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Res Judicata and ADR

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Achieving finality is one of the fundamental objectives of any dispute resolution process. 'Finality' has two distinct meanings. One sense relates to whether there is any possibility of an appeal within a single piece of litigation which may overturn a decision[1]. The other is whether a decision in one set of proceedings can be relitigated in later proceedings. Appeals are an established feature of court-based litigation, but tend to be severely restricted when parties decide to use alternative dispute resolution ('ADR') processes.

Regarding the second sense of finality, there is an important principle that decisions of competent tribunals must be accepted as providing a stable basis for future conduct[2]. This is commonly encapsulated by saying that judicial decisions are res judicata[3]. For those who like Latin maxims, there are three others that are commonly used in this area. Interest reipublicae ut sit finis litium expresses the strong public interest that it concerns the State that law suits are not protracted[4]. This maxim is often paired with the maxim nemo debet bis vexari pro una et eadem causa, which expresses a concept of private justice that no one ought to be troubled or harassed twice for one and the same cause[5]. While these two maxims are often used together, they reflect two distinct policies[6], one protecting the judicial system as a whole, and the other protecting individual litigants. The third maxim is transit in rem judicatam, which means that after judgment a cause of action passes into (or becomes) a res judicata. In modern times this third maxim is usually expressed in the language of merger: after judgment a cause of action is extinguished and merges with the judgment.

Put together they emphasise the importance of judgments in court proceedings. A judgment binds the parties, so they cannot thereafter sue a second time if their first claim was defeated, or contest issues in later proceedings that were decided in earlier litigation. If a claim was successful, the rights and obligations of the parties are now defined by the judgment, and they cannot revert to their original positions and start again. There has to be finality in litigation.

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[1] Appeals in civil court proceedings in England and Wales are governed by various statutes with detailed procedural rules in the Civil Procedure Rules 1998 (as amended), Part 52. See also *Blackstone's Civil Practice 2014* (OUP 2014, Oxford) chapter 74.

[2] *Zurich Insurance plc v Hayward* [2011] EWCA Civ 641, [2011] CP Rep 39, Smith LJ at [45].

[3] The Latin words 'res judicata' mean 'a thing judicially determined'. The full expression is res judicata pro veritate accipiter, which means a thing adjudicated is received as the truth.

[4] As suggested by Mr Wolman, counsel for the respondents in *Clark v In Focus Asset Management & Tax Solutions Ltd* [2014] EWCA Civ 118, [2014] PNLR 19, the underlying concern is that the public courts and tribunals should not be clogged by repetitious re-hearings and re-determinations of the same disputes. As is clear from the Civil Justice Reforms of 2013, this is a powerful consideration, as recognised by Arden LJ at [11].

[5] *Gleeson v J Whippell & Co Ltd* [1977] 3 All ER 54; *Phipson on Evidence* (18th ed Sweet & Maxwell, 2013) at 43.03.

[6] *Lockyer v Ferryman* (1877) 2 App Cas 519, Lord Blackburn at p 530.

Traditional statements of the principle of res judicata tend to be couched in terms directed at court litigation. For example, Professor Elliott[7] said that under the doctrine of res judicata: 'a final judgment of a competent court disposes once and for all of the matters decided, so they cannot be raised again between the same parties or their privies'. It is just as important that disputes resolved by ADR processes should be treated as final and binding as claims adjudicated by the courts. It has long been recognised that the public interest in the finality of decisions and the private interest in not being vexed by repeated claims, disputes or differences apply in a similar way to both litigation and ADR. Professor Elliott goes on to refer to res judicata applying to judgments signed by consent[8] and to arbitrations[9]. In fact, some of the best known authorities on res judicata are cases where the original proceedings were resolved by ADR[10]. Nevertheless, there are obvious differences between litigation and ADR processes, such as the absence of a State organised trial, and an almost universal application of confidentiality to ADR processes, which mean that traditional res judicata principles cannot always be applied directly in cases resolved by ADR.

This article will first consider the principles of res judicata as they apply to court proceedings. It will then discuss how these principles apply to the main adjudicative ADR processes, together with the adjustments and refinements to those principles that are necessary to deal with the different character of ADR processes. It will also consider the theoretical basis for the res judicata principle, and how this should inform decisions on whether res judicata and its related principles should apply where there are successive claims, disputes or differences which the parties have sought to resolve using ADR processes.

Res Judicata and Related Principles

It has long been recognised that the law in this area is not altogether clear[11]. In England and Wales there is no over-arching statutory framework governing the principles of res judicata, although aspects of the law are governed by legislation[12]. Most of the law is to be found in the decided cases, which is voluminous and not always consistent. The leading authority on one aspect of this area is *Henderson v Henderson*[13] , which has been described as the most cited Victorian case during the twentieth century, being cited 290 times in United Kingdom cases, 139 times in Australia, 323 times in Canada, and 48 times in the USA[14]. Yet it has been convincingly argued that most of these cases misinterpret the case they rely upon. Reported decisions not infrequently misapply established

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[7] *Elliott and Phipson, Manual of the Law of Evidence* (12th ed Sweet & Maxwell, 1987), p 317.
[8] *Elliott and Phipson* at p 318.
[9] *Elliott and Phipson* at pp 319, 320, 324 and 325.
[10] *Kinch v Walcott* [1929] AC 482 involved a claim ended by a consent order; *Jameson v Central Electricity Generating Board* [2000] 1 AC 455 was a case where the original claim was resolved by settlement; in *Johnson v Gore Wood & Co* [2002] 2 AC 1 the original claim was compromised during the trial. These methods of disposing of proceedings are a subject in themselves, and will not be considered further in the present article.
[11] For example, Lord Guest in *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] AC 853 at p 934.
[12] Legislation in England and Wales includes the Civil Evidence Act 1968, which by ss. 11 to 13 deals with the effect of certain judgments as evidence in later litigation against other parties; the Civil Liability (Contribution) Act 1978, which deals with subsequent litigation in contribution claims; the Civil Jurisdiction and Judgments Act 1982, s. 34, which deals with merger of foreign judgments; and the Civil Procedure Rules 1998, r. 3.4, which provides the jurisdiction to strike out for abuse of process.
[13] (1843) 3 Hare 100.
[14] K.R. Handley, *A closer look at Henderson v Henderson* (2002) 118 LQR 397.

principles, and there are continuing difficulties caused by inconsistent terminology[15], overly-complicated distinctions[16], and the opposite, attempts to conflate distinct sets of principles[17].

Despite the difficult state of the law, the main concepts may be stated as follows:

(a) A court judgment is conclusive evidence of its existence, date and legal effect[18]. This follows from its status as a formal, public, determination by a court established by the State, and whose records are presumed to be accurate. The conclusive nature of court records applies to everyone, whether or not they were a party to the proceedings. However, the scope of this rule is extremely narrow. It applies only to the fact and wording of the judgment (such as that on a particular date a named person was convicted of a particular offence). It does not extend to whether the decision was correct, or whether anyone was guilty, innocent, committed any breach or anything relating to the accuracy of the decision.

(b) A judgment in rem has a wider effect than an ordinary judgment in personam in that it determines the status of a person or thing, and has universal force rather than just binding parties and their privies[19]. Examples are Family Court findings affecting status, adjudications of bankruptcy, grants of probate, and judgments condemning vessels as prize[20].

(c) Judgment in favour of the claimant in a civil claim extinguishes all the rights previously available to the claimant flowing from the original cause of action[21]. This is the doctrine of merger, or transit in rem judicatam. A successful claimant is entitled to enforce the judgment, but only the judgment[22]. Merger prevents the claimant from bringing a second set of proceedings to enforce the original cause of action even if the judgment was for an amount less than the claimant was entitled to[23].

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[15] Maurice Kay LJ referred to problems caused by excessive and inconsistent taxonomy in the authorities in *Zurich Insurance plc v Hayward* [2011] EWCA Civ 641, [2011] CP Rep 39 at [63].

[16] Hard to justify distinctions can be found in almost every aspect of res judicata. In England and Wales there are different principles that apply in crime (autrefois convict and autrefois acquit) and civil cases, both of which have highly developed bodies of case law. Within the civil arena, the authorities on concepts such as whether a judgment is final, on who is a privy, whether successive causes of action are the same, whether an issue was necessary to the decision in the original claim, when special circumstances apply and what will amount to special circumstances (among others) have all attracted large numbers of reported decisions, many of which are difficult or impossible to reconcile. See *Spencer-Bower and Handley, Res Judicata* (4th ed Butterworths 2009) and *Phipson on Evidence,* chapter 43.

[17] An example is the attempt to conflate issue estoppel and abuse of process in *SGI Ltd v Deakin* [2001] EWCA Civ 777.

[18] *Stephen, Digest of the Law of Evidence* (12th ed Macmillan, 1948), art 41; *Phipson on Evidence* para 43-02.

[19] *Phipson on Evidence* para 43-10; *Elliott and Phipson* at p 321.

[20] While the principles have developed from different directions, the class of cases generating judgments in rem is very similar to those defining the concept of arbitrability in arbitration law. See *A Practical Approach to ADR* (3rd ed, OUP Oxford 2014, Blake, Browne and Sime) at 26.24. They should really be the same, because arbitrability is about restricting arbitration to claims that can properly be decided on a private basis between the parties alone, so is inappropriate for decisions that might have an effect on outsiders, particularly decisions about status.

[21] *Phipson on Evidence* para 43-17; *Republic of India v Indian Steamship Co* [1993] AC 410. A cause of action comprises the minimum facts that a claimant must prove in order to succeed on a claim (*Letang v Cooper* [1965] 1 QB 232, per Diplock LJ at p 243).

[22] *Clark v In Focus Asset Management & Tax Solutions Ltd* [2014] EWCA Civ 118, [2014] PNLR 19 at [5].

[23] *Wright v London General Omnibus Co* (1877) 2 QBD 271.

(d) There are two kinds of estoppels per rem judicatam[24]. Cause of action estoppel prevents a party from asserting or denying the existence of a particular cause of action which has been found not to exist in previous proceedings between the same parties[25].

(e) Issue estoppel is an extension of cause of action estoppel, and applies where the same parties or their privies are engaged in successive claims based on different causes of action, but where an essential issue in the first claim is also an essential issue in the second claim. Issue estoppel prevents the parties and their privies in the second claim from asserting that an issue is fulfilled if the court in the first claim determined that it was not, or from denying that it is fulfilled if the court in the first claim determined that it was[26].

(f) It may be an abuse of process to raise claims, issues or defences which could and should have been raised in previous litigation[27]. This concept does not apply in situations where an earlier court has decided the point in dispute, but in cases where the earlier court has not decided the point[28]. It is based on the same policies as inform cause of action and issue estoppels, that there should be finality in litigation and that a party should not be vexed twice in the same matter[29].

Defining the requirements for res judicata

According to Spencer-Bower and Handley[30], cause of action estoppel will apply where:

(a) The decision, whether domestic or foreign, was judicial in the relevant sense;

(b) It was in fact pronounced;

(c) The tribunal had jurisdiction over the parties and the subject matter;

(d) The decision was final and on the merits;

(e) It determined a question raised in the later litigation; and

(f) The parties are the same or their privies, or the earlier decision was in rem.

Where the requirements for cause of action estoppel are met, the earlier decision is an absolute bar to later proceedings, and the court has no discretion to hold that res judicata does not apply to the

[24] In addition to cause of action estoppels and issue estoppels as described in paragraphs (c) and (d) here, *Phipson on Evidence* at para 43-15 inserts what are described as 'extended' concepts of cause of action and issue estoppels covering points that might have been but were not raised in the earlier proceedings, relying on *Arnold v National Westminster Bank plc* [1991] 2 AC 93. See also *Virgin Atlantic Airways Ltd v Zodiac Seats UK) Ltd* [2013] UKSC 46, [2014] AC 160.

[25] *Thoday v Thoday* [1964] P 181, per Diplock LJ at p 196. If the cause of action was found to exist in the original proceedings it is merger that applies.

[26] *Thoday v Thoday* [1964] P 181, per Diplock LJ at p 197.

[27] *Henderson v Henderson* (1843) 3 Hare 100 as interpreted by *Johnson v Gore Wood & Co (No 1)* [2002] 2 AC 1.

[28] *Manson v Voogt* [1999] BPIR 376, per May LJ at pp 387.

[29] *Johnson v Gore Wood & Co (No 1)* per Lord Bingham of Cornhill at p 31. Basing striking out for abuse in this context on the first of these policies was criticised by Watt in *The danger and deceit of the rule in Henderson v Henderson: a new approach to successive civil actions arising from the same factual matter* (2000) 19 CJQ 287.

[30] *Spencer-Bower and Handley, Res Judicata,* 4th ed, para 1.02.

later case[31]. Similar requirements apply in respect of issue estoppel, but with the important difference that issue estoppel will not operate where there are special circumstances[32]. Issue estoppel applies to the issues or necessary conditions for a cause of action. It does not give rise to what may be described as 'fact estoppel', because it applies to issues rather than to each fact found to exist (or not to exist) in previous proceedings[33].

A judgment in default is treated as a final judgment for the purposes of res judicata[34]. In these cases the particulars of claim stand in as a proxy for the judgment of the court[35]. As there is no reasoned judgment, the issues in the original claim need to be scrutinised 'with extreme particularity' for the purpose of ascertaining the bare essence of what must necessarily and with complete precision have been decided[36].

The Spencer-Bower and Handley criteria have the appearance of precision, and were accepted as authoritative by the Supreme Court in *R (Coke-Wallis) v Institute of Chartered Accountants of England and Wales*[37]. Each of the criteria hides a substantial body of case law, and each has a range of technical rules and distinctions which are not consistently applied by the courts. They also change over time. For example, a less technical approach has been applied to determining whether the second set of proceedings involves the same cause of action as the first in more recent times because of the extension of the rules on merger to foreign judgments by the Civil Jurisdiction and Judgments Act 1982, s. 34[38]. It was not until *Arnold v National Westminster Bank plc*[39] that it was firmly established that an exception for 'special circumstances' applies to issue estoppel, but not to cause of action estoppel. Even the law on this latter point is not necessarily fixed for all time, and there have already been calls for Parliament to intervene and provide an exception to the rule that cause of action estoppel operates as an absolute bar in cases where the absolute bar may result in a failure to protect the safety of the public[40].

Henderson v Henderson[41] is usually cited for the following principle as enunciated by Wigram V-C:

'In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to

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[31] *Virgin Atlantic Airways Ltd v Zodiac Seats UK) Ltd* [2013] UKSC 46, [2014] AC 160.
[32] *Phipson on Evidence* para 43-23; *Arnold v National Westminster Bank plc* [1991] 2 AC 93.
[33] *Brewer v Brewer* (1953) 88 CLR 1, 15, per Fullagar J; *Thoday v Thoday* [1964] P 181, per Diplock LJ at p 198.
[34] *New Brunswick Railway v British and French Corp* [1939] AC 1; *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993.
[35] *New Century Media Ltd v Makhlay* [2013] EWHC 3556 (QB).
[36] *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993, per Lord Radcliffe at 1012.
[37] [2011] UKSC 1, [2011] 2 AC 146.
[38] *Phipson on Evidence* para 43-17.
[39] [1991] 2 AC 93.
[40] *R (Coke-Wallis) v Institute of Chartered Accountants of England and Wales* [1991] 2 AC 93.
[41] (1843) 3 Hare 100.

the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'

As has been demonstrated in an article by K.R. Handley in 2002, the actual decision in *Henderson v Henderson* was a conventional application of the rules governing cause of action estoppel[42]. Despite this, it is now far too late to go back. At one time it was thought that a second claim would be an abuse of process if it raised a claim that could have been brought in earlier proceedings[43]. It was firmly established by *Johnson v Gore Wood & Co* that this went too far, and that the opposite tendency, of looking for an abusive element[44], was too restrictive. Instead, the court needs to make:

'... a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts in the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before'[45].

Before *Johnson v Gore Wood & Co* it had been thought that the court had first to consider whether the second claim was potentially an abuse of process, and then to consider whether there were special circumstances which would justify allowing it to continue. Lord Bingham of Cornhill modified this approach, and the modern test is to consider whether in all the circumstances a party's conduct is an abuse, rather than to ask whether the conduct is an abuse, and if so, to ask whether the abuse can be excused or justified by special circumstances[46].

Theoretical basis

There is an unresolved issue over the provenance of the res judicata principle. Lord Guest's view was that it is a rule of evidence[47]. Lord Millett has taken the view that res judicata and all its branches should be regarded as a rule of substantive law[48]. A third view is that it is a rule of pleading[49]. Phipson takes the view[50] that no practical consequences flow from this, and the theoretical basis for the res judicata principle is rarely mentioned in the cases other than as an occasional throw-away line. While the provenance of the principle may make no real difference where both sets of proceedings involve litigation in the courts, the question becomes of more direct importance when

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[42] K.R. Handley, *A closer look at Henderson v Henderson* (2002) 118 LQR 397. The same view was expressed by Watt in *The danger and deceit of the rule in Henderson v Henderson: a new approach to successive civil actions arising from the same factual matter* (2000) 19 CJQ 287, who went on to argue that *Henderson v Henderson* abuse of process should be abandoned.

[43] *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581, where Lord Kilbrandon said that '... it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings'.

[44] Such as a collateral attack on a previous decision (*Hunter v Chief Constable of the West Midlands Police* [1982] AC 529), or dishonesty (*Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1982] 2 Lloyd's Rep 132), or unjust harassment (*Manson v Vooght* [1999] BPIR 376).

[45] Lord Bingham of Cornhill at p 31D. While the decision requires the assessment of a large number of factors, it is a decision admitting of only one correct answer, and is not an exercise of discretion (*Aldi Stores Ltd v WSP Group plc* [2007] EWCA Civ 1260, [2008] 1 WLR 748).

[46] Lord Bingham of Cornhill at p 31F.

[47] *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] AC 853 at p 933.

[48] *Johnson v Gore Wood & Co (No 1)* [2002] 2 AC 1 at p 59.

[49] *Stephen, Digest of the Law of Evidence* (12th ed Macmillan, 1948).

[50] *Phipson on Evidence* para 43-15.

an ADR process used to resolve one or both of the disputes. How this theoretical difference impacts on cases resolved by ADR will be considered further in this article.

A second theoretical issue is whether the res judicata principle depends on the proceedings being adversarial in nature. Diplock LJ certainly thought so in *Thoday v Thoday*[51], where he explained that '... under the rules of the adversary system of procedure upon which the common law of England is based, a party is not allowed, in certain circumstances, to prove in litigation particular facts or matters which, if proved, would assist him to succeed as plaintiff or defendant in an action. If the court is required to exercise an inquisitorial function and may inquire into facts which the parties do not choose to prove, or would under the rules of the adversary system be prevented from proving, this is a function to which the common law concept of estoppels is alien.' His lordship went on to suggest that it might not be irrational for a court exercising an inquisitorial process to be bound by the findings of another court of co-ordinate jurisdiction, but commented that such would be a different concept from estoppel as then known in English law.

On this second issue the law certainly has moved on since 1963. It is now settled that res judicata applies to overseas judgments, which might well have been decided under an inquisitorial system. As shall be seen later, res judicata also applies to previous arbitration awards. While arbitrations conducted in England and Wales are traditionally adversarial, arbitrations with seats in England may be conducted on an inquisitorial basis[52], and this is even more likely where the seat of the arbitration is in a civil law jurisdiction.

Extending res judicata to other dispute resolution processes

It will be seen from this review of the law that the main authorities on res judicata tend to focus on its effect in court proceedings. Not infrequently the earlier judgment will have been given by an overseas court[53], and there is a whole body of law dealing with the binding effect of judgments from overseas. One of the problems in these cases is that definitions of rights of action and their requirements, and court procedures, in overseas jurisdictions obviously differ from those in England and Wales. While these problems do not prevent parties in later proceedings being estopped, the principles of res judicata are applied with caution because of the uncertainties involved[54].

There is also a tendency to talk in terms of the first claim being disposed of at a final hearing. In reality a vast number of claims, disputes and differences are disposed of without court proceedings being initiated, and, even where they are, only 2 to 3 per cent are decided at trial. The extension of res judicata to default judgments, and the use of alternative sources in place of a reasoned judgment for the purpose of identifying the claims and issues that will be barred in future proceedings, shows that there is flexibility to apply the principles of res judicata to situations beyond cases resolved at trial in traditional legal proceedings.

[51] [1964] P 181 at p 197
[52] Arbitration Act 1996, s. 34(2)(e), (g).
[53] Even *Henderson v Henderson* was a case where the earlier decision was that of a colonial court in Newfoundland.
[54] *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] AC 853.

Dispute resolution lawyers tend to distinguish between adjudicative and non-adjudicative ADR processes[55]. Adjudicative processes include arbitration, adjudication and some decisions in disciplinary processes. Non-adjudicative processes include negotiation, mediation and conciliation[56]. It may be tempting to assume that this distinction would determine whether an ADR process is governed by res judicata. While a final resolution of the dispute or difference is required for res judicata to apply, it will be seen below that the dividing line does not follow the adjudicative / non-adjudicative distinction.

Statutory Tribunals

Statutory tribunals are only one or two removes away from the established courts, so it is not surprising that their decisions have been held to be subject to the rules on res judicata for many years. Both Spencer-Bower and Phipson[57] have lists of tribunals that are subject to these principles, which cover a wide range, including planning appeals[58] and decisions of Employment Tribunals[59] and the Employment Appeal Tribunal. Res judicata can apply where both proceedings are before tribunals, and also where the first decision is that of a tribunal and the second claim is before a court[60]. Cause of action estoppel and issue estoppel do not depend on the earlier claim being determined by a reasoned decision, but turn on whether there was a competent tribunal and whether a final order has been made[61]. The need for a competent tribunal means that while tribunal decisions can give rise to estoppels, a decision to refuse planning permission will not because this is an administrative decision[62].

Under ordinary res judicata principles the earlier decision will be binding only if it is final. This means that it must be finally concluded in the first instance court, ignoring any right of appeal. If there is an appeal, the first instance decision will cease to be binding if the appeal is successful, in which event the binding decision will be that of the appeal court. As mentioned previously, in ordinary litigation a default judgment counts as a final judgment for this purpose. A claim that is dismissed in ordinary litigation also counts as a final judgment[63], but not one that is discontinued[64] or one that is struck out for non-compliance with procedural orders[65].

Applying this sort of distinction can be difficult in cases decided by tribunals because their procedural rules do not always provide for these types of distinctions. Where tribunal rules are unclear on whether a particular means of disposal amounts to a final decision, it was suggested in

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[55] *Jackson ADR Handbook* (OUP, Oxford, 2013), Blake, Browne and Sime.
[56] The discussion below will concentrate on adjudicative ADR and related processes. Non-adjudicative processes in themselves do not produce final decisions, so res judicata does not even start to apply to them. Also outside the scope of this article are disposals of disputes by settlement, and disposal of court proceedings by consent orders, Tomlin orders etc..
[57] *Spencer-Bower and Handley, Res Judicata* para 2.03; *Phipson on Evidence* para 43-24.
[58] *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 AC 273.
[59] *Barber v Staffordshire County Council* [1996] 1 All ER 748.
[60] *Nayif v High Commission of Brunei Darussalam* [2013] EWHC 3938 (QB), [2014] Eq LR 136.
[61] *Lennon v Birmingham City Council* [2001] EWCA Civ 435, [2001] IRLR 826.
[62] *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 AC 273; *R (Reprotech Ltd) v East Sussex County Council* [2002] UKHL 8; [2003] 1 WLR 348.
[63] *Rothschild Asset Management Ltd v Ako* [2002] EWCA Civ 236, [2002] 2 All ER 693.
[64] CPR, r. 38.7.
[65] *Smith v Linskills* [1996] 1 WLR 763.

Rothschild Asset Management Ltd v Ako[66] that the parties should state the circumstances informing their agreement to terminate the tribunal proceedings which may then be included in the tribunal's order. With respect, this is wholly unrealistic. Parties agreeing to terminate tribunal claims (and indeed most claims) may have in mind in general terms whether they intend the agreement to be final and binding, but are extremely unlikely to have in mind the niceties of the law relating to res judicata, or the deficiencies in the procedural rules governing particular tribunals. Tribunals, even more than court proceedings, encourage litigants to act in person, which only compounds the unreality.

It has also been assumed by the Court of Appeal that *Henderson v Henderson* abuse of process applies to tribunal decisions[67]. This seems uncontroversial where the second claim is brought in a civil court to which CPR, r. 3.4 applies, because r. 3.4 is now the source of the jurisdiction to strike out for abuse of process[68]. *Henderson v Henderson* may need to be adapted to meet the special circumstances of tribunal cases along similar lines to the discussion below in relation to arbitration claims.

A more difficult question is whether *Henderson v Henderson* abuse applies where the second claim is also in a statutory tribunal. It is suggested that this can only be correct if the tribunal rules specifically allow the tribunal to strike out for abuse of process. Whether the theoretical basis for the res judicata principle is that it is a rule of evidence or a substantive rule of law (so that cause of action estoppel and issue estoppel can apply to tribunals), it must be clear that for the civil courts in England and Wales *Henderson v Henderson* abuse nowadays depends on CPR, r. 3.4. Under normal principles, it is only the senior courts that have inherent jurisdiction. Tribunals, like the County Court, are creatures of statute and do not have inherent jurisdiction. *Henderson v Henderson* abuse can only be based either on the inherent jurisdiction or a relevant rule of court. For the civil courts in England and Wales, that is now CPR, r. 3.4. Also under normal principles, once an area originally dealt with under the court's inherent jurisdiction is codified, the inherent jurisdiction drops away, leaving the position covered only by the relevant legislation[69]. The result must be that for the ordinary courts the jurisdiction governing *Henderson v Henderson* abuse depends on CPR, r. 3.4. It is difficult to conceive that tribunals have a jurisdiction to restrain abuse not enjoyed by the civil courts. The result must be that *Henderson v Henderson* abuse is only available in tribunals if the statutory instrument laying down the rules for the tribunal expressly provide for striking out for abuse of process.

Disciplinary Tribunals

It was held by the Supreme Court in *R (Coke-Wallis) v Institute of Chartered Accountants of England and Wales*[70] that cause of action estoppel applies to successive disciplinary proceedings heard by a professional body's disciplinary tribunal. As mentioned above, a key question was whether cause of action estoppel applied in the same way as in court proceedings, so that the second disciplinary

[66] [2002] EWCA Civ 236, [2002] 2 All ER 693.
[67] *Lennon v Birmingham City Council* [2001] EWCA Civ 435, [2001] IRLR 826.
[68] In *Lennon v Birmingham City Council* the first set of proceedings were before an Employment Tribunal, and the second claim was brought in the County Court relying on the same facts as those relied on in the tribunal.
[69] *Harrison v Tew* [1990] 2 AC 523; *Raja v Van Hoogstraten (No 9)* [2009] 1 WLR 1143; *Blackstone's Civil Practice 2014*, chapter 1.
[70] [2011] UKSC 1, [2011] 2 AC 146.

panel was absolutely stopped from reconsidering the complaint, with no exception for special circumstances[71]. To be consistent with statutory tribunals, it must follow that issue estoppel also applies, but that *Henderson v Henderson* abuse does not.

Internal Disciplinary Processes

A disciplinary procedure used by an employer investigating a suspected disciplinary offence by an employee does not result in the determination of issues establishing legal rights[72], and therefore does not result in an adjudication for the purposes of res judicata[73]. The key question is whether the process operates independently of the parties, which is not the case with internal dispute resolution processes, which are typically staffed by the employer's own personnel. As a result an employer is permitted to hold further disciplinary procedures involving an employee and the same background facts, even though this means reopening the decision of the earlier disciplinary process[74].

Arbitration

Arbitration is an adjudicative dispute resolution process based on an agreement between the parties to refer a dispute or difference between them to impartial arbitrators for a decision. It is often seen as a private version of litigation. It is therefore not surprising that the principles of res judicata have for a long time been held to apply at least to some extent to arbitrations[75]. While cause of action estoppel and issue estoppel may be less controversial[76], it has been doubted in modern times whether the doctrine of merger can ever apply to arbitrations[77]. The reasons for the doubt stem from the differences between court-based litigation and arbitration.

As stated by Lord Pearson in *F.J. Bloemen Pty Ltd v Council of the City of Gold Coast*[78], the award of an arbitrator differs materially from a court judgment. In court proceedings, the claimant's right of action and the court's power to award judgment are not derived from the agreement between the parties, so when judgment is given by a court it is an entirely fresh departure. An award by an arbitrator cannot be seen in isolation from the submission to arbitration under which it was made. For this reason the Privy Council expressed the view that there is a distinction between an arbitral award, which does not create a fresh cause of action (and hence there is no merger), whereas a court judgment does create a fresh cause of action. This view is not favoured by Phipson, and later authorities, such as *The Rena K*[79], assume that a cause of action in personam adjudicated upon by an arbitral tribunal merges with the tribunal's award.

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[71] See FN 40.
[72] The test promulgated by *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 AC 273.
[73] *Christou v Haringey London Borough Council* [2013] EWCA civ 178, [2014] QB 131.
[74] It has also been held that it is open to an independent regulatory body to pay close attention to the findings of a disciplinary tribunal, *R (G) v X School Governors* [2011] UKSC 30, [2012] 1 AC 167.
[75] *Purslow v Baily* (1705) 2 Ld Raym 1039.
[76] *Northern Regional Health Authority v Derek Crouch Construction Co Ltd* [1984] 1 QB 644, which held that awards by arbitrators were capable of creating issue estoppels affecting subsequent court proceedings.
[77] *Telfair v Interseas Carriers* [1983] 2 Lloyd's Rep 351.
[78] [1973] AC 115 at p 126.
[79] [1979] 1 QB 377 at p 405.

Other important differences include the restriction on appeals in arbitration to points of law[80] , which has been said to justify caution before finding an issue estoppel[81], and the difficulty in joining parties in arbitrations[82]. Further, the privacy and confidentiality of arbitrations make it difficult for non-parties to obtain access to awards for the purpose of establishing estoppels.

The contractual basis of arbitration was also identified as creating differences from litigation in *Purser & Co (Hillingdon) v Jackson*[83]. Forbes J pointed out that the public policy in avoiding protracted litigation may not have the same application in arbitrations because the parties choose their arbitrator. While there is a public interest in arbitrations being conducted properly, there is not the same public concern to avoid over-burdening arbitrators with successive arbitrations. Further, while the courts will not tolerate 'serial actions'[84], and will require the parties to bring all the claims that should be brought together to be advanced in a single set of proceedings, arbitration clauses may provide for serial arbitrations of similar points as and when disputes between the parties arise. This was the case in *EE and Brian Smith (1928) Ltd v Wheatsheaf Mills Ltd*[85], where the arbitration clause provided: 'All disputes from time to time arising out of this contract shall be referred to arbitration.'

Purser & Co (Hillingdon) v Jackson also held that it is the terms of reference of an arbitration that defines the issues the arbitrator has to decide. Where an issue is not included in the terms of reference of an earlier arbitration between the parties, that issue cannot give rise to an issue estoppel in a later reference to arbitration. The converse is that, having chosen to arbitrate a dispute, the parties are bound by issue estoppel by the determination of the arbitrator on any issue that is relevant to the decision on the dispute referred to arbitration[86]. As pointed out by Phipson[87], it depends on the proper construction of the agreement to arbitrate. It is perfectly possible for the parties to agree to refer all disputes to arbitration without restriction on the nature of the disputes that can be referred, and without giving themselves the right to make serial references. In such a situation merger, cause of action estoppel and issue estoppel will all apply[88]. They apply to partial and interim awards as much as to final awards, all of which are 'final' for the purposes of res judicata[89].

Where this is so, similar restrictions apply as in ordinary litigation. There will be no issue estoppel if the point said to give rise to an issue estoppel was not necessary for the original decision, or if the original arbitration was between different parties to those involved in the later arbitration[90]. On the latter point, the Court of Appeal in *Sun Life Assurance Co of Canada v The Lincoln National Life*

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[80] Arbitration Act 1996, s. 69.
[81] *Sun Life Assurance Co of Canada v The Lincoln National Life Insurance Co* [2004] EWCA Civ 1660, [2006] 1 All ER (Comm) 675 at [66].
[82] At para [68].
[83] [1976] 3 All ER 641.
[84] It will be recalled that Wigram V-C in *Henderson v Henderson* said that unless there are special circumstances the court requires the parties to litigation to bring forward their whole case (see FN 40).
[85] [1939] 2 KB 302.
[86] *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630, per Diplock LJ at p 643.
[87] *Phipson on Evidence* para 43-22.
[88] Phipson takes the view that this is in fact the usual position.
[89] *Sucafina SA v Rotenberg* [2012] EWCA Civ 637, [2012] 2 All ER (Comm) 952.
[90] *Sun Life Assurance Co of Canada v The Lincoln National Life Insurance Co* [2004] EWCA Civ 1660, [2006] 1 All ER (Comm) 675.

Insurance Co doubted first instance decisions[91] to the effect that an issue decided in an earlier arbitration award could bind a party to the earlier award who was also a party to the second arbitration. The court also rejected an argument that a person who was a party to two arbitrations might be bound by an issue decided in the first if it went against him, but not if he succeeded on the issue in the first arbitration. Res judicata operates on a mutual basis[92] , which is the source of the requirement applicable in court proceedings as well as in ADR that these estoppels only operate between the same parties and their privies.

Far more difficult is whether *Henderson v Henderson* abuse applies in arbitration claims. The paucity of authority on the subject supports the conclusion that the general position is that it does not apply to arbitrations[93]. CPR, r. 3.4 does not apply to decisions made by arbitrators. However, the principle of party autonomy in arbitrations[94] shows there is nothing to prevent the parties to arbitrations agreeing that their arbitrators will have the power to strike out for abuse of process.

Where a dispute is first arbitrated, and followed by court proceedings based on the same facts, the court certainly has the power to strike out for abuse of process in r. 3.4. In two first instance cases[95] judges have struck out the subsequent court proceedings for *Henderson v Henderson* abuse which were not covered by res judicata because the parties in the later court proceedings were not the same as the parties to the earlier arbitrations. Teare J in *Wilson v Sinclair* recognised that striking out on the basis that court proceedings against a non-party to an arbitration were an abuse of process should be reserved for rare cases, but it is submitted that both he and Hamblen J in *Arts & Antiques Ltd v Richards* were far too ready to find the subsequent court proceedings were a collateral attack on the earlier arbitral awards on grounds that amounted to little more than the court proceedings were inconsistent with the findings of the arbitrators[96]. These cases go too far. The limitation on rights of appeal in arbitrations[97], the restrictions on joining parties or intervening in arbitrations[98], the privacy of arbitrations, and the concept of arbitrability[99], are powerful reasons for not extending *Henderson v Henderson* abuse to non-parties.

Adjudication

Adjudication[100] is an interim dispute resolution process, under which an impartial adjudicator gives a decision on a dispute arising during the course of a construction contract[101]. While a dispute seeking

[91] Including *George Moundreas & Co SA v Navimprex Centrala Navala* [1985] 2 Lloyd's Rep 515.
[92] Per Mance LJ at [65], Longmore LJ at [77] and [80].
[93] The availability of a *Henderson v Henderson* power to strike out to arbitrators was doubted by Mance LJ in *Sun Life Assurance Co of Canada v The Lincoln National Life Insurance Co* at [63].
[94] Arbitration Act 1996, ss. 1 and 34.
[95] *Wilson v Sinclair* [2013] 1 All ER (Comm) 476 and *Arts & Antiques Ltd v Richards* [2013] EWHC 3361 (Comm), [2014] PNLR 10.
[96] Reliance was placed on *Hunter v Chief Constable for West Midlands Police* [1982] AC 529, but this applies where the purpose of the later proceedings is to mount an attack on an earlier decision (Lord Diplock at p 541), not on the basis of mere inconsistency.
[97] Arbitration Act 1996, ss. 67 to 69, which mean that parties to arbitrations may be bound by incorrect awards without rights of appeal, unlike court proceedings.
[98] *Sun Life Assurance Co of Canada v The Lincoln National Life Insurance Co* [2004] EWCA Civ 1660, [2006] 1 All ER (Comm) 675, per Mance LJ at [63]-[69].
[99] See FN 20.
[100] Adjudication procedures are laid down by the Housing Grants, Construction and Regeneration Act 1996 Part II, as amended by the Local Democracy, Economic Development and Construction Act 2009 ss. 138–145.

any type of relief may be referred to adjudication, an adjudicator simply makes a decision, and does not have any of the coercive powers available to a court.

In England and Wales, a construction contract must provide in writing that the adjudicator's decision is binding until the dispute is finally determined by legal proceedings, by arbitration or agreement[102]. An adjudicator's decision is binding in the sense that the losing party has an immediate obligation to pay the sum decided upon. It is also binding for the purposes of res judicata[103] in relation to future adjudications between the same parties under the same construction contract. The extent to which this is so depends on an analysis of the terms and scope of the earlier reference to adjudication[104]. For example, an adjudicator in *Vertase Fli Ltd v Squibb Group Ltd*[105] was not permitted to change his mind from the decision he made on an issue decided in the first adjudication which also arose in a second adjudication on the same contract between the same parties.

Res judicata based on an earlier adjudication, however, does not apply to subsequent court or arbitral proceedings. The underlying policy of construction industry adjudication is 'pay now, argue later'. There is an implied term[106] that either party can reopen the dispute in the courts or through arbitration. A court or tribunal will not be bound by the adjudicator's decision, and can order any overpayment to be repaid. To avoid the expense of subsequent litigation, the parties may agree to accept the decision of the adjudicator as finally determining the dispute.

Ombudsmen and Complaints Schemes

Ombudsmen act rather like umpires in complaints brought by individuals against public or private organisations. In addition to the Parliamentary and Health Service Ombudsman and the Local Government Ombudsman (England), there are ombudsman schemes for a range of different consumer services, including many professions, public utility companies such as energy, water, and telephones, and financial services such as banks and insurance companies.

Ombudsmen are independent from the organisations they investigate. Ombudsman schemes usually provide that reference to the ombudsman is only permitted after attempting to resolve the complaint through an organisation's internal complaints procedure. It follows from the discussion of disciplinary tribunals and internal disciplinary processes above that the res judicata doctrine can potentially apply to decisions by ombudsmen, but because of the lack of independence, res judicata cannot apply to internal complaints processes.

It is clear that an ombudsman's decision can potentially be challenged in judicial review proceedings[107]. A failure by a public body to carry out an ombudsman's decision can also be

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[101] *Macob Civil Engineering Ltd v Morrison Construction Ltd* (1999) 64 Con LR 1.
[102] Housing Grants, Construction and Regeneration Act 1996, s. 108(3).
[103] *Quietfield Ltd v Vascroft Construction Ltd* [2006] EWCA Civ 1737. It is submitted that *Henderson v Henderson* abuse does not apply for the same reasons as discussed above in relation to arbitration.
[104] *Benfield Construction Ltd v Trudson (Hatton) Ltd* [2008] EWHC 2333 (TCC) per Coulson J at [34].
[105] [2012] EWHC 3194 (TCC), [2013] BLR 352.
[106] *Aspect Contracts (Asbestos) Ltd v Higgins Construction plc* [2014] BLR 79.
[107] *R (Crawford) v Legal Ombudsman* [2014] EWHC 182 (Admin); *R (Hafiz & Haque Solicitors) v Legal Ombudsman* [2014] EWHC 1539 (Admin).

challenged in judicial review proceedings[108]. These, of course, are challenges based on the original decision, rather than relitigating the earlier decision.

Clark v In Focus Asset Management & Tax Solutions Ltd[109] held that the res judicata doctrine can apply to decisions of the Financial Ombudsman. Under the Financial Ombudsman scheme[110] a customer is entitled to complain to the Financial Ombudsman, who will investigate the complaint, giving both sides the opportunity to put their case in writing, and if the complaint is upheld may award compensation up to a financial limit, which at the time was £100,000[111]. Mr and Mrs Clark made a complaint which they said had a value exceeding £300,000. Their complaint was upheld, and the Ombudsman awarded the maximum of £100,000 and recommended that the financial adviser should make full compensation. Under the scheme the award became binding only if it was accepted by customer. Mr and Mrs Clark accepted the £100,000 stating they did so subject to their right to claim more in court proceedings. They in effect used the £100,000 as a fighting fund, and started court proceedings against the financial adviser for the rest of their losses.

Their court proceedings were struck because the complaint to the ombudsman raised a question based on facts amounting to a cause of action; the ombudsman made a judicial decision; and the court proceedings relied on the same cause of action between the same parties. The burden of proving these points rests on the party seeking to strike out for res judicata, in this case the financial adviser. It follows from this that not every decision by the Financial Ombudsman will involve res judicata. For example, if the complaint referred to the ombudsman does not constitute a cause of action (such as a client care or ethics issue not amounting to a legal cause of action), the first condition will not be satisfied. Further, Mr and Mrs Clark would not have been estopped if they had rejected the ombudsman's award[112]. Their purported reservation of the right to claim further damages did not prevent them being estopped[113].

Arden LJ inclined to the view that *Henderson v Henderson* abuse might apply where an ombudsman's decision was followed by court proceedings[114]. Davis LJ, on the other hand, had reservations over this. Complainants before ombudsmen often do not have legal advice, and may through lack of experience with legal disputes decide to raise only some of their complaints before the ombudsman, not realising that doing so may preclude them from raising them in later litigation[115]. His lordship's view was that any *Henderson v Henderson* application following a decision by an ombudsman would have to be scrutinised very closely.

A rather difficult decision is *Binns v Firstplus Financial Group plc*[116], which held that a County Court claim following an award of full compensation under the Complaint Handling Procedures of the Financial Ombudsman Service would be struck out under CPR, r. 3.4. The case is difficult partly

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[108] *R (Nestwood Homes Developments Ltd) v South Holland District Council* [2014] EWHC 863 (Admin), [2014] BLGR 354.
[109] [2014] EWCA Civ 118, [2014] PNLR 19.
[110] Established by the Financial Services and Markets Act 2000.
[111] The limit has subsequently been raised.
[112] By virtue of the Financial Services and Markets Act 2000, s. 228(6).
[113] Arden LJ at [108], because the doctrine operates independently of the wishes of the parties.
[114] At [80].
[115] At [129].
[116] [2013] EWHC 2436 (QB), [2014] Bus LR 110.

because it misapplies r. 3.4(2)(a)[117], and partly because it does not say expressly whether it is applying the *Henderson v Henderson* form of abuse of process. CPR, r. 3.4(2)(b) has been used in the company law context as a basis for striking out unfair prejudice proceedings under the Companies Act 2008, s. 994, independently of *Henderson v Henderson.* Where an unfair prejudice petitioner has failed to accept a reasonable offer to buy their shares, it is an abuse of the court's process to proceed with litigation where the respondent has already offered the petitioner all the relief that is likely to be granted by the court if the proceedings are successful[118]. Where court proceedings have already started at the time of the offer, the proceedings will only be struck out if the offer includes the petitioner's costs. A pre-litigation offer does not need to include costs. On this basis *Binns v Firstplus Financial Group plc* is perfectly compatible with the approach of the House of Lords in *O'Neill v Phillips*, and is to be welcomed both for its encouragement in the use of low-cost ADR schemes, and for avoiding unnecessary and disproportionately expensive subsequent court proceedings.

Clark v In Focus Asset Management & Tax Solutions Ltd was based very closely on the terms of the Financial Ombudsman scheme. Whether a similar approach is available under other ombudsman schemes is an open question. It is suggested that there is scope for applying *Clark* to at least some other schemes. In *Clark* a point made repeatedly by Arden LJ delivering the leading judgment was that the legislation setting up the scheme said in terms that it was '... a scheme under which certain disputes may be *resolved* quickly and with minimum formality by an independent person[119].' Similar wording is used in the statutory scheme for the Legal Ombudsman, with the Legal Services Act 2007, s. 113(1) providing that the purposes of the scheme is to enable complaints to '... be resolved quickly and with minimum formality by an independent person.' Like the Financial Ombudsman scheme, many complaints to the Legal Ombudsman will amount to causes of action, so there ought to be no reason why res judicata should not apply to the Legal Ombudsman as well.

Conclusion

The idea that res judicata is a common law doctrine based on the adversarial system should have been dispelled long ago. If it had been correct, res judicata would not extend to many non-court-based dispute resolution processes. In fact, the principle that the parties should not be permitted to relitigate their disputes after a final decision is one of almost universal application in most legal systems. As discussed in this article, res judicata applies to arbitrations, and it does not matter whether the arbitral tribunal adopted an adversarial or inquisitorial procedure.

It is reasonably common for overseas jurisdictions to recognise arbitral awards as res judicata, at least for the purpose of enforcement of the award in their courts, and often for wider purposes as well. Many countries have adopted arbitration laws informed by the UNCITRAL Model Law for International Commercial Arbitration. Examples include the Arbitration Act in Japan, which provides

[117] At paras [23] and [25]. The claimant plainly had a cause of action, so r. 3.4(2)(a) should not have been engaged at all unless the original cause of action had merged with the Financial Ombudsman's award, a point not discussed in the judgment, and which would have been a very difficult decision to make without a careful analysis of the authorities.

[118] *O'Neill v Phillips* [1999] 1 WLR 1092.

[119] Financial Services and Markets Act 2000, s. 225(1) (author's emphasis). See Arden LJ at [19], [101], [114] and [118], where her ladyship places similar emphasis on the word 'resolving'.

that an arbitral award has the same effect as a final judgment for the purposes of res judicata[120]. In China, the Arbitration Law[121] recognises the principle of res judicata in respect of arbitral awards. It is only if the award is cancelled or if enforcement is disallowed by a People's Court that the parties may re-apply for arbitration or initiate legal proceedings in the People's Court[122]. Spain's Arbitration Act, which was passed in 2003, is also based on based on the UNCITRAL Model Law. By art. 43 it provides that a final arbitral award has the effects of res judicata and shall only be subject to an application for revision in accordance with the procedure established in Spain's Civil Procedure Act for final judgments[123]. The Saudi Arbitration Law of 2012 is based heavily on the Egyptian Arbitration Law No. 27 of 1994, and has been drafted to be compliant with the UNCITRAL Model Law[124]. By art. 52 it provides that arbitration awards rendered in accordance with the provisions of the Saudi Arbitration Law have the authority of res judicata and shall be enforced. The overall picture is that a wide range of jurisdictions, with very different legal traditions, recognise res judicata principles even for arbitral awards.

From this it can be safely concluded that res judicata is not dependent on the adversarial nature of English common law, and nor is it a rule of pleading with its English common law procedural baggage. The strict rules of evidence rarely apply to ADR processes, and the fact the principles of res judicata apply to processes such as construction industry adjudications and the decisions of the Financial Ombudsman must mean that res judicata is not (or is no longer) a rule of evidence. The strict rules of evidence have not applied for some time to small claims in England and Wales, and no-one has suggested that res judicata does not apply to small claims decisions.

That leaves as the remaining theory that res judicata is a substantive rule of law. This view is gaining traction in recent decisions[125]. Such a theory provides a coherent basis for explaining why res judicata applies to the range of ADR processes described in this article. As a substantive rule of law, this must cover merger, cause of action estoppel and issue estoppel. While related to res judicata, *Henderson v Henderson* abuse has a different jurisdictional basis, and is a procedural rule based on what is now the CPR, r. 3.4. It is this jurisdictional difference that explains why certain ADR processes may be subject to the res judicata doctrine while not being subject to striking out on the *Henderson v Henderson* principle.

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[120] See L Nottage, *Japan's new arbitration law: domestication reinforcing internationalisation?,* (2004) Int ALR 54 at p. 57.

[121] Which is also influenced by the UNCITRAL Model Law.

[122] M. Kidwell and J Brown, *China: a perspective on international arbitration in China, recent developments and CIETAC arbitration* (2004) Const LJ 253 at p 258.

[123] D Cairns and A Ortiz, *Spain's new Arbitration Act* (2004) Int ALR 39. See also S Riegler, *Is Austria any different? The new Austrian arbitration law in comparison with the UNCITRAL Model Law and the German arbitration law* (2006) Int ALR 69. More than 50 countries have ratified the UNCITRAL Model Law.

[124] See also AY Baamir, *The new Saudi Arbitration Act: evaluation of the theory and practice* (2012) Int ALR 219.

[125] *Price v Nunn* [2013] EWCA Civ 1002 at [69]; *Arts & Antiques Ltd v Richards* [2013] EWHC 3361 (Comm) at [18], [2014] PNLR 10.