v. Harbottle* rule began in 1870 with the cases *Brewer v. Proprietors of Boston Theatre* and *Hawes v. Oakland.*[33] These cases[34] provided for restrictions on filing a derivative claim. These restrictions were related to prior approval and the requirement for shareholder status when filing the claim. In principle, the case of *Hawes v. Oakland* can be considered the American equivalent of *Foss v. Harbottle*; however, these cases were not completely identical. Compared with the American equivalent, the English *Foss v. Harbottle* rule only allows derivative actions against fraudulent acts.

The third period of development of derivative actions. These restrictions did not significantly affect the density of derivative claims filed.

In 1966, Rule 23.1 was created, which represented a special rule regulating derivative actions. The new rule was essentially created to incorporate the prior law. The shareholder still commences the claim, which technically belongs to the corporation.[35] Due to the fact that the action is 'derivative', the plaintiff has the right to bring an action only in the same scope that the company has (on whose behalf, and in whose interest, the plaintiff initiates the proceeding). The company is joined as a party of the proceedings. The relief awarded is a judgment against third parties in favour of the company. The plaintiff, as such, recovers nothing from the judgment, although he is a plaintiff in the process.[36]

Representatives of the Anglo-American doctrine have different views on the legal nature of derivative actions. Might we say that a contract binds the relationship between the shareholder and the director? Might we say that a contract was concluded between them? In this respect, it is difficult to link the contractual nature to a derivative action, since the shareholder is not bound to the director by any contract or contractual obligations. Moreover, while the director is bound by contract to the company, he is not bound to the shareholder himself, who acts as the plaintiff in derivative litigation. The contract does not bind them because the contract's traditional indicia – such as offer, acceptance and consideration – are absent from the shareholder and director's legal relationship. Suing the director for breach of duty does not reflect the traditional idea of breach of contract.[37]

Thus, English and American case law and legislation follow the idea that the participant/shareholder is entitled to file the statement of claim on behalf of the legal entity only in the case of the impossibility of the formation of will to perform such procedural acts by a person whose right is violated, or rather, the impossibility of the formation of will to sue the legal entity. Therefore, in particular, the second provision formulated by LJ Jenkins in relation to

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[33] X. Li, A COMPARATIVE STUDY OF SHAREHOLDERS' DERIVATIVE ACTIONS: ENGLAND, THE UNITED STATES, GERMANY AND CHINA (Kluwer) 90 (2007).

[34] *Brewer v. Proprietors of Boston Theatre*, 1870, 104 Mass. 378, 387; *Hawes v. Oakland*. 104 U.S. 450.

[35] B. G. Garth, I. H. Nagel & S. J. Plager, *Empirical research and the shareholder derivative suit: Toward a better-informed debate.* 48. L. AND CONTEMP. PROBS. No. 3. 138–139 (1985).

[36] Ibid. 139.

[37] See in Deborah A. Demott, *Shareholder Derivative Actions*. L. AND PRAC. Chap. 2, 7–9 (1993).

the rule of *Foss v. Harbottle* reflects an attempt to exhaust all available and legally stipulated ways of forming the will of a legal entity.[38]

A breach on the part of the director of his duties to the company can refer to a breach of the bargain between shareholders and, accordingly, to unfair prejudice for the statutory unfair prejudice remedy.[39]

Thus, if a claim is filed by a shareholder of a legal entity in the latter's interests, the formation of the will to perform a procedural action such as filing a claim is not carried out directly but derivatively. In this case, the will to file a claim is expressed by a person whose functions do not include conducting the company's affairs and filing claims on the company's disputes. Indeed, the very filing of a derivative action by a shareholder is accompanied by an analysis of a number of circumstances. Proper characterisation of the possible risks of the claim may lead to a refusal to bring a derivative action. For example, a derivative suit may be barred by res judicata,[40] or may be prohibitive by reason of unnecessary expenses without an achievable result. An action brought by the shareholder concerning the relationship between himself and the corporation will originate in a breach of the contractual or statutory relationship between them; it may well also be embellished by fraud or negligence.[41]

2.2. Civil Law

2.2.1. The Development of Derivative Actions

a) The Stages of Development of Derivative Actions in Italy

Approaches to the history of the development of derivative claims in Italy's modern period should be divided into two phases: before and after the 2003 reform.

Before the reform. Corporate law in Italy, influenced by the growing legal and financial literature, was entirely reformed in 1998 by Law No. 58 (CFSA).[42] In the doctrine, with all its debatable theories and conclusions, a strong emphasis was placed on protecting minority shareholders and investors, along with the central role of financial market development. The opinion of representatives of doctrine was taken into account by law drafters, who were required to face the unresolved issues of corporate litigation. In the Italian Civil Code, before 1998, only a company (itself as a legal entity represented by a director) could bring an action against the directors for damage caused to the company by a preliminary decision of its shareholders.[43] It emerged that the shareholders themselves had no right in practice to interfere in the company's affairs to protect their interests and bring derivative actions independently and/or separately. At the same time, the directors were appointed by the controlling shareholders and were *de facto* responsible to them; thus, claims against them brought by the minority were not implemented in practice until 2003.[44]

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[38] *Edwards v. Halliwell* (1950) 2 All ER 1064.

[39] See in Robin Hollington & Robin Hollington, HOLLINGTON ON SHAREHOLDERS' RIGHTS (Sweet & Maxwell) 8 (2020).

[40] J. B., *Distinguishing between Direct and Derivative Shareholder Suits*, 110 UNIV. OF PENN. L. REV. 1157 (1962).

[41] W. D. Park*, England and Wales*, 9 INTL. BUS. LAWYER. No. 9. 330 (1981).

[42] Decreto Legislativo No. 58 of January 24, 1998, Gazz. Uff., March 26, 1998.

[43] P. Giudici, *Representative Litigation in Italian Capital Markets: Italian Derivative Suits and (if ever) Securities Class Actions*, 6 EUR. CO. AND FIN. L. REV. 248 (2009).

[44] F. Bonelli, *La responsabilità degli amministratori di società per azioni*. (Giuffrè, Milano) 160 (1992).

Therefore, in reality, it was almost impossible for shareholders to hold the directors liable for the company's losses.[45] The idea that director misconduct needed to be contained through the mechanism of derivative actions filed on behalf of the company first began to gain momentum in professional circles, expressing the American equivalent of derivative actions. This led to the introduction of derivative actions for publicly listed companies in Italian law. In particular, art. 129 of Law No. 58 stated that minority shareholders can bring an action against directors for liability toward the company.

However, even the American equivalent did not solve all the problems in corporate law that arose in 1998, since the law severely restricted the right of some shareholders to file derivative claims. The original 1998 CFSA rule (art. 129) required plaintiffs to hold at least five per cent of the company's shares and be registered in the shareholders' book for at least six months prior to filing a claim. The quantitative and temporal threshold ideas were based on the concept that large shareholders should have more rights to protect their long-term investments. The six-month registration rule aimed to ensure that shareholders who invested in the company in the short term did not interfere in the relationship between the company and the directors.[46] It was believed that institutional investors would be interested in derivative claims as a protective tool for long-term investment. In the years following the 1998 reform, derivative claims against directors in Italian companies did not perform adequately;[47] it is considered that the threshold was too high and that the requirements regarding registration in the book were unnecessary.

After the reform. When analysing the experience of such companies after the 1998 reform, it should be noted that derivative actions were almost never used over a period of six years. The reasons for this are quite simple. First, there were no economic incentives for minority shareholders to file a claim. One reason was that the shareholders paid the legal costs; thus, a minority shareholder bore a fairly significant risk in the event of a loss. In addition, in case of victory in a legal dispute, only the corporation received the fruits of the judgment. Moreover, the very fact that action against current or former directors was pending in court could in itself negatively affect the price of shares. At the same time, an informational asymmetry exists in any controlled company when shareholders do not always have enough information to present evidence in court. Finally, the average length of civil action in Italy seriously hinders recourse to the courts as a remedy. Therefore, it is unsurprising that shareholders preferred to simply withdraw from the company and sell their shares rather than become involved in an expensive, uncertain and potentially lengthy legal process.

Following the reform, the legislator reduced[48] the threshold of joint-stock ownership to 2.5% for listed companies and removed the temporal prerequisite for shareholder registration. After that, derivative actions became more or less practical.[49]

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[45] G. Rossi, *Il conflitto epidémico*. Adelphi, Milano. 131 (2003).

[46] See in P. Giudici. *Representative Litigation in Italian Capital Markets: Italian Derivative Suits and (if ever) Securities Class Actions*, 6 EUR. CO. AND FIN. L. REV. NO. 2–3. 249–250 (2009); C. Angelici, *Le «minoranze» nel decreto 58/1998: «tutela» e «poteri».* I Riv. dir. Comm. 207 (1998).

[47] It is here worth noting the observation in Massimo Belcredi & Luca Enriques, *Institutional Investor Activism in a Context of Concentrated Ownership and High Private Benefits of Control: The Case of Italy,* EUR. CORP. GOV. INST. (ECGI), Working paper No. 225/2013, 2014). 6: 'such greater power has long been de facto useful only to dominant blockholders, allowing them to keep managers on a tight leash.'

[48] For listed companies, the threshold is 20%.

[49] Decreto Legislativo No. 6 of January 17, 2003, Gazz. Uff., January 22, 2003, http://gazzette.comune.jesi.an.it/2003/17/17.htm; Errata-Corrige, Gazz. Uff., July 4, 2003, http://gazzette.comune.jesi.an.it/2003/153/gazzetta153.htm. Decreto Legislativo No. 37 of February 6, 2004, Gazz. Uff., February 14, 2004, http://gazzette.comune.jesi.an.it/2004/37/4.htm; Decreto Legislativo No. 5 of January 17, 2003, Gazz. Uff, 2003, http://gazzette.comune.jesi.an.it/2003/17/16.htm; Floriano D'Alessandro*, La provincia del diritto societario inderogabile (ri)determinata. Ovvero: Esiste ancora il diritto societario?* 48 rivista delle società. No. 36 (2003).

b) The Stages of Development of Derivative Actions in France

France came to the legislative consolidation of derivative actions in 1966 by introducing rules on derivative actions in the French Commercial Code. However, the emergence of the formula of derivative actions is associated with the Constitutional court's decision in 1912. As a result, the development of derivative actions in France should be divided into three periods.

The first period of development of derivative actions in France in modern law begins from 1912 when French law created the first model of derivative actions and began to apply it in practice. The official appearance of derivative actions is associated with the decision of the Court of Cassation of November 26, 1912, according to which the liability of directors of joint-stock companies as a result of their management functions grants the right to bring two types of claims, both on the grounds of claiming damage caused to the company (derivative action) and of caused personal damage (direct action).[50] A representative of the company or a group of shareholders has the right to bring a derivative claim.

The second period of evolution of derivative claims extended from 1966 to 1988. According to article L223-22 of the Commercial Code, the legislator created the so-called derivative (subsidiary) mechanism of claims *ut singuli* in connection with the frequent misconduct of directors that caused damage to the company. *Ut singuli* is a measure provided for by law that allows members, along with shareholders under certain conditions, to initiate derivative actions for the compensation of damages caused to society regardless of the damage caused to the shareholder.

The third period of evolution of derivative claims began in 1988 and continues to this day. The scope of application of derivative actions in French law has been significantly expanded since such claims were initially created for commercial companies. To date, the legislator has extended this legal regime to all forms of business, in accordance with Law No. 88-15 of 5 January 1988, the provisions of which were adopted by art. 1843-5 of the Civil Code.[51]

c) The Development of Derivative Actions in Russia

Pre-revolutionary legal regulation of derivative claims in Russia.

It is noteworthy that, in Russian pre-revolutionary legislation, the rights of a shareholder to sue the company to protect his interests in case of a breach of duties by directors were declared, although not to protect the interests of the company. In other words, the law thereby legalised direct claims while leaving derivative claims aside.

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[50] Cass. Civ., November 26, 1912 : DP 1913, 1, 377.

[51] Code Civil [C. civ] [Civil Code] art. 1843-5 (Fr.): 'Outre l'action en réparation du préjudice subi personnellement, un ou plusieurs associés peuvent intenter l'action sociale en responsabilité contre les gérants. Les demandeurs sont habilités à poursuivre la réparation du préjudice subi par la société ; en cas de condamnation, les dommages-intérêts sont alloués à la société. Est réputée non écrite toute clause des statuts ayant pour effet de subordonner l'exercice de l'action sociale à l'avis préalable ou à l'autorisation de l'assemblée ou qui comporterait par avance renonciation à l'exercice de cette action. Aucune décision de l'assemblée des associés ne peut avoir pour effet d'éteindre une action en responsabilité contre les gérants pour la faute commise dans l'accomplissement de leur mandat.'

Nevertheless, the legislation in pre-revolutionary Russia did not allow the practice of an indirect claim by a shareholder. The legislation contained only general rules regarding directors' liability. In particular, under art. 2181 of the part 1, 4th Book, 'On obligations under contracts', vol. X, Code of Laws of the Russian Empire,[52] the company's general director or member of the board of directors acts as its statutory representative, which means that violation of any orders and limits of authority is subject to liability to the company on the general grounds of laws. Although formally establishing a derivative claim, the rule of law does not contain provisions regarding the party that has the right to initiate such a derivative claim, which indicates that there was no clearly defined concept of derivative claims at that time.

For example, G. F. Shershenevich pointed out that 'in order to protect their interests, shareholders can apply to the court with a claim against a joint-stock partnership'. In such a case, the shareholder could demand that the company pay dividends, deem the board of directors null and void in whole or in part and declare the joint-stock partnership terminated. In pre-revolutionary law, the position that denies formal separation of the status of shareholders-entrepreneurs from the status of a legal entity prevailed, since transactions were made not on their behalf but on behalf of the legal entity. From an economic point of view, shareholders do not exercise due diligence, which is characteristic of entrepreneurs; their income is a percentage of capital, not of business profits. This opinion was notably expressed by Petrazhitsky, in contrast to which an alternative position was also adopted by Shershenevich, specifically that a legal entity is only a legal means by which individuals act and that sole proprietors may also not manifest activity, transferring authority to the director in the same way as occurs in a joint-stock company.[53] According to various works on pre-revolutionary law, representatives performed their functions either within the limits of the law (listed legal entity) or within the limits of their authority (the executive body of a private legal entity); however, these could not go beyond the limits of the purpose for which the legal entity existed.[54] Within these limits, a legal entity was responsible for the actions of its authorities. Compensation for the damage allegedly sustained by the actions of representatives could be assigned to a legal entity only if the committed action is connected with the interests of the legal entity.[55] Thus, when acting within the limits of the authority granted to the director, a general director who acts in bad faith or engages in unreasonable conduct in the line of duty is responsible only to a legal entity, namely the board of directors as a body (organ).

Moreover, separating the derivative claim brought by the company against the directors and the shareholder's claim against the directors, the legal grounds of the claim are considered to be beyond the scope of authority.[56] These grounds include entering into a transaction without the right to challenge it and actions to distribute dividends. According to the comments of pre-revolutionary civilists, the right to a derivative claim belongs to the board of directors and not to the shareholders themselves. In justifying the right of the board of directors to bring a claim

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[52] The 4th Book On Obligations Under Contracts, Pt. 1, Vol. X of the Complete Code of Laws of The Russian Empire. para. 2181 https://civil.consultant.ru/reprint/books/211/160.html

[53] G. F. Shershenevich, *Uchebnik Torgovogo Prava*. M. 166–168 (1919).

[54] G. F. Shershenevich, *Br. Bashmakovy Kurs Torgovogo Prava Vvedenie Torgovye Deiateli.* T. 1.Prof. Mosk. Un-Ta 4-E. Izd. S. P. 520 (1908); P.P. Tsitovich, *Lektsii po torgovomu pravu*. Vyp. 1. Vvedenie Istoricheskii ocherk razvitiia torgovogo prava. Teoriia torgovykh deistvii. (1873); Vyp. 2 Torgovets V Odinochku Torgovyi Personal, Torgovye Knigi, Torgovye Tovarishchestva. (1875). Vyp 1-2. Odessa E M Lessar. P. 384 (1873).

[55] G.F. Shershenevich, *Uchebnik Russkogo Grazhdanskogo Pravam*. 130–131 (1917).

[56] P. Pisemskii, *Aktsionernye Kompanii S Tochki Zreniia Grazhdanskogo Prava*. M. Tip. Gracheva I Ko. 179–180 (1876).

against the director (directors), it is necessary to take the nature of the board of directors as a body (organ) of a legal entity into account.[57]

The right to bring an action against the directors and members of the audit committee was granted to minority shareholders holding at least one-tenth of the chapter capital. The law also provided that the claim should be brought at the same general meeting that refused to bring the claim (art. 2361 of the drafted Civil Code of 1905). However, P. Pisemsky contended that 'such an aspiration is, however, in complete contradiction to the general principles of law, which makes it absolutely unacceptable to bring a claim to protect another person's interests: in the absence of a legal authority to do so from the person on behalf of whom the claim is brought, and even more so in direct violation, clearly expressed in this regard – the will'.

In consideration of the foregoing, it should be concluded that the draft Civil Code of 1905 established the rudiments of not only the right to file a derivative action by a shareholder on behalf of a joint-stock company but also the procedural issues of filing derivative claims by both the body of a legal entity and its shareholders independently. However, such provisions of the Draft Civil Code were not adopted; as a result, particularly acute issues regarding the procedure for initiating derivative claims remained undisclosed for a reasonably long period in history.

The development of modern law in Russia

However, Russian civil law did not recognise the concept of the derivative claim brought by shareholders for a long time, although in case law, the award of damages in society's interest was still applicable. Until recently, it was considered that the shareholder exercises their direct right to claim, while the company is either a defendant, in cases of challenging transactions, or a third party that does not make independent claims regarding the subject of the dispute, in cases of recovery of losses.[58] Many authors have also argued that the company in this case is a kind of co-defendant, which granted the right to consider the shareholders and the company as two independent participants with equal interests and rights to bring a claim (see, for example, American case law).[59] At the same time, the courts, collecting damages in favour of the company, issue a writ of execution to the company; notably, however, if the company continued to hold the position of the director against whom the claim was filed, the writ of execution was not enforceable. Some authors believe that the statement in the law regarding the derivative nature of the shareholder's claim means that the writ of execution should be issued to him as a person who has the authority to conduct the case and execute the decision.[60]

Moreover, case law assigned the writ of execution to the shareholder, not to the legal entity. The SC Plenum ruling No. 28 directly prescribed that the decision shall be deemed to be in favour of the company on behalf of which the action was brought. In the writ, in this case, the claimant is that party that initiates derivative action, while the person who receives the fruits of the judgement is the legal entity in whose interest the action was brought.[61] Case law and the ruling of the Plenum of the SC No. 28 confirm the company's status as a beneficiary, although they do not completely exclude the role of the procedural plaintiff.

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[57] I. M. Tiutriumov, *Zakony Grazhdanskie S Razieiasneniiami Pravitelstvuiushchego Senata I Kommentariiami Russkikh Iuristov,* Kniga Chetvertaia. M.: Statute. 500–520 (2004).

[58] R.A., Chichakyan, *Derivative Actions in France, Italy and the Russian Federation: A Comparative Analysis*. 18 CIV. L. REV. No. 5, 7–49 (2018).

[59] V. A. Gureev, *Problemy Zashchity Prav I Interesov Aktsionerov V Rossiiskoi Federatsii*. Dis. Kand. Iurid. Nauk. M. P. 174–175 (2007).

[60] Ibid. 174–175.

[61] Resolution of the Plenum of the Supreme Commercial Court of the Russian Federation of 16.05.2014 N 28 'On some issues related to challenging large transactions and related-party transactions'.

Thus, we will consider the development of derivative claims in modern Russian law in the context of two periods: before the 2014 reform and after the reform.

Before the reform. For a long time, in Russian corporate law, a shareholder's claim against a corporation was referred to as a direct claim. It was believed that the participant was acting in his own interests in challenging the corporation's actions and collecting damages.

This model caused two core practical and theoretical issues. The first is that the claim was direct, meaning that everyone had the right to challenge the corporation's transactions; this caused mass actions by the members of the legal entity.

The second problem with the model was the occurrence of a logical error in the procedure: the participant conducted the case, and the award was executed in favour of the company. In this case, the writ of execution was presented to the company (to whom the award was made). Whether this writ would be submitted for execution depended on the actions of the director. In practice, there were accordingly cases in which the participant won, and the court issued a writ of execution to the company, but the director did not apply it for execution.[62]

After the reform. During the Civil Code reform in 2014, shareholders' claims were recognised as derivative and collective actions. The concept of a derivative claim holds that the award is made not to the person who holds a brief for the corporation, but to the person in whose interests the case was held. The person who brought the claim protects another person's right, which is granted to him by law.

The plaintiff under Russian law has a dual status. Thus, the category of the plaintiff can be divided into two subcategories: the substantial plaintiff (in whose interests and in whose favour the award will be made – a legal entity) and the procedural plaintiff (a person who conducts the case in the interests of another; the authority for this is provided by law and the procedural plaintiff bears the court costs).

Arts. 65.2 and 53.1 of the RCC define that a shareholder (participant) and a member of the board of directors may challenge transactions on behalf of the corporation and make claims for damages. In this case, the participant acts as a legal representative under the law.

Thus, in the course of research in the field of the reception and history of the development of derivative claims in the European jurisdictions and Russia, the core issue is as follows: is it possible to understand the reason why such a variety of approaches to the essence of derivative claims exist? The answer to this fundamental question depends on the approaches adopted to specific problematic issues of theory and practice in the field of derivative claims faced in Europe (France and Italy) and Russia.

2.2.2. Legal Nature of Derivative Actions

a) Concepts of Derivative Actions: Ut singuli and Ut universi under French Law

The legal nature of derivative actions.[63] On the one hand, shareholders may bring an action to protect the interest of the company due to the fact that, since the value of their shares depends

[62] R.A. Chichakyan*, Derivative Actions in France, Italy and the Russian Federation: A Comparative Analysis*. 18 Civ. L. Rev. No. 5, 7–49 (2018).

[63] However, it is important not to confuse a derivative claim brought on the basis of art. 1341-1 of the French Civil Code with a direct claim, which in some cases may be brought by law by a creditor against the debtor of its debtor. The differences between claims of one kind and the other are as follows: in general, derivative actions can be

on the damage caused to the company, shareholders act in a derivative and ego-altruistic way. On the other hand, they are considered as a corporate body representing the interests of the company, and this body has the right to initiate an auxiliary mechanism for filing a derivative claim in case the legal entity refrains from such actions.[64] The conclusion to be drawn is as follows: the member of the society protects his own interests derivatively from the company's interests. The derivative claim may be brought against the creditor, along with the interest of the company. We should not, in fact, assume that a derivative claim is an 'invasion' of the company's property rights, an intrusion that can only be justified by the obvious interest of the company.

Case law has made a clear distinction between the *action sociale* (actio pro socio) and individual action while expressly specifying that actio pro socio could be exercised in the form of ut singuli or ut universi.[65] This clarification has also been welcomed in the doctrine.[66] When a company's legal representative brings an action on behalf of the company, a corporate claim is filed in the form of ut universi to recover losses caused to the company by the management bodies.[67] A unique feature of this type of corporate claim is that the core purpose is to protect the company's property and shareholders by means of the company itself, namely through its current representatives concerning members of executive bodies (the board of directors). In our view, however, a derivative action brought by ut universi is challenging to implement in cases where the company's director continues to perform his/her functions. As an alternative to the corporate action ut universi, shareholders have the right to bring a derivative action against the management bodies for damages caused to the company. This corporate claim is called ut singuli, and is a traditional derivative action that allows the shareholder to recover damages on behalf of the company, as well as allowing a derivative action to be brought by shareholders either individually or collectively. In both cases, damages are collected in favour of the company.

In the literature on corporate actions, there seems to be general agreement that the term ut singuli has more grounds to be characterised as a derivative action than the term ut universi; this is because ut singuli explicitly refers to the right to bring an action that belongs to the shareholders as members of a legal entity, in a common capacity, as a corporate right:[68] 'Whether this action is exercised by all or by a few or by one, it is always the action of *ut singuli* that explicitly refers to it and belongs to the right of ut universi of the shareholders, even if only one of them uses it.'[69] The use of these terms has, at times, been established by the courts and is

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brought by any creditor, while the right to bring direct actions belongs only to the creditors expressly specified by law.

[64] D. Schmidt, *Les Droits De La Minorité dans la S.A* (Biblio. de Droit commercial R. Houin, Sirey) (1969). See in M. Germain, *Les Droits Des Minoritaires* (Droit Français Des Sociétés). 54 REVUE INTERNATIONALE DE DROIT COMPARÉ. No. 2. 401 (2002).

[65] Cass. crim., 16 déc. 2009, n° 08-88.305: JurisData n° 2009-051321; Cour d'appel, Douai, 1re chambre, 2e section, 27 Juin 2012 – n° 12/00778 ; Cour d'appel, Saint-Denis (Réunion), Chambre civile, 20 Février 2018 – n° 17/01202 ; Cour d'appel, Paris, Pôle 5, chambre 8, 15 Octobre 2019 – n° 18/09890.

[66] See in J. C. Pagnucco, *L'action sociale ut singuli et ut universi en droit des groupements*. LGDJ. Bordeaux (2006). 327–338 ; J. Redenius-Hoevermann, M. Germain, *La responsabilité des dirigeants dans les sociétés anonymes en droit français et droit allemand* (LGDJ) 313–319 (2010); P. Merle, A. Fauchon, *Societes commerciales*. (Dalloz) 147 (2018).

[67] G. Delmotte, *L'action sociale ut singuli*, Journal notaire. 945 (1981).

[68] See A. Boistel cited in J. C. Pagnucco, *L'action sociale ut singuli et ut universi en droit des groupements*. 8 (2006); see also Julia Redenius-Hoevermann & Michel Germain, *La Responsabilité Des Dirigeants Dans Les Sociétés Anonymes En Droit Français Et Droit Allemand*, LGDJ. 16 (2010).

[69] Ibid. A. Boistel cited in J. C. Pagnucco, *L'action sociale ut singuli et ut universi en droit des groupements*. 8–9 (2006).

very widely employed, to the extent that it goes beyond the scope of liability actions to designate through (often difficult) decisions of interpretation.

However, it is our contention that the action ut universi should be at least considered in connection with the topic of derivative actions, and at most considered a sub-group of them, since there is also a statutory representation (or mandate) in place. For this reason, we believe that corporate actions should be recognised as equivalent to derivative actions. Referring to *action sociale ut singuli* as equivalent to the common law derivative action does not mean that the derivative nature of the action must be limited by *action sociale ut singuli*. The possibility of classifying other types of derivative actions as such is a feature of a particular jurisdiction (France, Italy, Russia). In this dissertation, the term that will be used to describe this phenomenon is 'derivative action'.[70] Criticism of such categorisation is hardly fruitful, since the allocation of corporate claims is based on entirely different criteria than the allocation of derivative claims; specifically, it stems from the long-understood procedural law classification of claims on a substantive basis (i.e. the nature of the substantial legal relationship from which the corresponding dispute and claim arose). Derivative claims are distinguished within a fundamentally different classification framework depending on the nature of the protected interest and the claim's beneficiary. As for the other problems that have arisen in connection with the emergence of this category, particularly those regarding the procedural position of the shareholders who have filed a claim in the interests of a company, these are quite solvable within the framework of the current legislation.

Moreover, the law of 24 July 1966 established the existence of the actio pro socio and granted the members and shareholders of most commercial companies the opportunity to exercise the corporate action ut singuli, which did not give rise to any particular doctrinal comment. However, the evolution achieved by this law is significant in several respects. First, French law provides for the corporate action and its dual implementation mechanism (with an explicit legal basis) to interpret it, not requiring the deployment of the sense of art. 17 of the Law adopted in 1867.[71] Second, the legal reference to '...the corporate action in liability ...' contributed to a better understanding of the concept in case law. Some authors proposed calling for the *action sociale* to be referred to as the 'action for the benefit of the group', but this failed to find support in the French courts.[72]

Since then, the term *action sociale* has been exclusively assigned to liability claims brought against directors who caused damage to society through their own fault. The right to exercise the *action sociale ut singuli* has been strengthened. From this point onwards, damages have had to be paid to the company and no longer to the plaintiff shareholder. To date, the law prohibits the *action sociale ut singuli* from being the subject of a waiver and requires approval/authorisation from the corporate body. However, the legislature has emphasised both the group and class dimensions, allowing the group members to bring a derivative action to recover the damage suffered by the company. These principles were extended by Law No. 88-15 of 5 January 1988 to all companies as the result of final case-law and doctrinal controversies, as well as by the provisions on the action pro socio stated in the CivC, the ComC and the decrees of 23 March 1967 and 3 July 1978, which guarantee minorities the possibility of preventing the risk of the accruing agency problem.

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[70] Cass. Crim., 16 Dec. 2009, N° 08-88.305: Jurisdata N° 2009-051321; Cour D'appel, Douai, 1re Chambre, 2e Section, 27 Juin 2012 – N° 12/00778 ; Cour D'appel, Saint-Denis (Reunion), Chambre Civile, 20 Fevrier 2018 – N° 17/01202 ; Cour D'appel, Paris, Pole 5, Chambre 8, 15 Octobre 2019 – N° 18/09890.

[71] Loi du 24 juillet 1867 sur les sociétés commerciales.

[72] IBid. J. C. Pagnucco, *L'action Sociale Ut Singuli Et Ut Universi En Droit Des Groupements.* 8–9 (2006).

The relationship between the company, directors and shareholders was extensively discussed in the economic doctrine of the 1930s, mainly in the works of Berle and Means in 1933,[73] which reflect this reality: when a person (the principal) relies on another (the agent) for the management of his affairs, there is a probability (greater or lesser depending on the assumptions involved) that the agent will use his/her superiority and the latitude of his/her autonomous decision-making power to act in his own interest, or at least contrary to the interest of the principal. In 1976, Jensen and Meckling went even further, claiming that the model of the relationship between owners and managers is close to the relationship between a principal and an agent. The owners hire the managers to perform the tasks of governing a company, and they both seek to maximise their value, with the result that a conflict of interest arises.[74] The fact that this risk exists in the context of corporate representation justifies that both theorists and practitioners in corporate law are likely to contain it.

It is generally agreed that, unlike its American equivalent, the derivative action ut singuli remains an underexploited mechanism.[75] There are several reasons why occasions in which such an action can be used are so rare. The first of these concerns financial considerations. Second, opposition to the corporate bodies, the members, shareholders or investors is often regarded as a strategic retreat for the transfer of their titles. Meanwhile, despite its potential, the *action sociale ut singuli* is little known, both to its beneficiaries and to the general public, and notably poorly understood. The *action sociale ut singuli* (the French equivalent of actio pro socio) is always presented as a legally regulated exception to the principles of group representation; the *action sociale ut singuli* exists at the confluence of many sensitive issues of company law.

Contractual theory. A remnant of the company's contractual theory and the relations between the members and the corporate representatives justify the possibility for each member to take legal action (in particular, to bring an action) against the corporate representatives for the damages caused. However, this theory is not without its flaws. Such an approach was recognised as difficult to understand following the breakdown in the perception of the corporate mechanism. This was caused by the introduction of a large number of mandatory rules governing corporate relations in the law of 24 July 1966. Today, derivative actions concerning public listed companies are regulated by art. L.225–252 of the French CC. An individual shareholder holding a single share may bring a derivative action. Additionally, shareholders possessing at least five per cent of the registered capital are entitled to bring an action jointly or select a representative to bring the action (if the company is not initiating the action itself). This reduces the costs for the individual shareholders involved.[76]

Given that the corporate representatives are linked to the group, they are responsible for wrongdoing under an agency contract.[77] It must be noted that these representatives are liable to their principals for the improper performance of an agency contract. Like any representative, the corporate representative is liable not only for his delinquency but also for his mismanagement. This rule, formulated in art. 1992 of the FCC, is specifically taken up in company law by arts. 1850 of FCivC and L. 225-251 of the French Commercial Code. Mismanagement lies in poor

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[73] A. A. Berle, Jr., & G. C. Means, THE MODERN CORPORATION AND PRIVATE PROPERTY (Macmillan, New York) 233, 281 (1933).

[74] M. Jensen & W. Meckling, *Theory of the firm: Managerial behavior, agency costs and ownership structure*, 3 J. OF FIN. ECON., 305–360 (1976).

[75] M. Ventoruzzo, *Experiments in Comparative Corporate Law: The Recent Italian Reform and the Dubious Virtues of a Market for Rules in the Absence of Effective Regulatory Competition,* TX. INTL. L. J., Forthcoming, 2 EUR. CO. AND FIN. L. REV. No. 2, 42–43 (2004).

[76] H. Baum, & D. Puchniak, *The derivative action: An economic, historical and practice-oriented approach in* D. Puchniak, H. Baum, & M. Ewing-Chow (Eds.), *The Derivative Action in Asia: A Comparative and Functional Approach*. (INTL. CORP. L. AND FIN. MRKT. REG.) (Cambridge University Press) 83 (2012).

[77] Ibid. J. C. Pagnucco, *L'action Sociale Ut Singuli Et Ut Universi En Droit Des Groupements*. 150 (2006).

performance, or even the total or partial non-performance, of the mission. Like any agent, a corporate representative aims to find the best possible ways to satisfy the interest of the company of which he is in charge. Since corporate agents are obliged to defend the company's interest in the general context of their mission, it is broadly agreed that directors fail to exercise their prerogatives and commit mismanagement when, by action or omission, they contravene the company's interest. In this case, any corporate representative is liable to those of his constituents whose interest has been negatively impacted due to the loss or lack of gain resulting from the non-performance of contractual obligation.

Nevertheless, from our perspective, it must be considered in the context of contractual theory that the shareholder is acting as a statutory representative by bringing a derivative action. The power to make contracts, or to act on behalf of or in the interest of another, may be accorded by the statute regardless of the will of the represented party. Under normal circumstances, the legislator grants such power when a person lacks full contractual capacity. One excellent example is the body of the legal person that acts as a statutory representative; this makes it easier to argue for the contractual theory, because by bringing an action against the director, the shareholder is acting on behalf of the company as a statutory representative.

As discussed in some depth by G. Wicker with regard to the external relationship, the shareholders cannot claim to represent the company regarding third parties, since statutory representation entails relinquishing principal status.[78] However, this situation differs in the case of derivative actions, as the relationship in question should be considered the company's internal relationship. Accordingly, the relationship between director and shareholder is based on the nature of the contract; however, as G. Wicker points out, this is not because the director was elected by the shareholders. In this vein, it should be considered that the shareholder is a statutory representative of the company who has a contractual relationship with the director.

Quasi-contractual theory. The approach of denying the particularism of corporate action and seeking its sources in other better-known mechanisms is based on the postulate that the action ut singuli reflects the hypothesis of interference with the affairs of another without authority. Such a hypothesis has led the doctrine to seek the basis of the *derivative action* in the legal provisions that allow for derogation from the principle of free exercise of its rights by their shareholder, under the rules of action oblique (creditor's derivative action) and negotiorum gestio (the management of or interference with the business or affairs of another without authority). While these proposals had already been put forward at the time by the commentators of the first case law decisions concerning the exercise of the *action sociale ut singuli*, and were then regularly reaffirmed thereafter, each analysis was pushed into its entrenchments and the artificial nature of the reasoning.[79] From then on, attempts to reduce the *action sociale ut singuli* to the scope of action oblique or negotiorum gestio were doomed to failure.

Management of another's affairs (negotiorum gestio). Negotiorum gestio, a Roman civil law institution originally established in the classical age, was enshrined in art. 1330–1340 of the French CC. The underlying idea is that the *action sociale ut singuli* constitutes an interference with the business or affairs of another without authority. The reference to the unauthorised administration derogates from the principle of the free exercise of rights by its holder. It has sometimes been imposed as part of research into the basis of *action sociale.*[80] The most widespread concept in classical doctrine was a view of the management of another's affairs as an 'imperfect' agency or an 'improvised' agency (mandate) lacking only the will of the principal, or

[78] G. Wicker, et al., *La représentation en droit privé* (Société de législation comparée) 52–53 (2016).
[79] J. C. Pagnucco, *L'action Sociale Ut Singuli et Ut Universi En Droit Des Groupements*. 150 (2006).
[80] See in J. Hamel, G. Lagarde, *Traité de Droit commercial, Introduction generale: Les personnes de droit commercial*, Vol. 1 (Dalloz) 323–338 (1954).

more precisely, in which the use of the fiction of will would presume the consent of the beneficiary of the case. The analogy between the management of another's affairs and the agency justifies the reference to the ordinary law of the agency under art. 1301 of the CivC, according to which the manager carries out '...any juridical acts or physical action which this entails to all the obligations which he would have owed as an agent...'.

The key reason why French law decided to view negotiorum gestio as such a type of relationship between shareholder and director relates to contractual deviations of French law. Accordingly, French law opted for the doctrine of negotiorum gestio when a contract or agency approach would have been more appropriate. Another reason concerns the altruistic nature of the negotiorum gestio, which has a large amount in common with derivative actions in French law. The law itself came to view the institution as a paradigm of beneficent assistance. It must therefore be considered that this explains the shareholder's actions of rendering assistance to the wrongdoer company and protecting its interests as a separate legal entity. However, the focus should not only be on the altruistic nature of the company and shareholders. The notion of derivative claims and the doctrine of negotiorum gestio are based on self-interest or actions that have been performed in response to a general duty. Such a general duty may consist of the fiduciary duty of the shareholder.

Moreover, if the shareholder demonstrates his authority to perform actions on behalf of the director in any form, we are in the presence of an agency relationship. This notion of the mandate as the basis of management of another's affairs certainly explains the fact that the manager can perform legal actions in the principal's interest; however, it does not justify the performance of purely material actions on behalf of the principal, although this is expressly permitted by case law.

The foundation of the unilateral derivative action, analysed under the dual relationship of the autonomy of will and enrichment without cause (legal grounds), is defined as an expression of the moral duty of mutual help and justified by altruism. Some jurists[81] were concerned with showing that negotiorum gestio was not simply based on the agency or mandate but rather involved a new unique element: a person acting in the interest of another when exceptional circumstances appear, in which case it is necessary to make immediate and appropriate decisions.

However, these theses are often more sociological than legal and unable to provide a technical explanation adequate to promote an understanding of this atypical institution. Moreover, simply discussing altruism is insufficient; an agency relationship may also have an altruistic characte.[82] Even if the gestor's intervention is inspired by the idea of offering help, the principal could still counter that he neither wanted nor needed this help. In a corporate relationship, when a shareholder brings an action and intervenes in the relationship between company and director, he does this regardless of the company's will unless it is subject to approval by the executive body.

The most widespread conception of business management is that of a 'quasi-contract', conceived of as a legal action,[83] the fulfilment of which requires the application of a set of provisions of purely legal origin that are incumbent on both the shareholder and the principal of the case. The characterisation of a legal will is necessary for the formation of legal action. This

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[81] See Kohler's view in Anthony H. Angelo et al., *International encyclopedia of comparative law*, vol. X (Mohr Siebeck 9) 17-19 (2007).

[82] G. Wicker et al., *La représentation en droit privé* (Société de législation comparée) 34 (2016).

[83] G. Wicker & J. Amiel-Donat, *Les fictions juridiques: Contribution a l'analyse de l'acte juridique,* No. 98. (Paris, LGDJ, coll. « Bibliothèque de droit privé ») 97. (1996).

presupposes that two conditions are met: the existence of a will and the legal intention.[84] However, from the moment at which the analysis of positive law reveals that the legal norm may imperatively confer 'legal intentionality on the active or passive conduct of a person ...' or '... derive from the exclusive interest the existence of his will of a contractor...',[85] it must be admitted that a person may be bound by a legal action when he has at no time expressed his clear and explicit will. The examples offered by positive law relate to the presumption of acceptance of offers made in the exclusive interest of the beneficiary; the value of these has been discussed in depth in the case law concerning so-called assistance agreements.[86]

With regard to the particular application of the principle that one is presumed to have accepted an offer formulated in its exclusive interest, the litigation concerning the existence of assistance agreements directly involves highlighting the ground of business management.[87] The notion of exclusive interest would be too subjective in this case. Furthermore, the existence of a right to compensation in the event of injury sustained during the performance of the assistance agreement would be incompatible with the allegedly disinterested nature of the offer. Finally, recourse to the assistance agreement would be unnecessary, since all assumptions in which it could be found overlap with management cases. In addition to the first two objections (the artifice of which has been denounced), it is precisely the question of the symbiosis of the assistance agreement and business management that constitutes a privileged avenue for reflection in the request for the foundation of the latter. If, in certain extreme cases, the case law accepts that the beneficiary of an offer of assistance made exclusively in his interest is exempted from the expression of his will to accept, how can it not be admitted that the business manager must necessarily act on behalf of others in a spontaneous and disinterested way? Moreover, an intention cannot be a complete criterion for the following simple reason: it is also applicable in cases when the shareholder is assigned to the statutory agent.

A number of scholars have proposed theories to explain that business management as a hypothesis of an improvised agency concluded through the use of a fiction will be abstracted away from the notion of a quasi-contract.[88] In the context of that idea, it may also be valuable to propose an alternative derived from the Roman law tradition – actio funeraria or 'agency of necessity'. Nevertheless, it has been shown that the use of fiction stems from the inadequacy of will as a categorical criterion of the legal act. It must therefore be recognised that legal action can be validly formed in the absence of any manifestation of the will of one of the two parties and must be final.[89]

The objections raised to the agency thesis indeed cannot be overcome in all hypothetical scenarios. Several problems seem to present themselves. If the management of the business is akin to a mandate when the manager concludes legal acts on behalf of the principal, the fulfilment of substantial acts presupposes the existence of a contract, provided that the distinction between agency and negotiorum gestio is an element of relevant and exclusive situations of necessity or urgency in which there are many hypothetical courses of action for business management.

Therefore, it must be considered that the contractual basis of business management makes it possible to explain all the elements of its regime. For example, the legal provisions concerning

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[84] Ibid. G. Wicker & J. Amiel-Donat. 80. (1996).
[85] Ibid. G. Wicker & J. Amiel-Donat. 89–94. (1996).
[86] Cour de Cassation, Chambre civile 1, du 1 décembre 1969, Publié au bulletin. Publication: N 375. https://www.legifrance.gouv.fr/juri/id/JURITEXT000006981403/
[87] Ibid. Cour de Cassation, Chambre civile 1, du 1 décembre 1969, Publié au bulletin. Publication: N 375. https://www.legifrance.gouv.fr/juri/id/JURITEXT000006981403/
[88] Ibid. G. Wicker & J. Amiel-Donat. 94–95.
[89] Ibid. G. Wicker & J. Amiel-Donat. 89–94.

the management of business do not directly enact an authorisation given to a third party to interfere in an emergency or intervene benevolently in the affairs of others; these provisions govern only the consequences of interference, specifying the principal and the manager's mutual obligations when such interference occurs. Moreover, the principle of the binding force of contracts explains that the manager is obliged to persevere in his management, and art. 1301 of the FCC[90] echoes the requirement of good faith arising from art. 1104[91] of the FCC. The obligation is thus imposed on him to manage the business of others as his own. Current studies appear to support the notion that the contractual basis is capable of explaining the mechanism of business management. It must be compared with that of a derivative action, as it currently appears in positive law, to determine the mechanism's supposed origins.

In conclusion, it must be stated that although the FCC regulates the management of another's affairs in art. 1301, the law does not define it at all. A doctrine has remedied this inadequacy by considering that '… there is the management of business, whenever a person performs an act in the interest and on behalf of a third party..., without having received a mandate from the latter'. In general, it is considered that the application of the provisions of 1301 and those of the Civil Code is justified '...when a person interferes in the affairs of others with the intention of rendering service...'. This is similar to the situation in which the business manager exercises his rights and actions selflessly, in place of the director, with the sole purpose of rendering the latter a service. Based on the assumption that the shareholder is a third party in relation to the company, just as the director is a third party to the members of the society, the right to act ut singuli is granted to both the director and the shareholder.

Moreover, the theory of 'improvised mandate' must be rejected to the extent that the concept of negotiorum gestio explains only the claim's altruistic nature, not the statutory representation of the shareholder and member of the executive body. Altruism cannot be a complete criterion for use in identifying the derivative actions as a special case of negotiorum gestio.

Notably, the value of the notion of negotiorum gestio in practice lies in its function as a voluntary means by which a person may intervene in the affairs of another. In other words, it represents a type of business management without any special mandate from that person, but that provides a benefit that will result in the compensation of expenses based on the licit and voluntary fact of business management.

Thus, first, the intervention is a shareholder's decision: while the shareholder may or may not intervene in derivative litigation of the company's affairs, he acts with a fiduciary duty and not because of his free will (which is incompatible with the doctrine of negotiorum gestio).

Second, the shareholder carries all the same duties as the express agent, who does not intend to create a personal obligation.

Third, the shareholder brings a derivative action without relying solely on altruistic goals, since he is also interested in the quality of the company shares that he owns. The shareholder therefore mixes the interest of another with his own.

Finally, the application of derivative action by the shareholder does not require the will of the company, unless it is subject to approval by the executive body.

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[90] Code Civil [C. civ] [Civil Code] art. 1301 (Fr.): 'Celui qui, sans y être tenu, gère sciemment et utilement l'affaire d'autrui, à l'insu ou sans opposition du maître de cette affaire, est soumis, dans l'accomplissement des actes juridiques et matériels de sa gestion, à toutes les obligations d'un mandataire'.

[91] Code Civil [C. civ] [Civil Code] art. 1104 (Fr.). 'contracts must be negotiated, concluded, and performed in good faith and failure to comply with such an obligation can trigger the payment of damages and result in the nullification of the contract'.

Responsibility sui generis. Following the organic theory used to describe the model of management of the groups without being required to admit that the manager is the agent of the partners, a certain element of the doctrine has challenged the theory that the agent of the company is held to a contractual responsibility.[92] Instead, it has sought to describe the regime of the responsibility of the directors as a responsibility sui generis.

According to the authors of this approach, if it is accepted that the body does not act by virtue of a representation conferred by a mandate, but instead holds its prerogatives to be justified by the creation of its function following the birth of the legal person, the application of the rules of contractual responsibility is necessarily excluded, since there is no contract concluded between the director and the group of shareholders. Since the application of tort liability also appears difficult due to the peculiarities of the body's liability regime, it must be concluded that this is a special type of sui generis responsibility. In support of their proposal, these authors cite all specificities of the responsibility of corporate directors, which they believe reveal an essential divergence with the principles of contractual responsibility.[93] A telling example is the question of the limitation of the executive's responsibility. The limitation period for all liability actions against the manager is limited to three years, compared to 30 years for the statutory limitation period for contractual liability. The dissimilarity continues with the fact that the law of contractual liability authorises the contractors to stipulate the limitations or exclusive clauses of liability in the legal acts and documents. At the same time, the Commercial Code provisions do not consider the clauses through which the shareholder would renounce the exercise of the corporate action.

These objections, however, are not decisive for the rejection of the theory of contractual liability of the director, and the vagueness of the very concept of legal liability prevents the receipt of this proposal. However, this rapprochement seems open to abuse, as it is difficult to discern how the liability regime is applicable to directors. Unlike special regimes, the responsibility of directors always presupposes proof of the three fundamental elements of liability: damage, the fault and the causal connection between the two. There is therefore no particularity characterising this supposedly original source of civil liability.[94]

It is our contention that the sui generis option, in the absence of any clear justification, places the relations of the parties in a legal vacuum, leaving open the same questions about the fate of the obligation before the conditions for its fulfilment mature (which arise with ordinary legal conditions). In the end, the legal institutions involved are multiplied unnecessarily.

Oblique action and the action sociale. Oblique actions and derivative claims have some similarities, which has prompted the authors to consider that this resemblance could underpin the true identity of the latter. Indeed, the *action oblique*, like a derivative action, is individual in its exercise and collective in its effects.[95] The rapprochement between the *action oblique* and derivative action can be regularly observed in doctrine, resurfacing at each important stage of the jurisprudential construction of the mechanism of derivative action. However, analysis reveals that the alleged similarity of the regime described between the derivative action and the oblique action is corroborative; this dissimilarity is also confirmed concerning the respective foundations.

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[92] See cited in J. C. Pagnucco, *L'action Sociale Ut Singuli Et Ut Universi En Droit Des Groupement* (Clermont-Ferrand : Fondation Varenne. Paris) 148 (2006). C. Freyria, *Libres propos sur la responsabilité civile de la gestion d'une entreprise*. Mélanges dédiés à Louis Boyer. (Presses de l'Université des sciences sociales de Toulouse) 179 (1996).

[93] J. C. Pagnucco, *L'action Sociale Ut Singuli Et Ut Universi En Droit Des Groupements* (Clermont-Ferrand : Fondation Varenne. Paris). 148 (2006).

[94] Ibid. J. C. Pagnucco. 148–149 (2006).

[95] Ibid. J. C. Pagnucco. 46–48 (2006).

Oblique action (art. 1341-1 of the French CC)[96] essentially allows the creditor to exercise a right of action (e.g. a claim) of his debtor in their place. The former art. 1166 of the French CC was incomplete, both in terms of the conditions and in terms of the effects of the oblique action. Therefore, the new art. 1341-1 of the French CC provides useful clarifications that serve to enshrine the jurisprudential solutions. Art. 1341-1 of the French CC is sometimes presented as an exception to the principle of the relative effect of mechanisms; the oblique action allows creditors to exercise their debtor's rights and actions. This possibility constitutes the counterpart of the general pledge of the creditor regarding the assets of the debtor, provided for in arts. 2092 and 2093 of the French CC.[97] Since the debtor, who has committed all his assets, remains at the head of the latter, this option has been interpreted as follows: the creditor is permitted to act in the place of his debtor if the inaction of the latter would contribute to threatening his assets and thereby reduce the pledge of all creditors.

In terms of conditions, the oblique action is conditional on the debtor's failure to exercise his property rights and actions. A typical example would be as follows: the debtor has a claim in his estate that is due, but he does not demand payment from his debtor. The debtor's default also jeopardises the rights of his creditor. Thus, the creditor cannot exercise the oblique action if his debtor has sufficient liquidity to repay him. Finally, the creditor cannot exercise rights and actions that are exclusively attached to the debtor's person (such as the right to request the revision or cancellation of maintenance). However, the law does not specify the character of the claim of the creditor's action.

Both oblique actions and derivative actions are presented as a subsidiary mechanism with a mixed ego-altruistic purpose, which affects the company directly and the interests of the plaintiff in a derivative way. The member or the shareholder can take legal action to bring the liability of the director only on the condition that the company has not previously acted through company representatives. This condition is frequently recalled in jurisprudence and echoed in oblique action on the condition of deficiency or abstention. In order for the creditor to be permitted to take action in his and the debtor's role, it is still necessary that the debtor has refrained from taking action on his own behalf'.

The subsidiary nature of both claims is also expressed by the fact that if the member of the executive body takes the lead over derivative action, or if the company (as debtor in an oblique action) takes the lead over the claim itself, the creditor who took the initiative must be removed. This common condition is justified by the exceptional nature of individual corporate action and oblique action. Notwithstanding the principle of the free exercise of its title rights, the *action sociale* (just as the oblique action would) constitutes a tolerable interference in the patrimony of others. As such, the two shares offered to the shareholders must be firmly framed and should not appear to impose themselves on the debtor.

There are a number of similarities between oblique action and derivative action. Both oblique action and the *action sociale* presuppose an altruistic initiative on the part of the agent. In the matter of the *action sociale*, the fruits of the action, namely the compensation for damages incurred, falls into the fund of the society, without benefiting the person who has incurred costs in order to obtain them in court, and without granting any privilege on the sums obtained. The creditor who exercises, at his own expense, the rights of his debtor sees all the obtained sums

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[96] Code Civil [C. civ] [Civil Code] art. 1341-1 (Fr.): 'Lorsque la carence du débiteur dans l'exercice de ses droits et actions à caractère patrimonial compromet les droits de son créancier, celui-ci peut les exercer pour le compte de son débiteur, à l'exception de ceux qui sont exclusivement rattachés à sa personne'.

[97] Code Civil [C. civ] [Civil Code] art. 2093 (Fr.): 'Quiconque s'est obligé personnellement, est tenu de remplir son engagement sur tous ses biens mobiliers et immobiliers, présents et à venir.' Art. 2093 of the French Civil code: 'Les biens du débiteur sont le gage commun de ses créanciers ; et le prix s'en distribue entre eux par contribution, à moins qu'il n'y ait entre les créanciers des causes légitimes de préférence'.

directly integrated with the assets of the latter, which has the immediate effect of restoring those assets. Thus, by replenishing his own pledge, the agent replenishes the pledge of all creditors, who will subsequently enter into competition for the distribution of the bankruptcy estate in the event of a bankruptcy. This explains the derivative nature of the oblique action.

The unbalanced structure of the relationship between the investment required and the profit withdrawn explains the relative inadequacy of both of these actions. If we consider that the member holds a right of demand against the company, this statement does not precisely explain the legal source of its prerogatives. This imprecision is reflected in the widespread viewpoint that the member is not a creditor of the company, but rather a 'creditor' in the company. Despite its value being more symbolic than strictly legal, the assumption of the status of the creditor of the member, used by supporters of the assimilation of the *action sociale ut singuli* into a particular example of oblique action, is in no way imposed.[98] Assuming that the member is a creditor, the nature of the claim must still permit the rules of the *action sociale ut singuli* to be compatible with those of oblique action, which once again may give rise to doubts. In order to be entitled to exercise the debtor's action derivatively, the creditor must rely on a certain liquid and enforceable debt. However, the member's claim is unable to meet the last two criteria. The liquidity of the members' debt is problematic, as it is challenging to assess.

The legal basis for the possibility of the individual exercise of the *action sociale* has been sought among the legal prerogatives that allow for the implementation of a subjective right. According to the most widespread opinion, the representative acts by exercising the *action sociale ut singuli* in the interest of the group, and therefore in the interest of others. Therefore, the theory of power would suggest that the nature of the derivative action should be assessed from this perspective. This concept directly confronts certain elements of the *action sociale ut singuli*; by considering the member as a third party in relation to the group, given the necessary notion of the 'community of interest', the member proceeds by virtue of a prerogative of his own and defends his interest.

In matters of representation, the authority of *res judicata* is imposed on the owner of the right, namely the representative exercising the subjective right of the representation. The basis of the *action sociale* involves representation from a strictly procedural point of view: it is understood that the representative does not have to show his interest in action but must only establish the existence of procuration ad agendum, i.e. of an express power to act in the name of and on behalf of the represented.

Although the admissibility of the *action oblique* appears to be examinable in this way, it is notable that the group carrying out the *action sociale* must personally establish the existence and content of its interest in action. The incompatibility of the basis of the *action oblique*, specifically the power of representation from a legal source, with certain significant elements of the *action sociale ut singuli* model, brings a formal denial to the alleged unity of the source of the two types of actions. Some authors propose that the conditions for oblique action should be extended to better accommodate for ut singuli action and cannot, therefore, be accepted.[99] Distributive implementation of the scheme's elements to make both claims compatible is not justified, and further risks increasing the uncertainty surrounding these two more widely used institutions, as they have a number of differences. However, this should be considered an application of the concept that derivative action derives from a particular application of the general principle of oblique action provided for in art. 1341-1 of the French CC.

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[98] J. C. Pagnucco, *L'action Sociale Ut Singuli Et Ut Universi En Droit Des Groupements.* (Clermont-Ferrand : Fondation Varenne. Paris). 49 (2006).

[99] M. Jeantin , Droit des sociétés (Montchrestien) 273 (1994).

Some scholars are well aware of the limits of assimilating the oblique action into the action ut singuli and accordingly propose to highlight the basis of the alternative mode of exercise of corporate action with recourse to the other legal institution governing certain exceptional interference in the assets of a third party, namely negotiorum gestio.

The risk of assimilation of the action sociale ut singuli *to* action oblique. The theory of assimilation of the *action sociale ut singuli* into the *action oblique* has never been enshrined in jurisprudence. However, it is true that rapprochement between these two atypical mechanisms has occurred, with each derogating from the individualistic inspiration of civil law.

A similar legal comparison can be traced in Italian law, which allows the creditor to file a claim on behalf of the debtor against the company's debtor. Thus, in both Italy and France, creditors associated with the company's shareholders or with the company itself have the right to hold the company's managers liable. However, according to the analysed case law, even if they were to bring such an *action oblique* against the director on behalf of the company, the fruits of such claims will not provide them with legal advantages over other creditors. It must therefore be considered that such circumstances explain the rarity of such a claim being implemented in case law. The notion of the *action sociale* is motivated by a certain identity of mind in a group of stockholders. However, the correspondence between unauthorised administration and *action sociale ut singuli* is denied when confrontation occurs between their respective regimes. In our view, there are core differences between oblique action and corporate action. In particular, oblique action has an extracontractual basis, while corporate derivative actions clearly have a contractual basis. This contractual nature may be explained not only by the existence of the legal relationship between the company and the director; it may additionally be delineated as a double or derivative (indirect) representation, the legal mechanism that has gained the most popularity in European doctrine.[100]

Moreover, the purpose of the application of these two actions differs from the functional point of view. The functional and operational difference between these two claims is that the oblique action, generally speaking, is used in bankruptcy proceedings and allows for the preservation of the creditor's bankruptcy estate. The bankruptcy process is an entirely different and unique state of the company; it appears to be a transformation of the legal relationship between shareholders, creditors and the director. At the same time, a derivative action filed by the company's shareholders for an altruistic purpose deals with the economic purpose: specifically, to increase the shares' value or prevent their decline, prevent the company from incurring further losses, etc. All this has to do with the property, namely the assets of the shareholder, which are known as shares of the company. That is why such altruistic behaviour may also be understood as egoistic.

The special regimes governing these two actions prevent us from confusing such claims despite their similarities. Indeed, in this regard, it is difficult to foresee any practical confusion.

b) Concepts of Derivative Actions under Italian Law

Italian law establishes a distinct classification of derivative claims based on identifying the person who initiates a derivative claim. Thus, the company itself may file a derivative claim against the director for violations of its duties through its representatives. According to art. 2393 of the Italian Civil Code,[101] a claim for liability against one or more directors, or the entire board

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[100] G. Wicker et al., *La représentation en droit privé* (Société de législation comparée) 49 (2016).

[101] Codice Civile [C. civ] [Civil Code] art. 2393 (It.). Dispositivo dell'art. 2393 Codice Civile: '…L'azione di responsabilità può anche essere promossa a seguito di deliberazione del collegio sindacale, assunta con la

of directors, can only be brought by the company itself in accordance with the decision of the shareholders.

First, if a claim is filed against the company's directors by shareholders who hold at least one fifth of the company's share capital (or at least one fortieth of the public company's share capital), the director is automatically removed from his management position.

Second, a derivative claim can also be filed under art. 2393-bis of the Italian Civil Code by shareholders holding at least one fifth of the share capital in a public company. However, the peculiarity of Italian law is also that such a rule is inherently dispositive and allows the company to restrict and block the filing of derivative claims by minority shareholders in general, setting a sufficiently high quantitative threshold (for minority shareholders) for such purposes. It should be noted that any decision to refuse or settle should benefit the company, not the shareholder who initiated the claim.

It should further be noted that derivative claims can be considered from the following perspectives:

- the contractual nature of actio pro socio[102] (derivative action) against a director brought by the company (art. 2393 of the Italian Civil Code);
- the contractual nature of derivative action against the director brought by shareholders holding at least one fifth of the share capital, or one fortieth in the case of companies making recourse to the capital markets (art. 2393-bis of the Italian Civil Code);[103]
- tort nature of action against the director brought by the creditors of the company (art. 2394 of the Italian Civil Code).

There is also a direct claim brought by the company's shareholders (art. 2395 of the Italian Civil Code). However, the lack of common essential features does not permit us to classify direct claims together with derivative claims. Direct claims are filed in order to recover the damage caused to the shareholder personally. A derivative claim is always aimed at compensating the damage suffered by the company as a result of, for example, breach of fiduciary and due diligence duties by the management.

Contractual nature of derivative claim brought by the company (art. 2393 of the Italian Civil Code).

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maggioranza dei due terzi dei suoi componenti (1). L'azione può essere esercitata entro cinque anni (2) dalla cessazione dell'amministratore dalla carica. La deliberazione dell'azione di responsabilità importa la revoca dall'ufficio degli amministratori contro cui è proposta, purché sia presa col voto favorevole di almeno un quinto del capitale sociale. In questo caso, l'assemblea stessa provvede alla sostituzione degli amministratori (2386).' La società può rinunziare all'esercizio dell'azione di responsabilità e può transigere (1966), purché la rinunzia e la transazione siano approvate con espressa deliberazione dell'assemblea, e purché non vi sia il voto contrario di una minoranza di soci che rappresenti almeno il quinto del capitale sociale (2394, 2394 bis, 2395, 2434) o, nelle società che fanno ricorso al mercato del capitale di rischio, almeno un ventesimo del capitale sociale, ovvero la misura prevista nello statuto per l'esercizio dell'azione sociale di responsabilità ai sensi dei commi primo e secondo dell'articolo 2393 bis.

[102] See in G. F. Campobasso, M. Campobasso, 2: *Diritto delle società* (Wolters Kluwer Italia) 381 (2019); M. Carone & A. De Nicola, ITALIAN COMPANY LAW: COMPANIES LIMITED BY SHARES (EGEA) 119 (2015).

[103] Codice Civile [C. civ] [Civil Code] art. 2393-bis (It) : 'L'azione sociale di responsabilità può essere esercitata anche dai soci che rappresentino almeno un quinto del capitale sociale o la diversa misura prevista nello statuto, comunque non superiore al terzo. Nelle società che fanno ricorso al mercato del capitale di rischio, l'azione di cui al comma precedente può essere esercitata dai soci che rappresentino un quarantesimo(1) del capitale sociale o la minore misura prevista nello statuto(2). La società deve essere chiamata in giudizio e l'atto di citazione è ad essa notificato anche in persona del presidente del collegio sindacale'.

The responsibility of the directors is of a contractual nature, depending on the non-fulfilment of obligations of the 'corporate contract' (bylaws) from which the members of the management body secure their position. Under the current regulations, directors are responsible for the breach of fiduciary duty and are required to compensate for damages suffered by the company in cases where they did not perform the duties imposed on them by law or bylaws with the due diligence required by the assignment and their specific obligations.[104]

If there are several directors in the company, they are jointly liable. Each director may be held liable in full for compensation for all damage suffered by the affected party involved. However, the presence of directors with delegated functions does not entail that the others are necessarily exempt from joint liability for the conduct of the former. It is true that the current framework, unlike the previous one, no longer imposes on directors a general duty of supervision over management.

The nature of the contract[105] is supported with reference to the fact that responsibility derives from the breach of a pre-existing obligation (even if imposed by the law) and not from the mere completion of a malicious act. The company may bring an action against the directors to secure compensation for damages it has suffered due to the breach of their respective duties by means of the action referred to in art. 2393 of the ICC. Such duties may arise either from the contract or from the bylaws. In this regard, such a claim is of a contractual nature.

The shareholder commences the company's action against its directors and/or officers, with the goal of seeking relief on behalf of the company.[106] A derivative action of a contractual nature is one that the company itself is entitled to take against its director in order to obtain compensation for damages suffered as a result of conduct engaged in by the director that violates their legal and statutory duties.

A derivative action can be brought by the minority through one or more representatives appointed by a majority shareholder (those who are the owners of the company and therefore in control of its affairs). The goal of such an action is to restore the company's assets, not to compensate any damage suffered by the shareholders. The appointment of the procedural representative binds the plaintiff minority to take action together and is not subject to specific procedural rules, as has already been considered with reference to the previous legal regime. Therefore, a claim of this kind can be considered a derivative claim because it is based on the interests of the company, not of the shareholders. In fact, however, an action of this kind is initiated by the will of minority shareholders. Therefore, it is clear that the intention of such a regime is to include an instrument capable of overseeing the company's legal interest and not aimed at protecting the individual interests of the shareholders; otherwise, such an action could be considered nothing else but direct.

As far as they are not expressly provided for, the principles on subrogation will apply by analogy (art. 2900 of the ICC). It is generally accepted that although an action must ordinarily be prosecuted by, or in the name of, the legal owner of the substantive rights in issue (known as the *giusta parte*), it is sometimes possible for someone other than the owner of the claim to prosecute an action in his own name. The subrogation action, or *azione surragatoria*, is a vivid example of such a principle. This is an action by which a creditor may, under certain circumstances, enforce certain rights of his debtor against third parties. However, the existence

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[104] G. F. Campobasso, M. Campobasso, 2: *Diritto delle società* (Wolters Kluwer Italia) 381 (2019).

[105] This theory is also discussed in M. Carone & A. de Nicola., ITALIAN COMPANY LAW; COMPANIES LIMITED BY SHARES (EGEA) 119 (2015).

[106] M. Fabiani, *L'azione di responsabilità dei soci di minoranza e la sostituzione processuale.* Rivista Di Diritto Processuale. No 1–2. 697-720 (2015).

of a subrogation action in the technical sense must be excluded so that the exercise of the derivative action by the minority is considered subordinate on the part of the company.

Members of the executive bodies are bound to the company by a contract which, regardless of its typicality or atypical nature, is the source of specific obligations; any failure to fulfil these obligations exposes them to joint liability for the damages resulting therefrom. The action of liability can be exercised by the company (art. 2393 of the ICC), but also by the shareholders (who represent one fifth of the share capital or any different percentage provided for by the bylaws: art. 2393-bis, 2407.3 of the ICC) as entitled under extraordinary circumstances to assert the right of claim of the damaged party (art.81 of the Italian CivPC).

Claim against the director brought by shareholders (art. 2393-bis of the Italian Civil Code)

According to art. 2393-bis of the ICC, 'the company action for liability may be exercised by members representing at least 1/5 of the share capital or according to the by-laws, which in any case cannot be greater than 1/3'. The action may be exercised by the members representing one fortieth of the company's capital or any lower amount stipulated in the by-laws for listed companies.[107] The shareholders commence the derivative action by appointing one or more representatives to begin litigation and for the fulfilment of the ongoing acts.[108]

The initiation of derivative action is usually a result of a conflict in a company's internal affairs, which reflects the idea that the minority and the directors are at odds. The latter is nothing more than the expression of the will of the majority shareholders who are in ultimate control of the company's affairs. It is accordingly clear that, within the process arising from the experiment of the action referred to in art. 2393-bis of the ICC, there are two interpretations of the company's interest, both of which are potentially legitimate: one coming from the minority shareholders, the other from the majority. Within the framework articulated above, it is necessary to guarantee that the company, as the actual owner of the subjective right subject to the process, is able to oppose these requests.

It has also been pointed out that, in addition to the differences in their legal nature,[109] the actions ex art. 2393 and 2393-bis of the ICC should be kept distinct from the ex art. 2394 of the ICC (non-contractual), which aims to provide compensation directly to those who brought the action (actions such as individual shareholders, or creditors and third parties in general).

It is worth noting that there are few examples discussing the concept of the derivative action being a special case of negotiorum gestio (under art. 2028 ICC and art. 2030 ICC) in Italian doctrine. The theory of negotiorum gestio was proposed to justify the relationship between shareholders and the company. As D. Latello states, the doctrine of negotiorum gestio explains the necessary joinder of the parties, the notifications of the summons and the reimbursement of legal expenses, and also explains the possibility of the company intervening in

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[107] Codice Civile [C. civ] [Civil Code] art. 1393-bis (It).

[108] Codice Civile [C. civ] [Civil Code] art. 2393-bis (It): 'L'azione sociale di responsabilità può essere esercitata anche dai soci che rappresentino almeno un quinto del capitale sociale o la diversa misura prevista nello statuto, comunque non superiore al terzo. Nelle società che fanno ricorso al mercato del capitale di rischio, l'azione di cui al comma precedente può essere esercitata dai soci che rappresentino un quarantesimo(1) del capitale sociale o la minore misura prevista nello statuto(2). La società deve essere chiamata in giudizio e l'atto di citazione è ad essa notificato anche in persona del presidente del collegio sindacale. I soci che intendono promuovere l'azione nominano, a maggioranza del capitale posseduto, uno o più rappresentanti comuni per l'esercizio dell'azione e per il compimento degli atti conseguenti. In caso di accoglimento della domanda, la società rimborsa agli attori le spese del giudizio e quelle sopportate nell'accertamento dei fatti che il giudice non abbia posto a carico dei soccombenti o che non sia possibile recuperare a seguito della loro escussione. I soci che hanno agito possono rinunciare all'azione o transigerla; ogni corrispettivo per la rinuncia o transazione deve andare a vantaggio della società. Si applica all'azione prevista dal presente articolo l'ultimo comma dell'articolo precedente'.

[109] M. Carone, A. Nicola., ITALIAN COMPANY LAW: COMPANIES LIMITED BY SHARES (EGEA) 119 (2015).

proceedings under any circumstances that accord with art. 2028 of the ICC.[110] D. Latello refers to a procedural negotiorum gestio and eliminates it via substitution.

However, for a legal relationship to be qualified as negotiorum gestio in Italian law (under art. 2028 ICC and art. 2030 ICC), the principal requirement is that of undertaking the management of another's affairs, knowingly or voluntarily, until the principal is able to manage his own affairs. ICC places the gestor under the same obligations as arise from the proper agency. It can be assumed that, in future, derivative actions may become a prototype of negotiorum gestio in the doctrine. First, this is due to the fact that the shareholder brings a derivative action on behalf of the company to enforce or defend a legal right or claim, which the company has failed to do; in other words, the shareholder brings an action in the company's absence. Second, the shareholder shows an intention to manage the company's affairs as an independent and separate legal entity; a director owes duties to the company and not to the shareholders. Third, the claim is brought for the benefit of the company that proves the utility of the derivative action. These conditions are discernible in civil law systems in which negotiorum gestio is attended to in any way and are also applicable in Italian law.

However, this resemblance is due to the blurred distinction between negotiorum gestio and agency. The 'utility' is discovered in any agency contract. In any case, the agent acts for the principal or in the latter's interest. This similarity, however, does not dissuade us from referring to derivative action brought by the shareholder as a special case of statutory representation, where the shareholder acts as a statutory agent. In bringing an action against the director, the shareholder is acting on behalf of the company as a statutory representative, which proves that derivative action is based on the contractual nature. Overall, the derivative action is an action that is brought on behalf of the company by its statutory representative against its director.

Extracontractual (tort) nature of actions against the director brought by the creditors of the company (art. 2394 of the Italian Civil Code). Directors are liable to the company's creditors for any breach of their duty to preserve the company's assets in cases where the latter is not sufficient to satisfy the creditors' claims.[111] It would not be entirely accurate to distinguish between the breach of an existing obligation under the law and the performance of a harmful act in order to identify the criterion for use in discriminating between contractual and non-contractual liability. The fact that there is an obligation imposed by law prescribing certain conduct under the agent's liability would not be a useful criterion for distinguishing the nature of the liability.

The case law tends to consider *actions against the director on behalf of creditors* as extra-contractual in nature[112] 'in the absence of the essential presupposition of contractual responsibility which is constituted by the pre-existence of an obligation (although not necessarily of contractual origin) of which the default can be configured'.[113]

According to the doctrine, the distinction would have critical application reflections regarding the burden of proof relating to the subjective element. It is argued that in cases where the contractual nature of the action is considered, creditors should not provide evidence of directors' guilt. The doctrine tends to bring responsibility under consideration back into the contractual area. Therefore, it is dictated by the need to favour the damaged creditors in the discharge of the burden of proof of the directors' responsibility.[114]

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[110] D. Latella. *L'azione sociale di responsabilità esercitata dalla minoranza*. (Torino : Giappichelli). 232–233 (2007).
[111] E. Gilardi, *Liabilities of Directors and Shareholders of a Company Limited by Shares under Italian Law*. (Artículos, Derecho Mercantil) 3 (2012).
[112] M. Carone & A. Nicola., ITALIAN COMPANY LAW: COMPANIES LIMITED BY SHARES (EGEA) 119–120 (2015).
[113] Cass. 22 X 1998 n. 10488 in Jur. it. 1999, 773.
[114] M. Carone & A. Nicola., ITALIAN COMPANY LAW: COMPANIES LIMITED BY SHARES (EGEA) 119–120 (2015).

The creditor bears the burden of proof of the debtor's wrongful conduct; this may require proof of the negligent act of the director. In the obligations of due diligence, indeed, there are two criteria of interest: the determination of the performance and the responsibility. The inadequacy of the performance is given by the discrepancy between the performance fulfilled and the model of due diligent performance. The proof of improper fulfilment is, therefore, the proof of guilt. In terms of the obligations of means, the proof of wrongful conduct concerns the debtor's behaviour compared with the model of diligent behaviour. This accordingly leads to the application to the contractual liability of art. 1218 of the ICC of a rule identical to art. 2043 of the ICC in the matter of non-contractual liability: that is, to require that the creditor prove the director's fault in both cases. Configuring the responsibilities contained in art. 2394 of the ICC as a contract would therefore offer no evidentiary advantage. Recently, the Court of Cassation resolved the issue of the allocation of the burden of proof regarding the breach of contractual obligations. It requires the creditor to act in judgment for failure to meet the debtor's allegation, not to prove the incorrectness of the performance resulting from the non-observance of the obligation of due diligence.[115]

Recent research seems to indicate that, in practice, the responsibility of directors is generally based on the violation of specific obligations inherent in the preservation of the integrity of the company's assets. This means that the legislator has already made an abstract judgment regarding the reasonable predictability of the occurrence of harmful events.[116] In our view, there are two conclusive answers to these contentions. First, the relationship between the director and the creditor shows that no contractual relationship exists. Suppose that a company and a creditor can be bound by a contract; thus, we can explain how the creditor may file a claim on behalf of several creditors against the director. This leads to two conclusions: either the company is not bound to all creditors by a single contract, or the director is not bound to any creditor by a contractual relationship. Second, the post-contractual effect will not play a role in the qualification of such relations as based on the contractual nature. However, such a theory should also be rejected, since any qualification as sui generis that is unjustified represents a danger zone for regulating corporate or contractual relations.

Direct action brought by the company's shareholders and third parties (art. 2395 of the Italian Civil Code). Any shareholder may bring an action for damages arising from the directors resulting in direct damage suffered by the shareholder. As can be observed, in this case, the company's interests are not considered. It is the losses caused to the shareholder – his property, and therefore his interests – that are valued under art. 2395 of the ICC. Specifically, this art. stipulates that the actions of liability of the company and the creditors 'do not affect the right of compensation for the damage owed to the individual shareholder or to the third party who have been directly harmed or are culpable by the acts of the directors'. The individual shareholder or the individual third party (also other than the company's creditors) can claim damages from the directors under art. 2395 of the ICC.

c) Concepts of Derivative Actions under Russian Law

Few attempts have been made to investigate the legal nature of derivative actions in Russia.[117] D. Tuzov provided one of the earliest such discussions. Specifically, Tuzov claimed

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[115] Cass. Sez. A. 30.10.2001 no 13533 in F.IT. 2002 I, 770.

[116] Ibid. M. Carone, A. Nicola., ITALIAN COMPANY LAW: COMPANIES LIMITED BY SHARES (EGEA) 119–120 (2015).

[117] See for example R.A., Chichakyan, *Derivative Actions in France, Italy and the Russian Federation: A Comparative Analysis*. 18 CIV. L. REV. No. 5. 7–49 (2018).

that derivative actions are claims for the award; these may be contrasted with claims for challenging the transaction, which in turn are 'transformative'.[118] Notably, Tuzov's analysis does not take account of the latest Russian reform, and nor does he examine the consequences of such reform.

However, the confusion of the parties to derivative actions and the almost-absent differentiation of derivative actions blurs the representative functions of the company's director and the shareholder (participant), since derivative actions brought by shareholders in terms of claims against third parties are not limited in any way (except for the presence of a derivative interest, which goes without saying). Russian law also does not resolve the issue of the application of tort in derivative actions.

The consolidation of a derivative action requires the doctrine and case law to determine the procedural status of the member of the legal entity. The judicial practice failed to resolve this issue in a stable manner. For example, despite the explanations of the above-mentioned Resolution of the Plenum of the Supreme Court of the Russian Federation No. 25, the legal status of the participant was determined as the procedural plaintiff.

This study found that derivative actions against directors who caused damage to the company should be considered as contractual actions of liability available to the principal, as this will make the agent responsible for 'mistakes' made in the course of the company's management that led to losses on the company's part.

The purpose of allowing shareholders and members of the board of directors to challenge the corporation's transactions and recover losses from management bodies is to protect the company's property status and, as a result, to protect the shareholders' right to a part of the company's profits. Through these claims, participants perform the role of supervisors for the work of the management.

However, it is essential to note that priorities are changing in the course of the ongoing reform of relevant corporate legislation: rather than the predominantly imperative method of legal regulation, the main principle becomes that of freedom of contract and disposition, especially as concerns the legal regulation of commercial legal entities and non-public companies. This approach is based on implementation in the domestic legislation, which traditionally belongs to the continental system of law, of principles that are characteristic of the Anglo-Saxon legal family (borrowed primarily from American law), in which the corporation is considered as a simple nexus of contracts. Such a nexus of contracts may be interpreted as a source of agency costs or corporate conflicts, since the interests of directors and shareholders differ. It should be noted that we have observed the same trend in Italian law. The financial model of corporate structure in Italy takes part in reducing 'agency costs' by creating stimulus for all parties involved in the company. However, the company is seen as a collection of assets that are jointly owned by shareholders. This may cause some commitment problems when parties refrain from acting in the interests of the company by cooperating because of bargaining power concerns. The corporate tool of insolvency is used to ensure that the optimal party holds the property, which is interpreted as the right to have control over the assets of the company.[119]

The advantages and disadvantages of the contractual or tort approach can be discussed under two headings, which are as follows: 1) a derivative claim filed by a shareholder against a director; 2) a derivative claim filed by a shareholder to challenge a contract entered into by the company with a third party.

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[118] D. O. Tuzov, *Iski Sviazannye S Nedeistvitelnostiu Sdelok Teoreticheskii Ocherk (Tomsk).* 57 (1998)

[119] L. Sasso, *Capital Structure and Corporate Governance: The Role of Hybrid Financial Instruments,* 21 INTL. BANK. AND FIN. L. SER. BK. 87 (2013).

A derivative claim filed by a shareholder against a director (*actio pro socio*). It goes without saying that the issue of the nature of the derivative action is crucial due to the differences in the regulation of both types of civil liability. Suffice it to say that the qualification of the director's liability as tort makes it meaningless to raise the question of the right of the legal entity and the director when establishing the terms of liability in the contract between them (including limiting the director's liability in one way or another). It is also worth recalling that when awarding compensation for damage caused by negligence, the court may reduce the amount of this compensation after taking the property status of the director into account. By contrast, the rules regarding contractual liability contain no such basis for reducing the amount of liability. The answer to this question instead depends on the relationship between the director and a shareholder. At present, the Russian literature presents a fairly well-established view that corporate relations of civil law arise within a corporation, as evidenced by the inclusion of corporate relations in civil rights systems (along with traditional types).[120]

In the Russian doctrine, the shareholder's position in the contractual relationship between the director and the company is not disclosed. However, we here contend that the shareholder acts as a statutory representative when filing a derivative claim. This may be justified by the fact that the consequences of bringing a derivative action are similar to the consequences of concluding a transaction, as well as by the fact that the law establishes a shareholder's right to file a derivative action on behalf of the company. Among other things, the shareholder, in exercising his right to file a derivative claim, takes the place of the director or other executive body. Such circumstances, along with those we have indicated earlier and will go on to indicate in the conclusion, permit us to conclude that the filing of an indirect claim is an act of statutory representation. Accordingly, if we assume that the director and the shareholder are legal representatives in this case, it can be readily concluded that the derivative action is of a contractual nature.

It appears that a member of the legal entity acts as a representative in derivative litigation. The substantial and legal basis for such representation is a statutory provision of the law (paras. 5, 6, para. 1, art. 65.2 of the Civil Code of the Russian Federation, para. 3, para. 3, art. 6, part. 4, art. 32.2, para. 1, para. 5, art. 71, para. 6, art. 79, para. 1.2, para. 1, art. 84 of the Federal Law 'On JSC'). As has been noted by G. L. Osokina in describing the basis of legal representation, 'this type of representation is called statutory because the representative is not able to choose a representative for various reasons'.[121]

D. Stepanov further points out that the corporate relations are purely binding legal relations and are moreover relative legal relations, that are similar to contractual obligations but not reducible to such obligations.[122] Stepanov goes on to claim that the bylaws of the company have several similarities with the contract. In this case, the bylaws of the company, as well as all other internal documents referred to in the domestic legislative tradition as 'constituent documents of a legal entity', are nothing more than a form that frames the content of a contract or a multilateral contract, and the form of both the original transaction and the modified one, in case its content subsequently changes. The bylaws allow shareholders to capture the actual content of the contract so as to avoid any doubt from arising with respect to the current content of the contract on the part of persons present at the time, particularly third parties (para. 3 of art. 52 of the RCC,

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[120] V. A. Belov, *Grazhdanskoe Pravo Obshchaia I Osobennaia Chasti Uchebnik. (M. Iurinfor).* 806 (2003).

[121] G. L. Osokina, *Poniatie vidy i osnovaniia zakonnogo predstavitelstva. (Rossijskaya yusticiya. - M.: YUrid. lit.).* 43–44 (1998).

[122] D. I. Stepanov, *Ot Subieekta Otvetstvennosti K Prirode Korporativnykh Otnoshenii. Vestnik Vas RF.* No. 1. 20–75 (2009).

providing for the entry into force for third parties of changes in the constituent documents of a particular formal moment, as a general rule from the moment of their public registration).[123]

It is our contention that derivative actions against directors of a legal entity who have caused damage to the company through their own fault should be considered as close to the contractual liability available to the principal in order to force the agent to answer for 'mistakes' made in the management. However, any rule may have exceptions, and such exceptions may include the presumption of good faith on the part of the director. The director is presumed to be acting in good faith and innocent unless the plaintiff proves otherwise. As discussed above, such a decision seems to be the only correct one. Presuming guilt and placing the burden of proof on the director (who has in many cases already been dismissed and deprived of access to the necessary documents, making it difficult for him to prove his innocence) is both exceptionally unfair and economically inefficient. The fact is that art. 401 of the Civil Code and art. 1064 of the RCC, which establish the grounds for contractual and tort liability, directly fix the idea of presumption of guilt: the person who breached the contract is considered guilty unless they are able to prove the contrary. The first answer to immediately suggest itself is that this difference manifests the specifics of corporate relations. The rules on contractual and tort liability can be applied unless corporate relations dictate otherwise.

The concept of fault (or guilt) in art. 401 of the RCC is defined as follows: 'a person is guilty, if the degree of care and authority discretion that is required on the character of the obligation and conditions of civil turnover, it has taken all measures for the proper performance of the obligation'. Art. 1064 of the Civil Code concerning tort liability does not specify the content of the concept of 'guilt'. In this regard, it seems that the concept of guilt, enshrined in art. 401 of the RCC in relation to liability for breach of an obligation, can mutatis mutandis be applied to tort liability. This means that, in civil law, the content of the concept of guilt is objective.[124] When assessing a person's guilt or innocence, the fact that the debtor (delinquent) has taken reasonable measures to avoid the breach of duty should be considered. It is essential to determine whether these measures were consistent with a reasonable person's standards of conduct, taking into account the wrongdoer's status, the nature of the relevant legal relationship, and other contextually specific circumstances of the particular case.

In a contractual dispute, who should prove that the debtor's conduct was unfair? The plaintiff should. First, this conclusion follows logically from common sense. It is difficult to imagine what would become of the turnover if, for any action of a party to the contract that does not formally violate any clear condition of the contract or the requirement of the law, this action could be presumed unfair until proven otherwise. Second, such a conclusion directly follows from the law. Recall that according to para. 5 of art. 10 of RCC, 'the good faith of participants in civil legal relations and the reasonableness of their actions are assumed'.

What conclusion does this lead to? In ordinary contractual liability, the presumption of guilt ceases to function as soon as the focus shifts from violating specific terms of an agreement or the clear directives of the law to questions of whether an evaluative standard of good behaviour has been breached. In situations when there are no clear criteria of wrongdoing enshrined by law or by contract, and when the latter is determined through the correlation of the defendant's actual behaviour with some evaluative standard (e.g. honesty), it is impossible to disentangle the evidence of the offence from the finding of guilt as part of proving the basis of liability. Both objects of proof are expressed in terms of evaluation standards with characteristics that are challenging to distinguish. In theory, the plaintiff must prove that the defendant behaved

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[123] Stepanov D. I., *Ustav Kak Forma Sdelki. Vestnik Grazhdanskogo Prava.* No. 1. 3–9 (2009).

[124] Karapetov A. G*., Tesisy k Nauchnomu Kruglomu Stolu Osnovaniia Otvetstvennosti Direktora Iuridicheskogo Litsa.* (Working paper). 6 (2013).

in bad faith and thereby violated legal requirements pertaining to the fair performance of obligations, while the defendant must prove that he is not guilty (that is, that he did everything reasonably required of him to avoid such a result from the point of view of the nature of the obligation and other circumstances). In reality, these two sets of evaluation standards cannot be separated. Moreover, the criterion of good faith and the concept of guilt require assessment of the same factors: the (in)consistent behaviour of the defendant, along with the evaluative standards of proper behaviour, fragmented through the prism of the whole complex of the circumstances of the case (nature of relationships, the status of the defendant, etc.).

In the same way as with contractual liability and responsibility of the director, the burden of proof on the plaintiff is weakened in cases where it could present circumstantial evidence of bad faith on the part of the defendant, while the defendant, having access to documents and other evidence that could refute this derivative 'evidence', has refrained from submitting them.[125]

A derivative claim filed by a shareholder to challenge a contract entered into by the company with a third party.

Under Russian legislation, derivative actions include claims for damages against directors and challenging an agreement; if a company member brings them on behalf of the company, they have specific similar characteristics. First, the shareholder in both the first and the second case has not a direct but a substantive derivative interest, which is why the action of challenging the agreement is attributed to the category of derivative claims. Moreover, in Russia, such a right is granted to the shareholders by substantial law. The beneficiary in both cases is the company itself, which corresponds to the characteristics of derivative actions.

If a transaction is made on behalf of a company, the shareholders may also challenge the transaction itself under para. 1 of art. 65.2 of the RCC (for example, members or shareholders); under para. 4 of art. 65.3 of the RCC, such an action may apply to members of the corporation's executive body (for example, members of the board of directors). Such claims are filed by members of the company or members of an executive body on behalf of the company. In addition, such a claim may be filed on behalf of the corporation and the sole executive body or a person acting under a power of attorney issued by such a body.

In relation to the case of a claim filed by shareholders or participants of the company, an interesting question arises. The provision of cl. 1 of art. 65.2 of the RCC, which fixes the rights of the corporation's participants to challenge the transaction under the rules of art. 174[126] of the

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[125] Karapetov A. G*., Tesisy k Nauchnomu Kruglomu Stolu Osnovaniia Otvetstvennosti Direktora Iuridicheskogo Litsa.* (Working paper). 6 (2013).

[126] Russian Civil Code [RCC] [Civil Code] art. 174 (Rus.): The Effects of Violating by a Representative or Body of a Legal Entity the Terms of Exercising the Authority or Interests of the Represented Person or Interests of the Legal Entity. 1. If the authority of a person as to carrying out a transaction is limited by an agreement or regulations on a branch or representative office of a legal entity or the authority of a legal entity's body acting on behalf of the legal entity without a letter of attorney is limited by the constituent documents of the legal entity or by other documents regulating the activities thereof as compared to the way they are defined by a letter of attorney, law or as they can be deemed evident in the situation under which the transaction is being made and, while carrying it out, such person or such body fell outside the limits of this limitation, the transaction may be only declared by court invalid at the suit of the person in whose interests the limitations are established, if it is proved that the other party to the transaction knew or should have known about these limitations. 2. A transaction made by a representative or by a legal entity's body acting on behalf of the legal entity without a letter of attorney to the detriment of the interests of the represented person or the interests of the legal entity may be declared by court invalid at the suit of the legal entity and, where it is provided for by law, at the suit made in their interests by other person or other body, if the other party to the deal knew or should have known about the evident damage for the represented person or for the legal entity or there were circumstances which testified to a conspiracy or other joint actions of the representative or the legal entity's body and the other party to the transaction to the detriment of the interests of the represented person or to the interests of the legal entity.

RCC, does not establish any restrictions. However, from 1 January 2017, the norms of para. 2 of art. 69 and para. 6 of art. 79 of the JSC Law, as well as claims under 3.1 of art. 40 and para. 4 of art. 46 of the Law on LLC, entered into force. These established a limit on challenging the transactions without the approval of the general meeting of participants (shareholders) or the executive body if such consent was required in accordance with bylaws. Now, such claims can only be filed by a shareholder (participant) or a group of such persons who collectively hold at least one per cent of the votes of the LLC participants or voting shares in the JSC. In fact, these special laws curtail the rights of minority shareholders or members of an LLC with a low number of votes to challenge the transactions made on behalf of the company in violation of the restrictions set out in the charter.

Discussion of how this decision of the legislator limits the rights of minority shareholders is justified; this is a debatable issue of corporate law that clearly goes beyond the scope of this commentary. Nevertheless, it is impossible not to notice that some violation of logic is observed here, as these special restrictive norms relate only to statutory restrictions. At the same time, para. 1 of art. 174 of the RCC allows for challenging transactions made on behalf of the company, as well as in cases where restrictions are established in other internal documents regulating the powers of the director. A somewhat strange situation emerges as a result. When challenging transactions based on a violation of internal restrictions established in the company's bylaws, the '1% of the shares owned' rule applies. However, this qualification does not apply when challenging a transaction based on restrictions established in other 'internal' restrictions regulating the director's activities. Perhaps there are grounds to apply the same qualification for challenging a transaction made in violation of 'internal' restrictions established not only in the charter but also in other internal documents.

The law does not explicitly specify the possibility of such a claim being filed by the members of a unitary legal entity and members of other management bodies (members of the supreme collegial body of the foundation, the collegial management body of an autonomous non-profit organisation, etc.). At the same time, there are grounds to believe that such persons fall under the definition of a person for whom it is established that their interests have been restricted. In para. 9 of the Resolution of Plenums of the SC and SCC of Russian Federation dated 29.04.2010 No10/22,[127] it is stated that in the commission guidance, unitary enterprise deals – which under the bylaws of such an enterprise could not be accomplished without the consent of the property owner – can be challenged either by the enterprise or by the owner of the property enterprise, pursuant to the regulations of art. 174 of the RCC.

If a person is not the one in whose interests 'internal' restrictions are established, such a person does not have the right to challenge the transaction based on para. 1 of art. 174 of the RCC. In particular, such a claim cannot be filed by the other party to the transaction. As another example, a similar specification is made on p. 10 of the Information Letter of the Presidium of the of SCC 20.01.1998 No. 28[128] ('the guarantor is not entitled to claim invalidation of the transaction, from which arose the secured obligation, on the grounds stipulated by art. 174 of the RCC').

In some cases, claims for challenging a transaction, made in accordance with the rules of para. 1 of art. 174 of the RCC and brought by members of the corporation or members of other management bodies,[129] are considered to be filed on behalf of the company.

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[127] Para. 9 of the Resolution of the Plenum of the SC and SCC РФ of 29.04.2010 No10/22.

[128] Para. 10 of the Information Letter of the Presidium of the Supreme Commercial Court of the Russian Federation No. 28 dated 20.01.1998.

[129] Corporations or members of other management bodies usually do not act on behalf of the organisation without a power of attorney.

In situations such as these, the law gives these persons the authority to perform such an explicitly specified legally significant action as challenging the transaction on behalf of the organisation. Such persons act as statutory representatives. The fact that such persons act as representatives is expressly stated in cl. 1 of art. 65.2 of the RCC in relation to claims filed by the shareholders of the company. Nevertheless, the same approach seems to apply to lawsuits filed by members of the corporation's executive bodies.

Concerning cases of such claims being filed by the participants of the corporation, this is directly indicated by p. 32 Resolution of the Plenum of the Supreme Court of the Russian Federation of June 23, 2015, No. 25:[130] the defendant should not be the company whose director violated the 'internal' restrictions, but rather the counterparty to the contested transaction (or the party to which the unilateral transaction was addressed).

Overall, based on a relatively sparse theoretical underpinning, art. 65.2 of the RCC formulates a claim to which the participant is entitled, but the award of which will be made in favour of the company. Due to the lack of a direct award, we refer to this as a derivative action, although it has a hybrid character and does not fall under the known classifications. However, we may conclude that derivative action against the director is close to a civil liability action that is contractual in nature.

It can be stated that the participant does not have a direct claim, but rather a derivative one, and must act on behalf of the company while not having any powers outside the process. The pros and cons will be demonstrated in the practice of employing this hybrid instrument; only time will tell. The theory and reality of derivative action tend to diverge. Its development is unpredictable, since the created model does not fall under any known theory. Nevertheless, it can be concluded from the above that the shareholder is given the same remedies as the company through a derivative action. This is unsurprising, given that if the law wishes to provide the shareholder with a mechanism to protect the company, lawmakers should at least project the same means of protection. This can also be attributed to the cap of arguments favouring the shareholder as a legal representative who is granted the same legal remedies as the company's executive body. This approach is radically different from that adopted in France and Europe and has more similarities with the American model of derivative actions.

2.3. Conclusion and Comparative Remarks: The Legal Nature Proposed

Any assessment of the derivative action's legal nature will undoubtedly require an analysis of the relationship between the director, the company, and the shareholder. The core focus of such a study should be the place that the shareholder occupies in this corporate triangle, which depends on the essential characteristics of the legal nature of the shareholder. A shareholder may be a statutory representative of the company, which makes him (through the company) bound by the contractual relationship with the director, or bylaws may tie him to all legal entity bodies. However, we should limit this discussion only with reference to the framework of the application of derivative actions. It must also be mentioned that the action capable of being brought by the shareholder may be divided according to which of the following two methods is used: namely, representation power (derivative action is the term that is more applicable in Anglo-American jurisdictions; actio pro socio is more applicable in Continental European jurisdictions) or proprio nomine (direct action). The latter is beyond the scope of our research.

[130] Para. 32 of the Resolution of the Plenum of the SCC of the Russian Federation No. 25 of June 23, 2015.

Whether individually or in a group, shareholders do not have the same identity as the company, since the legal entity has an independent legal capacity and is separated from the shareholder. It may be speculated that the will of the shareholder has a great deal in common with the will to conclude the transaction: both are volitional actions aimed at achieving legal consequences, and in both cases, the consequences of this expression of will be experienced by the company (who is entitled to any of the fruits of a successful derivative action).

We identified a fairly small number of theories regarding the legal nature of the relationship between the shareholder and the director. In our opinion, this is due to the fact that the shareholder is most commonly not motivated to bring a derivative action against the director (the French and Italian model; in particular, it can be observed in Italy due to prevailing blockholder control). In this respect, a shareholder must be certain that he will gain a better outcome by litigating the case on behalf of the company rather than selling his shares.[131] The practical demand for derivative actions is most often associated with the protection of the rights of minority shareholders, since the majority shareholder actually appoints the director to his position (nevertheless, in listed companies, it will often be the case that all shareholders are minority shareholders; the distinction can be made respectively between institutional shareholders and other categories of minority shareholders). However, this does not mean that the issue is not relevant. On the contrary, there is instead an urgent need to arrive at an appropriate mechanism that fills all legal gaps and lacunes, can be actively applied in practice and works as a useful tool to protect minority shareholders. It accordingly seems clear that derivative action serves as a strategic tool of control over managerial behaviour by a minority. Considering non-European jurisdictions (the United States and Russia), the majority shareholders may also need to bring a derivative action. This stems from the fact that the shareholder also has the right to bring a derivative action against third parties (to challenge the company's transactions, to hold third parties liable, etc.). In American practice, the utility of derivative actions for majority shareholders also stems from double derivative action claims.

In the jurisdictions studied, we found several legal theories regarding the legal nature of derivative actions:

1) Contractual theory, based on the concept that the company is the shareholder's representative while the director is the representative of the company. This means that the director and the shareholder are connected by representative functions, with the director being obliged to represent both the company and the shareholders (this approach is in line with that of G. Wicker, France). However, in our contention, this view should be criticised, since the director's general duties are owed to the company rather than to individual members. In a much broader sense, it would therefore be challenging to create an unnecessary exception in the theory of a separate legal entity.

2) Quasi-contractual theory, substantiated by the idea that no contractual relationship exists between the shareholder and the director, and therefore that such a relationship should be qualified from the point of view of the negotiorum gestio doctrine (France and Italy). This suggests that the shareholder acts with the altruistic goal of protecting the company from a bad director without being bound by a contract with the company. This view is justified by the fact that the director has a contract with the company (charter or employment contract), but is not bound by a contract with the shareholders.

3) Sui generis theory. In this case, the relationship arising from the derivative action cannot be attributed to either the first or the second theory. This means that some authors advocate the special regulation of such relations.

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[131] See in A. Reisberg, *Access to Justice or Justice Not Accessed: Is There a Case for Public Funding of Derivative Suits?* 37 BKLYN J. OF INTL. L., No. 2. 1023 (2012).

In our opinion, one more theory should be taken into consideration, which is not so often discussed in the jurisdictions studied. In this thesis, we have already noted that the derivative action brought by the director should be considered as a special case of statutory representation.

The essence of derivative action is to put at stake the civil liability of the director to the group of shareholders due to the mistakes committed by management. The limits of the organ's theory, previously denounced, arise from the alleged absolute alienation between the group of shareholders and the body of shareholders more broadly and, consequently, between the group and its director. However, in any event, the director's appointment is a matter for the group of shareholders, the authority of the bylaws or a decision of the general meeting. Moreover, the shareholders are the creditors of the director's various obligations; they decide whether to renew his management mission or to revoke it. Therefore, a contractual basis for relations necessarily exists between the group's directors and the group of shareholders.

The current doctrine in the jurisdictions under study also suggests that directors would be held under a regime of negotiorum gestio or special regime of liability, neither contractual nor tort, but sui generis. In short, this would be a so-called 'legal' liability, with its own rules and peculiarities, modelled after the few special liability regimes created by the legislator in other areas. However, in our view, opting for the sui generis option without any clear justification puts the relations of the parties in a legal vacuum, leaving open the same questions about the fate of the obligation before the conditions for its fulfilment mature that might arise under ordinary legal conditions. In the end, the legal institutions involved are multiplied unnecessarily.

The theory of negotiorum gestio must also be criticised in order to eliminate the prospect of the quasi-contractual nature of a derivative action brought by the shareholder. *Negotiorum gestio* is not recognised by some jurisdictions studied (such as England) and is not fully applicable to those where negotiorum gestio is considered as a separate legal doctrine (e.g. in Italy and France).

It accordingly follows from the above chapter that French and Italian doctrine tends to refer derivative corporate action to contractual liability claims. While there is no such clear qualification in Russia, it is worth noting the presence of arguments favouring contractual, corporate responsibility. Meanwhile, we believe that the contractual nature most accurately reflects the legal reality of derivative actions due to the statutory representation of shareholders on behalf of the company whose relationship directly matters most. A derivative claim brought by the shareholder is difficult to call a tort claim, since the shareholder sues on behalf of the company rather than himself; in other words, the company and not the shareholder will benefit from the claim, with the shareholder acting only as a procedural guide. In order for the claim to be recognised as tort, the shareholder must be compensated for damages. Compensation for damages in the case of derivative claims is provided not to the shareholder but to the company that is directly connected with the director via contractual relations.

As illustrated in French and Italian doctrine, several authors refer to the directors' responsibility to the company and the shareholders as having a tort nature due to their status as corporate bodies and not as a mandate. This assumption, however, cannot be confirmed. The application of the tort law provision is possible only in the absence of any contractual relationship between the perpetrator of the act and the company suffered from the harm caused.

Moreover, the closest approach to the qualification of such a relationship between shareholders and directors is the contractual theory. In this regard, shareholders should be considered statutory representatives in bringing a derivative action. Since, in all jurisdictions studied, a person's power to bring a derivative action is permissible only within the framework of the law and is limited to the shareholders, the latter should accordingly be considered as statutory agents. We acknowledge that a general device for participation in legal life is lacking in English law. However, we find it useful to consider the approach of a special case of statutory

representation: the application of derivative action by a shareholder. Such a power of representation is accorded by the statutory text, regardless of the will of the party represented, in particular a company (art. L. 225-252 of the FCC, art. 2393-bis of the ICC, art 53.1 of the RCC, Part 11 of CA 2006 of the English regulation, Rule 23.1 of the USA regulation).

Therefore, the doctrine has revealed the dual nature of the shareholder in a derivative action. Indeed, the word 'power', in reality, designates two ideas: on the one hand, a particular type of prerogative; on the other hand, the ability to implement this type of prerogative. The ambivalence of this word leads to the conclusion that the notion of power in the case of shareholders includes consideration of interests somewhat different from their own. Power-prerogative would be the possibility of defining the interest of the company, while power-aptitude would be the ability to bring a derivative action. This would designate the prerogative and the corresponding capacity, which would be exercised in the company's interest. These two would be counterparts of each other: one in the order of altruism, the other in the order of egoism in derivative actions.

We could thus speak of a power of representation. This is a power that would be the efficient cause of the particular imputation characteristic of a shareholder as a statutory representative. Indeed, there would pre-exist a prerogative with defined outlines that the representative would only exercise for any act imputing itself to another. If power is the efficient cause of derogatory imputation, one could not conceive of derogatory imputation without power. In the case of bringing derivative action as a specific case of business management, the shareholder interferes in the affairs of another (the company as a separate legal entity) and brings a derivative action on behalf of the company. As the conclusion of a contract, this shareholder's action will be considered as brought by the company directly; the same would hold for the case in which the agent concludes a contract on behalf of the company. The shareholder derives legal power of representation from the law. If power is the explanation for the shareholder's representative capacity, this means that this power pre-exists the management of the business: even before they acted in this capacity, the shareholder had the power.

This conclusion directly affects the legal nature and foundation of the derivative action. The derivative action is aimed at engaging the responsibility of one or more directors to the group. Directors may be responsible for representing and/or administrating the business. A legal relationship of this kind may be classified as close to contract liability.

Considering the shareholder as a statutory agent allows us to treat derivative action as a claim based on contractual nature. This approach is acceptable in all jurisdictions studied. We contend that this type of qualification will allow us to move in the direction of an integrated legal order caused by globalisation while not excluding the features emphasised by the national law of each jurisdiction studied. As U. Mattei notes, globalisation may be seen as 'a global institutional change affecting altogether most of the legal systems of the world'.[132] Moreover, the proliferation of specific rules and special derogations should not instil doubts regarding the contractual nature of the liability of directors, which also explains the most salient elements of its regime.

3. The Legal Status of the Parties

3.1. Introduction

[132] U. Mattei, R. B Schlesinger et al., SCHLESINGER'S COMPARATIVE LAW (Foundation Press) 6 (2009).

The triple identity test of res judicata generally requires the identity of objects, parties and causes of action. In this subchapter, we will examine the issues of the company's position in the procedure and its legal status to shed some light on the 'identity of parties' element when bringing a derivative action. This study will examine the following issues: the substantial and procedural component of the plaintiff in filing a derivative action; the legal status of companies and filing of derivative action (multilateral agency agreement or separate legal personality); the subjective right of action or the prerogative thereof; interest of the shareholders as a group and interest of the company; representation theory, double representation theory, or lack of representation in the presence of a private prerogative.

3.1.1. Procedural and Substantial Plaintiff

The question of the plaintiff's status in derivative action should be considered from two perspectives: namely, that of the substantial and procedural plaintiff. In this case, the procedural plaintiff is a member of the board of directors, a sole executive body, a shareholder or a creditor (in Italy and France), while a substantial plaintiff is a legal entity in whose interests the claim is filed.

As the above analysis suggests, different legal systems allocate the right to initiate a derivative action in the context of corporate law quite differently. An observation of all studied jurisdictions reveals that this split results in several law enforcement problems. It is based on the demonstration of a unitary basis for all hypotheses of the substitution of persons in an obligation that transcend the hypotheses of delegation and representation on behalf of the others. In other words, under certain circumstances and conditions, there would be a genuine autonomous right of substitution of the transferor by the transferee, allowing the substitute to implement the obligations arising from the fundamental relationship between them.

E. Jeuland claims that the existence of the right of substitution in France must be subject to certain conditions. Specifically, the substitute must first refrain from acting, since the idea of subsidiarity prevails in the substitute's action. The power of acting on behalf of another person is the basis of the 'direct link' that must exist between the substituted and the non-substituted party for substitution to occur.[133] The acquisition of authority leads to the emergence of alternative potestative rights, which instantly become valid and enforceable in practice, leading to the creation of an act with a declaratory nature. The conditions that must be met for the existence of a right of substitution and a replacement in a procedural sense are identical to the hypotheses of substitution in exercising a fundamental right; however, these are also supplemented by other imperatives related to compliance with the admissibility conditions of the claim.

The substitute must establish interest to act, which is assessed with regard to both the substituent and the substituted, albeit with different requirements. The substituent is required to prove that he/she is the holder of the right or benefit that he/she intends to invoke through the legal action, whereas the substituent must establish that he or she has an advantage in that substituent and that a legal relationship exists between him/her and the substituent, an 'authority', justifying that he/she may act to remedy injustice. Unlike a case of representation, in which the representative is only required to produce a procuratio ad agendum,[134] the conditions of interest and quality are not assessed on the status of the representative alone, since it is considered that the substitute holder also holds a proper right to act, namely the right of

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[133] Ibid. U. Mattei, R. B. Schlesinger et al., SCHLESINGER'S COMPARATIVE LAW (Foundation Press) 6 (2009).

[134] J.-Ch. Pagnucco, *Groupes De Sociétés - Les Pouvoirs Des Minoritaires Dans Les Groupes De Sociétés*. (Revue Mensuelle Lexisnexisjurisclasseur) 46 (2017).

procedural substitution.[135] The substituent and the substituted are thus two holders of the same right to act. However, the recognition of interest does not occur according to the same criteria, since the advantage expected by the success of the legal action differs between the two parties: a direct advantage for the substituent and a derivative advantage for the substituent.

In a derivative action, the shareholder may exercise his right to trigger derivative litigation to protect the substituent because he/she is passive and a legal bond exists between the shareholder and the company. The idea is that the derivative action is not based on a power of representation, legal or conventional origin, or a power of its own of legal origin, but rather on an autonomous right of substitution to which the shareholder is personally entitled. This analysis, which places the basis of derivative action under the aegis of a right of its own (namely a procedural right of substitution), would justify the consistent requirement in case law that the statutory representative demonstrate a personal interest in acting regarding the derivative action.

However, this proposal appears challenging to accept, both for reasons relating to the proposed system's various components and, more particularly, due to the difficulties encountered in finding a sufficient explanation for the scheme of derivative action in the jurisdictions under study. The rule of substitution is not entirely applicable to derivative action since the replacement of the person in the process does not actually occur. If it had occurred, it would likely cause a large number of uncertainties in law, since it would have to meet specific requirements and conditions provided by the statute.

First of all, it is a significant concern that the proposed system is of extraordinary complexity. The implementation implies a specific effort of abstraction and fiction, both on the part of parties to the proceedings and the courts. The application of these concepts, which are difficult to transpose in terms of legal technique, would give rise to difficulties in assessing the admissibility of the action.

Second, even going beyond this crucial complication of assessment, the proposal is based on the idea that the existence of an 'authority' or 'power' would give rise, in the assets of the substituent, to a potestative right of substitution, made useful for the future by the substitution itself; this operation must be analysed as a declarative act. In addition to the above criticism, the proposed explanation hardly conveys a firm conviction that the imprecision of the legal qualifications adopted, if they permit the reconstruction of the various stages of the mechanism from its result, reduces the scope of the demonstration to essentially descriptive virtues.

Finally, in addition to these very general considerations, it should be noted that, despite the rigor of the adopted approach, the notion of substitution is difficult to clearly distinguish from the hypotheses of representation. This idea can be found in the work of E. Jeuland, devoted to the study of substitution in the exercise of a substantive right, which has covered the possibility of acting in place of the right holder on simple scenarious of representation or mandate.[136] This reveals all the ambiguity of the notion of substitution and all the difficulties associated with defending its autonomy. By contrast, the substitution of others in the exercise of legal prerogatives constitutes both the very object and the main effect of representation.

The reason why we have turned to substitution theories for analysis is that the case law requires some kind of doctrinal justification for the fact that a shareholder files the claim, while the fruits of the judgment are received by a company, and that these are two independent legal entities. We contend that the filing of a derivative claim by a shareholder is a special case of legal representation. However, what is in our opinion even more remarkable is that such a

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[135]Ibid. U. Mattei, R. B. Schlesinger et al., SCHLESINGER'S COMPARATIVE LAW (Foundation Press) 6 (2009).

[136] See E. Jeuland, *Essai sur la substitution de personne dans un rapport d'obligation* (Librairie générale de droit et jurisprudence) 85 (1999).

representative function mixes the substantial plaintiff and the procedural plaintiff. This thesis aims to prompt reflection on this matter.

From the conducted comparative research, we may conclude that the analysed jurisdictions may be divided into two approaches regarding the company's position in the procedure. The first of these, the common law approach, treats the company as a nominee defendant and the shareholder as a nominee plaintiff in the procedure (US, England).[137] This is a somewhat illogical approach that raises doubts from the point of view of common sense. This is the case even despite its 'nominal' nature; after all, the criterion of 'nominality' is difficult to fit into a precise framework of procedural law. If, in substantial terms, the company receives the fruits of the court decision, then why is it considered a defendant? Why under these circumstances is the company a nominal defendant and not a nominal co-plaintiff? Does this contradict the nature of the derivative claim filed by the shareholder 'on behalf of and in the interests of the company'? This approach can only be justified from the point of view of covering the company's litigation costs. The second approach, the continental law approach, does not include the company as a procedural party, and the procedural plaintiff is a shareholder (France, Italy, Russia). This confirms our point of view on the emergence of a certain symbiosis between the procedural and substantial plaintiff in filing the derivative claim. The substantial plaintiff, in this case, becomes the company that receives the fruits of the court decision.

However, following an analysis of the existing literature, only a few theories can be presented to justify such a transition of the company shareholders from the substantial realm to the procedural one in derivative actions. Such a symbiosis of the substantial and procedural plaintiff should be justified, if not by a direct reference to the norms of substantive and procedural law, then at least by a doctrinal interpretation of the prevailing theory of the legal entity. This thesis applies to European jurisdictions, since, in the US, the company usually acts as a co-defendant in a lawsuit, and there is no substitution in the procedural realm. It would have been more relevant if the researchers had asked as to the nature of corporate relations within a legal entity. It is not the task of the present paper to examine the nature of corporate relations or the theories of the legal entity; however, these might be used as counterarguments to the concept of the substitution of a shareholder and the company in derivative actions.

First, under the current procedural legislation in the European jurisdictions under study, the company itself can be qualified as a plaintiff. The derivative action filed by the shareholders on behalf of the company can be considered as a type of statutory representation when a shareholder, subject to the condition of holding a number of shares (depending on the jurisdiction), can act as a representative based on corporate legislation. We have raised the applicability of the statutory representation as an explanation of the right to bring a derivative action by the shareholder several times in this thesis.

Second, on the one hand, in the substantial and legal realm, the shareholders protect their interests, even if this is done derivatively. In any case, the shareholders have invested their funds in the company and have the right to defend their rights in the 'investment'. It is in their best interest that the value of shares grows and the business thrives. The limitation of the right to bring a derivative action may be considered unconstitutional, as it violates constitutional guarantees concerning property rights and freedom of economic activity. On the other hand, the company becomes a direct beneficiary in procedural terms, as the award is collected in their favour. The shareholders' benefit is considered derivative, since if the claim is satisfied, they are only entitled to compensation from the defendant for the legal costs they incur.

Third, in the theory of procedural law, it might be suggested that the party of the plaintiff in a derivative action is divided between the procedural plaintiff, who has the authority by law to

[137] Quigxiu Bu, *The indemnity order in a derivative action*, 27 THE CO. LAWYER. No. 1. 2–13 (2006).

conduct the case in the interests of another (a shareholder), and the substantial plaintiff, in whose favour the case will be decided (the company).

Overall, our position, which we have justified from the very beginning, is as follows: it is necessary to determine the dual nature of the substantial and procedural status of the shareholder and the company itself in a complex way, since it is impossible to separate them due to the relationships between them, the mixed nature of their interests and the aforesaid corporate nature.

3.1.2. The Theory of Representation

The appearance of a derivative action in the domestic civil law has actualised not only the problem of determining the parties, but also the problem of determining the position of a shareholder in a legal entity that has brought a derivative action. The preceding discussion in this thesis has set the stage for an approach to the various questions regarding the nature of the derivative action in civil and common law. The starting point for discussion of the procedural plaintiff's legal nature is the organ theory of the legal entity and the notion of statutory representation.

According to a competing approach to the early classical organ theory developed in the doctrine, the director acts as a representative. However, the representation in derivative litigation in this case is specific. On the one hand, the director does not represent the shareholders but rather the legal entity itself. On the other hand, this type of representation is devoid of a contractual character but instead claims the statutory authority, which assigns to the group or individual a statutory representative regime in the same way that it assigns one to the minority or to a party incapable of expressing his will in an informed way. While the corporate body's terminology is retained, it is accepted that the corporate body exercises a function of representation concerning the aim of the legal entity, which is vested in it by law. This position is undoubtedly excessive in that it is based entirely on the ambiguity of the concept of statutory representation, which is likely to refer to two quite distinct realities. In the first sense, the statutory representative is the subject of the right, to whom the law confers the power to act on behalf of others. The legislation imperatively establishes that a person is responsible for ensuring the interests of the incapacitated person for all or part of the acts of his civil life. The person capable of carrying out this task is selected based on an authoritative determination of the law, which considers specific categories of individuals in the entourage of the incapable person who are capable of adequately looking after his or her interests. In this case, the term 'statutory representation' refers to the source of the attribution of this power of representation by the shareholder.

As alluded to earlier, the derivative action is a type of representative claim: that is, the shareholder acts on behalf of the company as its statutory representative, and the claim is made in defence of all other shareholders. In some instances, the legislator authorises third parties to act in place of the holder of a right; this is a notion of statutory representation, and fits the essence of the derivative action. The legislative response is to provide provisions regarding derivative actions when the law exceptionally authorises shareholders to act on behalf of the company and in the company's interests.

In this thesis, we refer shareholders to the notion of statutory representatives (we have mentioned our point of view regarding the legal nature of derivative actions in Chapter 1 Subchapter 2.2.2). The following arguments may support this hypothesis. First, the power of shareholders to bring a derivative action is accorded by the statutory text. Second, the purpose of a shareholder intervening in a company's affairs by bringing a derivative action is to temporarily

replace the company's executive body with a person who has been duly appointed and who fulfils the functions of the organ. It is known that the executive board and any other representative body of the legal person are statutory representatives. Accordingly, during the derivative litigation, the shareholder himself becomes a representative body of the company. Derivative action constitutes exceptional empowerment of the shareholder, elevating him to the rank of representative organ. When he intervenes, he does so as a statutory representative of the company. It is therefore possible to apply the notion of a statutory representative to shareholders who act as a representative in derivative actions.

If we may refer to G. Wicker, we may state that the shareholder uses the power of representation in the interest of the person on whose behalf he acts by bringing a derivative action. By contrast, in bringing a direct action, a shareholder is acting as a holder of a subjective right and uses his right as a part of his property.[138] In such a case, the legal consequences resulting from the exercise of power are realised directly in the legal sphere of the person on whose behalf the action is exercised. The powers vested in the representative oblige him to act in the name and on behalf of the principal (that is to say, in the latter's interest). The representative is exercising a subjective right belonging to the company (principal).

Nevertheless, in some jurisdictions (France and Italy), derivative actions brought by creditors do exist. This kind of action (art. 1341-1 of the FCC and art. 2394 of the ICC) allows a creditor to exercise the action instead of his debtor, who remains inactive. Some scholars may claim that the shareholder may be subsumed under the category of creditor due to the similar features of these two actions (discussed further in Subchapter 2.2.2 in Chapter 1). In our contention, it is barely possible to insert an equals sign between the shareholder and a creditor, between an action brought by the creditor instead of his debtor, and derivative action brought by the shareholders. There are two arguments that can be leveraged to reject this theory. First of all, actions brought by the creditor in France and Italy (*action oblique* in French, *azione di responsabilità sociale e dei creditori sociali* in Italian) have an extracontractual nature; this is because creditors have no contractual relationship with the director and generally act during bankruptcy proceedings. Classical derivative action brought by the shareholder may be brought when wrong is done to the company. Second, the main aim of the action brought by the creditor is to protect the insolvency estate, while an objective of the classical derivative action is to protect the company's interest.

This is a problematic and controversial issue, which is likely to be resolved with representation theory. In respect to that, in all the jurisdictions studied, a more congruent analogy would be that of the relationship between directors and shareholders, specifically when shareholders bring an action against their director. In other words, derivative action is a specific case of statutory representation, since it is the shareholder's exceptional empowerment to act as a director. It must also be noted that, in civil law, the shareholder's will does not replace that of the company. In particular, the shareholder intervenes in the legal place of the company because the prerogatives relating to the right to bring an action have been transferred to him via statute.

3.1.3. The Notion of Interest of the Shareholder (or Group of Shareholders)

Initially revived in American law, the concept of interest in corporate law was easily globalised into the European legal space. In particular, the idea of distinguishing the concept of

[138] G. Wicker & J. Amiel-Donat, LES FICTIONS JURIDIQUES: CONTRIBUTION A L'ANALYSE DE L'ACTE JURIDIQUE. 66–67 (1996).

the company's interest was adopted by French legislators after the US; the distinctive features of the interest of a legal entity and a shareholder are also discussed in Russian doctrine.

In this subchapter, we will try to answer two key questions about the category of interest in law: 1) in whose interest should the director run the company; 2) how the shareholder's interest or a group of shareholders is reflected in the derivative action.

The first question is very closely related to whether the company has an independent interest at all. This issue was the subject of very heated discussion after the US began to promote the idea of a company's corporate social responsibility and stakeholders' interests. Is this question relevant in our work, since the consequences of bringing derivative actions depend on the company's interest? Suppose such an interest does not exist, and the company only represents the general interest of shareholders (majority or all shareholders); in that case, the distinction between a derivative action and a direct action in court practice will result in difficulties. So, can a company have its own autonomous, independent interests that differ from those of the shareholders?

Reasoning from the point of view of abstract categories, the company may not have its own interests. The company makes the decisions that the shareholders make, hence the theory of common interests. In this case, the company acts as a provider for the implementation of shareholders' interests. Accordingly, it would also not be entirely correct to limit the interests of shareholders. If we single out a company as a provider of interests, then the list of those who form such interests will include not only shareholders, but also stakeholders.

The dominant ideas about the purpose of the corporation in the business environment influence the decision-making process on the part of the directors, even if it does not lie in the legal plane. An illustration of this dilemma can be found in the board of directors' decision regarding the closure of a corporation's branch, which is a city-forming enterprise. For example, directors may close a loss-making branch or consider upgrading production, which will require additional investment and is associated with the risk that the branch will remain unprofitable. In this situation, the prevalence of the company's shareholder-oriented goals in the business environment creates increased incentive for the directors to close the branch, since additional investments in unprofitable production and the vague prospect of achieving profitability may lead to additional questions from shareholders and, as a result, the possibility of not being re-elected as a director in the future. By contrast, the dominance of the company's stakeholder goal in the corporate consciousness increases the chances of maintaining the branch or, at least, making increased payments in favour of dismissed employees in excess of the statutory ones or uniting with state authorities to implement an urban population relocation plan.

However, as has been repeatedly stated in the doctrine, the company is born out of the theory of fiction. The interest of the company can be reflected in its contract, charter or bylaws. Even if this is a fiction, a legal entity may have rights and obligations, and its actions entail legal consequences. Thus, why should a legal entity not have its own interests?

Suppose that a legal personality is reduced to a simple technique of opposability of the enunciations in the bylaws. In that case, the bylaws contain the source and nature of the rights drafted by the shareholders as well as the definition of the relationship between the latter and the legal entity.[139] However, bylaws, as a sole or unilateral collective act, are characterised by the uniqueness of interest existing between its members, tending (at the conclusion or subsequent

[139] See for example V. Mehrotra, R. Morck, *Governance and Stakeholders*. Working paper No. 507/2017 ECGI Working Paper Series in Finance, 42 (2017); M. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*. 12 BUS. ETHICS QUART. No. 2. 235–256 (2002); Géraldine Goffaux-Callebaut, *La définition de l'intérêt social retour sur la notion après les évolutions législatives récentes* (Dalloz) 35 (2004).

accession to that act) towards achieving the same purpose. This finding sheds some light on the meaning to be given to the notion of the company's interest, which is decisive when it comes to deciding on the symbolic distinction made between the legal entity and its members. The real and personal effects of this act reflect the origin and nature of the shareholder's rights and a group consisted of its shareholders.

The widespread view that the interest of a legal person constitutes a radically different and higher interest relative to that of its members (shareholders) has contributed significantly to reinforcing the exceptional character typically granted to the ability to exercise derivative action. It must therefore be considered that, by acting to make good the damage caused to the legal person through the fault of its managers, the shareholder would perform an altruistic intervention to preserve a shareholder's interest. From another angle, it should be considered that by causing harm to the company, a director would harm the interest of the legal person and, derivatively, the celli of its members.

It should be noted that some difficulties arise when determining the interest of a company and a shareholder and/or a group of shareholders. Such a strain may be shown through the delineation of the interests of the company from the shareholders. This problem is caused by the separation of shareholders' interests and those of the closely held company. In such cases, the boundary becomes barely noticeable. The filing of a direct individual claim by a shareholder becomes almost impossible, since the shareholders' interests and those of the company are barely distinguishable. It is difficult to deny that the majority shareholder in a closely held company has, strictly speaking, identical interests to the company. The majority shareholders are owners of the company and are therefore in ultimate control of its affairs. The majority shareholder formally decides what interests the company should have by exercising powers in general meetings. By contrast, in larger listed companies, all shareholders can be classified as minority shareholders in the sense that none of them has either legal or factual control. These companies could be regarded as examples of management control, making it easier for such cases to distinguish the superior company's interest.

However, the limits of the symbolic opposition that commonly exists between the interest of the company and its members lead to preferring the analysis according to which the interest of the group must be sought in the common interest of the members according to the statement of the bylaws and the submission to the various legal requirements entailed by the choice of a specific form of group. The belief in the radical separation between the legal entity and the group members continually interferes in the analysis of the conception of interest; this has led to its being considered a higher form of interest that transcends the special interests of the shareholders. Uncertainties as to the consistency of this transcendent interest necessarily hypothesise, through the confusion they engender, the operative character of the socio-economic approach aimed at equating the interest of members with the interest of the company, or the more neutral approach that reduces the corporate interest to the best interests of the legal entity.

The prevailing attitude towards derivative actions in English courts at the time the *Foss and Harbottle* case was considered was that 'the best interests of the company', as determined by the votes of the majority, should predominate over the interests of the individual shareholders. This approach is consistent with the aspirations of institutional theory and aimed at seeing the company as a centre of interest distinct from that of its founders, members and shareholders. However, this concept, refocused on the corporate entity, does not provide evidence that the company's interest is truly distinct from that of its members. The term 'superior interest of the legal person' contributes to distorting reality and, without being inaccurate, proceeds from an anthropomorphic approach that is likely to add to the existing confusion. Suppose the interest of the shareholders is indeed the interest that the legal personality renders enforceable, the only

identifiable interest of the personified entity by virtue of the teachings of the theory of technical reality. Consequently, to consider that the corporate interest[140] lies in the higher interest of the legal person provides no information as to the concept of interest of the members: on the strictly technical level, the interest of the legal person is only the interest expressed by the constituent instrument of the group[141] supporting the legal person, and, as such, cannot be considered 'superior'. It is therefore obligatory to search for the content of the notion of social interest on the side of the interest of the members of the group personified.

If it is considered that the interest of the shareholders is the synthesis of the various categorical interests involved and their power relations at a given time, only the manager can assess the adequacy of the company's course. However, if the company's interest is equated with that of the members,[142] they have in their hands all the information required to challenge the conformity of the activities carried out by the manager with their interest.[143] The excesses of the maximalist conception of the company's interest should be removed in favour of more strictly legal analysis. The need to subject the investor to the requirements of satisfying an interest that exceeds his particular interests appears to negate the company's essential objectives, since the latter is precisely constituted, financed and directed to provide shareholders with the profit they expect.

The recurring idea that the interest of shareholders – or, more generally, the interest of the group – results from a necessary conciliation between conflicting interests, is legally inaccurate and contributes significantly to the prejudicial vagueness of the concept. Any personified group is obliged to hold an identifiable interest, since the existence of a separate interest is the fundamental condition for its accession to legal personality.[144] In particular, we refer to G. Wicker, who noted that 'the subjective right can be defined as the interest of a person or a group of persons, legally protected by means of the power recognised by a will to represent and defend him; the holder of the right is the collective or individual being, in whose interest this right is recognised'.[145] It is therefore necessary to apply the concept of legal personality whenever there is a person with interests of his own that are recognised and protected by law. However, the notion of interest necessarily refers to the members who are referred to under the bylaws. The bylaws of any group capable of personification can be analysed as a unilateral act:[146] simple

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[140] The linking of the definition of the interest of the shareholders to the legal person must, like the previous connection to the company, be criticised on the grounds that this approach only increases the imprecision of the concept. Indeed '(...) the fact of hanging up the interest of the shareholders to such vague and indefinite entities, reflects the disorder of the authors before the notion of Interest .... These are solutions of ease which consist in expressing by inconsistent theories a notion which is already ...' – Gérard Sousi, *Représentation en justice d'une personne morale et nullité des actes de procédure*, 2 LA GAZETTE DU PALAIS. 427–435 (1984).

[141] See for example F. Deboissy, *Le contrat de société,* SOCIÉTÉ DE LÉGISLATION COMPARÉE. 119, 136, 142 (2008).

[142] The general formulation of the classic 'problem of collective action': 'in large groups, when the contribution of each member to the maintenance of the public good is insignificant, but each member equally benefits from the use of the good, the result of collective action to maintain the good will be uncertain; moreover, the public good will not be provided until there is an external mechanism to perform their duties to act together in favour of group interests'. M. Olson, THE LOGIC OF COLLECTIVE ACTION (Harvard University Press) 44 (1965).

[143] There is an alternative way to meet the current demand for social obligations of the business: direct assignment of the duty to act in the interests of stakeholders to directors or the duty to show 'non-transparency' in relation to all stakeholders (duty of impartiality). See for example A. N. Licht. Stakeholder *Impartiality: A New Classic Approach for the Objectives of the Corporation*. European Corporate Governance Institute. Working Paper No. 476/2019. 23–29.

[144] G. Wicker & J. Amiel-Donat, *Les Fictions Juridiques: Contribution A L'analyse De L'acte Juridique*. 206 (1996).

[145] Ibid. G. Wicker & J. Amiel-Donat, *Les Fictions Juridiques: Contribution A L'analyse De L'acte Juridique*. 206 (1996).

[146] Ibid. G. Wicker & J. Amiel-Donat, *Les Fictions Juridiques: Contribution A L'analyse De L'acte Juridique*.. 206 (1996).

when it establishes a single-person grouping, or collective when it constitutes the bylaws of a multi-person grouping. While the individual unilateral act materialises the assignment of subjective rights of the member to the satisfaction of a particular interest, the unilateral collective act presupposes that the act does not achieve conciliation between parties. However, it does bring together a bundle of unilateral declarations of will, all of which undertake to follow in the pursuit, defence and promotion of a particular interest. Unlike co-contracting parties, the author of the individual unilateral act or the co-adherents to the collective act therefore have identical interests, and as such constitute only one part.[147] Therefore, the latter are united by a common interest defined by the terms of the bylaws, perceived and pursued unitarily by all members of the group personified.[148] Once the unity and stability of its content have been demonstrated, it remains to be verified that the meaning to be given to the members' common interests can be objectively determined; otherwise, it would not contribute in any way to the clarification of the notion of interest.

However, in our contention, discussion of the company's interest does not provide any insight into the commercial life of the company. First, the doctrine of the best interests of the legal person proposes the notion of the unique and transcending interest of the shareholder. However, the concept of the best interests of the legal entity remains as vague as that of the company's interest. Second, the alternative theory represents the monistic conception, as there is a fictitious interest of the company (G. Wicker). Finally, the theory of mixed interests was proposed.

The question may be answered by the observation that, while the interest of the group lies in the common interest of the members of the group as expressed in the bylaws, the nature and content of this interest are necessarily influenced by the form of the group chosen by the members to achieve their common purpose. Indeed, the distinction between the different forms of groupings proposed by the legislator lies in the particularity of the object assigned to them. Therefore, the interest of the group must, at the same time, be determined based on the aim pursued, which is the foundation of the membership expressing the notion of corporate interest as used in case law, and bring together the distinctive signs of all the conceptions defended in doctrine.

3.2. Comparative Study

3.2.1. Common Law

In order to bring a derivative lawsuit, a plaintiff must have been a shareholder at the time that the improper transaction occurred (see in r 19.9 (1) of the English CPR and r 23.1 of the American Federal Rules of Civil Procedure).[149] A shareholder also has the right to bring a claim if he became a shareholder ipso jure from an ex-shareholder who had owned shares at the time of the allegedly improper transaction (for example, a beneficiary of a will or an ex-spouse after a divorce).[150] A person need not be a shareholder of record to have a right to bring a derivative

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[147] Ibid. G. Wicker & J. Amiel-Donat, *Les Fictions Juridiques: Contribution A L'analyse De L'acte Juridique*.. 226–228 (1996).

[148] G. Wicker & J. Amiel-Donat, *Les Fictions Juridiques: Contribution A L'analyse De L'acte Juridique*.. 151–152 (1996).

[149] *Bank of Santa Fe v. Petty*, 116 NM 761, 867 P2d 431 (NM App 1993); *Davis v. Harrison*, 25 Wash 2d 1, 167 P2d 1015 (1946); P. P. Harbrecht, *The Contemporaneous Ownership Rule in Shareholders' Derivative Suits*, 25 UCLA L. REV. 1041. 1052–1055 (1978).

[150] *Hurt v. Cotton States Fertilizer Co.*, 145 F2d 293, 295 (5th Cir 1944).

action; according to the case *Rosenfeld v. Schwitzer Corp*, an equitable interest may be sufficient.[151]

According to the English CPR, r 19.9 (3), the claimant in derivative proceedings will always be the shareholder who seeks to bring the action on behalf of the company. In each case, the company for the benefit of which a remedy is sought must be made a defendant to the claim (see in r 19.9 (3) of the CPR).[152] The shareholder is suing to enforce the company's rights, not his own. A similar approach is shown not only in English law, but also in American law (see in r 23.1 of the Federal Rules of Civil Procedure) According to the logic of the legislation and case law, it is essential for the company to be a party to the proceedings to ensure that it is bound by the court's judgment (hence aiming to block it from bringing subsequent action for the same relief) and that it receives any fruits recovered or obtains the benefit of any other relief granted in action.[153]

However, Lord Clarke points out in *Roberts v. Gill* that CPR 19.9(3) is based on the main purpose, and that the court must have the discretion to postpone the joinder of the company in a case. His argument is based on there being circumstances in a particular case that make it just to dispense with the necessity of joinder, suggesting that joining the company to the proceedings is meaningless if the claimant gives appropriate undertakings to hold any fruits recovered for the company's benefit, especially if there is proper consent and the general principle that no action should fail in case of non-joinder of a party.[154]

3.2.2. French Law

As far as the duality of the mode of the derivative action ut universi or ut singuli, the methods of assessing the subjective conditions of admissibility of the corporate action depend directly on the identity of the agent who brings an action. In the case of legal action, as with most of its functions, the corporate representative proceeds by virtue of a power of representation, which leads to the application of the rules specific to legal representation.

The French literature distinguishes between two different situations when determining the legal status of a person who initiates derivative action against directors (ut universi and ut singuli).

Under art. R 225-252 (*ut universi action*) of the French Commercial Code,[155] the company, as an 'aggrieved party', has the right to defend its interests and claim damages if several conditions are met. As we have already determined, such actions allow us to model the concept of a derivative action ut universi. In this case, the claim is filed on behalf of the company by its statutory representatives. Thus, in the context of monistic theory, such a legal representative is the chairman of the board of directors under art. R 225-51, para. 1, 2 of the French Commercial Code. If the sole executive body consults with one or more directors at the same time, they also have the right to bring a derivative action, since the right of directors to file a claim is not limited under French law according to art. R 225-56 of the French Commercial Code. The main obstacle

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[151] *Rosenfeld v. Schwitzer Corp.*, 251 F Supp 758 (SD NY 1966).

[152] *Roberts v. Gill* (2010) 2 WLR 1227, (39), Lord Collins.

[153] V. Joffe QC et al., *Minority Shareholders* (Oxford University Press) 42–43 (2019).

[154] Ibid. V. Joffe QC et al., *Minority Shareholders* (Oxford University Press) 42 (2019).

[155] See for example J. Redenius-Hoevermann, M. Germain, *La Responsabilité Des Dirigeants Dans Les Sociétés Anonymes En Droit Français Et Droit Allemand* (LGDJ) 313–319 (2010); P. Merle, A. Fauchon, *Societes Commerciales*. (Dalloz) 147 (2018).

is that both plaintiff and defendant may be members of the board, which may cause a conflict of interest.

However, in general, a claim is not filed until the company suffers damages due to the director's fault. It should be noted that French joint-stock companies have long been run by powerful chairmen of the board of directors; thus, in practice, no one on the board of directors would dare to file a lawsuit against the 'president'. In practice, lawsuits are often only directed against 'unloved' members as an attempt to get rid of them. If a derivative claim is brought, such circumstances are preceded by a change of the board of directors. Thus, the company will make demands on former managers.[156]

According to art. L. 225-252 of the French Commercial Code,[157] each shareholder can bring a derivative claim under the ut singuli model. Thus, if someone acquires shares of a company in which the director has caused losses to the company by his actions, such a shareholder has the right to file a derivative claim. The right to file a derivative claim is based solely on the shareholder's ownership of shares at the time of initiating such a claim procedure and at the time of the proceedings. If the status of a shareholder is terminated, a claim for damages is considered impossible. After the plaintiff-shareholder has sold his shares, only the new shareholder is authorised to make a derivative claim following the transfer of ownership of the shares, even to complete legal proceedings.[158] Thus, the former shareholder will be unable to file a derivative claim, even if the right to compensation for damages arose when he/she was still a shareholder.

Consequently, the transfer of a shareholder's shares is accompanied by losing the right to file a derivative claim. The right to file a derivative claim in the context of ut singuli is then transferred to the new owner of the shares. Similarly, there is no requirement for the duration of ownership of shares. The possibility of providing for a different rule in the company's bylaws could also limit patterns of abuse in practice.

If one of the shareholders no longer wishes to proceed with the case, then under para. 3 art. R 225-169 of the FCC, 'the waiver of a claim in the course of the proceedings of one or more of the shareholders…, either by losing their status as a shareholder or by voluntarily withdrawing the claim, does not affect the continuation of the legal proceedings'. In other words, a shareholder's waiver of a claim in court proceedings does not affect the procedure if the conditions established by law were met at the time the case was initiated in court.

Thus, the former shareholder will be unable to file a derivative claim, even if the right to compensation for damages arose when he was still a shareholder. It follows that the transfer of a shareholder's shares is accompanied by the loss of the right to derivative action, even if the losses occurred when such a person was still a shareholder. The right to a derivative action in the context of ut singuli is then transferred to the new owner of the shares.

Moreover, it should be noted that the legislation defines the shareholder as the procedural plaintiff of a derivative action (L. 225-252 ComC) and the participant of a limited liability company as the procedural plaintiff of a derivative action (L. 223-22 ComC). This approach, which considers a participant in a legal entity as a procedural plaintiff in a derivative claim and a legal entity as a substantial plaintiff, has been supported by judicial practice.[159]

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[156] J. C. Personne & B. Linel, *Responsabilités des dirigeants d'entreprises*. (L'Argus, Paris). 26 (1984).

[157] See for example P. Merle & A. Fauchon, Droit commercial; SOCIETES COMMERCIALES. (Dalloz). 147 (2018).

[158] Cour de cassation, Chambre commerciale, 26 janvier 1970, Rev. Soc. 1970.

[159] See in Cour de cassation, Chambre commerciale, 29 mars 2017 Rev. Soc. 2017. The claim was brought by Société de participation dans les énergies renouvelables, which owns 41% of the share capital of Compagnie du

3.2.3. Italian Law

According to art. 2393 of the ICC, the action for directors' liability is brought based on the resolution of the shareholders' meeting.[160] The resolution that allows for bringing an action against a director or directors may result in the removal of the directors from their positions if it is adopted with the favourable vote of at least 20% of the share capital. Correspondingly, the resolution for the replacement of a director is also adopted by the shareholders' meeting.[161]

Under the last para. of art. 2393 of the ICC, the company can waive the right to bring an action for liability providing that an express resolution approves such waiver or settlement of the shareholders' meeting, unless 20% or more of the share capital vote against this decision.

According to art. 2393-bis, the derivative action against directors may, in fact, be brought by minority shareholders, thus overcoming the possible inaction of the management group. In order to avoid pretextual or blackmail actions against directors, the shareholders taking the initiative must represent at least one fifth of the share capital or another measure provided for in the bylaws not exceeding one third. In companies that use the venture capital market, it is sufficient that the action be promoted by shareholders representing one fortieth of the share capital or the lowest percentage provided for in the bylaws. This accordingly represents a protection tool that can be used by stable and organised minorities, particularly in companies listed by institutional investors. It should also be excluded that the assembly may renounce the exercise of the derivative action in a preventive and general way.

Meanwhile, the 2003 reform in Italy failed to solve one of the core problems associated with the claim both in theory and in practice, specifically what practically happens to the claim if the plaintiff sells its shares during the litigation, hence lowering the threshold requirement below 1/5. Moreover, there is no solution to the problem in most jurisdictions under study concerning the similar issue arising when the company is in the process of reorganisation (mergers or acquisitions) and the final conversion of shares as a result of their repayment decreases the percentage of the share capital possessed by the shareholder in the company. This issue is essential, given the lengthy nature of proceedings in Italian and Russian courts and the fact that majority investors do not want to fall into the trap of their investments.[162] Since the relevant rule does not contain an answer to this question, the decision should be derived from the general principles of civil procedure law. However, academic scientists have not given a clear answer to this question. Most scholars believe that the plaintiff must hold at least one fifth of the shares during the entire period of consideration of court cases; if the participation rate falls below the threshold, the defendants will have the right to request a dismissal of the claim, as it does not meet the requirements of the law. It should be assumed that this approach is incorrect, since this will in practice again lead to the mortification of the derivative action[163] and may cause problems in special situations such as mergers. Such 'a continuing ownership rule' is accepted in US legislation; however, it may cause some practical problems.

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vent, against Compagnie du vent and Mr. X as defendants in the claim for damages. The French Court of Cassation points out that the claim was brought in favour of La Compagnie du vent.

[160] E. Gilardi, *Liabilities of Directors and Shareholders of a Company Limited by Shares under Italian Law*. (Artículos, Derecho Mercantil) 3–4 (2012).

[161] Ibid. 3–4.

[162] L. Enriques and F.M Mucciarelli, *L'azione sociale da parte delle minoranze* in Pietro Abbadessa and Giuseppe B. Portale, *Il nuovo diritto delle società*. Liber Amicorum Gian Franco Campobasso. (Utet, Torino). 876–878. 2006.

[163] P. Marchetti & L. A. Bianchi, *La disciplina delle società quotate nel testo unico della finanza*. (Giuffrè). 988–989 (1999).

3.2.4. Russian Law

Under the legislation, a member of the legal entity's right to bring a derivative action is set out in art. 53.1 of the CC, para. 5 of art. 71 of the Joint-Stock Companies Act, and para. 5 of art. 44 of the Limited Liability Companies Act.

According to para. 10 of the Resolution of the Plenum of the SCC of the RF of July 30, 2013, № 62, the person who filed the claim shall not be refused to satisfy the claim, if at the time the director made an action (omission) that resulted in losses for the company, or if he was not a shareholder in the company at the time of the direct occurrence of losses. The mechanism of action of this explanation can be traced back to the subsequent judicial practice. In cases when the share was acquired subsequent to the action causing the loss, the courts consider the claim, 'since under paragraph 3 of art. 53 of the Civil Code and art. 225.8 of the CPC[164] the member of the legal entity who filed a claim for compensation by the director of damages acts in the interests of the legal entity, in connection with which it has no legal significance when the plaintiff becomes a shareholder in the company'. However, the rule does not apply to a person who has lost participant/shareholder status; thus, it does not apply to those who managed to sell shares. According to the position of the commercial courts, the alienation of a share deprives the former participant of the right to file a claim in any case, even if the losses were caused at the time of his participation in the company.[165]

The absence of legal regulation of the beneficiary's procedural position regarding derivative actions in arbitration proceedings should not negate the shareholder's ability to exercise his right to judicial protection under art. 71 of the Federal Law, 'On Joint-Stock Companies'. Otherwise, such an action on the part of the company should be considered as an abuse of the right.

The problem of determining the parties in the proceedings of a derivative action was solved by para. 32 of the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 25. Under the provisions of Resolution No. 25, the corporation is recognised as the plaintiff on claims for compensation for losses caused to the corporation. Upon challenging the concluded transactions, the shareholder is recognised as a representative.

These provisions are consistent with the ideas highlighted in the doctrine in terms of determining the parties in a derivative action. The parties conduct the process on their behalf; a court decision is made in their interest. They are subject to the legal force of the court decision; the court resolves a dispute about the subjective right or the personal interest of the parties protected by law;[166] the parties have a substantial and procedural interest in the case.[167] All these

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[164] The Resolution of the CC of the North-Western District of 08.11.2013 on case No. A56-14323/2012.

[165] The Resolution of the FCC of the North-Western District of 19.03.2014 in case No. A56-20662/2013; The Decision of the Commercial Court of Moscow city of 26.11.2014 in case No. A40-117444/2014 (SPS 'Consultant-Plus'); the Decision of the Commercial Court of the Chelyabinsk region of 26.03.2015 in case No. A76-1792/2014 (SPS 'Consultant-Plus'); The Decision of the FCC of the North-Western of 23.08.2013 in case No. A27-16156/2012; The Decision of the CC of the North-Western District of 08.11.2013 in case no. A56-14323/2012; the Resolution of the CC of the North-Western District of 08.11.2013 in case No. A56-14323/2012; the Resolution of the Ninth Commercial Court of Appeal of 08.05.2018 N 09AP-15596/2018 in the case N A40-221163/17 (SPS 'Consultant-Plus').

[166] M. S. Shakaryan, *Uchenie o storonahl*; M.S. Shakaryan, *Izbrannye trudy. S.-Pb.:* ID R. Aslanova, 'Yuridicheskij centr'. 620 (2012).

[167] V.A.Musina, N.A. CHechinoj, D.M.CHechota, Grazhdanskij process pod red. V.A.Musina, N.A. CHechinoj, D.M.CHechota. (M.: PBOYUL Grizhenko). 71-73 (2001).

features are fully applicable to a legal entity: a party in the derivative action. However, they can only manifest themselves if the applicant is properly legitimised and the claim is qualified as a derivative claim at the stage of initiation of proceedings.

3.3. Conclusion

In striking a proper balance with regard to the tension identified above, this chapter has highlighted the importance of several key observations and proposals: 1) all the jurisdictions under study require a registration of membership (an ownership of shares) to bring a derivative action; 2) a shareholder's ability to bring a derivative action may be qualified as a specific case of statutory representation; 3) the interest of the group lies in the common interest of the members of the group as expressed in the bylaws, while the nature and content of this interest are necessarily influenced by the form of the group chosen by the members to achieve their common purpose; 4) there is a substance called 'interest of the company', which is sometimes reflected by the will of the stakeholders and, accordingly, has a fictitious nature; 5) there is a combination of substantial and procedural plaintiffs while bringing a derivative action; 6) since a derivative action is brought on the company's behalf, the company obtains any benefit from the action.

In all three civil law jurisdictions studied, shareholders can challenge the validity of shareholder resolutions in court if it violates the provisions of a company's bylaws or the law.[168] The influence of the legal personality on the organisation of the shareholders was perceived early on as the source of uncertainties regarding the basis of derivative action. Within the scope of this chapter, however, analysis is based on the postulate of the so-called internal (corporate) relations of legal personality. According to this conception, the reflection must engage with the idea that the relationship is concluded directly between the agent and the principal. Ample evidence supports this theory. Therefore, it must be considered that shareholders and members of the executive body are statutory representatives of the company.[169] This theory is taken up and systematised as the concept of separation between internal and external corporate legal relationships.

The management bodies, as agents, are responsible to the company and to shareholders, who are principals of the company, for any defective performance of their agency power. The shareholder may act against their agent either in isolation or through other corporate agents (representing their interests in the company). However, the opposition of the relationships between the members of the group and those of the group with third parties is undoubtedly key to the modern debate on the legal nature of the legal entity. Notably, this approach suffers from a significant flaw that owes more to its formulation than to its profound meaning. The finding that legal personality does not exist in relationships between shareholders proceeds only from an intuition, devoid of technical justification, and in some respects joins the excesses of the fiction theory. This approach, as initially formulated before being further elaborated upon in the context of a renewed analysis of the legal action, is therefore not admissible as such. The difficulties experienced in measuring the influence of the group of shareholders' legal personality on the mechanism of derivative action may have prompted another proposal, which benefits from following the more thoroughly signposted paths of the theory of legal action. This thesis is developed based on a descriptive observation, namely that the derivative action could constitute

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[168] For France, see art. L. 225–252 in FCC. For Italy, see arts. 2377–2379-ter in ICC. For Russia, see art. 53.1 in Russian Civil Code.

[169] Regarding external and internal relations, see also G. Wicker & J. Amiel-Donat, *Les fictions juridiques* (Atelier national de reproduction des thèses) 80–97 (1996).

a shareholder's corporate right to execute his function as a statutory representative of the company; this would explain the procedural and substantial dualism of a derivative claim and reflects that the group's interests are the company's interests.

In general, therefore, it would seem that the proper procedural plaintiff must have the status of shareholder in all jurisdictions, indicating that that person must own shares in the company. Several reasons may justify this: 1) ex-shareholders usually act in their own interest, because they are no longer associated with the company and do not hold any shares belonging to the company; 2) it may cause essential issues if a person becomes a plaintiff in litigation on behalf of a company in which he no longer holds shares or from which he is not entitled to receive dividends.[170]

Furthermore, it should be noted that on the subject of commercial legal entities, it can be taken into account that setting the threshold of ownership of a certain number of shares avoids eventual abuse by minority participants (shareholders), for whom the size of the share in the authorised capital (and hence the potential interest) clearly does not correspond to the costs associated with the derivative claim.

4. Double (and Triple) Derivative Action or Action of a Shareholder of a Subsidiary

4.1. Introduction

In Subchapter 2, the legal connections between the company, director and shareholder were carefully examined. In a derivative action, a group of shareholders, along with the company, are considered principals in relation to the agent-director. This construction allows us to substantiate the contractual theory of derivative action and to link it with other elements of internal corporate relations. We can therefore discuss the allocation of a separate group interest that affects the company's interest, which should also be taken into account while managing the company or protecting it throughout any legal proceedings and securing the most favourable outcome. Subchapter 3 also explores connections between the legal status of shareholders and the right to bring a derivative action. In order to file this type of claim, it is essential that the shareholder owns company shares. This chapter follows from the previous two since it solves the problem of filing such derivative actions by subsidiaries. The theoretical matters we are interested in determining throughout this subchapter are as follows: may a 'shareholder of a shareholder' file such a claim? The concept of the double derivative action is further explored. In common law and civil law, the answer to this question may be found in different ways. However, we should not rush into splitting the two approaches; although the approaches are different, the two concepts may have the same denominator. In our view, there is a risk of expanding preclusion in relation to a fairly broad interpretation of the 'same party',[171] and a double derivative claim may serve as an additional explanation for it.

A recent line of research has been established to suggest that when a shareholder of a parent company brings a derivative action on behalf of a subsidiary for alleged wrongs to a subsidiary, this is known as a 'double derivative' action.[172,173] Double derivative action is identical in form to a traditional derivative action, except for the fact the claim is brought by 'the

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[170] See A. Reisberg, DERIVATIVE ACTIONS AND CORPORATE GOVERNANCE (Oxford University Press) 205 (2007).

[171] The party who cannot bring a cause of action that is too similar to an earlier cause of action that has already been resolved.

[172] *Rales v. Blasband*, 634 A.2d 927 (Del. 1993).

[173] R. C. Ferrara & J. D Pizzi, SHAREHOLDER DERIVATIVE LITIGATION: BESIEGING THE BOARD (Law Journal Press) 4.26 (2005).

shareholder of the shareholder'. Such claims are referred to as double (triple, multiple) derivative claims and are widely used and recognised by every Anglo-Saxon jurisdiction.

In the case of a double derivative action, the suit is brought on behalf of one corporation (e.g. a parent) to enforce a cause of action in favour of a related corporation (e.g. its subsidiary). The plaintiffs must be shareholders or beneficial holders of stock of the company that owns, controls, or dominates the company that possesses the alleged cause of action.[174]

Current research seems to indicate that directors of corporations are liable to the corporation, shareholders and third parties for misconduct in their management, or for any violation of laws and bylaws. Within the group of companies, minorities obviously retain the right to take legal action against the directors of the group to which they belong in respect of derivative action.

Related considerations may concern the powers that the minorities would hold to act against the directors of a company to which they do not belong, but whose mismanagement would threaten the finances of the holding and, therefore, more or less directly, the fate of all its members. In this regard, two questions arise: can the minorities of a parent company act against the directors of a subsidiary? Can minorities in a subsidiary company bring an action against the directors of a parent company? With regard to the action of a parent company's minorities against the directors of a subsidiary, an analysis of positive law is necessary. In cases where the director of the subsidiary has caused damage through management mistakes, the action for compensation belongs to the company he manages, while its exercise of a derivative action, opened when the bodies of the group would not have themselves requested compensation, remains reserved to the shareholders. Therefore, it must be agreed that the parent company's shareholders cannot apply to the director of the subsidiary for compensation for the social damage suffered by the latter in civil law (Russia, France, Italy).

This finding calls for two counterarguments. First, this limitation of the right to act for compensation contradicts the recognised right of these same minorities to request management expertise relating to the operations carried out within the subsidiary. Second, this solution of positive law could be challenged. Indeed, could we not advocate for the recognition of a so-called double derivative action by the shareholders of the parent company wishing to act against the managers of the subsidiary? These minorities are in fact part of a society associated with the victim of corporate harm. The parent company is itself represented by an agent, often entrusted (in particular as a permanent representative) to exercise the prerogatives of a shareholder within the subsidiary on behalf of the parent company. It is, therefore, the manager of the subsidiary that would have the right to exercise the derivative action against the managers of the subsidiary if the subsidiary did not itself act against its legal representatives. If the permanent representative himself does not act in a proper manner, would it be inconceivable that the shareholders of the parent company could act directly against the director-wrongdoer of the subsidiary?

Is it possible to prosper in the second case, where it is the minorities of a subsidiary that would bring a derivative action against the directors of the parent company? It would be impossible here to reason on the chain of shares, and there would be no greater chance of obtaining compensation for the specific damage suffered by the minority of the subsidiary due to the detachable faults committed by the managers of the parent company, for the same reasons discussed above.

Our core goal is to determine whether or not the doctrine of res judicata is applicable in cases where the claim is filed by the beneficial owner. I will attempt to assess and consider the

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[174] Ibid. R. C. Ferrara & J. D Pizzi, SHAREHOLDER DERIVATIVE LITIGATION: BESIEGING THE BOARD (Law Journal Press) 4.26–4.27 (2005).

admissibility of such claims in jurisdictions where it is not possible for the beneficial owner to file a derivative claim, subject to the limitation of the doctrine of res judicata.

4.2. Comparative Study

Russia

In Russia, double (and triple) derivative actions are not permitted. The reason is that the participants in the 'mother', 'grandmother', 'holding', etc. structures that would apply with such a statement are not shareholders (i.e. non-participants).

There has already been much debate on the possibility of bringing a double derivative action. Several lawyers have openly advocated for this approach by insisting that beneficial holders of the company's stock have the right to bring derivative action. They offered the following explanation.[175]

First, they cite the famous *Aspect-Finance* case, in which the Supreme Court allowed the minority shareholder of the top floor offshore 'high-rises' to challenge the resolution of a general meeting on the lower floor; this occurred despite the fact that, formally speaking, cl. 7 of art. 49 of the JSC Law grants this right only to shareholders.

Second, the argument is also made that since beneficial holders of company stock may under certain circumstances be liable for losses caused to the company or subsidiary liability to creditors, the same logic should work in the opposite direction; accordingly, they should be granted some corporate rights in the company, specifically the right to a derivative claim.

Meanwhile, difficulties may also arise concerning the lack of the right to bring a double derivative action in legislation. We have mentioned that, in our contention, the shareholder acts as a statutory representative by bringing a derivative action. This might also be the case regarding double derivative action, which involves acting in such a manner as to protect the assets of the company in the subsidiary company. It is established as a general rule that a share is a property right, and that the holder is entitled to exercise the rights attached to it. Thus, we may advocate for double derivative action when a shareholder of a parent company files a claim on its behalf against the director of a subsidiary. However, there is some difficulty associated with justifying a double derivative action being filed by a shareholder against a sister company director.

Such cases are an example of changes providing for a broad conception of derivative actions. Changes such as these lay out fair and effective mechanisms for resolving shareholder disputes in the holding company. Accordingly, the parent company shareholder can trigger a double derivative action against the director of the subsidiary or challenge agreements concluded. Therefore, this action can be qualified as a 'second-degree derivative action', or to use an analogous American term, 'double derivative action'. In this regard, it may be advocated that such a broad interpretation would give the shareholders of the holding the right to bring an action against all directors of both the parent and the subsidiaries. At one level, this may lead to a certain generalisation of the lack of real autonomy for subsidiaries and the lack of legal bodies of the subsidiary. Is such a generalisation suitable, and if so, to what extent? In this respect, a significant theme in the derivative litigation is that although the shareholders of the parent company are not shareholders of the subsidiary and do not have the statutory right to bring a

[175] The resolution of the Supreme Court of the Russian Federation No. 302-ES19-4069 of 12.04.2019 in case No. A74-3619/2018.

derivative action, it is true that the effectiveness of the protection of the shareholder's assets will dominate. This is a controversial and challenging issue, which is unlikely to be accepted on a broad scale in case law. Nevertheless, it is still early days, and one cannot predict how things will develop in future with any degree of accuracy.

The US

Here is what the American courts (in particular, the Supreme Court of Delaware) write regarding the possibility of a double derivative claim (double derivative action) being brought by a shareholder of the parent company against wrongdoers on behalf of the subsidiary:

The plaintiff, who owned stock in the parent corporation, brought a double derivative action as a shareholder of the parent, claiming (among other things) mismanagement and breaches of fiduciary duty by the directors of the subsidiary that resulted in harm to the subsidiary and, consequently, to the parent as the subsidiary's only shareholder.[176]

In these circumstances, our law recognises a right to proceed double derivatively. Otherwise, there would be no procedural vehicle to remedy the claimed wrongdoing in cases where the parent company board's decision not to enforce the subsidiary's claim is unprotected by the business judgment rule.[177]

Thus, in the US, the courts allow multiple derivative claims, even though the plaintiff in such a case formally violates the (seemingly sacred for the Americans) instrument of derivative claim rule of continuous ownership of shares, or the contemporary ownership rule. The claim is filed by a person who was not and is not a participant in the company that suffered losses, either at the time of the disputed actions or on the date of the claim.[178]

Moreover, American courts and researchers argue that multiple derivative claims are permitted not only when the inactive parent company is a 100% shareholder or is a majority owner of the subsidiary that has suffered losses, but also when such a 'mother' is a minority:

'Suit by the stockholder of a parent corporation need not be limited only to situations in which the subsidiary is wholly owned or in which there is no one else who can sue.'[179]

In this respect, in describing how a court may distinguish direct and derivative actions, the court stated that a claim must be maintained derivatively if the injury falls equally upon all shareholders. In particular, it is worth examining the case of *Bokat v. Getty Oil Co*., in which a stockholder of a subsidiary brought an action against the parent company director for loss caused to the subsidiary. The claim was found to be derivative in nature.

England

The literal interpretation of art. s. 262(1) of CA 2006 does not permit a shareholder (participant) of a company to bring a double/triple derivative claim. However, The Law Commission[180] pointed out that the question of double/triple derivative claims was best left to the courts to resolve.[181]

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[176] *Lambrecht v. O'Neal*, 3 A.3d 277, Delaware Supreme Court's holding No. 135 (Del. 2010). https://courts.delaware.gov/opinions/download.aspx?ID=142610

[177] Ibid. Delaware Supreme Court's holding No. 135 (Del. 2010). https://courts.delaware.gov/opinions/download.aspx?ID=142610

[178] R. C. Ferrara & J. D Pizzi, SHAREHOLDER DERIVATIVE LITIGATION: BESIEGING THE BOARD (Law Journal Press) 4.26– 4.27 (2005).

[179] *Kaufman v. Wolfson*, 151 N. Y. S. 2 ed. 530, 532 (N.Y. App. Div. 1956); see also D. W. Locascio, *The Dilemma of Double Derivative Suits*, 83 NW. U. L. REV. (1989).

[180] Law Commission Report, *Shareholder Remedies* (No. 246), para 6.110.

[181] See Victor Joffe QC et al., MINORITY SHAREHOLDERS (Oxford University Press) 82 (2019).

After the corporate law reform in 2006, there was some hesitation in England as to whether the reform concerning the wording of art. 260 of CA 2006 did or did not eliminate the well-known common law double claims. However, in the *Universal Project Management* case, as superbly written by Judge Briggs, the court decided to reject the elimination of the double action.[182]

The court writes that if ordinary and double derivative claims had peacefully coexisted in common law in the past, in today's even more complicated world – when businesses are structured not only in the form of corporate high-rise buildings, but entire skyscrapers – the assumption that the legislator would prefer to get rid of double derivative claims through the reform would appear incorrect:

A conclusion that by narrowly defining locus standi for all company derivative claims to members of the wronged company Parliament abolished a convenient procedural device for doing justice in cases of wrongdoer control, in a modern context where multi-layered corporate structures with holding companies and subsidiaries are ever more common, hardly commends itself as an exercise in justice.[183]

Furthermore, the court compares the situation of an ordinary derivative claim (when a direct participant is suing the director for losses) and a double derivative claim (when a participant of the holding structure is doing so) and concludes that the difference between the two scenarios is purely technical. Furthermore, there is not the slightest doctrinal reason why the Parliament should suddenly decide to get rid of one means of protection while preserving the other:

There is, on the face of it, no persuasive reason why Parliament should have wished to provide a statutory scheme for doing justice where a company is in the wrongdoer control, but none where its holding company is in the same wrongdoer control.[184]

Next, the court turns to nature and the idea of derivative action. In so doing, it makes an important observation: the law on derivative action does not stem from the status of the investor in this particular society itself, while the next round requires a search for 'enough interested persons' who could in the absence of better candidates plausibly defend the rights of the company and lodge such a claim on its behalf. In this regard, it does not matter whether such a person was found from among the direct participants or one floor (or several) higher.

'Once it is recognised that the extension of locus standi beyond the immediate members of the wronged company is based upon the need to find a suitably interested claimant to pursue the company's claim when it is disabled from doing so, the precise nature of the corporate body which owns the wronged company's shares is of no legal relevance, provided that it is itself in wrongdoer control and has some members at least who are interested in seeing the wrong done to the company put right. As I have said earlier, the locus standi given to the member of the intermediate entity is not an aspect of that person's rights as a member, but simply the consequence of the law's search for a suitably interested representative, or champion, of the wronged company.'[185]

It must be noted that such double (or triple) derivative action goes beyond the concept of derivative action; a derivative action is an action that can only be brought by the shareholder. A

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[182] *Universal Project Management Services Ltd v. Fort Gilkicker Ltd & Ors* (2013) EWHC 348 (Ch) (26 February 2013).
[183] Ibid. *Universal Project Management Services Ltd v. Fort Gilkicker Ltd & Ors* (2013) EWHC 348 (Ch) (26 February 2013).
[184] Ibid.
[185] Ibid. *Universal Project Management Services Ltd v. Fort Gilkicker Ltd & Ors* (2013) EWHC 348 (Ch) (26 February 2013).

shareholder or member of the subsidiary is not strictly speaking the shareholder of the wrong done company; however, they can still bring such an action under the old common regime.[186]

France

The provisions of art. L. 225-252 of the French Commercial Code authorise the shareholders to exercise the derivative action ut singuli only against the directors of a company in which they hold shares.[187] Therefore, the shareholders of a parent company cannot bring a derivative action against the directors of one of its subsidiaries.

However, in this respect, a major flaw in practice is that although the action brought by plaintiffs who are shareholders of the parent company against the directors of the subsidiary is inadmissible, it is sometimes possible to bring a double derivative action.[188] In this respect, the situation is not necessarily a dead end. Indeed, the doctrine that has addressed this question has observed that a holding company should not cause an investor to lose control over their assets. Therefore, the protection of minority shareholders requires removing such obstacles as the company's separate legal personality, which results in their 'splendid isolation'. Hence, in certain situations, it is precisely the idea of recognising a kind of double derivative action that allows minority shareholders of a parent company to bring an action against the directors of a subsidiary in cases of omission on the part of the parent company. In other words, a double derivative action becomes an additional tool if the director of the subsidiary does not bring a derivative action. Meanwhile, only the Criminal Chamber has permitted a double derivative action thus far; commercial courts remain silent.[189]

It is generally agreed that the ut singuli action is a very useful mechanism for use by minorities to defend the company's interests against its director. It is, however, an exception to the principle that 'no one shall plead by proxy' (*null ne plaide par procureur*).[190] The Court of Cassation[191] ensures that it remains exceptional by very strictly interpreting the texts that govern it.[192] This decision of the court is in accordance with this trend, as it prevents the shareholders of a parent company from acting based on that action against the directors of a subsidiary.

In the most recent case of this kind, several minority shareholders of a parent company had appointed managers of two of its subsidiaries in an ut singuli action and requested the appointment of an ad hoc representative to represent the companies in the proceeding. Since the companies were subsequently the subject of safeguard proceedings, the judicial administrators (who became commissioners for the implementation of the plan) objected to these requests on the grounds that they were inadmissible. The judges of the Court of Appeal considered the ut singuli action inadmissible on the grounds that the plaintiffs were not shareholders of the subsidiary and therefore could not bring an ut singuli action against its managers. Before the Court of Cassation, the shareholders argued that the shareholders of a parent company were entitled to exercise the ut singuli corporate action against the directors of a subsidiary.

Even if art. L. 225-252 of the Commercial Code provides that 'shareholders may [...] bring the corporate action for liability against the directors or the managing director', the clarification that they are the only shareholders of the society to suffer the damage is clearly understood. For

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[186] *Universal Project Management Services Ltd v. Fort Gilkicker Ltd and others* (2013) EWHC 348 (Ch), (2013) All ER (D) 313 (Feb).

[187] Cass. com., 13 mars 2019, no 17-22128, Cts Y. c/ M. C. et a., D (2017).

[188] Court de Cassation, Chambre criminelle, du 13 décembre 2000, 99-86.875.

[189] E. Scholastique, *Détermination des personnes habilitées à exercer l'action sociale ut singuli dans un groupe de sociétés*. (Recueil Dalloz, Dalloz) (2002). P. 1475

[190] Chesne*, L'exercice ut singuli de l'action sociale*. (RTD civ). 347 (1962).

[191] Cass. com., 13 mars 2018, n° 17-22.128.

[192] P. Le Cannu, B. Dondero, *Droit des sociétés.* (LGDJ, 7e éd., 2018). 323-390 (in particular para. 483.).

this action to be extended to the shareholders of a parent company against the directors of a subsidiary, it would likely have required a specification in this sense of the text (for example, by indicating, after 'the shareholders', 'the members' of a company or of a company it controls within the meaning of art. L. 233-3). Such an opportunity already exists in terms of management expertise, another valuable tool for minorities. While the case law refused the requests for management expertise made by the shareholders of the parent company concerning the subsidiaries, citing the autonomy of the group companies, the legislation authorised such an action. From that point forward, the minority shareholder of the parent company may request expertise in management operations concerning one of its subsidiaries under art. L. 225 - 231 of the French Commercial Code.[193]

Nevertheless, this option is only applicable in the parent-to-subsidiary direction; maintaining a strict interpretation of the rules, the Court of Cassation recently recalled that the shareholder of a subsidiary could not subpoena the parent company on the basis of this text.[194] In other words, only the company of which the applicant is a shareholder (and, if applicable, a subsidiary of the latter) may be assigned as part of a request for management expertise. Management expertise within groups therefore exists but is limited. In the case of a derivative action, in the absence of a text expressly authorising it, the door seems to be closed for minorities since they are not shareholders of the company, and are thus not directly victims of faults perpetrated by its managers.

Jean-Christophe Pagnucco argues that it is a misconception to prohibit double derivative actions and has explained the concern for the protection of minority shareholders. It justifies that the procedural rules applicable to the various expertise existing in company law are adapted when they have a group of companies in the holding as their framework or object.[195]

As Florence Deboissy points out from Nicolas Ferrier's research, there is a distinction regarding the type of abuse perpetrated by the parent company: the first type results from an infringement of the interests of the subsidiary, while the second results from an infringement of its autonomy.[196] This is why French lawyers do not risk recognising a double derivative action: the unpredictable nature of the abuse of rights by the parent company's shareholders may lead to the loss of the legal identity of the subsidiary company. In particular, the shareholder of a material company intervenes in the affairs of a subsidiary (independent) company without good reason. However, if the shareholder is a majority owner, such a claim immediately turns into a de facto claim of a shareholder on behalf of the company, which is a traditional derivative action. This kind of action should not raise questions of applicability.

In his discussion of 'Les pouvoirs des minoritaires dans les groupes de sociétés', Jean-Christophe Pagnucco showed that derivative action may be applicable in holdings.[197] Drawing on the work of Frédéric Staziack, Deboissy highlights that, in these cases, the parent company is prosecuted and sanctioned not in its capacity as a majority shareholder but rather in its capacity as a director, by law or in fact, of its subsidiary.[198]

Italy

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[193] Cass. com., 14 déc. 1993, n° 92- 21.225: JurisData n° 1993-002709.

[194] Cass. com., 21 March 2018, n° 16-20. 879: Juridata n° 2018-004263.

[195] J.-Ch. Pagnucco, *Groupes De Sociétés - Les Pouvoirs Des Minoritaires Dans Les Groupes De Sociétés.* (Revue Mensuelle Lexisnexisjurisclasseur) 29 (2017).

[196] F. Deboissy, Rapport de synthèse. (Revue Mensuelle Lexisnexisjurisclasseur) 42 (2017).

[197] J.-Ch. Pagnucco, *Groupes de sociétés - Les pouvoirs des minoritaires dans les groupes de sociétés*. (Revue Mensuelle Lexisnexisjurisclasseur) 29 (2017).

[198] F. Deboissy, *Rapport de synthèse.* (Revue Mensuelle Lexisnexisjurisclasseur) 42-43 (2017).

According to art. 2393-bis of the ICC, the derivative action may be enforced by shareholders holding at least one fifth of the share capital or a different percentage as stated in the bylaws of the company, which cannot be more than one third. In addition, for listed companies, the action may be exercised by shareholders holding one fortieth of the share capital, or a lower amount if specified in the bylaws.

To date, to the best of our knowledge, no study has explicitly examined the possibility of the application of double derivative action in Italy. However, based on the literal interpretation of the article, we understand that a shareholder who files a derivative claim must own shares in the company. In our view, the shareholders of a parent company therefore cannot bring a derivative action against the directors of one of its subsidiaries under Italian law.

4.3. Conclusion

Current research seems to indicate that the issue of the double derivative action is quite complex. The opinions of both those who are for and those who are against such an action are at odds. There are those who advocate that the right to this protection method for recovery of losses from the director should be granted to the beneficial owner. First of all, we must again pay attention to the specifics of a derivative claim: it is filed in the company's interests, and the amount awarded is recovered in its favour. Consequently, the company receives the property that was disposed of due to the fault of the company's management; ultimately, creditors interested in increasing the property mass of this company benefit from this.

In European jurisdictions (France, Russia, Italy), the strongest argument against granting such a right is the lack of instructions in the law. Corporate law requires strict regulation of corporate procedures if legal entities are to achieve the status of reliable counterparties. Participants in the turnover who enter into legal relations with legal entities should understand with whom they are dealing and how the corporate structure of the legal entity can then harm them in terms of the disclosure or non-disclosure of the person who is the actual beneficial owner.

Suppose that the civil code of European jurisdictions has a gap in this respect. In that case, this would suggest that making a reservation for double derivative claims should become a proposal for further legislative reform, or (as in England) a task for the broad interpretation of the rule governing the derivative action (art. 65.2 of the Russian Civil Code, L. 225-231 of the French Commercial Code and art. 2393-bis of the Italian Civil Code) by the courts.

Moreover, as a matter of particular urgency, the double derivative suit should be used in a situation similar to that described in case law when the majority owner or several majorities control and paralyse the parent company. It is logical to assume that all unsightly happenings occur in the ‘daughter’ company with their consent and approval.

Responding to such phenomena with a double derivative action is necessary for the same doctrinal reasons that it is applied in all civilised corporate legal systems: some means of claiming damages must be granted to the company under these circumstances. Otherwise, the law may fail in its purpose, which will lead to injustice without redress. However, the additional layer in the corporate structure would prevent the occurrence of wrongs and ‘would insulate the wrongdoer from judicial intervention’ (see *Brown v. Tenney*).[199] However, it is our contention that double derivative action is not compatible with the notion of the status of a legal representative of the company as it is explained in the context of traditional derivative actions.

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[199] *Brown v. Tenney*, 155 Ill. App. 3d 605, 508 N.E.2d 347 (Ill. App. Ct. 1987).

Many related theories have been developed in the jurisdictions under study. While the authors of such theories have sought to provide a doctrinal justification for double derivative claims, each of these theories has clear inconsistencies. None of the proposed theories is universal in the sense of being capable of explaining the admissibility and legal nature of double derivative claims. In this regard, most recent court decisions have been based on the practical feasibility of double derivative claims. Practical expediency, in turn, is expressed in the performance of a deterrent and compensatory function. The deterrence of managers will not be excessive, since the 'business judgment rule', and res judicata are reliable protection against unfounded and litigious claims.

It could be argued that a traditional derivative action is sufficient to eliminate the consequences of violations at the level of subsidiaries and to protect investments therein by the parent company. At the same time, in European practice, several isolated cases that have a certain remarkable history have been considered thus far. For example, a single case of double derivative actions in Russia and France cannot be compared with the US's broad approach. To the best of our knowledge, there are no other Russian or French cases (except as provided in this work) where this approach has been adopted in the context of the application of double derivative action. In England, double derivative actions are prohibited, while in Italy, as far as we know, derivative actions were considered exclusively in line with the American paradigm. One cannot predict how these matters will develop in future; the purpose of this conclusion is to shed some light on these questions.

In addition, in our view, the right to a double derivative action is much easier to justify in cases where the subsidiary has only one member (the parent company); otherwise, the other participant will be able to exercise its right to a derivative claim against the director of the subsidiary, which reduces the need for a justification of the double derivative claim.

5. Derivative Actions and Shareholder Class Actions

5.1. Introduction

In Subchapter 3.1.3, we provided arguments outlining the interest group theory in derivative actions. We have already indicated that the interest of the group lies in the common interest of the members of the group, as expressed in the bylaws. The nature and content of this interest are necessarily influenced by the form of the group chosen by the members to achieve their common purpose. Indeed, the question arises as to whether derivative claims from several shareholders (participants) can be classified as a group or collective action. It is generally agreed that courts can recognise the res judicata effect on a class action judgment, which also seems to concern the specific class action device of the 'opt-out rule' or 'opt-in rule'. This subchapter provides an overview of current research on recognising derivative actions brought by several shareholders as class actions. One more question that needs to be asked, however, is that of whether class actions and derivative actions have a line of contact. In Chapters 2 and 3, the concept of res judicata is further explored.

Taking a historical view, the various types of actions that are now called 'representative actions' have existed 'since the earliest days of English law'.[200] Class actions are more of a recent creation of civil procedure, created by English courts as a tool that is 'an exception to the

[200] *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832, 119 S.Ct. 2295, 2308 (1999).

usual rule that litigation is conducted by and on behalf of the individual named parties only'.[201] According to the 'usual rule' referred to in the *Califano* case, it is necessary that 'all persons materially interested, either as plaintiffs or defendants in the subject matter of the bill ought to be made parties to the suit, however numerous they may be'.[202] As Justice Story explained:

The reason is that the court may be enabled to make a complete decree between the parties, may prevent future litigation by taking away the necessity of a multiplicity of suits, and may make it perfectly certain, that no injustice shall be done, either to the parties before the court or to others, who are interested by a decree, that may be grounded upon a partial view only of the real merits.[203]

It is generally accepted that a class action can be defined as an action where one shareholder (participant) acts in the interests of all, while not all those who join have access to essential procedural rights, apart from the right to access information related to the dispute and replace a representative who does not perform his duties properly. The main purpose of shareholder derivative action is to allow shareholders to pursue claims against the wrongdoer, while a class action enables a specific group of shareholders to sue the management of the corporation.[204]

In this subchapter, an analysis of the relationship between a derivative claim and a group or class action will be conducted using the 'multiple parties' category. Group and class actions reflect the method most effective in managing this multiplicity. By its legal nature, the multiplicity of parties in a representative or a class action is a modified complicity. For a derivative action, the multiplicity of parties is not the main feature. A secondary feature that characterises a derivative claim under the English and American models is the multiplicity of parties that are not complicit.

5.2. Comparative Study

Common law jurisdictions

The device of group actions was first developed in English law for the purpose of protecting the interests of large groups of persons whose rights had been violated by the actions of the same person. Subsequently, this institution was considered in the US, where it underwent significant development under the name 'class action'.[205] Class actions and shareholder derivative claims are both considered to be devices of private enforcement that involve multiple plaintiffs collectively filing a claim on behalf of a group or company.

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[201] *Califano v. Yamasaki*, 442 U.S. 682, 700-701, 99 S.Ct. 2545, 2557-2558 (1979).
[202] *West v. Randall*, 29 F. Cas. 718, 721 (No. 17,424) (C.C.D.R.I. 1820) (Story, J.).
[203] Ibid.
[204] 'The purpose of the derivative action (is) to place in the hands of the individual shareholder a means to protect the interest of the corporation from the misfeasance and malfeasance of 'faithless directors and mangers'' – see in *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, 548 (1949).
[205] The first proceedings resembling class actions appeared in England in the eighth century, when the inhabitants of the settlements agreed on 'collective proceedings' against, for example, feudal landowners. By the eighteenth century, historically, opportunities for class action in England had dried up. This was facilitated by the general mood in favour of large business associations, the paralysis of courts during the wars, and the fact that the possibility of considering such disputes was concentrated only in one court. However, this type of action was developed further in another country. In 1833, the United States adopted the so-called Equity Rule 48 for 'representative litigation', which prescribes how to act if too many similar cases are sent to the court. This formed the basis of modern legislation on such claims.

As numerous scholars have noted, a shareholder derivative action is a special form of class action in common law since the plaintiff shareholder acts to represent the interests of several or all shareholders and the interests of the company itself.[206] In accordance with art. 19.6 of the English CPR, for representative parties with the same interest: (1) where more than one person has the same interest in a claim, (a) the claim may be begun; or (b) the court may order that the claim be continued, by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest. The section concerning derivative action is located in pt. II, 'Representative parties'. Another part of the CPR is called 'group litigation'. This is a fundamental observation, as it will assist in interpreting these legal institutions from a systemic point of view. A study by Edward F. Sherman (2002) examined and explained the English rule from an American perspective as follows: 'it allows courts to issue group litigation orders providing for 'the case management of claims which give rise to related issues of fact or law''. This is essentially a consolidation device with elements of the American transfer of federal court cases. Parties who aim at joining the class action are required to 'opt-in'; this stands in contrast to representative litigation, which can effectively proceed without the awareness, participation and/or control of members of the class.[207]

Under the FRCP (the Act that governs civil proceedings in the US district courts), these actions were initially treated under Rule 23 as a species of class actions more generally. Thus, existing accounts fail to resolve the contradiction between class actions and derivative actions. However, the Kennedy study showed that the problem in the derivative action is compounded: while derivative and class actions are conceptually distinct, it is not at all unusual to have a lawsuit that alleges both derivative claims, redounding theoretically to the corporation's benefit, and class claims asserted on behalf of the shareholders.[208]

A report by Richard Booths has found that the law favours derivative claims initiated by the company rather than by shareholders.[209] According to § 23(b)(3) FRCP, a class action for damages may be certified only under one condition: 'a class action is superior to other available methods for fairly and efficiently adjudicating the controversy'. If a derivative action is an equally good (or even better) means of resolving the matter, FRCP 23 itself legally requires that the procedure be tried as a derivative action. Richard Booths went even further, claiming that 'it is all the more curious that the law has evolved as it has to emphasise a class action remedy rather than a derivative remedy'.[210]

Such approaches, however, have failed to address the core issue in corporate litigations. Current studies attempt to differentiate between different types of representative/collective and class actions in corporate litigation.

First, in our view, class actions brought by shareholders on behalf of shareholders (the model of direct action) and group actions brought by shareholders on behalf of and in the name of the company (the model of derivative action) should be distinguished. An individual shareholder may seek to challenge the company in his personal capacity. For instance, the company might deliberately fail to give notice to a particular shareholder or a class of

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[206] Bryant G. Garth, Ilene H. Nagel & Sheldon J. Plager, *Empirical Research and the Shareholder Derivative Suit: Toward A Better-Informed Debate.* 48 L. AND CONTEM. PROBS. No. 3. 138 (1985). See also in Kennedy, *Securities Class and Derivative Actions in the United States District Court for the Northern District of Texas: An Empirical Study*, 14 HOUS. L. REV. 769 (1977).

[207] Edward F. Sherman, *Group Litigation under Foreign Legal Systems: Variations and Alternatives to American Actions*, 52 DEPAUL L. REV. No. 401. 423–424 (2002).

[208] Bryant G. Garth, Ilene H. Nagel & Sheldon J. Plager, *Empirical Research and the Shareholder Derivative Suit: Toward A Better-Informed Debate.* 48 L. AND CONTEM. PROBS. No. 3. 138 (1985).

[209] S. J. Griffith et al., RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION. 82–83 (2018).

[210] Ibid. 83.

shareholders. Under such circumstances, the shareholder can sue on his own behalf or sue in the representative form on behalf of other shareholders or a class of shareholders. This will be a direct representative action in the sense of RSC Order 15 Rule 12 as opposed to being on behalf of and in the name of the company. This distinguishes such a claim from a derivative claim, which is brought on behalf of and in the company's name. If the procedural conditions (such as common questions, adequacy of representation, and numerosity) are satisfied, the direct suit on behalf of all shareholders is referred to as a class action.

Second, having absorbed the features of a class action, the derivative action has the following features. The first is procedural complicity: when one or more shareholders act in a group, they act on behalf of and in the company's name. In our view, a severe weakness of the existing approaches is that shareholders bringing derivative claims are grouped, not to protect their own interests and thus create the interest of the group, but to protect the company. Their interest is only a derivative interest and can be reasoned by the fact that the derivative claim has adopted the features of a class claim, but has not become a variation of it. In connection with this, it is proposed to distinguish the category of a collective action that will explain a lot on the part of the plaintiff. Representation without authority is also a feature of a collective derivative action when all other shareholders do not need to issue a power of attorney to conduct a derivative claim; using a certain method of combining claims (combining only homogeneous claims), the plaintiff must 'honestly and adequately' represent the interests of all other shareholders.

The condition of interest in action is superseded in the American courts by the meeting of four preconditions for the class action: numerosity (that there is a simply significant number of persons likely to act in the collective interest); commonality (that there is indeed a community of interests between the potential claimants); typicality (that the means on which the group action is based are, in fact, specific to the class availing itself of it); adequacy of representation (requires that class counsel be competent and qualified and that no antagonism exists between the representatives and the class members).[211]

Judgement rendered as a result of a class action necessarily has an effect on the substantive rights of persons who have not actually been a party to, or actually represented in, an action. Thus, since it must necessarily be able to modify the legal situation of third parties to the proceedings, the effectiveness of the decision rendered following a class action implies that the principle of relativity of res judicata is abandoned.

Nevertheless, the principles of res judicata should be applicable to collective derivative actions. This is another quality that derivative claims have transferred over from class actions. The doctrine of res judicata applies in representative shareholder litigation and, unless a class member affirmatively opts out of the class, he is bound by the judgement after notice (whether favourable or not).

In the US, class actions aim to bring civil liability actions against managers to compensate individual damages suffered by shareholders. When the latter acts to obtain compensation for damage caused to the company, the plaintiff follows the path of the derivative action. This finding is, however, problematic in a class action, as the class of claimants is not strictly identified.

Russia

In this respect, Russian law allows shareholders to file class actions dispositively. The advantage of a class action is that it can speed up the legal process involved. Class actions first appeared in the CPC of the Russian Federation in 2007; under Russian law, their essence is that

[211] *Baffa v. Donaldson*, 222 F.3d 52, 60 (2d Cir. 2000).

one shareholder (participant) acts in the interests of the group, while all those who joined do not have essential procedural rights (except for those required to become acquainted with the case materials and replace a representative who does not perform his duties properly). Indeed, the question arises as to whether derivative actions brought by several shareholders (members) can be classified as group or collective.

Under the provisions of this CPC, a shareholder may join the claim not only by forming a group but also as a co-plaintiff. It can, therefore, be concluded that in addition to the right to a derivative claim, an individual participant has the right either to join the group and form a class action or to not join the group initiating the claim but to instead act as their co-plaintiff, in which case the participant will create a class action.

Thus, the corresponding logic of the provisions of the RCC on joining the claim in the procedural forms provided for by law allows us to conclude that, under Russian law, there are group claims and collective claims. However, these claims are derivative in corporate disputes on challenging a transaction, excluding a participant or compensating for damages. This stands in contrast to the French legal regulation, which does not recognise class actions but does allow for a collective derivative claim.

Moreover, under Russian law, according to para. 32 of the resolution of Plenum of SC Russian Federation from 23.06.2015, Law No. 25, all procedural rights associated with the progress of the case should be granted to participants and the company only collectively, and then only on especially important issues (e.g. withdrawal of a claim or a change in reasoning or the subject of a claim can be made only with the consent of the participant who filed the lawsuit).[212] French law is more flexible in this regard and does not restrict changes to such issues with the consent of the claim initiator, since the shareholders' association is designed to arrive at a common opinion in relation to a derivative action, while the participant under French law is free to withdraw the claim when deemed necessary without the consent of the person filing the claim. This can easily be explained by the fact that, in this case, the participants do not form a strictly regulated group or class action, although a specific class or group of people interested in filing a claim is, in fact, formed.

France

With respect to art. L. 225-120 of the Commercial Code, the right to claim allows shareholders to form an association for the purpose of initiating the collective derivative action. This provision of the law has nothing to do with the class action rules since the shareholders' association does not represent the shareholders in court and does not defend their claims in the suit. Therefore, the principles of French civil procedure law are not violated. However, the rules of art. L 225-120 of the French Commercial Code do not apply to directors held liable for individual damages to shareholders since art. L. 225-252 of the French Commercial Code assumes that only derivative actions are possible for shareholders' associations, while direct actions are aimed primarily at protecting their individual rights and interests.

In a derivative action, the damage is collective, since all company shareholders are affected equally by the harm in question (deterioration of the quality of shares and a decrease in the value of the shares). Each shareholder suffers a depreciation of his assets that may vary in its

[212] For the purposes of art. 65.2 of the Russian Civil Code, the corporation in the face of the respective body and joined to the claim the parties may not, without the consent of the party who filed the claim, wholly or partly reject the claim, or change the grounds or subject of the claim, to conclude the agreement and the agreement on actual circumstances. A corporation participant who has applied to the court with a claim in the case of joining the claim of other participants also has no right to perform these actions without the consent of all such participants. Other members of the corporation who disagree with the stated requirements may enter into the case on the defendant's side as third parties who do not make independent claims.

consequences depending on the specific context. Nevertheless, since this depreciation is proportional and results from the same cause, it does not matter whether the consequences for an individual shareholder are more or less serious; it is considered equal for all of them.[213] Accordingly, collective derivative actions should not be recognised as class actions in the sense of American class action.

According to art. L. 223-22 para. 3 of the Commercial Code, French law authorises the shareholders of limited liability companies within the group to exercise a derivative action. Provided that the agents represent at least one tenth of the share capital, they are permitted to act in a common (class/group) interest, as well as to charge one or more of them (at their expense) to represent them in support of the derivative action against the managers. In addition, the partners are provided with the option of entrusting one of their group with a power of attorney to pursue a specific form of joint representation action in court.

In certain companies only, and under certain conditions, the law allows for the collective exercise of the derivative action *ut singuli* by an association of participants or shareholders. Law No. 2003-706 of 01.08.2003 on financial security (Loi de Sécurité Financière) was adopted with the objective of restoring trust among investors. This law derivatively opened up an option that enables certain associations to act in shareholders' defense.

Shareholders of public limited companies whose shares are listed in a regulated market (and, by reference, shareholders of limited partnership companies and simplified joint-stock companies (SAS)) are entitled to group into an association of shareholders to collectively exercise derivative action. The legislator opened up the possibility of bringing a class derivative action to shareholders who collectively hold at least five per cent of the voting rights while also providing for a gradual reduction, depending on the amount of the share capital involved, of the participation thresholds necessary for the collective exercise of derivative action (art. L. 225-120 of the Commercial Code).[214] This constitutes an undoubtedly welcome derogation from the well-known adage in procedural law, which states in principle that in France, excepting the king, 'no one shall plead by proxy' (*null ne plaide par procureur*).

Italy

Elisabetta Silvestri characterised the Italian forms of collective actions as 'not group actions in the conventional sense'.[215] However, the type of class actions that exist in Italy was substantially limited by consumer regulation (art. 140-bis of the Italian Consumer Code) and not applicable to derivative actions. As a result, it is generally accepted that there are no class actions or derivative actions in Italy in the American sense of these terms.[216] Marco Ventoruzzo supported the notion that Italian rules of civil litigation and the special regulation of attorneys do not supply the tools for encouraging the use of derivative actions in practice.[217]

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[213] P. Didier, *De la représentation en droit privé* (LGDJ, Droit Prive) 387 (2000).

[214] In accordance with art. L. 225-120 of the Commercial Code:
1. 4% for 750,000 euros;
2. 3% if the charter capital threshold is exceeded in the range from 750,000 to 7,500,000 euros;
3. 2% if the charter capital threshold is exceeded in the range from 7,500,000 to 15,000,000 euros;
4. 1% of the excess charter capital.
Code Commerce [C. com] [Commercial Code] art. L. 225-120 (Fr.).

[215] See Oscar G. Chase & Helen Hershkoff, CIVIL LITIGATION IN COMPARATIVE CONTEXT 538 (2d ed. 2017); E. Silvestri, *'Italy', The Globalization of Class Actions*, 622 THE ANNALS OF THE AMER. ACAD. OF POLI. AND SOC. SCI. 138 (1st ed. 2009).

[216] Luigi Malchiodi, *Italy,* 9 INTL. BUS. LAW. 335 (1981).

[217] Marco Ventoruzzo, *Experiments in Comparative Corporate Law: The Recent Italian Reform and the Dubious Virtues of a Market for Rules in the Absence of Effective Regulatory Competition.* TX. INTL. L. J., Forthcoming, 2 EUR.

However, New Law No. 31/2019 at arts. 840-bis and subsequent of the Italian Code of Civil Procedure regulates class actions.[218] It took some time to implement this innovation in civil procedure; as a result the right to be members of the class is no longer reserved for consumers and is applicable to whoever holds 'individual homogeneous rights'.[219] Moreover, a contingency fee is now applicable. Despite these developments, class actions and derivative actions in Italy differ from US-style extensive, party-controlled 'discovery'.[220] Derivative action brought by the group of shareholders is only collective in its essence but is not covered by the notion of class actions for at least two reasons. First, the sign of 'individual homogeneous rights' of the claim's grounds is not applicable in derivative actions since the derivative claim is based on only one type of right: the company's rights. Second, under the new class action regulation, an action can only be brought against certain defendants, as art. 840-bis now requires the defendant to have the status of an enterprise or public authority or entity managing public services. Meanwhile, according to the Italian jurisdiction, the derivative action can be brought against the director of the company.

5.3. Conclusion

The relationship between derivative actions and class actions has a certain historical and regulatory basis. Establishing the place of a derivative claim in the conceptual series of concepts specified above is of legal significance only for the Anglo-American model of derivative actions. Our analysis of these concepts does provide grounds for intersecting them in other legal systems, which is especially important for legislative and law enforcement analysis. This classification of claims is not natural for a derivative claim. A distinctive feature of any classification is the ability to distinguish between the genus and species. Specific concepts in this classification are collective, class and derivative actions. It would appear that, in jurisdictions where class actions are uncommon, the notion reflects the general in terms of the objects that make up its types, which is reflected in the concept of plurality of parties.

There are a number of important differences between a class action and a collective derivative action. It is generally accepted that, in class actions, the contemporary legal treatment of harms must affect hundreds and thousands of individuals. By contrast, the contemporary legal treatment of harm affects only the company. Moreover, any proceeds of a successful action are awarded to the company and not to the individual shareholders.

Class actions are most often filed in order to assemble plaintiffs into a group based on the type of right that was violated (for example, eight shareholders were restricted in their right to access financial documents) in order to protect the interests of each plaintiff. Combining the interests of each shareholder leads to the interest of a group of shareholders. Such group interest is supported by a representative in court. This is a prime example of a direct class action filed in order to protect every single shareholder in a group. However, when several shareholders bring a derivative action, regardless of how many of them there are or what purpose they pursue, the

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CO. AND FIN. L. REV. No. 2) 42–43 (2004). Available at SSRN: https://ssrn.com/abstract=556601 or http://dx.doi.org/10.2139/ssrn.556601

[218] Legge 12 aprile 2019, n. 31 Disposizioni in materia di azione di classe. (19G00038) (GU Serie Generale n.92 del 18-04-2019).

[219] C. Consolo, *La terza edizione dell'azione di classe & legge ed entra nel c.p.c. Uno sguardo d'insieme ad un'amplissima disciplina.* Corriere giuridico. 737–743 (2019).

[220] M. Ventoruzzo, *Experiments in Comparative Corporate Law: The Recent Italian Reform and the Dubious Virtues of a Market for Rules in the Absence of Effective Regulatory Competition*. (European Company and Financial Law Review Vol. 2, No. 2) 43 (2004).

main interest that has united them is to protect the company's interest. It is not a 'diffusive' right of individuals to protect. This is certainly true if a director has entered into a related-party transaction and thereby caused damage to the company in the form of losses; it is then better to protect the interest of the company, not the individual shareholder whose shares have fallen in price. The shareholder's interest is only derivative and is a consequence of protecting the company's interest.

The similarity of these two types of claims, derivative and class actions, may engender an incorrect understanding of the legal nature of each claim type. The concept of a derivative action has adopted some of the features of a class action, specifically the numerosity and adequacy of representation.[221] However, there are a number of inconsistencies. The derivative claim cannot be matched by attributes of typicality and commonality. In a derivative action, the core notion is to protect an issue of law or fact related to the company, not to the class. Moreover, there is only one claim that arises from the event: a claim on behalf of the company.[222]

The results of this research support the idea that there are both class actions and collective actions. The distinction between the two is further exemplified by French regulation, which does not recognise class actions but does allow collective derivative actions. Thus, even if the class action rules were valid, it would be necessary to pass pre-approval in order to file a claim in France; in this case, the courts are no longer required to decide on the damage caused to shareholders separately, but only in relation to the class as a whole. Class actions are well suited to shareholders filing a direct claim. The main problem that arises in the context of a class action is the potential for abuse of the process. In view of the above criticisms, the application of the class action rules in derivative actions should be restricted.

6. Causes of Derivative Action

6.1. Introduction

The triple identity test generally requires the identity of objects, parties and causes of action. In the previous subchapters, we have already examined the issues of legal status to shed some light on the 'identity of parties' element involved in bringing a derivative action. In general, res judicata comes into play only if the so-called triple identity test is met. We have determined that there is a duality of the substantial and procedural plaintiff, multiplicity on the part of the plaintiff, conflicting issues of interest of the group and the company (minority and majority interest collision), and a representative issue arising from a derivative action. We have already addressed the issue of the nature of derivative action and the shareholder–director relationship. This subchapter has sought to assess the 'causes of action' element of the res judicata triple identity. Traditionally, it has been established that a cause of action consists of two parts: a legal theory that refers to the legal wrong, and the remedy thereof. The goal of this subchapter is to explore the range of causes of actions in derivative actions. It will determine the importance of expanding res judicata or, on the contrary, the exclusion of the application of res judicata.

In addition, in order to understand how the law apportions responsibility, it is necessary to distinguish between derivative action that could be brought against directors, officers or

[221] *General Tel. Co. v. Falcon,* 457 U.S. 147, 157 n.13 (1982).

[222] Typicality requires that the claims of the class representatives be typical of those of the class, and it is satisfied when each claim in a collection of claims in class action arises 1) from the same course of events 2) based on the similar legal arguments.

members of the executive board (France, Italy, Russia, US, England) on the one hand and against third parties (US, Russia) on the other hand.

6.2. Comparative Remarks

Common law

A statutory derivative claim under pt. 11 of CA 2006 may be brought only in respect of the following causes of action: arising from an 'act or omission involving negligence, default, breach of duty or breach of trust by a director of the company' (s. 260(3) of CA 2006).[223] 'The cause of action may be against the director or another person (or both).' [224]

CA 2006 implements the Law Commission's recommendations, which are as follows: (1) the derivative claim should not be available where there has been no breach of duty by the directors. In cases where (for example) the majority shareholders abuse their position in a manner that affects the company, but there is no obvious breach of duty by the directors, the appropriate remedy is either a direct personal action under the articles of association or a § 994 petition. (2) Derivative claims against third parties are permitted in exceptional circumstances, for example, where the cause of action arose from an act or omission involving a breach of duty by the director that resulted in damage caused to the company. As a case in point, a derivative action will be allowed against third parties for receipt of money or property transferred in breach of trust or for knowing assistance in a breach of trust.[225]

Daniel Lightman argues that it would be a mistake to delve into the question of whether derivative claims should be brought against third parties since 'it goes too far in encouraging excessive shareholder interference with management decisions'.[226]

There are, however, some questions that still need to be asked: for example, is this justifiable? Will this limitation of derivative actions hamper the use of derivative action in practice? We may, for instance, observe the experience of European countries in which derivative actions are not widespread and easy to use. Despite its complex nature, strict threshold requirements, and costly procedure with inconclusive results, the mechanism still may return to life and be used properly by shareholders. Another potential reason for this underutilisation might be that shareholders do not have the right to file actions against third parties. As we will see in Subchapter 7, the French and Italian systems can be attributed to the compensational model, which means that shareholders can file a claim for damages only from the director. However, it is difficult to deny that, as a result of this approach, the shareholders encroach on the competence of the director, although not because it is justifiable to presume that actions not brought against third parties are not in the best interests of the company.[227] A derivative action brought by a shareholder may invade the director's space because it deals with the company's external relations. This approach may call the corporate theories of a legal entity into question.

Another solution to these difficulties would be to eliminate the thresholds for filing indirect claims, although this issue should be considered outside of the present dissertation as part of a

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[223] § 260, pt. 11 (CA 2006).

[224] See in Victor Joffe QC et al., MINORITY SHAREHOLDERS (Oxford University Press) 39–40 (2019).

[225] See also in A. Reisberg, *Derivative Claims Under the Companies Act 2006: Much Ado About Nothing?* RATIONALITY IN COMPANY LAW: ESSAYS IN HONOUR OF DD PRENTICE, J. ARMOUR, J. PAYNE, EDS., (Hart Publishing) 16 (2009).

[226] Ibid. 39.

[227] In Daniel Lightman's discussion of the s. 237(3) of pt. 2F.1A of the Corporations Act 2001 of Australia. See in Victor Joffe QC et al., MINORITY SHAREHOLDERS (Oxford University Press) 39–40 (2019).

dedicated separate study. The tendency to regulate derivative legislation shows that, in reality, the corporate policy is not particularly friendly to this mechanism; on the contrary, sometimes mass derivative claims have been limited through the imposition of unbearable thresholds (for example, in Italy or England). Notably, mass derivative claims by shareholders can also become burdensome for the regulation of corporate relations (too much interference in the company's affairs will lead to difficulties in governing its business affairs); however, the restriction of such semi-substantial and semi-procedural institutions should be transferred to the procedural plane. In other words, if the legislator wants to limit the application of derivative actions, he should solve this problem by changing the procedural legislation (e.g. res judicata or abuse of process), not the substantial legislation. Changing the latter means that the lawmaker risks turning the legal norm into a 'dead' (or half-alive) rule. This is precisely what the legislator in England did by establishing the court approval procedure for filing a derivative claim.

Daniel Lightman outlines that derivative actions must be permitted for breaches of directors' duties of skill and care.[228] However, the concern is related to enforcing the statutory derivative claim in practice; this is because it will apply to a broader scope of conduct than has been possible under the common law regime since it is expressly available for any breach of duty, negligence or default, even when the director has not personally benefited from his actual or proposed act or omission.[229]

In the US, for example, when a shareholder requests for the company to sue, the company refuses to initiate the litigation and that refusal is improper, then the shareholder is allowed to file a 'derivative' claim against the third parties.[230] Typically, a shareholder will bring a derivative claim under these circumstances because the company is not bringing a claim against a third party.[231]

Russian law

Turning to the substantive side of the question, in the traditional system, derivative actions are divided into the following types: claims for recovery of damages from the legal bodies (art. 53.1 of the RCC) and claims on challenging transactions of the legal entity (cl. 1 of art. 65.2 of the RCC). Given the amendments to the RCC, we can also add to this list the claim to demand the application of the consequences of a void transaction to the company (cl. 1 of art. 65.2 of the RCC). However, this list can hardly be considered satisfactory, as it is only a description of the provisions of the law.

T. Vasilieva, for his part, has argued against classifying a claim on the challenging transaction as a derivative claim: '...one cannot ignore the nature of a claim against mismanagement and the recovery of damages for mismanagement. The execution of a transaction is a consequence of improper management. Therefore, in relation to these requirements, the construction of a derivative claim is not applicable...this position – a narrow approach to the definition of a derivative claim – most corresponds to the classical concepts of a derivative action'.[232] As far as we can determine, the author focuses on the historical roots of this institution in Anglo-Saxon law, which, in itself, deserves full support; however, it is unclear why this should matter for the dogmatic qualification of the derivative claim in Russia. The criterion of the beneficiary (if the transaction is declared invalid, the resolution is made in favour of the legal entity) is not refuted by these arguments, and the author does not provide any other legally

[228] Victor Joffe QC et al., MINORITY SHAREHOLDERS (Oxford University Press) 39–40 (2019).
[229] Ibid. 39–40.
[230] See in Robert J. McGaughey, DERIVATIVE LAWSUITS 2 (2010); *Hoekstre v. Golden B. Products, Inc.*, 77 Or App 104, 712 P2d 149 (1985).
[231] *Davis v. Harrison*, 25 Wash 2d 1, 167 P2d 1015 (1946).
[232] T. A. Vasilieva, *Indirect claim in the civil process* (comparative legal research). (Moscow) 44 (2015).

significant differences between cases in which the participant (shareholder) files a claim to challenge the transaction and those in which he acts to recover losses.

The considerations underlying a derivative claim in corporate law, including bad faith or omission on part of the director and/or the majority owner who appointed him, can occur in a wide variety of cases, such as failure to declare a vindication claim. At the same time, it should be understood that any extension of the range of actions that a participant has the right to perform on behalf of a legal entity will diminish the independence of the legal entity, although this claim can also be addressed to the existing list of claims.

According to para. 2 of cl. 4 of art. 65.3 of the RCC, members of executive bodies have the right to bring an action for damages (art. 53.1 of the RCC), challenge transactions under art. 174 of the CC and demand the application of the consequences of a void transaction.

The provision that such an action is brought under para. 2 of art. 65.2 of the RCC indicates that this rule is related to the rules on traditional derivative actions of participants (shareholders) of a legal entity, as well as the fact that the following terminology is used: '...members of the executive body of the corporation have the right... to demand compensation for losses caused to the corporation (art. 53.1 of the RCC), to challenge transactions made by the corporation...'. Whereas, in the case of a claim filed by the legal entity itself, it is never specified that the claim is made by a single executive body. Based on this argument, the claims of members of the executive body should at least be considered in connection with the derivative actions; at most, they should be considered a variety thereof. The doctrine supports this view that such a claim should be classified as a derivative claim, since there is also statutory representation, although the legislator for some reason did not refer to para. 1 of art. 182 of the RCC (a transaction made by one person (representative) on behalf of another person (represented)).[233]

French law

The derivative action *ut singuli* is designed to allow the shareholders to act on behalf of the company when the directors have failed to do so in order to obtain compensation for damages suffered by the company. The compensation obtained for the damages are to be awarded to the company itself and not to the shareholders.

An important filter under French law is the fact that an action can be brought against the director of a company only for alleged corporate wrongdoing that causes harm to the company. The harm may be caused by violations of laws or the company's bylaws, as well as by breaches of duties, including negligence (art. L. 225-251 of the Commercial Code; art. 1850 of the Civil Code).

Regarding liability towards third parties, French law is not concerned with the scope of the duties or possible fiduciary relationships to identify the proper claimant; instead, it sees the allocation of responsibility as an aspect of enforcement.[234] If the company has suffered loss, the claim is brought either by the directors or by one or more shareholders on behalf of the company. If a shareholder claims damages for a loss suffered personally, the claim is brought in the form of direct personal action in the shareholder's name. Thus, the responsibility of the directors to the shareholders depends on the distinction between the shareholder's personal loss and the harm caused to the company.[235]

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[233] A. A. Kuznecov, *Kosvennye Iski V Korporativnom Prave Rossii: Material'no- Pravovoj Aspekt.* (Zhurnal ZAKON № 11) 82-83 (2020).
[234] C. Gerner-Beuerle, M. Schillig, *Constraints on Discretion: Part 1—Directors.* (COMP. CO. L.) 472 (2019).
[235] Ibid. 472–473.

The French courts have held that a loss suffered by the shareholders due to, for example, a reduction of the company's share price due to mismanagement does not qualify as a personal loss distinct from that of the company.

Italian law

Under Italian company law, a derivative action may be brought only in respect of the cause of action that is solely vested in the company. In accordance with art. 2393-bis of the ICC, the shareholder may bring a derivative action in order to enforce the company's claim against its directors, seeking relief on behalf of the company itself. Shareholders cannot bring derivative actions against third parties; in other words, it is impossible to challenge transactions or interfere with any other relations with the external world (third parties). Due to the derivative action, the shareholder has the right to claim damages from the director on behalf of the company itself.

In external relations, in order to protect the reliance of third parties and use the *exceptio doli*, acts performed by the director with power of representation but devoid of the power of management, as well as acts that exceed the limits to the powers of management or representation, shall remain valid and binding. For example, this rule applies to acts unrelated to the company's object or in cases of the dissociation of the power of representation from the management power. In the internal relations, regarding the lack or excess of power or the deviation of the act, the object of the company remains relevant as the basis for a civil action (art. 2393 of the ICC and art. 2393-bis of the ICC), which is a just cause for revocation (third subpart of the art. 2383 ICC).[236]

Directors may be held liable only if they caused damage by their acts (or omission) that was suffered by the company. The directors' duties towards the company are as follows:

1) the duty of care and loyalty (including, in particular, the duty to disclose any interest the director may have in a transaction to the board of directors and the board of statutory auditors), and

2) other duties set out in statutory provisions of law or in the company's bylaws.

6.3. Conclusions

This subchapter began by presenting a comparative approach to the causes of derivative action (legal wrong and remedy). The right of shareholders to protect the interests of the company can be explained, on the one hand, by the fact that shareholders bring an action in their own interest only derivatively (as the value of their shares depends on the damage caused to the company) and, on the other hand, by the idea that shareholders are treated as statutory representatives of the company. A shareholder can assert only causes of action vested in the company; this is because the derivative claim is a procedural device, and the cause of action remains to be that of the company. All these factors impact the authority, which may initiate a lawsuit in the alternative case that the company fails to bring an action in its own interest. The question thus arises when a shareholder wishes to act against third parties.

Using comparative analysis, we may conclude that the derivative action policy varies depending on the respective jurisdiction (we will discuss this in more detail in Chapter 1 Subchapter 7). In our contention, one of the key differences between the derivative claim of the

[236] Comment on 2393 bis of the CC. // https://www.brocardi.it/codice-civile/libro-quinto/titolo-v/capo-v/sezione-vi-bis/art2393bis.html

absolute model (in the US, England and Russia) and the compensatory one (in France and Italy) is that the relevant rights and defences are the same as when an action is brought by the company. It should be kept in mind that the shareholder's derivative action is *de facto* an action brought by the company because the company becomes a substantial plaintiff, which means that the fruits of the action belong to the company. In a claim of this kind, the shareholders can only assert the rights that the company itself, if willing to file suit, could assert. It follows that the shareholders cannot maintain the action if the company itself is not in a position to do so. Thus, the absolute model of a derivative claim is a complete duplicate of a claim brought by a company. In the compensational model, an entirely different set of circumstances apply: the shareholder does not have the right to challenge the company's transactions, whereas the company has such right and defence; moreover, the shareholder does not have the right to bring tort claims against third parties, whereas the company has such right and defence.

The evidence from this study suggests that, in jurisdictions where derivative actions are limited to the director's liability, the inability to bring an action toward third parties (for example, to challenge transactions) may be explained by the following arguments (e.g. in France and Italy). In particular:

1) a company is a separate legal entity distinct from its shareholders. Its property is its own and not that of the shareholders. A wrong done to a company is not a wrong done to each shareholder. Therefore, shareholders should not interfere in relations between the company and third parties. For this purpose, a role is established for the director or members of the collective executive body;

2) the separate legal personality of a company acts in combination with the recognition of legally enforceable rights of individual shareholders;

3) from a procedural point of view, it is easier to recover losses from the director than to challenge the transaction with third parties (except for certain situations in which the director does not have sufficient funds for compensation, at which point it will be necessary to initiate bankruptcy, which will entail additional transaction costs). There is often little incentive for shareholders to expose themselves to such financial risks, bearing in mind that all the benefits of a successful action will go to the company;

4) absent any features that enable the court to ‘pierce the corporate veil’.

In spite of its limitations, the present study certainly does not contend that the compensational model is an ideal model. This is simply a feature of the jurisdictions studied, which further depends on the level of shareholder activism, the severity of the agency problem and the characteristics of corporate governance in the jurisdiction. If shareholder activism is not developed and shareholders are primarily passive, it will become increasingly difficult to justify the absolute model. After all, the practice of derivative actions in some European countries (the most striking example of which is Italy) is very scarce and such actions remain rare. This may indicate that shareholders tend not to take risks such as bringing a derivative action on behalf of the company. In our view, there are no sufficient reasons in the current procedural legislation that will prompt a shareholder to litigate the issue in the company rather than sell his shares and avoid unnecessary transaction costs.

By contrast, in countries where the absolute model (Russia and US) is allowed, in practice, an active role of shareholders can be observed (i.e. a high level of shareholder activism in derivative actions) that can be contrasted with countries employing the compensational model. However, the English jurisdiction is an exception due to the limitations and restrictions proposed by the new procedure in the statute. Difficulties may arise in relation to the court granting a shareholder permission to bring a derivative action. This means that, in many instances, the derivative action still remains rare in practice. Moreover, the English law position regarding the costs of derivative action also affects the density of derivative action as a tool for use in

protecting the rights of minority shareholders. The subchapter that follows moves on to consider our proposed classification for the scope of derivative actions: the absolute and compensational model.

7. The Proposed Model for Derivative Actions: The Absolute and Compensational Model

The law inevitably faces the necessity of choosing what means will be made available to a person to enable them to protect their rights. This problem occurs in contract, property, corporate, and IP law. While there are many different models of protection, generally speaking, many of them can be divided into two main groups. The first contains sanctions that consist of awarding monetary compensation to the victim of the offence (based on the model of partial, full, restorative or punitive compensation); we may refer to these as the group of compensatory protection measures. The second contains sanctions that block the offence in the legal relationship itself *ex-ante* or literally (in-kind) restore the violated right *ex-post* (non-compensatory claims and vindication, challenging transactions, claims for specific performance, claims for suppression of unlawful actions, etc.). We refer to these as the group of absolute protection measures.

Traditional private law focuses on the model of full compensation protection (in the terminology of Calabresi and Melamed, this is the liability rule model).[237] Overcompensation penalties either do not work in practice (for example, reclaiming the violator's income, i.e. restorative compensation protection) or are not recognised as a right (punitive damages outside of certain legal enclaves such as consumer law and IP). Models of absolute protection in several areas do not work, are limited, or are treated with some suspicion by many lawyers (for example, those in contract and corporate law).

Before determining the appropriate attitude to the prospects of possibly expanding overcompensation penalties and absolute protection measures, it is necessary to decide how the civil rights protection regime will lead to a claim for damages (liability rule). The key argument put forward in this thesis is that the liability rule simply does not work because of problems associated with proving and recovering damages. Courts tend to systematically undercompensate; as a result, victims of offences receive less than the actual subjective value of the violated right. Accordingly, the idea of corrective justice is profaned. Moreover, in economic terms, the fact that shareholders' right to protection is enforced only through the claiming of damages can encourage offences. The expected number of damages is converted from a sanction to a tariff; as a result, any person who pays this tariff can take away, violate or restrict the civil rights of another. The structural propensity for compensation is thus extremely low, and conditions are created to stimulate the offences, which are not only 'cost-effective' (when the benefit received by the offender is greater than the actual losses incurred by the victim, while damages are paid last to ensure the offender will 'stay in the black'), but also completely ineffective (that is, when the benefit received by the offender is, in fact, less than the amount lost by the victim). As a result, the institutional environment is deformed, the legal culture is eroded, civil rights are defenceless against cynical attacks from the outside, and the corresponding risks of uncompensated losses from such attacks are embedded in the prices that we all pay. In general, there must be a rebuttable presumption that full compensatory protection alone is insufficient.

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[237] G. Calabresi & A. Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral.* 85 HRVD. L. REV. 1089 (6th ed. 1972).

This issue is discussed in this chapter, as it is of interest in derivative claims. By analysing what model of legal remedy can be attributed to the rights of shareholders in protecting the interests of the company based on the above chapters, we may conclude a thought-provoking observation.

On the one hand, France (which upholds the individual right of the shareholder to bring an action) and Italy (which upholds the collective right of the shareholder to bring an action) are following the path of the compensational model. As discussed above, traditional civil law takes precisely this approach because it seems convenient to perform and logical in its essence, at least at first glance. So, for example, for example, an avenue of challenging transactions involves the director himself.[238] He will be engaged in challenging transactions with a defect. If the transaction in question results in a loss due to the director's fault, the shareholders have the right to bring an action against the director. This is where the subsidiary nature of the derivative claim is externalised. The logic is as follows: first, let the director challenge the transaction, and if he does not challenge, the shareholders will file a lawsuit against him to compensate for the damages caused.[239] For communication with the outside world (in particular, to challenge transactions), the figure of the director exists.

On the other hand, jurisdictions such as Russia and the US allow absolute protection of the shareholder, permitting them to challenge the agreements concluded by the company or bring an action against third parties without resorting to the director's actions. American law also represents an example of an absolute model of derivative actions. As already noted in this chapter, typically, under American law, a derivative action is brought by a shareholder because the company has refused to initiate a litigation against a third party:[240] 'In a derivative lawsuit, a shareholder sues both the corporation and a third party. The third party is the 'real' defendant; the corporation is included in the lawsuit only as a nominal defendant.[241] In a derivative lawsuit, the plaintiff-shareholder seeks a remedy against the third-party defendant only; the plaintiff does not seek damages from the corporation, even though the corporation is a defendant. In fact, the plaintiff shareholder usually is not personally entitled to any damages awarded,[242] with any funds recovered from that third party usually payable only to the corporation.'[243]

The English law system may be considered an example of the absolute model, albeit with some exceptions. Thus, the main defendant will usually be the director; nevertheless, the shareholder can sue non-directors (or third parties), using derivative action as a tool. A claim against third parties is possible if connected with the director's breach of duties. Relevant examples would include specific cases such as properties having been transferred in breach of

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[238] In France, it is usually assumed that a derivative suit can only be brought if the corporation failed to sue, even though there is no formal demand requirement. In France, corporations can be appointed as directors. M. Gelter, *Why do Shareholder Derivative Suits Remain Rare in Continental Europe?* 37 BKLYN. J. INTL. L. 854 (2012).

[239] In Italy, the cause of action is exclusively vested in the company: the shareholder enforces the company's claim against its directors and its statutory auditors. In France, the shareholder enforces the company's claim against its directors and may rescind or nullify decisions made in the shareholder meeting (see in Chambre commerciale 16 octobre 1972, n°70-13691, Legifrance).

[240] *Davis v. Harrison*, 25 Wash 2d 1, 167 P2d 1015 (1946).

[241] See in R. J. McGaughey, DERIVATIVE LAWSUITS. 2 (2010).

[242] Ibid.

[243] Another case states that in a derivative action, 'the corporation is the real party in interest and the minority stockholder who brings the action is at best only a nominal plaintiff seeking to enforce the right of the corporation against a third party'. *Walters v. Center Electric, Inc.*, 8 Wash App 322, 506 P2d 883, 888 (1973). See also: *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wash App 502, 728 P2d 597 (1986), review denied, 107 Wash 2d 1022 (1987); *Cohen v. Beneficial Industrial Loan Corp.*, 337 US 541 (1949). See also in R. J. McGaughey, WASHINGTON CORPORATE LAW HANDBOOK § 8.04, 10–11 (2000).

trust, or an individual providing knowing assistance.[244] If these elements are not present, it is possible to bring a derivative action only after the court's sanction under s. 996 CA 2006. However, the definition of the derivative claim under CA 2006 is not aimed at protecting the company from insiders, and art. s. 260(3) requires a connection with the director's violation of his duties.[245] Due to the rule that a material cause of action against a third party could only be pursued with the court's sanction, we refer to English jurisdiction as an example of the de jure absolute model of derivative action. However, we can observe that the rate of transmission of derivative claims through these courts *de facto* is relatively low (both in general and in cases of claims against third parties). Accordingly, considering the policy of derivative actions in this particular jurisdiction from the point of view of real reflection on legal relations, it is challenging to categorise the English jurisdiction as an absolute derivative action model.

In this regard, we must recognise that in a situation where a shareholder has only a claim for full compensation for its losses in the arsenal of remedies, the law does not create institutional conditions that promote compliance with contractual law and the development of stable and predictable turnover. The legal value of the obligation is significantly devalued; as a result, the risks of opportunism and the occurrence of uncompensated losses among counterparties increase. The latter are included in the prices that are eventually paid by all participants in the turnover, including those that are not prone to opportunistic behaviour and are determined to adhere to the standards of honest business practices and adherence to the letter of the law.[246] High risks of violations of contractual obligations, the negative consequences of which the lender will likely be unable to compensate, also mean a high share of the risk premium in the contract price. Furthermore, the longer and more significant the contract, the higher the risk that severe uncompensated losses will occur (and, accordingly, the higher this premium). There is, thus, a cross-subsidisation: honest participants in the turnover pay a higher price and must pay the uncompensated contractors' costs resulting from violations of contracts allowed by individual opportunists.

We may draw some conclusions regarding the model of remedy in continental Europe. Italian and French law reflect the compensational model of protecting shareholders through derivative claims. For their part, Russian, English and US law, in addition to compensation, also allow shareholders to implement an absolute model of protecting the company's rights by challenging transactions. It is accordingly clear that there are valid reasons why some jurisdictions (Russia, England and the US) have adopted an absolute model of derivative action: it is justified as a mode of redressing severe corporate abuse and providing fair compensation or recovery from losses that occurred to the company. These jurisdictions focus on supporting the company's economic recovery in any way, including collecting damages from the director or filing a restitution claim against third parties. Similarly, those who believe corporate misbehaviour is under-deterred favour increasing director liability to obtain optimal deterrence and compensation from the director.

It is also crucial to discuss potential future consequences of the compensational model of derivative action approach. The compensational model of derivative actions is ordinarily obtained by imposing a threat of *ex-post* liability on directors who may engage in wrongdoing for the total cost of harm caused to the company (deterrence purpose of the derivative action). The argument is that the threat of liability for the total cost of harm caused by the director is the optimal measure of damages in cases where the director is found liable. Imposing such a threat leads companies to raise the directors' standard of corporate behaviour by making them fear that

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[244] A. Reisberg, DERIVATIVE ACTIONS AND CORPORATE GOVERNANCE (Oxford University Press) 139 (2007).
[245] *Iesini & Ors v. Westrip Holdings Ltd & Ors*, (2009) EWHC 2526 (Ch), (2010) BCC 420.
[246] S. Walt, *Penalty Clauses and Liquidated Damages in Geest, G., Contract Law and Economics* (Edward Elgar) 181 (2001).

such a remedy would be levelled against directors. Each of these policies has its own logic; they reflect the aggregated vision of the tension between the minority shareholders and directors in the company, providing a valuable tool for holding them liable. However, if the restrictive model is maintained, no minority shareholder is likely to initiate derivative action proceedings.

Moreover, we have observed that derivative actions are more frequently used in practice in jurisdictions where companies have dispersed ownership. The proportion of shares collectively held by shareholders operates as a stimulus for bringing a derivative action since it makes selling a less viable option. In cases where the stock price has been diminished by poor governance, losses on the sale are likely to occur. Conversely, when a company is profitable, bringing derivative action is less predictable, as shareholders are unlikely to interfere with management.

However, in all studied jurisdictions, we have observed a particular tendency to balance the rights and interests of directors and shareholders: specifically, a balance between protecting shareholder rights and protecting directors from vexatious and hazardous claims. In our opinion, some jurisdictions are more committed to protecting directors (England), while others are more committed to protecting shareholders' rights (Russia, the US, European countries). In any case, the most important rule to remember in all countries is that derivative litigation should not be abused.

8. Conclusion

This chapter has aimed to determine the degree to which derivative claims are consistent with the identity test of res judicata (discussed in more detail in Chapter 2). Specifically, we have attempted to answer a rather speculative question: what if derivative claims coincide with the identity test? Before we conclude this chapter, let us eliminate some uncertainty.

First, the investigation of derivative action has shown that, following a check for the 'parties' element' of the res judicata triple identity, the below set of combinations may present a risk of application of res judicata (as will be discussed in more detail in Chapter 3):

I) *The possibility of the duplication of proceedings due to the derivative nature of claims.*

The first/subsequent claim could be one of the following actions:

a) derivative action brought by a shareholder against the director to recover losses in favour of the company (England, the US, Russia, France, Italy);

b) derivative action brought by a member of the executive body against the director to recover losses in favour of the company (England, the US, Russia, France, Italy);

c) derivative action brought by a shareholder or a member of the executive body against third parties (the US, Russia);

d) direct action brought by the shareholder (England, the US, Russia, France, Italy).

The subsequent/first claim could be one of the following actions:

a) derivative action brought by another shareholder against the director to recover losses in favour of the company (England, the US, Russia, France, Italy);

b) a creditor's action on behalf of the company (Italy, France);

c) action brought by the company against third parties (the US, Russia, England);

d) derivative action of a shareholder of a subsidiary company (the US);

e) direct action brought by the shareholder (England, the US, Russia, France, Italy).

II) *The possibility of the duplication of proceedings due to the collective nature of claims.*

The first claim could be a collective derivative action against the director to recover losses in favour of the company (England, the US, Russia, France, Italy).

The subsequent claim could be one of the following actions:

a) derivative action brought by the shareholder (who is not a member of the group that previously brought a derivative action) against the director to recover losses in favour of the company (England, the US, Russia, France, Italy);

b) derivative action brought by a member of the executive body against the director to recover losses in favour of the company (England, the US, Russia, France, Italy);

c) creditor's action on behalf of the company (Italy, France);

III) *The possibility of the duplication of proceedings due to the application of derivative claims to third parties.*

The first claim could be a collective derivative action against the director to recover losses in favour of the company (England, the US, Russia, France, Italy).

The subsequent claim could be one of the following actions:

e) derivative action brought by another shareholder against third parties (the US, Russia, England);

f) derivative action brought by a member of the executive body against third parties (the US, Russia);

g) a direct claim brought by the company against third parties (England, the US, Russia, France, Italy).

Another significant finding was that collective derivative actions should not be considered class actions. Nevertheless, the collective nature of a derivative action brought by a group of shareholders is not in doubt. At the same time, this collective nature also makes it possible to distinguish one more combination for use in analysing the applicability of the res judicata doctrine. This leads to another paradoxical conclusion: any civil legal community is presented as a legal entity in the procedural sense since the claim is individualised through the interest of the entire group.

Second, the above investigation of derivative action has shown that, as a result of checking for the 'causes of action element' of the res judicata triple identity, the following models of actions can, on the contrary, dilute the application of the res judicata (as will be discussed in more detail in Chapter 3).

The following observations were made on the legal nature of derivative claims:

a) Derivative actions brought by a shareholder or a member of the executive body against the director (corporate actions) are suggested to be considered as contract liability claims (England, the US, Russia, France, Italy).

b) Actions brought by creditors on behalf of the company are suggested to be considered as claims that are extracontractual in nature (France, Italy).

The above-mentioned arguments would appear to support the contention that the legal nature of derivative actions can be considered as a common denominator in the formulation of the res judicata formula in Chapter 3.

The following observations were made regarding the model of remedy:

a) Compensational model: the shareholder has the right to claim damages only from the directors (in Italy and France).

b) Absolute model: in addition to the right to recover losses from the director, shareholders also have the right to bring an action (challenging transactions and claiming damages) on behalf of the company towards third parties (in Russia and the US).

In addition, in this chapter, we have proven that shareholders and members of the executive body should be considered legal representatives. As a consequence, the statuses of the substantial and procedural plaintiff (the company) break apart. The legal representative (substantial plaintiff) differs from the procedural plaintiff in that the procedural plaintiff can act only in the process, while the powers of the representative are broader in its notion.

We have also found that, crucially, there is correspondence between the significant growth in the number of people investing in shares and the development of a suitable platform for applying derivative actions designed to assist minority shareholders. To put it simply, in the US, companies are characterised primarily by dispersed ownership, in that no single investor owns enough stock to control a company, and corporate remedies are well used in practice. By contrast, in European countries, it is mostly large shareholders in the company that control the company's decisions. In relation to this, we might suggest that two justifications are in play. First, the law favours minority shareholders where they are associated with a large number of

listed companies, reduced private benefits of control and a lower concentration of ownership and control (the US).[247]Second, lower standards of managerial accountability have underpinned the broad notion of derivative actions in law to protect minority shareholders (for example, in Russia). Otherwise, the law would have shielded corporate managers from undue shareholder interference (for example, in England).

The explanation offered as to whether or not the doctrine of res judicata should be applicable to derivative actions depends on implicit comparison and the legal nature of derivative actions. Therefore, it must establish wrongfulness, harm and causation.[248]

The generalisability of these results is subject to certain limitations. For instance, we do not consider what possible factual circumstances might underlie the case to support or discourage application of the identity test. In addition, since the study was limited to derivative actions and application of the res judicata doctrine thereto, it was not possible to consider the features of direct claims in the framework of this study.

In Chapter 2, the concept of the res judicata doctrine is further explored. The next chapter begins by laying out the theoretical and historical dimensions of the res judicata doctrine and looks at how different jurisdictions understand res judicata. This will aid us in finding the elements missing from the 'formula of preclusivity' of the derivative claims.

[247] See also in A. Reisberg, DERIVATIVE ACTIONS AND CORPORATE GOVERNANCE (Oxford University Press) 171 (2007).

[248] In France, there is a practice of changing the burden of proof to the direction of the head, which could help in solving this problem. In addition, this is in fact permitted by art. 10 of the New Civil Procedure Code (NCPC), which allows the plaintiff to redistribute the burden of proof to the extent that the judge considers this necessary to clarify the circumstances of the case.

CHAPTER TWO

THE THEORY OF RES JUDICATA: A COMPARATIVE PERSPECTIVE

1. Introduction

The notion of the doctrine of res judicata underlying this study is a broad one. It is worth noting that it comprises two core substances: claim preclusion (which more closely resembles the negative effect of res judicata in European jurisdictions) and issue preclusion (positive effect of res judicata).[249] Claim preclusion is designed to bar relitigation of any issues raised in an earlier claim between the same parties. Meanwhile, as A. Bursak aptly notes, the issue preclusion (or collateral estoppel) mechanism 'bars a party from relitigating an adverse finding on an individual issue' in previous litigation.[250]

In this paper, we refer to the preclusion concept, which is relevant when considering derivative claims since the problem when considering these claims arises precisely when the identity test is insufficient. In its general sense, the triple identity test was adopted globally, although some declination from this test can be observed in the jurisdictions under study. The countries analysed consider the theory of identity in res judicata differently and offer varied conceptions of the subject matter or legal grounds. However, for the present research, the element 'identity of the parties' in the identity test used to decide on res judicata questions is of particular importance.

According to the res judicata triple identity test, relitigation is impossible if the claims are brought 1) between the same parties, 2) with the same subject matter or 3) on the same legal grounds. This test was adopted once in France and has since become globally accepted in arbitration. Thus, due to the need to match the duality of the plaintiff in derivative claims, there is a problem of circumventing one of the categories in the identity test (identity of the parties). Moreover, vague concepts in other identity test categories present severe complications (the same subject matter and legal grounds). This test was designed to limit the use of relitigation. When the test is applied, the very concept of derivative actions raises a number of questions that may call the restriction of relitigation into question. Failing the identity test entails the need to consider the claim preclusion regarding derivative actions. At the same time, issue preclusion will also be considered in this paper since this is one of the arguments used in reasoning the extension of res judicata in derivative actions.

The main topic of the current thesis remains the problem of derivative claims and the possibility of extending the doctrine of claim and issue preclusion. In this chapter, we attempt to extend the res judicata effect based on substantive private law, particularly the extension of the scope of res judicata affecting derivative action. This is also a result of the procedural rules that require parties conducting litigation in some extraordinary capacity to be treated as legally different persons than would be the case if the same individuals were involved in litigation in their interest.

This finding is congruent with the work of Albrecht Zeuner, who demonstrates that the extension of the preclusive effect of a judgement to third parties seems acceptable 'in one set of circumstances, namely where, given the existing relations between all parties involved, legal rights of a third party depend on dispositions made by the two other parties, even quite apart

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[249] The positive effect is that a judgment or award is binding upon the parties and must be implemented in good faith (bona fide). The negative effect is that an issue decided in a judgment or award may not be relitigated. See in Max Planck ENCY. OF PUB. INTL. L. 2 (2006). (Access: 06 December 2020) // https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1670?print=pdf

[250] A. Bursak, Preclusions. Notes. NYU Law Review. Vol. 91(6). 1653 (2016).

from any lawsuit. The situations in which one party has an obligation to maintain the legal interests of another party belong into this group, for instance, fiduciaries, successors-in-interest, and the special kinds of derivative legal rights'.[251] In this paper, we attempt to explore the possibility of extending such a set of circumstances with derivative actions.

2. The Historical Aspects of Res Judicata

Gino Gorla famously claimed that 'comparison involves history'.[252] This implies that any comparative investigation is also historical. Comparatists, after all, are never satisfied with positive law, which represents only one of the several layers that must be analysed to understand the inner structure and the deep choice mechanisms of a given legal system.[253] This study on res judicata is no exception. Therefore, before embarking on a synchronic comparison between the different legal systems considered, it is useful to first locate res judicata in time and space and investigate its historical roots.

The first item of note emerging from the study of res judicata in the different jurisdictions contemplated herein is that its terminology, part of its theoretical underpinnings and the general semantic domain it carries are inherited from Roman law.[254] First, as to the sources of law, the earliest extant mentions of res judicata can be found in the works of Cicero and Caesar, while occasional references to its precepts also emerge in the works of Quintilian, Ulpian and others. However, a more thoroughly elaborated notion of res judicata is provided for in the *Institutions* of Gaius.[255] In book IV, paras. 106–108,[256] Gaius underlines a rule of practice in pleading: 'The plea, called *exceptio rei in judicium deductae*, meant that the exact issue in between the parties had already been argued before the Praetor and had been settled by him in the shape of a formula'.[257] In other words, the plaintiff had already raised the same points and taken every measure in pleading to the *litis contestatio*. The *exceptio rei judicatae* is necessary to conclude that the case has finally ended: 'The Praetor had drawn the formula and sent it down to the judex with the precise question of fact for trial, and that the decision of the judex had been given'.[258] It is worth noting that there are several points of view in the doctrine regarding the same nature of *exceptio rei judicatae*, including 'an effective bar to any proceedings in which the same question… which has been decided is put in controversy again between the same parties'.[259]

As reasonably pointed out by D. Dozhdev, the instigation of a claim (*litis contestatio*) on a personal action extinguished (consummated) the right to a claim, in the absence of a substantive obligation, the fulfilment of the obligation – under the strict approach (as professed by the

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[251] A. Zeuner, H. Koch, Effects of judgments (res judicata) in M. Cappelletti, InternatIonal encyclopedIa of comparatIve law Vol. XVI. (Mohr Siebeck) 67 (2012).

[252] G. Gorla, *Diritto comparato*, in Enciclopedia del Diritto 928, 930 (1964).

[253] R. Sacco, *Legal formants: A dynamic approach to comparative law* (Installment II of II), THE AMER. J. OF COMP. L. 343 (1991).

[254] G. Pugliese, *Giudicato civile*, in 18 Enciclopedia del Diritto 785, 786–787 (1969).

[255] B. Walker & J. T. Abdy, THE COMMENTARIES OF GAIUS AND RULES OF ULPIAN (Bryan Walker, John Thomas Abdy) 460–462 (1874).

[256] Gaius, INSTITUTES OF ROMAN LAW, Vol. 4, paras. 106–108.

[257] B. Walker & J.T. Abdy, THE COMMENTARIES OF GAIUS AND RULES OF ULPIAN (Bryan Walker, John Thomas Abdy) 461 (1874).

[258] Ibid. B. Walker & J. T. Abdy 461.

[259] DD 44 2.7.4, citing from *Ulpian ad edictum*, lib. Xv. See also in Spencer, Bower and Handley: Res judicata (Butterworths Common Law) 338–339 (5th ed. 2019).

Proculians after *veteres* – should be considered improper fulfilment. The Sabinians translated the problem from the procedural aspect. The Proculians partially agreed with them; on the subject of the *bona fides* claims, they left these to the judge's discretion.[260]

'My claim must be rejected by an exceptio about the case in which a court decision was made or which became the subject of a claim.'[261] Guy presents this *exceptio* as a single notion, combining two grounds for refuting the claim: a court decision and *litis contestatio* (*exceptio rei iudicatae vel in iudicium deductae*).[262] Therefore, an *exceptio* is necessary for the case to be finally ended with a court decision or become the subject of judicial proceedings.[263]

Spencer, Bowler and Handley noted that the *exceptio* res judicata*e* approximates the English rule.[264] R. Gullien argued that a clear distinction existed between the authority of res judicata and *exceptio* res judicata*e* (see the next subchapters for more details).[265]

In Roman law, res judicata was the contested object of a civil claim brought by litigants before the competent court (the so-called *res in judicium deductae*) after it was adjudicated (*judicata*).[266] In the modern field of civil procedure, this is the term coined by G. Chiovenda; notably, it is *bene della vita*, the court decision on the concrete asset, 'that is pursued in judgment after the judge has recognized it or denied it and thus has become preclusive…The Romans saw the importance of res judicata not in the judge's reasoning, but in a sentence, that is, in the expression of the will of the law in the concrete case'.[267]

Today, doctrine and case law across different jurisdictions operate with reference to various concepts, referred to by the same root terms: prejudice, res judicata, *cosa giudicata*, *Rechtskraft*, *chose jugée*, *cosa juzgada*, res judicata facts, res judicata link and others. Common to them all is the conceptual idea deriving from the Latin term *praejudicium.*

From these shreds of evidence, it can be surmised that in different periods of Roman law, various legal phenomena were understood in terms of res judicata: namely, a legal norm determining the influence of a final judgement on any subsequent litigation on the same subject, termed res judicata ('after the case is decided it cannot be brought again') and a determination of the preliminary issue, a decision aimed at establishing the actual relationship on which the decision of another issue will depend, along with the disadvantage that arises from the preliminary decision of a side process taken to the detriment of one of the parties.

The multifaceted meaning of res judicata has concerned lawyers almost since the times of Roman law itself.[268] Well-regarded European legal scholars like Alan Watson have contended

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[260] D.V. Dozhdev, Institucii Gaya. Gai Institutionum commentarii quattuor. (Statut) 208, 328, 338. (2020).

[261] 'Unde fit, ut si legitimo iudicio debitum petiero, postea de eo ipso iure agere non possim, quia inutiliter in<ten>do DARI MIHI OPORTERE, quia litis contestatione dari oportere desiit, aliter atque si imperio continenti iudicio egerim; tunc enim nihilo minus obligatio durat, et ideo ipso iure postea agere possum(us), sed debeo per74 exceptionem rei iudicatae vel in iudicium deductae summoveri. Quae autem legitima sint iudicia et quae imperio contineant<ia sint>, sequenti commentario referemus.' (Gaius, Inst, 3.181).

[262] D.V. Dozhdev, Institucii Gaya. Gai Institutionum commentarii quattuor. (Statut) (2020). P. 208, 328, 338.

[263] 'Et si quidem imperio continenti iudicio (pro)actum fuerit, sive in rem sive in personam, sive ea formula quae in factum concepta est, sive ea quae in ius habet intentionem, postea nihilo minus ipso iure de eadem re agi potest; et ideo necessaria est exceptio rei iudicatae vel in iudicium deductae'. (Gaius, Inst, 4.106).

[264] Ibid. Spencer, Bower and Handley: Res judicata (Butterworths Common Law) 338–339 (5th ed. 2019).

[265] R. Gullien, L'acte juridictionnel et l'autorité de la chose jugée: Essai critique. (Imprimerie de l'Université) 252–256. (1931).

[266] See G. Chiovenda, Cosa giudicata e preclusione (1933), in Saggi di diritto processuale civile, III, Milano. 6–7. (1993).

[267] See in G. Chiovenda, Principii di diritto processuale civile. (Napoli, N. Jovene) 907 (1923).

[268] G. Chiovenda, Istituzioni di Diritto Processuale Civile (1935) (reprint of 2nd ed., 1957). P.319; G. Pugliese, Giudicato civile, in 18 Enciclopedia del Diritto (1969). P. 785, 786–787.

that 'the contents of a modern civil code and even more significantly, the exclusions have been dictated by the contents of an ancient legal textbook':[269] the Justinian *Corpus juris civilis*. Thus, an important question for us is to understand whether Roman law dictated the content of modern law as to the notion of res judicata or, more reductively, only provided its terminology. This is not merely a quibble over etymology or semantics; one of the reasons behind the almost ubiquitous presence of the doctrine of res judicata – and some form of preclusive effects of a prior judgement upon subsequent cases related thereto – is linked to the institutional aims and the policies pursued therewith. Res judicata is deemed an antidote against legal uncertainty because securing the stability of decisions, avoiding vexatious relitigation of cases and saving on the time and cost of proceedings are all objectives generally recognised as institutional advantages in almost every legal system. Despite the differences that can be observed in the various jurisdictions, which are the legacy of local history, cultural factors and institutional settings, the abovementioned rationales can be considered a common heritage of the Western legal tradition. Furthermore, these general rationales are enshrined in the Roman roots of res judicata through two famous maxims: '*interest reipublicae ut sit finis litium*' (in the interest of society as a whole, litigation must come to an end)[270] and '*nemo debet bis vexari pro una et eadem causa*' (no-one shall be tried or punished twice with regard to the same event).[271]

Nevertheless, we must also consider that the survival of Roman law in contemporary law faces several obstacles, as follows: the diversity of modern legal thought and practice, the natural effect of time, the novelties of competition and corporate rights. How will future law be developed? There seems to be a sort of convergence on the general policies pursued by res judicata that can be already found in the Roman origins of the concept. From there on, in the face of common policies, the application interpretation and scope of res judicata vary both as to the classic common law–civil law divide and within each of the two families. Res judicata and finality are deeply connected with the country-specific history, dogmatic categories and architecture of the judicial systems.

Roman law raises res judicata to the rank of legal truth: 'res judicata *pro veritate accipitur*'.[272] The concept of res judicata, which is still currently valid in most civil law countries, has been in place for a long time, although several corrective mechanisms have subsequently been introduced. Today, res judicata is considered the formal truth, which is no different from the legal truth: 'res judicata *pro veritate accipitur*'. If it is a formal truth, then it is a regulative but entirely (possibly) stipulative principle that makes no reference to reality. In this way, the judge's will is established as the truth. It has been noted that the first decision made by the court is final and that no such disputes can be subsequently considered by the same or another judge. In short, if there could be a good reason for denying formal truth, then it would not be a fundamental metaphysical fact, as Aristotle believed that 'it will not be possible for the same thing to be and not to be', where that is not 'just a matter of the word - but where it is a

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[269] A. Watson, ROMAN LAW AND COMPARATIVE LAW (University of Georgia Press) 100–103 (1991).

[270] *Ladd v. Marshall:* CA 29 Nov 1954 // https://swarb.co.uk/ladd-v-marshall-ca-29-nov-1954/.

[271] These two maxims are reported in almost every book. See Oscar G Chase & Helen Hershkoff, CIVIL LITIGATION IN COMPARATIVE CONTEXT 564 (2nd ed. 2017); Robert von Moschzisker, Res judicata, 38 YALE L. J. 299 (1929); William T. Hughes, EQUITY, ITS PRINCIPLES IN PROCEDURE, CODES AND PRACTICE ACTS: THE PRESCRIPTIVE CONSTITUTION 199 (1911); M. Melville, C. Bigelow & N. James (Ed.), TREATISE ON THE LAW OF ESTOPPEL OR OF INCONTESTABLE RIGHTS (6) 40–41 (1913); K. M. Clermont, RES JUDICATA AS REQUISITE FOR JUSTICE, 68 RUTGERS U.L. REV. 1067, 1069–1070, 1072–1073 (2016).

[272] *Developments in the law: Res judicata*, 65 HRVD. L. REV. 818 – 820, 887 (1952). It has been noted that Roman law provided that a former adjudication was conclusive in a second action involving the same central issue and the same legal basis.

matter of the thing'.[273] It would indeed be a special (conceivably false) or hypothetical (contrived) fact.

Now, the prohibition of a repeated process is a legal consequence of the universal principle that court decisions eventually become final and conclusive. This concept of preclusivity is known by the Latin Roman law term res judicata (also *chose jugée, cosa giudicata, prejudicia*) and has several aspects. The Latin term res judicata is generally used to refer to the principle that matters adjudicated and resulting in a conclusive judgement should not be relitigated, and this rule is adopted in most judicial systems. In a formal sense, res judicata (*force de la chose jugée* in French and *cosa giudicata formale* in Italian) means that the decision can no longer be impacted by remedies, such as appeals, so it becomes unalterable, final and binding for the parties of the proceedings. The final decision in a substantive sense (*autorité de la chose jugée* French and *cosa giudicata sostanziale* in Italian) has a negative effect (claim preclusion) since it represents a bar to any subsequent proceedings regarding the same cause or matter (*exceptio rei judicatae*). Otherwise, the finality of the first decision would be pointless.

However, it appears that Roman tradition has been reflected in the European jurisdictions and also left a considerable mark on English law. *Exceptio rei judicatae* has a significant amount in common with the English res judicata estoppel (protection of duplication of suits), 'former recovery' and 'merger in judgement' (absorption of the cause of action). The doctrine has conclusively shown that, in Roman law, there was a general prohibition against recommencing the res judicata. However, common law does not rely on a general prohibition but instead distinguishes the effect of res judicata as a bar to contradiction and repetition.[274]

Moreover, all of these issues reflect the concept of the binding force of judgment made the subject of almost endless discussion. Nevertheless, there is no reason to forcibly and prematurely arrive at conclusions in the current thesis.

A corollary to the concept of substantial res judicata (in Roman law, *auctoritas rei judicatae*), which prohibits two or more successive processes, is the concept termed *lis pendens* (or *exceptio litis pendentis, litispendencia*), which prohibits two or more parallel proceedings. Substantial res judicata may be referred to as res judicata in a traditional sense because, in most Continental jurisdictions (German, Austria and Italy), formal res judicata and substantial res judicata are always matched. France, however, is not among them since *autorité de la chose jugée* covers the judgement from its rendition.[275]

First, the setting for creating a formula that is the basis for production in the second stage of the process (i.e. directly in court or *in iudicio*) is given. The most important part of the sentence in Roman law, called *condemnatio* ('condemnation'), by which a judge receives the right to condemn or release, may sometimes have been absent. Professor Pokrovsky observes that 'there are cases where the plaintiff seeks at the moment only judicial recognition of his right, without requiring the *condemnatio* of the defendant; this recognition is needed, as a general rule, in order to then initiate actions and, perhaps, against different persons'.[276] The claims are referred to as prejudicial (*actiones praejudiciales*) or sometimes *pre tense* in the formula, especially in res judicata claims; for example, the question arose as to 'whether this slave is free or other issues' (Gaius, Inst, 4.44).[277]

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[273] R. M. Dancy, SENSE AND CONTRADICTION: A STUDY IN ARISTOTLE, Vol. 14. (Synthese Historical Library Book 14) 91 (1975).
[274] B. S. Handley, RES JUDICATA (Butterworths Common Law) 338 (5th ed. 2019).
[275] R. W. Millar, *The premises of the judgment as Res Judicata in Continental and Anglo-American Law: III. The Anglo-American law*. 39 MICH. L. REV. 238 7 (1940).
[276] I. A. Pokrovsky, HISTORY OF ROMAN LAW (SPb) 144 (1998).
[277] I. A. Pokrovsky, HISTORY OF ROMAN LAW (SPb) 145 (1998).

Second, since the procedural rule '*bis de eadem re agere non licet*' was strictly observed in Roman law, the magistrate could dismiss the statement of claim of both the plaintiff and the defendant since either a decision had been made regarding the disputed issue, or the case had been brought to the *contestatio* ('contest'). Sometimes, in the course of the contest, the judge issued a pre-judgement on the already existing *judicio (iudicio)*, a decision in a case related to the same issue or referring to a pre-trial ruling in this case (since the judge could have used another judgement as a motivating part of his decision).

Another matter of particular importance in this thesis is that the Romans also considered elements of the identity test, which was later reflected in the law globally, although it was first applied in France. In Roman law, the question of the identities of the subject matter and the parties was considered; the identity of the parties was appraised from the point of view of two notions: *in rem* and *in personam*. Accordingly, these concepts may be observed in the modern law of most countries.[278]

It follows that Roman society tried to extract a remedy for using res judicata against the possibility of conflicting decisions not only to give the law stability and viability but also to underline that an end to the litigation triggers the substantive effect of the judgement by generalising the prohibition of res judicata. The important matter for the Romans was that duplication of the litigation was impossible. Closing such a key gap in the substantial and procedural plane of law gives us stability in civil law. After all, the facts, circumstances and relationships the court recognises as res judicata in the procedural plane should no longer be questioned in substantive law. This provides the basis for the solid and stable construction of legal relations in general. The litigation ended the relationship in the procedural sphere and brought up a substantive relationship after *litis contestatio*.

Moreover, Ugo Rocco pointed out that the law may link the effects of substantive law and procedural law to certain legal facts.[279] In terms of determining these effects, the stability or fixity of judicial relations has been judged as an effect of substantive law deriving from the procedural phenomenon of res judicata. The doctrine of res judicata is not a direct cause of the effects of substantive law but a derivative and remote cause. The effects of substantive law as derivative or reflected effects derive from the authority of res judicata (direct and procedural effects).[280]

There has always been a limit to the desire to optimise the law since the doctrine is the root of the problem of res judicata in politics and economics. The multi-aspect nature of the application of res judicata in Roman law proves that there is an explanation for res judicata covered in legal substances: the transformation of the legal relationship from the procedural field to the substantive legal plane.

3. The Doctrine of Res Judicata in Common Law and Civil Law Jurisdictions

3.1. Introduction

[278] A community representative; the idea of the *in rem* process is mentioned several times in Digests (*Just inst iv*. 13.5, n8); see f.e. in Spencer, Bower & Handley: RES JUDICATA (Butterworths Common Law) 338–339 (5th ed. 2019).
[279] U. Rocco, *L'autorità della cosa giudicata e I suoi limiti soggettivi* (Athenaeum) 433 (1864).
[280] Ibid.

A comparative study of the doctrine of res judicata should begin by defining its basic concept. However, the issue is that the definition is rarely separated from its regime and effects. Legal characterisations concerning the potential consequences are often made. There is a strained correlation between the definition and effects of the res judicata doctrine since the substance of the definition seems to be determined by the results of final and binding decisions.

Within the legal systems studied in this thesis, we imply that the legal definition and potential consequences of the res judicata doctrine are in equilibrium, both concerning each other and with regard to the vision of res judicata in relation to derivative actions (given that it informs them both). Doctrinal differences are neither irrelevant nor merely distinctive; rather, they point to distinct conceptualisations. Res judicata concepts are related to history, legal development and even more fundamental questions, such as ideas about the proper relationship between law and the plaintiff.

The purpose of this subchapter is to review recent research into the concept of res judicata doctrine in the jurisdictions under study. This subchapter begins with analysing the historical evolution and doctrinal views regarding res judicata. It then goes on to explore the scope of the res judicata effect, requirements for applying res judicata and the triple identity test, divided into subjective and objective limits. This subchapter intends to explore how res judicata may be expanded.

3.2. The Doctrine of Res Judicata in Civil Law Jurisdictions

First of all, before entering a deep discussion about the legal nature of res judicata and whether it has an independent effect or represents a continuation of the court's decision, it is necessary to note that a linguistic trap should be avoided: despite the ostensible assonance between *cosa giudicata, rechtskraft, chose jugée, cosa juzgada, preudicia* and res judicata, there is an underlying difference in narrative and approach. Generally speaking, in the common law world, res judicata is considered a largely procedural, negative (preclusive) and external (with effects projected onto subsequent proceedings) mechanism with a specific focus on the finality principle(s), which is, in turn, linked to the historical and symbolic value of the idea of the court trial as a single and, thus, 'definitive' day in court (also due to the presence of a jury as a trier of fact).

It is accordingly necessary to clarify what is meant by res judicata doctrine, claim preclusion and issue preclusion, terms used frequently throughout this study. According to traditional comparative reconstructions (e.g. Chase and Hershkoof[281]), common law jurisdictions have a more extensive approach to res judicata (both claim and issue preclusion are contemplated); by contrast, in the civil law world, the scope of res judicata is relatively narrow and typically encompasses claim preclusion only (this is important since it can be explained in the light of the different historical and institutional backgrounds of these traditions).

Civilians are historically more likely to dwell on doctrinal debates concerning the legal nature of res judicata (for example, the famous German debates on the topic proposed by K. Hellwig) and its effects (for example, a renowned theory in Italy propounded by E. T. Liebman, U. Rocco, E. Betti, G. Chiovanda, F. Carnelutti and others),[282] according to which res judicata ought not to be considered a wholly autonomous effect of the decision but, rather, a particular

[281] O. G. Chase & H. Hershkoff, CIVIL LITIGATION IN COMPARATIVE CONTEXT 564–584 (2nd ed. 2017).

[282] E. T. Liebman, *Efficacia ed autorità della sentenza (Milano, A. Giuffrè)* 6 (1935); E. T. Liebman, *Manuale di diritto processuale civile* (tome 1; Milano, Giuffrè). 55–59, 216, 219 (1959).

'quality' of the effects already produced by their decision and their immutability. In particular, E. T. Liebman stated, 'today we speak of res judicata only when we use the elliptical form to denote the authority of res judicata. Nevertheless, this is a very abstract expression that cannot and does not refer to an autonomous effect, which in any way can be such; on the contrary, it shows the power and the way in which certain effects are produced, hence their quality or mode of existence'.[283] In other words, for E. Liebman, res judicata clarifies the quality of the judgement's effects. This line of thinking gained momentum and acceptance in Europe but was also criticised by famous scholars such as Carnelutti[284] and Pugliese.[285] E. Liebman contests Hellwig's proposed theory that res judicata as a specific effect of the judgement may confuse the effect's finality.[286] Therefore, the authority of res judicata seems to exist in relation to the effects of the judgement and is intended to increase stability in practice. The theory Liebman proposed was taken up in France by Jean Foyer, which significantly impacted the doctrine. The main point of criticism in French doctrine at that time was that the effect of the judgement was 'not ideal' when the authority of res judicata covered a judgement. For example, in 1965, it was possible to apply for ordinary appeal proceedings, but these were not subject to execution measures, as the notion of *autorité de la chose jugée* could not be questioned in this regard. Professor Tomasin advanced this criticism.[287] Therefore, it would seem contradictory to maintain that *autorité de la chose jugée* exists independently of its object; it would be difficult for the authority of res judicata to cover effects that do not yet exist. Another obstacle also pushed the French doctrine of the time to reject this thesis. The *autorité de la chose jugée* can only be convincing insofar as the judgement it brings can produce substantial effects. However, legal writers have long recognised that a type of judgement exists that is not an amendment or transformation of a disputed legal situation but, rather, a declaration as to the quality of the decision or as to whether the legal situation exists or does not exist.[288] Overall, Tomasin rejected the theory proposed by Liebman.[289]

Moreover, an analysis of each jurisdiction can provide a short historical overview. What should be noted from the development of this historical thought? The core idea that we can draw from the historical analysis is that the modern civil and procedural codes and classical Roman law, despite their striking linguistic similarities, were fundamentally different products of the academics and legislators. According to Herman Shael, legal systems ignored many aspects of Roman law and either mutated or tailored key concepts they allegedly 'borrowed' to ensure a fit with the social and political order.[290]

The conferral of the preliminary ruling to the judgement is dictated to the legislator by wholly necessary elements of the procedural economy: in cases where the possibility of bringing the same question to court again is admitted, without the second process being bound by the decisions of the first, the workload of the judicial bodies is greatly burdened, and there is a significant risk associated with making any such effort in vain. The legislature may choose another approach simply by prohibiting judgment on merit; in such a case, the second proceeding must not investigate the content of the first decision – the outcome of the first trial –

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[283] Ibid. E. T. Liebman, *Efficacia ed autorità della sentenza (Milano, A. Giuffrè)* 24–26 (1935).
[284] F. Carnelutti, *Lezioni di diritto processuale civile* (Padova, Cedam) 93 (1925).
[285] G. Pugliese, *Giudicato civile*, in *Enciclopedia del diritto XVIII*. (Milano) 794 (1696)
[286] Ibid. G. Pugliese, *Giudicato civile*, in *Enciclopedia del diritto XVIII.* (Milano) 27 (1696)
[287] Tomasin, *Essai sur l'autorité de la chose jugée en matière civile* (Thèse Toulouse, LGDJ) 102–103 (1975).
[288] Ibid. Tomasin, *Essai sur l'autorité de la chose jugée en matière civile* (Thèse Toulouse, LGDJ) 103 (1975).
[289] Ibid. Tomasin, *Essai sur l'autorité de la chose jugée en matière civile* (Thèse Toulouse, LGDJ) 105 (1975).
[290] S. Herman, *The uses and abuses of Roman law texts*. 29 AM. J. COMP. L. 672 (1981).

but only the existence of a *de eadem re* judgement, which excludes the possibility of the matter being brought again into question again once decided.[291]

Matteo Marrone[292] introduced the treatment of the problems related to the effectiveness of judgements in the history of the Roman civil process, clearly highlighting the alternative approach in which each order is made at the point when effects of the res judicata are recognised res judicata to satisfy *insopprimibile con le esigenze di economia processuale* and, at the same time, legal certainty. In accordance with Marrone's argument, the preliminary ruling that binds the parties in the second process (thereby obliging the court to comply with the results obtained in the first decision) is opposed to a truly preclusive or exclusionary effect, according to which the court more simply precludes the possibility of a new judgement on a given legal situation that is already the subject of a judgement that has become final.[293]

Meanwhile, E. Liebman highlighted that one of the elements of preclusivity is when a person has already exercised a right once, after which the procedure activity itself can no longer be carried out. Liebman went further to claim that this approach is inspired by the principle of the procedure's elasticity and adaptability to the particular needs of each cause, compatible with the need to ensure that the process is rapid, free from contradictions and guarantees the certainty of the proceedings.[294]

According to Giovanni Pugliese, these circumstances establish a problem according to which criteria the *eadem res* (the same thing) must be identified. The criteria are as follows: the identity of the issues decided in an initial trial and repeated in a subsequent one and *subjectivi del giudicato*, a process that comprises the fundamental aspect of the case law and doctrine associated with the problems related to the constraints of res judicata.[295] These and other issues directly affect the res judicata scope. This is an essential element for analysing what the court relies on and what *eadem res* is limited to. In the context of this study, we will deal with the first of the profiles indicated (concerning the limits of the judgement), with specific reference to a small but significant case study in the field of derivative actions in the first process and, subsequently, the subject of an action in a new legal controversy initiated by another shareholder, company or its management.

Overall, Roman law texts have given rise to a significant amount of controversy and reasoning. It is not always possible to provide an accurate answer to certain questions regarding the interpretation of the Roman texts, particularly the conclusive effect of the judgement attached to their premises. Meanwhile, according to Robert Wyness, these texts were interpreted in the mediaeval Italian doctrine to declare the affirmative.[296]

3.2.1. Substantial and Formal Res Judicata

3.2.1.1.Introduction

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[291] Marrone, *L'efficacia pregiudiziale della sentenza nel processo civile Romano*, in Annali Sem. Giur. Univ. Palermo (APal) 7 (1955).

[292] Ibid. Marrone, *L'efficacia pregiudiziale della sentenza nel processo civile romano*, in Annali Sem. Giur. Univ. Palermo (APal) 7 (1955).

[293] Ibid. Marrone, *L'efficacia pregiudiziale della sentenza nel processo civile romano*, in Annali Sem. Giur. Univ. Palermo (APal) 7-8 (1955).

[294] E. Liebman, *Manuale di diritto processuale civile* (Giuffre) 187 (1973).

[295] G. Pugliese, *Giudicato civile*, In 18 *Enciclopedia del diritto* (Milano, Giuffrè) 818 (1969).

[296] R. W. Millar, *The premises of the judgment as Res Judicata in Continental and Anglo-American law: III. The Anglo-American Law*. 39 MICH. L. REV. 9 (1940).

This subchapter aims to analyse complex issues relating to the justification of the substantial effect of formal res judicata in the Italian, French and Russian legal systems and common law jurisdictions. Furthermore, the thesis aims to outline a new application scope of substantial res judicata: corporate law. Thus, our primary concern in the present research relates to the possibility of applying res judicata in a series of derivative actions, as well as actions that pursue the same goals as derivative actions and are considered through the objective limits of res judicata (scope as to subject matter) and its subjective limits (scope as to parties). The problem of avoiding specious derivative claims is not new, although it is amplified by legitimate threats to mitigate harassing serial litigation.

The doctrine of res judicata and its functional equivalents are known to many foreign legal systems. In particular, it is applied by the courts in France, Italy, Russia, England and the US (which recognise many different types, for each of which the case law develops its own specific rules of formal and substantial res judicata); moreover, it is known and applied relatively intensively in Germany and many other countries. Continental European legal systems usually derive the prohibition of relitigation from the general idea (policy) of truth, which is the policy underlying the concept of the consequences of res judicata (see Roman maxims, as well as the comments of G. Chiovenda[297] and L. Cadiet[298]). This policy focuses on a combination of two opposing ideas: the need for stability and the human tendency to misrepresent the facts. The policy accordingly seeks to rationalise the parties' behaviour and bring it closer to the desired moral standard.

In all these jurisdictions, res judicata is embodied in different legal categories; even if they are considered analogous to res judicata, they are not identical. The terminological difference arose from the period of middle-century German law. For example, res judicata came into English law from Roman Law, while estoppel has its origin in German law.[299] Although both principles appear to have coexisted in English law, estoppel underwent considerable modifications and became estoppel by record. Civil law jurisdictions adopted almost exclusively from Roman law; nothing corresponding to the principle of estoppel appears.[300] However, the French legal system was not inherited directly from Roman law. The study of the latter was even prohibited[301] in France under the old regime until 1789. The Latin expression res judicata is typically not used in French law (the term *res judicata pro veritate accipitur* is used occasionally to explain the general principle). However, there is a pronounced tendency in contemporary legal practice to imitate the Romans. Roman writers' treatises were studied in an attempt to learn the classical 'language' of law – not only the vocabulary but also the rules for combining the different elements (the so-called 'grammar' of the law). The legal substance is created when concepts are superimposed on each other and a dichotomy arises.

Generally speaking, the difference between the formal and substantial effects of res judicata can be articulated as follows:

- in cases of preclusion of relitigation of the same issue in the same proceeding, this is called the formal effect of res judicata;

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[297] See generally G. Messina, *Contributo alla dottrina della confessione* (Milano, Giuffr) (1948); G. Chiovenda, *Principii di diritto processuale civile* (Napoli, E. Jovene) 13 (1980).

[298] See generally L. Cadiet, *Dictionnaire de la justice* (PUF) 85 (2004).

[299] J. H Friedenthal, M. K. Kane & A. R Miller, CIVIL PROCEDURE 613 (5th ed. 2015).

[300] J. H Friedenthal, M. K. Kane & A. R Miller, CIVIL PROCEDURE 614 (5th ed. 2015); See also R. W. Millar, *The Premises of the Judgment as* Res judicata *in Continental and Anglo-American Law*, 39 MICH. L. REV. No. 1. 8 (1940).

[301] See, for example, in E. Jeuland, *The Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition*, Res judicata and Abuse of Process. (BIICL) 5 (2006).

- in cases of preclusion of relitigation of the same issues in subsequent proceedings, this is called the substantial effect of res judicata.

The substantial effect of formal res judicata is laid out in the first step of res judicata analyses. A meaningful subject to discuss in this context is the principle of *non bis in idem*, which outlines the second step of res judicata: a denominator between common law (marked by the principle of the cause of action estoppel) and civil law jurisdictions (where the principle of the negative or substantial authority of res judicata reigns; examples include France and Italy).[302] Another procedural mechanism that may assist in resolving the dilemma of derivative actions and the application of res judicata is collateral estoppel or issue preclusion. These theories are largely unknown in Civil law countries.[303]

In Russian law, res judicata may be divided into two effects: the binding nature of the judgement and its preclusion effect and issue preclusion (if we use the Anglo-American terminology, however, the term 'procedural estoppel' is also applicable).

It should be noted that the differences between systems are significant, as is initially evident when one looks at the claim of the elements with the res judicata in a court decision. These differences are also evident when one examines the relationship between the authority of res judicata and the passage of time. For example, Italian law considers that a decision has full formal res judicata only when it is no longer subject to appeal, including cassation. On the other hand, French law,[304] like common law,[305] confers the application of res judicata to the decision upon its delivery of the final judgment, or whatever final decision is acquired as soon as the decision procedure is completed in such a way that nothing remains to be decided by the court responsible for the decision, while the divestiture of the judge as a corollary of the res judicata is also an element of the final decision. Overall, two major historical trends emerge: the restrictive approach to the authority of res judicata in countries with a civil law tradition, contrasting with the extensive approach to the same concept adopted in common law countries.

However, after leaving the shores of this reassuring, historical definition, the waters within this restrictive conception become troubled. How should the notion of identity of cause be understood? If we wish to go beyond this historic core of the authority of res judicata, which is principle *non bis in idem*, how far can we go? Should we include, for example, the positive effect of the authority of res judicata attached to what was decided in the reasons for a previous decision? Will the res judicata be effective in cases in which a derivative action is filed? Now more than ever, these questions tarnish most legal systems.

3.2.1.2.France

a) The Development of the French Doctrine of Res Judicata

It is from Rome that French law derived its current conception of the res judicata (*l'autorité de la chose jugée*). Domat and Pothier enshrined the doctrine of res judicata in the French Civil Code in art. 1350, even though this concept did not enjoy majority support at the

[302] S. Bollée, P. Mayer, *L'autorité de la chose jugée en droit comparé*, Actes du colloque Autorité de chose jugée et arbitrage, Revue de l'arbitrage (1). 3–4 (2016).
[303] J. H Friedenthal, M. K. Kane & A. R Miller, CIVIL PROCEDURE 613 (5th ed. 2015).
[304] O. G. Chase & H. Hershkoff, CIVIL LITIGATION IN COMPARATIVE CONTEXT 586–589 (2 ed. 2017).
[305] J. H Friedenthal, M. K. Kane & A. R Miller, CIVIL PROCEDURE 613 (5th ed. 2015).

time.[306] This art. (art. 1350 of the French Civil Code)[307] dealt with the authority of res judicata in the broad sense and described its authority as a legal presumption (a way to articulate the scope of the judgement itself, which transforms the relationship of original law as the *litis contestatio*). Moreover, art. 1351 (ancient) indicated the conditions under which the defence of res judicata may be challenged.[308] Art. 1351 (ancient) of the French Civil Code dealt with comparing the case and a procedural exception in the case of triple identity. According to the result of Ordonnance No. 2016-131 of 10 February 2016,[309] there is no reference to the res judicata in the new art. 1354, which separates general legal presumptions. Only in art. 1355 of the French Civil Code[310] is it presented as an 'essential legal presumption', according to the wording of the report accompanying the Ordonnance No. 2016-131.

In his 1931 work *L'acte juridictionnel et l'autorité de la chose jugée: Essai critique*, R. Gullien stated, 'there is confusion between the authority of res judicata and the effects of the judgement'.[311] He further criticised traditional doctrine for having included in the notion of the authority of res judicata the absolute nature of the effects of judgement. The concept of the authority of res judicata is grounded in the judgement's proper quality, which conceptually differs from its other effects. These doctrinal ideas were reflected in France around 1931. Meanwhile, in the Italian doctrine, Liebman specified such ideas around the same time, in 1935.

R. Gullien raised a clear distinction between the authority of res judicata and *exceptio rei judicatae*, which appears to be a defensive reliance on the rule or cause of action estoppel. Regarding Roman law, R. Gullien notes that, to avoid repetition of the judgement, the praetor used an *exceptio rei judicatae* (in modern French law, the *exception de la chose jugée* is considered *autorité de la chose jugée* raised by one of the parties as means of defence). This is necessary to link the two judgements. Any modification following this procedural phase contradicts the spirit of Roman law. Even the slightest amendment of such a judgement was considered impossible. Any changes in the legal relationship were not possible from the moment of the *litis contestatio*. The crystallisation of the procedure after the *litis contestatio* still survives in part.[312] It also appears in Foyer's 'Procedure civile'; if a claim has the same object and is based on the same cause, it will run up against the inadmissibility of the claim (referred to as an exception of res judicata).[313]

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[306] V. S. Lafont, *Considérations sur la pratique judiciaire en Mésopotamie in rendre la justice en Mésopotamie* (Archives judiciaires du Proche-Orient ancien (IIIe-Ier millénaires avant J.-C)) 32, 33 (2000); E. Szlechter, *L'autorité de la chose jugée en droit sumérien: Studi Vol. VI* (Milan). 533 (1977)

[307] Code Civil [C. civ] [Civil Code] art. 1350 (Fr.): La présomption légale est celle qui est attachée par une loi spéciale à certains actes ou à certains faits; tels sont 1° Les actes que la loi déclare nuls, comme présumés faits en fraude de ses dispositions, d'après leur seule qualité; 2° Les cas dans lesquels la loi déclare la propriété ou la libération résulter de certaines circonstances déterminées; 3° L'autorité que la loi attribue à la chose jugée; 4° La force que la loi attache à l'aveu de la partie ou à son serment.

[308] Code Civil [C. civ] [Civil Code] art. 1351 (Fr.).: L'autorité de la chose jugée n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement. Il faut que la chose demandée soit la même; que la demande soit fondée sur la même cause; que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité.

[309] Ordonnance n°2016–131 du 10 Février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations.

[310] Code Civil [C. civ] [Civil Code] art. 1355 (Fr.).: L'autorité de la chose jugée n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement. Il faut que la chose demandée soit la même; que la demande soit fondée sur la même cause; que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité.

[311] R. Gullien, *L'acte juridictionnel et l'autorité de la chose jugée: Essai critique* (Bordeaux, Impr. Y. Cadoret) 252–256 (1931).

[312] R. Gullien, *L'acte juridictionnel et l'autorité de la chose jugée: Essai critique* (Bordeaux, Impr. Y. Cadoret) 270–271 (1931).

[313] G. Cornu and J. Foyer, *Procédure civile* (PUF) 295 (1958).

Moreover, in 1958, Foyer and Cornu noted that confusion arose between substantial 'efficacité' (*efficacia*) and the authority of res judicata.[314] The latter is an attribute of the judgement that applies to the subject of said judgement and prevents the subject from being contested in the future between persons who were parties to or represented in proceedings. The judgement produces its effects concerning all parties to the extent declared by law. No person who has not participated in the judgement as a party (called or heard) can be prevented from questioning the subject of a judgement. The parties, by contrast, can no longer litigate the same subject of the judgement, as they have already utilised their right of action (right to be heard in court). The positive effect of the authority of res judicata was frequently confused over a long period with the substantial effect, which has only a derivative similarity.

Pierre Mayer contends that, in essence, the history of the authority of res judicata is a history of confusions and that it should be returned to its sources; these would be the principle of *non bis in idem* in both criminal and civil matters. What is important here is that two trials are never conducted for the same case for reasons of social stability and avoiding the congestion of the courts. It is, therefore, the negative (claim preclusive) effect of res judicata that matters and not the authority of res judicata as a presumption of truth of judgement. It is not between the judgement and the new claim that the comparison is made but between the two claims.[315] However, the doctrine has since changed. More precisely, an increasing number of voices are criticising the classical conception of the *l'autorité de la chose jugée* and proposing new mechanisms as a substitute.

Henri Motulsky[316] criticised the French approach below, based on Art. 1351 (ancient) of the French Civil Code[317] and argued that the criteria for res judicata were described too vaguely. He proposed that the sole criterion of res judicata should be the process itself. Thus, Motulsky became the author of art. 480 of the French New Code of Civil Procedure, having enclosed the identity of all elements of the claim as a criterion for application of res judicata. In France today, there are competing norms as regards res judicata: the traditional art. 1355 of the Civil Code and the new art. 480 of the French New Code of Civil Procedure. While case law refers to both articles, the legal force of art. 1355 of the Civil Code prevails over art. 480 of the CPC.

After art. 480 of the CPC was adopted, Foyer noted that the new article condemned this case law and no longer allowed 'fishing' for decisions. After some hesitation, the case law seemed to comply with the rule laid down by art. 480 of the CPC.[318] The end of inadmissibility is publicly ordered when it is ruled during the same proceeding on the consequences of a previous decision that has become final.

There is a slight difference in the functional approach without any essential contradiction between these provisions. The last stages of evolution in res judicata under French law can be seen through the influence of Motulsky's ideas since the criterion of the 'ground' is now strictly

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[314] G. Cornu and J. Foyer*, Procédure civile* (PUF) 285–295, 491–493 (1958).

[315] See in L. Cadiet and D. Loriferne, *L'autorité de la chose jugée* (Bibliothèque de l'Institut de Recherche Juridique de la Sorbonne – André Tunc) Tome 37. 19 (2012); See also P. Mayer, *Réflexions sur l'autorité négative de chose jugée*, in Mélanges Jacques Héron (LGDJ) 331 (2008).

[316] H. Motulsky, *Pour une delimitation plus precise de l'autorité de la chose jugée en matière civile* (Dalloz-Sirey. Chronique I) 186 (1968).

[317] Code Civil [C. civ] [Civil Code] art. 1351 (Fr.): 'L'impossibilité d'exécuter la prestation libère le débiteur à due concurrence lorsqu'elle procède d'un cas de force majeure et qu'elle est définitive, à moins qu'il n'ait convenu de s'en charger ou qu'il ait été préalablement mis en demeure'.

[318] See in G. Cornu & Jean Foyer, *Procédure civile* (PUFP) 295 (1958).

limited.[319] The traditional approach to matching the grounds of a claim was that new actions could be brought between the same parties on the same grounds. For example, if the first court decision denied damages (based on art. 1382 of the Civil Code, now art. 1240), it was possible to file a new claim on the basis of liability under art. 1384 (now art. 1242) or 1386 (now art. 1244) of the Civil Code. This traditional case law was overturned by a decision of the Court of Cassation (the Cesareo case). The Cesareo case introduced a rule similar to art. 2909 of the Italian Civil Code, under which the requalification of the claim does not change the subject matter of the case.

We have previously shown that the definition of res judicata has been the subject of heated debate in the legal literature. In France, the three core points of view regarding the notion of the *autorité de la chose jugée* should be distinguished:[320]

1) *Autorité de la chose jugée* is a specific constatation and assumption of a legal truth (the theory of Jezé).[321]

2) 'Desirable guarantees' between the parties should no longer be called into question; the legal authority attributed to the principle depends directly on the very forms in which it took place and, in particular, on the existence of a judicial body, as well as on the contradictions of the debates. The authority of res judicata is determined without these elements; it does not depend on a particular essence of the act but rather on the general 'atmosphere of impartiality' (the theory of Hébraud).

3) The notion of the authority of res judicata arises from the quality of judicial verification; by its nature, it may only translate the ideal resolution of a dispute within the dispute. The notion of the authority of res judicata arises from the 'atmosphere of impartiality' in which the dispute was settled; third parties are affected only by the existence of the judgement and by its effect. It is, therefore, necessary to seek the explanation of the phenomenon by examining the specific nature of certain legal relationships (the theory of Tomasin).

Legal scholars have attempted to clarify these concepts or replace them with less formalistic ones. However, these attempts were unsuccessful since the amendment to art. 1355 of the Civil Code will require a global reform of all relevant legislation.

b) French Modern Law

No legal definition of the res judicata effect has been stipulated, even though it is mentioned in several parts of both the CPC and FCC. In France, the binding character of a judgement may be erased by a distinction between '*autorité de chose jugée*' and '*force de chose jugée*'.[322] According to the French Code of Civil Procedure, a judgement obtains res judicata effects – the so-called '*autorité de chose jugée*' – 'from the time of its pronouncement' and maintains such effects unless overturned by an appeal or by other prescribed means of review.[323]

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[319] Motulsky H. *Pour une delimitation plus precise de l'autorité de la chose jugée en matière civile* (Dalloz-Sirey. Chronique I) 18 (1968).

[320] Tomasin, Essai sur l'autorité de la chose jugée en matière civile (Thèse Toulouse LGDJ) 106–114 (1975).

[321] Ibid.

[322] Oscar G Chase & Helen Hershkoff, CIVIL LITIGATION IN COMPARATIVE CONTEXT 586–589 (2nd ed. 2017).

[323] Art. 480 French NCCP reads: 'The judgement which decides in its operative part the whole or part of the main issue, or one which rules upon the procedural plea, a plea seeking a plea of non-admissibility or any other

This implies that once rendered, a final judgement remains binding upon the parties and can be executed and enforced provided that no appeal has been lodged.[324] The judgement will receive the '*force de chose jugée*' and be considered definitive if the following two conditions are fulfilled: (1) the party against whom the judgement is enforceable receives the notification of the execution, and (2) the judgement is not subject to any review staying its execution. If there is no recourse remaining (especially petition in cassation), the judgement is irrevocable.[325]

It should be duly noted that the Italian concept of formal res judicata is close to that of the irrevocability of the decision under French law, which concerns a judgement that cannot be called into question given that all remedies have been used and all deadlines have expired. However, judgements given by res judicata (i.e. by '*force de la chose jugée*') may be the subject of extraordinary recourse, which may be contrasted with the so-called ordinary appeals listed in art. 324 of the Italian Code of Civil Procedure. Extraordinary recourse is defined as certain types of revocation relating to the deceit of one party or another, such as a third-party opposition (*opposizione di terzo).* Italian substantial res judicata corresponds to the res judicata as defined by art. 2909 of the Civil Code. According to this provision, the decision contained in the judgement in the means of '*autorité de la chose jugée*' shall have all its effects between the parties, their heirs and their successors.

In France, the legality of the judgement does not affect the res judicata authority, regardless of whether the decision is affected by formal or substantive defects. As long as no appeal is lodged against the irregular decision (art. 460 of the CPC),[326] it retains the authority of res judicata and, if it has become res judicata, may be enforced.[327] The authority of res judicata can be raised either by one of the parties as a means of defence or *ex officio* by the judge.

In accordance with the French Civil Code, the res judicata effect of a judgement is defined under the section on presumptions,[328] although the authority of the res judicata is now separated from the general presumptions. It is, however, necessary to ask the following question: what appears to be reflected by the presumption? If we stick to the classical analysis, this will be a presumption of truth. Indeed, according to this analysis, the authority of res judicata would result from a presumption of truth attached to what has been deemed res judicata, a concept that is placed in the civil code under a title relating to 'proof of obligations'. However, regardless of whether or not it is true, analysing the authority of res judicata as a 'presumption' is now subject to discussion, particularly due to the refutations exposed by professors Foyer and Tomasin.[329] These scholars stated that the authority of judgement stands in the place of truth, which does not imply that even false judgement will be interpreted as truth, as this would be too strict. Raphael Drai explains that the authority of res judicata is intended to avoid duplication in civil matters

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interlocutory application, will, from the time of its pronouncement, become res judicata with regard to the dispute which it determines'.

[324] E. Jeuland, *The Effect in the European Community of Judgements in Civil and Commercial Matters: Recognition,* Res judicata and Abuse of Process (BIICL) 6 (2006).

[325] E. Jeuland, *The Effect in the European Community of Judgements in Civil and Commercial Matters: Recognition*, Res judicata and Abuse of Process (BIICL) 6 (2006).

[326] Code de procédure civile [C. proc. civ] [Code of Civil Procedure] art. 460 (Fr.): «La nullité d'un jugement ne peut être demandée que par les voies de recours prévues par la loi».

[327] Cass. com., 14 nov. 1989, No. 88-17. 188: JurisData No. 1989-703492; JCP G 1990, IV, 14 . Contra, Cass. 1st civ., 17 oct. 1995, n° 94-04.025: Bull. civ. I, No. 367; D. 1995, INF.rapper. p. 240; gas. PAL. 1996, 1. P. 133

[328] Peter E Herzog & Martha Weser, CIVIL PROCEDURE IN FRANCE. (Springer) 551 (2017).

[329]A. Botton, *L'autorité de la chose jugée au criminel sur le civil*: La thèse du Doyen Hébraud. In Miniato, L., & Théron, J., Pierre Hébraud, doctrine vivante? Presses de l'Université Toulouse 1 Capitole. 175-186. (2018). J. Foyer, *De l'autorité de la chose jugée en matière civile - Essai d'une définition* (Thèse Paris) 222 (1954); D. Tomasin, Essai sur l'autorité de la chose jugée en matière civile. (Thèse Toulouse, LGDJ) 239 (1975).

and that the judgement must build a new reliable relationship for this purpose; the importance of the truth is what makes it possible to convince the parties not to relitigate.[330]

The substantial effect of res judicata in France should be considered as follows: the rule of res judicata is grounded in the policy that there must be an end to litigation (*lites finiri oportet*).[331] The formal aspect of res judicata is that judgement benefits from a presumption of regularity and validity. Once only the so-called extraordinary review methods are available, rebutting the judgement becomes far more difficult, since all means of review against judgement are barred in France under these circumstances.[332]

3.2.1.3.Italy

a) The Development of Italian and German Doctrine of Res Judicata

The regulation of the Italian res judicata described and analysed herein has many features in common with the cultures of other jurisdictions, both near and remote. Giuseppe Chiovenda first defined and then elaborated the concept of preclusion, which is fully reflected in the broader reestablishment of the process as a legal relationship. Chiovenda first defined preclusion as the principle underpinning the procedural and substantial phenomenon whereby 'following the completion of certain acts or following the commencement of limitation periods, participation is precluded from carrying out other specific procedural actions, or in general procedural actions'; subsequently, he clearly pointed out the consistency of the procedural phenomenon.[333]

The so-called preclusion principle was also developed by Oskar von Bülow, who writes about the Rechtsverwirkungsprinzip, which pertains to the characteristics of the process by which the legal relationship is formed.[334] In the context of the reestablishment of the process as a legal relationship between the parties, it is recognised as a bundle of personal subjective procedural rights or faculties and procedural duties imposed between acts that are effective or ineffective and admissible or inadmissible, as well as between those acts that are legally optional and legally necessary.[335]

The starting point of von Bülow's postulate considers the relation of the court's role to the legislator's role. According to von Bülow, the state has the institution of the court at hand to ensure that a legal order prevails in all cases. The work of the latter helps to carry out and complete the rule of law, which only provides the beginning. The activity of the legislator ends

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[330] See in L. Cadiet, D. Loriferne, *L'autorité de la chose jugée* (Bibliothèque de l'Institut de Recherche Juridique de la Sorbonne - André Tunc) Tome 37. 21 (2012); R. Drai, Le Plus Grand Mensonge Du Monde - Théorie Juridique Et Théorie Psychanalytique (Hermann) 245 (2010).

[331] Peter E Herzog & Martha Weser, CIVIL PROCEDURE IN FRANCE. (Springer) 551 (2017).

[332]Note that collateral attack is not possible against judgements in France: Peter E Herzog & Martha Weser CIVIL PROCEDURE IN FRANCE. (Springer) 551 (2017).; *Bouchet v. Lamberty*, Cass. Civ., Feb. 25, 1964, D.J. 312.

[333] A. Carratta, *Il fondamento del principio di preclusione nel processo civile.* (Giappichelli) 12, 16 (2012). G. Chiovenda, Principi di diritto processua-le civile (Napoli) 12 (1923), R. Millar, *The Premises of the Judgement as Res judicata in Continental and Anglo-American Law.* 39 MICH. L. REV. No. 1. 1–36 (1940).

[334] R. Millar, *The Premises of the Judgement as* Res judicata *in Continental and Anglo-American Law: III. The Anglo-American Law*, 39 MICH. L. REV. No. 238. 1–36 (1940); G. Chiovenda, Principi di diritto processua-le civile (Napoli) 12-26 (1923). Von Bülow, *Civilprocessualische Fiktionen und Wahrheiten (Archive für civilistiche Praxis)* 13 (1879).

[335] Von Bulow, *Civilprocessualische Fiktionen und Wahrheiten in G. Carratta, Il Fondamento Del Principio Di Preclusione Nel Processo Civile* 13 *(2012).*

when an abstract rule of law is encountered. It is only through the ongoing work of the judge that the legal order becomes what it should be: a power that reigns over the lives of people.[336]

Based on this principle, von Bülow points out that if the party does not exercise his right to defend himself in the manner and within the terms established by the legislature, he loses the possibility of exercising it at a later date.[337] Von Bülow clearly proposes a pragmatic argument in favour of expanding the res judicata doctrine. The judicial system gives all parties the right to use legal remedies; one effective way means of avoiding redundancy is to allow all the arguments of a party to be expressed once and in the first stage of the process.[338] Moreover, such a broad interpretation permits us to conclude that the desire to expand the possibilities of the res judicata has always existed. There are several reasons for this, along with several possible solutions that remain relevant to this day. First of all, the parties to the first process must be sure that the dispute that has already been considered will not be relitigated, despite differences in the subject matter of the case, as such relitigation would undermine the stability of the parties and the subjects of the legal relationship.

It would therefore seem that von Bülow attaches a purely logical significance to the decisions of the court, seeing them as a logical operation; a conclusion is drawn from a syllogism in which the upper premise is the rule of law, the lower is the circumstances of the case under discussion, and the activity of the court is considered only as '*eine reine Verstandesthatigkeit*' (simply an intellectual activity). However, he subsequently removes these doubts. The power of res judicata (*Rechtskraft*) is stronger than the power of legislation (*Gesetzeskraft*).[339] The power of res judicata sets its last word not in the law but rather in the judicial (case law) definition of law. In our contention, this aims to provide additional stability in legal relations since the abstract law of the statute is not capable of regulating all possible civil-legal relations by itself. A court decision in a particular case can put an end to a civil dispute once and for all. As a result, this is seen as a significant role of the court in the practice of 'law-making' – after all, the res judicata is raised to the level of the law.

Moreover, as von Bülow points out, the failure to exercise the right when a time limit is set for its exercise entails the loss of the right and, therefore, the impossibility of its subsequent exercise: 'while guaranteeing the parties greater freedom of defence, the law proceeds by way of preclusion, in any case in which from general considerations, and more or less accurate, equitable, enforceable, lawful it feels empowered to do that way'.[340]

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[336] It seems to us that this may be one of the reasons why domestic procedural law is less subject to globalisation and reception. This complicates the task of finding a universal formula in comparative procedural studies.

[337] Von Bülow, *Civilprocessualische Fiktionen und Wahrheiten* (Archive für civilistiche Praxis) 69 (1879).

[338] Von Bülow, Civilprocessualische Fiktionen und Wahrheiten in G. Carratta, Il Fondamento Del Principio Di Preclusione Nel Processo Civile 12–16 (2012).

[339] A. Carratta, Il fondamento del principio di preclusione nel processo civile. (Giappichelli) 12–16 (2012). G. Chiovenda, Principi di diritto processua-le civile *(Napoli, N. Jovene)* 911 (1923). Von Bülow, Civilprocessualische Fiktionen und Wahrheiten *in G. Carratta, Il Fondamento Del Principio Di Preclusione Nel Processo Civile*. 13 (1879). Così Taruffo, *Voce Preclusioni, in Enc. dir., aggiornamento (Milano)* (1997) in *G. Carratta, Il Fondamento Del Principio Di Preclusione Nel Processo Civile.(Giappichelli) 14 (2012)*; E. Grasso, *Interpretazione della preclusione e nuovo processo civile in primo grado.* (Riv. Dir. Proc) 640 (1993).

[340] R. W. Millar, *The Premises of the Judgement as Res judicata in Continental and Anglo-American Law: III. The Anglo-American Law*, 39 MICH. L. REV. No. 238. 7 (1940); A. Carratta, *Il fondamento del principio di preclusione nel processo civile .(Padova)* 12–16 (2012); G. Chiovenda, *Principii di diritto processuale civile (Napoli, N. Jovene) 911* (1923). Von Bülow, Civilprocessualische Fiktionen und Wahrheiten *in G. Carratta, Il Fondamento Del Principio Di Preclusione Nel Processo Civile*. 13 (1879). Così Taruffo, *Voce Preclusioni, in Enc. dir., aggiornamento, Milano* (1997) in *G. Carratta, Il Fondamento Del Principio Di Preclusione Nel Processo Civile. (Giappichelli) 14 (2012);* E. Grasso, *Interpretazione della preclusione e nuovo processo civile in primo grado.* (Riv. Dir. Proc) 640 (1993).

Following van Bülow, E. T. Liebman argued that res judicata is a process that can be precisely defined as the immutability of the ruling arising from the judgement. It is 'a deeper quality, which affects the content of the judicial act and makes the effect of it immutable beyond the judicial act in its formal existence'.[341]

It follows that the natural character of the so-called preclusion principle is, in the context of the dogmatic (Italian, French and German) view of the process, a procedural legal relationship in which res judicata attached to the situations of economic advantage (position of benefit) prevails over passive situations of the parties (passive position). The need to organise these positions of advantage in the first process leads to the crystallisation of cases when the preclusion effect may be used.[342]

From this point of view, the fulfilment of a certain procedural step in the manner and within the terms established by the legislature is not a right or benefit (according to the reestablishment of the process due to the concept of legal relationship) as in the legal relationship; instead, it is a tool used to achieve the 'protection of parties' interests' and, therefore, an absolutely passive situation.[343]

This is the only means by which scholars can re-revaluate the limits connected with recognising the process as a legal relationship. The concept of 'protection of parties' interests' relates not only to the way the party must conduct itself to achieve a particular procedural advantage in its favour or the aspect of a judgement which is in itself favourable; it also concerns the conduct the party must perform to avoid the occurrence of inevitable adverse consequences, such as preclusion or forfeiture, or other negative consequences expressly provided by the legislator. In this context, preclusion coincides with the nonfulfillment of a determined procedural burden.[344]

It must be noted that, considering the development of the formal and substantial effects of res judicata (two sides of the same coin), most research into res judicata over the past decades has emphasised the use of two opposing theories:

1) The first theory concerns the bifurcated nature of the substance of res judicata and its division into two concepts (formal and substantial – referring to art. 2909 ICC and art. 324 Codice di Procedura Civile, respectively).

2) The second holds that, conceptually, there is only one broad notion of '*res judicata*', while the abovementioned provisions (art. 2909 ICC and art. 324 Codice di Procedura Civile) refer to the contrasting effects or scopes of res judicata enforcement (formal or substantive).[345] The criticism levelled at the twofold concept of res judicata is understandable due to the desire to unify an already complex doctrine. However, it is necessary to qualify the effect of res judicata in terms of its formal and substantial sides at the beginning of the notion's development. This approach is highly recommended for use in legal systems that exhibit considerable lacunae in the evolution of the res judicata doctrine.

Similarly, many German works, articles and judgements have developed the concept of res judicata's authority and its outlines. Various theories have been developed to evolve or argue

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[341] E. T. Liebman, *Efficacia ed autorità della sentenza (Milano, A. Giuffrè)* 40 (1935).

[342] A. Carratta, *Il fondamento del principio di preclusione nel processo civile .(Padova) 12-16* (2012).

[343] A. Carratta, *Il fondamento del principio di preclusione nel processo civile*. *(Padova) 12, 16* (2012). G. Chiovenda, Principii di diritto processuale civile *(Napoli, N. Jovene) 12 - 14, 16* (1923).

[344] A, Carratta, *Il fondamento del principio di preclusione nel processo civile.(Padova) 12-16 (*2012) ;G. Chiovenda, *Principii di diritto processuale civile (Napoli, N. Jovene) 12* (1923). O. Bülow, *Absolute Rechtskraft des Urtheils* (1894) in Millar, R. (1940). *The Premises of the Judgement as* Res judicata *in Continental and Anglo-American Law*. 39 MICH. L. REV. No 1. 10–36 (1940).

[345] G. Pugliese, *Giudicato civile* (Giuffrè) 794, 864–866 (1968).

with Savigny's theory that the doctrine of res judicata should lead to an extended binding effect of the judgement's content. Influenced by the principle of *res iudicata ius facit inter partes*, the substantial vision of res judicata presented by Savigny considered the authority of res judicata to be an institution with substantial effect. The judicial decision creates the rights between the parties; the rights recognised by the judicial act arise from the judgement and, until then, are non-existent. Supporters of this school consider the exception of res judicata as a means of substance and not of procedure since it has the purpose and effect of avoiding a contradictory judgement. Savigny, who made lasting contributions to doctrine, particularly regarding the evolution of legal institutions, is most commonly spoken of in terms of the 'conclusiveness of the grounds of decision'.[346]

On this basis, Savigny distinguished what was ordinarily spoken of as the 'grounds' of judgement into objective and subjective.[347] The objective grounds were the concrete legal relations upon which the operative part of the decision depended – the subjective reasons that personally moved the judge regarding his conviction as to these relations.[348] Res judicata was always to be predicated on objective grounds, which the author more specifically termed the 'elements of the judgement'.[349] The German concept of *Rechtskraft* does not fully correspond to the model adopted by French law but is more akin to Italian law. The German Code of Civil Procedure (*Zivilprozessordnung*; ZPO) contains a provision on res judicata and its scope; however, this text has had to be clarified by the case law, which must regularly intervene in complex issues, and by the res judicata doctrine.

In the context of a broader reconstruction of the procedural matters, preclusion becomes the negative consequence of the non-performance of a procedural burden or, rather, the consequence of the 'timely failure to carry out an activity, without which the party cannot achieve a certain result'.[350] From a similar point of view, the function of preclusion is nothing more than to sanction the conduct of the party who fails to perform the procedural activities in time and in the manner prescribed; therefore, the effect of an express provision of law will bring out such a result from a certain conduct of the case. It should be emphasised regardless of the circumstance that has determined the non-fulfilment of the procedural activity. Failure to perform the procedural activity may result either from the party's mere inactivity or the performance of activities incompatible with those provided by the legislator. As V. Grasso pointed out, the preclusion 'poses prima facie with the situation of the non-timely performance of the activity, without which the party cannot achieve a certain result (such as the introduction in the process of factual elements, when it is requested); and this is expressed, perspicuously, with the idea of a burden unfulfilled'.[351]

Moreover, if the preclusion is connected to the consummation of power, faculty or procedural burden, it must inevitably be noted that the predictive power of preclusive mechanisms is reflected in the defensive potentialities of the parties. There is no doubt that the inadmissibility of defensive actions of the parties, based on the substance but precluded,

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[346] R. W. Millar, *The Premises of the Judgement as* Res judicata *in Continental and Anglo-American Law*, 39 MICH. L. REV. NO. 1. 10 (1940).

[347] R. Wyness Millar, *The Premises of the Judgement as* Res judicata *in Continental and Anglo-American Law*, 39 MICH. L. REV. NO. 1. 10 (1940).

[348] Ibid. R. Wyness Millar, *The Premises of the Judgement as* Res judicata *in Continental and Anglo-American Law.* 39 MICH. L. REV. NO. 1. 10 (1940).

[349] R. W. Millar, *The Premises of the Judgement as* Res judicata *in Continental and Anglo-American Law*, 39 MICH. L. REV. NO. 1. 10 (1940).

[350] A. Carratta, *Il fondamento del principio di preclusione nel processo civile (Padova) 12, 16* (2012). E. Grasso, *Interpretazione della preclusione e nuovo processo civile in primo grado* (Riv. Dir. Proc) 640-641 (1993); Taruffo, voce Preclusioni (diritto processuale civile), in Enc. dir., aggiornamento (Milano) 794 (1997).

[351] E. Grasso, Interpretazione della preclusione e nuovo processo civile in primo grado (Riv. Dir. Proc) 641 (1993).

eventually limits the possibility of defence of the party itself and may, consequently, lead to an alteration in the assessment of the case on which to decide. However, there is no doubt that in a choice in favour of the preclusion system, the need for a process of reasonable duration plays a major role; this inevitably affects the quality of the assessment.[352]

However, this state of affairs can give rise to sharp criticism since any court decision resolves questions of facts, and in any such decision, there will be a judge's subjective opinion, which necessarily means subjective grounds. The judge may not abstract from any personal approaches to understanding the issues of resolving facts and law. If the judge were to consider only the issue of law – as most often happens in the context of interpretational documents regarding the conflict of law – then it is needless to talk about subjectivity. After all, interpretational cases are considered not by one judge but by several, all of whom analyse different approaches and choose the most appropriate interpretation for application in the legal order under consideration.

Obviously, given the subjective reasons for making decisions, an over-extension of res judicata would be required, which would be quite challenging to allow. After all, this case has an increased risk of abuse of the parties' procedural rights that were somehow affected in the court decision and matters of substance.

b) The Current State of the Doctrine

In Italian law, res judicata (referred to as '*cosa giudicata*' or '*giudicato*', which literally means 'what has been adjudicated') is envisaged by the legislator both in the Civil Code (art. 2909)[353] and in the *Codice di Procedura Civile* or Code of Civil Procedure (art. 324).[354] These provisions draw an essential distinction between two forms deemed to be unknown in French law (and poorly discovered in Russian law) and must, therefore, be discussed.

More specifically, the Italian solution, historically influenced by a German-derived dogmatic notion,[355] distinguishes two aspects of res judicata: the formal res judicata ('*cosa giudicata formale*') and the substantial res judicata ('*cosa giudicata sostanziale*').[356] These two notions, although interrelated, can be clearly distinguished on normative and dogmatic grounds, the latter being a legal and logical consequence of the former.

The formal res judicata is a procedural notion that can be defined as the situation in which no ordinary appeal may be raised against a judgement, whether procedural or on merits. More specifically, formal res judicata is governed by art. 324 of the *Codice di Procedura Civile*, which

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[352] A. Carratta, *Il fondamento del principio di preclusione nel processo civile (Padova) 12, 16* (2012). G. Chiovenda, *Principii di diritto processuale civile (Napoli, N. Jovene) 12, 16* (1923).

[353] Codice Civile [C. civ] [Civil Code] art. 2909 (It.): 'the findings contained in a final judgement are conclusive for all purposes on the parties, their heirs, or successors in interest.' For the English translation of the article, see art. 2909, M. Beltramo, *The Italian Civil Code and Complementary Legislation* (1993).

[354] Codice di procedura civile [C. proc. civ] [Code of Civil Procedure] art. 324 (It.): 'Si intende passata in giudicato la sentenza che non è più soggetta né a regolamento di competenza, né ad appello, né a ricorso per cassazione, né a revocazione per i motivi di cui ai numeri 4 e 5 dell'articolo 395.'

[355] As such 'german law recognises four forms of binding effect which a judgement can acquire: 1) inner-procedural binding effect; 2) formal res judicata; 3) substantive res judicata; 4) a result of a provision of substantive law, e.g. the guarantor may request release from his guarantee if the creditor has obtained an enforceable judgement against him. The effects of judgements as a result of substantive law have nothing to do with res judicata, but rather rooted in the relevant provisions of substantive law'. See P. L. Murray, Rolf Stürner, German Civil Justice (Durham, Carolina Academic Press) 361 (2004).

[356] See in G. Chiovenda, *Principii di diritto processuale civile (Napoli, N. Jovene)* 911 (1978).

provides that a civil judgement is understood as having passed into a final, binding judgement when it is no longer subject to attack by the ordinary means of impugnation (i.e. appeal, petition for annulment, rule of competence or ordinary revocation) nor by any form of appeal for jurisdiction (the so-called '*regolamento di competenza*', which refers to an appeal, an appeal in cassation, etc.).

In the same vein, Claudio Consolo notes that the judgement is recognised, even if it is not yet passed in formal judgement. The authority of the substantial res judicata is an authority arising from the fact that such a judgement emanates from a state body and that its 'content' of that (which is, in his opinion, still controversial) binds all parties and their heirs: art. 2909 of the CC.[357]

The Italian doctrine has criticised the fragility of the res judicata effect, which may be brought into question by means of an extraordinary remedy (art. 395 Codice di Procedura Civile[358]). However, case law shows that extraordinary remedies capable of affecting res judicata are very rarely invoked.[359]

A judgement that is formally res judicata may need but not have the substantial res judicata effect. In other words, final judgements on the merits that have become formal res judicata can become substantial res judicata. A judgement that decides only procedural issues and is no longer subject to any of the ordinary forms of attack is a formal res judicata and precludes relitigation of those issues in the same proceeding. The substantive res judicata concerns the binding effects of the court's assessment of the rights upon which the parties' claims were based. The Italian legislator has chosen to place this provision in the civil code because it does not directly concern the civil procedure insofar as it constitutes a substantial effect of the process.

In Italian law, '*cosa giudicata formale*' is a concept used to determine when a decision becomes irrevocable.[360] E. Liebman defines it as a quality of the judgement, as it can no longer be challenged due to the preclusive effect.[361] Therefore, it does not concern the question of the scope of the res judicata. At this point, it is the '*cosa giudicata sostanziale*' that we should examine. E. Liebman recognises the second notion of the res judicata doctrine as having specific efficacy – the authority of the res judicata – and arising only after the recognition of the *cosa*

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[357] See in C. Consolo, *Nuovi Ed Indesiderabili Esercizi Normativi Sul Processo Civile: Le Impugnazioni A Rischio Di 'Svaporamento'. (Ordinario di diritto processuale civile nell'Università di Padova) (Corriere Giur.) para. 18-19. P. 1143-1144 (2012).*

[358] Codice di procedura civile [C. proc. civ] [Code of Civil Procedure] art. 395 (It.): 'Le sentenze pronunciate in grado d'appello o in unico grado possono essere impugnate per revocazione: 1. se sono l'effetto del dolo di una delle parti in danno dell'altra; 2. se si è giudicato in base a prove riconosciute o comunque dichiarate false dopo la sentenza oppure che la parte soccombente ignorava essere state riconosciute o dichiarate tali prima della sentenza; 3. se dopo la sentenza sono stati trovati uno o più documenti decisivi che la parte non aveva potuto produrre in giudizio per causa di forza maggiore o per fatto dell'avversario; 4. se la sentenza è l'effetto di un errore di fatto risultante dagli atti o documenti della causa. Vi è questo errore quando la decisione è fondata sulla supposizione di un fatto la cui verità è incontrastabilmente esclusa, oppure quando è supposta l'inesistenza di un fatto la cui verità è positivamente stabilita, e tanto nell'uno quanto nell'altro caso se il fatto non costituì un punto controverso sul quale la sentenza ebbe a pronunciare; 5. se la sentenza è contraria ad altra precedente avente fra le parti autorità di cosa giudicata, purché non abbia pronunciato sulla relativa eccezione; 6. se la sentenza è effetto del dolo del giudice, accertato con sentenza passata in giudicato.'

[359] F. P. Luiso, *Diritto processuale civile (A. Giuffrè)* 277–276 (2009).

[360] Legal theorists also split into different camps on the issue of the nature of res iudicata, that is whether the final and binding effects of the judgement were directed at the judges (procedural/formal theory), in front of which the parties appeared to have the same claim relitigated, or the parties who had already seen their dispute being finally adjudicated in prior proceedings (substantial theory). See A. Salomone, *Riflessioni in tema di 'auctoritas rei iudicatae' (Tricase Lecce: Libellula edizioni) 794 (2014).*

[361] E. T. Liebman*, Efficacia ed autorità della sentenza (Milano, A. Giuffrè)* 44–45 (1935).

giudicata formale.[362] What is found to be substantial is based on the subject matter of the judgement and the *causa petendi*,[363] i.e. the reason of fact[364] and law invoked in support of the claim.

The articulation between the formal and substantial res judicata was cofounded by the Italian doctrine. It is generally considered that no contrast exists between the two basic principles[365] that intersect two aspects of the same phenomenon.[366] The legislation has followed the doctrinal position. Thus, the Court of Cassation decided that the res judicata found to be substantial is only a reflection of the res judicata found to be formal.[367] Therefore, substantial res judicata can only be attached to a decision with res judicata authority that is found to be formal. However, the distinction itself has less importance than is usually believed. The unity of the res judicata doctrine excludes the practical possibility that two aspects may be separated according to the subject matter of the judgement.

On the other hand, decisions vested with the authority of formal res judicata are not necessarily vested with the authority of substantive res judicata. The doctrine has also introduced a distinction between what is considered internal (*giudicato interno*) and what is considered external (*giudicato esterno*). The internal res judicata concerns decisions made in the same instance, namely all those vested with the authority of formal res judicata, such as a decision on a question before ruling on jurisdiction. Nevertheless, these decisions are not endowed with the authority of res judicata considered substantial.[368] They have a binding effect on the parties within the instance. These decisions are opposed by those with the authority of res judicata deemed external, which are vested with both formal and substantial res judicata. They have effects outside the proceedings because they determine the substance of the dispute.

3.2.1.4.Russia

a) The Development of Res Judicata in Russia

Res judicata in its modern sense was not legally fixed in Russia's national law until the nineteenth century, although the significance of earlier judgements was reflected in the legal norms of feudal law from the fourteenth century onwards, containing provisions that refer to previous judicial proceedings. In addition, the principle of res judicata that prohibited relitigation was established, according to which it was prohibited to repeat the same claims under threat of punishment, as indicated in art. 154 of Chapter X (on the court) of the Cathedral Code (1649). Thus, the first sources of law from the times of the Appanage and the Russian centralised state already contain rules pertaining to the meaning of earlier court decisions.

Considering the pre-revolutionary period, it is worth noting the Charter of Civil Procedure of 1864 (hereinafter 'the Charter'). Under arts. 81–82 of Chapter V of book I, the plaintiff must

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[362] E. T. Liebman, *Efficacia ed autorità della sentenza (Milano, A. Giuffrè)* 44–45 (1935).

[363] A. Cerino Canova, La domanda giudiziale ed il suo contenuto (Commentario al codice di procedura civile diretto da E. Allorio, II, Turin) 33 (1980).

[364] As a matter of fact, Cerino Canova (Ibid. P. 189) proposed the following theory: the criterion for identifying the fact would be the legal effect. If several subsumptions have a single legal effect, then the subjective right is the same.

[365] S. Satta, C. Carmine, *Diritto processuale civile* (Cedam) 511 (2000).

[366] E. T. Liebman, *Efficacia ed autorità della sentenza (Milano, A. Giuffrè)* 44–45 (1935).

[367] Corte Di Cassazione; sezione lavoro; sentenza 3 luglio 1987, n. 5840; Cassa Trib. Milano 30 dicembre 1983.

[368] F. P. Luiso, *Diritto processuale civile*, I principi generali, Giuffrè éd. 141 (2000).

prove his claim, and a defendant objecting to the plaintiff's claims must prove his objection. In this case, the court does not collect evidence and bases its decisions solely on the evidence presented by the litigants.[369] These provisions reflect the adversarial nature of the trial and the burden of proof being placed on the parties. The court's maximum level of intervention in the question of proof is stipulated in art. 368 of the Charter, according to which, if the court finds that some of the circumstances essential to the litigation were not presented, it sets a time limit for explaining the specified circumstances.[370]

Even though the Charter of Civil Procedure did not contain the concept of res judicata as such, as this appeared only later in the Soviet period, the issue of applying res judicata can be resolved based on a systematic interpretation of several articles of the Charter of Civil Proceedings in 1864. Thereby, for example, under art. 893 of the Statute of Civil Proceedings, the binding nature of a court decision that entered into force assumed that it would apply to the parties, the court itself and all other officials (i.e. state bodies).[371] As for the validity of the court decision itself, under the provisions of arts. 894 and 895 of the Statute of Civil Proceedings, the court's decision entered into force only in respect of the subject matter of the dispute. In conclusion, only the operative part of the court decision came into legal force.

Moreover, as even Savigny noted, many authors since ancient times had repeated the thesis that the legal force concerns only the judicial decision itself, not its grounds; only the operative part enters into legal force.

However, an attempt was made to introduce the res judicata effect into the Charter. For example, this was reflected in art. 29 of the Charter of Criminal Proceedings, under which the decision of the civil court is binding on the criminal court only in regard to the validity of events or acts and not in respect of the defendant's guilt. At the same time, if the victim wishes to bring a civil claim to the accused for compensation for damages caused by a crime or misdemeanour, he should do so either in the framework of criminal proceedings or in an independent civil process, but only after the criminal case has been resolved on its merits (arts. 5–6 of the Charter). Moreover, if an illegal action is found in the course of consideration of a civil process, a separate criminal procedure is initiated with the prosecutor's assistance, and the civil process is suspended until it is resolved (art. 8 of the Charter).

After the October revolution in 1923, a new Civil Procedure Code (hereinafter 'the CPC 1923') was introduced that changed the rules of civil procedure to adapt to the concept of socialism. There was no direct mention of res judicata in law in the CPC 1923. However, the Civil Procedure Code enacted in 1964 (hereinafter 'the CPC 1964') established the rule of res judicata in almost the same form as it still exists today. Under art. 55, the facts established by a court's decision that has entered into force in the first civil proceeding shall not be proven again in the case of a claim under civil legal proceedings in which the same persons participate.[372]

Mark Gurvich was one of the first lawyers to express a reasoned opinion that the entire decision, including the reasoning and operative parts, may be subject to res judicata.[373] In his works 'The decision of the Soviet court in claim proceedings' (1955) and 'Judicial decision:

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[369] The Charter of Civil Procedure. – 1867, with the statement of reasoning on which they are based / / SPS 'Consultant Plus'.

[370] The Charter of Civil Procedure. – 1867, with the statement of reasoning on which they are based / / SPS 'Consultant Plus'.

[371] The Charter of Civil Procedure. – 1867, with the statement of reasoning on which they are based / / SPS 'Consultant Plus'.

[372] The Civil Procedure Code of the RSFSR (approved by the Supreme Soviet of the RSFSR on 11.06.1964) / / SPS "Consultant Plus".

[373] M. Gurvich, Reshenie Sovetskogo Suda v Iskovom Proizvodstve. (M) 113 (1955).

Theoretical problems' (1976), he presented the point of view according to which the court's decision in full would be binding and final, including the reasons based on which the court came to a particular conclusion.

First of all, Gurvich considered res judicata as 'the manifestation of the force of a judicial decision in another process' and as 'the binding nature of judicial decisions for the court in another process and administrative bodies when discussing issues of fact or law previously made on these issues'.[374] Under the same legal force of a court decision, this position is presented to facilitate understanding of the resistance provided by the inadmissibility of its appeal and a new decision on the same claim. Simultaneously, that is the moment of action – confirmation, modification or termination of legal relationship.[375] Based on this, the court decision is the result of the court's activities throughout the process; ideally, it should serve as a tool of the procedural economy since it reduces the funds, time and effort spent on resolving the dispute, as well as protecting the interests of persons involved in the case, preventing both subsequent relitigation or a new legal relationship in a different process and the possibility of initiating a new process on similar subject matter and grounds.

In his book *The Decision of the Soviet Court in Adversary Proceedings*, published in 1955, M. A. Gurvich adhered to the traditional position of res judicata limits: the subject matter of the judgement (i.e. the actual relationship that was resolved via court decision or objective limits) and the persons affected by the court's decision (subjective limit). The issue of the subjective and objective limits of res judicata will be discussed in more detail in § 3.1.3.[376]

Gurvich contended that the facts set out in the court decision (i.e. in the motivational part/reasoning) come into force together with the operative part of the judicial decision and should be adjudicated jointly as part of a different process.[377] The general position Gurvich expressed on the issue of res judicata was that 'res judicata is applied in cases when a circumstance or legal relationship established by a court decision that has entered into legal force acts as a legal fact in another dispute between persons subject to the legal force of the decision, forming part of the basis of the court decision rendered in this process'.[378] In general, with this definition, Gurvich stated his point of view on most of the issues raised in Russia concerning res judicata; most importantly, he reflected that res judicata might also be included in the motivational part of the decision.[379]

In our contention, however, it is debatable that the reasoning part (motivational part) of the judgement should be recognised as having res judicata effect since the court must, in any case, indicate how it came to a particular conclusion. To illuminate this further, when generalising, a mathematician solving a problem will prescribe the stages of the solution so that if the result is not in accordance with the correct answer, it can be traced back through the logical chain until the error is identified. However, this does not mean that the selected path to the answer is the only correct one. Therefore, it does not seem rational to assign the effect of res judicata to the motivational part/reasoning, given that the court could have made mistakes in its conclusions or assessments even due to a simple human factor.

It should be noted that, in his early work, Gurvich further contrasted the views of Soviet professors with those of the German lawyer Leo Rosenberg, who believed that the validity of a judicial decision does not contain a provision that the legal conclusion in the judgement is made

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[374] M. Gurvich, Reshenie Sovetskogo Suda v Iskovom Proizvodstve. (M) 120 (1955).
[375] M. Gurvich, *Sudebnoe Reshenie Teoreticheskie Problemy.(* M) 146–147 (1976).
[376] M. Gurvich Reshenie Sovetskogo Suda v Iskovom Proizvodstve. (M) 122 (1955).
[377] M. Gurvich Reshenie Sovetskogo Suda v Iskovom Proizvodstve. (M) 122 (1955).
[378] M. Gurvich, *Reshenie Sovetskogo Suda v Iskovom Proizvodstve.* (M) 122 (1955).
[379] M. Gurvich*, Sudebnoe Reshenie Teoreticheskie Problemy. (M)* 164 (1976).

in accordance with reality since doing so under these circumstances would mean extending the validity of the judicial decision to the factual and legal statements underlying the decision.[380] At the same time, Gurvich justified this approach with reference to the idea that foreign law adhered to the concept of formal truth in civil proceedings, denying the guarantee of correctness and validity of statements of facts by the courts. Thus, in his opinion, such an approach may open space for judicial usurpation.

N. Zeider also expressed his point of view on the concept of res judicata in his 1966 work 'Judgement in a civil proceeding'.[381] He considered that res judicata contained in a court decision represents the court confirming the existence or absence of a particular legal fact, legal relationship and right. This confirmation is mandatory for the court to decide on the first case. Therefore, the scope of the res judicata must take the law, the legal relationship and the facts into account.[382]

It should be noted that CPC 1964 had legal effect until 2002. However, some adjustments were made to it even before the large-scale reform of the procedural legislation. Thus, in 1995, Federal Law No. 139-FZ was adopted, which outlined provisions on the competition and equality of the parties in court proceedings and no longer permitted the court to collect evidence independently.[383]

It is noteworthy that none of the professors of Soviet law considered the importance of separating formal and substantial res judicata. By mixing everything into one doctrine, these lawyers also circumvented the separation of the claim and issue preclusion effects. However, this did not affect lawmakers' decisions to reflect such ideas in post-Soviet law in the future.

b) Modern Russian Law

The issue of res judicata and the legal qualifications given by courts to legal relations between the parties is particularly crucial for the Russian judicial system. Unfortunately, it should be noted that the current development of the institution of res judicata in both Russian commercial and civil proceedings cannot be deemed sufficient since there is a gap in the doctrine and case law regarding the application of res judicata. Since this institution passed to Russia from the Soviet legislation and case law, it was not adapted to the adversarial process, which still applies to the modern Russian commercial process. Res judicata has, thus, become a tool for obtaining the desired outcome decision by unscrupulous parties.

In Russia, there is no division into substantive and formal res judicata; to the best of our knowledge, the doctrine does not discuss this issue at all. However, this does not mean it is impossible to deduce the nature of the concept from the interpretation of existing rules.

A judgement can acquire a binding effect if it is no longer subject to appeal (special rules apply for judgements on intellectual property, cases considered in simplified proceedings, etc.).[384] Russian legislation recognises formal res judicata when no ordinary appeal is

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[380] M. Gurvich *Reshenie Sovetskogo Suda v Iskovom Proizvodstve*. *(M)* 113 (1955).
[381] B. N. Zeider, *Sudebnoe Reshenie Po Grazhdanskomu Delu*. *(M)* 150 (1966).
[382] Ibid.
[383]The Federal Law No. 189-FZ of 30.11.1995 'On Amendments to the Civil Procedure Code of the RSFSR' / / SPS 'Consultant Plus'.
[384] Russian Code of Commercial Procedure [C. com. proc.] [Code of Commercial Procedure] art. 180 (Rus.); Russian Code of Commercial Procedure [C. com. proc.] [Code of Commercial Procedure] art. 16 (Rus): The binding nature of judicial acts of the ComPC.

available[385] and/or after the expiration of the appeal period (*cosa judicata formale, force de chose jugée, formelle Rechtskaft*; in the main, the Russian concept is more similar to the German model). In Russia, the judgement can also affect substantial res judicata if it meets the conditions envisaged in art. 69 of the ComPC and the form of the judgement is capable of such an effect. Finally, under art. 61 of the CivPC and art. 69 of the ComPC, a judgement of the civil court in respect of a previously considered civil case is binding for the commercial court, considering a case in respect of the matters, concerning the circumstances, established by the judgement of the civil court and pertinent to the persons participating in the case.[386]

Therefore, in commercial litigation, the res judicata effect is reflected in the provisions of art. 69 of the ComPC that appear under the title 'Grounds for relief from the burden of proof' (quite similar to the French law); as in other types of proceedings, it plays the essential role of preventing competition between judicial decisions. This idea establishes three rules: 1) circumstances established by an effective judicial decision of the commercial court and delivered in a previously considered case do not have to be proven again during consideration by the commercial court of another case with the same persons participating (para. 2); 2) a final civil court judgement in respect of a considered civil case is mandatory for the commercial court, considering a case in respect of the matters, concerning the circumstances, established by the previous judgement of the court of civil jurisdiction and pertinent to the persons participating in the case (para. 3); and 3) a judgement in a criminal case is final and binding in the commercial court in respect of the issues, whether certain actions took place and whether they were committed by a certain person (para. 4).

From these provisions, it follows that circumstances of res judicata significance can only be fastened in a court's judgements on the merits of a case that is binding and final, while the specific types of such facts are not specified. In general, these are matters of bankruptcy cases, of civil court decisions and of judgements and sentences in criminal cases.[387]

The term res judicata is not enshrined in law. However, the idea of res judicata is reflected in all branches of Russian procedural legislation (para. 2 art. 61 of the Civil Procedural Code (hereinafter 'CivPC'), para. 2 of art. 69 of the ComPC, art. 90 of the Code of Criminal Procedure, para. 2 of art. 64 of the Administrative Court Proceedings Code).

The circumstances established by a court decision entered into force in a previously solved case are binding on the court. These circumstances are not to be proved again or to be challenged when considering another case involving the same persons and in cases stipulated by the CivPC (pt. 2 of art. 61 of the CivPC).

When considering a civil case, the circumstances established by the commercial court's decision must not be proved and cannot be challenged by persons who participated in the case resolved by the commercial court (pt. 3 of art. 61 of the CivPC of the Russian Federation).

According to the meaning of the provision mentioned above considered in conjunction with para. 1 of art. 133 of the ComPC, the court must make reasonable efforts to ascertain the res judicata when preparing the case for trial. On the one hand, since this involves finding out pre-trial facts that are not subject to proof, it is an integral element of the court's assigned tasks to determine the circumstances that are important for the fair and just consideration of the case. On

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[385] Art. 180 of the ComPC; art. 16: The binding nature of judicial acts of the ComPC.

[386] Russian Code of Civil Procedure [C. civ. proc.] [Code of Civil Procedure] art. 61 (Rus.); Russian Code of Commercial Procedure [C. com. proc.] [Code of Commercial Procedure] art. 69 (Rus.).

[387] For example, the decision of the AC of the Povolzhsk District of 20.09.2018 no. F06-37061/2018 in case no. A55-32786/2016, the decision of the Fifteenth Arbitration Court of Appeal of 02.03.2018 no. 15AP-1311/2018 in case no. A53-28297/2017, the decision of the Presidium of the Supreme Commercial Court of the Russian Federation of 25.05.2010 no. 17099/09 in case no.A58-3515/08.

the other hand, a pre-trial hearing is part of Russia's current legal regulation (in a broad sense); therefore, the principle of *jura novit curia* (the court knows the law) applies. Indeed, this does not mean that res judicata cannot be raised at later stages of the trial and become the subject of dialogue or rivalry between interested parties, especially since the court, which manages the process in the interests of justice, is not deprived of the opportunity to involve the parties in the discussion of all issues regarding which the court may have doubts.

The study has shown that, in Russian law, the res judicata should be considered as comprising two principles: 1) the binding nature of the final judgement and its claim preclusion effect (under para. 2 art. 69 of the ComPC) and 2) issue preclusion (if we use the Anglo-American terminology; however, the term procedural estoppel is also applicable under para. 3.1. art. 70 of the ComPC).

If we consider these issues from the point of view of comparative studies, it can be noted that the analogous divisions of the principles of res judicata exist in other studied jurisdictions.

In the Anglo-American legal system, res judicata as a form of claim preclusion is interpreted as impermissibility if there is a final court decision regarding a new trial between the same parties or their privies on the same claims or grounds for action (i.e. same claim or cause of action). In the Russian legal doctrine of civil procedure, this rule generally corresponds to such a quality of a court decision that has entered into legal force as exclusivity. However, in Anglo-American law, the exclusivity of a judgement entered into legal force is understood more broadly as the impossibility of bringing a claim arising from the same actions or events.

Moreover, res judicata also includes a rule on the prevention of the issue (issue preclusion), according to which, if issues have already been addressed in court and the same issues were actually litigated, they should not be determined in subsequent processes (the preclusive effect of the judgement). According to para. 3.1 of art. 70 of the ComPC, 'the circumstances referred to by a party in support of its claims or objections are considered recognized by the other party, if they are not directly challenged by it or disagreement with such circumstances does not arise from other evidence justifying the objections submitted regarding the substance of the claims'. Here, the question can be answered far more simply. There is no direct and properly executed agreement on the facts, and the party does not make any statements that could be regarded as evidence: it simply does not challenge the facts referred to by the opponent. Theoretically, the latter rule, which, incidentally, is applied very carefully by commercial courts, can be recognised as the implementation of the rule of a kind of procedural estoppel. However, for this rule to be understood as an analogue of private law estoppel, it is necessary to consider the emergence of reasonable trust and the obvious injustice of its undermining.

Procedural estoppel is the loss of the right to object in case of unfair or contradictory behaviour during the process. As a result, an unscrupulous person cannot exercise such a right.

Procedural estoppel in Russian law can be deduced from a systematic interpretation of the provision of para. 3.1 of art. 70 of the RComCP. As stated in the Decision of the Commercial Court of the Moscow District, the principle of 'procedural estoppel' is a bar to referring to circumstances that were previously recognised by the party as indisputable, based on its actions or assurances.[388]

It must be noted that the res judicata principle under para. 2 art. 69 of the ComPC has a function close to that of an Anglo-American claim preclusion rule. However, it is noteworthy that this division of the preclusivity effect under Russian law also has similarities with the

[388] Decision of the Commercial Court of the Moscow District of 19.11.2018 N F05-20176/2018 in the case N A40-200515/17.

French legal system. The binding nature of the judgement and its preclusion effect is close to the French negative effect of res judicata; issue preclusion (or procedural estoppel) is similar to the positive effect of res judicata. We do, however, understand that this classification in France has been called into question by some researchers and legal commentators.[389]

The provisions of para. 1 of art. 180, paras. 3 and 4 of art. 69 of the ComPC and art. 61 of the CivCP detail the general provisions of procedural law regarding the binding effect of an enforceable judicial decision and its claim preclusion effect. Inclusion in the Russian legislation of art. 69 of the ComPC and art. 61 of the CivCP is aimed not only at the disclosure of the quality of an enforceable judicial decision but also at respecting certain fundamental principles of Russian law: the rule of law and the principle of legal certainty.

In general, the practical problem concerning the application of res judicata in Russia is comprehensive. There are challenges associated with distinguishing between the assessment of evidence (assessment of circumstances as established) and the assessment of circumstances in the sense of conclusions arising from them and the use of evaluation categories. The courts refuse to consider the issue due to some re-evaluation of the actual circumstances, although it is often not a question of re-evaluation of the evidence. The preclusive effect automatically means that a particular legal relationship is recognised as existing.

3.2.1.5.Conclusion and Comparative Remarks

There is, at least in part, a historical explanation for the complex regulation of res judicata. Various legal systems adopted the maxims of Roman law in their own way. Their understanding quickly flowed into the doctrine and was reflected in case law, which, in turn, began to either follow the doctrine or develop its own ideas and concepts. Different legal systems used contrasting approaches to deal with initial and subsequent claims. The views of many well-known theorists of the time show that the inexorability of the force of the court decision suggests that the res judicata should be expanded to include all of the above. The court seems to lock the process and does not permit the circumstances of the case to be reconsidered. This idea certainly reflects the stability of case law, which is now more lacking than ever in all jurisdictions; the analysis is mainly concerned with the formal and substantial context of the res judicata. The trend of expanding the scope of the res judicata does not lend itself to definitive analysis. However, it can be concluded that a court decision is a reliable source of law, while the revision of initial action through bringing subsequent actions would result in possible abuse or circumvention of one of the most important institutions of law.

French law distinguishes two concepts unknown in Italian and Russian law: *autorité de la chose jugée,* and *force de chose jugée.*[390] Indeed, by legal analogy, we may conclude that there are similarities between certain aspects of *autorité de la chose jugée* and *force de chose jugée* and formal and substantial res judicata. This similarity is explained by the fact that Italian law combines the French and German models. However, it should also be noted that French law contains the concept of 'cause', which is absent in Italian law; art. 2909 of the Italian Codice Civile does not mention it. However, none of these concepts can be used to arrive at a precise answer to the question of the extent of res judicata.

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[389] S. Schaffstein, *The Doctrine of Res Judicata before International Arbitral Tribunals*. Phd Thesis. 44 (2012).

[390] See the distinction in L. Cadiet, D. Loriferne, *L'autorité De La Chose Jugée* (Bibliothèque De L'institut De Recherche Juridique De La Sorbonne - André Tunc, Tome 37) 21 (2012).

In the matter of what is considered substantial, an area of interest in this study, the only text dealing with the matter – art. 2909 of the ICC – is very vague: it does not define or limit the judgement nor indicate whether it should be circumscribed within the judicial decision and placed in the operative part (regarding the issue preclusion effect). Moreover, the Italian doctrine continues to debate these questions. Therefore, the scope of the res judicata remains an open question, even if it is the subject of doctrinal proposals and *ad hoc* case law responses.

The doctrine of res judicata in Russia is only at the beginning of its path. While the doctrine of res judicata has had difficulties adapting after the end of Soviet law, it is destined to go its own way in terms of development. Despite this, when choosing a suitable comparative model designed to help the development of res judicata in Russia, the Italian and German models should both be considered suitable. The problem of expending the substantial res judicata to apply to derivative actions is highlighted from the operative part of the first judgement with the participation of the legal entity. While it initially seems reasonable that the members may not be subject to res judicata, this may lead to bad faith and abuse of rights on their part and may be considered negative consequences of establishing the figure of the representative (if we consider this in the context of art. 65.2 RCC and not para. 2 of art. 166 of the RCC). We advocate for the introduction of restrictions by analogy with bankruptcy: for example, the Supreme Commercial Court (in the Resolution of Plenum No. 57 of 27.07.2015) states that the participant is bound only by those arguments that were raised at an earlier hearing of the case, provided that the participant cannot give convincing reasons for reviewing these arguments in the new process. We also find it justified to establish a 'soft presumption' based on the idea that first judgement speaks the truth. However, at present, the prevailing opinion in case law is that the reference of the legal status of a party of the proceeding to art. 65.2 of the RCC binds it to claim preclusion.

In Italian and Russian case law, formal and substantial res judicata are always coincident: the judgement first becomes a formal res judicata and then achieves the status of a substantial one. However, in France, where the doctrine does not operate with the concepts of formal and substantial res judicata, judgement has the quality of authority of res judicata (analogue of substantial res judicata) from the time of its enforcement.

Legal certainty is the core postulate for enforcement of res judicata, which is reflected in the principles of the finality of judgements and binding force of the judgement. This principle underlines that relitigation aimed at rehearing a new determination of the same case is impossible if the judgement is final and binding. Higher courts' authority to relitigate the case should only be exercised to remedy judicial errors. This fundamental principle is justified only when justified by circumstances of a substantial feature.

The res judicata principle has both a positive effect (close to issue preclusion) and a negative effect (claim preclusive effect). The positive effect is that the judgement is final and binding between the parties and can be applied to any appeal or challenge. The negative effect is that the case cannot be relitigated. The philosophical dimension of res judicata finds a natural extension in what the Italians call the material dimension of res judicata. In order to express its concrete, procedural dimension, res judicata rests above all on a comprehensive ban on the parties to a trial (*giudicato sostanziale, materiale*).[391] French law reflects this prohibition by referring to the negative dimension of res judicata.

In Russian law, the res judicata should be considered a combination of two principles: 1) the binding nature of the final judgement and its claim preclusion effect (under para. 2 art. 69 of the ComPC) – this principle is close to the American sense of claim preclusion but narrower in its definition and 2) issue preclusion (if we use the Anglo-American terminology, although the

[391] D. Volpino, *L'oggetto del giudicato nell'esperienza americana.* (Wolters Kluwer Italia) 206–210 (2007).

term procedural estoppel is also applicable under para. 3.1. art. 70 of the ComPC), which is close to the issue preclusive effect.

Any branch of procedural law operates similarly to a complex algorithm. Small procedural and legal changes are like a pebble thrown into the water; it may seem that there are not many splashes, but ripples spread out in ever-broadening circles from the point at which the pebble lands. Similarly, judicial reform is a complex matter, and it can be difficult to predict all the consequences. The cooperation between procedural science and case law is an indispensable tool in this regard. It is easy to demonstrate this in the context of such procedural and legal institutions as proof and evidence, without which it is impossible to consider and resolve any case in court.

3.2.2. The Scope of Res Judicata: Comparative Study

3.2.2.1.Introduction

This subchapter is concerned with the scope of the res judicata doctrine. Fundamental and principal to expanding the application of the res judicata doctrine is the analysis of the identity test in the legal systems under study. This section focuses on the objective and subjective limits of res judicata and its preclusive effects.

It has been well established that the doctrine of res judicata applies in accordance with the triple identity test – the traditionally accepted test for determining the scope of res judicata. However, there has been an escalation of opinions and approaches to defining the essential denominators of the test: 'cause', 'parties' and 'object'.

The following subchapter begins by analysing the triple identity test. It then examines which criteria are vital for subjective and objective limits (taken from continental terminology; see, for example, in Italy, *limiti oggettivi* and *limiti soggettivi).*[392] The notion of the objective limits of res judicata concerns scope as to subject matter, which is distinguished from the subjective limits that pertain to scope as to parties.

Thus, this identity test can be conducted from the point of view of subjective and objective limits. It is necessary here to clarify what is meant by subjective and objective limits. When we speak of limits to res judicata, what does this actually mean? Are the boundaries of res judicata limits rigid and flexible when viewed from different perspectives? How can the limits mentioned above be outlined and, if necessary, reconceptualised? It is further necessary to clarify here that the res judicata triple identity test applies only in case of claim preclusion in some jurisdictions. Moreover, the triple identity test is not applicable subject to issue preclusion.[393]

3.2.2.2.French Concept

In France, the prevailing test for whether a judgement will have a preclusive effect is the triple identity test. It requires that the subsequent action involve (1) the same parties, (2) the

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[392] S. Menchini, *Disorientamenti giurisprudenzali in tema di limiti oggettivi del giudicato in ordine a giudizi concernenti ratei di obbligazione periodica*. (Giurisprudenza italiana) 53 (1991).

[393] S. Schaffstein, *The Doctrine of Res Judicata before International Arbitral Tribunals.* Phd Thesis. 235 (2012).

same legal basis and (3) the same subject matter. Recently, however, the triple identity test has not been strictly enforced; instead, there is a growing tendency to concentrate on the general evaluation of the set of circumstances in the first trial. A new claim between the same parties will be admissible if new factual circumstances arise between the first and second actions. Thus, regardless, the identity of the parties is crucial to recognising res judicata.

Art. 1355 of the FrenchCivil Code is traditional and authentic. It includes the three criteria of identity mentioned above. Therefore, one might assume that art. 1355 of the FCC is one of those clear, precise and unquestionable texts. However, the provision has given rise to many interpretations, controversies and criticisms, along with divergences within the doctrine and case law. Difficulties accumulate as we approach the examination of the identity test, as art. 1355 of the FCC lists these criteria without defining them. This imprecision causes upheaval in the case law, which justifies the question.

Art. 480 of the CPC, which came into force in 1976, is different because its concept was first expressed by the lawyer Motulsky, who explicitly criticised the triple identity test.[394] He suggested that the judge more generally compare the dispute contained in the new claim and the dispute settled by the court's decision. This is why art. 480 CPC provides that 'the court's decision that determines in whole or in part the fundamental question of the claim or which makes a decision on a procedural statement requiring mandatory decisions on the rejection or any other random claims since its removal becomes res judicata in respect of a dispute which it determines'.[395]

a) Subjective Limits

With respect to the 'identity of the parties' element, the party must be understood to mean 1) the persons who appeared in the proceedings as a party and 2) where applicable, the persons who were represented therein, within the meaning of representation *ad agendum*, as well as their successors or privies between the same parties. The same parties' requirements must also be 'by the same parties on the same capacity'. This explains situations in which a party who first acted as an agent will be able to act again, albeit on his own and on behalf of himself. For example, a shareholder representing the company in the first trial could then act as a shareholder even if the subject matter is the same and the claim is made on the same cause.[396]

Jointly and severally, liable debtors 'represent' each other, while (subject to some exceptions) a debtor represents his unsecured creditors. By special statute, the effects of a judgement concerning one of a group of bondholders may be extended to other bondholders; for example, a judgement concerning the proper designation of origin of wine (*appellation d'origine contrôlée*) as rendered to one grower in an area is binding on all growers in the same area.[397] Judgements create a new personal status, such as divorce, separation and bankruptcy judgements, while judgements in matters of nationality are binding on third parties, as well as on the parties to the original proceeding.[398]

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[394] Cass. 2eme civ., 15 Jul. 1975, JCP G 1976 II, 18313 Daigre.

[395] R. Perrot, N. Fricero, JurisClasseur Procédure civile, Fasc. 554. Autorité de la chose jugée au civil sur le civil. spéc. n° 5. (1998)

[396] L. Cadiet, *Droit judiciaire privé*. (Paris, LexisNexis) 572-576 (2013).

[397] Ibid. R. Perrot, N. Fricero, JurisClasseur Procédure civile, Fasc. 554. Autorité de la chose jugée au civil sur le civil. spéc. n° 5. P. 55. (1998).

[398] Ibid. R. Perrot, N. Fricero, JurisClasseur Procédure civile, Fasc. 554. Autorité de la chose jugée au civil sur le civil. spéc. n° 5. P. 55. (1998).

This means that the second action is barred only if it seeks adjudication of the same right to the same physical object. A person who lost in a case in which he claimed title to real estate might later claim a life estate (usufruct). Similarly, a person who has lost a 'possessory' action concerning a plot of land may later claim the title. Difficulties arise when claims are closely related. A person who has claimed debt and lost may not later claim interest on the money owed.[399] However, a person who sued to obtain interest on debt and lost may later claim the capital if the existence of the debt was not an issue in the earlier action.

The 'subject' criterion has two sub-conditions: 1) persons must be participants in both the first and the subsequent proceeding, and 2) the defendant, the plaintiff and third parties without independent claims are parties to the first trial. Usually, however, a person participating only to corroborate evidence is not considered a party in the first trial of a res judicata test.[400] A party that is not present at the first trial may be treated as a party, including with the participation of a representative. Therefore, the representatives of the company and the company acting as a party in the first case may not act as a party in the second with the same grounds (art. 492 of the Civil Code).

The Court of Cassation[401] has also developed a specific, extensive conception of the notion of representation that allows the res judicata effect to extend to other persons (for example, co-debtors) and the binding by the judgement of persons who were validly represented in the proceedings. The concept of representation might be applicable if a person has common interests with other parties of the proceedings. It operates in cases involving co-debtors who appear to be jointly liable.[402]

Case law uses the concept of party identity to expand res judicata to include situations in which a claim is duplicated with the same persons having the same legal interest.[403] In addition, creditors are considered to be represented by their debtors or shareholders in the same proceeding unless the debtor has committed fraud. The assignee shall be deemed to be represented by their assignor in the first judicial proceeding. Another issue is when a party participates in the second claim in a different legal capacity or quality. For example, the first action was brought on behalf of A and natural person B, while the second action was brought against company C, which is represented by B; it eventuates that the subsequent action is also against B. B sued twice, but with different legal capacities. In the second case, he is not a party but simply a representative of the party. As a result, the subsequent action is admissible and has no preclusive effect.[404]

Let us imagine a slightly different situation with a derivative action. The executive board member (A) of the company files on behalf of the company (B) an action against its managerial director. However, the executive body member fails in the action, and the shareholder then brings a subsequent action with the same grounds (whether he uses derivative or direct action under these circumstances is another thorny issue; for now, let us say that he uses derivative action). Even though the shareholder was not a party in the first process, in the second, he acts in

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[399] Ibid. R. Perrot, N. Fricero, JurisClasseur Procédure civile, Fasc. 554. Autorité de la chose jugée au civil sur le civil. spéc. n° 5. P. 55. (1998).

[400] For example, in France: Cass. 2 ° civ., 15 juillet 1975, JCP G 1976 II, 18313 Daigre.

[401] Cass. civ., 3 July. 1872: DP 1872, 1, p. 230; Cass. civ., June 18, 1902: DP 1902, 1, p. 385; Cass. req., 2 March 1942: DA 1942, p. 99; Cass. 2nd civ., 13 oct. 1965: Bull. civ. II, No. 730; Cass. 2nd civ., 16 June 1966: Bull. civ. II, No. 700.

[402] R. Perrot, N. Fricero, Jurisclasseur Procedure Civile, Fasc. 554. Autorite De La Chose Jugee Au Civil Sur Le Civil Spec. N° 5. P. 136 (1998).

[403] R. Perrot, N. Fricero, JurisClasseur Procédure civile, Fasc. 554 // lexis360.fr; Autorité de la chose jugée au civil sur le civil, spéc. n° 5. P. 55. (1998).

[404] For example, in France see in Cass. 1st civ., 7 jan. 1976 bull. I, n°7.

the interests and on behalf of society. That is, formally speaking, the plaintiff in the second case is the society, and the shareholder is a representative of society.

A similar question arose in another example when an action with the same subject matter was brought twice by the same shareholder: the first one was a direct action and failed, after which the plaintiff brought a subsequent action on behalf of the company based on the same facts (derivative action). We will discuss these cases in more detail in Chapter 3.

b) Objective Limits

We might first seek out the definition of the legal grounds (*causes)*. The doctrine does not provide a unitary or homogeneous definition of the legal grounds, and the concept of grounds has given rise to intense doctrinal controversies, from which three conceptions have emerged. These are summarised as follows by professors Fricero and Perrot and updated by Professor Duchy-Oudot:[405]

- Legal grounds are the legal principle on which the claim is founded, the rule of law or the legal category that serves as the basis for the claim (R. Savatier[406]).
- Legal grounds are the compound of alleged facts in support of the claim, regardless of the rule of law only being proposed by the parties to the court (H. Motulsky[407]).
- Legal grounds are a set of legally qualified facts (P. Hebraud,[408] H. Vizioz[409]).

Thus, referring to art. 480 of the CPC, the general concept of the dispute is taken into account. In particular, the legal grounds (*causa petendi or causes de la demande*) should be concentrated in a single proceeding. If one of the grounds is not presented during the first proceeding, it cannot be presented in the new claim.[410]

In case law, the identity of the cause is reduced to the identity of the facts giving rise to the dispute, while the identity of the object becomes the central element in the delimitation of the authority of res judicata.[411] Case law has adopted a so-called narrow conception of the legal grounds, corresponding to the legal ground invoked in support of the claim; thus, the change of the legal ground in a new proceeding that was invoked and tried at first instance led to a change of case. This view was reflected in a decision on 3 June 1994.[412]

However, the case law cracked on 4 March 2004.[413] The second chamber decided that the Court of Appeal, in considering that a proceeding previous to the one pending had been rejected by a previous decision, correctly held that the authority of res judicata precluded party, which relied on the second instance. Thus, the change of legal grounds no longer entailed a change of cause and was no longer sufficient to remove the authority of res judicata. The Plenary

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[405] See in L. Cadiet, D. Loriferne*, L'autorité de la chose jugée*. (Bibliothèque de l'Institut de Recherche Juridique de la Sorbonne - André Tunc, tome 37) 19 (2012).
[406] R. Savatier. Traité de la responsabilité civile en droit français civil, administratif, professionnel, procédural. In: Revue internationale de droit comparé. Vol. 2 N°4, Octobre-décembre. 800 (1950).
[407] Motulsky (Henri). *La cause de la demande dans la délimitation de l'office du juge* (Dalloz) 235-246 (1964).
[408] Hébraud, *L'autorité de la chose jugée au criminal sur le civil*, thèse, Toulouse. (Sirey) 156, 320-325 (1929).
[409] See in L. Cadiet, D. Loriferne*, L'autorité de la chose jugée* (Bibliothèque de l'Institut de Recherche Juridique de la Sorbonne - André Tunc, tome 37) 19 (2012).
[410] Cass. 2 ° civ., 16 mar. 1995, bull.v N°55.
[411] L. Cadiet, *Droit judiciaire privé*. (Paris, LexisNexis) 572-576 (2013).
[412] Cass. ass. plén. 3 juin 1994, no 92-12.157: Bull. civ. ass. plén. no 4; D. 1994, p. 395, concl. M. Jéol.
[413] Cass. Civ. 2e civ., 4 mars 2004, 02-12.141: Bull. civ. II 84.

Assembly's decision on this issue was made in the famous Cesareo case,[414] which took the opposite opinion than of its judgement of 3 June 1994.

The Plenary Assembly ruled as follows: *'it is incumbent upon the applicant to present at the time of the proceedings relating to the first claim all the means which he considers to be capable of substantiating it'.* It found that, as the first claim was formed between the same parties and tended to obtain payment of a sum of money as remuneration for work allegedly performed without financial consideration,[415] Gilbert Cesareo could not be allowed to challenge the identity of the legal grounds 'on a legal basis which he had refrained from raising so that the claim contradicted to what was previously decided concerning the same challenge'.[416] A new principle was created, namely the so-called concentration of claims. The point was raised that there are pleas in law and pleas of fact and, according to Cornu's legal vocabulary, the plea in law is the 'legal basis'.[417] In contrast, the pleas correspond to the 'facts specifically alleged by a litigant to substantiate a claim or response to a claim'. As a result of the case, Mr Cesareo could not be permitted to challenge the 'identity of legal grounds' by invoking a legal basis that was not raised in due time. The reasons concerned pertained to law, which is nothing more than the legal basis, and the legal basis is nothing more than the legal grounds. In that judgment, the legal basis and grounds appear to be synonyms or equivalents.

This assimilation could be challenged, as the authors generally distinguish between legal basis and reasons and, above all, legal grounds and reasons. However, in examining the various works on these distinctions, one can observe the great difficulty their authors experienced in giving clear and intelligible definitions. In any case, this equivalence of terms or concepts is not peculiar to the Cesareo case; it is found in many judgements of the Court of Cassation.

The delimitation of res judicata concerning the subject matter at issue can be illustrated using two examples: (a) a party who develops only new pleas and who invokes, in the new instance, a mandate, governance of business, personal guarantee, repetition of the wrongful act or enrichment without legal grounds and (b) a party who avails himself of the limitation of his commitment to security to bring a 'plea'. In that case, a question arises:[418] does the principle of concentration of pleas, applied in Cesareo to the reasons (means) of law, extend to the reasons (means) of fact, considered by some to be the factual part of the case?[419] In our contention, the answer should be given in the affirmative.

Moreover, the Court of Cassation consistently notes that 'there is no authority of res judicata when facts subsequent to the decision whose authority is invoked alters the situation previously recognised in court'[420] or, in the same way, that 'the authority of res judicata cannot

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[414] Cour de Cassation, Assemblée plénière, du 7 juillet 2006, 04-10.672.

[415] L. Cadiet, D. Loriferne*, L'autorité de la chose jugée*. (Bibliothèque de l'Institut de Recherche Juridique de la Sorbonne - André Tunc, tome 37) 26 (2012). P. 26. T. Moussa, *La Delimitation de la Chose Jugee au Regard de la Matiere Litigiese* in L. Cadiet, D. Loriferne, *L'autorité de la chose jugée* (Bibliothèque de l'Institut de Recherche Juridique de la Sorbonne - André Tunc, tome 37) 26 (2012).

[416] Ibid.

[417] G. Cornu & Jean Foyer, PROCÉDURE CIVILE (PUF) 283–289 (1958).

[418] See in T. Moussa, *La Delimitation de la Chose Jugee au Regard de la Matiere Litigiese* in L. Cadiet, D. Loriferne, *L'autorité de la chose jugée* (Bibliothèque de l'Institut de Recherche Juridique de la Sorbonne - André Tunc, tome 37) 27 (2012); Cass 2e civ 4 mars 2004, 02-12.141, Bull. Civ. II. 84.

[419] See in T. Moussa, La Delimitation de la Chose Jugee au Regard de la Matiere Litigiese in L. Cadiet, D. Loriferne, L'autorité de la chose jugée (Bibliothèque de l'Institut de Recherche Juridique de la Sorbonne - André Tunc, tome 37) 27 (2012); Cass. Com., 6 juill. 2010, 09-15.671.

[420] See T. Moussa, La Delimitation de la Chose Jugee au Regard de la Matiere Litigiese in L. Cadiet, D. Loriferne, L'autorité de la chose jugée (Bibliothèque de l'Institut de Recherche Juridique de la Sorbonne - André Tunc, tome 37) 27 (2012); Cass. civ. 22 oct. 2002, n° 00-14.035, Bull. civ. I, n° 234; Cass. 2' civ. , 3 juin 2004, 65 V. ; Cass. 1 n°

be opposed when subsequent events have changed the situation previously recognised in court'.[421] The Court considered that the authority of res judicata is necessary when the fact is not subsequent to the decision on which the authority is invoked. It follows that the obligation to concentrate the claims also concerns the pleas of fact since only facts subsequent to the first decision and modifying the legal situation established by that decision can remove the authority of the res judicata effect attached to it.[422] However, there is also a major difference between factual and legal grounds since, under certain conditions, the authority of res judicata gives way to a new factual basis.

Therefore, in France, the traditional approach of the concurrence of the cause of action was that subsequent action could be brought between the same parties on the same grounds. For example, if the first action to recover damages was dismissed (under art. 1382 of the FCC), a new action could be filed based on liability under art. 1384 or 1386 of the FCC. This traditional case law was overturned by the Court of Cassation in the Cesareo case.[423] Indeed, the inadmissibility of Mr Cesareo's claim was based on the fact that he was asking for something that he had already requested rather than for something that had already been judged. In fact, he was criticised for not having invoked unjust enrichment during the first trial. It was not argued that this question had been decided but, rather, that it could have been and that he should have raised it.

In this respect, the traditional principle is that while the grounds may be changed during the proceeding, the remedies must be determined at the beginning; subsequent claims are possible but must be closely related to the original claims. The Cesareo case creates the principle of concentration of grounds in the first instance. The applicant must act openly and in good faith from the outset of the proceedings. It should not delay the grounds for a subsequent new proceeding (which may be a possible tactic). This may be a derivative effect of European Union law.[424] The Magendie report supported the principle of ground concentration in 2004 (*principe de concentration*). However, the principle of concentration is a specificity of French procedural law; neither Italian nor Russian law has developed it or any analogy of it. Moreover, the principle of concentration is rather similar to the English law that establishes the principle reflected in *Henderson v. Henderson* (abuse of process estoppel).

The report asks whether there is a need for the principle of concentration of causes of action at the beginning of the trial, as was proposed in 1993.[425] This principle presupposes the recognition of additional claims in the same proceedings (even those that are not directly related to the original claim). Thus, this principle of concentration can become a trap for the parties to the process.

Overall, the principle of concentration has been very actively applied in case law since the Cesareo case and is now part of French legal policy. The principle of concentration has been extended 'to the parties' and, thus, to the defendant in action and possibly to the principal and the person joined to the suit.

Moreover, it should be noted that art. 1355 provides that for there to be an authority of res judicata, 'it must be the same relief'. From these provisions, the identity of the subject matter has been identified as one of the criteria of the authority of res judicata. Is this to say that the subject

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03-14.204, Bull. civ. II, n° 264; Cass. 3 civ. , 25 avr. 2007, n° 06-10.662, Bull. civ. III, n° 59; Cass. com. 3 avr. 2007, n° 05-12.781; Cass. com. 12 juin 2007, n° 05-14.548, Bull. civ. IV, n° 158.

[421] Cass. 2' civ., 6 mai 2010, n° 09-14.737.

[422] Cass. 2' civ. , 9 avr. 2009, n° 08-10.964.

[423] Cass. Ass. Plén., 7 juil. 2006, D. 2006.

[424] Magendie Report, *célérité et qualité de la justice,* La documentation française 51 (2004).

[425] N. Irti, L'interpretazione del contratto (Cedam) 81 (2000).

matter merges with the relief? Does it refer to the identity of the subject matter of the dispute or the subject matter of the claim needed? The definition of the subject matter given in art. 4 of the French Code of Civil Procedure states that 'the subject matter of the dispute is determined by the respective claims of the parties'. Therefore, the subject matter of the dispute is identified with the claim or all claims made by all parties.

Some authors believe that 'the subject-matter of the claim' and 'the relief' under art. 1355 of the FCC are the same, while others argue that the subject matter of the dispute is an expression in the Civil Procedure field, denoting the economic or social result sought and cleared of any legal colouration. The FCC uses the term 'relief', puts it in the category of civil law.[426] In case law, we can see a tendency to use both concepts as equivalent, making it possible for us to put an equals sign between these two terms.[427]

3.2.2.3.Italian Concept

In the absence of specific law provisions, one must turn to the doctrine and case law. The doctrine has proposed several solutions, while case law has also expressed its attitude to the issue several times. The scope of res judicata in Italy has subjective and objective limits. The former requires the identity of the parties; the latter is determined by the subject matter of the judgement based on the *petitum* (the relief sought) and the *causa petendi* (the factual and legal basis on which the relief is sought) of the application.

The provision of art. 2909 of the Codice Civile[428] is very general in scope. It revolves around the theory of objective and subjective limits of res judicata (*limiti oggettivi e soggettivi*),[429] which makes it possible to determine the scope of res judicata.[430] Art. 2909 is interpreted as the text providing that the authority of res judicata concerns only the parties to the judgement, referring here to the heirs of the parties and their successors; it is the basis of subjective limits. The decision rendered is the basis of objective limits.[431] Unlike French law (art. 1355 of the Code Civile), art. 2909 of the Codice Civile does not define the content of the res judicata. Instead, it merely refers to the decision without specifying which of its objective elements could not be called into issue. The task, therefore, falls to the doctrine and case law.

a) Subjective Limits

Italian law requires the identity of parties (art. 39 of the Code of Civil Procedure and 2909 of the Civil Code) because the court's assessment of the right in dispute has binding effects on the parties and their proxies (*eredi and aventi causa*). The question of the subjective limits of

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[426] See in T. Moussa, *La Delimitation de la Chose Jugee au Regard de la Matiere Litigiese* in L. Cadiet, D. Loriferne, *L'autorité de la chose jugée* (Bibliothèque de l'Institut de Recherche Juridique de la Sorbonne - André Tunc, tome 37) 28-29 (2012).

[427] See in Cour de cassation, civile, Chambre civile 2, 17 novembre 2011, 10-20.957, No. 10-25, 538; Cour de cassation, Chambre civile 2, 20 May 2010, No. 09-67. 662 ; Cour de cassation, Chambre civile 2, 30 Apr. 2009, No. 08-12.422 ; Cour de cassation, Chambre civile 2, 10 nov. 2010, No. 09-14.948 ; Cour de cassation, Chambre civile 2, 7 Jul.2011, No. 10-20.596 ; Cour de cassation, Chambre civile 3, 10 nov. 2009, No. 08-19. 756.

[428] Codice Civile [C. civ] [Civil Code] art. 2909 (It.): «L'accertamento contenuto nella sentenza passata in giudicato (324 c.p.c.) fa stato a ogni effetto tra le parti, i loro eredi o aventi causa (1306)».

[429] E. T. Liebman, *Efficacia ed autorità della sentenza (Milano, A. Giuffrè)* 43 (1935).

[430] L. Montesano, *Limiti oggettivi di giudicati su negozi invalidi.* 43. (1943).

[431] R. Alessi, M. Bessone, *Lineamenti di diritto privato* (Giappichelli) 717 (2017).

the substantial res judicata has not really caught the attention of Italian doctrine (in comparison with French doctrine), at least with regard to the question of the parties' identity.[432] Curiously, this has been passed over in silence, even while a certain interest is paid to the objective limits of res judicata doctrine.[433]

Nevertheless, the subjective limits of the res judicata doctrine have been discussed by such Italian scholars as Proto Pisani, Sergio Menchini and Enrico Allorio.[434] Regarding this issue, an interpretation of art. 2909 of the ICC can be found in Proto Pisani's discussion.[435] He points out that art. 2909 of the ICC refers only to those who have acquired the case after passing the judgement rendered against the person who transferred a right on him (*dante causa*). Moreover, he goes even further to claim that art. 2909 'may also be applied to third parties who have become liable during the pending proceedings by those who had purchased based on a contract whose validity and effectiveness is already the subject of the proceedings and the decision'.[436]

Sergio Manchini takes issue with the contention that the court can operate in favour of third parties, provided that they express the desire to take advantage of it.[437] After examining the notes of Proto Pisani, he concluded that the judgement is not effective against a third party; the sole exception concerns those cases that the legislator, to realise the values of the constitution or wishing to fully implement the instrumentality of the process concerning the substantive law, has not otherwise provided for.[438] These rules provide for full enforceability *ultra partes* and are strictly interpreted and formed by art. 2909 of the ICC. Only those cases in which a specific rule lays down the outcome of the claim that took place between the parties are addressed. It is binding on the right holder by configuring a dependency of the case, accompanied by the substantial dependence.

Overall, on the one hand, art. 2909 of the ICC limits the subjective limits of the res judicata effect not only to the parties but also to their heirs or successors, with an *ultra partes* extension unknown to the previous tradition. On the other hand, this limitation does not seem at all contradicted by the exceptionality of those rare cases in which the 'nature or the relationship or the situation that is the subject of the assessment' is to determine 'the character of the effects only seemingly universal' by configuring the hypothesis of final authority and *erga omnes*.[439]

However, it is necessary to note the issues discussed in doctrine, particularly that there could be a plurality of persons on the part of the plaintiff, all of whom are equally interested in the act to be challenged and, therefore, bound by this common quality.[440] In this regard, one commonly cited example concerns the right of appeal of the shareholders' meeting resolutions, incumbent on each member: res judicata is applicable if only one must determine the value for

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[432] S. Menchini. *Disorientamenti giurisprudenzali in tema di limiti oggettivi del giudicato in ordine a giudizi concernenti ratei di obbligazione periodica (*Giurisprudenza italiana) 53 (1991).

[433] However, this question was raised in F. Ligi, Stato Di Necessità E « Rei Iudicatae Exceptio ». 78 IL FORO ITALIANO, No. 2. 40 (1955).

[434] For example, see Allorio E., La cosa giudicata rispetto ai terzi (Giuffrè, Milano, 1935).

[435] A. P. Pisani, *Processo E Terzi: Brevi Note Sui Limiti Soggettivi Del Giudicato E Sul Litisconsorzio Necessario. Rivista di Diritto Processuale,* para. 4, 1662–1663 (2020).

[436] Ibid.

[437] S. Menchini. *I Limiti Soggettivi Di Efficacia Della Sentenza Civile Nel Pensiero Di Andrea Proto Pisani. (Rivista di Diritto Processuale)* 4–5*,* 1160–1165 *(*2017).

[438] S. Menchini. *I Limiti Soggettivi Di Efficacia Della Sentenza Civile Nel Pensiero Di Andrea Proto Pisani. (Rivista di Diritto Processuale)* 4–5*,* 1160–1165 *(*2017).

[439] C. C. commentato, art. 2909, Cosa giudicata. a cura di Luigi Paolo Comoglio, aggiornato da Francesca Parola (leggiditalia.it)

[440] G. Chiovenda, Istituzioni di diritto processuale civile (Eugenio Jovene) 314, 370 (1953).

all. The most common and widespread theory used to justify this sort of exception is the theory of representation.[441]

Moreover, two fundamental rules will dominate: respect for the adversarial principle (art. 24 of the Constitution of Italy and art. 111 of the Code of Civil Procedure) and the right to be heard in court (art. 24 of the Constitution of Italy). From this point of view, the doctrine admits that the rule governing the relativity of res judicata must then be assessed according to a criterion allowing the coordination between these two principles.

However, overall, it must be said that the question of the identity of the parties has not to date posed any real problems in case law, which likely explains the relative lack of interest in this issue in the doctrine. The case law also seems to have recognised the temporal criterion established in the doctrine. However, caution should be exercised regarding the scope of the recent decision on the issue since it was formulated in very general terms.[442]

It is apparent from the case law that the substantial effect of res judicata on such a decision may be challenged only by persons who had the opportunity to participate in the proceedings and did not come forward in the proceedings.[443]

b) Objective Limits

The question of the objective limits of the res judicata has been in focus in Italian doctrine.[444] In an attempt to summarise the question of interest, a distinction can be drawn as regards the problem of the delimitation of the res judicata by the subject matter of the judgement.

First, the subject matter of the judgement is the substantial matter as interpreted by the judge. It allows for delimiting the extent of the res judicata. The identity of a new claim between the same parties on the same subject matter of a judgement leads to its rejection on the basis of art. 2909 ICC. However, to determine whether there is an identity between the subject matter of the first judgement and that of the second, two criteria must be considered: non-compliance of the substantive situation (*situazione sostanziale*) and the type of protection required (*tutela inquiesta*) for the latter, which French law would translate into the terms of infringement of '*d'un droit subjectif*' and '*fondement de la prétentio*n'.

The doctrine considers that the subject matter of the judgement should be understood as the answer given by the judge to the issue applied to him. In other words, the subject matter of the judgement can be defined as the substantial situation recognised and qualified by the judgement. This definition leads Italian doctrine to distinguish between the subject matter of the claim and the subject matter of the judgement. The subject matter of the claim is the substantial situation as presented in the parties' claim; the subject matter of the judgement is the substantial situation as interpreted by the judge. It is the latter that should be described as the object of the judgement and that primarily sets the objective limits of what is deemed to be substantial. The doctrine has agreed that the delimitation of the res judicata implies an analytical examination of

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[441] L. Franco, *Stato Di Necessità E 'Rei Iudicatae Exceptio*', IL FORO ITALIANO, Vol. 78, No. 2 . 44 (1955).

[442] S. Menchini, *Disorientamenti giurisprudenzali in tema di limiti oggettivi del giudicato in ordine a giudizi concernenti ratei di obbligazione periodica* (Giurisprudenza italiana) 53 (1991).

[443] Cass. civ. n. 1245/2001. 15 ottobre 2001.

[444] S. Menchini, Il giudicato civile, *I Limiti Oggettivi del Giudicato Civile (Giuffrè)* 43–50 (1988); C. Consolo, *Oggetto del giudicato e principio dispositivo* I, Rivista Trimestrale di Diritto e Procedura Civile 215 (1991); G. Pugliese, *Giudicato civile: storia e diritto vigente*. (Giuffrè) 48–62 (1968); L. Montesano, *Limiti oggettivi di giudicati su negozi invalidi, Rivista di diritto processuale* 43 (1991).

the content of both the subject matter of the application and the subject matter of the judgement.[445]

However, such an analysis does not permit the clarification of specific criteria leading to a precise identification of the subject matter of the claim and the subject matter of the judgement. In fact, it was, above all, the question of the determination of the subject matter of the claim that could give rise to difficulties since the substantial situation was interpreted by the judge; that is, the subject matter of the judgement appeared to be relatively easily identifiable. The Italian doctrine, therefore, turned to the question of cases of modification of the appeal claim. The similarity of these two questions allows us to make an analogy of reasoning and a determination of the criteria for the claim subject matter. However, this approach can be readily replicated when one is interested in the subject matter of the claim for the authority of something considered substantial. Based on this reasoning, the Italian doctrine has taken up the criteria relating to identifying a new pending claim and applied them to the determination of the extent of the res judicata.

Second, it should be noted that Italian law has not familiarised itself with the French concept '*notion de cause*'; art. 2909 of the Codice Civile does not refer to it. Concerning the delimitation of the res judicata by the subject matter of the judgement, it is traditionally accepted that where the infringement of the subjective right and '*notion de cause*' is not the same, the filing of a claim cannot be challenged by the substantial res judicata. Nevertheless, the question is not so simple. Let us imagine that the party initiates a new process regarding contractual liability for non-performance of an obligation. From a theoretical point of view, the subject matter of the action is not the same; therefore, the substantial res judicata cannot prevent the filing of a new claim.

Finally, and most importantly, it should be noted that regarding the issue preclusion effect of the judgement, there are no provisions in Italian law confining the force of res judicata to the operative part (similar to Russia, but different to France's '*dispositif*', which is likened to the operative part). However, it is generally accepted that the subject matter of the decision is concentrated in the operative part, which does not mean that its normative scope (evaluation) should be limited to the precepts of the operative part. On the contrary, it is generally accepted in both doctrine and case law that the normative scope must be sought in the operative part in the light of the reasoning part. Accordingly, the provisions contained in the various parts complement and interpret each other, possibly replacing the lacunas of the operative part. In this sense, the delimitation of the res judicata involves an analytical examination of the content of the subject matter of the claim and the subject matter of the judgement.[446]

3.2.2.4.Russian Concept

Procedural rules serve two masters: they aim to ultimately end the dispute and to reach an accurate and just outcome. The scope of res judicata in Russia has both subjective and objective limits. The former requires the identity of the parties, while the latter is determined by the factual basis of the claim.

In his 1955 book *The Decision of the Soviet Court in Adversary Proceedings*, Prof. M. A. Gurvich adhered to the traditional position that the limitation of the binding force of court decisions is determined by two parameters: the subject matter of the judgement (i.e. the actual

[445] F. P. Luiso, *Diritto processuale civile, I principi generali* (Giuffrè éd) 142 (2000).
[446] A. Lugo, *Manuale di diritto processuale civile* (Giuffrè éd., 12ème éd) 175 (1996).

legal relationship resolved by court decision or objective limits) and the identity of parties subject to the proceedings (subjective limits).

a) Subjective Limits

Under Russian law, the identity of factual circumstances and parties to the proceedings is sufficient for a decision to be considered res judicata. Another interesting assumption is that if the same parties are acting in new litigation as in the first one, then the legal force of the res judicata will apply only to them, while all new persons will have the right to refute res judicata by providing new evidence.[447]

Russian law is unfamiliar with the concept of 'privies of the parties', which leads to great difficulties when res judicata matters are considered in court. However, the term 'interested parties' is close in essence to the concept of privies of the parties. Although the concept of an 'interested person' has different meanings in civil substantive and procedural law, neither the ComPC nor the CivPC contains a definition or enumeration of the characteristics of the 'interested parties' as a party in the proceedings. It seems that interested parties may include persons who are not yet participants in the proceedings in a particular case but believe that their rights and interests may be affected by the judicial act adopted in such a case. There is, accordingly, a need to define the notion of the 'interested parties'. However, the notion of an 'interested party' cannot completely replace the concept of a privy party.

Regarding the identity of the parties, the Court of Cassation noted that even though the second dispute involved an insurance company that did not participate in the bankruptcy case, the judge had the right to refute res judicata, limiting the parties who participated in the process earlier:

Within the meaning of part 2 of art. 69 of the ComPC, persons who have participated in a previously considered case are deprived of the opportunity to prove the established circumstances in a new case, since they have already used such right. This rule applies regardless of the partially changed composition of the procedural participants in the new case. At the same time, the law grants to the new parties the right to prove (refute) previously established circumstances, since they did not use this right.[448]

In our contention, this judgement fundamentally contradicts the principle of equality and competition of the parties. It seems that it would be more precise not to apply the doctrine of res judicata in this situation in connection with the entry of a third party into the case but only to take into account the facts established by judgement in the insolvency case and independently provide them with a legal assessment of the presence or absence of grounds for holding the insolvency representative responsible for losses.

It is challenging to give an unambiguous answer to the question of the subjective limits of applying the res judicata and all other questions raised within the framework of its application. There are several points of view in this regard, each of which deserves attention. In general, it seems that the question can be answered in the following ways: the res judicata applies to third

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[447] S. F. Afanas'ev, M.S. Borisov, K voprosu o svyazi obyazatel'nosti i preyudicial'nosti sudebnogo resheniya, vstupivshego v zakonnuyu silu (Zakony Rossii: opyt, analiz, praktika N 7.) 15 – 20 (2014)

[448] Resolution of the FCS of the East Siberian District of 15.10.2012 on the case N A19-22209/2011 (SPS 'Consultant Plus').

parties; it applies to all persons involved in the case (including third parties, both with and without independent claims); and it applies only to the plaintiff and the defendant.

In pre-revolutionary times, Professor M. T. Yablochkov wrote that the legal force of a court decision applies to the plaintiff and the defendant, as well as to third parties: specifically, not only those third parties who participated in the process in which the preliminary decision was made but also those involved in subsequent processes, albeit only if such third parties do not have independent claims. Yablochkov explained his position by referring to the presumption of representation, which operates in cases where the claim of a third party is derived from the position of a person directly involved in the process.[449]

A largely similar position was adopted by M. A. Gurvich, who pointed out that res judicata may be applied to those persons who are bonded by the court's decision, i.e. the relations of the parties and third parties involved in the process.[450] However, the rationale used by M. A. Gurvich to connect the indicated subjective limits is interesting. In his opinion, the legal force of a court decision generally applies to a confirmed or transformed legal relationship between the participants of the legal relationship.[451] Based on this thesis, the effect of a court decision can only apply to those persons whose rights are related to the subject matter of the judgement. Otherwise, a broader interpretation of the subjective limits of the court's decision would mean that judicial decisions could be adopted with respect to the rights and obligations of persons who did not participate in the court proceedings, leading to their subordination to such a judicial decision, which would contradict the basic principles of civil procedure legislation.[452]

At the same time, M. A. Gurvich pays special attention to the opinion that the subjective limits of the legal force of a court decision cannot be justified by the general validity of this decision, since, on the contrary, he believes that the general validity of a decision can be determined only by considering its subjective boundaries.[453] This is explained by, among other things, the fact that the general obligation of a judicial decision is a principle of public order and is an expression of socialist legality as a method of state order in application to a legal relationship confirmed by a court decision.[454] This obligation is established for all and is not restricted by any limits, it has a universal feature and is generally binding, and it has no subjective limits.[455]

Let us turn to the modern Russian case law established by commercial courts to clarify the answer to the question of interpreting the subjective limits of the validity of a court decision.

If you look at the provisions of current legislation, in particular, art. 69 of the ComPC, you will see that, formally, the facts established by an enforceable judgement is not proved again by consideration of the commercial court in another case involving 'the same persons'. Based on this wording, it is not clear whether the new process should include only the same persons as in the first, or if, for example, another co-plaintiff or any third person appears in the second process, the rule of res judicata will no longer be applied. Based on a literal interpretation, it seems that it is referring to all parties of the proceedings. However, strictly speaking, the decision is directly related only to the plaintiff and the defendant and gives the right only to the plaintiff.

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[449]T. M. Yablochkov, *Uchebnik russkogo grazhdanskogo sudoproizvodstva*. (Yaroslavl') 247 (1912).
[450]M. A. Gurvich, *Reshenie sovetskogo suda v iskovom proizvodstve*. (M) 121 (1955)
[451]M. A. Gurvich, *Reshenie sovetskogo suda v iskovom proizvodstve.* (M) 114 (1955)
[452]M.A. Gurvich, *Reshenie sovetskogo suda v iskovom proizvodstve*. (M) 115 (1955)
[453]M. A. Gurvich, *Reshenie sovetskogo suda v. iskovom proizvodstve*. (M) 116. (1955)
[454]M. A. Gurvich, *Reshenie sovetskogo suda v. iskovom proizvodstve*. (M) 117 (1955)
[455]M. A. Gurvich, *Sudebnoe reshenie. Teoreticheskie problemy*. (M) 153–155 (1976)

If a party did not participate in the first trial, in which a pre-trial decision was made, res judicata is not applicable. It seems to be more accurate, just, and fair. Thus, the position of para. 5 of the Resolution of Plenum № 13 is that, despite the facts established in the previously considered case, the facts are not required to be proved again by the court in another case involving the same persons if, in other proceedings involving other persons, these facts are not covered by res judicata and are established on a common basis.[456] A similar conclusion is found in the case law of the Supreme Court, in particular, in the Resolution of the Presidium of the Supreme Commercial Court of № 1346/97,[457] where the court, considering the issue of establishing succession between two legal entities, considered the conclusions of lower courts on the lack of succession regarding the establishment of this fact by decisions in other cases to be untenable and raised the dispute in the court again (in a new consideration).

In our contention, one of the most red-lightning cases of modern commercial case law is the high-profile case named 'Skakovaya 5', which reached the Presidium of the Supreme Commercial Court in 2013. Briefly, the heart of the matter of the case was that a condominium, Skakovaya 5, initially filed a claim against Komeks LLC for the recovery of illegally held property (case no. A40-66308/2006). Skakovaya 5 managed to win the case because the court concluded that the part of the premises claimed by them is for common use and belongs to the owners of the apartments of the house due to the right of commonly shared ownership. However, the court's decision was not enforced, and later the participants of Skakovaya 5 found that the property was already registered with an offshore company called Artex Corporation. Skakovaya 5 filed a second claim for reclaiming illegally held property, referring to, among other things, res judicata established in the judgement in case № A40-66308/2006.

Lower courts dismissed the claim, and their arguments were as follows: 1) a reference to para. 4 of the Joint Resolution of the Plenum of the Supreme Court and the Supreme Commercial Court of the Russian Federation of 29.04.2010 № 10/22 concerning the lack of commitment of the conclusions of the courts on claims for recognition of property rights, and 2) a direct reference to art. 69 of the ComPC, according to which, the established facts in the decision were grounds for the exemption of condominiums from proving the circumstances in the second proceeding.[458]

However, the Supreme Commercial Court did not agree with these arguments. First of all, the higher court pointed out that the para. 4 of the Joint Resolution of the Plenum of the Supreme Court and the Supreme Commercial Court of the Russian Federation of 29.04.2010 № 10/22 does not apply to issues of fact, but rather to conclusions about the property owned by a particular person. Furthermore, the court came to a very bold conclusion that in such circumstances, established in the judgement of case № A40-66308/2006, the facts of assignment of property to joint ownership in the building was res judicata for the court.[459] This conclusion seems to be bold since it does not solve the problem of extending the effect of res judicata to a certain group of persons. Moreover, if we do not pay due attention to a particular case's

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[456]The Resolution of the Plenum of the Supreme Commercial Court of the Russian Federation of 31.10.1996 No 13 'On the application of the Commercial Procedural Code of the Russian Federation when considering cases in the first Instance' // Special Appendix to the 'Bulletin of the Supreme Commercial Court of the Russian Federation', No 12, 2005.

[457] The Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation of 10.06.1997 N 1346/97.

[458]Decision of the Moscow Commercial Court of 28.12.2011 in case no. A40-82045/2011-64-444, decision of the Ninth Arbitration Court of Appeal of 11.03.2012 in case no. A40-82045/2011-64-444 // SPS 'Consultant Plus'.

[459]The Resolution of the Presidium of the Supreme Commercial Court of the Russian Federation of 26.03.2013 No. 14828/12 in case No. A40-82045/2011-64-444 // SPS 'Consultant Plus'.

circumstances, then this conclusion, blindly used by lower courts (which is not uncommon), puts parties in civil proceedings in an unequal position.

As for the specific case, the Supreme Commercial Court demonstrated a straightforward approach that the registration of the Artex Corporation in the Commonwealth of Dominica gives a reason to doubt its integrity and lack of affiliation with Komeks LLC. This lack of integrity was also indicated prior to the dispute as the companies used a chain of transactions between controlled entities to create the appearance of a transfer of ownership rights. In such circumstances, the Supreme Court considered it possible to extend the effect of res judicata to the persons who had not previously participated in the case.

The Supreme Commercial Court put an end to the apparent abuse of the rights on the part of companies that, after losing the first trial, decided to bring a new party into the process to again try and prove that there are no grounds for attributing the property to the joint ownership in order to delay or prevent the return of the property. However, the Supreme Commercial Court bluntly pointed out that when the defendant is affiliated with the plaintiff in a previous trial for the recovery of the same property, the new claim is an abuse of procedural rights by the defendant, and, therefore, the interest of such person is not subject to judicial protection.[460]

This case clearly demonstrates how parties currently use the doctrine of res judicata in Russia to serve their interests and, in particular, circumvent the law. It is possible to obtain a 'convenient' solution that can be used in the future as a basis for exemption from proof in another proceeding, and in the case of obtaining an 'inconvenient' judgement, you may add a third person to the proceedings who will not allow res judicata to determine the outcome of further processes. All this once again confirms that the concept of res judicata in Russian law is currently experiencing development and does not have the proper effect since neither the legislator nor the practice may establish clear rules for applying res judicata.

Regarding a party's identity in derivative actions in Russian case law, res judicata bears the following rule: if the shareholder is not a party to the proceedings, the decision may have an effect of res judicata. The argument arises that, in such cases, the status of the company's members should be justified not by art. 65.2 of the RCC but by para. 2 of art. 166 of the RCC. For example, since a shareholder cannot base its status on art. 65.2 of the RCC, it may not be subject to res judicata.

Thus, the question remains unanswered in modern practice as to which exact circle of 'party identities' the doctrine of res judicata applies to. If we proceed from a literal interpretation of Russian procedural legislation, the answer would be all parties involved in the case. However, in practice, there are cases where the court is not limited to the plaintiff, the defendant, and third parties, but goes beyond the persons involved in the case, as reflected, for example, in the judicial decisions in case № A40-82045/2011.

In addition, the issue of the commercial courts' understanding of this matter per art. 69 of the ComPC as a whole remains relevant. Some courts believe that this article contains provisions on irrefutable res judicata. Other courts agree with the conclusion about the res judicata but consider it surmountable and allow parties to refute it by presenting new evidence. Nevertheless, there are also courts that qualify the provisions of pt. 2 of art. 69 of the ComPC to overcome the res judicata validity of a court's decision. These courts also accept new evidence from parties to other proceedings, which completely contradicts the meaning of the doctrine of res judicata, as was the case with legislators in the Soviet era.

[460]The Resolution of the Presidium of the Supreme Commercial Court of the Russian Federation of 26.03.2013 No. 14828/12 in case No. A40-82045/2011-64-444 // SPS 'Consultant Plus'.

Overall, it must be said that the doctrine of res judicata prevents a party from asserting the existence of factual circumstances and their legal relevance when the question of their relevance has been previously decided by a court in a case between the same parties. Case law in Russia has tended towards a broad interpretation of the notion of 'identity of parties.' This tendency has made it essential to distinguish between the binding force of the decision and issue preclusion. Moreover, the epistemology that the shareholder acts on his behalf but in the company's interest may raise the question of the authority of res judicata.

b) Objective Limits

The factual circumstances established in a previously analysed case may become res judicata if they are relevant to a new litigation judgement. These may be the actual and legal relations of the persons involved in the case, referred to in the doctrine and case law as 'objective limits.' In the practice of commercial courts, there are several approaches to assessing such limits. Parties often incorrectly determine what is considered a circumstance established by the court when resolving the original dispute. An approach has already been developed among commercial courts, which is that such circumstances are understood to be facts established by courts, not their legal conclusions.[461]

The issue of extending the validity of a judgement to the actual grounds upon which it is based is discussed in a separate place in his work. Gurvich believes that the 'factual grounds' set out in a judgement (i.e. the reasoning part) come into force with the operative part of the judicial decision and should be adjudicated jointly in a different process.[462] The general position expressed by Gurvich on the issue of res judicata is that 'res judicata is applied in cases when a circumstance or legal relationship established by a court decision, that has entered into legal force, acts as a legal fact in another trial between parties subject to the binding force of the decision, forming part of the basis of the judgements'.[463]

Based on the literal interpretation of pt. 2 of art. 69 of the ComPC, only circumstances established by a court decision that have entered into force can be covered by res judicata. In our contention, in this case, the term 'facts' can be synonymous with the term 'circumstances'.

The literal interpretation of art. 69 of the ComPC is also confirmed by case law at higher level instances. Moreover, the position was expressed in the Resolution of the Constitutional Court of 21.12.2011 № 30-P that it is the facts established by the courts that are covered by res judicata. However, in this case, there was a question of the constitutionality of the provisions of the criminal procedure code.

As for ComPC, the Constitutional Court of the Russian Federation has not changed its position. Thus, the judgement of 06.11.2014 No. 2528-O repeats the view that under pt. 2 of art. 69 of the ComPC, the basis of exemption from proof in conjunction with the provisions of pt. 1 of art. 64 and pt. 4 of art. 170 of the ComPC means that only the actual circumstances (facts) established and entered into legal force by a judicial decision of a commercial court on the

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[461] The Resolutions of the Presidium of the Supreme Commercial Court of the Russian Federation of 03.04.2007 No. 13988/06 in case No. A63-6407/2006-C7, of 17.07.2007 No. 11974/06 in case No. A12-2463/06-c42, of 25.07.2011 No. 3318/11 in case No. A40-111672/09-113-880, the decision of the Supreme Court of the Russian Federation of 10.07.2018 No. 307-AD18-976 in case No. A56-27290/2016.

[462] M. A. Gurvich, *Reshenie sovetskogo suda v. iskovom proizvodstve.* (M) 122 (1955).

[463] Ibid. M. A. Gurvich, *Reshenie sovetskogo suda v. iskovom proizvodstve*. (M) 122 (1955).

earlier considered case are not required to be proved again by other commercial courts.[464] A similar position is reflected in other acts of the Constitutional Court: the judgement of 21.03.2013 N 407-O, the judgement of 16.07.2013 N 1201-O, and the judgement of 24.10.2013 N 1642-O.

Overall, the identity of the causa petendi (the factual basis) is determined as a matter of substance. The effect of res judicata in Russia arises where the factual circumstances in the subsequent claims are the same as in the previous proceedings with the same parties. There can be no res judicata unless there is a substantial identity between res judicata and a factual circumstance in the latter proceedings.

3.2.2.5.Conclusions and Comparative Remarks

This subchapter analysed the scope of res judicata in the civil law jurisdictions of France, Italy, and Russia. After highlighting the deficiencies in civil law, an approach to a broad interpretation of the 'identity test' for resolving the problems was identified. In a way, res judicata is vulnerable to an objection against the whole procedural system. There is no denying that it is challenging to encapsulate very complex procedural institutions in the statute. Equally, there is no denying that the new way of interpretation of the doctrine of res judicata broadens the circumstances in which it may be applied. In Russia, the doctrine of res judicata can now be applied to the privies of the parties. This is a much broader principle than it was before. As seen in France, there have also been other changes, such as the adaptation of the 'identity test' to a new reality.

However, the lack of unifying approaches to solving the issues raised in modern commercial practice and the vast number of problems that arise in practice when trying to apply res judicata by litigants indicates that at present, the doctrine of res judicata raises several issues. Lawyers must still confront the suspicion of procedural legislation regarding the res judicata principle.

In our contention, the only cure for such issues, which arose from the practical dimension of res judicata, is to determine the effect of res judicata on the privies of the parties in statutory law and allow courts to retain broad discretion over whether res judicata should be applied. Accordingly, we adhere to the comparative model, according to which only the operative parts of the judgement are to have preclusive effects. In that case, the problem of the possibility of res judicata of legal qualifications and facts will be solved, and the doctrine of res judicata will finally become functional. Another issue is that Russian legal practitioners flatly reject this idea since it is the possibility of applying res judicata to the motivational part of the judgement that often makes it possible to win complex cases involving several trials.

3.3. Res Judicata in Common Law Jurisdictions

The scope of res judicata and the existing analysis of the doctrine in civil law jurisdictions were identified in Subchapter 3.1. Analytically, a sound theoretical understanding of the scope of res judicata in common law is imperative.

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[464]The resolution of the Constitutional Court of the Russian Federation of 06.11.2014 N 2528-O 'At the request of the administration of the Krasnodar Territory to verify the constitutionality of pt. 2 of art. 69 of the Commercial Procedural Code of the Russian Federation' / / SPS 'Consultant Plus'.

Regarding the issues of the authority of res judicata, English law does not depart from the pragmatism that characterises its system. While there are several sets of rules relating to civil procedure and the judicial system, no specific article deals with res judicata in the Civil Procedure Rules of 1998 or the Rules of the Supreme Courts.[465] Textual sources are, therefore, rare, and the 'White Book' itself, which is still one of the reference books containing English procedural rules, does not contain any relevant components.

The notion of the authority of res judicata is not precisely translated into the English language, which therefore uses the Latin expression 'res judicata'[466] to refer to res judicata, a concept in which content and nature should be specified. As a result, judgements that may give rise to a defence based on the authority of res judicata will be considered before the implementation of these defences.

3.3.1. Concepts and Nature of Res Judicata

This notion is established as a true doctrine in English law,[467] and judgements willingly use it. As a practical doctrine, it is essential to most jurisdictions because it contains two ideas that are usually formulated in the form of Latin adages: 'interest republicae ut sit finis litium', that is, 'it is in the public interest that any dispute is final',[468] and '*nemo debet bis vexari pro una and eadem causa*', which states that no one should be prosecuted twice for the same cause.[469]

The literature on res judicata doctrine has highlighted the effects that it may have. In legal doctrine, the cause of action estoppel and issue estoppel are usually mentioned. However, the former recovery and abuse of procedure may also be applied when the subject matter in the subsequent claim has not been determined as res judicata earlier.[470] It is worth noting that while English law does distinguish a separate res judicata effect for the plea of abuse of process, US law does not descry it.[471]

Given its pragmatism, this doctrine is present in all systems based on common law. Res judicata defences also exists in the United States, where it relies on two concepts: claim preclusion and issue preclusion (or collateral estoppel).[472]

1) The technique of 'claim preclusion' consists of preventing a case from being brought before a court again when it concerns a cause of legal action (legal basis of the claim) that has already been definitively decided between the same parties.

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[465] O. G. Chase, Helen Hershkoff, CIVIL LITIGATION IN COMPARATIVE CONTEXT (West Academic Press) 570–577 (2nd ed. 2017).

[466] Dahl's law Dictionary 616 (Orion Books, 2nd ed. 2001).

[467] I. Gordon, *Res judicata and settlement agreements*, 149 NEW L. J., n/ 6878 348 (1999).

[468] *R v. Middlesex Justices*, ex p Bond (1933) 2 KB I, CA, para. 982.

[469] These two maxims are reported in almost every book. See. Oscar G. Chase & Helen Hershkoff, CIVIL LITIGATION IN COMPARATIVE CONTEXT (WEST ACADEMIC PRESS) 564 (2nd ed. 2017); Robert Von Moschzisker, *Res Judicata*, 38 YALE L. J. 299 (1929); William T. Hughes. EQUITY ITS PRINCIPLES IN PROCEDURE, CODES AND PRACTICE ACTS: THE PRESCRIPTIVE CONSTITUTION (Forgotten Books) 199 (1911); M. Melville; Carter Bigelow, N. James, Treatise on The Law of Estoppel or of Incontestable Rights (6) (Boston : Little, Brown, and Company) 40–41 (1913); Kevin M. Clermont, Res Judicata as Requisite for Justice, 68 RUTGERS U. L. REV. 1067, 1069–1070, 1072–1073 (2016); See Also N. Andrews, THE THREE PATHS OF JUSTICE (Springer) 126 (2nd ed. 2018); Spencer Bower and Handley: Res Judicata (Butterworths Common Law) 338–339 (5th ed. 2019).

[470] S. Schaffstein, *The Doctrine of Res Judicata Before International Arbitral Tribunals*. PhD thesis, 19 (2012).

[471] Ibid. S. Schaffstein, *The Doctrine of Res Judicata Before International Arbitral Tribunals.* PhD thesis, 32 (2012).

[472] J. H. Friedenthal, M. K. Kane & A. R. Miller, CIVIL PROCEDURE *(WEST ACADEMIC PUBLISHING)* 613 (5th ed. 2015).

2) The preclusion outcome prevents the 're-judgement' of facts that have already been decided in the court proceedings, at least as part of a previous action.

In common law, res judicata is always a defence that allows avoiding any further proceedings where a decision has already been made on the same issue. It is, therefore, called 'plea of res judicata'. In this respect, it is hardly different from the negative effect of res judicata in France or Italy.

An analysis of case law shows that the idea of res judicata is expressed both by the term 'res judicata' itself and by the terms 'issue estoppel', 'issue preclusion', 'cause of action estoppel', 'estoppel by record', and 'collateral estoppel'. Indeed, it seems that the distinctions between these notions have faded and that the modern trend is towards semantic confusion. Consequently, it is commonly accepted that the term res judicata encompasses all of these terms and that the res judicata recorded in English law is equivalent to the law of estoppel.[473] It can also be considered as a traditional understanding of the res judicata doctrine.[474] Moreover, it must be noted that the offensive use of issue preclusion is of particular interest to derivative actions.

According to the traditional definition, estoppel is an ancient procedural rule that forbids an individual who has created an appearance of contradicting himself at the expense of others. Whether or not the statement made by this individual conforms to reality, since it gave rise to an appearance (estoppel by representation) that the other party believed, the former is not allowed to argue because his previous statement was false.[475]

In procedural matters, estoppel can, thus, be defined as the inability of a party to allege or prove in judicial proceedings that a fact is different from what it appears to have been previously. Therefore, it is intended to protect legitimate confidence and stability.

Among the many existing cases of estoppel in English law (many of which relate to the law of obligations), those likely to be of interest in this study are those known as estoppel per rem judicata. This term actually covers two cases, estoppel by the record and estoppel quasi by the record.

The distinction between the two is based only on the type of court that rendered the decision. Estoppel by record is raised against a decision given by a court of record, that is to say, a court empowered to declare sentences of fines or imprisonment when its authority is not respected; however, estoppel quasi by record is raised when the decision has been rendered by any other court, including when it is an agreement between the parties.[476]

The study of res judicata, therefore, actually requires a study of estoppel *per rem judicatam*. Most of the characteristics of res judicata in English law can only be understood by studying the actions of a party wishing to oppose another where res judicata authority applies to a decision already rendered.

Before considering the conditions of admissibility of the defence based on res judicata, reference should be made to another principle, which appears to be an intermediary between estoppel by the record and estoppel in pais, and which may, in some respects, be applicable in the context of res judicata. This slightly peculiar type of estoppel is based on the principle that a

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[473] O. G. Chase, H. Hershkoff, CIVIL LITIGATION IN COMPARATIVE CONTEXT (West Academic Press)570–577 (2nd ed. 2017).
[474] S. Schaffstein, *The Doctrine of Res Judicata Before International Arbitral Tribunals.* PhD Thesis, 19 (2012).
[475] See for example J. Cartwright, *Protecting Legitimate Expectations and Estoppel in English Law,* Report to the XVIIth International Congress of Comparative Law, 4 (2006).
[476] O. G. Chase & H. Hershkoff, CIVIL LITIGATION IN COMPARATIVE CONTEXT (West Academic Press)570–577 (2nd ed. 2017).

person cannot approve something, then reprove it, hence the name[477] 'approval and reprobation'. This concept leads to two presumptions:

1) a person who has a choice between two attitudes must be treated as having made a choice from which he will not then be able to dispense, and

2) that, in general, he will be considered as having made a choice only if he has taken advantage of the conduct which he initially followed and with which his subsequent conduct disagrees.

Thus, the study of res judicata authority requires a study of what was formerly called estoppel per rem judicatam, namely, estoppel by record. Most of the characteristics of res judicata authority in English law can only be understood by studying the actions taken by a party wishing to oppose something where res judicata authority applies to a decision already rendered. It is, therefore, necessary to determine the conditions for the admissibility of res judicata.

Res judicata introduces a number of conditions or characteristics related to judgement. Estoppel by record applies too many elements.[478] However, it mostly relates to records, i.e., the 'minutes' of a judgement or, more commonly, the minutes of court decisions. In accordance with the adages mentioned in the introduction, a party wishing to implement estoppel by record must demonstrate that the matter in question has been decided by certain types of judgements, which must be regarded by English law as 'final judgements.' In addition, the judgement must also be 'conclusive'; otherwise, the estoppel cannot be applied.

In practice, the doctrine of res judicata embraces two cases of estoppel by record or quasi by the record, which can be raised against a final decision: cause of action estoppel and issue estoppel.[479]

3.3.2. England

3.3.2.1.Cause of Action Estoppel

Cause of action estoppel is defined as all the facts that the plaintiff has to prove in the proceedings in order to support his right to a judgement of the court,[480] i.e. to win the case. Moreover, 'the discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not (…) permit the latter to be reopened'.[481] It is commonly presented as the grounds of action (demand). However, it is not clear that what the English call the 'cause of action' corresponds to the subject of the litigation (as in Italian, French or Russian law). It would seem that the proper distinction in Italian, French, and Russian law between the grounds and subject matter of the litigation is not so marked in

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[477] *Lissenden v. CAV Bosch Ltd* (1940) AC, 412, (1940) I ALL ER, 425.

[478] O. G. Chase, Helen Hershkoff, CIVIL LITIGATION IN COMPARATIVE CONTEXT (West Academic Press)570–577 (2nd ed. 2017).

[479] O. G. Chase, Helen Hershkoff, CIVIL LITIGATION IN COMPARATIVE CONTEXT (West Academic Press) 573 (2nd ed. 2017).

[480] *Thoday v. Thoday* (1964) P 181, 197, CA. It must be noted from this case that: 'There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action.'

[481] *Arnold and Others v. National Westminster Bank pic* (1991) 2 AC 93 at 104 D-E (per Lord Keith).

England. The English cause of action would, therefore, consist only of facts and not of law and facts.

The existence of these facts is then admitted by the court, and the judgement is rendered in favour of the plaintiff. In this case, the cause of action (the facts supporting the claim) is incorporated into the judgement (transit in rem judicatam). It can no longer be challenged and relitigated in a later case because it is deemed to be merged with the judgement itself. Therefore, the facts supporting an appeal are considered non-existent, and the appellant can no longer support their case and apply per rem judicatam.

Claim preclusion refers to a general judicial decision and means the prohibition of disputes between the same persons on the same grounds. New claims are also not allowed if they relate to the same transaction, but the plaintiff requires a different remedy. The bar also applies to persons connected by a common interest (privies) with the parties in the original case.

This doctrine can also be used against an entire cause of action – all the facts underlying the claim – or against only one of the issues discussed. In both cases, the extent of the judgement will vary: 1) if only one of the discussed issues is in conflict with the argument of facts or law again, the solution must be found in issue estoppel;[482] 2) if all of the parts of the cause of action are addressed from a case law point of view, it is equal to the following statement: all the rights and obligations of the parties were decided by the previous judgement, and above all, the latter was able to decide issues of law as well as questions of fact. It can, therefore, be concluded that if the procedural concept of cause of action covers only the arguments of fact, it would appear that the concept of cause of action estoppel, that is, considered in the context of an issue of res judicata, would consist of all the arguments of fact and law.[483]

However, in deciding which issues of law and fact were decided in the previous judgement, the court is allowed to consider the reasoning behind the previous judge's decision, as well as the notes he may have taken regarding the evidence. Therefore, the court is not limited by what is contained in the record of the decision (a record). However, the judge's reasoning cannot be considered in order to exclude from the decision any issues of law or fact which, having regard to the arguments raised during the proceedings and under the very terms of the decision, should be included in the decision.

Represented persons. A party may be represented by another in five situations. First, if more than one person addresses the same interest in a proceeding, the court may direct that the claim be continued by or against one of the persons as a representative for the others. Second, the CPR allows for representing interested persons who cannot be ascertained in certain proceedings.[484] Unless the court orders otherwise, any judgement in either of these two cases will bind all persons represented in the claim. Third, actions brought by or against trustees will bind the beneficiaries unless the court expressly provides otherwise. Fourth, where a deceased person lacks a personal representative, and the court appoints one to act on his behalf or permits the claim to proceed in his absence, any judgement will still bind the deceased. Fifth, where a company is entitled to a remedy and an action is begun by one of its members to obtain it for the company, then any judgement given in respect of the claim will bind both the individual seeking it and the company. These are called 'derivative claims.'

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[482] O. G. Chase, Helen Hershkoff, CIVIL LITIGATION IN COMPARATIVE CONTEXT (West Academic Press)573 (2nd ed. 2017). See also *Collier v. Walter*, 1873, LR 17 Eq. 252.

[483] O. G. Chase, Helen Hershkoff, CIVIL LITIGATION IN COMPARATIVE CONTEXT (West Academic Press)574 (2nd ed. 2017). See also *Collier v. Walter*, 1873, LR 17 Eq. 252.

[484] The Civil Procedure Rules 1998 No. 3132 (L. 17). Rule 12, Rule 12A.

3.3.2.2.Issue estoppel

Issue estoppel relates to a case where a court has rendered a decision with exclusive jurisdiction, and the same question is raised again, but incidentally, in a subsequent procedure involving the same parties.

Some authors define estoppel in a strict sense (where the only absolute identity is that of the parties in the strict sense)[485] and others in a more extended sense (such as an abuse of law).[486]

Regarding issue estoppel in a strict sense, a party does not have the opportunity to object and argue the opposite of the specific issues that, having been clearly raised once, have been solemnly decided.

These issues cannot be the subject of a dispute between the same persons in a new proceeding (although the parties' composition in the two proceedings does not have to be identical). The estoppel also applies to persons connected by a common interest (in privity) with the parties to the original process. In comparison with Russian law, this concept is quite broad and may include, for example, an agent, an affiliated company, etc.

The doctrine acts as a procedural bar for asserting certain things (estoppel), in this case, challenging the correctness of the resolution of the issue in the previous proceeding. The interested party declares the application of the doctrine. This can be either the plaintiff (offensive collateral estoppel) or the defendant (defensive collateral estoppel).

It is essential that issue estoppel applies only to issues necessary for the first decision to be raised. The conclusions on the facts and legal positions formulated in the decision, which the court could have dispensed within making the first decision, do not have a preclusion meaning.

To apply the doctrine, the issue must be actively discussed by the parties in the first proceeding. If the issue is resolved without discussion, that is, the party did not have the opportunity to argue its position or present evidence (for example, due to the non-appearance of a party), the preclusion effect against such issues does not apply.

As mentioned above, according to the traditional version of the doctrine, the parties to the dispute (the person claiming the application of the res judicata and the person who is subject to the bar of challenging) must have also been the parties in the proceeding in which the first decision was made (or a privy). However, American courts allow deviations from this rule in some instances. In this case, we speak of non-mutual collateral estoppel. Although the subject matter of the first and subsequent claims are not the same, the conclusion of a matter, which has given rise to a final court decision, is conclusive in a subsequent action between the same parties and their privies.

The conditions for the application of the doctrine of issue estoppel in the strict sense are as follows:[487]

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[485] 'The specificity of this estoppel consists in the identity of the parties more than in the identity of the cause of the action. A cause of action estoppel is inadmissible in so far as the whole of the grounds are not identical and the issue estoppel is therefore reserved to cases where certain issues, whether of law or of fact, have already been decided by a court in a previous procedure between the parties.' See in Peter R. Barnett, RES JUDICATA, ESTOPPEL AND FOREIGN JUDGMENTS (Oxford: Oxford University Press) 183 (2001). See also in L. J. Stuart-Smith in *Talbot v. Berkshire County Council* (1994) QB 290, CA, at 296D-E.

[486] Extended issue estoppel also includes the assumption that issues should have been decided in a previous procedure but, by 'negligence, inadvertence or even accident' were not. See here Peter R. Barnett, RES JUDICATA, ESTOPPEL AND FOREIGN JUDGMENTS (Oxford: Oxford University Press) 184–185 (2001). See also *Henderson v. Henderson* (1843) 3 Hare 100, 67 ER 313.

1) the same issue decided in both proceedings was a question of fact, law, or a mixture of the two;

2) the court decision creating the estoppel has to be final;

3) and the parties to the first judgement or the persons entitled to them were the same persons as the parties to the subsequent proceedings.

This second distinction would have been made more than 150 years ago in Wigram VC's decision in *Henderson v. Henderson* in 1843.[488] Again, the idea behind the drafting of this rule was to encourage the parties to submit all aspects of their dispute to the judge at the same time for a ruling once and for all.[489]

The Henderson rule provides that a court may not authorise parties to open a new case on matters that should have been dealt with in an earlier proceeding, except in special circumstances.[490] Thus, as stated by a Lord of Appeal in a recent decision: 'the rule in *Henderson v. Henderson* (1843) is very well known. When a matter becomes the subject of litigation between them in a court of competent jurisdiction, it requires the parties to bring their whole case before the court so that all aspects of it may be finally decided (subject to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for the decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed.'[491]

This form of estoppel once again shows the philosophy behind these rules: putting an end to litigation. Here, the rule is more specific as it only considers procedural abuse caused by a party seeking to assert an element that it could well have asserted in previous proceedings. The party should have made all its arguments in the first case to succeed, failing which it commits an abuse of process by requiring the respondent to return to the judge to decide on an element that it was in a position to raise earlier.

However, this rule provides for mitigation by allowing the admissibility of a new case in exceptional circumstances. While in 1996, the position of the Court of Appeal seemed to want to apply this rule fairly strictly by limiting cases of an exceptional circumstance, since its purpose is to prevent the abuse of proceedings, its position has evolved, and this classic wording has been somewhat lessened since *Bradford & Bingley Society v. Seddon* in 1999.[492]

In the Bradford case, the judge held that debating in new proceeding issues that were not decided in a previous proceeding does not necessarily lead to falling under the rule of abuse of

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[487] *Carl Zeiss Stiftung v. Rayner and Keeler Ltd* (1967) I AC 853. See also here Peter R. Barnett, RES JUDICATA, ESTOPPEL AND FOREIGN JUDGMENTS (Oxford: Oxford University Press) 185–239 (2001).

[488] See also *Henderson v. Henderson* (1843) 3 Hare 100, 67 ER 313.

[489] O. G. Chase & Helen Hershkoff, CIVIL LITIGATION IN COMPARATIVE CONTEXT 574 (2nd ed. 2017)..

[490] Extended issue estoppel also includes the assumption that issues should have been decided in a previous procedure but, by 'negligence, inadvertence or even accident' were not. See here Peter R. Barnett, RES JUDICATA, ESTOPPEL AND FOREIGN JUDGMENTS (Oxford: Oxford University Press) 184–185 (2001). See also *Henderson v. Henderson* (1843) 3 Hare 100, 67 ER 313.

[491] *Barrow v. Bankside Agency Ltd.* (1996) 1 W.L.R. 257 // Judgments - *Johnson* (A.P.) (Original Appellant and Cross-Respondent) *v. Gore Wood & Co.* (A Firm) (Original Respondents and Cross-Appellants) // https://publications.parliament.uk/pa/ld200001/ldjudgmt/jd001214/johnso-2.htm

[492] Bradford and *Bingley Building Society v. Seddon and Hancock*; Walsh and Rhodes (Trading As Hancocks (a Firm): CA 11 Mar 1999. // https://www.bailii.org/ew/cases/EWCA/Civ/1999/944.html. See here Peter R. Barnett, RES JUDICATA, ESTOPPEL AND FOREIGN JUDGMENTS (Oxford: Oxford University Press) 221–223 (2001).

procedure. Similarly, raising a subsequent claim that might have been part of a previous case, or that even clashes with a previous claim in another proceeding, should not be viewed as an abuse of process in a systematic manner. This can be seen in a statement from judge Auld LJ: 'In my judgment, mere relitigation, in the circumstances not giving rise to cause of action or issue estoppels, does not necessarily give rise to abuse of process. Equally, the maintenance of a second claim which could have been part of an earlier one or which conflicts with an earlier one should not, per se, be regarded as an abuse of process. Rules of such rigidity would be to deny its very concept and purpose.'[493]

3.3.3. The US

3.3.3.1.Claim Preclusion

The rule 'use it or lose it' is a simple way to illustrate the doctrine of claim preclusion. Essentially, 'it bars claims which could have been raised in the prior proceeding but were not.'[494]

In other words, as was stated in the case, *Commissioner v. Sunnen*,[495] 'when a court of competent jurisdiction has entered a final judgement on the merits of a cause of action, the parties to the suit and their privies are thereafter bound, not only as to every matter which was offered and received to sustain the claim or defeat the claim or demand but as to any other admissible matter which might have been offered for that purpose.' This also accords with our earlier observations, which showed that a prior judgement bars the parties (or privies) from relitigating the 'same cause of action' in subsequent litigation.

Claim preclusion prohibits a party from relitigating a claim or cause of action. It depends largely on what is meant by a claim in the national legal system. We have already found out that there are differences in the concepts of French and Italian legislation. The Restatement (Second) highlighted several important provisions for commenting on the effect of res judicata, one of which is the definition of the concept of 'claim'.[496] Thus, in the res judicata context, 'claim' encompasses a bundle of remedial rights held by the plaintiff in relation to the transaction, or net of connected transactions, out of which the action arose.[497]

To determine the effects of res judicata, Schaffstein, citing Christopher Klein, Lawrence Ponoroff, and Sarah Borrey, stated that the concept of 'claim' is defined broadly by the term 'transaction'.[498] Without giving any precise definition of the term 'transaction', the Restatement (Second) determined that transactions 'are to be determined pragmatically, giving weight to such considerations as to whether the facts are related in time, space, origin, or motivation, whether

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[493] Bradford and *Bingley Building Society v. Seddon and Hancock*; Walsh and Rhodes (Trading As Hancocks (a Firm): CA 11 Mar 1999. // https://www.bailii.org/ew/cases/EWCA/Civ/1999/944.html

[494] *M&M Stone Co. v. Roger J. Hornberger*, 2009 U.S. Dist Court for the Eastern District of Pennsylvania LEXIS 91577 at 27.

[495] *Commissioner v. Sunnen*, 333 US 591, 597 (1948).

[496] Restatement (Second), Judgments, § 24 (1): 'When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose'. See also in f.e. S. Schaffstein, *The Doctrine of Res Judicata Before International Arbitral Tribunals.* PhD Thesis, 33 (2012).

[497] Ibid.

[498] See f.e. S. Schaffstein, *The Doctrine of Res Judicata Before International Arbitral Tribunals.* PhD Thesis, 33 (2012 citing *Principles of Preclusion and Estoppel in Bankruptcy Cases*, 79 THE AMER. BANKRUPT. L. J. 848 (2005).

they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage' (Restatement (Second), Judgments, § 24 (2)).

3.3.3.2.Issue Preclusion

In the United States, issue preclusion prevents the initiation of a new trial for an issue of fact or law. It can be referred to regardless of whether the action in a subsequent proceeding is the same as the action in the previous one. In addition, it can be enforced by non-parties of the previous proceedings.[499] Issue preclusion only bars the litigation of the facts and matters raised and established in a prior trial.

A subsequent proceeding on a matter of fact or law has a preclusive effect only when the resolution of that issue was crucial to the previous judgement. The Restatement of the Law (Second) stated that such crucial matters of law and fact are those that were determined by the parties and the court as essential to the previous proceeding.[500]

Issue preclusion or collateral estoppel is of particular interest in derivative litigation. A notable example of derivative action is the case of Parklane Hosiery.[501] In this case, the doctrine of mutuality in derivative actions comes to the fore, according to which, non-parties to the first proceeding would not have been bound by the prior judgement and, thus, would not have incurred risks of the outcome of the litigation. Therefore, they should not be allowed to relitigate the same matter of fact and law against one of the original parties. This rule restricts the effect of res judicata to cases when the parties or privies involved in the earlier action bring a subsequent action.[502]

However, the Parklane Hosiery case shows that a party who sued and lost in a previous proceeding has a right to bring a new claim with nearly identical issues and new parties. Thus, this case shows a broad interpretation of collateral estoppel's offensive use, which ultimately aims to make litigation 'full and fair'.[503] This court conclusion seems ambiguous to us since the shareholders ultimately defend the same company (acting on behalf of him and protecting its interest) in a derivative action. Even though the court has repeatedly pointed out that this rule has nothing to do with the judicial economy, it should be noted that such a situation can lead to a full but unfair result. The court also cautioned that it should not be allowed where the plaintiff could have easily joined an earlier action. It is crucial to consider cases of derivative claims filed by different shareholders, at different times, and in different civil proceedings. What is striking is the continual growth and duplication of the cornerstone of corporate governance: derivative action. However, it must be noted that the courts have been unwilling to depart from the rule when a claimant enforces collateral estoppel to block the relitigation of a respondent regarding issues decided against him in a previous claim. The interesting issue is the dominance of the extension trend of res judicata application after the critical approach of the doctrine of mutuality.

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[499] Ibid. S. Schaffstein, *The Doctrine of Res Judicata Before International Arbitral Tribunals.* PhD Thesis, 34 (2012); *Restatement of the Law (Second), Judgments, as Adopted and Promulgated* § 27 (1980).

[500] See f.e. S. Schaffstein, *The Doctrine of Res Judicata Before International Arbitral Tribunals.* PhD Thesis, 34 (2012).

[501] *Parklane Hosiery Co. v. Shore* - 439 U.S. 322, 99 S. Ct. 645 (1979).

[502] See in D. A. DeMott, *Shareholder Derivative Actions: Law and Practice.* (Clark Boardman Callaghan) Chap. 4, 175 (1993).

[503] Ibid. D. A. DeMott, *Shareholder Derivative Actions: Law and Practice.* (Clark Boardman Callaghan) Chap. 4, 175–176 (1993).

3.3.3.3.Subjective Limits

Therefore, this defence is limited to cases where the cause of the action and the parties are the same, or where there is privity in the first and second cases. That technique, therefore, prevents a party from denying or supporting, in a new case between the same parties or their privies, the existence of facts which founded its first action, provided that the question of their existence was decided by the court having jurisdiction in the previous case.[504]

The concept of privity is particularly important in this study. Since shareholders in a derivative claim have an altruistic interest, but not a direct one, they can be bound by the concept of privity. The term 'privity' encompasses the flexible and broad concept of persons who are not parties to the litigation but who have an interest in their outcome. Privies may be bound by or benefit from a judgement as if they were the parties themselves.[505] According to the First Restatement of Judgments, the word 'privy' includes those who are not parties to the proceedings but control the proceedings, whose interests are represented by a party to the proceedings, and successors in interest to those having derivative claims.[506] The preclusive effect of derivative actions was also witnessed in the Second Restatement of Judgments in Chapter 59 (2).

The concept of privity has been found in case law with respect to 'substantial identity' matters between a party and non-party. A non-party is a privy if it 'had a significant interest and participated in the prior action,' and if the interests of the party are so closely tied with that of its own that the party may almost be considered its representative. A relationship of privity can also be seen in cases where there is an 'express or implied legal relationship by which parties to the first suit are accountable to non-parties who file a subsequent suit with identical issues.'[507]

However, the Restatement (Second) defines circumstances where non-parties to the previous proceedings might have a preclusive effect. Therefore, non-party preclusion may be justified with respect to issues established in previous litigation if the person was connected to the proceedings in a way that it may justify the refusal of his attempt to relitigate the matters of law and fact established in the judgement. For example, when the person was not a formal party to the litigation but had control over the case or substantially participated in the control of the case.[508]

A non-party may be bound by a judgement relating to issues determined in prior proceedings if it was already represented by a party in those proceedings[509] or had a pre-existing substantive legal relationship with a party to the proceedings (for example, a bailee and a bailor; an indemnitor and an indemnitee;[510] or a corporation and a director, stockholder, officer, or another member of a non-stock corporation with a similar principal–agent relationship).[511]

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[504] See f.e. S. Schaffstein, *The Doctrine of Res Judicata Before International Arbitral Tribunals.* PhD Thesis, 20 (2012).
[505] See f.e. S. Schaffstein, *The Doctrine of Res Judicata Before International Arbitral Tribunals.* PhD Thesis, 36 (2012).
[506] Ibid.
[507] See in f.e. S. Schaffstein, *The Doctrine of Res Judicata Before International Arbitral Tribunals.* PhD Thesis, 37 (2012). Headwaters Inc, *Forest Conservation Council v. US Forest Service*, 382 F.3d 1025, 1030 quoting Tahoe-Sierra Pres. Council, 322 F.3d 1064, 1082 and in re Schimmels, 127 F.3d 875, 881 (9th Cir.1997).
[508] Ibid. Restatement (Second), Judgments, § 40.
[509] Ibid. Restatement (Second), Judgments, § 41. See also in *Inc. v. Gaudet*, 414 U.S. 573, 593, 94 S. Ct. 806, 39 L. Ed. 2d 9 (1974).
[510] Ibid. Restatement (Second), Judgments, §§ 43, 57.
[511] Ibid. Restatement (Second), Judgments, § 59.

3.3.4. Conclusion

It is imperative to analyse the common law experience in res judicata even though it differs a lot from the civil law jurisdictions studied above (that is why a comparative analysis was conducted separately). An analysis of common law shows that very early on, caselaw sought to combat the abuse of bringing claims and pleas before the judge again if they might have been set out in a previous case. The difficulties identified in common law and civil law jurisdictions may have given rise to the reassessment of the res judicata doctrine. It appears that common law has a relatively broad scope for the application of res judicata. For this study, the subjective limits of preclusive effects are of particular importance. Is it possible for preclusive effects to bind parties to the dispute with related persons? How should we define the privity of the parties? Does the concept of representation work regarding res judicata in common law?

In the US, a non-party preclusion is justified if a non-party was represented by a party to the proceedings or engaged in a pre-existing substantive legal relationship with such a party. Therefore, this means that a special relationship is required to preclude a non-party of the proceedings. The concept of 'privy' has also been found in case law as a 'substantial identity', which is disclosed in Chapter 3 of the Restatement (Second) Judgments. The general common law rule regarding the relationship between a shareholder, director, officer, and corporation is as follows: 'a judgment in an action to which a company is a party has no preclusive effects on a person who is a director, officer, stockholder, or member of a non-stock corporation, nor does a judgment in an action involving a party who is an officer, director, stockholder, or member of a non-stock corporation have preclusive effects on the corporation itself.'

However, several exceptions are provided, for example:

1) If there is an agency relationship between a company and a director, officer, stockholder, or a member of a non-stock company, the judgement has a preclusive effect under special rules governing those relationships (if the preclusive effects fall under those rules).

2) The judgement has a preclusive effect in a subsequent derivative action.

English law provides the following types of privies: privy in blood, title, or interest. 'A privy in interest has some kind of interest, legal or beneficial, in the previous litigation or its subject matter.'[512] However, in contrast to American law, the notion of 'privy in interest' does not exist between a company and its shareholders, even if the shareholder has control over the company.[513] Meanwhile, the CPR endows group litigation and representative parties to create a preclusive effect in a derivative action on the grounds of res judicata. They are precluded from bringing subsequent claims in the proceedings according to the principle established in *Henderson v. Henderson*.[514]

Analysis of the res judicata doctrine in common law jurisdictions has shown that res judicata occupies an important place in the civil process of these states. At the same time, the doctrine of res judicata in these countries was formed under the influence of adversarial civil proceedings.

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[512] See in f.e. S. Schaffstein, *The Doctrine of Res Judicata Before International Arbitral Tribunals.* PhD Thesis, 27 (2012).

[513] Ibid. f.e. S. Schaffstein*, The Doctrine of Res Judicata Before International Arbitral Tribunals.* PhD Thesis, 28 (2012). With reference to *Baratok Ltd v. Epiette Ltd* 1 BCLC 283, CA (1998).

[514] *Henderson v. Henderson* (1843) 3 Hare 100. See also *Stein v. Blake* (1998) 1 All. E.R. 724.

The possibility of applying the res judicata doctrine in common law depends primarily on whether the party was granted the right to prove (challenge) the established facts during the consideration of the previous case.

The legislation regulating res judicata in civil proceedings in England and the US was formed due to the need to ensure a balance between the procedural economy principle on the one hand and the guarantee of the right to judicial protection on the other. When determining the possibility of applying res judicata, such criteria are evaluated to prevent the unfair exclusion of facts (issues) from the subject of the trial.

It follows then that in the context of binding non-parties to the proceeding by preclusive effect and the notion of privity, English law sees it in a narrower sense than US law. Although this does not necessarily prevent the application of res judicata to derivative claims, a comprehensive analysis of each specific case is required to do so.[515] Overall, it must be said that an important aspect in the matrix of res judicata in common law is the level of stability it offers for the parties.

4. Conclusion: The Meaning(s) of Res judicata and its Possible Extension

The foregoing discussion suggests a role for identity tests in limiting the concept of res judicata and its effect on derivative actions. Generally speaking, the application of res judicata in a derivative action is based on three sets of issues. 1) The separation of formal and substantial res judicata in order to evaluate the plane of law to apply the doctrine of res judicata. This also raises the question of whether the court is dealing with a procedural or substantive issue. This is because legal regimes differ depending on the categorisation of the issue at stake. 2) The subjective scope of res judicata that usually only extends to those individuals or legal entities that have been parties or privies to earlier proceedings (identity of parties). 3) The exact cause of action, which has a somewhat limited role in certain jurisdictions.

Crucial to the deterrence rationale is the fact that the study of four contrasting laws (three of which are European laws) hardly makes it possible to distinguish a general movement in the direction of either extending or limiting the scope of res judicata. However, each country indicates its attitude to the possibility of expanding the scope of res judicata (this includes both claim preclusion and issue preclusion but focuses more on claim preclusion). At the same time, if we draw a scale of the scope of res judicata, the narrowest and strictest scope would be French law, and the broadest scope would be Anglo-American law. It is revealed that it is expressed both in doctrine and in case law that French and Russian law moves from a narrower understanding of res judicata to a wider one. Indeed, Russia is still at the beginning of its path, but case law already shows the commencement of an expanded interpretation of procedural legislation. Similarly, German and Italian law retain a relatively narrow view of the scope of res judicata, but some case law outcomes and uncertainties may give rise to an expansion of its scope. English law recognises res judicata as a much broader notion by applying the rules of a judgement's finality. For example, by subtle caselaw constructions, English law prohibits parties from invoking new proceedings based on the facts and legal grounds presented in support of a claim in the first case. All facts and legal issues should be raised in the initial proceedings for a claim rather than being reserved for a subsequent claim. This means that the facts, as well as

[515] See in All England Law Reports. Volume 1 (2001); *Johnson v. Gore Wood & Co* 1 All ER 481 (200). 'Whether in all the circumstances a party's conduct was an abuse than to ask whether the conduct was an abuse and then, if it was, to ask whether the abuse was excused or justified by special circumstances.' *Henderson v. Henderson* All ER Rep 378 (1843-60).

legal bases presented in support of a claim, are considered to be identical to those that have already been used in a previous trial, provided that they would have been usefully relied upon (this is because 'claim' is defined more broadly and has similarities with Russian law). It is, however, permissible to present new facts in support of a subsequent claim.

Firstly, it is crucial to deepen the separation of formal and substantial res judicata in legal doctrine. Although expressed differently in various countries, it is the fundamental flaw that may be the first step towards a more in-depth analysis of res judicata in Russia after the era of Soviet law. Indeed, this is not enough in this case. Today, doctrine tends to follow case law, not the other way around, and this may be the first symptom of the poor application of res judicata in Russia. If the issue studied was exclusively about the scope of res judicata, you may notice that the doctrine is not always able to keep up with case law. However, when it comes to the effect of the judgement's binding force, case law must follow the doctrine (not to mention the legislation). However, it is quite reasonable for modern scholars to reject the idea of the separation of substantial and formal res judicata as it further complicates an already complex tool that is entirely superfluous. The unity of the two effects of res judicata should be supported in jurisdictions that develop the doctrine of res judicata more sustainably.

With respect to the binding force of judgements and res judicata, the concept of formal truth, or what rather appears to be the fiction of the absolute truth of a court decision, is obsolete. The main argument is that by equating a court decision to truth, the process of litigation nullifies one of the essential principles of procedural law: the right to be heard in court. However, this does not mean that the power of res judicata should be disregarded, especially because the argument that res judicata operates without regard to whether the decision was fair/correct is no longer credible.

There has already been a debate on the exceptions to res judicata regarding specific situations in which a policy is deemed to outweigh judicial economy concerns.[516] In this regard, the formula for solutions to unjust situations should be as follows: the refutation of the presumption of a fair decision should not be considered an abuse of process.

The second prerequisite for the application of res judicata is the winning party's reasonable confidence in the judicial system and its stability. A party must have certain expectations about the legal relationship's future (a challenging agreement, collecting damages, vindication, etc.). The credibility factor assumes that the decision is final. It is especially noticeable when considering the effects of preclusion when one jurisdiction considers the judgement of the initial proceeding to be final, but another jurisdiction allows issues of fact or law to be relitigated. For example, this is clearly reflected in cases of abuse of rights, when a third party files a claim on the same grounds in an attempt to relitigate a case that was already contemplated in relation to other parties. In this regard, it seems more reasonable to maintain a sense of stability by excluding matters of facts, law, judgement rationale, and any preliminary matters to better respect party autonomy and expectations.

The third reason that should be noted when expanding the doctrine of res judicata is that judges must decide which is more crucial: the interest of the party protected by the legal norm (the winning party) or the necessity to protect a bona fide party suffering as a result of an error in argumentation and a reliance on the factual circumstances presented by the counterparty's dishonest behaviour. The list of factors to be considered when determining the validity of the application of res judicata is not exhaustive. However, identifying specific factors to be considered allows the court to limit its discretion to some extent.

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[516] J. H. Friedenthal, M. K. Kane & A. R. Miller, CIVIL PROCEDURE 650 (5th ed. 2015).

In general, these ‘factors of injustice’ form a mobile system of elements, where the strength of some may compensate for the weakness of others. The prominence of some factors may compensate for the absence of other factors and markers of injustice. Naturally, many courts do not proceed under such an algorithm and are guided solely by their political and legal intuitions. However, science’s task is to structure the logic of such reasoning, highlight relevant factors, and cut off irrelevant ones to ensure greater certainty and predictability in litigation.

However, it is not axiomatic to satisfy the party’s positive interest through res judicata if we seek using res judicata to avoid unfairly undermining the other party's trust in the judicial system's stability. Is it fair to prohibit relitigating the cause of action once it has been judged on in cases where the losing party could not achieve a fair judgement?

The case law of all of the legal systems studied showed that res judicata is in the process of expanding, beginning from the element of ‘identity parties’, which is of particular importance for this study. The question in the doctrine that arises regarding ‘identity parties’ is whether identity tests should be standardised and whether such a broad interpretation of it is confined to recognised civil liability tools such as derivative claims. The issue of the identity of the parties is relevant to both aspects of res judicata (claim preclusion and issue preclusion). It is essential because this element is necessary for more than one jurisdiction, which is already seen globally. Some prescribe this criterion in the law, while others note it in practice. In fact, without this criterion, the identity test may not be resolved at all. However, another problem arises regarding the interpretation of the identity test. What is meant by the interpretation of the identities of the parties? This topic has been of concern to academics and practitioners since the very beginning of the foundation of the rule of res judicata. An oversight in addressing this issue can create serious problems. Thus, too broad an interpretation may give rise to an unjustified restriction of procedural rights and violation of constitutional rights. Too narrow an interpretation will lead to the fact that the parties will not be sure of the litigation's stability since similar disputes will continue to be relitigated. The best solution would be to build a specific list of parties precluded via res judicata (as seen, for example, in the United States and England). Our assumptions are based on the idea that there might be no considerable alteration to the fact that the aim of the reform is primarily procedural.

The subjective limits of res judicata are expanding in the jurisdictions analysed above. Thus, whether broader res judicata application on the grounds of abuse of process would be accepted in a given jurisdiction should depend on whether the res judicata effects would already be included in the category of procedural abuse regardless of any legal requirements for applying res judicata. In addition, the other aspect of abuse of process, which is an exception to the expansion of res judicata, should be recognised as procedural fraud that prevents judges from relitigating.

Thirdly, it can be observed that the various jurisdictions studied sometimes differ with respect to 1) legal certainty and the finality of the judgement and 2) fair consideration of the factual circumstances and the capacity of the party. It is also possible to highlight the difficulties and obstacles within the doctrine and the contradictions in casuistic case law that gave rise to the tendency towards extending res judicata. It is closely intertwined with the notions of ‘claim’ and ‘demand’, which are not always clearly defined, particularly in the *jura novit curia* rule. Besides, it should be noted that different approaches should be considered. The remarkably different approach to the ‘same claim’ taken by Russian law appears to be closer to the German and French models of res judicata than to the broad Anglo-American model. Obstacles are also present in the issues related to a judgements’ technicalities and the division between reasoning and the operative part of a judgement. All of this contributes to the thorny delimitation of res judicata in all the aforementioned legal systems.

It should be noted that the idea of comparing a court’s decision with a contractual relationship is an excellent example of sealing the subject matter of a judgement involving

identical parties that cannot be reconsidered. The judgement is merely the conclusion of a legal relationship between the parties of the judgement. Therefore, it is quite engaging to apply the principle of substantive law to the relativity of contracts (and the rule of privity of the parties). However, this contractual technique, which may be introduced as fiction, has the severe drawback of ignoring the nature of legal proceedings, which is no longer subject to the doctrine's dispute. In any case, the application of substantive law to contracts could resolve several issues, mainly by applying the ability to invoke unfair terms of the contract and the principle of privity of the contract. From the point of view of contract law – it does not matter whether the representative or represented enters into the contract – the parties' privity applies to the represented and the second party to the contract. This issue should also be resolved concerning derivative claims.

As for the subjective and objective limits of res judicata, it should be noted that both case law and doctrine go along the path of rejecting the requirement of the threefold identity of parties for applying res judicata and considering the subsequent claim as being not admissible. We contend that if a strict interpretation of the meaning of 'the same party' was applied, it would open the door to abuse. This study provides several examples that support this thesis. Therefore, the analysed jurisdictions use the term 'privy' (England and the US) or the representation concept (Italy, France, and the US) to expand the notion of subjective limits.

Firstly, parties interested in the outcome of a trial should be considered as parties for res judicata. It is necessary to consider and apply the res judicata when a subsequent claim is filed by a person who aims to deliberately circumvent res judicata. As a sanction for the abuse of procedural rights, it is essential to deny a subsequent claim. However, the rejection of a formal criterion is not likely to simplify the situation. While it is logical that the party is personally interested in the proceedings, it is still necessary to find the outlines of this interest and, on this point, case law does not give all the answers. Moreover, the principle that a person appearing at the proceeding must be personally interested in it in order to be considered a party may sometimes lead to the exclusion of certain persons who had appeared at the trial.

Secondly, the judgement should be considered preclusive if a party in a subsequent trial acts in the same capacity. For instance, the capacity will differ, if the person acts as a principal in the first proceeding and as an agent in the subsequent proceeding.

Difficulties may also arise in relation to the subjective limits of res judicata and the application of res judicata. The French Court of Cassation formulated the notion of representation. [517] The French doctrine of representation means that representatives under substantial law are considered parties to the proceeding, that is, the same parties are represented and are bound by the court's decision. The concept of representation is interpreted very flexible, broad, and includes cases where representation is implicit and sometimes fictitious.[518] It means that French law is as close as possible to preventing two identical claims from being considered with different procedural plaintiffs. The extension of the concept of representation in action can make it possible for the successors of the parties to be deemed to have been represented in the case in which their parties participated and can therefore invoke the judgements obtained by their parties for their benefit or to oppose decisions taken against them.[519]

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[517] Cass. 1re civ., 5 nov. 1962: Bull. civ. I, n° 460; Cass. 1re civ., 10 mars 1969 Bull. civ. I, n° 105; Cass. 3e civ., 30 mai 1969: Bull. civ. III, n° 436.

[518] See also in S. Schaffstein, The Doctrine of Res Judicata Before International Arbitral Tribunals. PhD Thesis, 46 (2012).

[519] Cass. 1re civ., 5 nov. 1962: Bull. civ. I, n° 460; Cass. 1re civ., 10 mars 1969 Bull. civ. I, n° 105; Cass. 3e civ., 30 mai 1969: Bull. civ. III, n° 436.

In relation to objective limits, the courts should not overlook the potential consequences created by case law, especially when they use inadequate terminology in their verdicts. Suppose we adhere to the comparative model, according to which only the operative part of the judicial decision will come into legal force. In that case, the problem of applying res judicata to the facts will be solved, and res judicata will become as accurate, stable, and predictable as a mathematical model. At the same time, we should always remember that a party may abuse its procedural rights when it is possible to overcome res judicata. Such issues must be addressed unequivocally.

Overall, it is a less-than-adequate response to the scope of the res judicata problem inherent in procedural law. Therefore, fact that the law may influence the manner in which the scope of res judicata evolves has potentially significant policy implications. In this respect, a major flaw in the new broad interpretation of the doctrine of res judicata is that even though the new legal policy tried to put to rest some serious ancient shortcomings, it has not tied up all the loose ends. This challenge has been seen in the experiences of the jurisdictions studied, namely that the doctrine of res judicata will be perceived as a more complex form of preventing multiple derivative actions without some limit being placed upon its scope. As will be seen in Chapter 3 below, a general denominator needs to be found and re-evaluated if any practical application of res judicata to derivative action is to occur.

CHAPTER THREE

RES JUDICATA WITH RESPECT TO JUDICIAL DECISIONS ON DERIVATIVE ACTIONS. OBSERVATIONS, ANALYSES AND CONCLUSIONS

'The defense of res judicata is universally respected, but actually not very well liked.'

Judge Clark[520]

1. Introduction

As shown so far in this thesis, bringing a derivative claim may cause mass corporate litigation. Not only is this an expensive and complex remedial tool for corporate actors, but due to the laws in the jurisdictions studied, there is a chance of it being recognised as a res judicata matter. In particular, in Chapter 1, we tried to determine how consistent the nature of derivative claims is to the identity test of res judicata, which was discussed in more detail in Chapter 2.

The central question of this thesis was whether it is possible to expand res judicata when bringing a derivative action. Should courts apply the res judicata principles to prevent serial litigation? Is it possible in this case to find a universal formula based on comparative analysis?

The main thesis underlying this research was that it is necessary to expand the application of res judicata principles by creating a universal model that might be generally accepted and that would respect the nature, core elements and objectives of derivative actions.

The investigation of derivative action has shown that, as a result of checking for the 'parties' element' of res judicata triple identity, the set of combinations may present a risk of application of res judicata. In the countries studied, there is a pattern that may affect the duplication of derivative actions. The seriality of such derivative actions was classified and highlighted with a particularly high degree of risk of application of the res judicata doctrine. The findings of this research provide insights for the criterion by which it is possible to determine whether a particular jurisdiction will apply the doctrine of res judicata (it may be called a policy of res judicata in derivative actions) in derivative actions. The results of this research support the idea that a rejection on the merits of a derivative action brought by one shareholder against corporate directors operates as a res judicata bar to a similar action instituted by another shareholder or by a member of the executive body, depending on the following criteria:

a) whether the model of the claim is an absolute (in Russia and the US) or compensational model (in France and Italy),

b) whether the action is a group or individual action,

c) whether the action is a traditional, double or triple derivative action, and

d) the substantial and procedural status of the plaintiff.

All these criteria may play a role in determining the 'parties' element' and the 'cause of action element' of res judicata triple identity and application of res judicata. Nevertheless, where the identity test is not satisfied in some jurisdictions, courts should take the previous case into consideration and evaluate the set of circumstances in order to avoid contradictory decisions.

Although this study focuses on applying the doctrine of res judicata to the derivative actions, the findings may well have a bearing on another major idea: that collective derivative actions should not be considered class actions. Nevertheless, the collective nature of the derivative action brought by the group of shareholders is not in doubt. At the same time, this nature also makes it possible to distinguish one more combination to analyse the applicability of

[520] Riordan v. Ferguson, 147 F.2d 983, 988 (2d Cir. 1945) (Clark, J).

res judicata doctrine. This leads to another paradoxical conclusion – any civil legal community is presented as a legal entity in the procedural sense, since the claim is individualised through the interest of the entire group.

Moreover, the legal connections between the company, director and shareholder were carefully examined. Comparative analysis was undertaken to determine the nature of derivative action in the studied jurisdictions. In a derivative action, a group of shareholders, along with the company, are considered principals in relation to the agent-director. This construction allows us to substantiate the contractual theory of derivative action and to link it with other elements of internal corporate relations. Thus, we can revolve around allocating a separate group interest of shareholders that affects the company's interest, which should also be considered while managing the company or protecting it throughout any legal proceedings and securing the most favourable outcome.

These considerations about the nature of derivative claims lead to the fact that the res judicata doctrine should be expanded depending on the policy of the res judicata and the corporate litigation of the jurisdictions studied. Since in several cases described in this thesis, the subject composition (the plaintiff) and the cause of action may coincide in the first and subsequent suit, we can point out the possibility of an extension of the res judicata with a particular reference to the work of Albrecht Zeuner,[521] which demonstrates that the extension of the preclusive effect of a judgement to third parties seems acceptable. For example, this can be seen' in cases in which the shareholders individually file a derivative claim or when the company brings a derivative action and the shareholder then brings a subsequent derivative action, as well as in other examples and combinations. It depends on how the jurisdiction relates to the procedural and substantive plaintiff. The most important factor is the identity of the third party in the proceedings. The fact is that in this study, we divide the essence of a legal entity in the proceedings of a derivative action into two parts: the substantial and the procedural plaintiff. The procedural plaintiff is the initiator of the claim, and includes anyone who has the right to bring a derivative claim: a member of the collective executive body, a director, or shareholder(s). The substantial plaintiff is the company that the court rules in favour of. In this case, such a third party is any other procedural plaintiff in a subsequent claim. We have already mentioned that such derivative claims may relate to representative claims. That is, such a claim is considered to be filed on behalf of the company. Furthermore, these findings suggest that preclusive (res judicata) effects bind by prosecution to final judgement only those non-parties who are closely connected with the representative or those in privity with a party[522] (see, for example, in Anglo-American case law: Kremer v. Chem. Constr. Corp. 1982[523]).

The 'identity of parties element' may raise a challenging question in double or triple derivative actions, such as whether the acts of the head company functioning through its subsidiaries are the same as other head companies' corporate actions. The issue is whether a separate legal entity in a holding may be considered as the same party to the proceedings or at least related to in the context of a 'triple identity test'. This is especially relevant given that modern law does not always meet the challenges of changes in the market. In other words, it is

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[521] A. Zeuner, H. Koch, Effects of judgments (res judicata) in M. Cappelletti, InternatIonal encyclopedIa of comparatIve law Vol. XVI. (Mohr Siebeck) 67 (2012).

[522] Moreover, the term 'privity' in Anglo-American law expresses the general idea that persons who are not parties to the proceedings but are related to the process in their own interests can be bound by the court's decision or benefit from it, as if they were parties. The 'privity' includes 'non-parties: who control the proceedings; whose interests are represented by the party to the proceedings; and legal successors in the interests of persons with derivative claims'. See In Ali, Restatement of the Law (Second), Judgments, as Adopted and Promulgated 389 (1980).

[523] *Kremer v. Chem*. Constr. Corp., 456 U.S. 461, 480–83 (1982).

typical for modern organisations to build their corporate structure according to the type of company groups (holdings), but the legislation has gaps regarding the operation of such holdings. The issue of res judicata can be attributed to such legislation gaps.

What is interesting in this proposition is that if such an approach is accepted in national courts (where such double derivative actions are allowed), it should be applied for the purposes of preclusivity to avoid separate companies in a holding availing themselves of the possibility of serial litigation. The exclusion of the application of the res judicata principle in corporate groups should only be based on and in accordance with opposition to the abuse of the process. The same situation applies to bringing derivative actions by individual shareholders or by a group of shareholders and directors.

2. Critical Issues

The findings of this study have several empirical implications. The practical state of affairs dictates that the doctrine of res judicata should be applicable to most situations involving mass stockholder claims. Severe financial hardship could befall corporate defendants if an unlimited number of derivative suits based on the same claim were permitted. Res judicata will become a safeguard when dealing with most subsequent stockholders' actions in such a situation.

Other potential problems in applying res judicata to derivative suits stem from the lack of security provided to other shareholders to ensure that the corporation will receive adequate representation. However, even assuming that all the prerequisites are met, it is essential that the shareholder, who is the plaintiff in a derivative action, is an adequate representative if the corporate case is to be fully considered before a final decision is made.

In determining the 'cause of an action' in the context of a derivative action or any other action, the courts went beyond the theory on which the plaintiff based his claim for exemption from liability for the facts constituting the alleged offence. The substantial nature of the operational facts between these two acts generally leads to the application of the res judicata to prohibit the second trial.

In most shareholders' derivative actions, the corporate directors are accused of harming the corporation (i.e. in the US, France, Italy and Russia). The director is initially in a stronger informational position since he is the person who carries out the company's day-to-day business operations and activities. For this reason, it is not enough to find an evidence base. Even when the plaintiff is aware of all relevant facts, it is not certain that he will be able to prove or utilise such information appropriately. Depending on the particular circumstances, a derivative plaintiff may choose to predicate his action, for example, on debt, breach of fiduciary duty (in the US and England), breach of the duty to act in good faith and reasonableness (in Russia[524]), waste, fraud, breach of trust (in the US and England) or violation of any applicable regulatory statute (in the all jurisdictions studied: in common law, Russia, France and Italy).

[524] According to para. 3 of art. 53 of the Civil Code of the Russian Federation, a person who, by virtue of the law or the constituent documents of a legal entity, acts on its behalf must act in the interests of the legal entity represented by it in good faith and reasonably. On the basis of para. 1 of art. 53.1 of the Civil Code, a person acting on behalf of a company is obliged to compensate, at the request of such a company, participants acting in the interests of a legal entity, for losses caused to a legal entity. Moreover, the responsibility of the director for breach of the duty to act in a good faith and reasonableness is stipulated in Art. 71 of the Joint-Stock Companies Act and art. 44 of the Limited Liability Companies Act. However, a more specific interpretation is reserved for case law. Russian Civil Code [RCC] [Civil Code] art. 53 (Rus.).

The findings from this study thus theoretically make several contributions to the legal questions as to whether preclusion in derivative actions is permissible if (i) the plaintiff in the first action did not know that a judgement may bind other shareholders and/or (ii) the plaintiff against whom preclusion is asserted was not aware of the other derivative action. From a practical point of view, these theoretical scenarios do not arise too often in the jurisdictions studied, but they might, and the factual circumstances and their alterations might affect the test of preclusion effect.[525]

In order to extend the res judicata doctrine, we should expound the elements of the 'triple identity test' in the context of res judicata in order to determine the 'identity element' in a prior and a subsequent litigation. This will not always be possible because of the uncertainties and gaps that exist in national law as to the definitions and scope given to the notions of 'parties', 'cause' and 'object' in the jurisdictions studied. However, the current study is based on a common denominator and tendency in res judicata doctrine. The current findings support the relevance of these existing problems in theory and practice.

3. Summarising Observations

The following conclusions can be drawn from the present study:

In Chapter 1, we tried to determine the nature of derivative claims, the difficulties that arise from using them to protect the rights of minority shareholders, the status of the shareholders and the combination of the substantial and procedural plaintiff in derivative actions. The chapter also proposed a new classification and explanation of absolute and compensational models of derivative actions.

Chapter 2 of this thesis has gone some way towards enhancing our understanding of res judicata and the lack of its universal and worldwide accepted notion. Although the res judicata is considered as a general rule in law in all the jurisdictions studied, there are also significant differences in the scope of regulation in this area and the degree of elaboration of the details in legislation and case law. These differences are reflected in the notion of 'parties', 'cause', and 'object' of actions as well as negative and positive res judicata effects, claim preclusion and issue preclusion. While common res judicata principles have been developed in the jurisdictions studied, the findings suggest that none have been developed regarding the scope and specifications of res judicata in a derivative action. This is the first study that examines policy associations between the doctrine of res judicata and derivative actions.

The justifications for applying res judicata to derivative action and best practice formula and the universal model for each jurisdiction studied are explained in depth at the end of this chapter.

Several questions remain to be answered. Further research needs to examine more closely the links between the derivative actions and res judicata doctrine before national courts. Work

[525] However, in the US, in the Feliciano v. Seabrook case (2020 NY Slip Op 50753(U) (Sup Ct, Queens County Jun. 11, 2020) (Livote, J.)), it has recently been established that enforcing a subsequent derivative action will not be barred by the res judicata if the board of directors wrongfully refused to litigate and demand was not an issue that could have been litigated in a previous litigation. The dismissal for failure to plead demand futility is a final judgement on the merits in accordance with the res judicata under New York law (see in City of Providence v. Dimon, 2015 WL 4594150). However, it does not follow that dismissal of a demand futility action has a preclusive effect on a subsequent action based on a board of directors' refusal to commence a litigation. In the Weitschner case (Wietschner v. Dimon, NY Slip Op 03664, 2016), the subsequent case raised the same demand futility arguments as the action to which res judicata applied, effectively barring the subsequent action.

also needs to be done to establish whether there are other solutions to the problem of universal res judicata doctrine in derivative actions before national courts. This thesis does not claim to provide the definitive answer to this complex analysis or to be the only solution to the challenges raised by res judicata and derivative actions (it is barely possible to give the one and only 'right' answer in any legal matters). Research could also be conducted to determine the effectiveness of a universal formula of the res judicata principle that is applicable to the derivative actions.

4. Justifications for Application of Res judicata to Derivative Action and Best Practice Formula

In order to justify the extension of the res judicata doctrine and apply it in derivative actions, it is necessary to prove a special relationship between the prior litigation party and a subsequent litigation plaintiff (such as representation relationship, derivative interest in the award or succession). Proving such a connection is a prerequisite of the ideas in the doctrine, in particular, those provided by Albrecht Zeuner, who shows that the extension of the preclusive effect of a judgement to third parties seems acceptable 'in one set of circumstances, namely where, given the existing relations between all parties involved, legal rights of a third party depend on dispositions made by the two other parties, even quite apart from any lawsuit. The situations in which one party has an obligation to maintain the legal interests of another party belong into this group, for instance, fiduciaries, successors-in-interest and the special kinds of derivative legal rights'.[526] In addition, such a special relationship as a requirement to extend the res judicata effect is reflected in national jurisdictions (for example, in the US and England).

Holding the director liable allows the shareholder to confirm the derivative character of its action. In that case, the company only pursues the compensation for damages to the common interest of the group members, as shown in the bylaws. The company, necessarily informed of the action taken, then has the opportunity to join more actively in the claim or to resume the action by the exercise of remedies. However, the question could be posed in doctrine regarding whether the claim preclusion or issue preclusion was also imposed on the other shareholder or group of shareholders. It is in the field of opportunity that this question arises: should the other members of the group be prohibited from implementing another derivative action subsequently, in compensation for the same damage caused by the same management misconduct, when the previous action could have failed? Derivative action brought by a shareholder may give rise to a certain scepticism and confusion to those who analyse it as the expression of a power of statutory representation by which the shareholder acts on behalf of the company.

An intervener's coerced challenge is admissible only because the intervener is neither a party nor represented in the proceeding. If the relationship between shareholder or member of the executive body and a company is based on the representation, then the extension of the doctrine of res judicata would be acceptable (according to the agency theory, in this case such persons are acting as an agent, which means that they are chained by executive functions). However, the condition of challenge attests to the inaccuracy of the theory of representation being the foundation of derivative action brought by the shareholder. Indeed, it is because the member acts under his right that the court decision rendered on this occasion cannot be imposed by law on the company and that the derivative action is necessary. The shareholder acts in the company's name to hold liable the representative who has not fulfilled the mission that had been personally assigned to him by each of the group members. Therefore, the decision initially

[526] A. Zeuner, H. Koch, Effects of judgments (res judicata) in M. Cappelletti, International encyclopedia of comparative law Vol. XVI. (Mohr Siebeck) 67 (2012).

concerns his interest. On the other hand, the execution of derivative claims will always be in favour of the company unless such a claim is not direct. Indeed, the damage for which compensation is sought is the same as that felt by the entire community of members. More precisely, due to the nature of the task entrusted to the representative (to perform legal acts in the name and on behalf of the company), the harm experienced by the company lies in the harm experienced by the group of shareholders.

However, the procedural law refuses to recognise the so-called group action, as a general principle, in connection to the derivative action (in some jurisdictions). Under group action, all persons suffering from identical damage can benefit from the compensation sought and obtained by one of them. In theory, compensation for identical damage suffered by all the members of the group would require either that a multitude of separate legal actions on the part of each member is implemented or that all the members of the group be a party to the proceedings, in order to benefit on the same basis as the agent bringing the derivative action from a common judgement and the damages awarded. This second solution, for its obvious practical advantages, was imposed by the company law. Admittedly, reference is made only to the action brought by the company through its legal representatives and not to the challenges raised by each of the group members. However, the forced intervention does not concede that the legal person is a consistent requirement, given the universal procedural policy and tradition and an entire procedural facility granted to the shareholder. The enforceability *erga omnes* of the constituent instrument's statements attached to recognising the group's legal personality demonstrates its virtues in the matter. Therefore, the analysis of this thesis suggests that derivative claims brought by several shareholders should not be attributed to class actions, but should adopt the nature of a collective claim.

The discussed elements make it possible to propose an analysis of the res judicata effect on derivative action. However, this approach is, for the time being, only forward-looking, to the extent that this issue does not seem to attract the attention of the doctrine, or, save a few decisions, that of the litigants. Where the action is brought by the shareholders or members of the group, and where the decision rendered is no longer subject to appeal, it is no longer possible for the director (acting as an agent) or for another shareholder or member to bring a derivative action for compensation for the same damage caused to the company by the same event. If the derivative action is brought by the shareholders (the collective as a whole, as well as each of its members), they are deemed to be parties to the proceedings, so that a claim for the same purpose and based on the same cause would run counter to the rule of triple identity according to the doctrine of res judicata, and the doctrine of res judicata would prohibit them from submitting identical claims to the court. In the case that there are still remedies that the original agent (director) has refrained from exercising, all the members of the group, represented by its agents, or each of the members taken individually, are admissible, in their capacity as parties to the proceedings or as interveners, to take up the proceedings in place of the original applicant. This idea explains that, in the hypothesis where derivative action brought by shareholders is put into a collective, the withdrawal of some of the initial agents does not bring into question the continuation of proceedings. By making it possible to extend the scope of the judgement to all the agents likely to bring the action to account, this condition of admissibility gives the procedure more readability and ensures that it allows, by the multiplication of its potential actors, greater efficiency. Thus, although the legal obligation concerns only certain companies, it is necessary to advocate for all groups in which derivative action brought by shareholders can be exercised, at least as a matter of principle. In addition to the absence of res judicata, the need to act within the time limits granted by law constitutes the second objective condition of admissibility of the derivative action. This question is necessarily influenced by the consequences drawn from the contractual analysis by which it has been shown to be a derivative action.

5. The Development of the Two Remedy Models

When positive law structures certain civil rights and their content, it inevitably faces the problem of choosing the optimal model for their protection in case of violation in corporate law.[527] Among the various private law remedies for the protection of civil rights, two different regimes of derivative actions in the jurisdictions studied should be distinguished in their functional orientation, and the regulatory impact of these will be further analysed.

1) The first regime is the compensatory regime (derivative actions in France and Italy), in which the right is protected by claiming monetary compensation from the violator but cannot be protected by preventive suppression or literal restoration.
2) The second regime is an absolute protection regime (derivative actions in the US, England and Russia), which grants the victim (without prejudice to his rights to recover monetary compensation) additional powers to prevent ex-ante situations of violation of his right or to restore ex-post the lost right 'in-kind'.

Indeed, this does not mean that the option in which the right is protected only by measures of absolute or compensatory protection is absolutely unacceptable. In some cases, such a decision may be quite justified, considering specific political and legal factors.

6. General Observations

We are now finally able to determine the preclusive effect of the judgement in the litigation of the derivative actions in the cases listed in Chapter 3 (Subchapters 1 and 2).

A) Absolute model of derivative action

The US

The Restatement treats the general doctrine of res judicata under the separate concepts of issue preclusion and claim preclusion. The Restatement defines the claim preclusive effects of a judgement for a defendant as follows: 'A valid and final personal judgment rendered in favour of the defendant bars another action by the plaintiff on the same claim.'[528] The Restatement also establishes that such a bar extinguishes 'all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose'.[529]

It is important to note that § 19 and § 24 of the Restatement merely define the scope of claim preclusion between the parties to the prior litigation. Other sections of the Restatement

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[527] See for example F. H. Easterbrook, D. R. Fischel, The Economic Structure of Corporate Law (Harvard University Press) 158 (1996) (regarding analysis in the categories of Liability Rule and Property Rule of a shareholder's right to buy back their shares (appraisal) in case of disagreement with management decisions regarding the fate of the corporation in comparison to the right of shareholders to initiate injunctions); Deborah A. DeMott, Proprietary Norms in Corporate Law: An Essay on Reading Gambotto in the United States. Ramsay I. (ed). Gambotto v. WCP Ltd.: Its Implications for Corporate Regulation (Ian Ramsay) 90 (1996) (regarding analysis of the institution of forced displacement of minority shareholders in the framework of the Liability Rule model for the protection of corporate shareholder rights).

[528] Restatement, Second, Judgments § 19 (1982).

[529] Restatement, Second, Judgments § 24 (1982).

must be examined to determine the extent to which, if at all, a non-party such as a shareholder, member of an executive body or subsidiary company can obtain the claim preclusive benefit from a judgement to which it was not a party. Three such provisions exist. First, § 34 provides that only parties are bound by or entitled to the benefit of res judicata (i.e. rules of claim and issue preclusion).[530] Second, § 41 contains the sole exception permitting complete non-mutuality as follows:

'A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of a judgment as though he was a party. A person is represented by a party who is:

1) The trustee of an estate or interest of which the person is a beneficiary; or

2) Invested by the person with authority to represent him in action; or

3) The executor, administrator, guardian, conservator, or similar fiduciary manager of interest of which the person is a beneficiary; or

4) An official or agency invested by law with authority to represent the person's interests; or

5) The representative of a class of persons similarly situated, designated as such with the court's approval, of which the person is a member'.

Third, § 59 (2), which deals with shareholders and corporations, would permit the claim preclusive benefit in derivative actions of the court judgement: 'The judgment in an action to which the corporation is a party is binding under the rules of res judicata in a subsequent action by its stockholders or members suing derivatively in behalf of the corporation, and the judgment in a derivative action by its stockholders or members is binding on the corporation.'[531]

Moreover, the company, shareholders and executive body members are in privity with the company's shareholders, which matters when the prior adverse judgement in shareholders' action against third parties barred subsequent action against the third party under the res judicata. In particular, this is most pronounced when they were sole owners and exercised complete control over management and operation of the company, such that the enterprise was effectively proprietorship or partnership conducted in corporate form.[532]

Thus, under the Restatement, because there is a special relationship between the company (director) and a member of the executive body, the shareholder and subsidiary in derivative action triggers a claim preclusive effect under §§ 43–61. The subsequent plaintiff is entitled to the claim preclusive benefit of the prior judgement, only if it bears a relationship to the prior plaintiff (other shareholders or the company) at the time of the litigation so that the subsequent plaintiff was 'represented' in that action by the prior plaintiff, as that term is defined in § 41 and § 59 (2). The plain literal language of § 41 and § 59 (2) compels the finding that 'subsequent plaintiff' (a member of the executive body, a shareholder or subsidiary in derivative action) may fall within the listed categories, and therefore may be entitled to the claim preclusive benefit of the prior judgement.[533] This conclusion is a feature of the absolute model of a derivative claim, an example of which is the US law.

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[530] Restatement, Second, Judgments § 34 (1982).

[531] Restatement, Second, Judgments § 59 (2) (1982).

[532] Restatement, Second, Judgments §§ 59, 59(3)(b) (1982).

[533] 'The corporation must be made a party to the action, although the corporation may oppose the enforcement of its right of action and be aligned as a party opposing the plaintiff stockholder. The corporation must be made a party to the action, although the corporation may oppose the enforcement of its right of action and be aligned as a party opposing the plaintiff stockholder'. See in Restatement, Second, Judgments § 59 (1982).

Russia

Res judicata binds all those who participated in the prior case, regardless of their procedural status. The rules on joining a lawsuit mean that those who joined are bound by res judicata. Those who did not join without good reasons cannot repeat the process, but the prejudice should not apply to them.

The objective limits are the legal relationship and legal facts established by the court when resolving the case. The subjective limits of the preclusive effect are determined by the circle of persons involved in the case, that is, the subjects of substantive relations: the parties and third parties.[534]

The specific nature of 'the parties' element' of a derivative claim determines the features of the subjective limits of the legal force of a court decision on that claim. The res judicata effect of the legal relations and facts established in court will apply not only to the persons participating in the case (the derivative plaintiff, the original plaintiff and the defendant) but also to other interested persons who could but did not join the derivative claim as derivative plaintiffs or third parties without independent claims.

Thus, under the ComPC, since the party of the litigation is a company and because the company (director), member of the executive body, shareholder and subsidiary act with the same capacity as the company in a derivative action, it triggers a claim preclusive effect under art. 69 ComPC. The subsequent plaintiff is entitled to the claim preclusive benefit only if it bears a relationship to the prior plaintiff (other shareholders or the company) at the time of the litigation so that the subsequent plaintiff was acting in the same capacity in that action by prior plaintiff. This conclusion is a feature of the absolute model of a derivative claim, an example of which is Russian law.

B) Compensatory model of derivative actions

Applicable to the French and Italian[535] jurisdictions. Since the absolute model of a derivative claim is a broader concept that allows us to file a claim not only against third parties but also against the director, such a compensatory element of the Anglo-American and Russian jurisdictions will be discussed in this section as well.

With regard to the identity of parties, the legal personality of the parties is the only aspect that matters, in that the person must have been present 'in the same capacity'.[536] Thus, in France, the concept of 'représentation' is developed (see in detail in Chapter 2 Subchapter 3.1.3). The concept of 'représentation' indicates that persons who are adequately represented in the litigation are considered as parties and are bound by the final judgement.[537] A similar concept is enshrined in § 41 of the Second Restatement of Judgements in the US.[538] This approach was found in the

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[534] M. Treushnikova, Grazhdanskiy protsess. Khrestomatiya: Uchebnoye posobiye. 3-e izd. (M.: Izdatelskiy Dom «Gorodets») 407, 538 (2015).

[535] English law treats the general doctrine of res judicata under the separate concepts of cause of action estoppel and issue estoppel. Indeed, cause of action estoppel does not bar litigation of a separate claim even if it arises out of the same relationship or is based on the same type of transaction as the first.

[536] The notion of 'the same capacity' ('la même qualité'): in France, see in art. 1351 of the CC and f.e. in R. Perrot, N. Fricero, JurisClasseur Procédure civile, Fasc. 554. Autorité de la chose jugée au civil sur le civil. spéc. n° 5. P. 145 (1998); in Italy, see in art. 2909 of the Civil Code, according to which the subjective limits of the res judicata effect not only to the parties but also to their heirs or successors; and in Russia, see in para. 2 of art. 69 of the ComPC and para. 2 of art. 61 of the code of civil procedure of the Russian Federation.

[537] In France see e.g. in R. Perrot, N. Fricero, JurisClasseur Procédure civile, Fasc. 554. Autorité de la chose jugée au civil sur le civil. spéc. n° 5. P. 136. (1998).

[538] Restatement (Second) Of Judgments § 41.

Italian doctrine as well (it is not so widely discussed, but it still has a place).[539] There is no concept of 'privity' in Russia, but it is recognised that the shareholder and the company in the derivative claim act in the same capacity.

In England, the CPR encompasses representative parties and group proceedings members to create a cause of action or issue estoppel effect, precluding the claimants from pursuing their claims in the derivative action on the grounds of res judicata. They are precluded from seeking to bring subsequent claims in the proceedings on the principle established in Henderson v. Henderson.[540] Cause of action extends to all persons deemed privy to the parties by blood, title or identity of interest. Care must be taken in each case to ensure that there is real privity of interest. However, it must be noted that in contrast to American law, the notion of 'privity in interest' does not exist in the relationship between a company and its shareholders, albeit the shareholders have control over the company's affairs.[541]

Some requirements must be met for res judicata to apply, depending on jurisdiction:

In France, negative res judicata effects covers cases where (1) the parties, (2) the cause and (3) the object are the same in both claims. The positive preclusive effects of the judgement include proceedings where the identity feature between the first and subsequent litigation is not fully matched but has partial recognition. For example, it includes cases where the parties are the same, but the cause and object in both proceedings may not match the identity feature.

In Italy, res judicata requires the identity of (1) the parties, (2) the subject matter of the judgement on the grounds of the alleged claim (petitum) and (3) the factual and legal core of that claim (causa petendi).[542]

The requirements of the application of res judicata in the US are as follows: (1) the prior claim has the same set of facts; (2) the prior claim has the same parties (or their privies); (3) a final judgement on the merits exists; (4) the party of the litigation had a full and fair opportunity to litigate the matter in question (to litigate the direct action, in the case analysed in this thesis).[543]

The requirements of the application of res judicata in Russia are as follows: (1) the prior claim has the same parties (para. 2 art. 69 of the ComPC); (2) the prior claim has the same factual basis.

Points (2), (3) and (4) should be analysed on a case-by-case basis, as they are beyond the scope of this study.

We will focus on the combinations in which there is a probability of applying res judicata in derivative actions. For example, a shareholder moved to file a direct (individual) action

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[539] F. Ligi, *Stato Di Necessità E « Rei Iudicatae Exceptio ».* 78 IL FORO ITALIANO, No. 2. 40 (1955).

[540] *Henderson v. Henderson* (1843) 3 Hare 100. See also *Stein v. Blake* (1998) 1 All. E.R. 724.

[541] Ibid. 28. With reference to *Baratok Ltd v. Epiette Ltd* (1998) 1 BCLC 283, CA.

[542] In Italy, res judicata provision (art. 2909 of the ICC) was interpreted by the Corte suprema di cassazione (Supreme Court of Cassation) in its judgement No. 13916/06 as follows: '… where two sets of proceedings between the same parties are concerned with the same legal relationship, and one of those sets of proceedings has culminated in a judgment that has acquired the force of res judicata, the findings thus made concerning that legal situation or concerning the resolution of points of fact or of law on a fundamental issue common to both cases – and thus constituting the logical premise underpinning the decision in the operative part – preclude that same issue of law, now settled, from being re-examined, even if the aims of the subsequent proceedings are different from those reflected in the subject-matter and form of order sought in the first'.

[543] In the US, 'Defense preclusion requires that, as between the two suits, the parties and causes of action be the same. It also requires that the first suit result in a final judgement. In addition, courts have discretion to deny defense preclusion when fairness requires'. see in *Lucky Brand Dungarees v. Marcel Fashion Group Inc.*, No. 18–1086 in the Supreme Court of the United States.

against the director. The court dismissed the direct claim. After that, the shareholder filed a derivative claim against the defendant on behalf of the company. The derivative claim alleged that the director breached the shareholder's statutory duties. The question here is whether the court should dismiss the derivative action on res judicata grounds because the direct action and the derivative action involved the same parties (point (1) in all the jurisdictions studied).

At first glance, regarding the first point in this matter (1), it is noticed that the direct action and the derivative action were brought on behalf of two different parties: the direct action was brought by the shareholder individually, on his own behalf, while the derivative action was brought by the shareholder on behalf of the company. Because the actions were brought in two different capacities and implicate separate, independent and different interests, these claims do not involve the same parties. However, it is essential to note that if such a shareholder is a majority or sole shareholder in the company, then it appears to be de facto one person with the same interest, which means he/she might be in privity. Furthermore, as a non-controlling minority shareholder, the shareholder is necessarily not in privity with the company as a matter of law. Therefore, holding that privity only exists where the shareholder owns a majority stake in and controls the corporation's affairs, and even then, privity can be established only after careful consideration of the facts of the case.

However, in this research, we have pointed out three key ideas:

First, under the current procedural legislation in the European jurisdictions studied, the company itself can be qualified as a plaintiff. The filing of a claim by shareholders on behalf of a company can be considered as a type of statutory representation, when a shareholder, subject to the condition of holding a number of shares (depending on the jurisdiction), can act as a representative on the basis of corporate legislation.

Second, on the one hand, in the substantial and legal realm, shareholders protect their interests, even if these are made derivatively. In any case, the shareholders have invested their funds in the company and have the right to defend their rights in the 'investment'. It is in their best interest that the value of shares grows and the business thrives. On the other hand, the company becomes a direct beneficiary in procedural terms, in whose favour the award is collected. The benefit of the shareholders is derivative since if the claim is satisfied, they are only entitled to compensation from the defendant for the legal costs incurred by them.

Third, in the theory of procedural law, it might be suggested that the party of the plaintiff in a derivative action is divided between the procedural plaintiff, who has the authority by law to conduct the case in the interests of another (the shareholder), and the substantial plaintiff, in whose favour the case will be held (the company).

Therefore, it is necessary to determine the dualism of the substantial and procedural status of the shareholder and the company itself in a complex way since their separation is impossible due to the relationship of their interests and the corporate nature aforesaid.

These conclusions challenge the argument that the actions were brought in two different capacities and implicate different interests and that these claims do not involve the same parties.

We will look at this in more detail in accordance with the elements of the doctrine of res judicata because the above arguments are still not enough to expand the application of the res judicata effect.

A shareholder brings a direct action to enforce his own personal rights and recover for harm inflicted directly upon him individually; in contrast, a derivative action belongs to the company and seeks to remedy the harm done to the company. Therefore, the proper party in interest to a derivative action is the company, not the individual shareholder suing on the company's behalf, and a decision rendered in a derivative action adjudicates the rights and interests of the company, rather than those of the individual shareholder.

Companies are treated as separate entities from shareholders, directors, officers and members of the executive body. When the controlling shareholder (sole or majority shareholder or/and a shareholder who may hold significant sway over the direction of the company) is the party to the litigation, his opportunity and incentive to litigate issues, often even indirectly affecting him and the company, is ordinarily to act on behalf of the company as well. In these cases, the rule of res judicata prima facie should apply in studied jurisdictions and should be considered as the formula of best practice. However, it is possible that a situation will develop in which a substantial proprietor in a company finds himself in a conflict with the director (the management in general) or with other stockholders, and in an individual and antagonistic position regarding issues litigated by the latter (not engaging in any group of persons). The rule of res judicata should not be applied in such circumstances, or in circumstances where its application would unfairly affect another person associated with the company, or third persons such as creditors, or where the interests of the corporation and its owners were in such potential conflict of interests concerning the issue that it would be unfair to give preclusive effect to the prior determination.

If there was at least one other shareholder whose interests were not represented in the individual shareholder's prior suit, the extent of the shareholder's ownership stake or his involvement in the company's management must be made clear in the record. Without this information, the court may determine that the trial court's finding of privity was 'premature', and remand the case.

Thus, there is the identity of parties when, after acting on behalf of the company and initially a party to the proceeding, the shareholder, member of the executive body or subsidiary acts on its behalf in a subsequent proceeding. In the same case, there is a party identity when, after having been represented by the shareholder, member of executive body or subsidiary while the director failed to file an action, the res judicata should be enforceable in accordance with the representation theory. If a collective derivative claim has been filed and a member has not joined such a claim, res judicata should have an effect on him in future claims.

7. Conclusions

The main goal of the current study was to determine the scope and breadth of res judicata through its application in derivative actions across different civil law and common law jurisdictions. This study set out to carry out a broader comparative analysis of the application of the doctrine of res judicata to corporate disputes with a particular focus on derivative claims to shed some light on the role of res judicata. The second aim of this study was to create a best practice formula in the context of the application of claim preclusion and issue preclusion in derivative actions.

These findings contribute in several ways to our understanding of res judicata and derivative actions in the US, England, France, Russia and Italy and provide a basis for evaluating the possibility of a broader application of res judicata.

Finding a universal formula for applying the res judicata doctrine in a derivative action for all the jurisdictions studied is a task beyond the bounds of what is currently possible. The approach of national jurisdictions to matters of procedural law is very dissimilar. However, it is quite possible to determine which best practice formula is the solution to most of the existing unsolved legal puzzles in corporate and procedural law.

Some problems faced by courts and parties in civil cases, particularly related to res judicata, are common to numerous jurisdictions. The study of the methods of their solution in

various legal systems provides valuable results used in the implementation of legal reforms to improve civil proceedings.

Globalisation and rapid economic integration require the creation of common criteria and denominators in legal space, the attribute of which is the uniform interstate regulation of the most critical issues of judicial proceedings. The similarities and differences identified as a result of the comparative analysis in the solution of cross-cutting issues of civil procedure that are of an inter-ethnic nature and are of mutual interest to states allow the prevention of legal collisions.

First, in Chapter 1 of this research, we showed that due to the legal nature of the derivative actions, their features and characteristics, the analysed jurisdictions may be classified into two distinct types: absolute derivative actions (the US and Russia) and compensatory derivative actions (France, Italy and England). This classification helps to determine the possible list of combinations in which the application of the doctrine of res judicata is possible in order to develop a best practice formula.

Second, the analysis of derivative actions undertaken here has extended our knowledge of the plaintiff's status and the circle of persons who may initiate derivative actions in the jurisdictions studied. This new understanding should help to improve predictions of the impact of 'the parties' identity' element in the triple identity test to apply res judicata.

Third, in Chapter 2, we saw that there is no universal res judicata doctrine in the studied jurisdictions. All the jurisdictions studied have their own specifics due to the uniqueness of their historical origins. Even though the European jurisdictions have adopted the provisions on res judicata from each other (Russia and Italy adopted some provisions from Germany and France), each jurisdiction understands the provisions differently. Indeed, this cannot but affect the interpretation of the scope of application of the res judicata as well as its application to the derivative actions.

Finally, in Chapter 3, we determined the content (why and when) of the res judicata principles that courts should apply in derivative actions. We showed that the cases of applying the res judicata doctrine should be decided based on the following factors: a) whether the model of the claim is absolute (in Russia and the US) or compensational (in France and Italy); b) whether the action is a group or individual action; c) whether the action is a traditional, double or triple derivative action; and d) the substantial and procedural status of the plaintiff.

All these criteria may play a role in determining the 'parties' element' and 'cause of action element' of res judicata triple identity and the application of res judicata. Undoubtedly, we do not claim to have an exceptional view on such matters.

In Chapter 3, we also justified the extension of the circle of persons bound by a decision in a derivative action in reference to the concept of 'representation' that is known to varying degrees in the studied jurisdictions and means the attribution of represented parties to parties who are bound by the final judgement.

We have noted that the best practice that is universally applicable to all possible combinations in the studied jurisdictions is the following: in situations where a derivative action is filed after a direct claim by a shareholder, such an action should be considered bound by preclusive effect in cases where the shareholder is holding shares individually or the majority share of the company. In other cases, the application of res judicata should be considered on a case-by-case basis and in accordance with national regulations (see Chapter 3 Subchapter 6). As we also mentioned in Chapter 2 Subchapter 4, the application of res judicata is the occurrence of the winning party's reasonable confidence in the judicial system. With such a universal formula, the winning party will be aware of the possibility of application of res judicata principles.

We have already noted in this study that res judicata has a lot in common with a mathematical algorithm; specifically, with mathematical problems that do not result in a general

solution but which allow for various particular solutions, the totality of which could approach a general solution. The task of res judicata can be considered for such a task. Res judicata acts as a binding force for the broad stream of notions which, if taken separately, would be about the same as a chaotic series of unsatisfactory attempts at a solution, and which therefore require the doctrine to generalise them in order to provide a correct and all-encompassing solution.

Despite its exploratory nature, this study offers some insight into the application of res judicata in derivative actions. The intention was to create a bridge between the two different legal systems of common law and civil law traditions and to integrate the most challenging issues of the theory and practice into corporate litigation. Since the notion of a derivative action, as well as the doctrine of res judicata, is complex and deep in nature, and due to the limited scope of this research, it was not possible to suggest theories or universal formulas for all of the questions that such mechanisms pose. For this reason, several questions remain to be elucidated, such as the operative part of the judgments, the ‘cause’ and ‘object’ of actions and the recognition of the preclusive effects of foreign judgments.

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