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THE EFFECT IN THE EUROPEAN COMMUNITY OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS: RECOGNITION, *RES JUDICATA* AND ABUSE OF PROCESS

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COMPARATIVE REPORT

The Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, Res Judicata and Abuse of Process

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Introduction to the Study

The British Institute of International and Comparative Law

The British Institute of International and Comparative Law continues to pursue a mission established in 1895 to understand and influence the development of law on a supranational rather than merely national basis. The Institute promotes the international rule of law and human rights by its activities in the fields of comparative law, international law and the conflict of laws, and in the fields of European law and Commonwealth law. The Institute's unique contribution is in moving freely over the boundaries that divide these fields of law and bringing out the underlying unities. Its individual projects involve practitioners and leading academics as advisers, and are undertaken under guidance and supervision of five specialised sections of an Advisory Board, which reports in turn to the Board of Trustees.

The core activities of the Institute include academic research, publication of the International & Comparative Law Quarterly (ICLQ), consultancy work for government departments, international organisations, development agencies and other clients, monitoring and project programme reviews, undertaking comparative law studies and surveys, and development, organisation and management of a programme of distinguished lectures, conferences, seminars and workshops. These provide a forum for policy discussion and professional training, as well as interaction with foreign lawyers, academics and judges. The strength of the Institute lies in its ability to provide high quality legal research expertise, drawing from its own permanent staff of research fellows as well as from its extensive network of experts and advisors. The Institute's varied research profiles, together with its proven track record in managing large projects, give added value and sustainability to any project that it is associated with.

Background to the Study

This study, undertaken from April 2007 until April 2008, is part of the European Commission's 2006 Framework programme for judicial co-operation in civil and commercial matters. In the endeavour to establish a more effective civil justice area, the principle of mutual recognition has been proclaimed the cornerstone of judicial cooperation within the European Union. This principle equally lies at the heart of the Brussels/Lugano Regime, although its practical precise application and effectiveness have been little considered in European and national case law, and legal writing. After 40 years of legal integration in the area of civil justice, it remains true that getting involved in a civil justice matter abroad is a frightening, complicated and unknown prospect for most Europeans. Over half of European citizens are concerned that they do not know the rules of procedure in other countries, and indicate a preference for harmonised, uniform procedures and rulings at the EU level (source: *Eurobarometer* 292).

Europeans are concerned about their ability to access civil justice abroad, or to see a civil court ruling enforced in another country. They look to the EU to ease their path. In this regard, to date, the focus in the EU has largely been on the *enforcement effect of judgments*, while other significant functions of judgments in civil and commercial matters were largely overlooked, including the *res judicata effect of judgments* in preventing the needless repetition of final judicial findings. This lacuna in attention is unjustified considering the risk of unnecessary proliferation of cross-border litigation in the EU if the finality brought by judgment in civil and commercial disputes is not adequately ensured in Member States other than where the judgment is initially rendered. Due attention to this subject was justified and is now achieved in the form of the present study. It features a in-depth exploration of the pertinent substantive issues involved in this key aspect involved in the mutual recognition of judgments, and moreover, into the legal and judicial practice in the Member States in this area. It therefore constitutes the necessary basis for an informed discussion of the question how litigants can be protected, the consistency of legal orders maintained, and civil justice resource economy ensured by ensuring the finality and effectiveness of judgments in civil and commercial matters throughout the EU.

Scope of the Study

The study examines the preclusive effects of judgments, domestically and internationally, which are commonly and historically associated with the doctrine of *res judicata*, and analyses how they are relied upon in proceedings in 9 different legal systems. In light of the advice of the Project Advisory Board, which was received at an early stage of the study, in terms of feasibility, the scope of the study does not

address the dispositive, evidential, and enforcement effects of judgments, but rather focuses on the procedural effects of judgments, i.e. the preclusive effects of judgments, as described above. The Project, being principally concerned with the recognition of judgments under Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in *civil and commercial matters* is limited, even in its study of rules applicable in domestic situations and in cross-border situations to judgments falling within the subject matter scope of the Brussels Regulation, as defined by Article 1. The Project is thus concerned only with judgments in "civil and commercial matters" and does not extend to other matters which are excluded from the scope of the Brussels Regulation. In many cases, the dividing line between judgments falling within the scope of the Brussels Regulation, and those falling outside, is a narrow and uncertain one and the Project was not concerned with drawing or re-defining that line.

Objectives of the Study

The study and the post study activities promote a better understanding of the Member State rules concerning the authority and effectiveness of judgments, and their impact on the Brussels/Lugano Regime. In light of discussion at the meeting of the Advisory Board on 19 September 2007, concerning the scope and objectives of the Project, and with a view to using the available resources in the most effective manner, it was proposed that the principal objectives of this exploratory study be limited to an analysis of the law and legal/judicial practice concerning domestic and foreign judgments in the selected legal systems. It was acknowledged in particular that any findings, conclusions and recommendations of the final study could not be based on an *empirical analysis* or *impact assessment* sufficient to establish whether any legislative measures at the EC level would facilitate the proper functioning of the EU civil justice area, or its internal market in general. This implies that the study does not consider whether disparities between the Member State rules create any impediment to the functioning of the principle of mutual recognition, nor does it analyse whether any EC-wide solution to such problems is desirable and viable. Its main objective is rather to provide the necessary substantive basis for the aforementioned discussion of how litigants can be protected, the consistency of legal orders maintained, and civil justice resource economy ensured by ensuring the finality and effectiveness of judgments throughout the EU.

Methodology of the Study

The Member States covered by the study have been chosen on the basis of a *functional comparative method*, which includes the major legal systems and the legal systems represented in the EU. The study is based on a comparative analysis of the legal practice of seven (7) EU Member States: England and Wales, France, Germany, Netherlands, Romania, Spain, and Sweden. Moreover, the study contributes to the identification of best practices globally by examining the drawing lessons from other non-EU jurisdictions, as much as evaluating the legal practice in the Member States. Accordingly, the following non-EU countries were included in the study: United States and Switzerland. The analysis of Switzerland was further attractive for the purpose of providing an insight into the implementation in practice of the Lugano Convention. Throughout this report, reference is made to the US National Report for the purpose of allowing the drawing of informative and constructive parallels between the legal systems of the EU and the US.

The inquiry into the nine (9) legal systems covered by the study was based on a meticulously prepared Questionnaire, which was prepared by experts in the field of (international) civil procedure originating in different legal systems (both common law and civil law), discussed with and commented on by a Project Advisory Board consisting of the most senior legal/judicial practitioners and legal academics, and finally established after its detailed consideration by the Project National Rapporteurs. The Questionnaire was furthermore accompanied by detailed explanatory notes, explaining the pertinence, aim and substance of each and every question. The National Reports were prepared by highly qualified researchers and are based on an analysis of the law *in practice* rather than merely the law in the books. The reports thus feature a detailed consideration of the relevant case law and, accordingly, clearly benefit from a sense of reality. The Comparative Report is based on these National Reports, which were summarised in a Comparative Table. This table was repeatedly reviewed for its accuracy by the National Rapporteurs. The same was repeated for the eventual Comparative Report.

Structure of the Study

The study consists of four parts: (1) Judgments; (2) Preclusive effects of (domestic) judgments; (3) Preclusive effects of judgments within the Brussels/Lugano Regime; and (4) Preclusive effects of judgments from third states. This structure has been followed closely in the Project Questionnaire, in the National Reports, and in the Comparative Report. This structural consistency allows for easy and efficient reference between the different documents.

Part I consists of an evaluation of the character of judgments in each of the countries surveyed. The Rapporteurs provided information relating to: (1) the concept, form, structure and terminology of judgments; (2) the final determination and findings on issues of fact and law; (3) the binding character of a judgment; and (4) judgments that are capable of having preclusive effect.

Part II evaluates what preclusive effects, if any, are attributed to domestic judgments in the legal systems examined. In doing so, it distinguishes between claim, issue and wider preclusion. These are independent concepts, which do not relate or derive from any particular legal system. This part further identifies the nature, legal basis, and rationale of each type of preclusion, as well as its application in specific contexts, such as between the Claimant and Defendant, other participants, representative actions, and in relation to third persons. It further considers how the preclusive effects of a judgment are invoked before the court, and whether any exceptions apply.

Part III assesses the practice under the Brussels/Lugano Regime in relation to claim, issue and wider preclusion with regard to the law applicable to such effects and the conditions for their application. More generally, it evaluates the type of judgments recognised, the procedural aspects and effects of judgment recognition, and any relevant exceptions that apply.

Part IV consists of a brief survey of preclusion in the countries surveyed with regard to third state judgments. It considers whether third state judgments are recognised in the legal systems examined, the conditions and exceptions applicable, and the preclusive effect that such judgments are accorded and in accordance with what legal system.

The Study further consists of several Annexes. With a view to their size, *Annexes II* through *V* are not included in this document but accompany this report as separate documents. *Annex I* is a Glossary of Terminology used in the study. This glossary refers to common terms used, to the extent possible, throughout the study. Nonetheless, the National Rapporteurs have consistently included references in their reports to the original concepts used in their own language.

Annex II contains national Case Studies, which were prepared in order to clarify the operation of national rules relating to preclusion in practice. Accordingly, the National Rapporteurs very kindly agreed to consider and answer questions relating to three different case study scenarios. Two concern tort claims, the third involves claims based on contract. The exercise has resulted in short answers, which can easily be compared. The National Rapporteurs have included, where relevant, references to particular issues in their legal systems. As indicated, the purpose of the case studies is to clarify the operation in practice of the legal systems examined in the course of this study. They do not substitute, but complement the National Reports, which are annexed to this report.

Annex III consists of copies of Sample Judgments in the legal systems examined. With a view to language difficulties, these samples have been clarified and made accessible by the National Rapporteurs by means of common identifiers (e.g. Date of judgment, Case number, Judgment reference number, Court [Supreme Court/Court of Appeal/First Instance Court], Judge(s), Names of parties, Procedural positions of parties, Legal representatives, Facts, Procedural history, Identification of issues for determination, Discussion (reasons), Disposal of case (operative part)). Comparative Table, which features summaries of the national reports, again following the basic structure of the study to allow for quick reference. *Annex IV* consists of the Comparative Table of the legal systems considered. This table summarises the National Reports and may be used for quick and easy reference. *Annex V* consists of the National Reports.

Implementation of the Study

The team of researchers at the British Institute involved with the execution of the study consisted of Mr Jacob van de Velden (project director and national rapporteur), Mr Andrew Dickinson (project consultant and national rapporteur) Ms Justine Stefanelli (research fellow and national rapporteur), Mr Edward Ho

(research assistant), Ms Natasha Nakai (research assistant), Ms Floor Rombach (research assistant), Ms Miranda de Savorgiani (research assistant), and Mr Daniel Vasbeck (research assistant).

The National Rapporteurs were chosen because they were particularly well placed to identify and subsequently approach their domestic stakeholders with specific inquires aimed at retrieving information, and to assess whether the current formalities in their respective Member State cause difficulties in practice. The following experts have prepared national reports: Professor Alegría Borrás, with the assistance of Ms Esther Rivera (Spain), Mr Andrew Dickinson (England and Wales), Mr Christian Heinze (Germany), Professor Lars Heuman, with the assistance of Mr Jonas Olsson and Mr Mikael Pauli (Sweden), Professor Emmanuel Jeuland (France), Professor Paul Oberhammer, with the assistance of Mr Urs Hoffmann-Nowotny (Switzerland), Dr. Norel Rosner (Romania), Ms Justine Stefanelli (United States), and Mr Jacob van de Velden (Netherlands).

Similarly, our Advisory Board consisted of experts in the field from both inside and outside of the European Union. The Advisory Board consisted of the following members: The Rt Hon Sir Francis Jacobs KCMG QC (Professor of European Law, Kings College University of London, *chair*), Lord Mance (Lord of Appeal in Ordinary, House of Lords), Mr David Anderson QC (Brick Court Chambers), Dr Peter Barnett (consultant), Mr Peter Beaton (consultant), Professor Adrian Briggs (Oxford University), Professor Burkhard Hess (University of Heidelberg), Mr Adam Johnson (Herbert Smith LLP), Mr Alex Layton QC (20 Essex Street Chambers), Professor Paul Oberhammer (University of Zurich), Professor Rolf Stürner (University of Freiburg), Ms Mona Vaswani (Allen & Overy LLP), Professor Rhonda Wasserman (University of Pittsburgh), and Professor Mathijs ten Wolde (University of Groningen).

The study initiated with the preparation by the Institute of a Questionnaire, prepared by Mr Jacob van de Velden and Ms Justine Stefanelli in close cooperation with Mr Andrew Dickinson. Prior to the dispatch of the questionnaire, the project Advisory Board (on 19 September 2007) and the National Rapporteurs (on 4 & 5 October 2007) scrutinised the Questionnaire and provided the researchers with feedback on prior drafts. The national reports, which were prepared by the national experts, were analysed by the Institute and the National Rapporteurs received feedback on their initial reports. Eventually, the Institute analysed and compiled all the information provided by the National Rapporteurs in a Comparative Table and provided it to the National Rapporteurs for comments. The National Rapporteurs then gathered at the Institute (on 14 & 15 March 2008) for a final discussion on the Institute's findings and to clarify any misunderstanding in the Institute's draft Comparative Report. A large part of the analytical research was conducted centrally at the British Institute through a comprehensive study of the relevant EC legislation and the case law of the European Court of Justice. Another major source of the Institute's research was derived from National Reports prepared by the above-mentioned National Rapporteurs.

For the purpose of managing the project, the Institute developed a project website, which is accessible for the public (http://www.biicl.org/judgments/). Moreover, the Institute introduced the use of a project extranet, which is accessible for the National Rapporteurs, the members of the Advisory Board, and the European Commission. The extranet was used to inform all the participants in the project on the progress of the study and to make easily available the national reports, as well as any relevant documentation such as European and domestic case law, feedback on the national reports, and literature.

Post Study activities

After the completion of the study, the Institute will organise a public conference where the findings of the study will be discussed. Moreover, the conference will provide the first opportunity for the discussion of the question how litigants can be protected, the consistency of legal orders maintained, and civil justice resource economy ensured by ensuring the finality and effectiveness of judgments in civil and commercial matters throughout the EU. Moreover, it will be considered at the conference whether a harmonised approach concerning the preclusive effects of foreign judgments is desirable and viable in the European civil justice area. The conference aims at bringing together all interested parties, including academics, practitioners and public officials, in addition to the National Rapporteurs, the project Advisory Board. Finally, to ensure the wide dissemination of the outcome of the study, the Institute's report, including the national reports and any conference papers will be published by the Institute in 2009.

Guide to the project CD-ROM

The CD-ROM provided to the Commission with the hard copy study documents contains all the relevant study documents in 6 numbered folders: 1. COMPARATIVE REPORT; 2. COMPARATIVE TABLE; 3. NATIONAL REPORTS; 4. CASE STUDIES; 5. SAMPLE JUDGMENTS; and 6. QUESTIONNAIRE MATERIALS. The contents of these folders are self-explanatory.

COMPARATIVE REPORT

The Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, Res Judicata and Abuse of Process

I. Judgments

A. The concept, form, structure and terminology of judgments

Please describe the typical concept, form, structure and terminology of judgments in your legal system.

Comparative response

Judgments in the analysed legal systems typically include components that may usefully be divided into three parts: (1) practical information; (2) a statement of facts and legal reasoning; and (3) an operative part. With some variation, the practical information generally includes the names of the court, parties, legal representatives, the number of the case, and the date. The second part may be said to consist of the procedural history of the case, the facts of the dispute, the applicable legal rules and analysis as to the application of those rules to the facts. This section will also include the court's reasoning for its judgment, where legal systems require that reasons must be provided. Finally, the operative part is the actual decision of the judicial authority on the claims put forward by the parties. It should be noted that a judgment in one legal system is comprised of two separate documents: (1) the formal document setting out the terms of the judgment, and (2) the document setting out the reasons given by the court for the judgment.[1] Some legal systems require that the court delineate the steps for appeal if an appeal is possible, while some also require that the judgment is signed in order for it to be official.[2]

All of the legal systems analysed require the court to state its reasons for its decision[3], and all of the countries evaluated follow the requirements of Article 6 ECHR[4]. It is often the case that the court must address all of the issues disputed by the parties.[5] One National Report indicated that the courts often make their reasons available in draft to the parties prior to judgment so that they may consider the consequences of the court's decision and address any issues they may feel necessary to the resolution of the case.[6]

Judgments may generally be view as final or non-final, reversible or irreversible and distinguishable according to whether they were procedural decisions or decisions on the merits. Further distinctions include whether the judgment is in relation to a person (*in personam*) or a thing/status (*in rem*), or whether or not the judgment is one for money. Each legal system breaks these categories down further, especially with regard to final judgments. The most common typology refers to whether the judgment is condemnatory (ordering a party to do or not do something), declaratory (confirming or denying a legal right/obligation or status), or constitutive (creating, changing, or ending a legal right/obligation or status). One National Report indicated that distinctions between judgments were based on the particular nature of its legal system.[7]

Sample copies of typical domestic judgments in the legal systems examined are attached as Annex II to this report. With a view to language difficulties, these samples have been clarified and made accessible by the National Rapporteurs by means of common identifiers (e.g. Date of judgment, Case number, Judgment reference number, Court [Supreme Court/Court of Appeal/First Instance Court], Judge(s), Names of parties, Procedural positions of parties, Legal representatives, Facts, Procedural history, Identification of issues for determination, Discussion (reasons), Disposal of case (operative part)). Reference should, however, also be made to the corresponding sections of the National Reports, which feature an in-depth discussion of the concept, form, structure and terminology of judgments in the legal systems considered.

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[1] England & Wales Report Part I.A.
[2] France, Germany, United States.
[3] In the United States federal judges are only required to make findings of fact and state conclusions of law during a bench trial; Where the case is tried before a jury, a statement of reasons is not required, although a judge may choose to issue an opinion (Report p 6).
[4] It should be noted in this respect that the Swedish Report indicated that although its practice of requiring reasons does not seem to have been directly influenced by the ECHR, its practice has not contradicted the Convention's provisions (Report Sweden, Part I.A).
[5] See, e.g., France, Netherlands, Spain. The English Court of Appeals has interpreted Article 6 as only requiring that the Court demonstrate in its reasoning that the essential issues raised by the parties have been addressed by the court, rather than addressing, as some have argued, its reasons for every decision it makes, such as why it preferred one piece of evidence over another.
[6] Report England & Wales Part I.A, p 8.
[7] Netherlands.

B. The final determination and findings on issues of fact and law

How does the court's determination of a matter in your legal system relate to the findings on issues of fact and law on which this determination is based?

Comparative response

Judgments in most legal systems demonstrate a distinction between the findings of fact and law and the actual decision of the court. In most countries, the findings of fact and law form the reasoning and become important for the interpretation of the judgment's operative part.[8] In these legal systems, it is also usually the case that the reasons, although they assist in interpretation, are not binding on the parties. Some systems indicate that the findings of fact and law (i.e. the reasons) should only be consulted in the event that the operative part is unclear. Furthermore, it is important to note that some countries require that the operative part logically flow from the reasons as stated in the judgment[9], and one country's law[10] allows for the annulment of a judgment if it appears that the decision was either not based on the reasoning or contradicts the reasoning.

Some systems allow appellate courts to reconsider findings of fact and law as found by the court of first instance.[11] Any restrictions on the right to review are usually embodied in a prohibition of the review of the lower court's findings of fact. Some countries specifically indicate that because it is only the court's decision that is binding, rather than the reasoning, a successful party may not challenge a finding of fact or law in the reasoning to which he/she objects, unless that finding is made the subject of a declaration.[12] Thus, if the court wishes to allow for an appeal by an otherwise successful party against a particular finding, it must include a declaration with regard to that finding in the decision.[13]

C. The binding character of a judgment

Please describe the prerequisites for a judgment to have binding character so as to be capable of having preclusive effects in your legal system.

Comparative response

Generally, a judgment must be considered valid, irreversible (or final), and in some cases[14], determined on the merits, before it can have binding effect. The concept of "on the merits" refers to a determination of the substantive validity of the claim, or the court's treatment of the judgment as such. Some legal systems indicate that a formal pronouncement of the judgment is a component of whether it will be considered binding.[15] Arguably the most important requirement is that the judgment must be final. In most countries, finality depends on whether the judgment is open to appeal or whether an appeal has been lodged. Where that is the case, the judgment will not be capable of having preclusive effect until the period for appeal has lapsed or unless no appeal has been lodged.[16] Appeal in these circumstances generally refers to methods of ordinary, versus extraordinary, appeal. Most countries' legal systems do not (ordinarily) allow a judgment to be attacked after the time period during which to lodge an ordinary appeal has passed. Therefore, it is often the case that an erroneous judgment will be immune from attack once the time for ordinary appeal has lapsed. Although some countries[17] view preclusion as starting from the moment the judgment is rendered,

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[8] See, e.g., Germany, Sweden, Switzerland.
[9] Netherlands, Romania.
[10] Report Romania, Part I.B p9.
[11] France, Netherlands.
[12] Report England & Wales, Part I.B p13; Report Switzerland, Part II.A.5 p18 n 224.
[13] This is not the case in Switzerland, however.
[14] England & Wales, Romania, Scotland, Spain, United States.
[15] England & Wales, France, Germany, Netherlands, Switzerland.
[16] This is the case in all the countries surveyed except for England & Wales, France, Romania, and the United States for which legal systems the relevant point in time for preclusion is the moment the judgment is rendered. Please note that the word used in Spain is "final" and not "irreversible" in those cases in which the Civil Procedure Act does not provide for an appeal against the decision, when the period provided for by law in order to appeal against a judgment has expired and none of the parties has appealed against it, when the party drops the appeal, or when the court refuses the appeal *ab initio* because it does not fulfill the legal requirements or prerequisites (Report Spain, Part II.A.1, p19).
[17] See fn 15 above.

and others from the moment the judgment becomes irreversible, other rules, such as *lis pendens*, may serve to fill in the gap between these two points by, for example, preventing the filing of the same claim while a judgment is pending.[18] Finality may occur at an earlier stage with regard to issue preclusion.[19]

For those legal systems in which the commencement of preclusive effects is not linked to reversability on appeal, generally a reversal by an appellate court will put an end to the judgment's preclusive effects. Most countries' legal systems also allow a judgment to be challenged by a separate action, for example, by means of extraordinary appeal, although the circumstances in which such action may be brought vary.[20]

Where a legal system follows the principle of party autonomy[21] and an inconsistent judgment has been rendered due to a party's failure to invoke the preclusive effect of a prior judgment or a court's unwillingness to acknowledge such effects, the prevailing rule seems to be that the judgment rendered first in time will prevail.

D. Judgments that are capable of having preclusive effects

Please identify and describe (1) the types and characteristics of judgments in your legal system that are capable of having preclusive effect and (2) any types of judgments that are not capable of having preclusive effects.

Comparative response

Each of the countries evaluated provided a list of the different types of judgments in their legal systems and indicated whether or not they were capable of having preclusive effects. Typical distinctions among the types of judgments include the following: (1) whether *in rem* or *in personam*; (2) whether final or interlocutory; and (3) categorizations according to the circumstances in which they were given, e.g. at trial or default, consent, dismissals based on procedure, etc. The common thread throughout this exercise was the fact that a judgment must be a final decision on the merits[22] (or treated as such[23]), regardless of the judgment's designation (e.g. as consent, declaratory, interlocutory, etc.). The preclusive effect depends more on the individual circumstances of the proceedings rather than the type of judgment that is issued by the court.

However, the situation is slightly different with regard to the preclusive effects of constitutive judgments against third persons. All of the legal systems evaluated distinguished between the *erga omnes* (extension of the binding effect to non-parties) effect of such a judgment and its preclusive effect in new proceedings. For example, one legal system specified that the preclusive effects of a constitutive judgment differ in how they apply to the parties to the action and all other persons.[24] In relation to the parties to the action, a constitutive judgment will result in claim and issue preclusion, but with regard to all other persons, the binding nature of the judgment has its limitations, e.g. it will not be binding if a person who has an interest in the status was unable to contest its existence as a party. Another legal system notes that judgments *in rem* are capable of binding strangers, but only as to questions of status thereby conclusively determined and closely related questions of fact.[25] The *erga omnes* effect of constitutive judgments is largely explained by

[18] France, Spain, Sweden and Switzerland. Although there is no official rule regarding *lis pendens* in the United States, it is often the case that a court will suspend its proceedings pending the outcome of the appeal in order to avoid inconsistent judgments.
[19] Report United States, Part II.C p 7.
[20] England & Wales, France, Germany, Netherlands, Romania, Spain, Sweden, Switzerland, United States.
[21] All the legal systems analysed follow the principle of party autonomy with regard to the invocation of preclusion with the exception of Germany, Sweden and Switzerland. The Romanian Report indicated that preclusion may be invoked by either the judge or the parties. The Spanish Report indicated that preclusion may be declared by the court *ex officio* even if it has not been argued by the parties, where its existence is clear (Part II.A.4, p28).
[22] A decisions to reject a claim on jurisdictional, procedural or technical grounds seem no less capable of satisfying those conditions, although such a judgment may be very unlikely under national rules to preclude re-litigation of the claim (as opposed to the specific ground for rejection) in later proceedings within the same Member State. See, for instance, Report England & Wales, Part III.B.1, p58-9.
[23] This applies in certain legal systems in relation to default judgments.
[24] United States Report, p11.
[25] England & Wales Report, p34; Netherlands. For instance, when a Netherlands court annuls the registration of the deposit of a trademark (Article 14 D Benelux Convention on Intellectual Property), its decision has binding effect. The effect of the court's decision affects third parties to the extent that it concerns the annulment of the trademark deposit registration. This does not mean, however, that the findings of the court on which its annulment decision is based have binding effect (or in the words of the Hoge Raad

referring to the particular interest of the state in ensuring that such proceedings are conducted with a view toward making firm legal determinations that can serve as a legal premise in all matters in which such status may be subsequently significant.[26] Similarly, one legal system indicated that the policy was based on the "particular public interest in these proceedings".[27]

II. Preclusive effects of judgments

This part of the report is concerned with the effects of a judgment (including, for this purpose, any statement of the reasons given for a judgment) insofar as it restricts the ability of the participants in the proceedings in which it was given, or related or non-related persons, to bring or conduct later proceedings (whether or not forming part of the same action) as they would wish. In particular, its focus is on so-called rules of "res judicata" or their equivalent. This part is not concerned with the evidential status of the record of judgment, nor with the value of judgments as a legal precedent for future cases (*stare decisis*), both of which fall outside the scope of this report.

For the purpose of this study a distinction has been drawn between "claim preclusive effects" and "issue preclusive effects" of judgments. These terms are used as descriptive categories, the former (which might also be described as "same claim preclusion") embracing rules of preclusion affecting the re-litigation of claims which a legal system considers to have been determined in earlier proceedings, and the latter relating to rules of preclusion affecting attempts to re-open issues of fact or law which a legal system regards as having already been determined in earlier proceedings. A third category of "wider preclusive effects" was used to accommodate rules of preclusion which are considered to fall into neither of the two aforementioned categories. In the legal systems examined, these wider preclusive effects (where they exist) are generally considered not to derive from the effect of a judgment, but rather from the conduct of parties prior to, during and following proceedings.[28]

For the purpose of determining whether a judgment has issue and/or claim preclusive effect the decisive consideration in most legal systems seems to concern which part of a judgment is considered relevant for the purpose of determining its preclusive effect. A judgment has claim preclusive effect if the findings contained in its *operative part* are attributed binding effect. The same has issue preclusive effect if binding effect is attributed to findings contained in its *reasons*.[29] Consequently, a judgment is deemed to have *claim* preclusive effect for the purpose of this report if a finding contained in the operative part of the judgment is accorded binding effect when the same question arises as an *issue* in a subsequent case.[30] In this sense, the distinction between "finding on the claim" (findings contained in the operative part) and "finding on an issue" (findings contained in the reasons) is known to most of the legal systems examined.[31] The National

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"have to accepted as accurate") in other proceedings. In accordance with Article 236 Rv, this will only be the case for the same parties involved in the original case. This will not be the case for third persons who were not involved as parties in the original case. This implies that if a trademark is deposited anew even though the registration of the deposit of the same trademark was annulled as a result of a constitutive judgment, the Benelux Office for Intellectual Property (BOIP) must examine independently whether the registration is to be refused. The BOIP may not refuse the registration for the sole reason that the registration was previously annulled by the court. On the other hand, it may follow the reasons of the court for its decision, and refuse the registration on those grounds (see Report, Part II.A.3, p 46).

[26] United States Report, p11.

[27] Spanish Report, Part II.A.10 p44.

[28] See Part II.C.1.

[29] Germany judgments, for instance have no issue preclusive effect in this sense. In the grounds for the decision (*Entscheidungsgründe*), the court may address several issues (validity of the patent, jurisdiction, admissibility of the claim, applicable law to the contract etc.). These issues are relevant, but none of the elements of reasoning of the court become binding on the parties. The only thing that is binding is that, for instance, the defendant has to pay 200.000 Euro damages (for breach of the licensing agreement). Should any party wish to extend the scope of the preclusive effect of the judgment to cover the issues determined by the court, he must seek separate declaratory relief on the issue which is incidental to the judgment (*Zwischenfeststellungsklage*, § 256 (2) ZPO). Report Germany, Part I.B, p11.

[30] This form of preclusive effect is recognised in Germany, Romania, Sweden ("*positiv rättskraft*" or *prejudiciell betydelse"*), and Switzerland ("*Präjudizialitätswirkung*"). In some of those legal systems, this is described as the "positive" res judicata effects of judgments, which are contrasted with the "negative" res judicata effects that implies that claims that were decided previously in a final and irreversible manner are procedurally inadmissible (i.e. non-jusiticiable) leading to the dismissal of the case.

[31] Netherlands ("*Geschilbeslissing*" and "*Voorbeslissing*"), Switzerland ("*Hauptfrage*" and "*Vorfrage*"), and United States. In England and Wales, the separation of the formal record of judgment from the reasons of judgment (n 1) above means that, although the distinction between "claim preclusion" and "issue preclusion" is recognised, their relationship with the operative part of the judgment and the reasons is more complex.

Report for Spain, when explaining that Spanish law attributes issue preclusive effect to judgments, refers to an interesting passage in a decision of the Spanish Supreme Court which clearly points out the distinction as described above:[32]

> "… unlike what occurs with the negative effect, the positive effect of res iudicata does not require complete identity, which if it existed would act so as to exclude the second proceeding, for the positive effect it is sufficient, as legal literature has emphasised, if what was decided – what was adjudged – in the first proceeding between the same parties acts in the second proceeding as a conditioning or prejudicial element, in such a way that the first judgment does not exclude the second pronouncement, but rather conditions it, binding it to what has already been decided … It is true that within this general conception, … there are in turn – *two possible options*: one more rigorous, which states that only what is contained in the *operative part* of the judgment is capable of being binding, and another wider or more flexible view which states that the binding effect also extends to those *elements of the decision which condition the ruling while not being specifically included in it*, acting on it as logical determinants. The latter is the view which has prevailed …." (emphasis added)

A. Claim preclusion

1. Existence and nature of claim preclusive effects

Are judgments in your legal system capable of having claim preclusive effects?

Comparative response

The claim preclusive effect of judgments on the basis of the doctrine of res judicata or otherwise are recognised in all legal systems analysed, which use a variety of terminology.[33] In some legal systems, there is an express rule of law contained in either the civil code of procedure or the civil code; in others the doctrine has been confirmed in case law. Differences occur in relation to the nature of the claim preclusive effect of judgments. In *common law* jurisdictions[34], the claim preclusive effect of judgments can be either substantive (through the doctrine of "merger" that operates to extinguish all rights of a successful claimant arising from a cause of action, and instead merges these rights into the rights conferred by the judgment, to create an obligation of a higher nature) or procedural (by way of an evidential or procedural "bar" preventing contradiction by the unsuccessful defendant of an earlier finding contained in a judgment) in nature. In *civil law* jurisdictions, the nature of the claim preclusive effect of a judgment is typically deemed to be merely procedural[35] (i.e. the judgment does not extinguish all rights of a successful claimant arising from a cause of action; it results in a bar that either prevents the bringing of the same claim, or it prevents parties in new proceedings from contradicting the earlier finding on the claim).

2. Policies underlying claim preclusive effects

What are the policy considerations for the claim preclusive effect of judgments in your legal system?

Comparative response

The procedure for the rendering of civil justice is sometimes described as a process in pursuit of the truth as between the parties involved in a dispute. The "truth", which is contentious and often relative to the parties' perspectives may, however, never be satisfactorily established. For the following reasons, it appears to be widely accepted that the quest for the truth must eventually cease in the interests of the parties themselves and the interest of society at large. First, it is uncertain whether the continuation or repetition of litigation

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[32] Judgments of the Supreme Court (20 October 2004, 27 May 2003, 13 October 2000, 17 December 1998, 23 October 1995 and 29 May 1995).

[33] England & Wales (merger and bar), France (*exception de chose jugée*, art. 1351 CC, 122 and 440 CPC), Germany (*materielle Rechtskraft*, §322(1) ZPO), Netherlands (*gezag van gewijsde*, Article 236 Rv), Romania (*putere de lucru judecat*, 1201 Civil Code), Spain (*efecto negativ de la cosa juzgada*), Sweden (*[negative] rättskraft*, Code of Judicial Procedure Chapter 17, section 11), Switzerland (*materielle Rechtskraft*, rule based on case law), and United States (bar and merger, Restatement (Second) of Judgments ss 18 and 19).

[34] England & Wales and United States.

[35] However, it has been questioned in Swedish and Swiss literature whether the above-mentioned "positive res judicata" effect or *Präjudizialitätswirkung,* respectively, of a judgment is procedural or substantive in nature (Reports Sweden and Switzerland, Part II.A.1).

will ever satisfactorily establish the truth from the perspective of both parties and, second, it is extremely doubtful whether any benefit of continuous or repetitive litigation can outweigh the financial and social costs of litigation. Both the public and private interests are reflected in maxims that have historically been advanced to justify the preclusive effect of judgments:[36] (1) *interest reipublicae ut sit finis litium* ("it is in the public interest that there should be an end of litigation"); and (2) *nemo debet bis vexari pro una et eadem causa* ("no one should be troubled twice for one and the same cause").

Notwithstanding divergences in formulation, three main policy considerations are advanced in the legal systems analysed for granting claim preclusive effects to judgments: (1) the protection of litigants and other interested persons by ensuring the finality and effectiveness of judgments, (2) the protection of the consistency of the legal order by preventing the rendering by courts within the same jurisdiction of irreconcilable judgments, and (3) civil justice resource economy requiring the prevention of the waste of resources caused by the needless repetition of final judicial findings.[37] Other reasons advanced include the promotion of "legal peace" between the parties[38], the separation of powers[39], and the prevention of an abuse of the legal system[40]. More generally, the just application of the doctrine of res judicata appears to involve a balancing act between the right to the effectiveness of the judgment by ensuring its finality and enforcement and the right to a fair trial.[41] In practice this requires a determination of the proper scope of the claim preclusive effects of a judgment, both in terms of *what* is precluded and *who* is affected by the judgment.

3. Conditions for claim preclusive effects

What are the conditions for the claim preclusive effects of a judgment?

Comparative response

The identity of *claims* and the identity of *parties* constitute the two principal conditions which must be satisfied before a judgment will have claim preclusive effect in new proceedings. In addition claim preclusive effect may be contingent on the satisfaction of further requirements and variation exists between the different legal systems.[42] Significant differences have been identified between the legal systems considered in the precise interpretation of the concepts of "same claim" and "same parties". The interpretation of these terms is in practice decisive for the scope of the claim preclusive effect of a judgment. A broad interpretation leads to a far-reaching claim preclusive effect, while a narrow interpretation constricts the same.

Three approaches to the concept of "same claim" have been identified. The first considers solely whether there is an identity of the factual cause of action.[43] The second requires an identity of the factual cause of action *and* the relief claimed.[44] The third necessitates an identity of the *legal* cause of action and the relief claimed.[45]

By contrast a generally uniform approach is taken to the concept of "identity of parties", namely that in principle claim preclusive effect extends *only* to the parties to the proceedings leading to the judgment.[46] Third persons are not implicated by the claim preclusive effect of a judgment. Nonetheless, differences

[36] See The Digest, Book 50, ch 17; and Justinian, Institutes, IV 13.5. See also Report England & Wales.
[37] Netherlands, Romania, Spain, Sweden, Switzerland, and United States.
[38] Report Germany, Part II.A.2, p18.
[39] Report United States, Part II.A.2, p17.
[40] *Ibid*.
[41] Article 6(1) ECHR.
[42] See Part I.D.
[43] England & Wales, Netherlands, and United States. In the United States, a transactional approach is used to define whether the same claim has been put forward. This approach considers that where claim preclusion applies, "the claim extinguished includes all rights of the claimant 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" (Report United States, p18). The Spanish Report indicated that the cause of action is made up of the set of facts essential for attaining the legal consequence sought by the Claimant or the title which serves as a basis for the right claimed (Part II.A.3 p23).
[44] Germany and Switzerland. In Switzerland, however, the case law seems ambiguous as to how far the legal cause of action would be considered in addition to these two elements (Report p16).
[45] France and Romania.
[46] England & Wales, Germany, Netherlands, Romania, Spain, Sweden, Switzerland, and United States.

apply between the legal systems considered when it comes to determining precisely which persons are considered to have been "parties to the proceedings". The scope of this term is typically restricted to the named parties in proceedings, in particular the Claimant and Defendant and any co-claimants and co-defendants. However, some legal systems extend the scope of a judgment's claim preclusive effect to third persons who are deemed to have been represented and who are legally bound by a judgment, although they were not named parties in the proceedings. In other words, they are deemed parties for the purpose of defining the scope of a judgment's claim preclusive effect. This may occur in the context of group and representative actions, but is not limited to those cases.[47]

The claim preclusive effect of a judgment typically extends to the parties' privies by blood, by title, or based on an identity of interest.[48] The term "privy" is used predominantly in *common law* jurisdictions. However, the comparative analysis of the legal systems examined shows that in other *civil law* systems, the scope of the claim preclusive effects of judgments extends in similar ways beyond the named parties to so-called (universal or particular) "legal successors" of the original parties.[49] Parts II.A.6-10 discuss in more detail the extent to which the claim preclusive effect of a judgment applies between the (co-)claimant(s) and (co-)defendant(s), other participants, represented persons, persons connected to the (co-)claimant(s) and (co-)defendant(s) and other participants, and third persons.

4. Invoking claim preclusive effects

Please describe how the claim preclusive effects of a judgment are invoked in your legal system.

Comparative response

In some legal systems, courts are required to apply the claim preclusive effect of judgments *ex officio*, although it is conceded that in practice courts will frequently be unaware of earlier judgments and thus largely rely on the parties' initiative.[50] In one legal system, the court is expressly prohibited from applying the claim preclusive effect of a judgment *ex officio*. Consequently, the party that wishes to rely on a judgment's preclusive effect must raise it.[51] Finally, there are states where, in principle, claim preclusive effects must be raised by the party seeking to rely upon it, although exceptionally courts can do so in certain circumstances (e.g. where the existence of a judgment on the same claim is clear) raise claim preclusive effect of their own volition to promote efficiency.[52]

In the event that a judgment's claim preclusive effects are invoked, differences apply between legal systems in terms of how the new proceedings are affected. In some legal systems, the effect of a judgment's claim preclusive effect is that new actions concerning the same claim between the same parties are procedurally inadmissible[53], while in others such actions are admissible but may be challenged or defended on the ground of claim preclusive effects[54].

In some legal systems judgments are capable of having claim preclusive effect when they are final, while in other legal systems it is a prerequisite that a judgment be irreversible.[55] In relation to the latter group, the question arises how courts deal with situations where new proceedings are instituted concerning the same claim while an ordinary appeal has been lodged against the first judgment, or if the time for such an appeal has not yet expired. Two approaches can be distinguished in this regard. Some legal systems feature rules

[47] England & Wales, Netherlands.
[48] England & Wales and United States.
[49] Germany, Netherlands, Romania, Spain, Sweden, and Switzerland.
[50] Germany ,Switzerland, and Sweden (however, as regards Sweden, there is some academic debate as to whether the court *ex officio* should consider also the "positive res judicata" of a judgment and not only the "negative res judicata" effect).
[51] Netherlands.
[52] England & Wales, Spain and United States.
[53] Germany, Sweden and Switzerland.
[54] England & Wales, Netherlands, Romania, Spain and United States. Please note that according to the Spanish Report the action is, in principle, admissible. Claim preclusion is analysed in the preliminary hearing or at the beginning of the trial as a procedural issue and the claim may be disallowed based on this procedural issue.
[55] See Part I.C and Part I.D. Please note that the word used in Spain is 'final' and not 'irreversible' in those cases in which the Civil Procedure Act does not provide for an appeal against the decision, when the period provided for by law in order to appeal against a judgment has expired and none of the parties has appealed against it, when the party drops the appeal or when the court refuses the appeal *ab initio* because it does not fulfil the legal requirements or prerequisites (Part II.A.1 p19).

on *lis pendens* in addition to rules on res judicata, which prevent new proceedings between the same parties on the same claim even if an ordinary appeal has been lodged against the first judgment, or if the time for such an appeal has not yet expired.[56] In one legal system, the new case will be inadmissible with reference to the limited system for means of recourse against judgments.[57]

5. Exceptions to claim preclusive effects

Please verify whether the claim preclusive effect of judgments in your legal system is subject to generally accepted exceptions.

Comparative response

The claim preclusive effect of judgments can be subject to important exceptions. These exceptions operate in various ways: an extraordinary means for recourse against the judgment which could theoretically have claim preclusive effects[58], defences advanced in the course of new proceedings to oppose the claim preclusive effect of a judgment[59], new proceedings in relation to the original judgment which might affect its preclusive effect[60], or the re-opening of proceedings in relation to the original judgment which might affect its preclusive effect[61]. In some legal systems, the available exceptions further depend on the type of judgment involved.[62] Irrespective of the foregoing issue concerning the question how and when exceptions might be invoked, the question arises which *grounds* potentially warrant an exception to a judgment's claim preclusive effect.

In the legal systems considered, the following grounds potentially warranting an exception to a judgment's claim preclusive effect have been identified, although they are not universally applicable: (1) a change in material circumstances after the judgment was rendered[63]; (2) fraud by one of the parties in the course of the original proceedings leading to the judgment[64]; (3) prevention of a party - outside of his own fault - from appealing the judgment[65]; (4) the judgment is (clearly) erroneous[66]; (5) procedural deficiencies in the original proceedings leading to the judgment[67]; (6) new material factual evidence becomes available[68]; (7)

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[56] Germany, Spain, Sweden, and Switzerland.
[57] Netherlands.
[58] England & Wales, Germany, Netherlands, Romania, Sweden, and Switzerland and United States. In England & Wales, this occurs in limited circumstances: (1) the Court of Appeal , and possibly the High Court when sitting as an appeal court , has power in "exceptional circumstances" to recall its decision following a second appeal, in order to remedy "real injustice" which would otherwise be suffered; and (2) the House of Lords (as the ultimate court of appeal) has power to correct any injustice caused by its own order in circumstances where a party has been subjected to unfair procedure through no fault of his or her own (Report Part I.C, p15).
[59] England & Wales, Germany (the Rapporteur clarifies that "*claims which are incorporated in judgments are nevertheless subject to the general substantive law restraints which apply to all rights and are based on the substantive law concept of good faith (Treu und Glauben)"*. See Report Germany, Part II.A.5, p28), Netherlands (the Rapporteur states, for instance, that possible defences are those that aim at preventing an abuse of process, or a violation of the principle of due process. See Report Netherlands, Part II.A.5, p60-1); Switzerland (the Rapporteurs state that under exceptional circumstances, a court may nevertheless disregard preclusive effect based on substantive law if a defence referring to res judicata constitutes an abuse of law (Report Part II.A.4 and 5, p18).
[60] In England &Wales, the court giving judgment has power to recall and alter its decision after giving judgment but before the record of judgment is perfected by sealing where strong reason for doing so is demonstrated (Report Part I.C, p15).
[61] Germany.
[62] For instance, in England & Wales, judgments by consent *"may be impeached not only on the ground of fraud and collusion, but also on the ground of incapacity, want of authority, mistake, uncertainty or other grounds on which contracts may be set aside, although a fresh action must be brought for this purpose."* Report England & Wales, Part II.A.5, p25.
[63] Germany, Netherlands, Spain, Sweden. In Switzerland, no claim preclusive effect occurs in such situations because a new claim is assumed (Report Switzerland, Part II.A.1, p16); In England & Wales, a more general exception (based on "exceptional circumstances") applicable in such circumstances is presently only accepted in relation to the issue preclusive effect of judgments, although it is possible that this approach may change.
[64] England & Wales, Germany, Netherlands, Romania, Switzerland and United States.
[65] Germany
[66] Germany and Sweden (ground limited to legal errors or errors concerning the assessment of evidence, see Report Sweden, Part II.A.5, p25). For the position in England & Wales, see n 58 and n 60 above.
[67] Germany, Romania (the Rapporteur refers to a lack of due service of process in relation to the original proceedings leading to the judgment), and Sweden.
[68] Germany, Romania Sweden and Switzerland. In England & Wales, a more general exception (based on "exceptional circumstances") applicable in such circumstances is presently only accepted in relation to the issue preclusive effect of judgments, although it is possible that this approach may change. See Report England & Wales, Part II.A.5, p23-4.

the judgment whose claim preclusive effects are invoked is irreconcilable with another judgment[69]; (8) the claim preclusive effect would be unfair[70] or undesirable[71]; (9) the claim preclusive effect would be contrary to constitutional or legislative provisions[72]; (10) party autonomy as regards the effects of a judgment[73]; (11) a court decision expressly limits the claim preclusive effect of a judgment[74]; (12) invoking the claim preclusive effect of a judgment amounts to an abuse of law[75]; (13) invoking the claim preclusive effect of a judgment amounts violates the requirement of due process[76]; (14) the claim preclusive effect of a judgment would violate public policy[77]; and (15) the judgment violates the rights guaranteed under the ECHR, including its Protocols[78]. Grounds that are not recognised to justify an exception to the claim preclusive effect of a judgment include: (1) a change in the law[79], or (2) the fact that a judgment is under appeal[80]

Beyond the aforementioned grounds potentially justifying exceptions to the claim preclusive effect of judgments, disputes might arise between the parties as regards the question whether a judgment is actually capable of having preclusive effect in the first place and, if so, what its scope is.[81] In relation to such disputes, a court's decision on the claim preclusive effect of a judgment may further be subject to judicial review[82], although the possibility of appeal in cassation may be restricted due to the factual nature of the finding whether or not a judgment has preclusive effect[83].

In the previous section, the Report addressed general aspects of claim preclusive effects of judgments. The following numbered points address particular questions that may arise in relation to the operation of the claim preclusive effects of judgments in particular circumstances which may be subject to specific rules and conditions. It is appreciated that some of the issues addressed in the previous section will be involved in these specific situations, which are intended to provide an insight into the particularities, if any, of the application of claim preclusion in the circumstances as described.

6. Claimant and Defendant

May a Claimant or Defendant in your legal system be prevented by judgment on a particular claim from bringing or defending fresh proceedings against the Defendant or Claimant based on what is considered in your legal system to be the same claim?

Comparative response

As indicated in Part II.A.3, the claim preclusive effect of a judgment in a new case involving what is considered to be the "same claim"[84] principally[85] only applies between the named parties in proceedings, in

[69] Romania.
[70] United States.
[71] Netherlands.
[72] United States. In the context of EC law, compare the recent decision of the *ECJ* in Case C-119/05 *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA* [2007] *unpublished*. In this case the *ECJ* stipulates a similar exception is adopted in relation to the preclusive effect of a judgment under Italian law, as the preclusive effects attributed under national procedural law to a decision of a national court exceeded the limits of the jurisdiction of the court in question as laid down in Community law (para 59). Arguably, however, this case concerned the limits dictated by EC law to the objective scope of the preclusive granted to a judgment under national procedural law, although it cannot be excluded that EC law might also require exceptions to the claim preclusive effect of judgments if granting this effect impedes the effectiveness of EC law.
[73] England & Wales, Germany, Netherlands, and United States. However, party autonomy is excluded in Sweden.
[74] United States (the Rapporteur states that if the court in the first action expressly reserved the claimant's right to maintain a second action, the general rule of extinguishment of a claim does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant. See Report United States, Part II.A.5, p23).
[75] Netherlands, Switzerland.
[76] Netherlands and Sweden.
[77] England & Wales, Germany, Romania, Spain, and United States.
[78] Germany, Romania, Sweden, and Switzerland.
[79] England & Wales (although note the possible development of an "exceptional circumstances" exception described at n 63 above) and Netherlands.
[80] See, for instance, Report England & Wales, Part II.A.5, p24. This point is relevant only for legal systems where judgments that are not irreversible are capable of having preclusive effect in the first place.
[81] Germany, Netherlands, Spain and Switzerland.
[82] Netherlands, Romania (Report Romania, Part II.A.4, p15), Spain (Report Spain, Part II.A.4, p29).
[83] Netherlands.
[84] See Part II.A.3.

particular the Claimant and Defendant and any co-claimants and co-defendants[86]. In new proceedings between parties who were Claimant and Defendant in the previous case, two factors might influence the answer to the questions whether and, if so, how the claim preclusive effect of a judgment operates in those new proceedings: (1) the outcome of the first case, and (2) the procedural role of the parties in the first and, subsequently, the second case.

In practice, only the first factor gives rise to differences in approach between the legal systems examined. Moreover, these differences can be explained with reference to the differences in the classification in those legal systems of the nature of the claim preclusive effect of a judgment. In *common law* jurisdictions[87], the claim preclusive effect of judgments can be either substantive *or* procedural in nature, while in *civil law* jurisdictions, the nature of the claim preclusive effect of a judgment is merely procedural.[88] As a result, in the common law jurisdictions, the way in which the claim preclusive effect of a judgment operates between the parties in a new case involving the same claim depends on the outcome of the first case. Accordingly, a distinction is made between the situation where (a) the *successful* Claimant brings the same claim again, and (b) the *unsuccessful* Claimant or Defendant seeks to re-litigate the same claim.

In these common law jurisdictions, (a) in the first situation, the doctrine of merger applies, which operates to extinguish all rights of a successful claimant arising from a cause of action, and instead merges these rights into the rights conferred by the judgment ("*transit in rem judicatam*"), to create an obligation of a higher nature, which entitles a party to sue for relief based on the judgment[89], and (b) the second situation gives rise to a bar preventing contradiction by the unsuccessful claimant or defendant of an earlier finding on the claim contained in a judgment.[90]

In *civil law* jurisdictions, by contrast, the way in which the claim preclusive effect of a judgment operates between the parties in a new case involving the same claim does *not* in principle depend on the outcome of the first case.[91] The nature of the claim preclusive effect of a judgment is always procedural, i.e. the judgment does not extinguish all rights of a successful claimant arising from a cause of action. Accordingly, in the event that the same claim is considered to be involved in later proceedings, the preclusive effect of a judgment operates through a procedural bar that renders a claim inadmissible (non-justiciable), or it prevents the parties and the court in new proceedings from contradicting the earlier finding on the claim.

As regards the second factor that relates to the procedural role of the parties in the first and second case, in all the legal systems considered, a change in the role of the parties in the first and second case (e.g. the claimant is defendant in the second proceedings and vice versa) does not affect the claim preclusive effect of a judgment.

7. Other participants

To what extent, if at all, do the claim preclusive effects of judgments extend to other participants in the litigation?

Comparative response:

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[85] See Part II.A.3 for a discussion of the situations in which - in the legal systems evaluated - the scope of the claim preclusive effect of a judgment extends beyond the named parties to proceedings, e.g. to the parties' privies or legal successors by blood, title, or identity of interest.

[86] In England & Wales, there is uncertainty regarding whether the claim preclusive effect of a judgment applies between co-claimants and co-defendants (Report Parts I.A.7 (p29) and II.B.7 (p39)).

[87] England & Wales and United States.

[88] See Part.II.A.1.

[89] In England & Wales, the doctrine of merger is also referred to as the doctrine of "former recovery".

[90] In England & Wales referred to as "cause of action estoppel" and, more generally, "estoppel by record", which is, at least for the purposes of domestic classification, probably not *substantive* but operates by way of an *evidential* or *procedural* bar, preventing contradiction of the earlier decision. See Report England & Wales, Part II.A.1, p20.

[91] In the Netherlands, however, courts are likely to strike out the case involving the same claim by the successful claimant on the basis that he does not have a sufficient legal interest to initiate the action, or that his conduct constitutes an abuse of process. If the court does allow the case, the claim preclusive effect of the judgment is that the parties and the court in new proceedings are prevented from contradicting the earlier finding on the claim. By way of comparison, in France, a litigant acting in a dilatory or vexatious manner may be penalised by way of a civil penalty of €3.000 without prejudice to damages and interest thereon.

Persons other than the principal Claimant or Defendant (or co-claimants and co-defendants) may become "parties" in the course of the proceedings. In principle, these participants equally benefit from, or are affected by, the claim preclusive effects of a judgment in the proceedings in which they are involved. Differences apply between the legal systems analysed in relation to the question which persons can become parties in the proceedings, and, furthermore, precisely how and when this occurs. For instance, several legal systems provide for the joining in the proceedings of persons who have a particular interest in the case. This may apply when cases involve indivisible obligations or co-ownership claims.[92] Moreover, the procedural role of joining, intervening, impleaded, or notified third parties is not always the same. Divergences in this regard might impact on the question whether or not these participants can be influenced by the claim preclusive effect of a judgment in the proceedings in which they participate. For instance, in relation to third party notice, some legal systems extend the claim preclusive effect of judgments to them even if these third parties did not appear.[93] Depending on the nature and degree of the participation of third parties in the proceedings, other restrictions apply in some legal systems. This occurs, for instance, in relation to parties who intervene in the proceedings on their own initiative, but who have a procedural role that is subordinate to that of the principal parties.[94]

In a few of the legal systems examined, a distinction is made between principal parties in proceedings and auxiliary parties.[95] There, the general principle is that the effects associated with the doctrine of res judicata are restricted to the principal parties. These include the claimant and defendant, and any co-claimants and co-defendants. Moreover, claim preclusive effects equally occur where the participation of a third party constitutes a new claim distinct from the principal claim, even if it is addressed by the court within the same proceedings. This may come about, for instance, when an intervener takes a position adverse to both parties. On the other hand, in these legal systems, res judicata effects do not extend to auxiliary parties, for instance interveners entering the litigation in support of either claimant or defendant, or notified third parties. In relation to these parties, however, binding effects very similar to res judicata effects are accorded to judgments. For instance, regarding notified third parties, in one of the legal systems, an *unfavourable* judgment against the notifying party has a binding effect on the notified third party irrespective of his participation in the litigation, if he was under a duty to support the *unsuccessful party*.[96]

With a view to the difference in the nature of these effects of judgments, it is interesting to note that the binding effect of a judgment based on a third party notice comprises not only the operative, but also the *essential reasons* of the judgment. In the definition of this study, the judgment would thus be characterised as also having issue preclusive effect.[97] The same effects are accorded to judgments in proceedings without third party notice, which involves a party intervening in support of a party in the litigation.[98]

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[92] Netherlands, Spain, and United States.

[93] Spain. Please note that, in this legal system, the claim preclusive effect of judgments only extends to third parties, even if they do not appear, in very particular cases (Part II.A.7, p 37).

[94] Spain [the Rapporteur states that the intervening third person who has an indirect interest (simple adhering voluntary intervention) has a position in the case that is subordinate to that of the principal party he is acting with, so that the effects of the final judgment do not apply to him to the same extent, e.g. the preclusive effect of the judgment issued in the proceeding in which he intervenes is not applicable to him (Part II.A.7, p 36)]. In the Netherlands, the situation is similar; the relevant criterion is whether a party is directly implicated by a particular finding contained in a judgment. See Report Netherlands, Part II.A.3, p43.

[95] Germany, and Switzerland.

[96] The duty to support may derive from the legal relationship between the parties or the general principle of good faith. Notice in a timely manner is required for this effect (*Streitverkündungswirkung*) to occur. Moreover, the unfavourable judgment must not have been caused by the notifying party's negligence in the conduct of the case. See Report Switzerland, p22.

[97] The effect of the Streitverkündungs- or Interventionswirkung can either be claim or issue preclusive in the definition of the study.

[98] In Switzerland, this effect – which is generally assumed to exist although it is not (yet) codified - is entitled "*Interventionswirkung*". See Report Switzerland, p22. In contrast to the *Streitverkündungswirkung*, it seems unclear whether an intervener is also able to rely on a judgment which is rendered in favour of the supported party. In Germany, both types of effect are entitled "Interventionswirkung". In Germany, its scope goes beyond res judicata in that the third party is precluded from questioning the factual or legal basis of the court's decision. On the other hand, the effect is limited in a number of ways: (a) the preclusive effect does not extend to factual or legal findings which were not necessary for the earlier decision; (b) it is limited to the facts tried before the court. If the decision in the judgment was based on a non liquet or the burden of proof, the preclusive effect is limited to the fact that the particular issue could not be resolved and had to be decided according to the burden of proof; (c) as the intervening party may only support the main party, it is not bound by findings in the judgment which were in the earlier lawsuit favourable to the main party and could therefore not be attacked by the intervenor. Only findings of the court which were disfavourable for the main party are therefore binding in a later lawsuit; (d) the intervenor may be heard with the assertion that the main party conducted the action in a defective manner to the extent that he was prevented from asserting means of attack or defense by the state of the action as it was at the time of his intervention, or that he was prevented by declarations and pleadings of the main party to assert means of attack or defense, or that

8. Represented persons

Does your legal system provide for group/representative actions (including, for example, United States-style class actions)? To what extent, if at all, do the claim preclusive effects of judgments in such actions extend to the other members of the group/persons represented in the action?

Comparative response

In relation to the question whether, in group/representative actions, the claim preclusive effects of judgments extend to the other members of the group/persons represented in the action, the legal systems evaluated must first be divided into those that provide for group actions[99], test-case actions[100], and representative actions[101], and those that do not[102].

The following types of group actions have been identified, (1) group actions on an opt-in basis where the claims of the claimant and the members of the class must be based on common or similar circumstances and the resulting judgment is binding on all class members[103], and (2) group actions on an opt-out basis[104]. In relation to the latter type of group action, United States law provides that unnamed class members are bound once class certification has been granted, while those class members who have opted out will not be bound by the judgment. However, class members will only be bound by a judgment if the representation was adequate and there was true identity of interests between the representative and the class. In Spain all persons involved in a group action will be bound by a judgment issued in the proceedings, whether they were involved as a party or not, and given these wide preclusive effects, extensive obligations are imposed as to the publicising of the existence of the claim, ensuring that consumers are given the opportunity to take part.

The possibility of test-case actions exists in England and Wales where the law provides for "group litigation orders" providing for the resolution by one or more test claims of common issues which have arisen in multiple claims in combination with the creation of a registry of claims in which those common issues have arisen[105]. A judgment given in a claim on the group register binds all parties to claims on the register and the Court may provide the extent to which the judgment will bind parties subsequently entered on the register. German law allows for so-called "model proceedings" for situations of ten or more suits for violation of *securities law* which involve identical issues. In those circumstances, the individual proceedings are stayed and a common question is referred to the Oberlandesgericht. The resulting judgment will have preclusive effect in all the individual cases.

As far as representative actions are concerned, in some legal systems the preclusive effect of a judgment may extend to third persons whose legal interests are deemed to have been represented in proceedings where they were not specifically named parties.[106] Accordingly, these represented persons are bound as parties by a judgment and its claim preclusive effect. The situations where such extension may occur differ between legal systems[107], and depend, for instance, on the question whether or not a system contains rules

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means of attack or defense of which the intervening party had no knowledge had not been asserted by the main party intentionally or by gross negligence; (e) the Interventionswirkung works only to the benefit of the main party which the intervenor supported. However, if the earlier judgment includes findings which are both to the benefit and to the detriment of the main party and the main party invokes the earlier judgment in a follow-on suit against the intervenor, the main party is also bound to the negative findings in the earlier suit. It is not possible to rely only on the advantageous findings of the earlier judgment (no "picking of the raisins"); and (f) the preclusive effect of the Interventionswirkung is limited to the relationship between the main party supported by the intervenor and the intervenor and does not extend to the opponent of the main party. It is however extended to the legal successors of the intervenor by analogy to § 325 ZPO.

[99] Sweden and United States.
[100] England & Wales, Germany (in the context of securities law violations), and Sweden.
[101] England & Wales, Germany (in particular in consumer and competition cases, although not limited to these cases), Netherlands, Spain (in consumer cases), and Switzerland (in particular in consumer and competition cases).
[102] Romania.
[103] Sweden.
[104] Spain (consumers) and United States.
[105] England & Wales.
[106] England & Wales, Netherlands, Switzerland, and United States.
[107] In the Netherlands, minors and those lacking the required capacity to act in civil proceedings are represented, and, although they are not a named party in the proceedings (*formele procespartij*), they are deemed to be a party by representation (*materiële procespartij*). The same applies between the a party who acts on behalf of another person in his own name or in the name of the represented person,

on the compulsory joinder of interested third persons[108], or whether and, if so, a legal system allows for this type of representation of third persons. This ground for extending the claim preclusive effect of a judgment beyond the parties is sometimes referred to as "*procedural* privity", where a person is or is deemed to be a party, as distinguished from situations of so-called "*substantive* privity" where it is accepted that one is not nor should have been a party, but because of a relationship with a party, that person becomes bound.[109] Situations of procedural privity may include the following scenarios: (1) a trustee of an estate or interest of which the (represented) person is a beneficiary[110]; (2) the party has (been given) specific authority to represent the person whose interest is (jointly) involved in an action[111]; (3) the executor, administrator, guardian, conservator, or similar fiduciary manager of an interest of which the third person is a beneficiary[112]; or (4) an official or agency given authority by law to represent a person's interests in legal proceedings[113]. In one legal system[114], for instance, 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. Any party may, however, apply for an order that a person should not act as a representative. Unless the court directs otherwise, any judgment or order given in a claim in which a party is acting as a representative under is binding on all persons represented in the claim. Such persons are considered to have been "present by representation".[115]

A final type of representative actions are those initiated by representative organisations in a public interest or group interest.[116] In general, all causes of action and forms of relief can be pursued in a representative action with the exception of claims for damages, including a declaratory judgment on liability for sustained

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between a company that is a party in legal proceedings and its *majority shareholder* who is not formally a party to the proceedings, between the members of a community of ownership since by law every member of the community has the power to start legal proceedings in the interest of the community, and finally between spouses if a *spouse* starts a case in his own and the other spouse's interest who is not formally a party to the proceedings, e.g. by filing a claim that forms part of their patrimonial property. This is the same in France.

In Switzerland, in principle, only the person entitled to a right is ordinarily allowed to claim such right as a party in a lawsuit. However, in some exceptional cases, the law explicitly provides for a type of representative action (*Prozessstandschaft*), e.g. the parent vested with custody is entitled to sue for the child's maintenance in a litigation which he conducts as a party in his own name. It is widely assumed that preclusive effects in such constellations extend to the party in interest.

According to Romanian case law where there is a substantial connection between the non-party and the Claimant or the Defendant, preclusive effects towards non-participants may be envisaged. The case law has expressly dealt with the situation of heirs, co-debtors and family members (Report Part II.A.9).

[108] France, Netherlands (see Report Netherlands, Part II.A.3), Spain, and United States. In contrast, in Switzerland, Federal substantive law requires a compulsory joinder as claimants or defendants where several persons are involved in a legal relationship upon which a decision can only be rendered in a uniform manner for all of them (e.g. claim for declaration of the invalidity of a sales contract involving two buyers); cf also art 68 of the Draft for a new Federal Code of Civil Procedure. Failure to comply will result in the dismissal of the claim.

[109] See, for instance, Report United States, Part II.A.9. A similar distinction is made in England & Wales ("present by representation" and "litigation friend" as distinguished from "privy by blood, title or identity of interest"), France, and Netherlands ("*materiële procespartij"* as distinguished from "*rechtverkrijgenden onder algemene of bijzondere titel*").

[110] England & Wales (see n 115 below), Netherlands, and United States

[111] Netherlands, and United States

[112] Netherlands, and United States

[113] Netherlands, and United States

[114] England & Wales.

[115] Examples of orders made under this rule, include (1) representation of an unincorporated association by one of its members, and (2) an order that one insurance syndicate be allowed to represent other syndicates with similar characteristics. England & Wales further recognises representation of interested persons who cannot be ascertained in claims concerning (a) the estate of a deceased person, (b) property subject to a trust, or (c) the meaning of a document including a statute. Here, the court may make an order appointing a person to represent any other person or persons in the claim where such person or persons (1) are unborn, (2) cannot be found, (3) cannot easily be ascertained, or (4) form part of a class of which one or more members fall within categories (1)-(3) above. A similar conclusion prevails in other situations in which the rules allow one person to represent another, eg a child or mental patient suing by his "litigation friend". In addition to those situations, a claim may be brought by or against trustees, executors or administrators in that capacity without adding as parties any persons who have a beneficial interest in the trust or estate. Any judgment or order given or made in the claim is binding on the beneficiaries unless the court orders otherwise in the same or other proceedings. Moreover, courts may appoint a representative to bring or defend a claim on behalf of a person who has died but for whom a personal representative has not yet been appointed, or to allow a claim in which such deceased person is interested to proceed in his absence. Again, if such an order is made, any judgment or order made or given in the claim is binding on the estate of the deceased. Finally, so-called "derivative claims" where a company, other body corporate or trade union is alleged to be entitled to claim a remedy, and a claim initiated (or continued) by one of its members. Any judgment on a derivative claim binds the company as if it had brought the action. See Report England & Wales, Part II.A.8, p30ff.

[116] Germany, Netherlands, Switzerland, Spain.

damages[117] and certain personal actions[118]. In practice the relief most commonly sought is of either injunctive[119] or declaratory in nature.[120] Differences apply between the legal systems analysed in relation to the claim preclusive effect accorded to resulting judgments in such representative actions. In some legal systems, the preclusive effect of a judgment in a representative action is limited to the actual parties to the proceedings[121], while in other legal systems the preclusive effect extends to those represented[122].

9. Persons connected to the Claimant, Defendant, and other participants

To what extent, if at all, do the claim preclusive effects of judgments extend to persons who have not directly participated in the proceedings giving rise to judgment but who are connected in a legally relevant way to the Claimant, Defendant or another participant in the proceedings?

Comparative response

The claim preclusive effect of a judgment typically only applies to the parties in the proceedings leading to a judgment. However, all of the legal systems examined provide for extensions of this effect to certain third persons (non-parties) who are connected in a legally relevant manner to the (co-)Claimant, (co-)Defendant or other participants in the proceedings. This form of extending the scope of a judgment's preclusive effect is sometimes referred to as "substantive privity", as opposed to "procedural privity", a distinction which was discussed above in Part II.A.8. Essentially, two grounds can be identified for substantive privity: (1) the legal succession of parties by third persons through blood or title (or "privity by blood or title")[123], and (2) the existence of an identity of interest of the parties to the proceedings and third persons ("privity of interest")[124].

The first ground is accepted universally in the legal systems examined. In common law jurisdictions, the claim preclusive effect of a judgment is extended to the parties' "privies by blood or title".[125] In civil legal systems, the scope of the claim preclusive effects of judgments extends in a similar manner to (universal or particular) legal successors of the original parties.[126] The extension of the claim preclusive effect of a judgment is typically restricted to situations where the judgment is rendered after the succession takes place.[127] In some legal systems, a successor who was unaware of the pending litigation might be protected against the preclusive effect of a judgment.[128] The question whether a bona fide successor is protected will typically depend on the applicable substantive law provisions governing the succession.

The second ground for extending the preclusive effect of judgments is not commonly recognised in the legal systems evaluated. This can be explained with reference to the basic rule that a judgment only has claim preclusive effect between the parties to the proceedings. The practice in the legal systems examined demonstrates a highly restrictive approach to accepting a widening of the scope of a judgment's preclusive effect on the basis of a person's connection with subject matter of, or the interests involved in the

[117] Netherlands, Switzerland.
[118] France.
[119] Germany, Switzerland.
[120] Netherlands, Switzerland.
[121] Germany (the scope of res judicata has been extended by law in the field of consumer law to allow any third party to invoke invalidity of the contractual term based on the judgment between the interest group and the party using the contractual term. This binding effect goes beyond the normal scope of res judicata under German law in extending its effect to the essential reasons for the judgment, see also Part II.B.1), Netherlands, and Switzerland.
[122] Spain and France.
[123] England & Wales, Germany, Netherlands, Romania, Spain, Sweden, Switzerland, and United States. The Swiss Rapporteur indicates an interesting issue that in Swiss law it is clear that preclusive effects extend to the successor of a *right*, but that it is unclear as to whether they extend to legal successors to a *duty*.
[124] England & Wales, Romania (the Rapporteur notes that preclusive effects may follow whenever there is "a substantial connection" between the non-party and a party to proceedings, see Report Romania, p19)
[125] England & Wales and United States.
[126] Germany, Netherlands, Romania, Spain, Sweden, and Switzerland.
[127] Germany, Netherlands. In England & Wales, the position is different: the claim preclusive effect of a judgment will bind a successor provided that their title legally accrues subsequent to the judgment (Report p 31).
[128] Germany, Netherlands, Switzerland, and United States.

proceedings.[129] Where it is known, the term "identity of interest" is not clearly defined and the ground for extending the effect is applied only exceptionally.[130] In this regard the following potentially relevant connections were considered: (1) company and shareholders[131]; (2) companies within the same corporate group[132]; (3) partners in an unincorporated association[133]; (4) members of a community of ownership[134]; (5) spouses[135]; (6) parent and child (or family members generally)[136]; (7) insurer/indemnified party and the insured[137]; (8) lessor/lessee and the owner of the property[138]; (9) persons that are jointly and severally liable for a debt[139]; (10) judgment creditor/debtor where there are third party debtors in the framework of enforcement disputes[140]; (11) creditor/debtor and a guarantor (surety of a debt)[141]; (12) persons who might be entitled to one and the same inheritance where there is a legal dispute over this entitlement between only some of those persons[142].

The concept of privity, be it procedural or substantive, is intrinsically linked to the substantive and procedural rules of law governing the relationships that form the subject of a dispute and those governing the relationships between the parties and third parties. For the same reason, it is not possible to have in mind all the circumstances where "privity" may arise and to determine when an extension of the preclusive effect of a judgment is justified. Neither would it be right to attempt to formulate a general definition. Each case must be decided in light of its particular facts and with reference to the law applicable to the legal relationship in question between a party and a third person. Moreover, the issue of extending the claim preclusive effect to the parties' privies involves a balancing of significant interests involved in civil justice. From one perspective, the consistent realisation of private law rights and obligations may, with a view to the indivisibility of certain legal relationships, necessitate that a court's finding on a claim be the same for all interested persons (even non-parties) to avoid irreconcilable decisions.

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[129] Situations of "procedural privity" are not considered here, i.e. situations where a judgment's claim preclusive effect extends to a third person who is deemed to have been *represented* in the proceedings. See for a discussion of this form of privity Part II.A.7.

[130] In England & Wales, "identity of interest" has been given a flexible (albeit narrow) definition, such that the test now appears to be that in successive proceedings between A and B and A and C, C will be bound by the earlier judgment where there is a "sufficient" degree of identity between B and C that it is "just" that the earlier judgment should tenure to C's benefit and that the earlier judgment should bind C. In each of the cases considered in the following text, the court will determine on a case-by-case basis whether a sufficient degree of identity exists so that the person or entity is bound. Thus, it is not possible to say affirmatively or negatively whether privity exists in these circumstances.

[131] Affirmative: Spain (the extension of the preclusive effect is limited to judgments on challenging company resolutions, which affect all the shareholders, even if they did not take part in the proceedings).

[132] Negative: Germany (if the companies are independent legal entities), Spain. The Spanish Report indicated that in the case of companies belonging to the same group there is no legal provision which extends the effects of *res iudicata* deriving from a judgment given in relation to a particular company to the others of the group which have not taken part in the proceeding. Nevertheless, where the court finds there is fraudulent use of a legal person it can 'pierce the corporate veil' and make a declaration of liability in the judgment (Part II.A.9 p 42-43).

[133] Affirmative: Germany, Sweden, Swizerland and United States. Negative: Netherlands,

[134] Negative: Netherlands (the preclusive effect may nonetheless extend on the basis of procedural privity. Report Netherlands, Part II.A.3, p50).

[135] Negative: Netherlands (see the exception where one of the spouses is authorised by law to represent the interests of the other spouse, when the preclusive effect may nonetheless extend on the basis of procedural privity. Report Netherlands, Part II.A.3, p50), Romania (procedural privity might apply in relation to goods acquired by spouses during marriage that form their common property).

[136] Negative: Germany, Netherlands (procedural privity may apply, e.g. where a parent is authorised by law to represent the interests of a child. Report Netherlands, Part II.A.3, p49), Switzerland (procedural privity may apply, e.g. when the parent vested with custody is entitled to sue for the child's maintenance in a litigation which he conducts as a party in his own name).

[137] The insured third party, who is not involved in a direct action of the injured party against the insurer, usually has a direct interest in the outcome of the case between the insurer and the injured party. Negative: Netherlands,

[138] Negative: Netherlands,

[139] Negative: Netherlands, Spain (the various debtors cannot raise the preclusive effect of a judgment between the Claimant and a different separately and jointly liable debtor until the Claimant has recovered in full), Swizerland and United States (in a situation involving several co-obligors, a judgment against one of the co-obligors will not preclude a subsequent action against the others unless there has been prior agreement otherwise or if specific suretyship laws provide for such preclusion. Where a judgment has been obtained in an action filed by one obligee, his or her co-obligees will be precluded from filing a subsequent action. The obligee who has filed suit effectively acts for all the co-obligees in his or her prosecution of the action). Affirmative: Romania.

[140] Negative: Netherlands,

[141] Negative: Germany, Netherlands. Affirmative: Spain (partly by allowing for issue preclusive effect of the judgment against the non-party on the basis of identity of interest. The Supreme Court held that "it is not possible to '*ignore the collateral effects of what was proved in the previous proceeding*" between the principal debtor and the creditor); Switzerland (prevailing opinion, however not confirmed by case law).

[142] Negative: Netherlands,

From another perspective, the right to a fair trial guaranteed by Article 6(1) ECHR would be diluted if a person's civil rights could be affected by a judgment in proceedings where he was not and could not have been a party and where his rights were not sufficiently protected by another. Namely, this right requires, *inter alia*, the possibility of having one's civil rights and obligations determined by a court or tribunal (i.e. a right to a court).[143] The legal systems examined strike the required balance differently and in diverse ways.[144] The extension of a judgment's preclusive effect appears to be deemed justifiable in some legal systems insofar as it operates only to the advantage of a third person (i.e. does not affect his interests negatively).[145]

By way of comparison, in the United States, a further extension of the scope of the claim preclusive effect of a judgment beyond situations of procedural or substantive privity might be rooted in the conduct of a non-party which induced reliance upon an earlier judgment.[146] The latter ground implies that a person who has a claim arising out of the same facts as the basis of the earlier action will be precluded from filing a separate action if he was aware of the prior action and enforcing his second claim would result in inconsistent judgments, and he acted in a manner which lead the defendant to believe he would make no later claim and would abide by the result of the first action, having failed to avail himself of joinder or intervention to resolve his claim.

10. Strangers

To what extent, if at all, do the claim preclusive effects extend to persons who have not directly participated in the proceedings giving rise to judgment and who are not connected in a legally relevant way to the Claimant, Defendant or another participant in the proceedings or the subject matter of the action?

Comparative response:

Parts II.A.6-9 have clarified the extent to which the claim preclusive effect of judgments applies between the (co-)claimant(s) and (co-)defendant(s), other participants, represented persons, persons connected to the (co-)claimant(s) and (co-)defendant(s) and other participants. The basic rule applicable in all legal systems examined is that a judgment only has claim preclusive effect between the parties to the proceedings, certain third persons who are deemed to have been a party (procedural privity), and, finally, those third persons who have a relevant legal connection with the parties through blood, title or interest (substantive privity).

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[143] This applies irrespective of the fact that the same right to a fair trial is equally illusory if a legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party, for instance by not providing for effective means of enforcement, or by non-observance of the principle of legal certainty requiring the finality of judgments.

[144] See for an interesting and clear example the national report for Switzerland, Part II.A.9, p22-23. See also Report Netherlands, Part II.A.3, p51. Netherlands law aims at ensuring that interested third persons become parties to the proceedings on their own initiative or on the initiative of the parties either expressly by law or on the basis of the indivisibility of legal relationships allowing for a motion of "*exceptio plurium litis consortium*" if the interested third persons are not joined, which typically results in the court giving the Claimant an opportunity to join the third parties. Failure to comply may result in the dismissal of the claim, or the court's judgment lacking binding effect vis-à-vis the third persons. Moreover, third persons who's interests are affected by a judgment between two or more parties may initiate third-party proceedings (*derdenverzet*) to have the judgment amended or revoked; see also Romanian Report Part II.A.7, p18 for a discussion on its rules of joinder in civil proceedings. In France, third party application is called "tierce opposition" and does not modify the judgment for the parties but has an effect in relation to the third party. For example: a couple obtained in court an adoption judgment. On the basis of this judgment, the initial grandfather of the child adopted is no longer the grandfather since the child lost his first filiations. The grandfather may, however, lodge a third party application against the adoption judgment. If he succeeds, the adoption judgment will not have binding effect in relation to him and he will remain the grandfather of the child, but the adoption judgment will not be modified as far as the parties are concerned: the new parents remain the new father and mother of the child. See Report France, Introduction, p6.

[145] For instance, in a Swiss case where a health insurance company had refused to reimburse the costs for the treatment in certain private hospitals, which was considered to constitute a violation of Swiss antitrust law, the Federal Supreme Court held that it was appropriate for the purpose of effectively achieving the goals of Swiss antitrust legislation that insured persons who had not participated in the earlier proceedings could nevertheless rely on the respective judgment. Report Switzerland, Part II.A.8, p24. See also Report Sweden, Part II.A, p36, where is stated that "[t]he question of whether a third party is bound by the judgment's legal force is sometimes dependent on the result of the first litigation. This is the case when a creditor raise a claim against a guarantor. If the creditor and the debtor litigate a dispute regarding the debt, the guarantor, in his capacity as a third party, may rely upon a judgment beneficial to the debtor. If a court has found that the debtor has no payment liability to the creditor, this judgment applies to the benefit of the guarantor. On the other hand, the guarantor is not bound by a judgment detrimental to him, whereby the debtor is found to have payment liability to the creditor …. The judgment in the payment case between the debtor and creditor applies to the advantage, but not to the detriment, of the guarantor/third party."

[146] United States.

Outside of those situations, persons who have not participated in the proceedings giving rise to judgment generally are not implicated by the claim preclusive effect of judgments.[147]

B. Issue preclusion

1. The existence and nature of issue preclusive effects

Are judgments in your legal system capable of having issue preclusive effects?

Comparative response

The question whether a judgment has issue preclusive effect (i.e. the binding effect of findings on issues of fact or law contained in a judgment's reasons) is answered differently in the legal systems examined. In this regard, there appears to be a more or less even split between the legal systems. In five legal systems judgments rendered have no issue preclusive effect.[148] In the remaining four legal systems issue preclusive effect is attributed to judgments[149]. The nature of the issue preclusive effect of a judgment is typically deemed to be procedural. This implies that it results in a bar that prevents the contradicting by the parties and the re-evaluation by the court of an issue that was decided by judgment in an earlier case.

2. Policies underlying issue preclusive effects

What are the policy considerations for the issue preclusive effect of judgments in your legal system?

Comparative response

Broadly speaking, the policies underlying the choice to attribute issue preclusive effect to judgments are the same as those described in Part II.A.2 on claim preclusion: (1) the protection of litigants and other interested persons by ensuring the finality and effectiveness of judgments, (2) the protection of the consistency of the legal order by preventing the rendering by courts within the same jurisdiction of irreconcilable judgments, and (3) civil justice resource economy requiring the prevention of the waste of resources caused by the needless repetition of final judicial findings. One report further indicated that issue preclusion is also thought to encourage parties to take their law suit seriously and advance their best arguments on a point, in the knowledge that once the issue is decided they will be precluded from re-litigating it.[150]

3. Conditions for issue preclusive effects

What are the conditions for the issue preclusive effects of a judgment?

Comparative response

In the legal systems where issue preclusion is known[151], in principle, judgments are capable of having issue preclusive effect only if it can be established that there is an identity of issues and an identity of parties[152] between two cases, i.e. the case in which the original judgment was rendered and the new case between the

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[147] The Swedish Report indicates that a judgment declaring a patent invalid has universal legal force. See Part II.A.10 p 32.
[148] France, Germany, Romania (although Romanian case law and doctrine speak of the presumption that what has been decided in a judgment is presumed to contain the truth and thus limited issue preclusion effects related only to the operative part of a judgment may be envisaged – see Part II.B.1 of the report), Sweden, and Switzerland (although issue preclusion has long been discussed in a very caustic manner and has been confirmed in very limited constellations by case law. See Report Part II.B.1 pp24-25).
[149] England & Wales, Netherlands, Spain, and United States.
[150] United States Report p42.
[151] England & Wales, Netherlands, Spain, and United States.
[152] See, however, Report United States, Part II.B.3, p42, which states that the party in the second action seeking to use a first action party's victory on an issue against the former party or his privy need not be a party to the first action. In this regard, the scope of the issue preclusive effect attributed to judgments is broader than in the other legal systems considered, where it is in principle required that there be an identity of parties or a situation of procedural or substantive privity (so-called "mutuality"). Nonetheless, it must be pointed out that United States law features several procedural mechanisms, e.g. those providing for the joinder of claims and parties, which make this extension less of an issue. Also, there are procedures in place (providing for exceptions to a judgment's issue preclusive effect) to ensure that the party against whom issue preclusion is invoked had a full and fair opportunity to litigate the issue being invoked against him. See Part II.B.5.

same parties where the same issue(s) arises.[153] With a view to these conditions, essentially two questions are earmarked as decisive when considering whether, and if so, to what extent a judgment has issue preclusive effect: (1) what is the meaning of the terms "issue" and "party" in a particular legal system; and (2) when is there an "identity of issues" and an "identity of parties" between two cases?[154] A broad and flexible approach when answering these questions implies a far-reaching issue preclusive effect of judgments; a narrow and rigid attitude constricts the same.

How a court defines an *issue* will inform how broadly or narrowly issue preclusion is applied in the second action. The term "issue" is generally conceived as a point of fact or law, a finding on which is necessary for the court's final determination of the claim. In other words, an issue is taken to be one of the conditions for establishing a cause of action.[155] This approach links the issue preclusive effect of a judgment directly to the applicable law to the claim (i.e. the legal cause of action). Conversely, the following types of judicial findings are generally deemed to be outside the scope of the issue preclusive effect of judgments: (1) unnecessary findings; (2) findings on facts, (at least where) isolated from their legal consequences[156]; and (3) rulings exclusively on the law[157]. Consequently, in light of the above, a relevant *finding on an issue* may involve (1) a court's determination of an operative fact (i.e., facts that have legal consequences and are material for a finding on the claim in light of the relevant legal cause of action), and (2) a conclusion of law (i.e., the relevant rules of law as applied to the operative facts).

In all the legal systems attributing issue preclusive effect to judgments, judgments do not only preclude re-litigation of an issue with respect to *points actually determined* by the judgment (whether or not they were contested) but they also prevent a party from challenging a finding on a particular issue by reference to *legal arguments or factual evidence which might have been but were not raised and adjudicated upon* in the earlier proceedings for the purpose of persuading the original court that the issue should be differently decided.[158] It is generally accepted in the legal systems which attribute issue preclusive effect to judgments, that a judgment only precludes the re-litigation of an issue that was "actually litigated", which requires that the issue was *properly raised*, by the pleadings or otherwise, and submitted for determination in the course of proceedings, and necessarily determined in the sense that the judgment's very existence can be explained only by assuming the issue to have been determined (even if implicitly)[159] . Moreover, it appears to be common opinion that it is immaterial for issue preclusion whether or not an issue raised was contested by the opponent.[160]

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[153] These two conditions apply in addition to other prerequisites before a judgment can have preclusive effects which are discussed in Part I.B.

[154] Part II.A.3 and Parts II.A.6-10 on claim preclusion have addressed the meaning of the term "party" and the question when there is an "identity of parties". This condition is applied in the same way (compare n 152) for the purpose of determining a judgment's issue preclusive effects and it accordingly is not discussed again. The present analysis is focused on the meaning of the term "issue" and the "identity of issues"-requirement in the legal systems that recognise issue preclusion.

[155] Report England & Wales, Part II.B.1, p35.

[156] England & Wales (see Part II.B.1, p36), Netherlands, United States (see Part II.B.5, p47-8). Only findings as to the legal consequences of particular facts as well as findings as to matters of disputed fact which have legal consequences have preclusive effect in the legal systems examined.

[157] England (see Part II.B.1, p36), Netherlands, United States (see Part II.B.5, p47-8).

[158] England & Wales, Netherlands, Spain and United States.

[159] England & Wales, Netherlands and United States. The England & Wales Report (Part II.B.3, p38) indicates in this regard that "[i]t seems to follow from the general proposition that only issues upon which the earlier judgment necessarily depended give rise to issue preclusion that a finding adverse to the successful party in an action will not have that effect, unless it has been separately determined by the judgment (for example, as an interlocutory issue or by way of declaration)."

[160] Some controversy nonetheless manifests itself in relation to the question whether default judgments in which issues are not contested should be attributed issue preclusive effect. Affirmative: England & Wales, Netherlands and United States (State of New York). Negative: United States (Restatement Second). Report England & Wales states (p37) that "[t]he English courts will exercise particular caution in analysing default … judgments, so as to restrict their preclusive effect to that which has actually and necessarily decided by the judgment." On the other hand, issue preclusive effect of default judgments is not excluded in England & Wales and the Report also states that "[i]ssue estoppel, like cause of action estoppel, … precludes re-litigation of an issue with respect to points actually decided by the judgment (*whether or not they were contested*) …." [emphasis added] Under the Restatement Second (Report United States, Part I.D, p9), "[d]efault judgments are not accorded issue preclusive effects … since the issues are not deemed to have been *actually litigated* … though New York has adopted a minority practice of according issue preclusive effects to such judgments." [emphasis added] See, in more detail Part I.D.

According to the Spanish legal provisions, it is immaterial for the positive effect of *res iudicata* whether or not an issue raised was contested by the opponent (Part II.B.1, p45)

For the purpose of successfully relying on the issue preclusive effect of a judgment it is generally required that the point of fact or law (necessarily) decided in the original judgment is the same as the point of fact or law that falls to be determined in a following case. In one of the legal systems considered this test is described expressly as the "identity of issue test".[161] Essentially, a court can be expected to review whether the new case involves the determination of the *same* operative fact(s), or involves the same conclusion(s) of law as contained (necessarily) in a previous judgment. In concrete terms, courts can be expected to consider the degree of factual (what is pleaded or is otherwise properly raised in the course of proceedings) and legal overlap of the two actions, while balancing important interests consisting of a desire not to deprive a litigant of an adequate day in court (compare the right to a fair trial under Article 6 ECHR) and a desire to prevent repetitious litigation of what is essentially the same issue.[162]

Some examples serve to clarify how the issue preclusive effect of judgment is applied in the legal systems. In a tort action resulting from an automobile accident, an issue concerned the defendant's negligence *due to speeding*. In a second action based on a new claim, an issue relating to the defendant's negligence *due to intoxication* is precluded because it is reasonable to expect that *any grounds of* negligence were put forth in the first action.[163] This is an example of a broad interpretation of the issue involved. The same can be said of a court's finding that an agreement is valid which precludes the possibility of raising new grounds for avoiding the agreement in later proceedings.[164] In the legal system from which this example derives, this even applies if the validity of the agreement was not (properly) examined by a first court. In other words, the finding that an agreement is valid entails that the parties are precluded from arguing other grounds to seek to avoid the agreement in a subsequent case.

In particular, in running down cases, successive actions arising from the same incident may raise issues which focus on identical *factual* elements but for the purpose of drawing *legal* conclusions which are fundamentally different. In another example, in the area of negligence claims,[165] the question whether a party has failed to exercise *reasonable care* in driving a vehicle may be relevant to the question (a) whether the driver breached a duty of care towards another driver, (b) whether the driver breached a (legally distinct) duty of care towards his passenger, and (c) whether the driver was contributorily negligent so far as his own injuries are concerned.[166]

In one of the legal systems examined, courts will sometimes consider as the same, issues that were determined *by inference* in relation to the ultimate issues. For example, in a first action between C[laimant] and D[efendant], where D is successful on the issue of negligence, a second action based on D's recklessness, which is a higher standard of misconduct, will be precluded because the absence of negligence implies the absence of recklessness.[167] In other words, the application of different legal standards in the two actions will result in different issues; however, in this example, the recklessness issue has been determined by inference in the negligence action and so that issue cannot be raised again by C.

In one legal system, the scope of the issue preclusive effect of a judgment is inter-connected with all other basic rules and principles of civil procedure in a legal system and depends, for instance, on the way in which courts within their civil procedure system establish the operative facts (the factual cause of action), and determine and apply the applicable rules of law (legal cause of action).[168]

4. Invoking issue preclusive effects

Please describe how the issue preclusive effects of a judgment are invoked in your legal system.

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[161] Report United States, Part II.B.3, p43, indicates that this is how the condition is referred to in the State of New York.
[162] The same balancing of interests appears to be relevant generally in the process of determining a judgment's proper preclusive effect. Compare, for instance, Part II.A.2, and Part II.A.9.
[163] Report United States, Part II.B.3, p43. The Report highlights the relevance of the following factors: (1) examination regarding the existence of a substantial overlap in evidence or legal argument; (2) whether application of the same rule of law is involved; (3) whether pretrial discovery and preparation could have reasonably encompassed the issue presented in the second action; and (4) the closeness of claims in the two proceedings.
[164] Report Netherlands, Part II.B.1, p66.
[165] Report England & Wales, Part II.B.3, p38.
[166] The balance of English authority appears to favour a broad approach, in favour of treating these issues as identical. See Report England & Wales, Part II.B.3, p38. A different question is whether there is an identity of parties between two cases as required before a judgment has issue preclusive effect in practice. See Part II.A.3 and Parts II.A.6-10.
[167] Report United States, Part II.B.3, p43.
[168] Report Netherlands, Part II.B.3, p65.

Comparative response

Issue preclusion can be raised by either party and be used either offensively (in support of a claim) or defensively (as a defence to ward off a claim). It is raised not to extinguish another party's claim[169], but to prevent litigation over certain issues arising in the new case. A claimant in a new case may wish to use a previous judgment to prevent the re-litigation of issues that must be determined for a new claim for relief against the same defendant, for example, when the claimant seeks payment of *new* instalments by the same defendant where the validity of a lease agreement was already established by the court previously, concerning *old* instalments.

Courts do not typically apply the issue preclusive effect of a judgment *ex officio*.[170] There are some legal systems, however, where, in principle, the issue preclusive effect ought to be raised by the party seeking to rely upon it. Courts may exceptionally raise issue preclusive effect of their own volition to promote efficiency.[171] Pleas of issue preclusive effect are typically characterised as *affirmative defences*, notwithstanding the fact that the effect of a judgment's issue preclusive effect is considered to be procedural. Therefore, the motion must therefore be raised simultaneously with other affirmative defences in the main proceedings.[172] In the common law legal systems studied, it used to be required that the issue preclusive effect judgment be pleaded at the earliest possible opportunity, with the consequence that it would otherwise be considered to have been waived.[173] However, the modern practice in the legal systems considered is more flexible, and a party may be permitted to raise the preclusive effect by way of amendment to its statement of case (or even at trial without pleading), provided that such amendment would not cause injustice to the other party.[174]

5. Exceptions to issue preclusive effects

Please verify whether the issue preclusive effect of judgments in your legal system is subject to generally accepted exceptions.

Comparative response

As is the case regarding claim preclusion, in those legal systems where issue preclusive effect is explicitly recognised as a separate aspect of preclusion, exceptions to its application may be relevant in the second action. For most countries, the exceptions are the same as applied in the context of claim preclusion.[175] However, some legal systems provide for additional exceptions specifically in this context. Furthermore, it seems as though the exceptions are permissive rather than mandatory in most cases, and their application will depend upon whether the legal system is one in which the court must raise the matter *ex officio* or whether party autonomy applies. In a number of legal systems, issue preclusion may not be applied where the party against whom the preclusion is invoked was unable to obtain appellate review on the issue[176], or

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[169] See Part II.A.1ff.

[170] England & Wales, Netherlands, United States. In the Netherlands, the parties, and not the court, are responsible for invoking the claim preclusive effect of a prior judgment. In fact, courts are explicitly prohibited from doing so on their own motion. The plea of res judicata must also be clear in order for it to be considered by the court; it may not be deduced from the fact that a party has unmistakably presented the same claim as in an earlier case. The rationale behind such a rule is due process (i.e. the parties' right to a fair trial) and party autonomy. See Report Netherlands, p47.

[171] England & Wales (rarely), Spain (the Spanish Report indicated that the positive effect of res judicata may be found *ex officio* provided the court is aware of it, Part II.B.4. If not applied by the court *ex officio*, it could be a ground for appeal on very rare occasions.) and United States (rarely).

[172] Netherlands and United States. In the United States there is some disagreement as to whether issue preclusion must be raised in the party's pleadings. Federal Courts and the United States Supreme Court have all ruled that it must. However this view is considered to be subject to flaws, since the first judgment creating issue preclusion might only be given after proceedings in the second action have begun and so it should be available by virtue of an amendment to the pleadings or by motion. In fact, some courts allow the parties to raise the existence of a prior judgment for purposes of issue preclusion at any point during the trial, even when no mention has been made of it in the pleadings or via a motion. Most courts do hold, however, that issue preclusion must be raised before the case goes to trial or it is waived and will not be preserved for appellate purposes. Report United States, Part II.B.4, p46.

[173] England & Wales, and United States.

[174] In England & Wales, a party may leave the matter to be dealt with at trial, or seek immediately to strike out the part of his opponent's statement of case which he claims to be inconsistent with the issue preclusive effect of a previous judgment or to recover summary judgment on the ground that his opponent's claim or defence has no reasonable prospect of success.

[175] England & Wales (for the most part), Netherlands, Romania (as regards the second forum's obligation not to contradict the reasoning that supports and is included in the binding operative part), and Spain.

[176] Netherlands, United States.

where there is a change in the applicable legal context that is either significant[177] or substantial[178]. However, this exception is not a general rule.[179] The legal systems also seemingly provide for a sort of "catch-all" exception that is applied where "special (or exceptional) circumstances" exist that would make its application unjust[180], undesirable[181], or where there is a "clear and convincing need" for a new determination on the issue because it may potentially impact the public interest or the interest of a non-party[182]. Other exceptions included the discovery of new evidence that changes an aspect of the case and could not have been reasonably discovered before,[183] and several other exceptions were indicated by a couple of legal systems in particular[184]: (1) where it was unforeseeable that the issue would arise in later proceedings and there is a clear and convincing showing of the need to re-litigate the issue, and (2) where the party against whom the preclusion is being invoked did not have a full and fair opportunity to litigate the issue in the prior proceedings and there is a compelling showing of unfairness.

In the previous section, the Report addressed general aspects of issue preclusive effects of judgments. The following numbered points address particular questions that may arise in relation to the operation of the issue preclusive effects of judgments in particular circumstances which may be subject to specific rules and conditions. It is appreciated that some of the issues addressed in the more general in the previous section will be involved in these specific situations, which are intended to provide an insight into the particularities, if any, of the application of issue preclusion in the circumstances as described.

6. Claimant and Defendant

May a Claimant or Defendant in your legal system be prevented by judgment on a particular claim from challenging in the same or subsequent proceedings against the same party any finding (whether adverse or otherwise) on an issue of fact or law which the court may have determined in giving judgment on a particular claim?

Comparative response

Where issue preclusion is applicable in the legal systems evaluated, its application between the Claimant and Defendant is largely the same as regards claim preclusion.[185] However, two legal systems explicitly addressed issue preclusion in this context. In one legal system[186], where issue preclusion is raised by the Defendant as a defence, and all the conditions for the application of issue preclusion have been fulfilled, the court in the second forum is bound by the first court's determination of the issues (assuming the parties have raised the matter). Another legal system[187] notes that issue preclusion applies regardless of whether the Claimant or Defendant was successful in the first action, as long as the party against whom issue preclusion is being invoked was a party or in privity with a party to the first action.

7. Other participants

To what extent, if at all, do the issue preclusive effects of judgments extend to other participants in the litigation?

Comparative response

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[177] United States.
[178] England & Wales.
[179] Netherlands. Dutch law provides for an exception due to a change of circumstances, which does not apply, however, to a change in the *legal* cause of action, including relevant case law. It has been submitted that if the legislator wishes to achieve this *ex ante* effect of legislative changes, it ought to provide for this explicitly when these changes occur. Report Netherlands, Part II.B.5, p72
[180] England & Wales.
[181] Netherlands. See Report Netherlands, p51.
[182] United States.
[183] England & Wales (as one example of an "exceptional circumstance" justifying non-recognition of an issue preclusive effect; a change in the law subsequent to judgment may have the same character).
[184] Netherlands, United States.
[185] England & Wales, Spain and Switzerland (to the extent that it exists).
[186] Netherlands.
[187] United States.

As above, in most countries where issue preclusion exists, it applies to other participants to the same extent as in the case of claim preclusion.[188] Only two legal systems specifically noted differences in the application of issue preclusion to other participants in the litigation. The first indicated that issue preclusion generally is only operable between the Claimant and Defendant, although there is some authority which suggests that it may operate between co-defendants despite the fact that no claim may exist directly between them.[189] The other legal system[190] which noted variances in issue preclusion with regard to other participants noted that issue preclusion will apply to other participants in the action provided that the relationship between the parties in the first action was adversarial in nature. The report also noted the existence of a mechanism that may bind a third party defendant over whom the court was unable to obtain jurisdiction, for example, in the case where the defendant wishes to implead a party for indemnification. Provided that certain conditions are fulfilled, this third party will be considered a privy to the action that is bound by the issues determined therein.

8. Represented persons

If your legal system provides for group/representative actions (including, for example, United States-style class actions), to what extent, if at all, do the issue preclusive effects of judgments in such actions extend to the other members of the group/persons represented in the action?

Comparative response

Issue preclusion applies to represented persons (where such actions exist) to the same extent as claim preclusion in all the legal systems evaluated that indicated the existence of issue preclusion within their system,[191] with one exception.[192] The United States Report noted that in the context of class actions, issue preclusion may not be invoked by a party who has opted out of the litigation, even if it is invoked against someone who was a party or in privity with a party in the first action. Thus, the normal rule of non-mutuality of issue estoppel is inapplicable where a class action is involved. However, it must be remembered that absent class members (those who have not opted out) may raise the issue of adequate representation in collateral proceedings.

9. Persons connected to the Claimant, Defendant, and other participants

To what extent, if at all, do the issue preclusive effects of judgments extend to persons who have not directly participated in the proceedings giving rise to judgment but who are connected in some way to the Claimant, Defendant or another participant in the proceedings or to the subject matter of the action?

Comparative response

Again, where the legal systems evaluated provide for issue preclusion, the circumstances under which it is applicable to persons connected to the Claimant, Defendant, and other participants is largely the same[193] as in claim preclusion, with only limited particularities. For a discussion in this regard, please refer to Part II.A.9 specifically in relation to the concepts of privity and identity of interest. Only one legal system specifically noted that variances were applicable in the context of issue preclusion as it is applied in the context of wrongful death actions, between assignors and assignees, and in relation to indemnification, closely held corporations and partnerships.[194] For example, where a successful action has been brought by an injured person, the indemnitor is precluded from re-litigating the issue of the indemnitee's liability. In the context of a wrongful death action, issue preclusion will only apply where the beneficiaries' cause of action is considered supplemental to, and not independent from, any cause of action that the descendent may have had.

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[188] England & Wales, Netherlands, Spain, Switzerland (to the extent that it exists). See Part II.A.7.
[189] England & Wales.
[190] United States.
[191] England & Wales, Netherlands, Spain, United States.
[192] See Part II.A.8.
[193] England & Wales, Netherlands, Spain, Switzerland (to the extent that it exists) and United States (with some exceptions discussed).
[194] United States.

10. Strangers

To what extent, if at all, do the issue preclusive effects of judgments extend to persons who have not directly participated in the proceedings giving rise to judgment and who are not connected in a legally relevant way to the Claimant, Defendant or another participant in the proceedings or the subject matter of the action?

Comparative response

As discussed above in relation to claim preclusion, the basic rule in most jurisdictions is that the preclusive effect of judgments applies between the (co-)claimant(s) and (co-)defendant(s), other participants, represented persons, persons connected to the (co-)claimant(s) and (co-)defendant(s) and other participants. The basic rule applicable in all legal systems examined is that a judgment only has issue preclusive effect between the parties to the proceedings, certain third persons who are deemed to have been a party (procedural privity), and, finally, those third persons who have a relevant legal connection with the parties through blood or title (substantive privity). Outside of those situations, persons who have not participated in the proceedings giving rise to judgment generally are not implicated by the issue preclusive effect of judgments.[195]

Generally, a stranger cannot be bound by or benefit from the issue preclusive effects of a prior judgment.[196] However, sometimes there is a limited exception to this rule contained in specific statutes, for instance in one legal system in a statute regarding civil liability which states that any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise). The concept of a person's "liability in respect of any damage" is to be understood as referring to any such liability which *has been* or could be *established* in an action brought against him by or on behalf of the person who suffered the damage. Accordingly, a party to contribution proceedings, whether claimant or defendant, is not able to deny a liability established by judgment in proceedings brought by the injured person.[197] Further, any issues determined in an action brought by or on behalf of an injured person against any person from whom contribution for damages is sought *in favour of* the contribution defendant will have issue preclusive effect in the proceedings for contribution, so as to bind the contribution claimant even though he may not have been a party to the earlier proceedings.

By way of comparison, the United States Report specified that a stranger could invoke a prior judgment in order to benefit from its issue preclusive effect as long as it was being invoked against a prior party or privy who was able to fully and fairly litigate the issue.[198] The ability of a stranger to invoke issue preclusion in this way may be limited in certain circumstances, depending on the state's law. For example, some states limit its application in relation to mass tort cases by only allowing defensive use of issue preclusion (i.e. the defendant-stranger in the second suit is the only party able to invoke a prior judgment's issue preclusive effect). Furthermore, as discussed above in question 8, in the context of class actions, persons who have opted out of the action may not invoke the issue preclusive effect of the class action judgment against anyone, be they former parties/privies or not. Finally, strangers may not invoke the issue preclusive effect of a judgment against the state or federal government.

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[195] The Swedish Report indicates that situations involving declarations of a patent's validity have universal legal force.

[196] For instance, in England & Wales, a principle is applied that effectively gives an extended meaning to "parties" to include third persons who, in some sense, had a right to intervene in proceedings which would effectively determine his rights and obligations, but chose not to. In such circumstances, these persons may be considered a party, and not strangers. In *Wytcherley v Andrews* (1871) L. R. 2 P. & D. 327, 328, Lord Penzance stated that "[t]here is a practice in this court, by which any person having an interest may make himself a party to the suit by intervening; and it was because of the existence of that practice that the judges of the Prerogative Court held, that if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to re-open the case. That principle is founded on justice and common sense, and is acted upon in courts of equity, where, if the persons interested are too numerous to be all made parties to the suit, one or two of the class are allowed to represent them; and if it appears to the court that everything has been done bona fide in the interests of the parties seeking to disturb the arrangement, it will not allow the matter to be re-opened." Report England & Wales, p34.

[197] England & Wales. See Report England & Wales, p34.

[198] United States Report p 49.

C. Wider preclusive effects

This section is concerned with the wider preclusive effects of judgments, that is to say any preclusive effect which does not fall into either section A (claim preclusive effects) or section B (issue preclusive effects) above. It is thus concerned with rules which preclude the raising of claims or re-litigation of issues which are not considered by your legal system to have been determined by an earlier judgment, e.g. on the basis of procedural fairness or abuse of process), but which are in some sense related to determined claims or issues.

1. The existence and nature of wider preclusive effects

Does your system attribute wider preclusive effects to judgments on the basis of, for example, a doctrine of abuse of process or procedural unfairness?

Comparative response

It can be said that, generally, the wider preclusive effects *of judgments* in their own right do not exist in any of the legal systems analysed. However, some systems provide for mechanisms which regulate party conduct in a way that may prevent re-litigation of claims or issues, but only by virtue of the character of the parties' conduct and not due to the preclusive effects of the judgment itself. Therefore, generally speaking, judgments do not offer preclusive effects going beyond that which was discussed above in relation to claim and, where applicable, issue preclusion.

The most common way in which party conduct is regulated is via some notion of a prohibition of abuse of process.[199] Generally, this doctrine considers it an abuse for a party to raise a claim or defence that should have been raised in the first action, sometimes taking into account certain considerations[200] such as the public and private interests involved, as well as the individual circumstances of the case. In one legal system in particular[201], where an abuse has been alleged, the courts will generally examine whether circumstances justify precluding re-litigation of the claim or issue. Another legal system specifically noted that an abuse may be found where a party held back arguments without good reason, thereby harming the interest of his opponent who would have benefited from having them considered and decided on immediately in the first proceedings.[202] Finally, one report specified that an abuse of process may be found where a claim has been submitted in bad faith or where it is based on a grave error and is intended to cause damage, or where the opposing party has been coerced to abandon its rights or to make concessions.[203]

As noted above, the concepts of claim preclusion and issue preclusion may prevent the re-litigation of matters falling within the scope of the particular a claim or issue that could have been raised in the initial proceedings, but were not. This, however, is not an example of wider preclusion in the sense here described, because the preclusive effect is limited to the claim or issue (deemed to be) *determined in the original proceedings* and does not extend to matters that were not decided. For instance, in a number of legal systems, a judgment prevents the re-litigation of all matters within the claim that could have been brought in the initial proceedings, as well as any defences, but were not. [204] By way of comparison, it should be noted that in most jurisdictions within the United States, the rules of civil procedure make it extremely easy for a party to bring forward all of his arguments or defences in one action so that judicial economy can be preserved and fairness to the defendant observed. On a related note, some jurisdictions[205] may penalize the parties for their conduct in wrongfully or vexatiously bringing or continuing proceedings

[199] England & Wales, Netherlands, Romania, Spain.
[200] England & Wales.
[201] England & Wales.
[202] Netherlands. This situation applies primarily in relation to summary judgments, which are incapable of having preclusive effect under Netherlands law. See Report Netherlands, Part I.D, p35.
[203] Romania.
[204] Netherlands, Switzerland, and United States.
[205] France, Netherlands, Sweden, United States. The German Report (p 38) and the Swiss Report (pp24-25) note that there is some authority for the proposition that the doctrine of the prohibition of abuse of rights may apply in the limited circumstances where a party in the first action pleads the invalidity of a contract as a defence and then in a later action claims that the same contract is valid.

against another party. However, these mechanisms do not prevent re-litigation of a claim or issue as preclusion does.

In addition to the above-mentioned concepts of wider preclusion, other methods by which a court can regulate the parties' behaviour and which may have an effect on the parties' ability to re-litigate claims or issues were noted by some of the reports. One legal system pointed out the existence of a doctrine entitled "waiver by election".[206] This involves the situation where a Claimant has available to him several inconsistent and alternative claims against a Defendant and chooses to pursue only one cause of action to judgment. He will, by virtue of the election of that cause of action, be deemed to have waived the others. The action of the Claimant in having elected one cause of action over the others precludes later litigation of the alternative claims not chosen in the first suit: it is, however, the election and not the judgment which is binding.

Another report indicated that proceedings which involve the evasion of law or procedures may be rejected *ex officio* by the courts.[207] A party is considered to have evaded the law where an act is carried out pursuant to the text of a rule which pursues a result prohibited by the law, or contrary to it. Finally, another legal system[208] specified that the court may also regulate the parties' behaviour in the following two circumstances: (1) where the claimant lacks a sufficient interest to bring the action, and (2) where the claimant's conduct toward the defendant is unfair and inequitable so as to amount to a breach of due process. In these latter two situations, a party may be prevented from relying on the preclusive effects of a judgment or the exceptions thereto.

Generally, all of these doctrines seek to promote the general policies of ensuring that litigation is commenced for a rightful purpose (i.e. the settlement of disputes) and to promote fair and just conduct between the parties. Abuse of process, especially, shares its policy interests with that of claim and issue preclusion, namely: (1) the protection of litigants and other interested persons by ensuring the finality and effectiveness of judgments, (2) the protection of the consistency of the legal order by preventing the rendering by courts within the same jurisdiction of irreconcilable judgments, and (3) the maintenance of civil justice resource economy requiring the prevention of the waste of resources caused by the needless repetition of final judicial findings.

[206] England & Wales.
[207] Spain (Part II.C, p48).
[208] Netherlands.

III. Preclusive effects of judgments within the Brussels/Lugano Regime

This Part is concerned with the practice of the legal systems concerning the recognition of "judgments" (as defined) under the Judgments Regulation, the Brussels Convention (as amended) and the Lugano Convention, to the extent that the State of which each legal system falls part is a Member State or Contracting State bound by the Regulation and/or the either of the Conventions. References to "State of Origin" are to the Member or Contracting State from which the judgment emanates and references to "Recognising State" are to the Member or Contracting State in which recognition of the judgment, for whatever purpose, is sought. Detailed analysis of the provisions of the Brussels Regulation (hereinafter abbreviated as "BR") and of the Brussels and Lugano Conventions (hereinafter also referred to as "BC" and "LC" respectively), as well as the decisions of the European Court of Justice (hereinafter "*ECJ*") referred to below, falls outside the scope of the study, except insofar as such analysis is necessary or appropriate to explain the practice of each legal system.

Preliminary remarks

1. The Brussels/Lugano Regime

Since the entry into force of the Amsterdam Treaty on 1 May 1999, the matters covered by the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (the "**Brussels Convention**")[209] have become the subject of EC legislative competences, pursuant to Title IV (in particular, Articles 61(c) and 65(a) EC Treaty). Consequently, following four accession treaties in 1978[210], 1982[211], 1989[212], and 1996[213], the 1968 Brussels Convention was converted into an EC Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "**Brussels Regulation**")[214]. The Brussels Regulation modernised the rules of the Brussels Convention and aimed at making the system of recognition and enforcement between the Member States more efficient. The Kingdom of Denmark does not participate in Title IV of the Treaty.[215] Consequently, EC instruments adopted in the field of, among others, judicial cooperation in civil matters are not binding upon or applicable in Denmark. From 1 July 2007 the provisions of the Brussels Regulation do apply between the EU Member States, pursuant to the Agreement between the EC and Denmark on jurisdiction and the

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[209] [1972] OJ L 299/32.

[210] Convention on the accession of the Hellenic Republic to the Convention on jurisdiction and enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland [1978] OJ L 304/1.

[211] Convention on the accession of the Hellenic Republic to the Convention on jurisdiction and enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland [1982] OJ L 388/1.

[212] Convention on the accession of the Kingdom of Spain and the Portuguese Republic to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland and the adjustments made to them by the Convention on the accession of the Hellenic Republic [1989] OJ L 285/1.

[213] Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland, by the Convention on the accession of the Hellenic Republic and by the Convention on the accession of the Kingdom of Spain and the Portuguese Republic [1997] OJ C 15/1.

[214] Council Regulation (EC) No 44/2001 of 22 December 2000 [2001] OJ L 12/1.

[215] See Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on the European Union and the Treaty establishing the European Community.

recognition and enforcement of judgments in civil and commercial matters, signed at Brussels on 19 October 2005.

On 6 July 2007, the European Commission made a proposal for a Council Decision concerning the signing of a Convention between the EC and the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation, and the Kingdom of Denmark[216] on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "**Lugano II Convention**"). Negotiations for this Convention were successfully concluded in Brussels on 28 March 2007.[217] The Lugano II Convention will align the EFTA-EU system of recognition and enforcement of judgments with the rules of the Brussels Regulation, and it will replace the 1988 Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters[218] ("**Lugano Convention**"). This Convention was signed between 16 Member States of the EEC[219] and certain Member States of the European Free Trade Association ("EFTA"), including Iceland, Norway, and Switzerland[220]. This convention entered into force on 1 January 1992, and constituted a further geographical extension of the cooperation in the field of international jurisdiction, recognition and enforcement in Europe. The Lugano Convention extended the scope of the application of the rules of the Brussels Convention on the same subject matter to Iceland, Norway, and Switzerland.[221]

In the following section of the report, reference will be made regularly to the term "**Brussels/Lugano Regime**". This is used to refer to the system of recognition and enforcement of judgments in civil and commercial matters currently applicable by virtue of the Brussels Regulation and the Lugano Convention. Where reference is made in this context to the "Member States", this will typically include Switzerland, which country was covered by this study since it is a Contracting State of the Lugano Convention. However, it must be appreciated that Switzerland is not an EU Member State and the reference is not intended and ought not to be construed in this manner.

2. The principle of res judicata as a general principle of EC law

"[T]he importance of the principle of res judicata cannot be disputed .... In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called in question."[222]

The importance of the principle of res judicata both for the Community legal order and national legal systems has been accepted by the *ECJ*.[223] The doctrine of res judicata thus constitutes a general principle of law, which, according to the Court, ensures stability of the law and legal relations, and the sound administration of justice by entailing that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called in question.[224] The principle applies to national and European judicial decisions alike, although its conditions, scope and effect of application are considered to be governed by different legal systems, i.e. respectively the *national* or the *European* judicial system. As regards the former, the Court sees domestic

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[216] In light of the its exclusion from Title IV measures, Denmark will participate as a Contracting Party in the Lugano II Convention, not as an EU Member State.

[217] Proposal for a Council Decision concerning the signing of the Convention between the European Community and the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation, and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters COM(2007) 387 final

[218] Convention on jurisdiction and the enforcement of judgments in civil and commercial matters - Done at Lugano on 16 September 1988 [1988] OJ L 319/9.

[219] Austria (1 September 1996); Belgium (1 October 1997); Denmark (1 March 1996); Finland (1 July 1993); France (1 January 1992); Germany (1 March 1995); Greece (1 September 1997); Ireland (1 December 1993); Italy (1 December 1992); Luxemburg (1 February 1992); Netherlands (1 January 1992); Poland (1 February 2000); Portugal 1 July 1992); Spain (1 November 1994); Sweden (1 January 1993); and United Kingdom (1 May 1992).

[220] The Republic of Iceland (1 December 1995); the Kingdom of Norway (1 May 1993) and the Swiss Confederation (1 January 1992). Prior to its accession to the EU on 1 May 2004, Poland acceded to the Convention on 1 February 2000.

[221] Liechtenstein, a Member State of the European Free Trade Association (1960 EFTA Convention) and the European Economic Area (EFTA-EU relations in the 1992 EEA Agreement), is not a party to the 1988 Lugano Convention.

[222] Case 224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR I-10239, para 38. See also Case C-234/04 *Rosmarie Kapferer v Schlank & Schick GmbH* [2006] ECR I-2585, para 20.

[223] *Kapferer* (n 222), para 20.

[224] *Köbler* (n 222), para 38. See also *Kapferer* (n 222), para 20.

procedural rules on res judicata as an expression of the basic principles of the national judicial system, such as the principle of legal certainty and acceptance of res judicata.[225] In relation to the latter, the practice of the Court of Justice, the Court of First Instance, and the Civil Service Tribunal bears out that the principle plays a role in framework of the application of their respective rules of procedure when deciding whether there exists any absolute bar to proceeding with an a case or action[226].[227]

The principle of res judicata as applied in the national judicial systems of the Member States is, in principle, absolute; in theory it is not subject to exceptions other than those (potentially) provided for under national law. For instance, the obligation of a court to review a final decision which has been adopted in breach of EC law is subject, in accordance with Article 10 EC, to the condition that that court is empowered *under national law* to reopen that decision.[228] In other words, the principle of cooperation under Article 10 EC does not require a national court to disapply its internal rules of procedure according to which a judgment acquires the force of res judicata and may no longer be called in question by a subsequent action in order to review and set aside a final judicial decision if that decision should prove to be contrary to Community law.[229] The only restrictions under EC law placed on the application of national rules on res judicata are the Community principles of equivalence and effectiveness.[230] The requirement of equivalence implies that legal actions based on EC law must be treated in the same way as comparable actions based on national law. Accordingly, where its domestic rules of procedure require a national court to allow an action calling into question a judgment that has acquired the status of res judicata, e.g. for failure to observe national rules of public policy, the court must equally allow such action where it is founded on failure to comply with Community rules of the same nature. The requirement of effectiveness entails that national rules on res judicata must not be framed in such a way as to undermine the effectiveness of EC law in that they render impossible in practice the exercise of rights conferred by EC law. For instance, in a hypothetical situation, a court might be forced to accept an exception to national rules laying down the principle of res judicata if a person was defrauded from the possibility of asserting his rights guaranteed under EC law in the proceedings leading up to a judgment which has acquired the status of res judicata and is subsequently prevented from doing so by virtue of the preclusive effect of this judgment under national law.

The application of national rules laying down the principle of res judicata is trumped by EC law in one additional instance. This is when the application of those rules is that effects are attributed to a decision of a national court which exceed the limits of the jurisdiction of that court as laid down in EC law. In other words, EC law restricts the scope of the preclusive effects of judicial decisions of national courts to those matters that fall within their subject matter jurisdiction as determined in EC law. This may occur, for instance, when the application of these rules has the effect of calling in question the lawfulness of the decision of a Community institution before the national courts in an action brought against the measures taken by the national authorities in implementation of that decision, thereby frustrating the application of EC law in so far as it would render the decision in question impossible to implement. This situation arose in *Lucchini,*[231] in relation to the recovery of State aid granted in breach of EC law which had been found to be incompatible with the common market in an irreversible decision of the European Commission. In this case, Italian rules on res judicata precluded not only the reopening, in a second set of proceedings, of pleas in law which have already been expressly and definitively determined but also precluded the examination of matters which could have been raised in earlier proceedings but were not. The *ECJ* considered that one of the consequences of those rules could be that effects are attributed to a decision of a national court which exceed the limits of the jurisdiction of that court as laid down in EC law. Essentially, therefore, EC law

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[225] Case C-126/97 *Eco Swiss China Time Ltd. v. Benetton International NV* [1999] ECR I-3055, para 46.
[226] Compare Article 92(2) of the Rules of Procedure of the Court of Justice of the European Communities of 19 June 1991 [1991] OJ L 176/7 (as amended), Article 113 of the Rules of Procedure of the Court of First Instance of the European Communities of 2 May 1991 [1991] OJ L 136/34, and Article 77 of the Rules of Procedure of the European Union Civil Service Tribunal of 25 July 2007 [2007] OJ L 225/1.
[227] Order of 1 April 1987 in Joined Cases 159 and 267/84, 12 and 264/85 *Ainsworth and Others v Commission* [1987] ECR 1579, paras 2-4.
[228] *Kapferer* (n 222), para 24. Compare in the context of final *administrative* decisions, Case C-453/00 *Kunhe & Heitz NV v. Produktschap voor Pluimvee en Eieren* [2004] ECR I-837, para 28.
[229] *Kapferer* (n 222), para 24.
[230] *Kapferer* (n 222), para 22. See more generally, Case C-78/98 *Preston and Others* [2000] ECR I-3201, para 31 and the case law cited.
[231] *Lucchini* (n 72), para 63.

restricts the scope of the preclusive effects of judicial decisions of national courts to those matters that fall within their subject matter jurisdiction as determined in EC law. While national courts may, in principle, consider whether a Community act is valid, they have no jurisdiction to declare acts of Community institutions invalid. The Court of Justice alone therefore has jurisdiction to determine that a Community act is invalid.[232] The preclusive effect of their judgments is restricted accordingly.[233] That exclusive jurisdiction is also expressly set out in Article 41 of the ECSC Treaty.

Where European and national rules and principles compete, the former will take precedence and the latter will have to be disregarded. In a number of cases before the *ECJ* involving damage caused by a Member State court's decision which infringed EC law, the principle of res judicata in the national judicial systems appeared to compete with the European principle on State liability. However, the Court clarified that the two principles do not actually compete, since they have a different purpose, scope and effect (i.e. legal consequences).[234] The purpose of the principle of res judicata is to provide legal certainty by ensuring that judicial decisions which have become definitive can no longer be called in question. Conversely, the aim of the principle of State liability is to guarantee reparation for damage caused by a Member State court's decision which infringes EC law. Moreover, an action out of State liability does not necessarily involve the same parties as the proceedings resulting in the decision which has acquired the status of res judicata. Finally, and arguably most importantly, the legal consequences of the application of the two principles are not mutually exclusive, since the application of the principle of State liability, while securing an order for reparation of the damage incurred, does not necessarily lead to a declaration invalidating the status of *res judicata* of the judicial decision which caused the damage.

The scope of the doctrine of res judicata in the European judicial system depends on the meaning given to the terms "same parties", "same purpose" and "same subject matter".[235] The *ECJ* has provided no exact guidance on the meaning to be given to the terms "same parties" and "same purpose", largely since the issue has never arisen. Rather it has taken a holistic approach, simply declaring that the parties and the purpose are the same as in previous litigation, e.g. *Ainsworth*[236]. The *ECJ* has given some guidance as to the meaning of "same subject matter". In *Maindiaux,*[237] the Court noted that the act whose annulment is sought is an essential element of the subject-matter of the action. Again though the issue has not received great attention. The effect of res judicata is to cover only the questions of fact and law actually or necessarily settled by the judicial decision in question. So if an earlier decision decided no point of fact or law which could bind the Court in making its present decision the doctrine is of no relevance.[238] Similarly the earlier decision must actually decide a question of fact or law. If a question is unanswered then the doctrine cannot be engaged as it is essentially without substance.[239]

3. The finality of judgments and Article 6(1) ECHR

"The right to a fair hearing … as guaranteed by Article 6 § 1 … must be interpreted in the light of the Preamble to the Convention, which declares, among other things, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, inter alia, that where the courts have finally determined an issue, their ruling should not be called into question."[240]

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[232] Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415, para 17, and Case C-344/04 *IATE and ELFAA* [2006] ECR I-403, para 27.
[233] Case 314/85 *Foto-Frost* [1987] ECR 4199, para 20.
[234] *Köbler* (n 222), para 39.
[235] The interpretation of these terms can be compared with the interpretation by the *ECJ* of the terms "same parties" and "same claim" in as discussed in Part III concerning the application of the rules on *lis alibi pendens* that apply under the Brussels/Lugano Regime to prevent parallel proceedings (see Article 27 BR / 21 LC). They can further compared with the interpretation of "same parties" and "same claim" as discussed in Part II in relation to the condition of a judgment's preclusive effect in accordance with national law.
[236] *Ainsworth and Others v Commission* (n 227).
[237] Case T-28/89 *Maindiaux and Others v ESC* [1990] ECR II-59, para 23.
[238] Case T-333/01 *Karl L. Meyer v Commission of the European Communities* [2003] ECR II-117.
[239] Joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij NV v. Commission (2nd PVC Case)* [1999] ECR-II 931.
[240] This ruling has been reiterated in numerous cases. See, for instance, *Brumărescu v. Romania* [GC], no. 28342/95, § 6(1), ECHR 1999-VII, para 61.

Article 6 § 1 of the European Convention on Human Rights enshrines important procedural rights for individuals. This protection includes notably the right of access to a court and the right to a fair hearing before an independent and impartial tribunal. The provision in question also obliges the Contracting States to guarantee that domestic court proceedings are conducted and finalised within a reasonsable time. More specifically, the Court has emphasised in a series of recent judgments that the principle of legal certainty is a fundamental component of Article 6 § 1. This principle requires that judgments settling in a final and binding manner a dispute between parties may not be reviewed or otherwise called into question and imposes a duty on the competent authorities to ensure that those final judicial decisions are effectively implemented.

Article 6 § 1 does not expressly mention legal certainty, but the ECHR has consistently interpreted that it derives from the rule of law referred to in the preamble of the Convention, and has moreover established that the right to initiate proceedings before courts in civil matters necessarily entails the right to execution of a judgment[241]. Those two interpretations were frequently recalled by the Court when dealing with cases relating to legal certainty. The recent character of the cases ought to be stressed: 19 of the 25 examined judgments were rendered by the ECHR between 2004 and 2007. Another noteworthy feature is that virtually all of the analysed litigations concerned the legal system of eastern European countries, in particular Russia, Moldova, Romania and Ukraine. In 16 of the 25 analysed judgments, the respondent states were either Russia or Moldova. According to the general approach of the Court when assessing the requirements of legal certainty in the light of Article 6 § 1, the loss of a favourable judgment by a litigant constitutes a violation of the Convention. Essentially three different types of circumstances have led to such a result.

First, in around half of the cases considered, a final judgment was quashed by way of supervisory procedure lodged either by a judge or a procurator general. In that respect, the Court has consistently held that legal certainty and the principle of *res judicata* require that 'no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case' and has underlined that 'Higher courts' power of review should be exercised to correct judicial errors and miscarriages of justice'.[242] Factors liable to trigger a violation of Article 6 § 1 on that ground include notably the partly or total enforcement of the final judgment at the time of the quashing, the pecuniary character of the judgment, the re-opening of proceedings to re-assess the facts of the dispute, and, most importantly, the existence in the domestic legal system of a supervisory review procedure permitting, without any time-limit, the repeated setting aside of a final judgment.[243] It should be noted that the requirements of legal certainty are not absolute and the ECHR has acknowledged, especially where criminal disputes are concerned[244], that re-opening owing to newly discovered circumstances does not as such infringe the Convention and may be legitimate where the procedures are conducted in accordance with statutory criteria and do not constitute an abuse of revision procedures.[245]

Second, in three cases the Court found a violation of Article 6 § 1 on the ground that the final favourable judgment that applicants had obtained remained partly or entirely un-enforced for several years. The ECHR construed in those cases the Article as protecting, beyond the right to access to a court and the right to a fair

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[241] The corresponding, much-repeated passage is the following: '[The right to a court] would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party.' (*Ryabykh v. Russia*, no. 52854/99, § 6(1), ECHR 2003-IX, para 55).

[242] *Ryabykh v. Russia* (n 241), para 52.

[243] In that context, the Court has made clear in cases involving Russia and Ukraine as the respondent states that 'judicial systems characterised by the objection (протест) procedure […] are, as such, incompatible with the principle of legal certainty that is one of the fundamental aspects of the rule of law for the purposes of Article 6 § 1 of the Convention, read in the light of Brumărescu' (*Sovtransavto Holding v. Ukraine*, no. 48553/99, § 6(1), ECHR 2002-VII, para 77).

[244] It appears that the Court accepts more readily limitations on the principle of *res judicata* for criminal litigations than for civil disputes. Compare the interpretation in *Kehaya and Others v. Bulgaria*, nos. 47797/99 and 68698/01, § 6(1), 12 January 2006, para 63: "the principle according to which a final judgment is a res judicata and resolves the dispute between the parties with final effect is a fundamental element of the right to a fair trial guaranteed by Article 6 of the Convention in *civil matters*", and the same judgment. para 68: "the principle of legal certainty dictates that where a *civil dispute* is examined on the merits by the courts, it should be decided once and for all' (emphasis added) with the interpretation in *Popov v. Moldova (no. 2)*, no. 19960/04, § 6(1), 6 December 2005, para 46: "Re-opening due to newly-discovered circumstances is not, as such, incompatible with the Convention. Moreover, Article 4 of Protocol No. 7 specifically permits the State to correct miscarriages of justice in *criminal proceedings*." (emphasis added).

[245] *Popov v. Moldova (no.2)* (n 244), para 46.

hearing during the actual proceedings, the right to the implementation of judicial decisions.[246] While recognising that 'a delay in the execution of a judgment may be justified in particular circumstances', the Court held that that delay 'may not be such as to impair the essence of the right protected'.[247] The ECHR ruled that states may not invoke a lack of funds or of available accommodation as reason to justify a failure to comply with a judgment. [248] The Court underlined the importance for the rule of law of the states'duty to execute final judicial decisions in the particular context of 'administrative proceedings concerning a dispute whose outcome is decisive for a litigant's civil rights', finding that a failure, refusal or even a delay of the administrative authorities to comply in such situations would infringe Article 6.[249]

Third, in three cases, a new set of parallel proceedings was instituted leading to contradictory judgments, depriving the final judgment delivered first of any effect. The ECHR took the view that this amounted to the loss of a final judgment by the applicant and found the result to be the same as in the event of an actual quashing. Again, the fact that enforcement proceedings in respect of a final judgment had already commenced and the absence of a time-limit to the re-examination of a dispute already finally determined proved to be aggravating factors triggering the violation of Article 6 § 1. In the most relevant passage, the Court observed that it is 'the State's responsibility to organise the legal system in such a way as to identify related proceedings and where necessary to join them or prohibit further institution of new proceedings related to the same matter, in order to circumvent reviewing final adjudications treated as an appeal in disguise, in the ambit of parallel sets of proceedings'.[250]

4. The Full Faith and Credit Clause of the US Constitution

"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."[251]

A different preliminary remark should be made in relation to the US and the State of New York. The legal practice in the US, and at state level in New York, has been included in this study to provide important comparative insights into a well-established legal system applying a comparable principle to the European mutual recognition principle. Accordingly, throughout this report, reference is made to the US National Report for the purpose of allowing the drawing of informative and constructive parallels between the legal systems of the EU and the US. The United States has a system for the recognition by all courts of judgments rendered in other US states that is governed by the "Full Faith and Credit Clause" of the United States Constitution. This Clause, and its implementing statutes, make it clear that full faith and credit is applicable not only horizontally (i.e. between state courts and between federal courts) but also vertically (i.e. between federal and state courts).

One of the leading policies behind the system of full faith and credit is said to have been to help American citizens benefit from a unified nation which purpose "'was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin'."[252] Once a judgment is recognised based on full faith and credit, the recognising court must give it the same effect it would receive in its state of origin.[253] This protects the states' interest in the finality of judgments and promotes legal certainty by assuring the parties that their judgment will be recognised and given the same effect in all courts throughout the United States. Although it may be viewed as constraining the states' individual sovereignty, full faith and credit actually operates to protect sovereignty by ensuring that a state's judgment is respected across the nation.

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[246] *Hornsby v. Greece*, judgment of 19 March 1997, § 6(1), *Reports of Judgments and Decisions* 1997-II, para 40.
[247] *Burdov v. Russia*, no. 59498/00, § 6(1), ECHR 2002-III, para 35.
[248] *Prodan v. Moldova,* no. 49806/99, § 6(1), ECHR 2004-III, para 53.
[249] *Hornsby v. Greece* (n 246), para 41.
[250] *Driza v. Albania,* no. 33771/02, § 6(1), ECHR 2007, para 69.
[251] US Constitution Article IV s 1. See United States Report Part III.A, p 53
[252] United States Report Part III.B, p 53.
[253] This will be discussed more below in Part III.A.4.

B. Recognition

1. Judgments recognised

Which judgments, or types of judgments, are recognised (or not recognised) in your legal system under the Brussels/Lugano Regime?

Introduction

In the following, "decisions" (in a broad sense) are identified which have (or have not) been recognised by courts in the examined legal systems under the Brussels Regulation or the Brussels/Lugano Conventions (together the "Brussels/Lugano Regime"). The analysis is not conclusive as not all imaginable types of foreign judgment have been the subject of recognition procedures; judgments clearly within the scope of Article 32 seq. BR are less likely to become the subject of litigation up to appellate courts. Therefore, the fact that a type of judgment is not expressly mentioned does not mean that it would not be recognised. Moreover, there are relatively few reported domestic decisions on the "*concept of a judgment*" under the Brussels/Lugano Regime, or the "*characteristics which a court decision must possess*" if it is to be recognised as judgment under the Brussels/Lugano Regime (which is arguably just a different way of presenting the same question[254]). In general, however, courts appreciate that the notion of "judgment" in Article 32 BR and 25 Brussels/Lugano Conventions is interpreted autonomously[255] and, in practice, in a broad manner[256] by the *ECJ* in light of the objectives of the Brussels Regime and typically with regard to the existing explanatory reports on the Brussels Convention.

Comparative response

The term "judgment" has a broad meaning and includes any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.[257] As interpreted by the *ECJ,* the term is relevant for all the provisions of the Regulation where it is used.[258]

The examples in Article 32 BR of labels attaching to a judgment suggest that the authors of the Convention (Article 25) drew a distinction between the substantive judgment or the ***the final order contained in a judgment***, i.e. the operative part, and the reasons given for it. One of the language-versions of the Regulation refers to "*beslissing*", which is the operative part of a judgment.[259] This suggests that, in principle, only that part (and not the reasoning) falls to be recognised as a judgment under the Regulation. On the other hand, in other language versions, the meaning of the term is not limited to the judgment's operative part.[260] For instance, the term "*Entscheidung*" is used for judgments in a broad sense and does not refer exclusively to a judgment's operative part.[261] Moreover, it is submitted, any restriction in the autonomous meaning to be given to this term does not, in any event, preclude reference to the reasons for a decision in order to determine the legal effects of that decision: recognition of a judgment may thus be tantamount to recognition of the underlying reasons.

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[254] A Layton and H Mercer, *European Civil Practice* (2nd ed, 2004, hereinafter "Layton/Mercer"), paras 24.019-24.021 and the court in *CFEM Façades v SA v Bovis Construction Ltd* [1992] ILPr 561 treat the two questions as separate. On the other hand, the reasoning in *EMI Records Ltd v Modern Music Karl-Ulrich Waterbach GmbH* [1992] QB 115 suggests that the court regarded exclusion from the regime for recognition and enforcement as denying the status of "judgment" under Article 25 of the Brussels Convention.

[255] See, for instance, BGE 129 III 626, 631 et seqq (30 July 2003) (Federal Supreme Court of Switzerland); and the Provincial Court of Barcelona of 12 September 2002 (Report Spain, Part III.A.1, p 53).

[256] BGE 127 III 186, 191 (9 February 2001) (Federal Supreme Court of Switzerland).

[257] Regulation, Article 32.

[258] Case C-414/92 *Solo Kleinmotoren v Boch* [1994] ECR I-2237, para 20.

[259] Dutch language version. The term "beslissing" is distinguished from "vonnis" (judgment), which refers to the "beslissing" (operative part) and the "gronden" (reasons). Report Netherlands, Part I.A, p13.

[260] France, Germany, Romania, Spain and Switzerland (Article 25 LC). As a matter of terminology in England & Wales, it has been noted that the term "judgment" may refer to (a) the decision of the court as a concept, (b) the record of judgment, or (c) the reasons for judgment. The reference is therefore ambiguous, although the examples point towards the first two possibilities.

[261] Report Switzerland, Part I.A, p5.

Judgments within the meaning of Article 32 BR must emanate from a *judicial body*[262] of a *Member* (or Contracting) *State*[263] deciding on its *own authority the issues between the parties*[264]. This has two main implications: (1) *judgments on the basis of recognised non-Member State judgments* are not judgments in the sense of Article 32[265] (discussed below), *and* (2) *court approved settlements which are essentially contractual* because their terms depend first and foremost on the parties' intention, are not judgments in the sense of Article 32 even if it was reached in a court and brought legal proceedings to an end[266]. In approving a settlement agreement of the parties in relation to their dispute, the court does not *typically* decide on its *own authority* any *issues* between the parties. Accordingly, when recognition is sought for an enforceable settlement reached before a court in order to settle legal proceedings still in progress, such a settlement cannot constitute a "judgment" within the meaning of Article 34(3) BR.[267]

The decision of the *ECJ* in *Solo Kleinmotoren* has been criticised[268], and arguably on occasion not strictly followed[269] in the legal systems considered. In *Solo Kleinmotoren*, the Court concluded that "an enforceable settlement reached before a court of the State in which recognition is sought in order to settle legal proceedings which are in progress does not constitute a "judgment", within the meaning of that provision [Article 27(3) BC], "given in a dispute between the same parties in the State in which recognition is sought" which, under the Convention, may preclude recognition and enforcement of a judgment given in another Contracting State." Accordingly, the Court held that *the gravity of the infringement on the national rule of law* is not sufficient to justify a refusal of recognition and enforcement of a judgment whose legal consequences are irreconcilable with an enforceable settlement reached before a court in order to settle legal proceedings. This approach, which undermines the legal strength of court settlements, potentially affects the legal protection (legal certainty) of parties choosing to settle a (cross-border) dispute. On the whole, however, courts in the legal systems considered usually adhere to the *ECJ*'s guidelines.[270]

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[262] If the court or tribunal satisfies the requirements of independence and due process, it does not matter whether it sits in civil, commercial, administrative, or criminal proceedings. See Magnus/Mankowski/Wautelet, *Brussels I Regulation I* (Sellier, München 2007), p 538. Decisive is the question whether the subject matter of the decision is within the scope ratione materiae of the Regulation. See Article 1(1) BR.

[263] Case C-129/92 *Owens Bank Ltd v Fulvio Bracco and Bracco Industria Chimica SpA* [1994] ECR-I 417, para 17-8. Also, see Article 299 EC.

[264] *Solo Kleinmotoren* (n 258), paras 17 and 18.

[265] *Owens Bank* (n 263), para 25.

[266] *Solo Kleinmotoren* (n 258), paras 17 and 18.

[267] In *Solo Kleinmotoren* (n 258), Advocate General Gulmann makes a distinction between "court settlements" and "consent judgments". The former, in his view, cannot acquire the status of res judicata while the latter will generally acquire this status at some point. Moreover, he pointed out, "a settlement will typically not be afforded all the *guarantees* of a judgment and the *authority of the law* does not lie behind a court settlement as it does in the case of a court judgment." (emphasis added).

[268] Report Netherlands, Part III.A.1, p85.

[269] Spain. The judgment of the Provincial Court of Madrid (21 March 2005) stated the following: '*There is no discrepancy as regards the order which homologates the settlement the parties reached converting it to a judicial settlement, which for the same reason is enforceable on the terms of a judgment and has effect, or what is the same thing, the judicial settlement is the equivalent or substitute of a judgment and opens a direct route to enforcement constituting an executory instrument under Article 57.2.3 and 58 of Regulation 44/2001*'. Compare the judgment of the Supreme Court (7 December 1999) which ruled that the recognition and enforcement of a German judgment which contained a judicial settlement was subject to the Brussels Convention.

[270] For instance, in France, a distinction is made between the receptive act of the judge (for example settlement) and the true non contentious judgment when the judge expresses his will even though there is no litigation (Report France, Part III.A.1, p34). Accordingly, a judicial settlement was not considered to be a decision according to article 25 Brussels convention, although a trend suggests that there are more and more type of judicial settlement that are considered as real non contentious judgments with possible recourse. In Switzerland, the same distinction is drawn among scholarly authors, although no case law with regard to the question exists. Report Switzerland, Part III.A.1, p31).The English Court of Appeal in *Landhurst Leasing v Marcq* (1997) unreported, 4 December (Report England & Wales, Part III.A.1, p49) upheld the registration under the Brussels Convention of an order of a Belgian court which had been entered following *the defendant's agreement not to oppose the claim*. Insofar as relevant it held that "… those observations of the European Court, though relevant to the case in which they were made, were *not intended to attenuate the meaning of judgment* in the Convention, nor are they capable of the interpretation that the judgment entered in the present case was not a judgment within Article 25. A Judgment entered *by consent or default* is nonetheless a judgment. Under the Convention, the substance of the judgment is nonetheless a judgment. Under the Convention, the substance of the judgment can under no circumstances be reviewed. If a party agrees to a judgment being entered by conceding the issues, the judgment is no less an authoritative judgment than a judgment entered in default, which is quite clearly within Article 25 (see for example Article 27(2) and Article 46(2))." (emphasis added) This reasoning was probably not necessary for the decision in that case, since the Belgian judgment in question in the case clearly stated that it followed a hearing at which both parties had been represented and that the Court was satisfied that the claim was admissible and well-founded. Nevertheless, the Court comments were said to make perfect sense from the viewpoint of English law; a judgment by consent (or a default judgment) under English law can give rise to judicially enforceable obligations and undoubtedly has preclusive effects, in the same way as a judgment following trial (Report England & Wales, Part

Judgments which contain findings pertaining to the legal relationships of the parties and resolving issues of substance or procedure are considered to be within the scope of the Brussels/Lugano Regime. Interim decisions that determine the legal relationship of the parties are also characterised as "judgment" within the meaning of Article 32 BR.[271] On the other hand, interim decisions that are merely intended to arrange the further conduct of the proceedings are not.[272] In the legal systems examined, ***judgments disposing of the claim*** and ***interim judgments on incidental questions*** are considered judgments within the meaning of Article 32 BR.[273] This includes ***judgments granting a claim*** and ***judgments dismissing a claim for substantive or procedural reasons***[274]*,* i.e. irrespective of the question whether the issues decided by the court were *substantive* or *procedural.* Judgments are recognised under the Regulation whether they are *irreversible, final and conclusive,* or *provisional*[275]; whether they *dismiss* or *grant* a claim[276]; whether they terminate a dispute in *whole* or *in part*; or whether they are rendered after *contradictory proceedings* or, as indicated, *in default of the defendant's appearance*[277].

Furthermore, ***judgments containing a (provisional) enforceable decision in the event that no objection is made*** (e.g. the German enforcement order[278] (*Vollstreckungsbescheid*) are typically considered to be judgments within the meaning of Article 32 BR. Nonetheless, the proceedings for obtaining an enforcement order must be preceded by a *notice* served on the debtor. Thus a German order for payment (*Zahlungsbefehl*) is deemed to be a judgment if it is duly served on the defendant in sufficient time to enable him to prepare for his defence.[279] Equally, the Italian "*decreto ingiuntivo*" is considered to be a judgment in the sense of Article 32 BR and therefore to be enforced under Article 32 seq. BR, even if the order is provisionally enforceable under Italian law before the proceedings have ended and the judgment is final[280], unless it was issued without prior hearing of the defendant[281] or without the defendant having had

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III.A.1, p49). It is therefore considered to involve a decision of a court deciding *on its own authority the issues between the parties*, consistently with *Solo Kleinmotoren*. Accordingly, in England & Wales, under the Convention, the substance of the consent judgment is nonetheless considered to be a judgment, which can under no circumstances be reviewed.

[271] England & Wales, Netherlands, Spain. For instance, Hof Amsterdam (Netherlands) 1 June 1995, NIPR 1996, 426 held that a Belgian interim judgment determining the law applicable to the legal relationship of parties involved in a dispute pertains to an aspect of the legal relationship of the parties and thus constitutes a "judgment" within the meaning of Article 25 BC. Compare P Schlosser, *Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice* [1979] OJ C 59 5, para 187.

[272] P Schlosser, Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice [1979] OJ C 59 5, para 187. The Report Spain describes this type of judgments as "decisions which are limited to ordering matters relating to the internal development of the proceeding and which therefore do not have effects outside the said proceeding" (Report Spain, Part III.A.1, p 55).

[273] It is controversially discussed in Switzerland whether interlocutory decisions determining preliminary issues of substantive law would be recognized under the Convention (Report Switzerland Part III.A.1 p32).

[274] For instance, Report Spain (Part III.A.1, p51) indicates that judgments that declare the inadmissibility of an action on the grounds that the court of the state of origin lacks jurisdiction are recognised. Accordingly, where a court dismisses a case on the grounds of lack of international jurisdiction, this declaration must be accepted and recognised in other states belonging to the Brussels/Lugano Regime. It is disputed whether a judgment dismissing the claim on procedural grounds (*Prozessendentscheid*) would be recognized in Switzerland (Report Switzerland, Part III.A.1 p32).

[275] See, however, Articles 37(1) and 46(1) BR, which allow the court in the country of recognition/enforcement to stay the recognition, or the appeal of a declaration of enforceability, inter alia, when the judgment is under appeal in the country of origin. See in more detail Part III.A.3. Compare OLG Düsseldorf RIW 2004, 391 (IPRspr 2004, No. 156, 347) which held that an appeal against a provisionally enforceable French judgment does not hinder declaring the French judgment enforceable in Germany. However, the German judge may stay the proceedings for granting an execution permission ("*Vollstreckungsklausel*"), in accordance with Article 46(1) BR, until the French appeal has been decided. The stay of proceedings depends on the *likelihood of success* of the appeal in France.

[276] Case C-80/00 *Italian Leather SpA v WECO Polstermöbel GmbH & Co* [200] ECR I-4995, para 19 in conjunction with 47.

[277] See, however, the possible exception to the recognition of default judgments under certain circumstances in Article 34(2) BR. See in more detail Part III.A.3. In relation to the Brussels Convention, the *ECJ* ruled that "[j]udicial decisions, which are delivered without the party against which they are directed having been summoned to appear and which are intended to be enforced without prior service do not come within the system of recognition and enforcement." [emphasis added] See Case 125/79 *Denilauler v Couchet Frères* [1985] ECR 2553, para 17.

[278] The objection to the order for payment, transforms the procedure into adversary proceedings. See §688 seq. ZPO.

[279] Case 166/80 *Peter Klomps v Karl Michel* [1981] ECR 1593, para 9. See also Provincial Court of Barcelona of 12 September 2002 (see Report Spain, Part III.A.1, p53).

[280] OLG Celle NJW-RR 2007, 718. In this situation, the judgment creditor seeking enforcement would normally be required to give security pursuant Art. 46 (3) BR. Same opinion ("decreto ingiuntivo" judgment in the sense of Art. 25 BC/Art. 32 BR): OLG Düsseldorf OLGR Düsseldorf 2007, 458; OLG Zweibrücken RIW 2006, 709; OLG Frankfurt OLGR Frankfurt 2005, 964 and apparently Austrian OGH EuLF 2006, II-81. Report Germany, Part III.A.1, p40.

the opportunity to be heard[282]. The right to be heard is deemed to be sufficiently guaranteed in relation to an Austrian "*Zahlungsbefehl*", because the judgment becomes enforceable only after it has been served and the period for objections has expired.[283] Conversely, *decisions issued by organs other than courts* are, in principle, not regarded as judgments. For instance, an Italian "*atto di precetto*" (a document issued by an Italian lawyer as a demand to pay to the debtor and which is required by Italian law before an enforcement may start) is not considered a judgment in the sense of Article 32 BR.[284] The same applies to a "*titre executoire*" (a document issued by a French "*huissier*" for non-payment on a check) which is not a judgment within the sense of Article 25 BC.[285]

The Brussels Regulation is fundamentally concerned with judicial decisions which, before their recognition and enforcement are sought in states other than the state of origin, have been, or have been capable of being, the subject of an inquiry in adversary proceedings under the law of the state of origin including the various applicable procedures.[286] In view of the protection of the judgment debtor, it is crucial that judicial decisions can be contested in the Member State of origin before they are recognised outside the Member State of origin.[287] In this regard, *the availability of an effective remedy against a decision*, be it at a later stage in the proceedings, appears to be sufficient.[288] ***Judgments containing a decision rendered in default*** are generally recognised as "judgments" under the Brussels Regime by courts in the legal systems examined.[289]

Judgments containing provisional (including protective) measures[290] which were issued in non-adversarial proceedings (i.e. *ex parte* measures) are not considered judgments in the sense of Article 32 BR and thus cannot be recognised under Article 33 BR.[291] In this sense, the *Denilauler*-jurisprudence of the *ECJ* is still considered relevant for the interpretation and application of the Brussels Regulation. An Italian provisional judicial payment order ("*ordinanza ingiuntiva de pagamento*")[292] can, however, be declared enforceable under Article 32 seq. BR.[293] A French "*ordonnance de référé*" (if issued *inter partes*) is also characterised as a judgment in the sense of Art. 25 BC.[294] Finally, an Italian provisional measure corresponding to the German provisional attachment ("*Arrest"*)[295] has been deemed a judgment in the sense of Art. 25 BC.[296]

Judgments made without notice to the defendant have sometimes been refused recognition under the Brussels Regime. These decisions have been criticised, however, on the ground that the court failed to take into account the fact that there had been an opportunity for the defendant to apply to set the order aside.[297] In one legal system, a German judgment ordering a provisional measure ("*einstweilige Verfügung"*)[298]

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[281] OLG Düsseldorf OLGR Düsseldorf 2006, 876.
[282] OLG Zweibrücken IPRspr 2005, No. 157, 430.
[283] LG Freiburg 22.5.2002 2 O 165/02 (Juris).
[284] OLG Köln InVO 2006, 489=EuLF 2006, II-96-II-98.
[285] OLG Saarbrücken IPRax 2001, 238. It does however constitute an enforceable public document in the sense of Article 50 BC (citing Owens Bank for the definition of judgment and the judicial organ issuing the judgment).
[286] *Denilauler* (n 277), para 13.
[287] Case 39/02 [2004] ECR I-9657, para 50-2. See HR 20 December 1996, NJ 1998, 489, and more recently HR 29 September 2006, NJ 2007, 393.
[288] See, for instance, the references in Report Switzerland, p31, n 388.
[289] For instance, the Spanish Supreme Court held on 31 December 1999, that "a settled doctrine has been built up deriving from the judgments of the Court of Justice of the European Community, in the sense of making possible the enforcement of a foreign judgment issued in default of appearance by the defendant, where he was summoned in due form and with sufficient time" (see Report Spain, Part III.A.1, p52).
[290] As regards provisional measures two situations are distinguished, (1) measures adopted by the competent court ex Article 31 BR, which typically only have national effect, and (2) measures adopted by the court with principal jurisdiction that take effect in the territory of other Member States.
[291] BGH ZIP 2007, 396 (citing *Denilauler* (n 277)). This decision ends a split between different German Courts of Appeal. OLG Schleswig OLGR Schleswig 2005, 520 held that the *Denilauler* was no longer good law under the Regulation, while OLG Zweibrücken IPRspr 2005, No. 157, 430 and OLG Düsseldorf OLGR Düsseldorf 2006, 876 held the contrary opinion. See also Judgment of the Spanish Supreme Court (13 December 2006) (Report Spain, Part III.A.1, p54).
[292] Article 186ter Codice di Procedura Civile.
[293] OLG Zweibrücken RIW 2006, 863. Same approach is taken in Austria. See Austrian OGH ZfRV 2000, 231.
[294] BGH NJW 1999, 2372; and OLG Hamm NJW-RR 1995, 189.
[295] OLG München RIW 2000, 464.
[296] OLG Brandenburg InVo 1999, 394.
[297] *EMI Records Ltd v Modern Music Karl-Ulrich Waterbach GmbH* [1992] QB 115 (see Report England & Wales, Part III.A.1, p43ff).
[298] §§ 935, 938 ZPO.

delivered without the party against which it was directed having been summoned to appear, and intended to be enforced without prior service was refused recognition and enforcement, and, as a secondary consequence, the order for the reimbursement of costs ("*Kostenfestsetzungsbeschlusse*") rendered on the basis of this judgment was not recognised either, since the judgment could not be recognised.[299]

Article 32 BR indicates that ***decisions involving a determination of costs by an officer of the court*** are to be characterised as judgments. Some of the legal systems expressly provide for such decisions; for instance, German law makes provision for this: the court registrar acts as an officer of the court which decided the case itself and, in the event of an objection to the registrar's decision on the costs, the court decides the issue instead. The practice in the legal systems considered confirms that such decisions are regarded as judgments within the meaning of Article 32 BR. For instance, in principle the German "*Kostenfeststellungsbeschluss*"[300] is regarded as a judgment within the meaning of the Regulation.[301] Another example is the order of the president of the Paris chamber of lawyers on the fees of a French attorney ("*decision du batonnier*") which has been declared enforceable by the President of the Paris Tribunal de grande instance ("*expedition executoire*"), which has been deemed a judgment within the sense of Article 32 BR.[302] Court decisions on costs are also deemed to be judgments in the sense of Article 25 Lugano Convention.[303] Conversely, certain exceptions have been identified, for instance, if a decision on costs only states which party has to bear the costs without in any way specifying the amount, the judgment cannot be enforced because it has no enforceable content.[304] Moreover, the German bill for court fees ("*Gerichtskostenrechnung*") which is an enforceable title to claim court fees (as opposed to attorney's fees) from a defendant who has lost court proceedings has been denied recognition under Article 33 BR, since it concerns a public law claim (of the state against the litigant for court fees).[305] Finally, the German "*Kostenrechnung*" was not considered to be a judgment within the meaning of Article 25 BC, since it was not rendered by a court, nor was it a determination of the costs by an officer of the court.[306]

The Brussels Regulation's chapter on enforcement does not apply to proceedings for the enforcement of ***judgments given in non-Member States***[307].[308] In his opinion in *Owens Bank*, Advocate General Lenz established that under English law there are a number of ways in which foreign judgments may be recognised (and enforced). One of the possibilities that common law provides in certain cases is to bring proceedings on the basis of a foreign judgment. These are so-called ordinary civil proceedings, in which the action is based not on the original claim, but on the foreign judgment. Lenz concluded that Chapter II, Section III, equally does not apply where the judgment of the non-Member State is made "the basis of civil proceedings". He stated that: "[t]he decision regarding such an actio judicati is also apt to facilitate the enforcement of the judgment of the non-contracting State in the Contracting State in question". This assimilation of the exequatur procedure with the "*actio iudicati*" proceedings has been accepted, albeit with some hesitation.[309] Some doubts can be cast on the justification of this assimilation where the "*actio iudicati*" proceedings actually involve a decision on the merits, i.e. where the court decides on its own authority on the issues between the parties.[310] In those circumstances the automatic characterisation of the "*actio iudicati*" proceedings as mere exequatur proceedings appears to be misguided. In general, however,

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[299] Rb Breda 30 October 1985 NJ 1987, 184. Netherlands Report, p76.
[300] § 104 seq. ZPO.
[301] Rb Almelo 25 November 1977, NJ 1979, 371. See also references in the Report Switzerland, p 31, note 385.
[302] BGH NJW-RR 2006, 143. See also OLG Hamm IPRspr 2003, No. 188, 618; OLG Koblenz IPRax 1987, 24. The same applies to Dutch cost order declared enforceable by a Dutch court on the basis of the fixation of lawyers' fees by the Dutch lawyers' association. See OLG Düsseldorf IPRax 1996, 415.
[303] Austrian OGH ZfRV 2000, 30.
[304] OLG Hamm NJW-RR 1995, 189.
[305] KG Berlin KGR Berlin 2005, 881. See also BGH IPRspr 2000, No. 178, 391 (advance payment for costs of an appeal in law); and OLG Schleswig RIW 1997, 513.
[306] Rb Maastricht 11 November 1981, NJ 1982, 466.
[307] Where reference is made to "Member State" or "Member States", it ought to be noted that Switzerland, which is one of the countries whose legal system was analysed in the framework of this study, is not a Member State of the EU, but instead a Member State of the EFTA, and a Contracting State to the Lugano Convention (1 January 1992).
[308] Case C-129/92 *Owens Bank v Bracco* [1994] ECR I-117, para 25. Compare OGH Wien ZfRV 2002, 24.
[309] Report Netherlands, Part III.A.1, p84.
[310] *Solo Kleinmotoren* (n 258), paras 17 and 18.

the practice in the legal systems examined shows that judgments that merely recognise third state judgments are not recognised under the BR (no *exequatur* of the *exequatur*).[311]

The recognition and enforcement under the BR of ***judgments on arbitral awards*** (e.g. judgments which declare arbitration awards enforceable) is disputed in the Member States. Some argue that enforcement under the BR should be permitted at least in situations in which according to the Anglo-American "doctrine of merger" the arbitration award becomes completely absorbed by the enforcement order of the court.[312] A judgment which not merely declares an arbitration award enforceable, but also contains an independent condemnation judgment has been enforced as "judgment" in the sense of Article 32 BR.[313] In other legal systems, judgments which declare enforceable an arbitral award will not be recognised under the Brussels/Lugano Regime.[314]

The situation is unclear whether or not ***judgments containing evidentiary orders*** are to be regarded as judgments in the sense of Art. 32 BR.[315] Arguably orders to take or preserve evidence - to the extent that they do not fall under the Evidence Regulation (i.e. do not amount to a cross-border taking of evidence) - fall under Article 32 BR if they have an enforceable content.[316] Some domestic (pre-Evidence Regulation) case law suggests otherwise.[317] ***Judgments containing periodic payment orders***[318] are only recognised and enforced under Article 33, 49 BR if the order is irreversible in the state of origin (this applies only to the *astreinte*, not the enforcement of the judgment itself).[319] If the amount of a penalty under Article 49 BR has not been specified by the foreign court, the order cannot be recognised under Article 49 BR.[320] On the other hand, ***judgments not specifying the amount of interest owed*** are recognised. For instance, a judgment in a French adhesion procedure is enforceable under Article 32 seq. BR *including interest*, even if the French judgment does not specify the amount of interest.[321] Similarly, a French judgment ordering payment of legal interest is sufficiently precise for enforcement.[322]

2. Procedural aspects of recognition

What are the procedural aspects of recognition under the Brussels/Lugano Regime in your legal system?

Introduction

Judgments rendered in other Member States which decide claims and issues within the scope of the Regulation[323], i.e. in civil and commercial matters, must be recognised throughout the EU without the need for any special procedures.[324] In other words, judgment recognition (whatever this may involve; see Part III.A.4 below) is "automatic" under the Regulation based on the overarching European principle of mutual recognition.[325] Generally speaking, a court recognising a foreign judgment in the framework of the Brussels Regulation merely examines whether the formality under Article 53(1) Regulation is fulfilled. This formality implies that a party seeking recognition needs to produce a copy of the judgment that satisfies the

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[311] OLG Frankfurt IPRspr 2005, No. 153, 414 (IHR 2006, 212).
[312] BGH NJW 1984, 2763, 2765.
[313] OLG Frankfurt IPRspr 2005, No. 153, 414 = IHR 2006, 212 (note Borges IHR 2006, 206).
[314] England & Wales and Spain.
[315] See Report Germany, p41-2; cf also Report Switzerland, p 32; Report England & Wales, p 47.
[316] *Ibid*.
[317] OLG Hamm RIW 1989, 566 (DE) held that a judgment ordering the taking of evidence is purely procedural decision and therefore no judgment in the sense of Article 25 BC. However, OLG Hamburg IPRax 2000, 530 held that a judgment in evidentiary proceedings constitutes a provisional measure under Article 24, 25 BC.
[318] German "*Zwangsgeld*", and Dutch "*dwangsom*".
[319] OLG Naumburg 3.8.2007, 6 W 74/07 (Juris).
[320] OLG Köln InVO 2004, 473.
[321] OLG Saarbrücken 7.4.2004, 5 W 4/04-1 (Juris).
[322] OLG Hamm NJW-RR 1995, 189.
323 Regulation, Article 1.
[324] Regulation Article 33 (Article 26 Brussels/Lugano Conventions). See also Schlosser, *EU-Zivilprozessrecht* (2003), Article 33, no1.
[325] For instance, in Spain "automatic recognition makes it possible directly to invoke the foreign decision as a decision recognised, and therefore legally binding, before all public authorities of the forum, judicial and non-judicial". See Report Spain, p71. Compare the Provincial Court of Lugo in its Judgment of 2 July 2003: 'Article 33 of the Regulation referred to laid down that decisions issued in a Member State shall be recognised in the other member states without any procedure being necessary'. The decision of Provincial Court of the Balearic Islands of 13 May 2003 is the same.

conditions necessary to establish its authenticity.[326] Legalisation as a formality to certify and establish a foreign judgment's authenticity may not be required.[327] The requirement of automatic recognition does not exclude the court's basic duty to consider whether the rules on recognition of the Brussels Regulation or the Lugano Convention are at all applicable, e.g., the court should satisfy itself that a foreign judgment whose use is sought is one which falls within the scope of the Brussels/Lugano Regime.[328] In this regard, the possibility is noted that only part of a judgment is within the scope of the rules of the Brussels/Lugano Regime, while another part is not. This option is useful when a judgment contains findings on issues outside of the material scope of the Regulation, while other findings are within its scope of application. The judgment, as regards its latter part, must then be recognised in accordance with domestic law.[329]

It has been argued that the function of the first paragraph of Article 33 BR is limited to a statement of principle, laying down the principle of automatic recognition, while the latter two paragraphs actually determine, in conjunction with Articles 38-56 (i.e. Chapter III, Sections 2 and 3)[330], the recognition procedure of foreign judgments in practice.[331] In this view, the term "special procedure" in the first paragraph is understood as referring to any procedure other than provided for under paragraphs (2) and (3).[332] However, this cannot be said to be the general approach in the legal systems examined.

Comparative response

On the whole, it appears that Article 33(1) BR is accepted in the legal systems examined as the legal basis for the recognition of judgments, while Article 33(2) BR is thought to relate to the exceptional situation that an (interested) party[333] seeks recognition as the principal issue "in a dispute".[334] In this procedure, the recognition itself is the point at issue and there is no question of enforcement. If successful, this claim results in a declaratory judgment recognising the foreign judgment. This procedure operates in accordance with the provisions of sections 2 and 3, Chapter II of the Regulation.[335] Generally, only positive claims for recognition of judgment are considered to be admissible, while claims for a negative declaratory decision (i.e. that the judgment is not to be recognised) are not.[336]

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[326] Regulation Article 53(1). Article 55(2) BR allows the court or competent authority to ask for a translation of "the documents" certified by a person qualified to do so in one of the Member States. This term arguably refers both to the judgment itself and, where applicable, its accompanying certificate. Wautelet suggests that Article 53(2) Regulation requires a party who relies on a foreign judgment to produce a certificate filled in by the court in the state of origin. See Magnus/Mankowski/Wautelet (n 262), p550. However, it is submitted that only a "party applying *for a declaration of enforceability* shall also produce the certificate …." (emphasis added) Arguably, a party applying for recognition for other purposes than enforcement is not required to produce the certificate referred to in Article 55 BR. See also Report Spain, p75.

[327] Regulation, Article 56. The authenticity of a judgment will be established in accordance with the maxim locus regit actum; it is therefore the law of the place where the judgment was given which prescribes the conditions which the copy of the judgment must satisfy in order to be valid. See Jenard Report (n 344), p55.

[328] See, for instance, Report England & Wales, p50.

[329] Regulation, Article 48 in conjunction with Article 34(2) BR. See P Vlas in Asser/Doek (eds), *Losbladige Burgerlijke Rechtsvordering* (Looseleaf, Kluwer, Deventer 1953-), note 2 on Article 33 BR, with further references.

[330] In this regard, some suggest that, while Article 33(3) BR does not refer explicitly to Chapter III, Sections 2 and 3 BR, the provisions of those sections will apply mutatis mutandis to the procedure for incidental recognition. See Magnus/Mankowski/Wautelet (n 262), p554. See also Kropholler, *Europäisches Zivilprozeßrecht* (8th ed, 2005), Article 33, no10. This interpretation implies that a court is prevented from reviewing whether there is a ground for non-recognition (Articles 34 and 35 BR) at the stage of recognition. Although this approach appears logical for the *ex parte* procedure under Article 33(2) BR, it does not appear to be so for the situation where the question of recognition arises as an incidental question in the course of adversial litigation when one of the parties argues that a ground for non-recognition applies.

[331] Germany,

[332] Magnus/Mankowski/Wautelet (n 262), p550.

[333] Layton/Mercer (n 254), para 26.007 suggest that "interested party" may include not only the original parties and their assignees but also other persons directly affected by a judgment, such as a surety whose rights are determined by a judgment against a principal debtor.

[334] Since the procedure of Article 33(2) BR operates in accordance with sections 2 and 3 of Chapter III of the Regulation, it is first and foremost intended to be conducted *ex parte*.

[335] Regulation Article 33(2); see also *Schlosser Report* (n 272), para 189.

[336] Layton/Mercer (n 254), para 26.009. There is some discussion on this issue in German literature. See Report Germany, Part III.A.1, p44. The controversy does not seem to have much practical impact: even if the procedure under Art. 38 seq. and the AVAG ("*Anerkennungs- und Vollstreckungsausführungsgesetz*") was not available for a negative declarations, such a declaration is considered to be possible under the regular provision on declaratory judgments in § 256 ZPO. Conversely, in Sweden a negative declaratory judgment concerning the issue of recognition is allowed. See Report Sweden, Part III.A.4, p45. In England & Wales, a party seeking to refute recognition of a judgment under the Brussels/Lugano Regime may apply separately for non-recognition of the

Article 33(3) BR is thought to be essentially redundant, aside from the fact that it states the obvious and clarifies that incidental motions for recognition are allowed under Article 33(1) BR, and that the court hearing the principal claim has jurisdiction over the incidental question. Accordingly, incidental questions of recognition arising in the course of proceedings can be determined without the need for making a separate application.[337] Although no case law has been reported on this issue, an example of an incidental question might involve a motion for dismissal which is made referring to the preclusive effect of a foreign judgment.

As regards the question when the grounds for non-recognition can be raised, a distinction is typically made between typical recognition under Article 33(1) BR and atypical recognition in accordance with Article 33(2) BR. In the former, grounds for non-recognition may be raised immediately at the stage of recognition, in relation to the latter the same grounds can only be reviewed at the stage of the appeal against the declaratory judgment that a judgment is recognised. Invariably, the court is deemed to be allowed to consider (certain) grounds for non-recognition of its own motion. In the following section, the practice in the legal systems is discussed in more detail.

In one legal system, the effects of a foreign judgment extend to the recognising state without the need for a separate proceeding to obtain a decision declaring the recognition, and the judgment may be directly invoked before any court or public authority, *provided there is no opposition* to the recognition.[338] Such specific proceedings for recognition (i.e., the procedures under Article 33(2) and (3) BR) are only required in the event that one of the parties opposes the effect of the foreign judgment.[339] Accordingly, there is a presumption in favour of recognition which may only be overturned on the grounds contemplated in the Brussels/Lugano System. This approach is said to derive from the principle of reciprocal trust which obliges the mutual and outright recognition of judgments, without it being necessary, except in the case of opposition, to have any other proceeding.[340] This makes it possible, for instance, for the procedure to enforce in a Member State a judgment given in another Member State to be quick.[341] In this way, it is possible to carry out official acts on the basis of the judgment, for example, to obtain entry in public registers such as the property register or the commercial register. As regards the consideration by the court of grounds for refusing recognition, a distinction is made between proceedings in which the issue of recognition arises as an incidental question and proceedings in which the recognition of a judgment is the principal question. In the former proceedings, the grounds for non-recognition can be raised by the party

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judgment by a claim for declaratory relief and then seek to deploy the declaration of non-recognition in English proceedings. See Report England & Wales, Part III.B.7, p67.

[337] Layton/Mercer (n 254), para 26.010 note that the English text appears to be more restrictive than the French, Italian and Spanish texts in appearing to require a *decisive* issue.

[338] Spain. See, for instance, Provincial Court of Navarre, 15 January 2002. Report Spain, p71.

[339] Judgment of the Provincial court of Teruel, 20 March 2007. As regards the procedure for recognition under Article 33(2), the Report indicates that all procedural aspects not covered by the Brussels Regulation are governed by Spanish domestic law. Report, p72. The Spainsh report also indicates that – contrary to the practice under the Brussels & Lugano Conventions - this procedure is restricted to the verification of the fact that the judgment presented is within the scope of application of the Regulation, and that the necessary documents have been presented. If these requirements are met, the court will immediately grant recognition without taking into account any observations the party against whom recognition is sought may happen to have made. A second, adversial stage is provided for in which it is possible appeal the decision granting or denying recognition. Here, the applicant is allowed to object the judgment's recognition on the grounds of Articles 34 and 35 BR. Finally, against the decision given there is in turn the possibility of an appeal to the Supreme Court, or an equivalent appeal before the court designated in the Regulation. Article 40 BR, which states that "the procedure for making the application shall be governed by the law of the Member State in which enforcement is sought" is interpreted as a reference to domestic Spanish law, which therefore governs, *inter alia*, the formulation of the application, the public authority to which the application must be made, the number of copies that must be presented, the language in which it is to be drawn up, and the question whether court representation is required. See Report Spain, p72.

[340] Interestingly, the Spanish Report indicates that the effect of an incidental finding on the recognition of a foreign judgment is limited to the proceeding in which it is made. The resulting judgment has *no preclusive effect on the issue of recognition* in subsequent proceedings (i.e., the decision granting or denying recognition is not binding on the parties or the court in subsequent proceedings). Accordingly, it is assumed that the question of recognition can be re-examined again, either because a declarative action of recognition is brought pursuant to Article 33(2) BR, or because the judgment is invoked incidentally in other proceedings (with a different conclusion being reached). See Report Spain, p72.

[341] In the same sense: Judgment of the Supreme Court (4 April 2006), Judgment of the Provincial Court of Guipúzcoa (3 May 2004), Judgment of the Provincial Court of Cadiz (21 November 2001), Judgments of the Provincial Court of La Rioja (21 May 2003, 19 October 2001 and 4 February 2000), Judgment of the Provincial Court of the Balearic Islands (29 May 2001) and Judgments of the Provincial Court of Madrid (2 July 2002 and 14 February 2000).

opposing the recognition immediately, or, in certain circumstances by the court out of its own motion[342], while in the latter proceedings the review of the grounds for non-recognition is reserved for the appeal that may be brought against the recognition of the judgment.

In another legal system, Article 33(1) BR is also deemed to be the principal provision, however, this provision is not considered to regulate the recognition of foreign judgments to the exclusion of the application of domestic procedural rules, which continue to apply in the absence of specific European rules.[343] For instance, the reference in the Jenard Report to "presumption in favour of recognition"[344] is not understood as meaning that a judgment to which one of the grounds of non-recognition applies must, nonetheless, be recognised and given full effect *unless and until* the party opposing recognition establishes a ground for refusal[345], or as requiring that party himself to make a formal application contesting the recognition. In this legal system, it is assumed that Article 33(1) does not exclude the court's duty to consider whether there is any ground for refusing recognition under Articles 34 and 35.[346] Article 33(2) BR is considered to concern the - rare - situation where the recognition of a judgment is raised as the principal issue in a dispute, while the meaning of Article 33(3) BR is restricted to its precise wording, i.e., it provides for the jurisdiction of the court to decide on an incidental question of recognition if the outcome of a case depends on its determination.

Then there is a legal system where, for the application of Article 33 BR, a distinction is made between paragraphs (1) and (2) of said provision, i.e. between proceedings for a decision that a judgment be recognised or for a declaration of enforceability under Article 33(2), 38 seq. BR, and proceedings in which the matter of recognition comes up as an incidental question outside the procedure for a declaration of recognition. In relation to the former, the grounds for non-recognition of Articles 34 and 35 BR can only be raised in appeal[347].[348] Proceedings where recognition comes up as an incidental question are not considered to fall under Article 38 seq. BR. Accordingly, the court is considered bound to determine *ex officio* whether a ground of non-recognition is present in those circumstances.[349] Art. 33(3) BR is argued to be redundant in view of the same rule in Art. 33(1) BR. The only effect of the rule is deemed to be to give to the court (in which proceedings depend on the determination of an incidental question of recognition) jurisdiction to issue a declaratory judgment on the recognition of the foreign judgment.[350]

The creation of the procedure under Article 33(2) BR has been welcomed by some, although criticism has been expressed in relation to the design of the "recognition procedure", which derives from a mere reference to the analogous application of sections 2 ("Enforcement") and 3 ("Common provisions" of Chapter III of the Regulation principally containing rules for the procedure for obtaining a declaration of enforceability and in addition some common provisions. For instance, the referral to the rules of the procedure for enforceability in Article 38 seq. BR does not take into account that the recognition procedure under Article 33(2) BR results in the rendering of a declaratory judgment while a declaration of enforceability is merely constitutive, establishing enforceability of the foreign judgment in the state of

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[342] Some Spanish authors argue that the court may review *ex officio* grounds for non-recognition that concern public or "supraindividual" interests (e.g., the genuineness of the judgment, or the breach of public policy). See Spanish Report, p78. The same approach finds support in Sweden.
[343] England & Wales. See Report, p50ff.
[344] P Jenard, *Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters* (hereinafter "Jenard Report") [1979] OJ C59, 1, p44.
[345] Layton/Mercer (n 254), para 26.003.
[346] England & Wales. See Layton/Mercer (n 254), para 26.003. As a matter of practice, however, the way in which English adversarial system operates may make this debate an academic one in England & Wales. The nature of that system generally requires the court to base its decisions on the parties' statements of case and legal submissions. If a particular point has not been taken by a party, the court will not normally be justified in raising it of his own motion, unless it goes to his jurisdiction to make the ruling in question. That is not to say, however, that the court has no control over the matters taken by the parties: in particular, observations made by the court will often lead the parties to present their case in a different way. Thus, in practice, an English judge may be able effectively to invite a party to English proceedings (whether under Art 33(2) or otherwise) to take a particular objection to recognition of a Member State judgment. It is up to that party whether he wishes to take up that invitation, and to the court whether to allow him to do so depending on the stage which the proceedings have reached.
[347] Regulation, Article 43 and 45 BR.
[348] Reference is made to Regulation, Article 41.
[349] Schlosser, *EU-Zivilprozessrecht (2003)*, Article 33, no2. See also ArbG Berlin 8.11.2006, 86 Ca 405/06 (Juris) (Report Germany, Part III.A.1, p44).
[350] See Report Germany, p43.

recognition.[351] A question raised is, for instance, whether the *ex parte* procedure Art. 41 BR is appropriate for the recognition procedure in the light of Article 6 ECHR, because the rationale underlying the decision to allow an *ex parte* procedure for a declaration of enforceability (i.e. a quick execution and surprise of the judgment debtor) does not appear to be relevant when a declaratory judgment for recognition is claimed.[352]

In the context of the Lugano Convention, Article 26(1) LC has been interpreted as constituting the legal basis of the principle of automatic recognition.[353] This principle is considered to establish a presumption in favour of recognition of foreign judgments rendered in a Contracting State. Accordingly, although recognition may be opposed at the recognition stage, the party who opposes recognition carries the burden of establishing a ground for non-recognition pursuant to Articles 27 and 28 LC.[354] In Switzerland, Cantonal courts have held without reservation that a court must take into account the aforementioned grounds for non-recognition of their own motion (i.e., irrespective of whether they are invoked by the parties),[355] although the Federal Supreme Court has left the question undecided.[356] In line with this approach, it is assumed that facts that are alleged by the parties in this regard must be considered at any stage of the proceedings.[357] Article 26(2) LC is assumed to grant any interested party the right to apply for a declaration of the recognition of a foreign judgment as a principal question in separate proceedings. In contrast, the significance of Article 26(3) LC and its relation to Article 26(1) LC is rarely addressed; the former provision is either considered to simply clarify that any party may raise the question of recognition as a preliminary question if the outcome of the respective proceedings depends on a foreign judgment, or it is deemed to explicitly confer jurisdiction for the recognition on the court before which such proceedings are pending.[358] Other authors argue that courts are under a duty to consider the effects of a foreign judgment of their own motion, irrespective of whether recognition is expressly applied for by the parties. In this view, Article 26(3) LC explicitly grants the right to apply for an incidental recognition in case the court fails to recognise the foreign judgment on its own initiative.

In all legal systems considered, it has been confirmed that the proceedings in which the question of recognition of a foreign judgment arises can be stayed. Courts may decide this out of their own motion if an "ordinary appeal" against the judgment has been lodged in the Member State of Origin. The term refers to "any appeal which is such that it may result in the annulment or the amendment of the judgment … and the lodging of which is bound, in the state of origin, to a period which is laid down by the law and starts to run by virtue of that same judgment".[359] A question arises here whether the stay should depend on the likelihood of the success of an appeal, and, moreover, whether courts can take into account the effects of an appeal under the law of the state of origin.[360]

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[351] Geimer/Schütze(-Geimer), *Europäisches Zivilverfahrensrecht* (2004), Article 33, no74.
[352] Report Germany, Part III.A.1, p44. The Report refers to Geimer/Schütze(-Geimer), *Europäisches Zivilverfahrensrecht* (2004), Article 33, no104.
[353] Switzerland.
[354] BGer 5P.304/2002 (20 November 2002) (Federal Supreme Court of Switzerland); and PKG 1999 no 31, 107 (9 February 1999) (Cantonal Court of Grisons). See Report Switzerland, Part III.A.2, p38.
[355] BlSchK 2007 32, 34 (13 January 2006) (Cantonal Court of Vaud); and PKG 2001 no 44, 180 (6 September 2001) (Cantonal Court of Grisons).
[356] BGer 5P.5/2000 (7 March 2000). The Court has stated – with regard to the enforcement of a foreign judgment – that the defendant should be capable of waiving grounds for non-recognition in the adversary stage of the enforcement proceedings which merely serve his own protection and no public interest such as those set out in Article 27 (2) LC.
[357] PKG 2001 no 44, 380 (6 September 2001) (Cantonal Court of Grisons); cf also the decision of the Cantonal Court of Glarus (referred to in BGE 124 III 444 et seq (9 September 1988) (Federal Supreme Court of Switzerland)).
[358] Monique Jametti Greiner, 'Überblick zum Lugano-Übereinkommen über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen in Zivil- und Handelssachen' in Zeitschrift des Bernischen Juristenverbandes 128 (1992), 69.
[359] Case 43/77 *Industrial Diamond Supplies v Luigi Riva* [1977] ECR 2175, para 42. Compare BGer 5P.402/2005 (14 July 2006); and BGE 129 III 574, 575 (23 June 2003). In both cases, the Swiss Federal Supreme Court held that an ordinary appeal must potentially lead to the annulment or amendment of the original judgment and be subject by law to a time period which starts by virtue of the judgment. In the first Swiss decision referred to, the Court held that this was not the case with a submission for a '*Nachverfahren*' relating to a '*Vorbehaltsurteil*' under German law.
[360] For instance, OLG Düsseldorf RIW 2004, 391 (IPRspr 2004, No. 156, 347) held that the German judge may stay the proceedings for granting an execution permission ("*Vollstreckungsklausel*"), in accordance with Article 46(1) BR, until the French appeal has been decided. The stay of proceedings in those circumstances depends on the likelihood of success of the appeal in France. In Switzerland, The court in ZGGVP 2001 154, 159 (13 September 2001) (Justice Commission of the Canton of Zug) held that the court deciding on a stay of the proceedings must not consider grounds which the party lodging the appeal failed to put forward in the judgment's state of origin. The same court held that the consideration of such grounds would constitute a prohibited review of the foreign judgment as to its substance in the sense of Article 29 LC. On the other hand, it has been emphasized that Article 30 LC gives the court wide discretionary powers as to whether the proceedings ought to be stayed. See BGer 5P.402/2005 (14 July 2006); BGE 129 III 574, 576

In one legal system, it is argued that the application of Article 37 BR should be restricted to situations where a foreign judgment is capable of having binding effect while an appeal is pending under the law of the state of origin. If the foreign judgment has no effect during an appeal, there is no reason for staying the proceedings.[361] In another, it is contended that Article 46(1) BR applies in relation to proceedings where recognition is the principal issue in a dispute which operates in accordance with the provisions of sections 2 and 3, Chapter II of the Regulation.[362]

By way of comparison, in the United States, before a sister-state judgment can be recognised, typically,[363] it must first be authenticated in the recognising state and filed with any county clerk of court within 90 days of its authentication. This, of course, is assuming that the judgment itself is considered a valid and final judgment in the state of origin. Along with the judgment, an affidavit must be produced which states that the judgment was not given in default of appearance or by confession, that it is unsatisfied (and the amount for which it is so), that its enforcement has not been stayed, and the address of the judgment debtor.[364]

3. Exceptions to the rule (grounds for non-recognition)

How does your legal system approach the grounds for non-recognition under the Brussels/Lugano Regime so far as they concern the preclusive effects of the judgment?

Introduction

This section reports on the application in the legal systems examined of the rules providing for exceptions to the recognition of judgments, so far as those exceptions concern the preclusive effects of judgments. In this regard, the focus of the analysis is on Article 34 BR.[365] Article 34 BR provides that judgments are not recognised in the following circumstances: (1) if such recognition is [manifestly][366] contrary to public policy in the Member/Contracting State where recognition is sought; (2) where the judgment was given in default of appearance and the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time [and in such a way][367] as to enable him to arrange for his defence, [unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so][368]; or (3) (a) if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought; or (b) [if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed][369].

Comparative response

The comparative analysis of the question whether the grounds for non-recognition under the Brussels/Lugano Regime have impacted *on the preclusive effects of judgments* can be concise due to the apparent absence of any reported case law on the subject.[370] A general trend is that the grounds for non-

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(23 June 2003) (both Federal Supreme Court of Switzerland); BJM 2002 315, 317 (13 August 2001) (Appellate Court of the Canton of Basle); ZGGVP 2001 154, 159 (13 September 2001) (Justice Commission of the Canton of Zug). For instance, in ZGGVP 2001 154, 159 et seq (13 September 2001) (Justice Commission of the Canton of Zug) the Cantonal court denied a stay because it deemed the appeal's chances of success to be very small. The chances of success of the ordinary appeal have also been considered as a relevant element by the Federal Supreme Court in BGer 5P.402/2005 (14 July 2006). One last factor that has been taken into account by the court in ZGGVP 2001 154, 159 et seq (13 September 2001) (Justice Commission of the Canton of Zug) is the fact that a final judgment in the proceedings in the state of origin could not be expected for at least another eighteen months.

[361] Report Germany, Part III.A.2, p45. See also (for the limitation of Article 37 BR to situations in which there is indeed something to recognise under Article 33 BR) Schlosser, *EU-Zivilprozessrecht* (2003), Article 37, no2. Conversely, Swiss courts have held that a stay does not depend on whether the appeal suspends the enforceability of the judgment or hinders it from acquiring the status of finality (*formelle Rechtskraft*). See BJM 1996 142, 145 (22 December 1994) (Appellate Court of the Canton of Basle); cf also BJM 2002 315, 317 (13 August 2001) (Appellate Court of the Canton of Basle).

[362] Regulation, Article 37(1). See *Losbladige Burgerlijke Rechtsvordering* (n 329), note 1 on Article 37 BR.

[363] At least this is the case in the state of New York, which was the sample state for the project.

[364] United States Report Part III.C, p 61.

[365] See Article 35 BR for further exceptions to recognition, which are not considered separately here.

[366] Term used only in Brussels Regulation and Revised Lugano Convention.

[367] *Ibid*.

[368] *Ibid*.

[369] *Ibid*.

[370] None of the rapporteurs has reported relevant domestic case law in this regard.

recognition are rarely engaged.[371] Moreover, the exceptions are interpreted *strictly* as stipulated by the *ECJ*, because a prolific application would obstruct the attainment of one of the fundamental objectives of the Regulation: the free movement of judgments.[372] The majority of cases reported are either decisions refusing the application of Article 34 BR, or cases that involve the interpretation of Article 36 BR on the prohibition of any review of a foreign judgment as to its substance. In general, courts appear to be well aware of the prohibition under Article 36 BR, which is borne out by the fact that the provision is frequently referred to in practice. Finally, there appears to be a degree of deference of courts in relation to Article 34(1) to the courts of the country of origin of a judgment; courts add weight to the question whether a party actually availed himself of all available means of appeal in the country of a judgment's origin before claiming that the foreign judgment cannot be recognised due to a violation of public policy[373], or due to a lack of notice[374]

The United States system of full faith and credit only allows for limited exceptions to the recognition of sister-state judgments.[375] Consequently, there is no general public policy exception to the application of full faith and credit. The most common circumstance in which full faith and credit is avoided concerns adjudications affecting land in the recognising state. For example, in one Supreme Court case, full faith and credit was denied because the judgment attempted to directly transfer title to land situated in the recognising state.[376] Other circumstances under which a sister-state judgment may be denied recognition include where the amount of money awarded in a judgment is uncertain, or where specific parts of the judgment are modifiable.

4. Effects of recognition

What are the effects of "recognition" within the Brussels/Lugano Regime?

Introduction

Does the obligation imposed to "recognise" a judgment given in another state[377] mean that such a judgment must be given the same effect in the other contracting states as it has under the law of the state in which it was given? Famously, though unclearly and in a particular context, the *ECJ* ruled in *Hoffmann v Krieg,*[378] citing the Jenard Report, that recognition must have the result of conferring on judgments the authority and effectiveness accorded to them in the state in which they were given. In the Court's own wording: "a foreign judgment which has been recognized by virtue of Article 26 of the Convention [Article 33 BR] must *in principle* have *the same effects* in the state in which enforcement is sought as it does in the state in which judgment was given."[379] (emphasis added)

Prior to this ruling, three possible approaches were advanced to determine the legal consequences of a judgment recognised in accordance with the Brussels/Lugano Regime: (1) the extension of effects (the law

[371] For instance, for Germany only 5 successful cases were reported on which involved non-recognition on the basis of the public pokicy exception.
[372] Case C-414/92 *Solo Kleinmotoren* [1994] ECR I-2237, para 20; and Case C-7/98 *Dieter Krombach v André Bamberski* [2000] ECR I-1935, para 21.
[373] England & Wales, and Netherlands. For instance, in *Interdesco S.A. v Nullifire Limited* [1992] 1 Lloyds' Rep 180, the court held that the English court should consider whether a remedy lay in such a case in the foreign jurisdiction in question - if so, it would normally be appropriate to leave the defendant to pursue his remedy in that jurisdiction. The court added that "[s]uch a course commends itself for two reasons. First it accords with the spirit of the Convention that all issues should, so far as possible, be dealt with by the State enjoying the original jurisdiction. Secondly, the Courts of that State are likely to be better able to assess whether the original judgment was procured by fraud [i.e. violates public policy]." See also HR 5 April 2002, NJ 2004, 170 (*Landelijk Bureau Inning Onderhoudsbijdragen v W*), in which the Dutch Supreme Court held that "[i]nsofar as the defects as regards the judgment of a foreign court – in this case: violation of the duty to provide reasons and the violation of the right to be heard – could have been repaired by means of an appeal [in the country of origin] and it does not appear that the affected party was not in a position to avail himself of the means of recourse, this decision cannot be refused recognition and/or enforcement in this country by claiming a violation of public policy."
[374] Regulation, Article 34(2) provides for an "exception to the exception" in case the defendant "failed to commence proceedings to challenge the judgment when it was possible for him to do so" in the state of origin.
[375] For example, a judgment that is not valid or final may be attacked collaterally for the purpose of defeating recognition (United States Report Part III.F, p 56).
[376] Furthermore, the Supreme Court has held that, "a sister State's decree concerning land ownership in another State has been held ineffective to transfer title…" (*Fall v Eastin* 215 US 1 (1909) in United States Report Part III.F, p 57).
[377] Article 33(1) BR; Article 26 BC/LC.
[378] Case 145/86 [1988] ECR 645, para 9.
[379] Ibid, para 11.

of the state of origin applies), (2) the equalisation of effects (the law of the state of recognition applies), and (3) the combined effects (dual application of the law of the state of origin and the state of recognition).[380]

The opening sentence of the Jenard Report's commentary on Article 26 BC [33 BR] hints at the principle of extension of effects in that "[r]ecognition must have the result of conferring on judgments the *authority* and *effectiveness* accorded to them in the State in which they were given"[381] (emphasis added). In this regard, it is considered that the term "authority" should be taken to refer to the status of judgment as an expression of judicial authority in determining the parties' civil rights and obligations, while the term "effectiveness" more naturally refers to the legal consequences of a judgment in a particular legal system.[382] In *Hoffmann v Krieg*, the *ECJ* initially cites the abovementioned line of the Jenard Report. Subsequently, however, the Court consistently refers to the "effects" of a judgment.[383] The Report indicates that, as recognition is automatic, it "does not require a judicial decision in the State in which recognition is sought to enable the party in whose favour the judgment has been given to invoke that judgment against any party concerned, for example an administrative authority, in the same way as a judgment given in that State". Rather than interpreting this statement as supporting an "equalisation of effects" approach, it is suggested that the intended reference is to the implications of the requirement of automatic recognition which prohibits any special procedures before a judgment can be invoked, rather than to a judgment's effects. Thus, for example, if a judgment against an insolvent regulated organisation is a pre-requisite to obtaining compensation from the regulator, the judgment of another Member State should be given equal status with a local judgment in the compensation process, but that is not the same thing as giving it the same legal effect.

The extension of effects approach equally finds support in Article V of the Protocol to the Convention and the accompanying commentary of Jenard on that provision. The provision - dealing with warranty and guarantee actions in Germany and Austria - provides that "[a]ny effects which judgments given in [Austria and Germany] may have on third parties by application of the [provisions of the German and Austrian codes of civil procedure set out] in the preceding paragraph shall also be recognised in the other Contracting States". The Jenard Report expands on this, as follows: "Thus, for example, a guarantor or warrantor domiciled in France can be sued in the German court having jurisdiction over the original action. The German law judgment in Germany affects only the parties to the action, but it can be invoked against the guarantor or warrantor. Where the beneficiary of the guarantee or warranty proceeds against the guarantor or warrantor in the competent French courts, he will be able to apply for recognition of the German judgment, and it will no longer be possible to re-examine that judgment as to the merits." Overall, it is noted that the Jenard Report strongly supports an "extension of effects" approach. But its application and limits are not clearly defined.

The Schlosser Report is less outspoken on the question what are to be the effects of a judgment recognised. Interestingly, it stresses that "[j]udgments *dismissing an action as unfounded* must be recognized" (emphasis added). A dismissal judgment cannot be enforced within the meaning of Article 38(1) BR, neither can it be executed by means of measures for enforcement under the law of the state of recognition. Consequently, aside from its use as a means of evidence, the only reason why a party might seek

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[380] G Droz, *Compétence judiciaire et effets des jugements dans le marché commun* (Librairie Dalloz, Paris 1972), p281ff. Compare the opinion of Advocate General Darmon in *Hoffmann v Krieg* (n 378), para 20, who stated that "I agree with G.A.L. Droz that *a dual limit should be imposed*: the judgment cannot have greater effects in the State in which enforcement is sought than it would have in the State in which it was delivered nor can it produce greater effects than similar local judgments would. That second limitation is founded on the need to harmonise interpretations and the desirability of preventing excessive recourse to the public policy exception." (emphasis added)

[381] Jenard Report (n 344), p43. The German version of the Report states that recognition should have the effect that "den Entscheidungen die *Wirkungen* beigelegt werden, die ihnen in dem Staat zukommen, in dessen Hoheitsgebiet sie ergangen sind" (emphasis added). The French version states that recognition should "avoir pour effet d' attribuer aux décisions *l'autorité et l'efficacité* dont elles jouissent dans l'état ou elles ont été rendues" (emphasis added). In Dutch it states „gevolge te hebben dat de beslissingen *het gezag en het effect* worden verleend die zij genieten in het land waar zij zijn gewezen" (emphasis added). Compare the citation of the report by the *ECJ* in *Hoffmann v Krieg* (n 378), para 10. Also compare the Evrigenis-Kerameus Report on the Convention on the accession of the Hellenic Republic to the Convention on jurisdiction and enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland [1986] OJ C298/1, para 75.

[382] Layton & Mercer, *European Civil Practice* (2nd ed., 2004), paras 24.007-24.010 suggest, by contrast, that the concept of "authority" more naturally refers to the dispositive effects of a judgment and that the concept of "effectiveness" more naturally refers to the procedural effects of a judgment.

[383] Compare "werking" in Dutch, "effets" in French, and "Wirkung" in German.

recognition of such a judgment is to prevent an unsuccessful opponent from attempting to re-litigate his lost cause with a view to obtaining a more favourable decision in a court located in a different state. Accordingly, the drafters of the Convention acknowledged the fact that under the regime established by the Brussels Convention, the recognition of judgments might be sought for purposes other than enforcement. Moreover, it is most likely that the drafters of the Convention were contemplating the recognition of judgments for the purpose of invoking their preclusive effect. This is arguably the only conclusion that can possibly be derived from the explicit reference to the recognition of dismissal judgments.

With considerable insight, the Report acknowledges that the effects of a court decision are not altogether uniform between legal systems. It provides two examples: (1) the characterisation of the same judgment's effect as substantive in one and procedural in another legal system (i.e., a judgment delivered in one state as a decision on a procedural issue may, in another state, be characterised as a decision on the substance), and (2) the scope of the same judgment's effect limited to the principal parties in one legal system and extended also to third persons in another (e.g., in one state, a judgment against the principal debtor is also effective against the surety, whereas in another it is not). The Report indicates that harmonising these matters was not deemed to be part of the tasks of those drafting the Brussels Convention. Accordingly, it is submitted that – even today - the Brussels Regulation, and equally the Lugano Convention, cannot be construed as harmonising the effect of court decisions. In the absence of European law, the application of national law is thus necessitated. In this regard, the Report stipulates that decisions which are considered procedural in the state of origin ought not to be characterised as binding as to the substance in the state of recognition. The court in the state of recognition may therefore allow (or disallow) a subsequent action for substantive reasons.

Comparative response

In the legal systems examined, the ruling of the Court in *Hoffmann v Krieg* has, generally speaking, been interpreted broadly as concerning all possible legal consequences that may be accorded to a judgment in the state where it was rendered. This implies that a majority of legal systems has adopted the extension of effects approach.[384] A minority of states applies either the equalisation[385] or the combined effects[386] approach. Overall, the legal practice appears to be well aware of the *ECJ*'s expressed view of the effect, in principle, of the recognition of judgments. On the other hand, in various Member States the legal practice still appears to be divided on the matter, which results in diverging approaches by courts (and commentators) within the same state.[387]

Analysis

The broad reading of the ruling in *Hoffmann v Krieg* is understandable with a view to the broad formulation of the question referred for a preliminary ruling by the Dutch Hoge Raad.[388] Principally, however, *Hoffmann v Krieg* concerned the issue of recognition *for the purpose of enforcement*, and the execution of judgments recognised (i.e. the enforcement in the Netherlands of a German judgment ordering the payment of maintenance).[389] To obtain a declaration of enforceability under the Brussels/Lugano Regime, a

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[384] Germany, Netherlands, Spain, and Sweden. In England & Wales and France the legal practice appears to be undecided over the proper interpretation of the meaning of the ruling as regards the preclusive effects of judgments. In Romania, the ruling does not appear to be followed, at least not in relation to the preclusive effect of judgments.

[385] Romania.

[386] France.

[387] England & Wales and France.

[388] "Does the obligation imposed on the contracting states to recognize a judgment given in another contracting state (Article 26 of the Brussels Convention) mean that such a judgment must be given the same effect in the other contracting states as it has under the law of the state in which it was given and does this mean that it is therefore enforceable in the same cases as in that state?"

[389] The parties to the main proceedings (German nationals) were married in 1950. In 1978, the husband left the matrimonial home in Germany and settled in the Netherlands. On application by the wife, the husband was ordered by a decision of a German court (21 August 1979) to make maintenance payments to her as a separated spouse. On the application of the husband, a Dutch court granted by default judgment a decree of divorce (1 May 1980), applying German law in accordance with Netherlands choice of law rules. The divorce was entered in the Dutch civil register (19 august 1980), whereupon in the Netherlands the marriage was dissolved. The judgment containing the divorce decree had not been recognized in Germany at the time which the national court considers material for the purposes of the case. Moreover, divorce is a matter not covered by the Brussels Convention. Accordingly, the divorce judgment could not be recognised and enforced under that Convention. On the application of the wife, a Dutch court rendered a declaration of enforceability (29 July 1981) of the German maintenance judgment. Notice of the enforcement order was served on the husband who did not enter an appeal against it. For the purpose of execution, the wife then obtained an attachment of the husband's earnings (28 February 1983). Consequently, the husband brought interlocutory proceedings in the Netherlands to have the attachment

judgment must be enforceable in formal terms in its state of origin.[390] A judgment acquires this status - and subsequently retains it - when it is certified as enforceable in the state of its origin.[391]

The judgment's enforceability *in formal terms,* which is ensured by its accompanying certificate, must be distinguished from its enforceability *in practical terms*, i.e. the circumstances in which a judgment may be executed under the law of the state of origin and, alternatively, under the law of the state of enforcement. [392] For instance, a judgment that is certified as enforceable in formal terms is often rendered unenforceable in practice by some cause occurring after the certification takes place (e.g. by payment of the judgment debt).[393] The distinction is understandable; the court originally certifying a judgment's enforceability cannot foresee events that might affect the judgment's enforceability in practice. Accordingly, a judgment that is enforceable in formal terms, might not be enforceable in practice under the law of the state of origin.[394]

More generally, the enforcement procedure of the Brussels/Lugano Regime only determines the procedure for obtaining an enforcement order (i.e. a declaration of enforceability).[395] It does not concern the execution of the judgment itself, including the circumstances in which judgments may (or may not) be executed, i.e. cause that render a judgment unenforceable in practice. The execution is governed by the law of the country of enforcement.[396] In other words, while a recognised judgment for which a declaration of enforceability has been given must, in principle, be accorded the same effect as it has in its state of origin, the law of the state of enforcement governs the procedure for its implementation. In relation to the enforcement effect of judgments recognised under the Brussels/Lugano Regime, the Court has thus struck a (certain) balance between the issues covered exclusively by the Brussels/Lugano Regime and those left to be dealt with under the domestic laws of the state of origin and the state of enforcement.

The balance between the role of the law of the state of origin and the law of the state of recognition has not so far been crystallised by the Court of Justice or, in explicit terms, by Member State Courts in relation to other effects of judgments recognised, including the preclusive effects of judgments.[397] Outside the context of enforcement, the Brussels/Lugano Regime merely determines key aspects of the procedures for obtaining recognition of a judgment. Recognition of a foreign judgment does not require the judgment to be enforceable in the state of origin.[398] As discussed previously, recognition for purposes other than enforcement only involves the production a copy of the judgment that satisfies the conditions necessary to

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order discharged, or at least suspended. Successful at first instance, unsuccessful on appeal, he appealed in cassation to the Dutch Supreme Court.

[390] Article 38 BR stipulates that "[a] judgment given in a Member State and *enforceable in that State* shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there." (emphasis added) The Jenard Report states that "[t]he foreign judgment must … be enforceable in the State in which it was given in order to be enforceable in the State in which enforcement is sought. See Jenard Report (n 344), p47.

[391] Regulation, Article 40(3) in conjunction with 53(2). Certification of the formal enforceability of a judgment is to be done by means of a certificate using the standard form annexed to the Regulation. See Article 54 (Form Annex V of the Regualtion). Under the Brussels and Lugano Conventions, no certification is required. Instead, the applicant must produce documents which establish that, according to the law of the State of origin the judgment is enforceable (and has been served). See Article 33 in conjunction with 47(1) of the Brussels and Lugano Conventions.

[392] Case 267/97 *Eric Coursier v Fortis Bank* [1999] ECR I-02543, para 24.

[393] In Germany there is a debate whether the parties may bring additional substantive objections (e.g. that the debt owed under the judgment has been paid after the judgment was handed down, that there has been set-off or that the claim has been assigned to a third party) against foreign judgments which arose after the rendering of the foreign judgment according to § 12 AVAG. § 12 (1) AVAG reads as follows: "In the miscellaneous appeals directed against the authorisation of the enforcement of a judgment, the party against whom enforcement is sought may also raise objections against the claim itself insofar as the reasons on which they are based came about after the judgment was issued." The Bundesgerichtshof held recently that this is possible. See BGH NJW 2007, 3433 (citing Coursier). Report Germany, Part III.B.8, p57.

[394] Another situation can occur where a judgment which remain enforceable in practice, may be refused recognition on one of the grounds for non-recognition. In *Coursier* (n 392), the German judgment remained enforceable in practical terms in Germany, while it could not be recognised in the Netherlands because it was irreconcilable with a domestic judgment which had not (yet) been recognised in Germany.

[395] In this sense only does the Brussels/Lugano Regime constitute an autonomous and complete system. See Case 148/84 *Deutsche Genossenschaftsbank v Brasserie du Pecheur* [1985] ECR 1981, para 17; and Case C-172/91 *Sonntag v Waidmann* [1993] ECR I-1963, paras 32 and 33. See also *Eric Coursier v Fortis Bank* (n 392), para 25.

[396] *Deutsche Genossenschaftsbank v Brasserie du Pecheur* (n 395). See also *Hoffmann v Krieg* (n 378), para 27 and *Eric Coursier v Fortis Bank* (n 392) para 28.

[397] Or, for instance, judgments' constitutive effect, intervention effect, effect of third-party notice, or evidentiary effect.

[398] Only the enforcement requires the judgment to be enforceable in the state of origin. Without proof of a judgment's enforceability in formal terms no declaration of enforceability can be obtained in the Member State of enforcement. See Article 38 BR.

establish its *authenticity*.[399] Recognition thus implies that the document that is produced is acknowledged as an authentic judgment. Prior to the establishment of the Brussels/Lugano Regime, there were striking differences in relation to the prerequisites for recognition between various conventions applicable amongst the Member States in that either it had to be established that the judgment was "*res judicata"* in the country of origin, or that it was "enforceable" in that state before it could be recognised.[400]

The Brussels Convention, and later its successor and the Lugano Convention, omitted any reference to the words "*res judicata"*, because it was considered that the Brussels Regime should allow for the recognition of judgments that do not always have the "force of *res judicata*".[401] For that reason, it is no condition for recognition that a foreign judgment has the status of res judicata in the state of origin. In other words, recognition of a judgment does not warrant the conclusion that the same is binding in terms of being final or irreversible in the state where it was rendedered. The Regulation only provides that the recognition proceedings may[402] be stayed by the court in the state of recognition if an ordinary appeal against the judgment has been lodged.[403] Accordingly, recognition does not require, nor does it automatically allow,[404] the court in the state of recognition to take for granted that the judgment recognised is formally binding, irreversible, or capable of having claim preclusive effect under the law of the state of origin. Separate inquiries by the court into these questions may be necessary when giving effect to the judgment recognised.[405]

This contrasts with the requirement, when a declaration of enforceability is sought, that it be shown that a judgment is *formally enforceable* in the state of origin, by means of a specific standard form certificate prescribed by the Regulation[406].[407] In *Deutsche Genossenschaftsbank v Brasserie du Pecheur*[408]*,* the *ECJ* held that the *enforcement* procedure under the Regime as an autonomous and complete system, including the matter of appeals.[409] No comparable system appears to exist for the recognition procedure under the Brussels/Lugano Regime, although Article 33(1) stipulates that judgments be recognised in the Member States *without any special procedure being required*.[410] This remark arguably does not apply to situations referred to in Article 33(2) BR (i.e. an interested party raises the recognition of a judgment as the principal issue in a dispute and applies for a decision that a judgment be recognised) which does operate in

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[399] See Part III.A.2.
[400] See Jenard Report (n 344), p7.
[401] *Ibid*, p43. The Jenard Report gives that example of interim proceedings and judgments rendered *ex parte*. See Part I.D for a comparative analysis of the types of judgments that are capable of having preclusive effect.
[402] The reference to "may" implies a power of descretion for the recognising court. Recognition of a judgment that is under appeal is therefore not excluded under the Brussels/Lugano Regime.
[403] Article 37(2) BR provides that the same proceedings may be stayed in Ireland or the United Kingdom if "enforcement" is suspended in the state of origin, by reason of an appeal. The use of this term in the context of recognition might create the mistaken impression that only judgments the by their nature are capable of enforcement can be recognised. This is not the case. See Part III.A.1.
[404] In relation to the certificate required for the purpose of obtaining a declaration of enforceability, Article 54 BR states that the court may, if it considers that it has sufficient information before it, dispense with its production. Compare Article 48 LC. A similar reasoning might be applied by analogy in relation to the question whether a judgment is formally binding in the state of origin, i.e. if a court considers it has sufficient information before it, it may dispense with the requirement of additional proof.
[405] P Barnett, *Res Judicata, Estoppel and Foreign Judgments* (Oxford University Press, Oxford 2001), para 7.06.
[406] The Lugano Convention does not introduce the use of standard for certificates. Article 46 LC states that "[a] party seeking *recognition or applying for enforcement* of a judgment shall produce: 1. a copy of the judgment which satisfies the conditions necessary to establish its authenticity; 2. in the case of a judgment given in default, the original or a certified true copy of the document which establishes that the party in default was served with the document instituting the proceedings or with an equivalent document." (emphasis added) Article 47 LC provides that "A party applying for *enforcement* shall also produce: 1. documents which establish that, according to the law of the State of origin, the judgment is enforceable and has been served; …." (emphasis added) The revised Lugano Convention, on the other hand, contains the same provisions as the Brussels Regulation in this regard.
[407] Regulation, Article 38, 53(2), 54, and Annex V.
[408] Case 148/84 [1985] ECR 1981, para 16-7.
[409] For instance, it follows that Article 43 BR excludes procedures whereby interested third parties may challenge an enforcement order under domestic law. Ibid, para 17.
[410] In Case C-365/88 *Kongress Agentur Hagen GmbH v Zeehaghe BV* [1990] ECR-I 01845, paras 17-9, the Court stressed that "the object of the Convention is not to unify procedural rules" and that "as regards procedural rules, reference must be made to the national rules applicable by the national court (see *in particular*, as regards the concept of lis alibi pendens, (…) Case 129/83 Zelger v Salinitri [1984] ECR 2397, and, as regards the conditions for the enforcement of a foreign judgment, the (…) Case 148/84 Deutsche Genossenschaftsbank v Brasserie du pêcheur SA [1985] ECR 1981, and (…) Case 145/86 Hoffmann v Krieg [1988] ECR 645)." (emphasis added) In *Hagen,* the Court clarified that the European rules on international jurisdiction should be distinguished from rules laying down conditions for the admissibility of a case. On the other hand, the Court also clarified that the application of national procedural rules may not impair the effectiveness of the Convention. For instance, a court may not apply conditions of admissibility laid down by national law which would have the effect of restricting the application of the European rules of jurisdiction (see Case 288/82 Duijnstee v Goderbauer [1983] ECR 3663.

accordance with the autonomous and and complete procedure provided for in Sections 2 and 3 of Chapter III of the Regulation on recognition and enforcement. This suggests that in situations other than that referred to in Article 33(2) BR, the rules of the state of recognition apply, insofar as the application of these rules (1) does not require a special procedure for recognition, (2) is not excluded by explicit rules contained in the Regulation (see Section 3 of Chapter III), and (3) does not undermine the effectiveness of the Brussels/Lugano Regime.[411]

Another – crucial – aspect unregulated by the Brussels/Lugano Regime is the question which legal system is to govern the preclusive effects of a judgment after it has been recognised. Although the issue remains formally undetermined with a view to the subject of the Court's decision in *Hoffmann v Krieg*, the court's approach (as described above) in relation to the enforcement effect of recognised judgments gives reason to conclude that a foreign recognised judgment should, in principle, be accorded by the recognising court the same preclusive effects as it has in the state of origin ("formal recognition"), while the process of administering the recognised judgment's preclusive effect is governed by the law of the state where the effect is invoked ("recognition in practice").

As indicated, in practice, the "same effect" requirement is interpreted in Member States as a reference to the law of the state of origin. However, when one looks at the four main aspects related to the preclusive effect of a judgment in practice, it quickly becomes clear that a unilateral approach (the application of the law of the state of origin to the exclusion of all other legal systems) is impractical (in addition to being theoretically uncalled for). The four essential aspects of a judgment's preclusive effect are (1) the conditions for preclusive effect, including the question whether a judgment is capable of having preclusive effect[412], (2) the scope of preclusive effect[413], (3) the procedure for invoking preclusive effect[414], and (4) the possible exceptions to preclusive effect[415].

Out of these four, only the first and second aspect unquestionably relate directly to the effect of the judgment recognised. Accordingly, to ensure that a judgment's effect is the same throughout all the Member States, the application of the law of the state of origin might be advocated to determine the conditions for and the scope of a judgment's preclusive effect. This argument does not apply to the third aspect which concerns the process of administering the recognised judgment's preclusive effect - including

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[411] See Joined Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen* [1995] ECR I-4705, para 17; Case C-129/00 *Commission v Italy* [2003] ECR I-14637, para 25; and more recently, Case C-222/05 *Van der Weerd and Others* [2007] ECR-I 4233, para 28. In the absence of Community rules, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law (i.e. the recognition of judgments falling within the scope of the Brussels Regulation), provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, secondly, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness). As regards the principle of effectiveness, the Court of Justice has held that that each case which raises the question whether a national procedural provision renders the exercise of rights conferred by the Community legal order on individuals impossible or excessively difficult must be analysed by reference to (a) the role of that provision in the procedure, (b) its progress, and (c) its special features, viewed as a whole, before the various national instances. In that context, it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as (a) the protection of the rights of the defence, (b) the principle of legal certainty, and (c) and the proper conduct of the proceedings. See, to that effect, Case C-312/93 *Peterbroeck* [1995] ECR I-4599, para 14, and *Van Schijndel and Van Veen*, para 19). For instance, in examining the compatibility with the principle of effectiveness of a principle of national law which provided that the power of the court to raise pleas of its own motion in domestic proceedings was limited by its obligation to keep to the subject-matter of the dispute and to base its decision on the facts put before it, the Court ruled that that limitation on the power of the national court was justified by the principle that, in a civil suit, it is for the parties to take the initiative, and that, as a result, the court is able to act of its own motion only in *exceptional cases involving the public interest* (see for an example Case C-168/05 *Mostaza Claro* [2006] ECR I-10421 involving the need to ensure that consumers are given the effective protection they derive from EC law against unfair terms in consumer contracts). That principle safeguards the rights of the defence and ensures the proper conduct of proceedings by, in particular, protecting them from the delays inherent in examination of new pleas (see *Van Schijndel and Van Veen*, para 21). Accordingly, the principle of effectiveness does not preclude a national provision which prevents national courts from raising of their own motion an issue as to whether the provisions of Community law have been infringed, where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions has based his claim (see *Van Schijndel and Van Veen*, para 22).

[412] Part I.D, and Part II.A.3.

[413] Part II.A.3.

[414] Part II.A.4.

[415] Part II.A.5.

the circumstances in which the judgment must be given preclusive effect in practice - and is thus subject to the law of the state of recognition.[416]

As to the final aspect, i.e. the possible exceptions to preclusive effect, it is arguably necessary to distinguish between exceptions which concern the character of the judgment or the circumstances in which it was given (e.g. that it was procured by fraud), and exceptions which concentrate on other matters (e.g. the post-judgment conduct or agreement of the parties). On this view (admittedly not yet supported by existing practice in the Member States), only exceptions which are intertwined with, and inseparable from the first two aspects (conditions and scope), should fall within the province of the law of the Member State of origin.

As a comparison, it may be helpful to consider the full faith and credit system for recognition in the United States. The Constitutional Clause, its implementing statutes, and Supreme Court case law have all confirmed that once a judgment from another state is recognised, it must be given the same preclusive effect that it would receive in its state of origin.[417] It is important to note that there is some controversy as to whether a sister-state judgment may be accorded *more* preclusive effects than it would receive in the state of origin[418]. Those in favour of extending the scope of preclusion in this way argue that in situations where the rendering state has a significant interest in the controversy, that state should be permitted to apply its preclusion law to the case. However, it is important to note that the majority practice of the states is to accord the same effect – and not more – as the rendering state would apply.

C. Claim preclusion within the Brussels/Lugano Regime

1. Existence and nature of claim preclusive effects

Do judgments recognised in accordance with the Brussels/Lugano Regime have claim preclusive effects in your legal system?

Introduction/Analysis

The claim preclusive effect of judgments can be associated with the underlying objectives of the Brussels/Lugano Regime. These are "[1] to facilitate the recognition and enforcement of judgments of courts or tribunals and [2] to strengthen in the Community the legal protection of persons therein established." In *Gubisch v Palumbo*[419]*,* the *ECJ* ruled that these core objectives are, *inter alia*, obtained by so-called rules on *lis alibi pendens,* which are aimed at preventing parallel proceedings before the courts of different Member States.[420] The objective of these rules is to contribute to the process of avoiding conflicts between judicial decisions that might lead to situations of non-recognition on the ground of the irreconcilability of judgments between the same parties.[421] In the same case, the *ECJ* reiterated that it had previously stressed – as early as 1976 in *De Wolf v Cox*[422] - the importance of the aforementioned two objectives "*outside the narrow field of* lis pendens" (emphasis added).[423] The Court based this finding on the universal obligations of the Member States to recognise judgments without any special procedure being required, and to refrain under any circumstances, from reviewing foreign judgments as to their substance.[424]

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[416] For instance, in Germany a majority of authors argues that the claim preclusive effects of a judgment recognised must be regarded by the German court *ex officio* even if they must be pleaded under the law of the judgment's state of origin. See Report Germany, Part III.B.7, p57. See, affirmative, Kropholler (n 330), Article 33, no12. For a negative opinion, see Geimer/Schütze, *Europäisches Zivilverfahrensrecht* (2nd ed, 2004), Article 33, no35.

[417] United States Report Part III.D, p 55.

[418] Some states have strayed from the typical route of applying the same effects as the state of origin in favour of an approach where, if the state of recognition has a significant interest in the controversy, it will apply its own law of preclusion (United States Report, Part III.D, p 62).

[419] Case 144/86 [1987] ECR 4861, para 9.

[420] Article 27 BR / 21 LC. See also Article 28 BR and 22 LC concerning related actions, which are not discussed in this report.

[421] Regulation, Article 34(3) and (4), and Article 27(3) and (5) Brussels/Lugano Convention. See Part III.A.3.

[422] Case 42/76 *De Wolf v Cox* [1976] ECR 175, paras 7-9.

[423] *Gubisch v Palumbo* (n 419), para 9.

[424] More generally, although outside the context of the recognition and enforcement of judgments, the *ECJ* has stated that "attention should be drawn to the importance, both for the Community legal order and national legal systems, of the principle of *res judicata*. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial

The Court's line of reasoning in *De Wolf* was as follows: in practice, a Member State court might find itself in a situation where it is forced to violate the aforementioned obligations (i.e. of *automatic recognition* and of refraining from a substantive review) by addressing a claim which will require a decision to be taken as to whether it is well founded that may conflict with the decision contained in an earlier foreign judgment. To avoid this risk and in the interest of proper administration of justice, the Court appears to have been drawn towards the – *as yet uncodified* - solution that claims liable to give rise to judgments irreconcilable with earlier Member State judgments, at least insofar as they involve the same parties and the same cause of action, are inadmissible. The concern to prevent the duplication of successive main actions in relation to the same claim provides some support for this solution. Allowing such duplication in situations where the first action has already concluded (i.e. in situations other than *lis pendens*) would also imply the risk of irreconcilable judgments and the risk of a creditor's possessing two orders for enforcement on the basis of the same debt.[425]

From one view, the scope of application of this solution, which appears autonomous in scope, should not, in principle, be considered restricted to situations (such as that in *De Wolf*) where a claimant who has obtained a judgment in his favour in a State A, being a judgment for which an order for enforcement may be issued in State B, brings a claim in a court in State B for a judgment against the other party in the same terms as the judgment delivered in the State A.[426] By virtue of the rationale given above, it can be relevant for any situation where there is a risk of duplication of successive main actions in relation to the same claim. From another view, *De Wolf v Cox* should be taken only to establish that the enforcement procedures laid down in the Brussels/Lugano Regime provide an exclusive remedy for a person with the benefit of an enforceable Member State judgment. It is, accordingly, more in the nature of a decision concerning "abuse of process" and does not cast any more general light on the question of the "effectiveness" of Member State judgments.[427]

Comparative response

Whichever view is followed, there appears to be no room for doubting that a Member/Contracting State judgment may have the effect of preventing the parties to the original proceedings, and certain other persons, from re-litigating claims already determined. The difficulty lies in determining the basis on which, and the law by reference to which, the claim preclusive effects of a judgment are to be determined. On the whole, the legal systems considered reflect the opinion that the recognition of judgments under the Brussels/Lugano Regime has the result of conferring on those judgments the claim preclusive effect accorded to them in the state where they were rendered in the first place.[428] In one decision in one of the legal systems examined,[429] one member of the court ruled that Article 33(1) BR and its predecessor support an autonomous regime of claim preclusive effects, founded on the same concepts of "same parties" and "same cause of action" deployed in the *lis pendens* provisions of the Brussels/Lugano Regime.[430]

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decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question (*Köbler* (n 222), para 38)." See *Kapferer* (n 222), para 20.

[425] *De Wolf v Cox* (n 422), paras 10-13.

[426] See, for instance, Layton/Mercer (n 254), para 24.008 (fn 56), para 24.042 (fn 95).

[427] See Report England & Wales, p58ff. Conversely, the report indicates that the *ECJ*'s decision in *De Wolf v Cox* is, in substantial part, mirrored in the provisions of s 34 of the UK Civil Jurisdiction and Judgments Act 1982, which provides that "[n]o proceedings may be brought by a person in England and Wales … on a cause of action in respect of which a judgment has been given in his favour in proceedings between the same parties, or their privies, in a court in another part of the United Kingdom or in a court of an overseas country, unless that judgment is not enforceable or entitled to recognition in England and Wales". The Report states that to the extent that the provision has any wider effect than the situation expressly foreseen in *De Wolf v Cox*, it could be argued to undermine the effectiveness of the rules of jurisdiction within the Brussels/Lugano Regime.

[428] See Part III.A.4, and Part III.B.3.

[429] In *Berkeley Administration Inc v McClelland* [1995] ILPr 201, the Court of Appeal held that a French judgment dismissing claims and counterclaimants brought by rival parties in an acrimonious dispute was entitled to recognition under Art 26 of the Brussels Convention, with the result that the English defendants were precluded from advancing certain contentions in support of their claim for damages under a cross-undertaking given to the court by the claimants as a pre-requisite to obtaining an interim injunction against the defendants at an earlier stage in the proceedings. Report England & Wales, Part III.B.1, p54. Of the three judges, only Dillon LJ appeared to advocate an autonomous effects regime. A similar idea has been expressed by P Oberhammer, 'Internationale Rechtshängigkeit, Aufrechnung und objektive Rechtskraftgrenzen in Europa' in Praxis des Internationalen Privat- und Verfahrensrechts 22 (2002), 431. See Report Switzerland, Part III.A.4, p45.

[430] It will be discussed in Parts III.B.5 and 6 whether *lis pendens* concepts are appropriate in the context of claim preclusion.

2. Policies underlying claim preclusive effects

What are the policy considerations for the claim preclusive effect of judgments originating in other EU Member/ Lugano Contracting State in your legal system?

Comparative response

The policy considerations for requiring that recognition must have the result that the same claim preclusive effects are conferred on judgments as they are accorded in the state of origin are commonly associated with the overall objectives of the Brussels/Lugano Regime, i.e. the facilitation of the recognition and enforcement of judgments of courts or tribunals in Member/Contracting States, and the strengthening of the legal protection of persons therein established.[431] A main concern is to prevent the duplication of successive main actions in relation to the same claim.[432] Allowing such duplication in situations where the first action has already concluded (i.e. in situations other than *lis pendens*) would entail the risk of conflicts between decisions leading to situations of non-recognition on the ground of the irreconcilability of judgments between the same parties.[433] This would affect negatively the two core objectives. Ensuring the claim preclusive effect of judgments supports the attainment of those objectives.

3. Law applicable to claim preclusive effects

Does your legal system consider that claim preclusive effects of a judgment recognised under the Brussels/Lugano Regime follow from (1) the conclusion that the judgment is recognised under the Brussels Regulation or the Brussels or Lugano Convention (as applicable), without further justification being required, (2) the conclusion that the judgment is recognised for these purposes applied in conjunction with the rules of the State of Origin concerning the claim preclusive effects of the judgment, (3) the conclusion that the judgment is recognised for these purposes applied in conjunction with the rules of your legal system concerning the claim preclusive effects of an equivalent local judgment, (4) the conclusion that the judgment is recognised for these purposes applied in conjunction with the rules of your legal system concerning the claim preclusive effects of an equivalent judgment of a non-Member/Contracting State; or (5) other reasoning?

Comparative response

A trend in the legal systems examined is to accord to a recognised judgment the (claim) preclusive effect accorded to it under the law of the state of its origin.[434] This, however, does not constitute a universal practice in the Member States.[435] Moreover, in various Member States the legal practice is divided on the matter, which results in diverging approaches by courts in those Member States.[436] One Member State

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[431] *Gubisch v Palumbo* (n 419), para 9.
[432] *De Wolf v Cox* (n 422), paras 10-13.
[433] Regulation, Article 34(3) and (4), and Article 27(3) and (5) Lugano Convention.
[434] Germany, Netherlands, Spain, Sweden, and Switzerland. In England & Wales, some authority suggests that an autonomous system applies for the purpose of determining the preclusive effect of a judgment recognised under the Brussels/Lugano Regime. Other authority is consistent with the approach that the law of the state of origin applies. For instance, in *The Tsaskemolen* (No 2) [1997] 2 Lloyd's Rep 476 (Clarke J), a case before the English Commercial Court, it was argued that the effect of a decision of the Dutch court to release a vessel from arrest precluded the later arrest of the same vessel in England. The Judge appeared to look to Dutch law to determine the scope and effect of the Dutch judgment (concluding that it was not intended to preclude arrest outside The Netherlands), although his reasoning on this point was rather impressionistic and not based on evidence of Dutch law. Moreover, in *Air Foyle Ltd v Center Capital* , however, the Commercial Court Judge considered detailed Dutch law evidence in ruling that (a) the Dutch judgment in issue in that case did not itself effect a sale of an aircraft but instead conferred authority on a custodian to do so, and (b) the Dutch court's decision to confer authority on the custodian did not have a res judicata effect although it was binding on all the world (*erga omnes*) in that the authority to sell conferred by it could not be affected by any subsequent sale by the owner of the aircraft. In consequence, the title of the purchaser from the custodian at auction in The Netherlands was held to be derived not from recognition of the Dutch judgment, but as a result of applying the English rule of applicable law for the transfer of title to movables, favouring the lex situs. See Report England, Part III.b.1, p60). Finally there is some support amongst academic writers and judicial practice for the application of the law of the recognising state, i.e. England & Wales.
[435] Romania. It should be mentioned that due to the short period of time that has elapsed since Romania joined the European Union, no definite conclusion may be drawn on this aspect. Due to the lack of case law on this mater, one would have to turn to the general rule of private international law, which considers a recognized foreign judgment as having the same effects as a similar Romanian judgment. However, it is to be expected that in the future Romanian courts will follow suit with the other Member States and apply the approach upheld by *ECJ* in *Hoffmann v Krieg* (n 378). See Part III.A.4.
[436] England & Wales, and France.

appears to take an intermediate position by applying domestic law in conjunction with the rules of the state of origin to determine the claim preclusive effect of foreign judgments recognised.[437]

By way of comparison, in *Durefee v. Duke*, the United States Supreme Court has interpreted the Full Faith and Credit Clause to require that the recognizing court give the judgment from the originating court the same effect as it would have in the originating state. A controversial question, however, is whether a recognizing court can afford a judgment more effect than it would have in its state of origin, to which there is as yet no resolution.

4. Conditions for claim preclusive effects

What are the conditions for the claim preclusive effects of a judgment?

Comparative response

The applicable conditions for a judgment's claim preclusive effect depend on the applicable law. Four possible alternatives have been identified in this regard by Member State courts and legal commentators, (1) autonomous conditions under the Brussels/Lugano Regime, (2) the law of the state of origin, (3) the law of the state of recognition, or (4) a combination of the latter two.

On the whole, considering the trend in the legal systems examined to confer on a judgment recognised the (claim) preclusive effect accorded to it under the law of the state of its origin,[438] it has been pointed out that, in principle, this law determines the conditions that are to be met before a judgment has claim preclusive effect.

5. The identity of claims in the Brussels/Lugano Regime

How do courts in your legal system determine the identity of claims under the Brussels/Lugano Regime?

Introduction/Analysis

As indicated previously,[439] no express rule is contained in the Brussels Regulation or, for that matter, the Brussels/Lugano Conventions, on the claim preclusive effect of judgments recognised in accordance with those instruments. Conversely, an unwritten rule has been read into the *ECJ*'s case law, in particular in *De Wolf v Cox*[440] as referring to the law of the state of a judgment's origin when the conditions for claim preclusive effect are concerned.[441] Naturally, this approach is more demanding on national courts which are forced to apply foreign law when evaluating whether a judgment recognised must be accorded claim preclusive effect in their legal system.

A comparative analysis of the legal systems considered has clarified that a case must involve the "*same parties*" and the "*same claim*" before the claim preclusive effect of a judgment can be invoked.[442] Accordingly, under the Brussels/Lugano Regime, courts apply the law of the state of a judgment's origin when considering the question whether a particular claim in their court is precluded, because it involves the same parties, and the same claim as previously determined by means of a foreign judgment that can be recognised.

In contrast to the above, an explicit rule is in fact provided on the matter of *lis alibi pendens.*[443] The Brussels/Lugano Regime unequivocally requires any court other than the court first seised to stay, of its own motion, its proceedings until the court first seised of an action has established its jurisdiction, insofar as the proceedings in both courts involve the "same cause of action" and are between the "same parties".[444]

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[437] France.
[438] Germany, Netherlands, Spain, Sweden, and Switzerland. In England & Wales, some authority suggests that an autonomous system applies for the purpose of determining the preclusive effect of a judgment recognised under the Brussels/Lugano Regime.
[439] See Part III.B.1.
[440] (n 422).
[441] See Part III.A.4, and Part III.B.4.
[442] See Part II.A.3.
[443] Article 27 BR / 21 LC. See also Article 28 BR and 22 LC concerning related actions, which are not discussed here.
[444] These terms are used in both the first of the rules of *lis alibi pendens* (Article 27 BR / Article 21BC/LC), and the exception to the recognition of judgments in the case of irreconcilability with a judgment from a non-Contracting/Member State or, in the case of the

The *ECJ* has interpreted this rule, and its substantive elements, autonomously (i.e. independently from the national law of the state of a judgment's origin and of the state of recognition). This implies that the terms "same cause of action" and "same parties", which are stated in Article 27 BR and 21 LC, must be interpreted and applied independently from national law.

The Court justified this line of attack with reference to the objective of the rule on *lis pendens*: the prevention, in the interests of the proper administration of justice within the Community, of parallel proceedings and conflicting judgments giving rise to situations of non-recognition due to the rendering and existence of irreconcilable judgments.[445] The Court provided three additional reasons why an autonomous interpretation was called for and justified in relation to Article 21 BC [27 BR].

In the first place, the concept of *lis pendens* "is not the same in all legal systems" participating in the Brussels Regime. Secondly, "a common concept" of *lis pendens* could not be arrived at "by a combination of the various relevant provisions of national law".[446] Finally, Article 21 BC (now 27 BR) lays down "a number of substantive conditions as components of a definition", instead of referring to the term *lis pendens* as used in the different national legal systems.[447]

It is tempting, in light of the difficulties involved in applying foreign law, to advocate an autonomous regime of claim preclusive effects, founded on the concepts of "same parties" and "same cause of action" deployed in the *lis alibi pendens* provisions of the Brussels/Lugano Regime. In support, the argument could be advanced that the two principal conditions for *lis pendens* and claim preclusion appear – on their face - to be similar, if not the same (compare "same claim" – or same "cause of action"[448] - and "same parties" for claim preclusion, and "same cause of action" and "same parties" for *lis pendens*).

One situation has been identified in the legal systems examined, where it appears that a judge has not resisted this temptation.[449] It is stressed here, however, that a sufficient degree of caution ought to be observed before completing the aforementioned parallel, notwithstanding the terminological similarity of the applicable conditions for *lis pendens* and those in relation to preclusive effect. The *ECJ* has interpreted the terms in Article 27 BR broadly so as to prevent *as much as possible parallel proceedings*. This is a justifiable reason for broadening the scope of the applicable conditions. The same argument does not apply, however, to the same extent for the conditions for the preclusive effect of judgments. The effect of preclusion is far-reaching in preventing the litigation on issues and claims, while, on the contrary, the rules on *lis pendens* never wholly restrict the access to a court; one is always assured of at least one (the first) forum. In this regard, the preclusive effect of a judgment, if defined too broadly, is liable to interfere in an unacceptable manner with the right to a fair trial as guaranteed, for instance, under Article 6(1) ECHR.

Notwithstanding these warning signs, it is nonetheless a useful exercise to evaluate, for purposes of comparison and insight, how the *ECJ* has defined the "same cause of action" and "same parties" requirements for the purpose of *lis pendens.* The Court's guidelines might at least usefully inform the discussion on how an autonomous rule on the claim preclusive effect of judgments recognised under the Brussels/Lugano Regime might look.

Judgments Regulation, another Member State (Article 34(2) BR / Art 27(5) BC/LC). To date, the English courts have largely considered the concept in the former context.

[445] Case 144/86 *Gubisch Maschinenfabrik v Palumbo* [1987] ECR 4861, para 8.

[446] Compare Case 129/83 *Siegfried Zelger v Sebastiano Salinitri* [1984] ECR 2397.

[447] *Gubisch Maschinenfabrik v Palumbo* (n 445), paras 10-2. More generally, these aspects provide an interesting insight into the question how an express rule on claim preclusion could be established and formulated, if the need for having such a rule can be shown. The same approach of the autonomous interpretation has not always been followed by the Court in relation to the provisions of the Brussels Regime. For instance, in *Zelger v Salinitri* (n 446), para 15*,* the Court pointed out that the question, in Article 27 BR, as to "the moment at which a court is to be considered seised of a case" for the purposes of applying the provision on *lis pendens* had to be answered according to the rules of the lex fori.[447] For this interpretation, the Court referred to the absence of any indication in Article 21 BC of the nature of the relevant procedural formalities, since the Convention "does not have the aim of unifying those formalities, which are closely connected with the procedural systems of the different Member States." See also *Gubisch Maschinenfabrik v Palumbo* (n 445), para 12.

[448] See Report England & Wales, Part II.A.3, p21.

[449] Dillon LJ in *Berkeley Administration Inc v McClelland (1994)* [1995] ILPr 201 seemed to advocate an autonomous regime by which to determine claim preclusive effects. This implies an assumption that the Brussels Convention Regime featured an unwritten rule according to which a claim between two or more parties ought to be precluded if it transpires that the same claim had previously been decided on between the parties in a judgment capable of having claim preclusive effect. Dillon LJ's view was not supported by the other members of the Court of Appeal, Hobhouse LJ and Stuart-Smith LJ, each of whom appeared to rest his decision on the English rules of issue (not claim) preclusion. Nor has Dillon LJ's view been adopted by any court since.

Article 27 Brussels Regulation applies to two actions that (1) are between the "same parties"[450], (2) have the "same subject-matter" or "object"[451] (i.e., the end that an action has in view) and (3) rely on the "same cause of action" (i.e., the facts and the legal rule invoked as the basis for a claim for relief). The English and German language-versions do not make this immediately clear. Other versions – including the French and Netherlands – explicitly state the distinction subject-matter and cause of action.[452] *The Tatry* confirmed that although the English language version of Art 21 BC does not expressly distinguish between the concepts of "object" and "cause of action", it must be construed in the same manner as the majority of other language versions which do draw that distinction.[453]

The meaning of the requirement of same parties will be discussed in the following section[454], while the present focus is on the requirement same claim. The term "subject matter" is rather straightforward when it comes to its meaning. It refers to the *end that an action has in view* (e.g. an action for damages seeks to have the defendant declared liable). The "cause of action" of a claim comprises the facts (e.g. the harmful act and the damage) *and* the legal rule (e.g. the law governing non-contractual liability) invoked as the basis for a claim for relief (e.g. the payment of damages).[455] Article 27 BR is – since its aim is to prevent irreconcilable decisions – not restricted to claims which are entirely identical.[456] However, within the terms of Article 27 BR, there is no situation of *lis pendens* in absence of an identical subject-matter and an identical cause of action.[457]

In order to determine whether two sets of proceedings have the identical subject-matter, account should only be taken of the claimants' respective claims in each of the proceedings, and not of the defence which may be raised by a defendant - as is evident from the wording of the provision.[458] It is sufficient if the same subject matter is central to both actions. For instance, it is sufficient when one case concerns an action to enforce a contract (action to give effect to the contract), while the other is for its rescission or discharge (action to deprive the contract of any effect), because the question whether the contract is binding lies at the heart of both actions.[459] Another example involves the situation where a first action seeks a declaration to find the claimant is not liable to pay damages (i.e. an action for negative declaratory relief), while the second aims at a decision to find the claimant to have caused damages (action for damages).[460] Similar to the previous example, the liability for one and the same harmful event is at the centre of the two actions. It follows from this illustration that the procedural nature of actions is irrelevant for the question whether two actions involve the same subject-matter, i.e. it is irrelevant that the objective of one action is expressed in negative terms, whereas in the parallel action they are expressed in positive terms.

As far as the requirement of an identical cause of action, the conclusion of the *ECJ*'s case law is that if the legal rule which forms the basis of each of those applications is different, there is no identity of cause of action between two cases, even if the facts underlying two sets of proceedings are identical (e.g. "*the damage allegedly caused by X to the goods of Y in a particular place during X's activities in a particular time period*").[461] For instance, the domestic law on non-contractual liability is not identical to domestic rules on the application for the establishment of a liability limitation fund implementing a convention. However, rather than requiring an identical *source* in law, it is suggested that comparing the *substance* of rules of law is more sensible.

Comparative response

The evaluation of the countries related to the concept of "identity of claims" has revealed that although the *ECJ*'s interpretation of the concept may be more broad than the interpretation given by the domestic

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[450] See Part III.B.6.
451 Case C-406/92 *Tatry v Maciej Rataj* [1994] ECR I-5439, para 40.
452 See for example, the French language version: "Lorsque des demandes ayant le même objet et la même cause …", and the Dutch language version: "vorderingen … die hetzelfde onderwerp betreffen en op dezelfde oorzaak berusten" (emphasis added); *Gubisch Maschinenfabrik v Palumbo* (n 445), para 14.
[453] *Tatry v Maciej Rataj* (n 451), para 38 referring to *Gubisch Maschinenfabrik v Palumbo* (n 447), para 14.
[454] Part III.B.6.
455 *Tatry v Maciej Rataj* (n 451), para 38.
456 *Gubisch Maschinenfabrik v Palumbo* (n 447), para 17.
457 Case C-39/02 *Mærsk Olie & Gas* [2004] ECR I-09657, para 39.
458 Case C-111/01 *Gantner Electronic* [2003] ECR I-4207, para 26.
459 *Gubisch Maschinenfabrik v Palumbo* (n 447), para 16.
460 *Tatry v Maciej Rataj* (n 451), para 31.
461 *Tatry v Maciej Rataj* (n 451), para 39.

system, when it comes to the application of *lis pendens*, the national courts will follow the *ECJ*'s autonomous interpretation as described above.[462] However, some reports noted that outside the context of *lis pendens*, the national courts would interpret these concepts according to the law of the state of origin.[463] Some reports provided specific interpretations of the *ECJ* concept by its national courts. For example, one report noted that, "ultimately, the question must be seen broadly in terms of the judgment sought and not in terms of the issues raised on the way".[464]

Another Report indicated that its country's Supreme Court has stated that the purpose of the requirements in relation to *lis pendens* is not to frustrate recognition of a judgment and should therefore be interpreted broadly so that it should be considered sufficient if there is a substantial link between the causes of action, their subject matter, (and, as appropriate, the parties to the proceedings).[465] One report indicated that the concept of identical claims depends on a pragmatic delimitation of the factual circumstances of the dispute and the claims' legal grounds.[466]

6. The identity of parties in the Brussels/Lugano Regime

How do courts in your legal system determine the identity of parties under the Brussels/Lugano Regime?

Analysis

For an account of the reasons for including this question in the scope of the study, please refer to the preceding section of the Report.[467] For the application of Article 27 BR, the "same parties" must be involved in parallel actions in different Member States. Firstly, the *ECJ* has clarified that this requirement is met when there is such a degree of identity between the interests of the parties involved in the parallel proceedings that a judgment delivered against one of them would have the force of res judicata against the other.[468] For instance, when an insurance company invokes its right of subrogation to defend proceedings in the name of its insured, the insurer and the insured may be regarded as the same party for the purposes of Article 27, because – in the opinion of the Court – a judgment delivered against one of them would have the force of res judicata against the other.[469] On the other hand, application of Article 27 cannot have the effect of precluding the insurer and its insured from asserting their respective interests before the courts against the other parties, where their interests *diverge*.[470]

The procedural position of each party in the two actions is irrelevant.[471] Consequently, the claimant in the first action could be the defendant in the second, and vice versa. In a situation where only some parties to the second action were also parties to the first, the second court must decline jurisdiction in relation to those parties only. It has been suggested that the autonomous interpretation of this term applies not only to the question of whether the parties are the same, but also to the question of when persons acquire the status of a party in each of the cases.[472] Caution appears to be advocated with regards to the definition of "party to proceedings", which – if interpreted too broadly – might conflict with the safeguards laid down in Article 6 ECHR and Article 47 EU Charter by virtue of which every person has the right to a fair hearing.

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[462] England & Wales, France, Germany, Netherlands, Spain, Switzerland. Netherlands courts have, for example, treated as the same subject matter two actions for the payment of a sum of money and as the same cause of action because the facts and rules argued in the two actions were the same (Report p104). The Romanian Report noted that although there is not specific national case law on this matter, presumably the *ECJ* interpretation would be applied. Sweden indicated only that there was no relevant national case law.
[463] Germany. In Switzerland, no case law exists; however, scholarly authors are explicitly in opposition to the use of these terms as they are applied in the context of *lis pendens* in relation to preclusion (Report Switzerland, p 40).
[464] England Report p 64. For example, the High Court has interpreted proceedings in Germany challenging the validity of contractual provisions by reference to mandatory rules of German law and English proceedings seeking to uphold the validity of the same clauses based on English law as constituting the "same cause of action".
[465] Spain report p 76.
[466] Switzerland Report p 48. The Swiss Report indicated, for example, that the Federal Supreme Court has referred explicitly to the *ECJ*'s decisions in *The Tatry* and *Gubisch* when confirming that a claim for damages based on allegedly tortuous conduct concerns the same subject matter as a respective action for declaration of non-liability.
[467] Part III.B.5.
468 Case C-351/96 *Drouot assurances v Consolidated metallurgical industries and others* [1998] ECR I-3075, para 19.
469 It may be noted here, that this conclusion is incorrect insofar as Netherlands law is concerned. See Report Netherlands, Part II.A.3.
470 *Drouot assurances v Consolidated metallurgical industries and others*, para 20 (n 468).
471 Compare the case of *Tatry v Maciej Rataj* (n 451).
472 See the opinion of Advocate General Léger in *Mærsk Olie & Gas* (n 457), para 35.

Comparative response

The majority of the legal systems evaluated indicated that the *ECJ*'s autonomous interpretation of "same parties" is applied by their domestic courts in their determination of the identity of parties under the Brussels/Lugano Regime. One legal system has interpreted the *ECJ* concept as focusing on the substance of the matter, rather than the formal title of the action and considers several factors to determine identity of parties, including whether there is such a degree of identity between their interests that a judgment given against one would have the force of res judicata against the other.[473] As the report states, this last factor is particularly interesting in the context of this study. The report cited one case in which one judge used the concept of "same parties" in assessing preclusive effects of a Member State judgment and concluded that sufficient identity existed between a parent company and its incorporated subsidiary. Typically, national case law in the legal systems surveyed indicated that their courts refer to the *ECJ*'s decisions in *Drouout Assurances SA v Consolidated Metallurgical Industries, The Tatry,* and *Gubisch v Palumbo*.

7. Invoking claim preclusive effects under the Brussels/Lugano Regime

Please describe how the claim preclusive effects of a judgment originating in another EU Member/Lugano Contracting State are invoked in your legal system.

Comparative response

The Brussels/Lugano Regime only determines certain aspects of the procedures for obtaining the recognition of a judgment (e.g. through a declaration of recognition per Article 33(2) BR). As indicated previously, a judgment within the meaning of Article 32 BR which is binding in formal terms in its state of origin must, upon recognition, in principle, be accorded the same preclusive effect in the state of recognition as it has under the law of the state of origin.[474] It was also suggested that, in line with the approach taken to enforcement under the Brussels/Lugano Regime, the process of administering the judgment's preclusive effect ought, in principle, to be governed by the law of the state where the effect is invoked.[475]

The procedural aspects of recognition can be expected to involve questions relating to the invoking of the claim preclusive effect of a judgment. For instance, should courts raise the preclusive effect of a judgment *ex officio*, are there time limits for invoking the judgment, or can a decision granting or refusing a judgment's preclusive effect be appealed? The process of administering a judgment's preclusive effect equally involves queries into the impact of a judgment's claim preclusive effect, i.e. is the effect that new actions are procedurally inadmissible[476], or that such actions are admissible but may be challenged or defended on the ground of claim preclusive effects[477].[478]

This interpretation of the Brussels/Lugano Regime has been (at least partly) confirmed for a number of legal systems for which it was suggested that domestic courts are likely to apply the *lex fori* (i.e. the law of the state of recognition) to certain issues related to the process of administering a recognised judgment's preclusive effect.[479] By way of example, a German court might apply *ex officio* the claim preclusive effect of a Dutch judgment, while under Dutch law courts are expressly prohibited from applying the claim preclusive effect of a judgment *ex officio* requiring the party seeking to rely upon it to raise. At first sight, the application of the law of the state of recognition appears to potentially be inconsistent with the principle that a foreign judgment ought to be granted the same, but not more, effects than those conferred on it in the state of origin.

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[473] England & Wales.
[474] See Part III.A.4.
[475] Ibid.
[476] Germany, Spain, Sweden and Switzerland.
[477] England & Wales, Netherlands, Romania, Spain and United States.
[478] See Part II.A.4.
[479] England & Wales, Germany, Sweden, and Switzerland. For instance, in Germany a majority of authors argues that the claim preclusive effects of a judgment recognised must be regarded by the German court *ex officio* even if they must be pleaded under the law of the judgment's state of origin. See Report Germany, Part III.B.7, p57. See affirmative, Kropholler (n 330), Article 33, no12. For a negative opinion, see Geimer/Schütze, *Europäisches Zivilverfahrensrecht* (2nd ed, 2004), Article 33, no35.

Upon closer consideration, however, the procedural rules determining how the claim preclusive effects of a judgment are invoked in a legal system do not determine the preclusive effects of a judgment (i.e. essentially *what* is precluded between *whom*), but merely how the legal consequences of a judgment play out in practice. In other legal systems, there has been no discussion of the point. Responses in these reports were limited to general references to the law of the state of origin, although no case law on the matter has been reported.

8. Exceptions to claim preclusive effects under the Brussels/Lugano Regime

Please verify whether the claim preclusive effect of a judgment originating in another EU Member/Lugano Contracting State is subject to generally accepted exceptions in your legal system.

Comparative response

Following the trend in the legal systems examined to accord to a judgment the claim preclusive effect accorded to it under the law of the state of its origin, in principle, the same law will govern the exceptions to a judgment's claim preclusive effect.[480] In a number of reports, the grounds for non-recognition were referred to as additional exceptions to the claim preclusive effect of judgments under the Brussels/Lugano Regime. Arguably, this suggestion is somewhat confusing since these grounds relate to the recognition of judgments; they do not operate as exceptions in relation to judgments that are in principle capable of having claim preclusive effects in the state of recognition. In other words, the question of accepting exceptions to a judgment's preclusive effect arises only after it is established that it can be recognised. For the same reason, the prohibition of review of a judgment's substance *in the context of recognition* is irrelevant for the process of determining a judgment's claim preclusive effect, including the question whether any exceptions apply. This implies that a court in the state of recognition may accept an exception to claim preclusive effect under the law of the Member State of origin on the ground that a judgment recognised is (clearly) erroneous, even though such argument could not be raised by way of objection to recognition of the judgment *per se*.

A significant question that merits further discussion, and which has already been discussed, is whether the characterisation of a ground for accepting an exception to a judgment's claim preclusive effect might determine which law is applicable in a particular case. For instance, it could be argued that exceptions based on the conduct, particularly post-judgment conduct, of the party invoking the preclusive effect (e.g. abuse of right or party autonomy) does not relate to the judgment's *effect* and ought to be determined exclusively in accordance with the law of the state where the judgment is invoked. By contrast, exceptions which concern the character of the judgment or the circumstances in which it was given (e.g. that it was procured by fraud or that it is manifestly wrong or unsupported by reasons) appear intertwined with, and inseparable from the conditions and scope of the preclusive effect of a judgment and should properly fall within the province of the law of the Member State of origin.

D. Issue preclusion

1. Existence and nature of issue preclusive effects

Do judgments recognised in accordance with the Brussels/Lugano Regime have issue preclusive effects in your legal system?

Comparative answer

It has been suggested that the Article 33 BR obliges courts to recognise judgments and orders. For that reason, it would not require courts, at least in terms, to attach any, or any particular, significance to the

[480] Germany, Netherlands, Spain, Sweden, and Switzerland. In England & Wales, some authority suggests that an autonomous system applies for the purpose of determining the preclusive effect of a judgment recognised under the Brussels/Lugano Regime.

reasons of a judgment, as distinguished from its operative part.[481] This approach implies that the Brussels/Lugano Regime exists, first and foremost, to ensure the cross-border enforcement of judgments, logically, although presently only implicitly[482], to prevent the re-litigation of disputes. The trend toward issue preclusive effects under the Brussels/Lugano Regime seems to mirror that found in the context of claim preclusion. That is, most legal systems presume that the law of the state of origin will apply to determine whether such effects may be attributed to the judgment.[483] One legal system indicated that in the case of issue preclusion, one of two situations can be imagined: either its own rules on issue preclusion would be applicable, or the court would take an impressionistic approach as to the points which were in fact determined by the foreign court.[484]

Presumably, the application of the law of the state of origin in the context of issue preclusive effects is equally pertinent to each of the situations below, although there is less basis upon which to rest this conclusion as there is in connection with claim preclusion under the Brussels/Lugano Regime, as some legal systems' domestic law does not provide for such effect. However, it is important to consider whether it is contrary to the principle of legal protection of parties under the Regime to allow for differing standards of preclusive effect so that the parties could conceivably obtain conflicting judgments.

E. Wider preclusion (abuse of process/claims and issues that could or should have been raised)

1. The existence and nature of wider preclusive effects

Do judgments recognised in accordance with the Brussels/Lugano Regime have wider preclusive effects in your legal system?

Comparative answer

Whether a judgment recognised in accordance with the Brussels/Lugano Regime will be accorded wider preclusive effects in the legal systems evaluated largely depends on the law of the judgment's state of origin.[485] This reflects the trend within the Regime to accord a recognised judgment the same preclusive effect it would receive in the law of the state of origin.[486] There is some qualification to this rule; for example, one legal system specifically indicated that once a foreign judgment is recognised, it will have the

[481] A Briggs, *Civil jurisdiction and judgments* (4th ed, Norton Rose LLP, London 2005), p515. Briggs indicates that "no doubt this is deliberate: the purpose of the Judgments Regulation is to assist the free circulation and quick enforcement of judicial orders throughout the territory of the Member States. It is not, overtly at least, part of that purpose to give effect to statements recorded in judgments, not least because these may have very different status from court to court and from state to state. However, if a party is able to persuade a court to make declarations on particular points which he wishes to have conclusively determined in his favour, the declaratory judgment would, as a matter of European law, be entitled to be recognised. … There is nothing to prevent an English court from applying its own principles of issue estoppel to conclusions reached and expressed by a court in the course of a judgment which would otherwise qualify for recognition. … [I]t is important to lay emphasis on the observation that the applicable principles will be those of English law, and not of European law."

[482] See Part III.B.1.

[483] France, Germany, Netherlands, Spain, Switzerland. The French Report indicated that in this regard, internal procedural law in connection with foreign law will be applicable; however, as a foreign judgment cannot be given a greater effect in France than an equivalent French judgment, the preclusive effect of the foreign judgment will be limited to its holding (France Report, p 41). The Swiss Report noted that, although there is no Federal Supreme Court case law on the matter, it would be consistent with the theory of *Wirkungserstreckungstheorie* to accord issue preclusive effects if they would be bestowed in the judgment's state of origin (Switzerland Report, p 43). Similarly, the Swedish Report, based on *Hoffmann v Krieg* (n 378), presumes that the law of the state of origin would be applicable in these circumstances (Report Sweden, p 47).

[484] Report England & Wales, p 68. The Romanian Report indicated that its own internal rules are applicable in the context of issue preclusion and that although only the operative part of a judgment is to be given preclusive effect, such part is deemed to be true and hence, the recognising court is bound not to contradict the reasons in support of it (Report Romania, p20).

[485] Germany, Netherlands, Spain, Sweden, Switzerland. The Swiss Report indicated that this question has not yet been addressed by the Federal Supreme Court, and that whether a recognised foreign judgment will have wider preclusive effect will depend upon which theory of recognition (*Wirkungserstreckungstheorie* or *Theorie der kontrollierten Wirkungserstreckung*) is adopted by the court. However, the Rapporteur indicates that a consistent application of *Wirkungserstreckungstheorie* (recognition in accordance with the law of the state of origin without modification) would counsel in favour of applying the law of the state of origin when it comes to wider preclusion. The Report goes on to explain that, as with the recognition of claim preclusive effects, the extent to which Swiss law may require modification of the rules of the state of origin remains unclear.

[486] See above Part III.B.3.

same effect as a similar domestic judgment.[487] One Report recognised specifically the rule of state of origin but then considered that the recognition of wider preclusive effects would depend upon whether such effects are considered part of the effects of a foreign judgment to be recognised under Article 33 of the Brussels Regulation, or whether they are to be considered as independent from the judgment.[488]

One legal system which specifically recognises a doctrine of wider preclusion (albeit not one which operates more widely than cases in which judgments have been rendered), indicated that domestic rules of wider preclusion will apply.[489] Courts will apply the same merit-based test for abuse of process whether the judgment is foreign or domestic. The test takes account of the foreign procedural rules related to the raising of claims or defences and any other relevant factors (e.g. costs). Furthermore, the recognised foreign judgment can be used as a tool to inform courts as to whether an abuse has taken place. For example, the recognising court may engage in a detailed analysis of the parties' conduct both abroad and domestically in order to assess whether an abuse has been committed. The Report indicates that the system's abuse of process doctrine is not considered with the "authority" and "effectiveness" of the judgment itself and therefore there is no reason why domestic rules should not apply; likewise, there is also no reason why a foreign court should be obliged to apply another jurisdiction's abuse of process doctrine when recognising one of its judgments simply because that jurisdiction would have done so itself.[490]

[487] Romania. The Report indicated that because this is so, the abuse of process rule discussed in Part II.C.1 is applicable. Somewhat similarly, the French Report made reference to its internal law; however, unlike Romanian domestic law, there is no doctrine of wider preclusion in France.
[488] Germany. The Report indicated that there is no German case law on this point; however, it went on to specify that the notion of wider preclusion in the sense of abuse based on procedural fraud would, in fact, be recognised under German law because such fraud makes the proceedings unenforceable under Article 34 of the Brussels Regulation. The tort action under German law discussed above in Part II.C.1 would, however, not be capable of being based on the Regime, as Articles 34 and 35 are conclusive as to the grounds for non-enforcement of foreign judgments.
[489] England & Wales.
[490] The Report noted, however, that where another legal system accords any wider preclusive effect that is inherent in the judgment's "authority" and "effectiveness", it may be argued that the foreign effects should be applied by the recognising country.

IV. Preclusive effects of third state judgments

Do the preclusive effects described in Parts II and III above (or similar effects) extend in your legal system to third state judgments?

Comparative response

All of the legal systems analysed have a system for the recognition of third state judgments that is outside the Brussels/Lugano Regime and any international treaties to which they may be signatory.[491] Most legal systems require that the foreign judgment was rendered by a court that had proper jurisdiction over the proceedings. This requirement varies slightly depending on whether the system requires that jurisdiction be analysed according to the law of the state of origin[492] or some other measure of jurisdiction[493]. Most legal systems require that the foreign judgment be irreversible and therefore capable of recognition in its rendering country.[494] One legal system specifically noted that the judgment must be considered to have been given "on the merits" before recognition is possible, although default and consent judgments may satisfy this requirement.[495]

Considerations of due process largely take the form of requirements that proper notice had been given to the defendant[496], and one legal system[497] specifically noted that a foreign court must have properly evaluated the parties' pleadings and allowed the defendant the right to be heard, as well as ensuring that the judgment include its reasons. Other variances include that recognition must not be prohibited by statute[498], and that the judgment be rendered by a judicial body[499], that is impartial[500]. One legal system indicated that the judgment must have been rendered *in personam*.[501]

Three countries indicated that reciprocity was a condition for the recognition of a third country judgment; however, of those three, only one legal system applied the condition consistently, so that a foreign judgment would not be recognised unless the recognising country's judgments would equally be recognised in the rendering country.[502]

Every legal system presented a list of factors that would exclude a foreign court from recognition, largely based on public policy concerns. Of the concerns listed, the most common was that the foreign judgment could not be in contravention of the recognising forum's public policy. This exception varied slightly amongst the systems evaluated, for example in two legal systems, the wording specified that the judgment

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[491] There are no bilateral treaties on recognition and enforcement between Sweden and third states regarding judgments in civil law matters in general. The main rule is that a third state judgment may not be recognized in Sweden unless there is statutory support therefore. There is also no statute on a simplified procedure for recognition of third state judgments. Such a statute was proposed in 1968 but was never enacted (see SOU 1968:40). In exceptional situations there is, under the Supreme Court practice, such a simplified procedure to "transform" the third state judgment into a Swedish one (see Report Sweden, p 45.)

[492] France, Romania, Spain (although there is a provision which requires that the foreign proceedings must not have been within the exclusive competence of the Spanish courts), Switzerland, United States.

[493] England & Wales (English private international law), Germany (recognizing court's law), Netherlands (according to internationally accepted standards of jurisdiction); Switzerland (specific provisions of Swiss law which are, however, not completely equivalent to those providing for a Swiss court's jurisdiction to try the case).

[494] Note that in England & Wales, Romania, and United States, a judgment becomes final for the purpose of recognition once it has been rendered, whereas in the other legal systems, a judgment only becomes final (or irreversible) once an ordinary appeal can no longer be filed or has been filed and completed.

[495] England & Wales.

[496] France, Germany, Netherlands, Spain, United States.

[497] Netherlands.

[498] England & Wales.

[499] Spain, United States.

[500] United States.

[501] Spain. Please note that "in personam" has been interpreted by the Supreme Court in the sense that the condition seeks to avoid the recognition in Spain of judgments issued by foreign courts in matters which come under the exclusive international judicial competence of the Spanish courts (Part IV, p 83).

[502] Romania. In Germany, reciprocity applies only where the foreign claim was pecuniary in nature or involved a child/parent matter. Furthermore, reciprocity will not apply where there would have been no German jurisdiction over the proceedings. In the United States, reciprocity is only applicable in limited circumstances, e.g. where the foreign judgment is in favour of a national of the rendering country and against a foreign defendant.

could not be 'manifestly contrary' to public policy[503], whereas another indicated that the judgment could not be 'repugnant to notions of' public policy[504], and one that the foreign proceedings must not be 'opposed to natural justice'[505]. Fraud in the foreign proceedings was also mentioned in several reports.[506] Finally, one legal system also specified that a foreign judgment may not be recognised if the rendering court had assumed jurisdiction in contravention of a forum selection clause or if the forum was seriously inconvenient for the defendant and the basis for personal jurisdiction was mere personal service rather than any substantive connection to the forum.[507]

Lastly, most legal systems indicated that the foreign judgment would not be recognised if it is irreconcilable with a judgment in prior or pending proceedings.[508] Some countries indicated that the judgment to be recognised must not be irreconcilable with a judgment given in proceedings ineither the recognising jurisdiction or the foreign jurisdiction (provided in the latter case that the judgment is itself entitled to recognition)[509], whereas some noted that the irreconcilability applies only to other proceedings in the recognising forum[510].

Once a third state judgment is recognised, the court must decide what preclusive effect to give the judgment. There are two basic theories in relation to this decision. The first can be termed the theory of equivalent effects. Under this theory, the foreign judgment will be treated as equal to a national judgment and will consequently have the same effects as a similar decision in the recognising country. Two of the legal systems analysed clearly apply this theory to the recognition of third country judgments.[511] The other system for the application of preclusive effects is called the theory of extension of effects. Systems that operate according to this theory apply the law of the country of origin to determine the preclusive effect of the foreign country judgment.[512] One legal system appears to apply its own rules, but with reference to the law of the country of origin on questions such as to whether the judgment is conclusive on a particular claim or issue.[513]

[503] Netherlands, Switzerland.
[504] United States.
[505] England & Wales.
[506] England & Wales, France, Romania, United States.
[507] United States. In England & Wales, breach of a dispute resolution clause is recognised as a ground for non-recognition (see Civil Jurisdiction and Judgments Act 1982, Section 32.
[508] England & Wales, Germany, Romania, Spain, Switzerland, United States.
[509] England & Wales, Germany, Switzerland, United States.
[510] Romania and Spain.
[511] Netherlands and Romania.
[512] Switzerland and United States. The German Report indicated that there is a debate between both theories that does not seem to favour either position. In Switzerland, the law of the state of origin will apply unless that law is completely foreign to Swiss law, in which case Swiss law may be used to modify the effects of the judgment.
[513] England & Wales.

Annex I - Glossary of Terms

abuse of law

To depart from legal use in dealing with a person or thing that typically results in the violation of one's due process rights.

abuse of process

The improper and tortious use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope.

act

1. Something done or performed.
2. The formal product of a legislature or other deliberative body; esp., statute.
   judicial act. An act involving the exercise of judicial power (i.e. court).
   juridical act. A lawful volitional act intended to have legal consequences.

action (proceedings in court of law)

Any judicial proceeding in a court of justice, by which one party prosecutes another party and which, if conducted to a determination, will result in a judgment or decree. The action is said to terminate at judgment. The terms 'action' and 'suit' are used simultaneously.

action for money paid. At common law, an action by which the claimant could recover money paid to a third party in circumstances in which the defendant had benefited.

joint action. An action brought by two or more claimants or defendants.

possessory action. An action to obtain, recover, or maintain possession of property but not title to it, such as an action to evict a non-paying tenant.

action in personam

An action in which the named defendant is a natural or legal person rather than property. An in personam judgment is binding on the judgment debtor and can be enforced against all the property of the judgment debtor.

action in rem

An action determining the title or rights in property or the status of a party or person, which has effect not merely against the parties but *erga omnes*.

representative action

Group interest collective actions brought by representative organisations.

test-case action

Particular to English law, group litigation orders provide for the resolution by one or more test claims of common issues which have arisen in multiple claims in combination with the creation of a registry of claims in which those common issues have arisen.

third-party action

An action brought as part of a lawsuit already pending but distinct from the main claim, whereby a defendant sues an entity not sued by the claimant when that entity may be liable to the defendant for all or part of the claimant's claim. A common example is an action for indemnity or contribution.

adjournment

The postponing of the hearing of a case until a later date.

admissibility

The quality or state of a matter or fact allowed to be entered into evidence in a hearing, trial, or other proceeding.

affidavit

A written, sworn statement of evidence.

affirmative defence

A defendant's assertion of facts and arguments that, if true, will defeat the claimant's or prosecution's claim, even if all the allegations in the complaint are true. Examples are duress (in a civil case) and insanity and self-defence.

annul

To declare no longer valid.

appeal in cassation

Appeal to the highest court which has power to quash (*casser*) the judgments of the lower courts.

award

A final judgment or decision, esp. the result of an arbitration hearing or the amount of damages assessed by a Court.

beneficiary

A person to whom another is in a fiduciary relation, whether the relation is one of agency, guardianship, or trust.

binding

To impose one or more legal duties which must then be obeyed by the persons bound.

Binding character of a judgment. The binding character includes any binding effects that a judgment may have on parties, third parties and third persons.

civil justice recourse economy

Prevention of the waste of resources caused by the needless repetition of final judicial findings.

claim

An interest or remedy recognised at law; the means by which a person can obtain a privilege, possession, or enjoyment of a right or thing

liquidated claim. A claim for an amount previously agreed on by the parties or that can be precisely determined by operation of law or by the terms of the parties' agreement.

matured claim. A claim based on a debt that is due for payment.

unliquidated claim. A claim in which the amount owed has not been determined.

frivolous claim. A claim that has no legal basis or merit, esp. one brought for an unreasonable purpose such as harassment.

secured claim. A claim held by a creditor who has a lien or a right of setoff against the debtor's property.

claimant

The party who asserts a right or demand (blacks); the claimant brings an action against the defendant.

co-claimant

One of two or more claimants bringing an action in the same litigation.

co-defendant

One of two or more defendants sued in the same litigation or charged with the same crime.

complaint

The initial pleading that starts a civil action and states the basis for the court's jurisdiction, the basis for the claimant's claim, and the demand for relief.

amended complaint. A complaint that modifies and replaces the original complaint by adding relevant matters that occurred before or at the time the action began.

supplemental complaint. An additional complaint that either corrects a defect in the original complaint or adds relevant matters that occurred after the action began.

third-party complaint. A complaint filed by the defendant against a third party, alleging that the third party may be liable for some or all of the damages that the claimant is trying to recover from the defendant.

conservator

A guardian, protector, or preserver with extended powers. Although judicial appointment and supervision are still required, a conservator has far more flexible authority than a guardian, including the same investment powers that a trustee enjoys.

counterclaim

A claim brought by a defendant in response to the claimant's claim, which is included in the same proceedings as the claimant's claim; esp., a defendant's claim in opposition to or as a setoff against the claimant's claim.

cross-claim

claim asserted between co-defendants or co-claimants in a case and that relates to the subject of the original claim or counterclaim.

damages

A sum of money awarded by the court as compensation to the claimant.

aggravated damages. Additional damages which the court may award as compensation for the defendant's objectionable behaviour.

exemplary damages. Damages which go beyond compensating for actual loss and are awarded to show the court's disapproval of the defendant's behaviour.

decision

Judicial determination after consideration of the facts and the law; esp., a ruling, order, or judgment pronounced by a court when considering or disposing of a case.

decision on the merits

Decision with reference to a determination of the substantive validity of the claim, or the court's designation of the judgment as such.

interim decision

Decision which determines a preliminary or subordinate point or plea but does not finally decide the case.

procedural decision

Decision on procedural issues.

declaration

A formal statement, proclamation, or announcement, esp. one embodied in an instrument.

declaration of default. A creditor's notice to a debtor regarding the debtor's failure to perform an obligation, such as making a payment.

judicial declaration. A party's statement, made in court and transcribed, about a case's material facts.

defendant

A person sued in a civil proceeding or accused in a criminal proceeding.

defence

A defendant's stated reason why the claimant or prosecutor has no valid case; esp., a defendant's answer, denial, or plea.

frivolous defence. A defence that has no basis in fact or law.

negative defence. A defendant's outright denial of the claimant's allegations without additional facts pleaded by way of avoidance.

peremptory defence. A defence that questions the claimant's legal right to sue or contends that the right to sue has been extinguished.

demand [for relief]

The assertion of a legal or procedural right.

discovery of documents

Mutual exchange of evidence and all relevant information held by each party relating to the case.

discontinuance

Notice given voluntarily by the Claimant of his intention to end the claim or of a Defendant to end his counterclaim. The leave of the Court may be required, depending on the stage proceedings have reached. (Note: a Defendant can withdraw his defence to similar effect as a Claimant discontinuing his claim)

dismissal

Termination of an action or claim without further hearing.

agreed dismissal. A court's dismissal of an action with the acquiescence of all parties.

dismissal without prejudice. A dismissal that does not bar the claimant from re-filing the action within the applicable limitations period.

doctrine of merger

(Common Law): Doctrine which operates to extinguish all rights of a successful claimant arising from a cause of action, and instead merges these rights into the rights conferred by the judgment to create an obligation of a higher nature, which entitles a party to sue for relief base on the judgment.

election

The exercise of a choice; esp., the act of choosing from several possible rights or remedies in a way that precludes the use of other rights or remedies.

element

A constituent part of a claim that must be proved for the claim to succeed.

erga omnes

Describing obligations, rights, or effect toward all. For instance a property right is an erga omnes right, and therefore enforceable against anybody infringing that right. An erga omnes right (a statutory right) can here be distinguished from a right based on contract, which is only enforceable against the contracting party (inter partes).

enforcement

The act or process of compelling compliance with a law, mandate, command, decree, agreement or judgment.

executor

One who performs or carries out some act or a person named by a testator to carry out the provisions in the testator's will.

ex parte proceeding

A proceeding in which not all parties are present or given the opportunity to be heard.

expert witness

Person employed to give evidence on a subject in which they are qualified or have expertise.

extraordinary appeal

Means of recourse not available to a party unless necessary to preserve a fundamental right that cannot be protected by using ordinary means of recourse.

fact

An actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation.

> ***fact in evidence.*** A fact that has been admitted into evidence in a trial or hearing. ***fact in issue.*** A fact that one party alleges and that the other controverts. ***material fact.*** A fact that is significant or essential to the issue or matter at hand. ***operative fact.*** Fact contained in the operative part of the judgment, i.e. in the actual decision of the judicial authority on the claims put forward by the parties.

factual cause of action

A group of operative facts giving rise to one or more bases for suing; it may be defined generally to be a situation or state of facts that entitles a party to maintain an action in a court.

finality

The status of a conclusive judgment that binds the parties to the proceedings.

final decision
Decision contained in a final judgment.

final order
An order that is dispositive of the entire case.

finding of fact
A factual deduction drawn from observed or proven facts;

finding of law
An inference on a question of law, made as a result of a factual showing, no further evidence being required; a legal inference.

finding on the claim
Findings contained in the operative part of the judgment.

form
1. Established behaviour or procedure, usu. according to custom or rule.
2. A model; a sample; an example.
3. The customary method of drafting legal documents, usu. with fixed words, phrases, and sentences.

grievance
An injury, injustice, or wrong that gives ground for a complaint.

ground
The reason or point that something (as a legal claim or argument) relies on for validity.

group action
A form of legal action in which large groups of people (physical or legal) are represented by a small group of named parties where the claims of the party/claimant(s) and the members of the group must be based on common or similar circumstances and the resulting judgment is binding on all group members. Membership in such a group typically operates according to either an opt-in or an opt-out basis.

identity of issues
A relationship between two or more issues which are so closely intertwined that a finding on one automatically means that the same finding applies to the other.

identity of parties
A close relationship between two persons such that they are deemed, for the purpose of res judicata, to be the same party.

identity of interests

A relationship between two parties who are so close that suing one serves as notice to the other, so that the other may be joined in the proceedings.

indemnity

A right of someone to recover from a third party the whole amount which he himself is liable to pay.

inference

A conclusion reached by considering other facts and deducing a logical consequence from them.

adverse inference. A detrimental conclusion drawn by the fact-finder from a party's failure to produce evidence that is within the party's control.

injunction

A court order which either restrains a person from a course of action or behaviour, or which requires a person to follow another course of action.

interested party

The original parties and their assignees as well as other persons directly affected by a judgment.

interim proceedings

Proceedings resulting in a interim judgment which determines a preliminary or subordinate point or plea but does not finally decide the case.

irreversibility

Status of a judgment that is not open to appeal, save in exceptional circumstances

issue

A point of fact or law on which a finding is necessary for the court’s final determination of the claim. An issue is taken to be one of the conditions for establishing a cause of action

issue estoppel

(Common Law) Issue preclusion: a doctrine barring a party from re-litigating an issue determined against that party in an earlier action, even if the second action differs significantly from the first one.

judgment

Any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution as well as the determination of costs or expenses by an officer of the court. It refers to the final order

contained in the judgment, rather than to the court's final order *and* reasons for the judgment.

annulment of judgment

A retroactive obliteration of a judicial decision, having the effect of restoring the parties to their pre-trial positions. Types of annulment include reversal and vacation.

conclusive judgment

Authoritative or decisive judgment.

condemnatory judgment

Ordering a party to do or not do something.

consent judgment

A settlement that becomes a court judgment when the judge approves it. In effect, a consent judgment is merely a contract acknowledged in open court and ordered to be recorded, but it binds the parties as fully as other judgments.

constitutive judgment

Creating, changing or ending a legal right or status.

declaratory judgment

Confirming or denying a legal status that establishes the rights and other legal relations of the parties without providing for or ordering enforcement.

default judgment

A judgment entered against a defendant who has failed to answer or otherwise defend against the claimant's claim.

dismissal judgment

A final determination of a case (against the claimant in a civil action or the government in a criminal action) without a trial on its merits.

erroneous judgment.

A judgment issued by a court with jurisdiction to issue it, but containing an improper application of law. This type of judgment is not void, but can be corrected by a trial court while the court retains plenary jurisdiction, or in a direct appeal.

entry of judgment

The ministerial recording of a court's final decision, usu. by noting it in a judgment book or civil docket.

executory judgment

A judgment that has not been carried out, such as a yet-to-be-fulfilled order for the defendant to pay the claimant.

final judgment

A court's last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and, sometimes, attorney's fees) and enforcement of the judgment.

interim judgment

An intermediate judgment that determines a preliminary or subordinate point or plea but does not finally decide the case.

irreversible judgment

Judgment that has reached the stage that it can only be appealed in exceptional circumstances.

judgment in rem

A judgment that determines the status of a party or the status or condition of property and that operates directly on the property itself. The phrase denotes a judgment that affects not only interests in a property but also all persons' interest in the property.

judgment in personam

A judgment as a result of an action in which the named defendant is a natural or legal person rather than a property. An *in personam* judgment is binding on the judgment debtor and can be enforced against all property of the judgment debtor.

judgment on the merits

Judgment made with reference to a determination of the substantive validity of the claim, or the court’s designation of the judgment as such.

judgment on the pleadings

A judgment based solely on the allegations and information contained in the pleadings, and not on any outside matters.

money judgment

A judgment for damages subject to immediate execution, as distinguished from equitable or injunctive relief.

motion to alter or amend the judgment

A party's request that the court correct a substantive error in the judgment, such as a manifest error of law or fact.

summary judgment

A judgment obtained by a claimant where there is no defence to the case or the defence contains no valid grounds. A summary judgment can be obtained without a trial or hearing. A defendant can also obtain summary judgment if he or she can establish that the claimant has no real prospect of succeeding on the claim.

void judgment

A judgment that has no legal force or effect, the invalidity of which may be asserted by any party whose rights are affected at any time and any place, whether directly or collaterally.

judgment creditor

A person having a legal right to enforce execution of a judgment for a specific sum of money.

judgment debtor

A person against whom a money judgment has been entered but not yet satisfied.

jurisdiction

The area and matters over which a court has legal authority

leave

Permission; some steps in legal action require the permission of the court. For example a losing party may require leave to appeal.

application for leave to appeal. A motion requesting an appellate court to hear a party's appeal from a judgment when the party has no appeal by right or when the party's time limit for an appeal by right has expired.

legal cause of action

A (breach of) rule of law which gives rise to one or more bases for suing.

joint liability

Parties who are jointly liable share a single liability and each party can be held liable for the whole of it.

several liability

A person who is severally liable with others may remain liable for the whole claim even where judgment has been obtained against the others.

limitation period

The period within which a person who has a right to claim against another person must start court proceedings to establish that right. The expiry of the period may be a defence to the claim.

lis pendens

Doctrine which prevents new proceedings between the same parties on the same claim, even if an ordinary appeal has been lodged against the first judgment or if the time for such an appeal has not yet expired

maladministration

Maladministration is administration that leads to injustice because of such factors as excessive delay, bias or arbitrary decision-making.

means of recourse (ordinary)

Any means by which a party can appeal a judgment, including appeal in cassation.

extraordinary means of recourse

Means of recourse not available to a party unless necessary to preserve a fundamental right that cannot be protected by using ordinary means of recourse.

motion

An application by one party for an order in their favour

named parties

The parties named in the summons and the judgment record.

new cause of action

A claim not arising out of or relating to the conduct, occurrence, or transaction contained in the original pleading.

notice

Legal notification required by law or agreement, or imparted by operation of law as a result of some fact (such as the recording of an instrument).

legal notice. Notice arising by presumption of law from the existence of facts and circumstances that a party had a duty to take notice of, such as a registered deed or a pending lawsuit.

direct notice. Actual notice of a fact that is brought directly to a party's attention.

due notice. Sufficient and proper notice that is intended to and likely to reach a particular person or the public; notice that is legally adequate given the particular circumstance.

express notice. Actual knowledge or notice given to a party directly.

fair notice. 1. Sufficient notice apprising a litigant of the opposing party's claim. 2. The requirement that a pleading adequately apprise the opposing party of a claim.

implied notice. Notice that is inferred from facts that a person had a means of knowing and that is thus imputed to that person. Also termed indirect notice; presumptive notice.

public notice. Notice given to the public or persons affected.

reasonable notice. Notice that is fairly to be expected or required under the particular circumstances.

non-parties

Persons who have not directly participated in the proceedings giving rise to judgment and who are not connected in a legally relevant ay to the Claimant, Defendant or another participant in the proceedings or the subject matter of the action. Also called 'third persons' or 'strangers'.

on the merits

reference to a determination of the substantive validity of the claim, or the court's designation of the judgment as such.

operative part

The actual decision of the judicial authority on the claims put forward by the parties.

order

A written direction, instruction or command delivered by a court or judge.

evidentiary order.Orders to take or preserve evidence

interim order. Order which determines a preliminary or subordinate point or plea but does not finally decide the case.

ordinary appeal

Appeal available to the party if made according to the procedural rules, including taking account of the time limitation period.

other participants

Persons who are directly participate in the proceedings, which includes co-defendants and co-claimants as well as third parties.

particulars of claim

This document contains details of the claimant's claim.

party

One by or against whom an action is brought or who is otherwise involved in litigation as a named party on the court record. For purposes of res judicata, a party to proceedings is a person who has been named as a party and has a right to control the lawsuit either personally or, if not fully competent, through someone appointed to protect the person's interests.

party autonomy

The doctrine that people have the right to bind themselves legally based on mutual agreement and free choice, and thus should not be hampered by external control such as governmental interference.

persons connected to the Claimant, Defendant and other participants

Persons who have not directly participated in the proceedings giving rise to judgment but who are connected in some way to the Claimant, Defendant or another participant in the proceedings or to the subject matter of the action.

preclusive effect, claim

Rules of preclusion affecting the raising of claims which a legal system considers to have been determined in earlier proceedings.

preclusive effect, issue

Rules of preclusion affecting attempts to re-open issues of fact or law which a legal system regards as having already been determined in earlier proceedings. It thus entails the binding effect of findings on issues of fact or law contained in a judgment's reasons.

raise issue preclusion offensively. In support of a claim.

raise issue preclusion defensively. As a defence to a claim.

preclusive effect, wider

Rules of preclusion which beyond those provided for by claim preclusive effect and issue preclusive effect and operate to preclude the raising of claims or re-litigation of issues which are considered to have been determined by an earlier judgment, e.g. on the basis of procedural fairness or abuse of process.

privy, privies

'Legal successors' of the original parties, including privies by blood, title or identity of interest. Typically used in common law jurisdictions.

privity

Concept intrinsically linked to substantive and procedural rules of law governing the relationships that form the subject of a dispute and those governing the relationships between the parties and third parties.

procedural privity. A person is or is deemed to be a privy.

substantive privity. It is accepted that one is not or should not have been a party, but because of the relationship with a party, that person becomes bound.

plea

A defendant's reply to a charge put to him by a court; i.e. guilty or not guilty.

pleading,

1. A formal document in which a party to a legal proceeding sets forth or responds to allegations, claims, denials, or defences. The main pleadings are the claimant's complaint and the defendant's answer. 2. A system of defining and narrowing the issues in a lawsuit whereby the parties file formal documents alleging their respective positions.

alternative pleading. A form of pleading whereby the pleader alleges two or more independent claims or defences that are not necessarily consistent with each

other, such as alleging both intentional infliction of emotional distress and negligent infliction of emotional distress based on the same conduct.

amended pleading. A pleading that replaces an earlier pleading and that contains matters omitted from or not known at the time of the earlier pleading.

defective pleading. A pleading that fails to meet minimum standards of sufficiency or accuracy in form or substance.

issue pleading. The common-law method of pleading, the main purpose of which was to frame an issue.

sham pleading. An obviously frivolous or absurd pleading that is made only for purposes of vexation or delay.

precedent

The decision in an earlier case which established principles of law which act as an authority for future cases of a similar nature.

provisional measures

Temporary measures taken by the court in the interim of legal proceedings, usually for protective reasons, e.g., an interim injunction.

quash

Power of a higher court to annul a decision or judgment of a lower courts; i.e. to declare no longer valid.

reasons for judgment

The document or part of the judgment setting out the reasons on which the court's decision is founded.

recognising state

State in which recognition of the judgment, for whatever purpose, is sought.

(claim for) relief

The redress or benefit that a party asks of a court.

interim relief. Relief that is granted on a preliminary basis before an order finally disposing of a claim for relief.

rejoinder

The defendant's answer to the claimant's reply.

remedy

The means of enforcing a right or preventing or redressing a wrong; anything a court can do for a litigant who has been wronged or is about to be wronged. The two most common remedies are judgments that claimants are entitled to collect sums of money from defendants and orders to defendants to refrain from their wrongful conduct or to undo its consequences.

provisional remedy A temporary remedy awarded before judgment and pending the action's disposition, such as a temporary restraining order, a preliminary injunction, a prejudgment receivership, or an attachment.

reply

The claimant's response to the defendant's plea or answer. The reply is the claimant's second pleading, and it is followed by the defendant's rejoinder.

right

A legally enforceable claim that another will do or will not do a given act; a recognised and protected interest the violation of which is a wrong. A is said to have a right that B shall do an act when, if B does not do the act, A can initiate legal proceedings that will result in coercing B. In such a situation B is said to have a duty to do the act. Right and duty are therefore correlatives, since in this sense there can never be a duty without a right.

legal right The capacity of asserting a legally recognised claim against one with a correlative duty to act.

procedural right A right that derives from legal or administrative procedure.

substantial right An essential right that potentially affects the outcome of a lawsuit and is capable of legal enforcement and protection, as distinguished from a mere technical or procedural right.

right in personam. An interest protected solely against specific individuals.

right in rem A right exercisable against the title to property and the rights of the parties, not merely among themselves, but also against all persons at any time claiming an interest in that property.

service

Steps required by rules of court to bring documents used in court proceedings to a person's attention.

set aside

Cancelling a judgment or order or a step taken by a party in the proceedings.

setoff

1. A defendant's counter-demand against the claimant, arising out of a transaction independent of the claimant's claim.
2. A debtor's right to reduce the amount of a debt by any sum the creditor owes the debtor; the counterbalancing sum owed by the creditor.

settlement

A voluntarily agreement by the claimant and defendant to settle their civil case.

statement

1. A verbal assertion or nonverbal conduct intended as an assertion.
2. A formal and exact presentation of facts.

false statement. An untrue statement knowingly made with the intent to mislead.
sworn statement. A statement given under oath; see 'affidavit'.

statement of claim

A claimant's initial pleading in a civil case.

statement of defence

The defendant's answer to the claimant's statement of claim.

statement of fact

A form of conduct that asserts or implies the existence or non-existence of a fact. The term includes not just a particular statement that a particular fact exists or has existed, but also an assertion that, although perhaps expressed as an opinion, implies the existence of some fact or facts that have led the assertor to hold the opinion in question.

state of origin

State from which the judgment emanates.

stay

A suspension of court proceedings. This remains in effect until an order has been followed. No action may be taken in the case other than an application to have the stay lifted. A case can also be stayed when an offer of payment is accepted or if the court feels it is necessary.

strangers

Persons who have not directly participated in the proceedings giving rise to judgment and who are not connected in a legally relevant ay to the Claimant, Defendant or another participant in the proceedings or the subject matter of the action. Also called 'third persons' or 'non-parties'.

strike out

Striking out means the court ordering written material to be deleted so that it may no longer be relied upon.

striking a case out. The court can strike out a case (prevent all further proceedings) if a party fails to comply with a rule, practice direction or court order. It can also happen if it appears there are no reasonable grounds for bringing or defending a claim. Either party (the defendant or the claimant) can ask the court to strike a case out.

summary proceeding

A non-jury proceeding that settles a controversy or disposes of a case in a relatively prompt and simple manner.

summons

A writ or process requiring the person to whom it is directed to appear and answer or to produce evidence to the court issuing the summons.

third party

Person(s) other than the principal Claimant or Defendant or co-claimants and co-defendants who become party(ies) in the course of the proceedings. A third party may be relevant because he or she owes the defendant money. In that case the defendant can issue a third party notice against such a party.

tribunal

A tribunal is a body exercising judicial or quasi-judicial functions outside and distinct from the State's regular judicial system. Tribunals adjudicate disputes within specific, pre-defined areas such as immigration or employment disputes.

Treaties, regulations, and regimes

Brussels Convention

1968 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1972] OJ L 299/32. Established a system on jurisdiction and enforcement of judgments in civil and commercial matters between the Member States of the EEC. Was eventually converted into an EC Regulation in 2002.

1978 Accession Convention

Convention on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (Signed on 9 October 1978) [1978] OJ L 304/1.

1982 Accession Convention

Convention on the accession of the Hellenic Republic to the Convention on jurisdiction and enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland (Signed on 25 October 1982) [1982] OJ L 388/1.

Lugano I Convention

Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Signed on 16 September 1988) [1988] OJ L 319/9. This Convention was signed between 16 Member States of the EEC and certain Member States of the European Free Trade Association ("EFTA"), including Iceland, Norway, and Switzerland. Extended the scope of the application of the rules of the Brussels Convention.

Brussels Regulation

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1. The Regulation simplifies the system on jurisdiction and enforcement of judgments in civil and commercial matters established by the Brussels Convention.

Lugano II Convention

Convention signed on 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters that will simplify the system on jurisdiction and enforcement of judgments in civil and commercial matters established by the Lugano Convention.

Brussels/Lugano Regime

Regime that consists of the rules of the Brussels (Convention) Regulation and the Lugano Convention that simplifies the system on jurisdiction and enforcement of judgments in civil and commercial matters amongst 27 EU Member States and 3 EFTA Member States.

VI. ANNEX II

National Case Studies

Answering the questions referred to in scenarios 1 through 6

The aim of the case studies is to clarify the operation in practice of the legal systems examined in the course of this study. The exercise aims at short answers, for instance: "No, see National Report, Part II.A.5, p55." The national rapporteurs are allowed to include references to particular issues in their legal systems, for example: "No, see National Report, Part II.A.5, p44. However, in France the following particular situation arises: …(see National Report, Part II.B.5, p65)."
England and Wales

England and Wales

Tort claim example (1)

In June 2007, a jet-ski piloted by A but owned by B, also on board as a passenger, collides with a jet-ski piloted by C. A and B suffer personal injuries, and both jet-skis are damaged beyond repair

Scenario 1

(1) B brings a fault based tort claim against C seeking damages for personal injury, including lost income during June 2007 resulting from his personal injury. C successfully defends the claim on the ground that A was solely to blame.

(2) B brings a second fault based tort claim against C seeking damages for (a) additional lost income during June 2007, and (b) medical costs, resulting (in each case) from his personal injury.

(3) B brings a fault based tort claim against A seeking damages for personal injury.

B's insurer pays B's claim for the value of the jet-ski less a deductible

(4) B brings a fault based tort claim against C seeking to recover, by way of damages for damage to property, his insurance deductible.

(5) B's insurer brings a fault based tort claim against A and C seeking to recover, by way of damages for damage to property, the amount paid to B.

- **What effect would the judgment in claim (1) have in claims (2), (3), (4) and (5)?**

  As a consequence the judgment in claim (1) (and, in the case of abuse of process, the surrounding circumstances):

  Claim (2) would be barred in its entirety by cause of action estoppel (National Report, Part II.A.1 & 3).

  Claim (3) would not be barred by cause of action estoppel (as A is a different party), but may be argued to amount to an abuse of process (National Report, Part II.C.1).

  Claim (4) would not be barred by cause of action estoppel (as the property damage claim would be considered a separate cause of action from the personal injury claim), but may be argued to amount to an abuse of process (see claim (3) above) or to be doomed to fail because of an issue estoppel on the question of causation (National Report, Part II.B.1 & 3).

  Claim (5) would not be barred by cause of action estoppel (for the reason given above in relation to claim (4)), but may (possibly) be argued to amount to an abuse of process (see claim (3) above) or (as against C but not A) to be doomed to fail because of an issue estoppel on the question of causation (see claim (4) above).

- **What effect would a judgment in claim (4) (whether in favour of or against B) have in claim (5)?**

  A judgment in claim (4) in favour of B would bar claim (5) by operation of the doctrine of merger (National Report, Part II.A.1 & 3), subject to the possibility of an application to set the judgment (4) in claim aside if justice so required (see the quoted extract from the judgment of Sir John Donaldson MR in *Buckland v. Palmer* [1984] 1 WLR 1109, at 1115 in National Report, Part II.A.5, p. *).

  A judgment in claim (5) against B would bar claim (5) by cause of action estoppel (National Report, Part II.A. 1 & 3), again subject to the possibility of an application to set the judgment in claim (4) aside if the judgment so required.

Scenario 2A

(1) B brings a fault based tort claim against A and C seeking damages for personal injury. B succeeds against both A and C.

(2) A brings a fault based tort claim against C seeking damages for personal injury. C relies on A's contributory fault as a total or partial defence.

What effect would the judgment in claim (1) have in claim (2)?

Arguably, as a consequence of the judgment in claim (1), both A and C (as co-defendants in the first action) would be barred by issue estoppel from denying that he was at fault in relation to the accident (National Report, II.B.7). C may argue that A's separate claim is an abuse of process (National Report, Part II.C.1).

Scenario 2B

As 2A above, but C successfully defends claim (1) on the ground that A was solely to blame, with the result that A alone is liable to B.

What effect would the judgment in claim (1) have in claim (2)?

Arguably, as a consequence of the judgment in claim (1), A (as against C, his co-defendant in the first action) would be barred by issue estoppel from denying that he was at fault in relation to, and caused, the accident (National Report, II.B.7). C may also argue that A's separate claim is an abuse of process (National Report, Part II.C.1).

Scenario 3

B dies as a result of the accident

(1) A, as B's personal representative, brings a fault based tort claim against C seeking damages for B's personal injury/wrongful death.

(2) A brings a fault based tort claim against C seeking damages for his own personal injury.

(3) B's family members (including A) bring a fault based tort claim against C seeking damages for grief/loss of dependency.

What effect would the judgment in claim (1) have in claims (2) and (3)?

As a consequence the judgment in claim (1) (and, in the case of abuse of process, the surrounding circumstances):

Claims (2) and (3) would not be barred by cause of action estoppel or by the doctrine of merger (National Report, Part II.A.1 & 3), as both the parties and the cause of action are different in each case (A suing in his own capacity being treated as a different person from A suing as B's representative). C may argue that the separate claims are an abuse of process (National Report, Part II.C.1).

Tort claim example (2)

Two thieves, F and G, enter H's house and steal a Swiss watch and Euro 1000.

Scenario 4A

(1) H successfully brings a claim against F for Euros 500.

(2) H brings a further claim against F for the remaining Euros 500.

(3) H brings a claim against F for the value of the watch.

(4) H brings a claim against G for Euros 1000.

(5) F brings a claim against G for Euros 250 seeking a contribution towards the amount of his liability towards H in claim (1).

What effect would the judgment in claim (1) have in claims (2), (3), (4) and (5)?

As a consequence the judgment in claim (1) (and, in the case of abuse of process, the surrounding circumstances):

Claim (2) would arguably be barred by the doctrine of merger, as the parties and the cause of action would be treated as the same (National Report, Part II.A.1 & 3). Nevertheless, if more than one note is involved, it may be argued that the theft of each note creates a separate cause of action. Even if such argument were accepted, claim (2) would likely be held to amount to an abuse of process (National Report, Part II.C.1).

Claim (3) may not be barred by the doctrine of merger, as the cause of action (theft of the watch) may be treated as different from the cause of action (theft of the money) in claim (4). Even if such argument were accepted, claim (3) would likely be held to amount to an abuse of process (see claim (2) above).

Claim (4) would not be barred by the doctrine of merger, although F and G may be joint tortfeasors. Claim (4) may, however, be held to amount to an abuse of process (see claim (2) above)

In claim (5), G would be unable to deny F's liability to H (see the reference to the Civil Liability (Contribution) Act 1978 in National Report, Part II.A.10)

Scenario 4B

H's claim (1) is unsuccessful.

Would this fact make any difference to the conclusions for claims (1), (2), (3) and (4) in 5A above?

Save that (a) instead of the doctrine of merger (which applies to successful claimants), it would be necessary to consider whether H's claims (2), (3) and (4) were barred by cause of action estoppel, and (b) F's claim (5) would no longer be necessary, this fact would make no significant difference to the analysis.

Scenario 4C

H's claim (1), as in 5A above, is unsuccessful, after which his insurance company compensates him for the Euro 1000 and the value of the watch.

(2) H's insurance company claims Euro 1000 against F.

What effect would the judgment in claim (1) have in claim (2)?

A judgment against H in claim (1) would bar claim (2), brought by H's insurance company, by cause of action estoppel (National Report, Part II.A.1 & 3), subject to the

possibility of an application to set the judgment (1) in claim aside if justice so required (see the quoted extract from the judgment of Sir John Donaldson MR in *Buckland v. Palmer* [1984] 1 WLR 1109, at 1115 in National Report, Part II.A.5, p. *).

Contract claim example

D and E enter into negotiations for the distribution by D of widgets manufactured by E and agree heads of terms. The parties subsequently fall out.

Scenario 5A

(1) D brings a claim against E seeking an injunction to restrain E from distributing widgets through another company in breach of an alleged exclusive distribution arrangement. E successfully defends the claim on the ground that no contract was concluded.

(2) D brings a claim against E seeking damages for the same breach of the alleged exclusive distribution arrangement. E does not enter an appearance in the action.

What effect would the judgment in claim (1) have in claim (2)?

> **In principle, D's claim (2) would be barred by cause of action estoppel. If, however, E did not appear to raise that argument, D may be able to obtain judgment in default. If so, E may apply to set aside judgment on the ground that the cause of action estoppel provides a defence but the Court would have a discretion as to whether to set the judgment aside.**

Scenario 5B

As 5A above, but E does defend the action, again on the ground that no contract was concluded.

Would this fact make any difference to the conclusions in 5A above?

> **D's claim (2) would be barred by cause of action estoppel (National Report, II.A.1 & 3), as the parties and the cause of action are the same even though the remedy sought is different.**

Scenario 5C

As 5A above, but in claim (1) E seeks and obtains a declaration that no contract was concluded.

Would this fact make any difference to the conclusions in 5A above?

> **No – cause of action estoppel would still apply.**

Scenario 5D

As 5A above, but E's defence in claim (1) is unsuccessful.

What effect would the judgment in claim (1) have in claim (2)?

In principle, D's claim (2) would be barred by the doctrine of merger (see National Report, Part II.A.1 & 3). If, however, E did not appear to raise that argument, D may be able to obtain judgment in default. If so, E may apply to set aside judgment on the ground that the merger provides a defence but the Court would have a discretion as to whether to set the judgment aside.

Scenario 5E

As 5A above, but claim (2) is brought by the assignee of D's "contractual" rights.

Would this fact make any difference to the conclusions in 5A above?

No – the assignee would be regarded as the "same party" as D for these purposes (National Report, Part II.A.9).

Scenario 6

As 5A above, but in claim (1) D obtains judgment by default.

Would this fact make any difference to the conclusions in 5A above?

No – the judgment would be equally capable of supporting a cause of action estoppel (National Report, Part II.A.3)

France[1]

Tort claim example (1)

In June 2007, a jet-ski piloted by A but owned by B, also on board as a passenger, collides with a jet-ski piloted by C. A and B suffer personal injuries, and both jet-skis are damaged beyond repair

Scenario 1

(1) B brings a fault based tort claim against C seeking damages for personal injury, including lost income during June 2007 resulting from his personal injury. C successfully defends the claim on the ground that A was solely to blame.

A jet ski seems to be a motorized vehicle since a snow-grooming machine is such a vehicle according to case law. Therefore the law applicable would be the act of parliament of the 25th July 1985 and not the usual rules under 1382 Civil code. Consequently, in this case, there would certainly be conciliation and a settlement. But there is still litigation in this matter for the hard cases. The condition of fault is replaced by the condition of involvement in the accident which is easer to prove.

So in scenario 1, the driver involved is liable and it is not necessary to prove a fault.

(2) B brings a second fault based tort claim against C seeking damages for (a) additional lost income during June 2007, and (b) medical costs, resulting (in each case) from his personal injury.

Res judicata requires three conditions: same parties, same grounds and same relief. There are, in this scenario, identity of parties and grounds. But additional lost income is a new relief. Therefore the claim is admissible on this specific point. Conversely medical cost concerns the same injury which was claimed in the first trial (see French report p. 23 II, A, 32). The first judgement evaluated the medical cost for the future. If certain medical costs were not included in this assessment, a new claim is admissible. For example, the victim getting worst has to be medically cured in a specialized institution. The first judge did not take into account this medical cost in his initial judgment (crim. 9 July 1996, JCP G I 4025 Viney). Then the victim could initiate a new trial. Yet if the medical state does not get worst and if the victim wants to benefit from a new medical treatment, a new claim is not admissible concerning these new medical costs (see Report, p.23).

(3) B brings a fault based tort claim against A seeking damages for personal injury.

There is no identity of parties therefore the claim is admissible (see report p.23, n° 31).

B's insurer pays B's claim for the value of the jet-ski less a deductible

[1] The responses to the case study scenarios were prepared by Professor Emmanuel Jeuland and David Chekroun.

(4) B brings a fault based tort claim against C seeking to recover, by way of damages for damage to property, his insurance deductible.

There is a new relief (damage to property) therefore the new claim is admissible.

(5) B's insurer brings a fault based tort claim against A and C seeking to recover, by way of damages for damage to property, the amount paid to B.

There is identity of parties but not the same relief between B and C, but there is no identity of parties between B and A.

- **What effect would the judgment in claim (1) have in claims (2), (3), (4) and (5)?**

The first judgment did not condemn C because of the involvement of A in the accident. But this statement is in the reasoning of the judgement not in the holdings. So it has no res judicata in the new trial (see report p.30 3 B 1). But case law is not totally clear and it is unlikely that the new tribunal would take into consideration the involvement of A (see Cass. 1 civ., 4 jan. 1995 quoted in the report p.30).

- **What effect would a judgment in claim (4) (whether in favour of or against B) have in claim (5)?**

Scenario 2A

(1) B brings a fault based tort claim against A and C seeking damages for personal injury. B succeeds against both A and C.

(2) A brings a fault based tort claim against C seeking damages for personal injury. C relies on A's contributory fault as a total or partial defence.

What effect would the judgment in claim (1) have in claim (2)?

The new claim is admissible since there is no identity of parties. The condemnation of A and C was in the holdings of the first judgment which has res judicata. Therefore A cannot put into question the first judgment on liability.

Scenario 2B

As 2A above, but C successfully defends claim (1) on the ground that A was solely to blame, with the result that A alone is liable to B.

What effect would the judgment in claim (1) have in claim (2)?

The first judgment states in the holdings that A is liable. These holdings have res judicata. Therefore the second tribunal is bound by the first decision.

Scenario 3

B dies as a result of the accident

(1) A, as B's personal representative, brings a fault based tort claim against C seeking damages for B’s personal injury/wrongful death.

(2) A brings a fault based tort claim against C seeking damages for his own personal injury.

What effect would the judgment in claim (1) have in claims (2) and (3)?

If A was B's agent, the death of B ends the contract of agency. So A has no power of attorney and his claimed has to be cancelled. But the second claim is admissible. If A is the inheritant of B, then he/she could lawfully initiate the claim against C. But in this case the second claim would be between the same parties but not for the same relief.

(3) B's family members (including A) bring a fault based tort claim against C seeking damages for grief/loss of dependency.

The claim is admissible and the judges will take into consideration the loss of dependency because of the indirect damage. The first judgment has res judicata on the liability of C since this statement is in the holdings. Therefore the tribunal will grant damages for the family's member.

Tort claim example (2)

Two thieves, F and G, enter H's house and steal a Swiss watch and Euro 1000.

Scenario 4A

(1) H successfully brings a claim against F for Euros 500.

(2) H brings a further claim against F for the remaining Euros 500.

In French law, there is the principle of full compensation of the loss suffered. Moreover there is restitution only for the belongings retained by the police. If the claimant only asks 500 E, the judge cannot grant more than this amount. He would decide ultra petita (art. 5 CPC). Therefore the first judgment is considered to have granted the full compensation (it is not restitution). So the second claim is not admissible since it is based on the same relief.

(3) H brings a claim against F for the value of the watch.

It is a new relief, so the claim is admissible.

(4) H brings a claim against G for Euros 1000.

There are not the same parties. It is admissible. The holdings of the first judgment have res judicata. 500 euros were considered as the full compensation. So the second tribunal is theoretically bound by the first decision. But in reality the second judge could take benefit of the uncertainty of the case law.

(5) F brings a claim against G for Euros 250 seeking a contribution towards the amount of his liability towards H in claim (1).

Nemo auditor propriam turpitudinem allegans, a thief cannot bring a claim against his accomplice.

What effect would the judgment in claim (1) have in claims (2), (3), (4) and (5)?

Scenario 4B

H's claim (1) is unsuccessful.

Would this fact make any difference to the conclusions for claims (1), (2), (3) and (4) in 5A above?
Same relief and principle of full compensation: new claim is not admissible.

Scenario 4C

H's claim (1), as in 4A above, is unsuccessful, after which his insurance company compensates him for the Euro 1000 and the value of the watch.

(2) H's insurance company claims Euro 1000 against F.

What effect would the judgment in claim (1) have in claim (2)?

There are the same parties and relief so the first judgment has res judicata.

Contract claim example

D and E enter into negotiations for the distribution by D of widgets manufactured by E and agree heads of terms. The parties subsequently fall out.

Scenario 5A

(1) D brings a claim against E seeking an injunction to restrain E from distributing widgets through another company in breach of an alleged exclusive distribution arrangement. E successfully defends the claim on the ground that no contract was concluded.

(2) D brings a claim against E seeking damages for the same breach of the alleged exclusive distribution arrangement. E does not enter an appearance in the action.

What effect would the judgment in claim (1) have in claim (2)?

If there is no contract it is a matter of tort for abusive breach of negotiation. The first judgment is an interlocutory injunction which has not res judicata on the merits. Therefore the second tribunal is not bound by the first interlocutory judgment. The fact that E does not enter an appearance in the action has no effect on res judicata.

Scenario 5B

As 5A above, but E does defend the action, again on the ground that no contract was concluded.

Would this fact make any difference to the conclusions in 5A above?
If E proves that there is no contract, he wins.

Scenario 5C

As 5A above, but in claim (1) E seeks and obtains a declaration that no contract was concluded.

Would this fact make any difference to the conclusions in 5A above?

In French procedural law, this case is almost impossible. There is no declaratory action in principle except in certain specific matters (declaration of nationality for example) and certainly not in interlocutory proceedings.

Scenario 5D

As 5A above, but E's defence in claim (1) is unsuccessful.

What effect would the judgment in claim (1) have in claim (2)?

There is a contract. The interlocutory injunction has no effect on the merits.

Scenario 5E

As 5A above, but claim (2) is brought by the assignee of D’s “contractual” rights.

Would this fact make any difference to the conclusions in 5A above?

The assignee is a party but the interlocutory injunction has no res judicata.

Scenario 6

As 5A above, but in claim (1) D obtains judgment by default.

Would this fact make any difference to the conclusions in 5A above?

It makes no difference (see above).

Germany

Tort claim example (1)

In June 2007, a jet-ski piloted by A but owned by B, also on board as a passenger, collides with a jet-ski piloted by C. A and B suffer personal injuries, and both jet-skis are damaged beyond repair

Scenario 1

(1) B brings a fault based tort claim against C seeking damages for personal injury, including lost income during June 2007 resulting from his personal injury. C successfully defends the claim on the ground that A was solely to blame.

(2) B brings a second fault based tort claim against C seeking damages for (a) additional lost income during June 2007, and (b) medical costs, resulting (in each case) from his personal injury.

(3) B brings a fault based tort claim against A seeking damages for personal injury.

B's insurer pays B's claim for the value of the jet-ski less a deductible

(4) B brings a fault based tort claim against C seeking to recover, by way of damages for damage to property, his insurance deductible.

(5) B's insurer brings a fault based tort claim against A and C seeking to recover, by way of damages for damage to property, the amount paid to B.

- **What effect would the judgment in claim (1) have in claims (2), (3), (4) and (5)?**

The judgment in claim (1) would have an effect on claims (2), (3), (4) and (5) only if it concerns the same "Streitgegenstand" (cause of action). The Streitgegenstand is determined by two elements, namely the relief sought and the factual basis on which the claim is based.

(1) Effect in claim (2)

The judgment in claim (1) will bar claim (2) as far as the medical costs are concerned (it is presumed that in the first action the damages for personal injury included the medical costs). The judgment in claim (1) would probably not bar claim (2) insofar as B's second action seeks additional lost income which was not subject of the earlier action. If the plaintiff sues only for part of the damages (in this case lost income) which he might be entitled to, he is not barred from sueing for the rest in a later action even if he did not expressly make clear that his earlier action shall only concern part of his damages claim. The BGH has decided accordingly at least for those cases in which the plaintiff succeeded in the earlier action (BGH NJW 1997, 1990). It has not yet been decided by the BGH whether the same rule applies if the plaintiff loses in the first action, but it seems likely that it does (see OLG Frankfurt NJW-RR 1997, 700, Zöller/Vollkommer, ZPO (2007)[26], Vor § 322 No. 48). If C wants to avoid later actions for further damages not claimed in the earlier proceedings, he could raise a counterclaim in the first action for a declaratory judgment (§ 256 (2) ZPO) finding that he is not liable to B as a result of the accident between B and C.

(2) Effect in claim (3)

As A was not party to the earlier proceedings between B and C and no successor in the sense of §§ 325 seq. ZPO, he would not be bound by the judgment in the action between B and C. In order to extend the effects of the judgment between B and C to A (to seek compensation from A if the action against C fails), B should declare suit on A in the first action between B and C (Streitverkündung, § 72 ZPO). If he has done so in the action against C and the action against C is dismissed because A is found negligent, the findings of the court would become binding for a later action of B against A (§§ 74 (3), 68 ZPO), according to majority opinion however only in so far as they are beneficial for B.

(3) Effect in claim (4)

The action of B against C would be admissible. The first action was limited to damages for personal injury and lost income. Damages to property caused by that accident constitute a different Streitgegenstand and are therefore not subject to res judicata effect of the earlier action. Again, C can avoid a further action if he seeks a declaratory judgment in the first action finding that he is not liable to B as a result of the accident (§ 256 (2) ZPO).

(4) Effect in claim (5)
The action of the insurer is admissible. As the scope of res judicata of the first action of B against C is limited to personal damages and lost income claimed in that action and damage to property constitutes a different Streitgegenstand, the first action would not bar an action of B against A and C to recover his damages to property (see effect in claim (4)) and accordingly does not bar an action of his insurer either.

- **What effect would a judgment in claim (4) (whether in favour of or against B) have in claim (5)?**

A judgment in claim (4) would probably have no effect for claim (5) because B's claim involves a different part of the claim for property damages (no extension of res judicata if only part of a claim is sued for, "keine Rechtskrafterstreckung bei verdeckter Teilklage", BGH NJW 1997, 1990), namely the deductible for which no subrogation takes effect because no insurance money is paid for it. Furthermore, the insurer was not a party of the earlier action of B v. C. Even if the action B v. C would concern the same part of the damage claim (which here it does not because the insurance did not pay for the deducted portion of B's damage), the insurer would only be bound by the result of B v. C if the damage claim was assigned to him after the action B v. C was initiated (i.e. the complaint served on C, see § 325 (1) ZPO: "nach Eintritt der Rechtshängigkeit Rechtsnachfolger der Parteien"). As German law has a cessio legis in insurance law as far as the insurance pays for the damage (§ 86 (1) Versicherungsvertragsgesetz 2008), it would thus depend on whether the insurance paid for the damage before or after B initiated suit against C. Only in the case of compulsory insurance (here probably not the case), there is a broader extension of res judicata between insurer and insured (§ 124 (1), (2) Versicherungsvertragsgesetz 2008).

Scenario 2A

(1) B brings a fault based tort claim against A and C seeking damages for personal injury. B succeeds against both A and C.

(2) A brings a fault based tort claim against C seeking damages for personal injury. C relies on A's contributory fault as a total or partial defence.

What effect would the judgment in claim (1) have in claim (2)?

The judgment in claim (1) would have no effect for claim (2). Under German law, the first action would only determine that A and C are liable to B for *B's* damages (for *B's* personal injury). It would not rule on the damages which A might claim from C for his (A's) personal injury. Only if the second action of A against C concerned a claim for contribution for damages (e.g. if A fully compensated B and now seeks compensation from C), the first judgment would be relevant as it determines that A and C are indeed jointly liable to B (but not which quota of liability applies between them).

Scenario 2B

As 2A above, but C successfully defends claim (1) on the ground that A was solely to blame, with the result that A alone is liable to B.

What effect would the judgment in claim (1) have in claim (2)?

No effect. The first action still involves only the liability of A and C for B's damages, not liability of C for A's damages. The judgment makes only clear that C owes nothing to B for his damages and says nothing for the relationship A-C. The fact that the action against C was dismissed on the ground that A was solely to blame constitutes merely part of the reasoning which is not part of the binding res judicata.

Scenario 3

B dies as a result of the accident

(1) A, as B's personal representative, brings a fault based tort claim against C seeking damages for B's personal injury/wrongful death.

(2) A brings a fault based tort claim against C seeking damages for his own personal injury.

(3) B's family members (including A) bring a fault based tort claim against C seeking damages for grief/loss of dependency.

What effect would the judgment in claim (1) have in claims (2) and (3)?

A preliminary remark: German law of succession does not know the personal representative. The rights of the deceased pass directly to his heirs (§ 1922 (1) BGB, exception: execution of the will ordered by the deceased, §§ 2212, 2213 BGB). I shall therefore presume that A is heir of B.

The judgment in claim (1) would have no effect for situation (2) because the action of A against C in situation (2) concerns his own claim for personal damages whereas claim (1) concerns the rights of the deceased A or, respectively, as inherited by his heirs. The two claims therefore concern a different Streitgegenstand.

The action of the family members for their own grief/loss of dependency (rather limited in German law, see §§ 844-846 BGB) concerns a right different from the damages claim which they inherited from the deceased (damages of the deceased for his personal injury). Therefore, different causes of action (Streitgegenstände) are involved and there is no res judicata effect of the judgment in claim (1) for claim (3).

Tort claim example (2)

Two thieves, F and G, enter H's house and steal a Swiss watch and Euro 1000.

Scenario 4A

(1) H successfully brings a claim against F for Euros 500.

(2) H brings a further claim against F for the remaining Euros 500.

(3) H brings a claim against F for the value of the watch.

(4) H brings a claim against G for Euros 1000.

(5) F brings a claim against G for Euros 250 seeking a contribution towards the amount of his liability towards H in claim (1).

What effect would the judgment in claim (1) have in claims (2), (3), (4) and (5)?

Claim (1) has no effect in claim (2) because the Streitgegenstand of the first action was only part of the damages, i.e. 500 of the full 1000 Euros which were stolen. H may sue for further damages which he did not recover in the first action (BGH NJW 1997, 1990).

Claim (1) has no effect for claim (3) either. Again, the claim for the value of the watch is a different part of the H's damages claim. As the first action concerned only damages for the "first" 500 Euro stolen, there is no res judicata.

Claim (1) has no procedural effect for a later an action against G for 1000 Euro. The res judicata of that action concerns only H and F, not H and G (see § 425 (2) BGB: in case of joint liability, a binding judgment has only effect for the debtor against whom it was obtained). However, if F had indeed already compensated H for the theft, his action against G would (partially) fail on substantive law grounds because his damages claim would be (partially) fulfilled.

Claim (1) has no effect for the contribution action of F against G because G was no party to the action H-F.

Scenario 4B

H's claim (1) is unsuccessful.

Would this fact make any difference to the conclusions for claims (1), (2), (3) and (4) in 5A above?

No changes. The limits of res judicata in partial actions apply as well if the action for the first part of the damages was unsuccessful (see OLG Frankfurt NJW-RR 1997, 700, Zöller/Vollkommer, ZPO (2007)[26], Vor § 322 No. 48).

Scenario 4C

H's claim (1), as in 4A above, is unsuccessful, after which his insurance company compensates him for the Euro 1000 and the value of the watch.

(2) H's insurance company claims Euro 1000 against F.

What effect would the judgment in claim (1) have in claim (2)?

The claim of the insurance company would be unsuccessful as procedurally inadmissible (barred by res judicata). As the insurance compensated H after his action was initiated, cessio legis (legal assignment, (§ 86 (1) Versicherungsvertragsgesetz 2008) of H's damages claim against F took effect after the action H-F was initiated. As a result, the res judicata of the action H-F extends to H's insurance (§ 325 (1) ZPO).

Contract claim example

D and E enter into negotiations for the distribution by D of widgets manufactured by E and agree heads of terms. The parties subsequently fall out.

Scenario 5A

(1) D brings a claim against E seeking an injunction to restrain E from distributing widgets through another company in breach of an alleged exclusive distribution arrangement. E successfully defends the claim on the ground that no contract was concluded.

(2) D brings a claim against E seeking damages for the same breach of the alleged exclusive distribution arrangement. E does not enter an appearance in the action.

What effect would the judgment in claim (1) have in claim (2)?
The judgment in claim (1) would have no effect in claim (2). The Streitgegenstand of claim (1) was limited to injunctive relief, the (in)existence of the contract was only a preliminary question in claim (1) which does not form part of res judicata. An extension of the "Rechtskraft" in claim (1) is possible if either party request a declaratory judgment on the validity of the contract (§ 256 (2) ZPO).

Scenario 5B

As 5A above, but E does defend the action, again on the ground that no contract was concluded.

Would this fact make any difference to the conclusions in 5A above?

No difference, no binding effect.

Scenario 5C

As 5A above, but in claim (1) E seeks and obtains a declaration that no contract was concluded.

Would this fact make any difference to the conclusions in 5A above?

In this situation the declaratory judgment would rule conclusively on the validity of the contract. The court would have to take that judgment into account and would be bound on the question of validity of the contract.

Scenario 5D

As 5A above, but E's defence in claim (1) is unsuccessful.

What effect would the judgment in claim (1) have in claim (2)?

No effect because the validity of the contract does not form part of the Streitgegenstand of claim (1).

Scenario 5E

As 5A above, but claim (2) is brought by the assignee of D's "contractual" rights.

Would this fact make any difference to the conclusions in 5A above?
No effect, the validity of the contract is still only a preliminary question outside the Streitgegenstand.

Scenario 6

As 5A above, but in claim (1) D obtains judgment by default.

Would this fact make any difference to the conclusions in 5A above?

No difference to the previous answers.

Netherlands

Tort claim example (1)

In June 2007, a jet-ski piloted by A but owned by B, also on board as a passenger, collides with a jet-ski piloted by C. A and B suffer personal injuries, and both jet-skis are damaged beyond repair

Scenario 1

(1) B brings a fault based tort claim against C seeking damages for personal injury, including lost income during June 2007 resulting from his personal injury. C successfully defends the claim on the ground that A was solely to blame.

(2) B brings a second fault based tort claim against C seeking damages for (a) additional lost income during June 2007, and (b) medical costs, resulting (in each case) from his personal injury.

(3) B brings a fault based tort claim against A seeking damages for personal injury.

B's insurer pays B's claim for the value of the jet-ski less a deductible

(4) B brings a fault based tort claim against C seeking to recover, by way of damages for damage to property, his insurance deductible.

(5) B's insurer brings a fault based tort claim against A and C seeking to recover, by way of damages for damage to property, the amount paid to B.

- **What effect would the judgment in Claim (1) have in claims (2), (3), (4) and (5)?**

  Claim (1) / Claim (2) A court may award damages for damage which has not yet occurred; in Claim (1), B could have claimed his future lost income (i.e. over June 2007) and medical costs that have not yet been incurred (see Article 6:105(1) BW). However, B was not obliged to do this and can bring a claim for compensation of the other damage arising from the same facts once the damage in question has actually occurred, bearing in mind the applicable limitation periods. Accordingly, the judgment in Claim (1) has no claim preclusive effect in Claim (2). Both claims concern a different damage (factual cause of action) and are therefore considered to be different claims (see National Report, Part II.A.1, p37ff). Nevertheless, the judgment in Claim (1) may have issue preclusive effect in Claim (2), insofar as it is established that there is an identity of issues, because there is an identity of parties (see National Report, Part II.B.1, p56ff).

  Claim (1) / Claim (3) The judgment in Claim (1) has no preclusive effect in Claim (3), because, most importantly, there is no identity of parties in both proceedings (B-C/B-A) (see National Report, Part II.A.3, p42ff). The judgment in Claim (1) may have a certain evidential value in Claim (2), subject to the discretion of the court (see National Report, Part I.C, p30-1).

  Claim (1) / Claim (4) The judgment in Claim (1) has no claim preclusive effect in Claim (4); there is no identity of claims (no identity of the factual cause of action of both claims) since the damage on which the claim for relief is based differs (see National Report, Part II.A.3, p37ff).

Claim (1) / Claim (5) The judgment in Claim (1) has no claim preclusive effect in Claim (5); there is no identity of claims (no identity of the factual cause of action of both claims) since the damage on which the claim for relief is based differs (see National Report, Part II.A.3, p37ff). Nevertheless, the judgment in Claim (1) may have issue preclusive effect in Claim (5), insofar as it is established that there is an identity of issues (see National Report, Part II.B.1, p56ff). There is deemed to be an identity of parties, since B's insurer is subrogated in all of B's rights of action to seek damages arising from the property damage (Article 7:962(1) BW, see National Report, Part II.A.3, p45) after paying, either voluntarily or obligatorily under the insurance agreement, B's claim for the value of the jet-ski. The insurer thus succeeds B under a particular prerogative (i.e. the insurance agreement). Insofar as the succession takes place *after* the judgment in Claim (1) is rendered, the insurer is, in principle, liable to be affected by the preclusive effect of a judgment between B and C (see National Report, Part II.A.3, p44-5) in Claim (5).

- **What effect would a judgment in Claim (4) (whether in favour of or against B) have in Claim (5)?**

  Between B's insurer and C, the judgment in Claim (4) has claim preclusive effect in Claim (5); there is an identity of claims, i.e., an identity of the factual cause of action of both claims (see National Report, Part II.A.3, p37ff). Moreover, there is deemed to be an identity of parties in both proceedings, because, for the purpose of determining the preclusive effect of the judgment in Claim (4) between B and C, B and his insurer are deemed to be one and the same party (see the previous answer, and the National Report, Part II.A.3, p44-5). Conversely, the same judgment has no preclusive effect in Claim (5) between B's insurer and A, since there is no identity of parties in both proceedings (B-C/B's insurer-A) (see National Report, Part II.A.3, p42ff).)

Scenario 2A

(1) B brings a fault based tort claim against A and C seeking damages for personal injury. B succeeds against both A and C.

(2) A brings a fault based tort claim against C seeking damages for personal injury. C relies on A's contributory fault as a total or partial defence.

What effect would the judgment in Claim (1) have in Claim (2)?

Arguably, owing to the judgment in Claim (1), A (as co-defendant in the first action) is prevented by the issue preclusive effect of that judgment from denying in the context of Claim (2) that he was at fault in relation to the accident, insofar as this was established in the fault based tort action in Claim (1) (see National Report, II.B.3, p60ff). *It is noted, however, that for the reason that multiple defendants were involved in Claim (1), a particularly close examination of the findings contained in the resulting judgment is called for, because the preclusive effect of that judgment extends only to the parties directly implicated by findings on issues contained therein.*

Scenario 2B

As 2A above, but C successfully defends Claim (1) on the ground that A was solely to blame, with the result that A alone is liable to B.

What effect would the judgment in Claim (1) have in Claim (2)?

Please refer to the answer for Scenario 2A.

Scenario 3

B dies as a result of the accident

(1) A, as B's personal representative, brings a fault based tort claim against C seeking damages for B's personal injury/wrongful death.

(2) A brings a fault based tort claim against C seeking damages for his own personal injury.

(3) B's family members (including A) bring a fault based tort claim against C seeking damages for grief/loss of dependency.

What effect would the judgment in Claim (1) have in claims (2) and (3)?

The judgment in Claim (1) has no preclusive effect in claims (2) and (3), as both the parties (in particular, A suing in his own capacity being treated as a different person from A suing as B's representative) and the factual cause of action is different in each case (there is a different damage involved in each case, i.e., B's damage in Claim (1), A's damage in Claim (2), and the family's damage in claim (3)).

Tort claim example (2)

Two thieves, F and G, enter H's house and steal a Swiss watch and Euro 1000.

Scenario 4A

(1) H successfully brings a claim against F for Euros 500.

(2) H brings a further claim against F for the remaining Euros 500.

(3) H brings a claim against F for the value of the watch.

(4) H brings a claim against G for Euros 1000.

(5) F brings a claim against G for Euros 250 seeking a contribution towards the amount of his liability towards H in Claim (1).

- **What effect would the judgment in Claim (1) have in Claim (2)?**

  The judgment in Claim (1) has no claim preclusive effect in in Claim (2), because the two claims involve a different factual cause of action (different damage, i.e. different parts of the stolen money). The same judgment might have issue preclusive effect in Claim 2, insofar as it is established that there is an identity of issues between both claims (see National Report, Part II.B.1, p56ff). H has the opportunity two claim the stolen money in two separate actions only if he has a good reason for doing so (e.g. he only realised later that instead of €500, €1000 had been stolen). However, if his only intention is, for instance, to harrass F by instituting two separate proceedings, his action might be dismissed for an abuse of process (see National Report, Part I.C, p28ff).

- **What effect would the judgment in Claim (1) have in Claim (3)?**

The judgment in Claim (1) has no preclusive effect in Claim (3), because the factual cause of action in Claim (1) (i.e., the theft of the watch and the damage – the loss of the watch - thereby incurred) is different from the factual cause of action in Claim (3) (i.e., the theft of the money and the damage – the loss of money - thereby incurred). The judgment in Claim (1) might have issue preclusive effect in Claim (2) between the same parties, insofar as it is established that there is an identity of issues between both claims (see National Report, Part II.B.1, p56ff).

- **What effect would the judgment in Claim (1) have in Claim (4)?**

  The judgment in Claim (1) has no preclusive effect in Claim (4), because there is no identity of parties in both proceedings (H-F/H-G) (see National Report, Part II.A.3, p43ff). H can only claim Euro 500 from G after recovering the other half from F (see Article 6:102(1) in conjunction with 6:10(2) BW).

- **What effect would the judgment in Claim (1) have in Claim (5)?**

  The judgment in Claim (1) does not have preclusive effect in Claim (5), as there is no identity of parties in both proceedings (H-F/F-G) and the preclusive effect of judgments does not extend to third persons who are jointly and severally liable for a debt (see National Report, Part II.A.3, p44).

Scenario 4B

H's Claim (1) is unsuccessful.

- **What effect would the judgment in Claim (1) have in claims (2) and (3)?**

  Please refer to the first and second answers in Scenario 4A.

- **What effect would the judgment in Claim (1) have in Claim (4)?**

  H is entitled to bring an action against G for Euros 1000 (see Article 6:102(1) in conjunction with 6:10(1) BW). Otherwise, the answer is the same as the third answer in Scenario 4A.

- **What effect would the judgment in Claim (1) have in Claim (5)?**

  Please refer to the answer four 4 in Scenario 4A

Scenario 4C

H's Claim (1), as in 4A above, is unsuccessful, after which his insurance company compensates him for the Euro 1000 and the value of the watch.
(2) H's insurance company claims Euro 1000 against F.

What effect would the judgment in Claim (1) have in Claim (2)?

H's insurer is subrogated in all of H's rights of action to seek damages arising from the theft (Article 7:962(1) BW, see National Report, Part II.A.3, p45) after paying H's claim for the Euro 1000 and the value of the watch, either voluntarily or obligatorily under the insurance agreement. The insurer thus succeeds H under a particular prerogative (i.e. the insurance agreement). Insofar as the succession takes place *after* the judgment in Claim (1) is

rendered, the insurer is, in principle, liable to be affected to the claim preclusive effect of the judgment between H and F (see National Report, Part II.A.3, p44-5) in Claim (2).

Contract claim example

D and E enter into negotiations for the distribution by D of widgets manufactured by E and agree heads of terms. The parties subsequently fall out.

Scenario 5A

(1) D brings a claim against E seeking an injunction to restrain E from distributing widgets through another company in breach of an alleged exclusive distribution arrangement. E successfully defends the claim on the ground that no contract was concluded.

(2) D brings a claim against E seeking damages for the same breach of the alleged exclusive distribution arrangement. E does not enter an appearance in the action.

What effect would the judgment in Claim (1) have in Claim (2)?

It depends on the question whether or not the judgment in Claim (1) is in summary proceedings. It this is the case, it is not capable of having preclusive effect in Claim (2) (see National Report, Part I.D, p35). If, on the other hand, it is rendered in ordinary proceedings and thus, in principle, capable of having preclusive effect, the issue arises that the court is prohibited from applying the preclusive effect of judgments *ex officio* (see National Report, Part II.A.4, p46ff). If the judgment in Claim (2) is rendered in default of E's appearance, the court will, in principle, re-decide the issue whether an exclusive distribution agreement exists between D and E, notwithstanding the fact that in Claim (1) it was found that no such contract was concluded. The court in Claim (2) might, however, in certain instances dismiss the case *ex officio* by holding that (a) D has no sufficient interest in bringing the second claim, (b) D's claim amounts to an abuse of process, or (c) D's action violates the requirements of due process (see National Report, Part I.C, p28ff). Moreover, E may still enter, within a specific time limit, an objection against the default judgment, which leads to a re-opening of the case thus allowing him to invoke the preclusive effect of the judgment in Claim (1) (see National Report, Part I.D, p34). On the assumption that that in Claim (1) no widgets had yet been distributed through another company, and at the time of Claim (2) widgets had in fact been distributed, the in Claim (1) would only be capable of having issue preclusive effect in Claim (2) since the factual cause of action in the former claim is different and therefore claim preclusion is not in question. If in both instances, however, the claim was based on the same factual cause of action, i.e. the fact that widgets had been distributed through another company, the judgment in Claim (1) could preclude Claim (2), which would then be dismissed upon application of E.

Scenario 5B

As 5A above, but E does defend the action, again on the ground that no contract was concluded.

Would this fact make any difference to the conclusions in 5A above?

The court will decide the issue anew, since E does not expressly invoke the issue preclusive effect of the judgment in Claim (1) (see National Report, Part II.B.4, p61ff).

Scenario 5C

As 5A above, but in Claim (1) E seeks and obtains a declaration that no contract was concluded.

Would this fact make any difference to the conclusions in 5A above?

No.

Scenario 5D

As 5A above, but E's defence in Claim (1) is unsuccessful.

What effect would the judgment in Claim (1) have in Claim (2)?

In principle none. The court will grant D’s claim in default of E’s appearance. If E enters an objection against the default judgment, when the case is re-opened, D may invoke the issue preclusive effect of the judgment in Claim (1).

Scenario 5E

As 5A above, but Claim (2) is brought by the assignee of D’s “contractual” rights.

Would this fact make any difference to the conclusions in 5A above?

No – the assignee would be regarded as the "same party" as D for these purposes (National Report, Part II.A.3).

Scenario 6

As 5A above, but in Claim (1) D obtains judgment by default.

Would this fact make any difference to the conclusions in 5A above?

No - the default judgment is equally capable of having preclusive effect (National Report, Part I.B, p33)

Romania

Tort claim example (1)

In June 2007, a jet-ski piloted by A but owned by B, also on board as a passenger, collides with a jet-ski piloted by C. A and B suffer personal injuries, and both jet-skis are damaged beyond repair

Scenario 1

(1) B brings a fault based tort claim against C seeking damages for personal injury, including lost income during June 2007 resulting from his personal injury. C successfully defends the claim on the ground that A was solely to blame.

(2) B brings a second fault based tort claim against C seeking damages for (a) additional lost income during June 2007, and (b) medical costs, resulting (in each case) from his personal injury.

(3) B brings a fault based tort claim against A seeking damages for personal injury.

B's insurer pays B's claim for the value of the jet-ski less a deductible

(4) B brings a fault based tort claim against C seeking to recover, by way of damages for damage to property, his insurance deductible.

(5) B's insurer brings a fault based tort claim against A and C seeking to recover, by way of damages for damage to property, the amount paid to B.

- **What effect would the judgment in claim (1) have in claims (2), (3), (4) and (5)?**

Claim (1) will not bar claim (2) (4)(not the same object), or claim (3) (not the same parties). For claim (5) the fact the there are no similar parties may not be an obstacle for res judicata effects (see answer to scenario 4C below). However, since in claim (5) the object is not similar there can be no claim preclusion. See report Part II.A.3.

- **What effect would a judgment in claim (4) (whether in favour of or against B) have in claim (5)?**

None (one of the three elements is missing – same object). See report Part II.A.3

Scenario 2A

(1) B brings a fault based tort claim against A and C seeking damages for personal injury. B succeeds against both A and C.

(2) A brings a fault based tort claim against C seeking damages for personal injury. C relies on A's contributory fault as a total or partial defence.

What effect would the judgment in claim (1) have in claim (2)?

To the extent that the judgment in claim (1) upholds the fault of A in the operative part, the defence of C in claim (2) will be presumed to have been settled by judgment (1). See report Part II.B.1.

Scenario 2B

As 2A above, but C successfully defends claim (1) on the ground that A was solely to blame, with the result that A alone is liable to B.

What effect would the judgment in claim (1) have in claim (2)?

Same response as in 2A above.

Scenario 3

B dies as a result of the accident

(1) A, as B's personal representative, brings a fault based tort claim against C seeking damages for B's personal injury/wrongful death.

(2) A brings a fault based tort claim against C seeking damages for his own personal injury.

(3) B's family members (including A) bring a fault based tort claim against C seeking damages for grief/loss of dependency.

What effect would the judgment in claim (1) have in claims (2) and (3)?

None. The claims have all different object. See report Part II.A.3.

Tort claim example (2)

Two thieves, F and G, enter H's house and steal a Swiss watch and Euro 1000.

Scenario 4A

(1) H successfully brings a claim against F for Euros 500.

(2) H brings a further claim against F for the remaining Euros 500.

(3) H brings a claim against F for the value of the watch.

(4) H brings a claim against G for Euros 1000.

(5) F brings a claim against G for Euros 250 seeking a contribution towards the amount of his liability towards H in claim (1).

What effect would the judgment in claim (1) have in claims (2), (3), (4) and (5)?

Claims (2) and (3) are not barred since they have different object (Part II.A.3). Claim (4) will be barred since judgment in claim (1) will have preclusive effect on G, as co-debtor (Part II.A.9). Claim (5) is not barred since it concerns different parties and object (Part II.A.3).

Scenario 4B

H's claim (1) is unsuccessful.

Would this fact make any difference to the conclusions for claims (1), (2), (3) and (4) in 5A above?

No

Scenario 4C

H's claim (1), as in 4A above, is unsuccessful, after which his insurance company compensates him for the Euro 1000 and the value of the watch.

(2) H's insurance company claims Euro 1000 against F.

What effect would the judgment in claim (1) have in claim (2)?

Even though the Romanian case law has not settled the relationship between insurer and insured as regards the res judicata effects, it is to be expected that the judgment in claim (1) will preclude claim (2) only insofar as it concerns the amount already settled in the former (Euro 500) (see part II.A.3 and 9).

Contract claim example

D and E enter into negotiations for the distribution by D of widgets manufactured by E and agree heads of terms. The parties subsequently fall out.

Scenario 5A

(1) D brings a claim against E seeking an injunction to restrain E from distributing widgets through another company in breach of an alleged exclusive distribution arrangement. E successfully defends the claim on the ground that no contract was concluded.

(2) D brings a claim against E seeking damages for the same breach of the alleged exclusive distribution arrangement. E does not enter an appearance in the action.

What effect would the judgment in claim (1) have in claim (2)?

If in the dictum of judgment (1) the court determined that there has been no contract between the parties, as an issue of law, then such may be presumed to be the truth in the second case. The court may look at this matter *ex officio*. (see Part II.B.1 and 4).

Scenario 5B

As 5A above, but E does defend the action, again on the ground that no contract was concluded.

Would this fact make any difference to the conclusions in 5A above?

The only difference is that E could raise this issue as well.

Scenario 5C

As 5A above, but in claim (1) E seeks and obtains a declaration that no contract was concluded.

Would this fact make any difference to the conclusions in 5A above?

The conclusion in 5A took into account an almost similar scenario. Such issue preclusion is valid *a fortiori* if such declaration is made by the court.

Scenario 5D

As 5A above, but E's defence in claim (1) is unsuccessful.

What effect would the judgment in claim (1) have in claim (2)?

In such case the determination of whether there has been a contract will have to be settled in judgment (2).

Scenario 5E

As 5A above, but claim (2) is brought by the assignee of D’s “contractual” rights.

Would this fact make any difference to the conclusions in 5A above?

Since the assignee is the legal successor of D, the answer would be similar (see part II.A.9).

Scenario 6

As 5A above, but in claim (1) D obtains judgment by default.

Would this fact make any difference to the conclusions in 5A above?

Similar response.

Spain

Please note that according to the provisions of the Spanish legal system only final judgments, upholding or rejecting the parties' claim/s, will have the effect of substantive *res iudicata* (see National Report, Part II.A.1, p19).

Tort claim example (1)

In June 2007, a jet-ski piloted by A but owned by B, also on board as a passenger, collides with a jet-ski piloted by C. A and B suffer personal injuries, and both jet-skis are damaged beyond repair

Scenario 1

(1) B brings a fault based tort claim against C seeking damages for personal injury, including lost income during June 2007 resulting from his personal injury. C successfully defends the claim on the ground that A was solely to blame.

(2) B brings a second fault based tort claim against C seeking damages for (a) additional lost income during June 2007, and (b) medical costs, resulting (in each case) from his personal injury.

(3) B brings a fault based tort claim against A seeking damages for personal injury.

B's insurer pays B's claim for the value of the jet-ski less a deductible

(4) B brings a fault based tort claim against C seeking to recover, by way of damages for damage to property, his insurance deductible.

(5) B's insurer brings a fault based tort claim against A and C seeking to recover, by way of damages for damage to property, the amount paid to B.

- **What effect would the judgment in claim (1) have in claim (2)?**

  Judgment in claim (1), rejecting B's claim/s on the ground that A was solely to blame, will have the effect of substantive *res iudicata* preventing subsequent proceedings between B and C (see National Report, Part II.A.3, p22). The Court will find there is a final decision with identical cause of action (*causa petendi*) between the same parties and it will issue an order for the discontinuance of the proceedings (see National Report, Part II.A.1, p20).

  Please note that *'res iudicata even extends to questions not judged, insofar as not expressly raised in the proceedings … which is what happens with claims supplementary to another principal claim or other questions which could have been raised but were not raised, provided there is a strong link between them and the main object of the proceedings, as maintaining in time the uncertainty of litigation, in which objectively and causally the plaintiff could have enforced all of the claims he had against the Defendant, is in breach of the legal guarantees of the threatened party … arguments now to a large extent expressly incorporated in Article 400 of the new Civil Procedure Act*' (see National Report, Part II.A.3, p24).

- **What effect would the judgment in claim (1) have in claim (3)?**

Judgment in claim (1) will be taken into account by the Court in fresh proceedings between B and A (C successfully defended the claim on the ground that A was solely to blame). However, *res iudicata* will not take effect provided there is not identity of the parties (see National Report, Part II.A.3, p22 and 25).

- **What effect would the judgment in claim (1) have in claim (4)?**

Judgment in claim (1), rejecting B's claim/s on the ground that A was solely to blame, will have the effect of substantive *res iudicata* preventing subsequent proceedings between B and C (see National Report, Part II.A.3, p22). The Court will find there is a final decision with identical cause of action (*causa petendi*) between the same parties and it will issue an order for the discontinuance of the proceedings (see National Report, Part II.A.1, p20).

- **What effect would the judgment in claim (1) have in claim (5)?**

B's insurer is entitled to bring a fault based tort claim seeking to recover the amount paid to B as Spanish law attributes standing to a person other than the holder of the right (B) for the bringing of the corresponding proceeding (there is a kind of procedural substitution due to the subrogatory action contemplated in Article 43 of the Law 50/1980 of October 8, 1980 on Insurance Contracts).

By virtue of the said provision a creditor (B's insurer) who is the holder of a credit right against the debtor (B) may be subrogated in the position of the latter and exercise the actions and rights of which the latter is the holder against third parties (A and C) [see National Report, Part II.A.7, p35].

In the proceedings between B's insurer and C, the Court will find there is a final decision with identical cause of action (*causa petendi*) and it will issue an order for the discontinuance of the proceedings (please see the first answer of Scenario 1). Nevertheless, in the proceedings between B's insurer and A, the Court will find there is no *res iudicata* and it will order the continuance of the proceedings (please see the second answer of Scenario 1).

Scenario 2A

(1) B brings a fault based tort claim against A and C seeking damages for personal injury. B succeeds against both A and C.

(2) A brings a fault based tort claim against C seeking damages for personal injury. C relies on A's contributory fault as a total or partial defence.

What effect would the judgment in claim (1) have in claim (2)?

The positive effect of *res iudicata* involves the obligation of the Court to follow absolutely what was declared in the previous proceeding, where the subject-matter of the second proceeding partially coincides with that of the first, both being concerned, to that extent, with the same judicial dispute (i.e. A's contributory fault)

The positive effect of *res iudicata* acts in the sense of not being able in a subsequent proceeding to decide a specific matter, question or disputed point in a manner contrary to or different from how it was resolved or decided in a previous proceeding (see National Report, Part II.B.1, p45).

Scenario 2B

As 2A above, but C successfully defends claim (1) on the ground that A was solely to blame, with the result that A alone is liable to B.

What effect would the judgment in claim (1) have in claim (2)?

Please see the previous answer.

Scenario 3

B dies as a result of the accident

(1) A, as B's personal representative, brings a fault based tort claim against C seeking damages for B's personal injury/wrongful death.

(2) A brings a fault based tort claim against C seeking damages for his own personal injury.

(3) B's family members (including A) bring a fault based tort claim against C seeking damages for grief/loss of dependency.

Please note that the Spanish Civil Code distinguishes between legal representatives (holders of the parental authority or *patria potestas* and persons legally responsible for a ward of court) and 'voluntary' representatives (acting with full powers on behalf of someone). Regarding these two types of representation it must be taken into account the following: (a) the voluntary representation becomes extinguished because of the represented person's death (B). Therefore, Spanish law does not attribute standing to A in order to bring a fault based tort claim against C seeking damages for B's death; (b) Spanish law only attributes standing to those damaged by someone's death (family members or not). Therefore, only those damaged by B's death would be entitled to file a claim against C seeking damages.

Taking into account the previous comments, Scenario 3 (1) (2) would not be possible according to the provisions of the Spanish legal system (A, as B's personal representative, would not be entitled to claim for damages).

Notwithstanding the above, in an abstract Scenario, there would not be identity of parties because A appears in one proceeding as holder of legal or voluntary representation of a third party (B) and in a second proceeding in his own name. Therefore, *res iudicata* will not take effect provided there is not identity of the parties (see National Report, Part II.A.3, p25-26).

Tort claim example (2)

Two thieves, F and G, enter H's house and steal a Swiss watch and Euro 1000.

Scenario 4A

(1) H successfully brings a claim against F for Euros 500.

(2) H brings a further claim against F for the remaining Euros 500.

(3) H brings a claim against F for the value of the watch.

(4) H brings a claim against G for Euros 1000.

(5) F brings a claim against G for Euros 250 seeking a contribution towards the amount of his liability towards H in claim (1).

- **What effect would the judgment in claim (1) have in claim (2)?**

  Please note that questions not raised but which could have been raised in previous proceeding are also covered by *res iudicata*, preventing them being reproduced in subsequent proceedings:

  '*Res iudicata even extends to questions not judged, insofar as not expressly raised in the proceedings … which is what happens with claims supplementary to another principal claim or other questions which could have been raised but were not raised, provided there is a strong link between them and the main object of the proceedings, as maintaining in time the uncertainty of litigation, in which objectively and causally the plaintiff could have enforced all of the claims he had against the Defendant, is in breach of the legal guarantees of the threatened party … arguments now to a large extent expressly incorporated in Article 400 of the new Civil Procedure Act*' (see National Report, Part II.A.3, p24).

  This is an effort to avoid the proliferation of litigation on the same matter, precluding subsequent proceedings that involve issues that could and should have been raised previously (see National Report, Part II.C, p50).

- **What effect would the judgment in claim (1) have in claim (3)?**

  Please see the previous answer.

- **What effect would the judgment in claim (1) have in claim (4)?**

  Having recovered Euros 500 from F, H is entitled to bring an action against G for only Euros 500 and the value of the watch.

  In this way, it must be taken into account that if the creditor (H) opts to claim against only one of the joint and several debtors (F) and judgment is given against that debtor, the debt may only be enforced against the assets of that debtor and not those of the others who have not participated in the proceeding and have not had judgment given against them. If the creditor (H) does not have the debt paid with the assets of the Defendant debtor (F), there is nothing to prevent him from claiming against another or other joint and several debtors (G) who will not be able to argue the negative effects of *res iudicata* (see National Report, Part II.A.9, p41).

- **What effect would the judgment in claim (1) have in claim (5)?**

  Judgment in claim (1) will be taken into account by the Court in fresh proceedings between F and G. However, *res iudicata* will not take effect provided there is not identity of the parties in both proceedings (see National Report, Part II.A.3, p22 and 25).

Scenario 4B

H's claim (1) is unsuccessful.

- **What effect would the judgment in claim (1) have in claims (2) and (3)?**

  Please see the first and second answers in Scenario 4A.

- **What effect would the judgment in claim (1) have in claim (4)?**

  H is entitled to bring an action against G for Euros 1000 and the value of the watch.
  If the creditor (H) does not have the debt paid with F's assets, there is nothing to prevent him from claiming against another or other joint and several debtors (G), who will not be able to argue the negative effects of *res iudicata* (see National Report, Part II.A.9, p41).

- **What effect would the judgment in claim (1) have in claim (5)?**

  F is not entitled to bring a claim against G for Euros 250 because he has not paid any amount to H. Therefore, his claim will be rejected.

Scenario 4C

H's claim (1), as in 4A above, is unsuccessful, after which his insurance company compensates him for the Euro 1000 and the value of the watch.

(2) H's insurance company claims Euro 1000 against F.

What effect would the judgment in claim (1) have in claim (2)?

H's insurance company is entitled to bring a claim seeking to recover the amount paid to H as Spanish law attributes standing to a person other than the holder of the right (H) for the bringing of the corresponding proceeding (there is a kind of procedural substitution due to the subrogatory action contemplated in Article 43 of the Law 50/1980 of October 8, 1980 on Insurance Contracts).

By virtue of the said provision a creditor (H's insurance company) who is the holder of a credit right against the debtor (H) may be subrogated in the position of the latter and exercise the actions and rights of which the latter is the holder against third parties (F and G) [see National Report, Part II.A.7, p35].

In the proceedings between H's insurance company and F, the Court will find there is a final decision with identical cause of action (*causa petendi*) and it will issue an order for the discontinuance of the proceedings. Nevertheless, in the proceedings between H's insurance company and G, the Court will find there is no *res iudicata* and will order the continuance of the proceedings.

Contract claim example

D and E enter into negotiations for the distribution by D of widgets manufactured by E and agree heads of terms. The parties subsequently fall out.

Scenario 5A

(1) D brings a claim against E seeking an injunction to restrain E from distributing widgets through another company in breach of an alleged exclusive distribution arrangement. E successfully defends the claim on the ground that no contract was concluded.

(2) D brings a claim against E seeking damages for the same breach of the alleged exclusive distribution arrangement. E does not enter an appearance in the action.

What effect would the judgment in claim (1) have in claim (2)?

Concerning judicial decisions on preliminary injunctions or provisional measures (*medidas cautelares*), as they are only aimed at obtaining provisional protection, they do not have *res iudicata* effect with regard to the parties' main claim/s (in this case the damages for the breach of the exclusive distribution arrangement) [see National Report, Part I.D, p18].

Scenario 5B

As 5A above, but E does defend the action, again on the ground that no contract was concluded.

Would this fact make any difference to the conclusions in 5A above?

Please see the previous answer.

Nevertheless, please note that the judicial decision on preliminary injunctions given in claim (1) will be taken into account by the Court in the main proceedings between D and E (E successfully defended the claim on the ground that no contract was concluded).

Scenario 5C

As 5A above, but in claim (1) E seeks and obtains a declaration that no contract was concluded.

Would this fact make any difference to the conclusions in 5A above?

Please see the previous answer.

Scenario 5D

As 5A above, but E's defence in claim (1) is unsuccessful.

What effect would the judgment in claim (1) have in claim (2)?

Concerning judicial decisions on preliminary injunctions or provisional measures (*medidas cautelares*), as they are only aimed at obtaining provisional protection, they do not have *res iudicata* effect with regard to the parties' main claim/s [see National Report, Part I.D, p18].

Nevertheless, please note that the judicial decision on preliminary injunctions given in claim (1) will be taken into account by the Court in the main proceedings between D and E (E's defence in proceedings on preliminary injunction was unsuccessful).

Scenario 5E

As 5A above, but claim (2) is brought by the assignee of D's "contractual" rights.

Would this fact make any difference to the conclusions in 5A above?

This fact would not make any difference to the conclusions in 5A above because judicial decisions on preliminary injunctions do not have *res iudicata* effect with regard to the parties' or the assignees' main claim/s.

Scenario 6

As 5A above, but in claim (1) D obtains judgment by default.

Would this fact make any difference to the conclusions in 5A above?

This fact would not make any difference to the conclusions in 5A above.

Sweden

Introduction to the Swedish responses

In the following examples we assume that the time to appeal against the first judgment has elapsed and that no appeal has been made.

When it in the following is said that a judgment has res judicata effects, this means that the court in the second litigation must render a final decision where the claim will be dismissed on procedural grounds.

The fact that a judgment has no preclusive effects does not prevent it from having evidentiary effects in a subsequent litigation.

Tort claim example (1)

In June 2007, a jet-ski piloted by A but owned by B, also on board as a passenger, collides with a jet-ski piloted by C. A and B suffer personal injuries, and both jet-skis are damaged beyond repair

Scenario 1

(1) B brings a fault based tort claim against C seeking damages for personal injury, including lost income during June 2007 resulting from his personal injury. C successfully defends the claim on the ground that A was solely to blame.

(2) B brings a second fault based tort claim against C seeking damages for (a) additional lost income during June 2007, and (b) medical costs, resulting (in each case) from his personal injury.

(3) B brings a fault based tort claim against A seeking damages for personal injury.

B's insurer pays B's claim for the value of the jet-ski less a deductible

(4) B brings a fault based tort claim against C seeking to recover, by way of damages for damage to property, his insurance deductible.

(5) B's insurer brings a fault based tort claim against A and C seeking to recover, by way of damages for damage to property, the amount paid to B.

- **What effect would the judgment in claim (1) have in claims**

(2) The judgment will preclude claim a) (additional lost income for June) due to res judicata. There will be no preclusive effects as regards claim b) (medical costs). (See National Report, part II.A.3, p. 16.)

(3) No preclusive effect. (See National Report, part II.A.1 p 13 and II.A.9 p. 30).

(4) No preclusive effect. (See National Report, part II.A.3, p. 16.)

(5) No preclusive effect. (See National Report, part II.A.3, p. 16.)

- **What effect would a judgment in claim (4) (whether in favour of or against B) have in claim (5)?**

No preclusive effects due to the fact that the Insurance company has acquired B´s right to compensation from A and C *before* the litigation. (See National Report, part II.A.9 p. 30 f.)

Scenario 2A

(1) B brings a fault based tort claim against A and C seeking damages for personal injury. B succeeds against both A and C.

(2) A brings a fault based tort claim against C seeking damages for personal injury. C relies on A's contributory fault as a total or partial defence.

What effect would the judgment in claim (1) have in claim (2)?
No preclusive effect. (See National Report, part II.A.1 p 13 and II.A.9 p. 30).

Scenario 2B

As 2A above, but C successfully defends claim (1) on the ground that A was solely to blame, with the result that A alone is liable to B.

What effect would the judgment in claim (1) have in claim (2)?
No preclusive effect. (See National Report, part II.A.1 p 13 and II.A.9 p. 30).

Scenario 3

B dies as a result of the accident

(1) A, as B's personal representative, brings a fault based tort claim against C seeking damages for B's personal injury/wrongful death.

(2) A brings a fault based tort claim against C seeking damages for his own personal injury.

(3) B's family members (including A) bring a fault based tort claim against C seeking damages for grief/loss of dependency.

What effect would the judgment in claim (1) have in claims

(2): No preclusive effect. (See National Report, part II.A.3 pp. 15 ff.).

and (3)?
No preclusive effect. (However, it must be noted that the institute "personal representative" does not seem to have any equivalent under Swedish law. It is not possible for another person, e.g. a relative, to seek compensation for a deceased persons damages. Relatives to deceased may instead in some cases be entitled to compensation for their own damages (e.g. regarding "mental illness") due to the death of their relative.

Tort claim example (2)

Two thieves, F and G, enter H's house and steal a Swiss watch and Euro 1000.

Scenario 4A

(1) H successfully brings a claim against F for Euros 500.

(2) H brings a further claim against F for the remaining Euros 500.

(3) H brings a claim against F for the value of the watch.

(4) H brings a claim against G for Euros 1000.

(5) F brings a claim against G for Euros 250 seeking a contribution towards the amount of his liability towards H in claim (1).

What effect would the judgment in claim (1) have in claims

(2) Res judicata. (See National Report, part II.A.3 p. 15).

(3) The leading Swedish commentator believes that there would be res judicata in this case.

(4) No preclusive effects. (However, G may in the second litigation oppose to H´s claim as regards 500 Euro since H already has been compensated with this amount. This is not a procedural objection but a substantive objection.) (See National Report, part II.A.1 p 13 and II.A.9 p. 30).

and (5)?
No preclusive effect. (See National Report, part II.A.1 p 13 and II.A.9 p. 30).

Scenario 4B

H's claim (1) is unsuccessful.

Would this fact make any difference to the conclusions for claims (1), (2), (3) and (4) in 5A above?

No. (See National Report, IIA.6 p. 23).

Scenario 4C

H's claim (1), as in 4A above, is unsuccessful, after which his insurance company compensates him for the Euro 1000 and the value of the watch.

(2) H's insurance company claims Euro 1000 against F.

What effect would the judgment in claim (1) have in claim (2)?
If we assume that the right to compensation from F was transferred from H to the insurance company *after* the first judgment (or under the proceedings), the company´s claim will be barred by res judicata. If, by contrast, the insurance company acquired this right before the first litigation, it will not be bound by the judgment between H and F. (In the latter situation, H apparently did not have any right to compensation from F since this right had been transferred.) (See National Report, part II.A. 9 pp. 30 f.)

Contract claim example

D and E enter into negotiations for the distribution by D of widgets manufactured by E and agree heads of terms. The parties subsequently fall out.

Scenario 5A

(1) D brings a claim against E seeking an injunction to restrain E from distributing widgets through another company in breach of an alleged exclusive distribution arrangement. E successfully defends the claim on the ground that no contract was concluded.

(2) D brings a claim against E seeking damages for the same breach of the alleged exclusive distribution arrangement. E does not enter an appearance in the action.

What effect would the judgment in claim (1) have in claim (2)?

No preclusive effect. (See National Report, part II.A.3 pp. 15 ff., especially p. 17).

Scenario 5B

As 5A above, but E does defend the action, again on the ground that no contract was concluded.

Would this fact make any difference to the conclusions in 5A above?
No.

Scenario 5C

As 5A above, but in claim (1) E seeks and obtains a declaration that no contract was concluded.

Would this fact make any difference to the conclusions in 5A above?
The declaration will have “positive legal force” (which also might be called “positive res judicata” or “substantive res judicata”). This means that the court in the second litigation will be “bound” in its reasoning by the finding that no contract was concluded. Thus there will be no procedural bar to the second litigation. (See National Report, part II.A.1 p. 13).

Scenario 5D

As 5A above, but E's defence in claim (1) is unsuccessful.

What effect would the judgment in claim (1) have in claim (2)?
No preclusive effect.

Scenario 5E

As 5A above, but claim (2) is brought by the assignee of D's "contractual" rights.

Would this fact make any difference to the conclusions in 5A above?
No preclusive effect.

Scenario 6

As 5A above, but in claim (1) D obtains judgment by default.

Would this fact make any difference to the conclusions in 5A above?
No. (See National Report, part I.D. p. 9).

Switzerland

Tort claim example (1)

In June 2007, a jet-ski piloted by A but owned by B, also on board as a passenger, collides with a jet-ski piloted by C. A and B suffer personal injuries, and both jet-skis are damaged beyond repair

Scenario 1

(1) B brings a fault based tort claim against C seeking damages for personal injury, including lost income during June 2007 resulting from his personal injury. C successfully defends the claim on the ground that A was solely to blame.

(2) B brings a second fault based tort claim against C seeking damages for (a) additional lost income during June 2007, and (b) medical costs, resulting (in each case) from his personal injury.

(3) B brings a fault based tort claim against A seeking damages for personal injury.

B's insurer pays B's claim for the value of the jet-ski less a deductible

(4) B brings a fault based tort claim against C seeking to recover, by way of damages for damage to property, his insurance deductible.

(5) B's insurer brings a fault based tort claim against A and C seeking to recover, by way of damages for damage to property, the amount paid to B.

- **What effect would the judgment in claim (1) have in claims (2), (3), (4) and (5)?**

Claim (2): No preclusive effects for lack of identity of prayers for relief (see National Report, Part II.A.3, p15) and limitation of preclusive effects to the judgments operative part (see National Report, Part II.B.1, p24). In case Claim (1) is dismissed, however, see also the discussion on preclusive effects of the dismissal of a *Teilklage* in National Report, Part II.B.1, p25, which may be applicable depending on the exact determination of the relevant factual circumstances.

Claim (3): No preclusive effects for lack of identical parties (see National Report, Part II.A.3, p14 and Part II.A.6, p20).

Claim (4): No preclusive effects for lack of identity of prayers for relief (see National Report, Part II.A.3, p15) and limitation of preclusive effects to the judgments operative part (see National Report, Part II.B.1, p24). In case Claim (1) is dismissed, however, see also the discussion on preclusive effects of the dismissal of a Teilklage in National Report, Part II.B.1, p25, which may be applicable depending on the exact determination of the relevant factual circumstances.

Claim (5): No preclusive effects for lack of identical parties (see National Report, Part II.A.3, p14 and Part II.A.6, p20) and lack of identity of prayers for relief (see National Report, Part II.A.3, p15).

- **What effect would a judgment in claim (4) (whether in favour of or against B) have in claim (5)?**

  No preclusive effects for lack of identical parties (see National Report, Part II.A.3, p14 and Part II.A.6, p20) and lack of identity of prayers for relief (see National Report, Part II.A.3, p15). However, in case of identical prayers for relief, extension of preclusive effect notwithstanding lack of identical parties because of (potential) succession to a right (see National Report, Part II.A.9 p22).

Scenario 2A

(1) B brings a fault based tort claim against A and C seeking damages for personal injury. B succeeds against both A and C.

(2) A brings a fault based tort claim against C seeking damages for personal injury. C relies on A's contributory fault as a total or partial defence.

What effect would the judgment in claim (1) have in claim (2)?

In principle no preclusive effects for lack of identical parties (see National Report, Part II.A.3, p14 and Part II.A.6, p20) and lack of identity of prayers for relief (see National Report, Part II.A.3, p15). However, the Federal Supreme Court has explicitly left the question of preclusive effects undecided in a constellation which bears certain similarities (see National Report, Part II.A.6, p20).

Scenario 2B

As 2A above, but C successfully defends claim (1) on the ground that A was solely to blame, with the result that A alone is liable to B.

What effect would the judgment in claim (1) have in claim (2)?

In principle no preclusive effects for lack of identical parties (see National Report, Part II.A.3, p14 and Part II.A.6, p20) and lack of identity of prayers for relief (see National Report, Part II.A.3, p15). However, the Federal Supreme Court has explicitly left the question of preclusive effects undecided in a constellation which bears certain similarities (see National Report, Part II.A.6, p20).

Scenario 3

B dies as a result of the accident

(1) A, as B's personal representative, brings a fault based tort claim against C seeking damages for B’s personal injury/wrongful death.

(2) A brings a fault based tort claim against C seeking damages for his own personal injury.

(3) B's family members (including A) bring a fault based tort claim against C seeking damages for grief/loss of dependency.

What effect would the judgment in claim (1) have in claims (2) and (3)?

Claim (2): No preclusive effects for lack of identity of prayers for relief (see National Report, Part II.A.3, p15) and limitation of preclusive effects to the judgments operative part (see National Report, Part II.B.1, p24).

Claim (3): No preclusive effects for lack of identity of prayers for relief (see National Report, Part II.A.3, p15) and limitation of preclusive effects to the judgments operative part (see National Report, Part II.B.1, p24).

Tort claim example (2)

Two thieves, F and G, enter H's house and steal a Swiss watch and Euro 1000.

Scenario 4A

(1) H successfully brings a claim against F for Euros 500.

(2) H brings a further claim against F for the remaining Euros 500.

(3) H brings a claim against F for the value of the watch.

(4) H brings a claim against G for Euros 1000.

(5) F brings a claim against G for Euros 250 seeking a contribution towards the amount of his liability towards H in claim (1).

What effect would the judgment in claim (1) have in claims (2), (3), (4) and (5)?

Claim (2): No preclusive effects for lack of identity of prayers for relief (see National Report, Part II.A.3, p15) and limitation of preclusive effects to the judgments operative part (see National Report, Part II.B.1, p24 et seq).

Claim (3): No preclusive effects for lack of identity of prayers for relief (see National Report, Part II.A.3, p15) and limitation of preclusive effects to the judgments operative part (see National Report, Part II.B.1, p24 et seq).

Claim (4): No preclusive effects for lack of identical parties (see National Report, Part II.A.3, p14 and Part II.A.6, p20) and (partial) lack of identity of prayers for relief (see National Report, Part II.A.3, p15).

Claim (5): In principle no preclusive effects for lack of identical parties (see National Report, Part II.A.3, p14 and Part II.A.6, p20) and lack of identity of prayers for relief (see National Report, Part II.A.3, p15). However, the Federal Supreme Court has explicitly left the question of preclusive effects in this constellation undecided (see National Report, Part II.A.6, p20).

Scenario 4B

H's claim (1) is unsuccessful.

Would this fact make any difference to the conclusions for claims (1), (2), (3) and (4) in 5A above?

Claim (2): According to the Federal Supreme Court no preclusive effects for lack of identity of prayers for relief (see National Report, Part II.A.3, p15) and limitation of preclusive effects to the judgments operative part (see National Report, Part II.B.1, p24 et seq). This view is, however, disputed among academic writers (see National Report, Part II.B.1, p25).

Claim (3): According to the Federal Supreme Court no preclusive effects for lack of identity of prayers for relief (see National Report, Part II.A.3, p15) and limitation of preclusive effects to the judgments operative part (see National Report, Part II.B.1, p24 et seq). However, see also the discussion on preclusive effects of the dismissal of a *Teilklage* in National Report, Part II.B.1, p25, which may be applicable depending on the exact determination of the relevant factual circumstances.

Claim (4): No preclusive effects for lack of identical parties (see National Report, Part II.A.3, p14 and Part II.A.6, p20) and (partial) lack of identity of prayers for relief (see National Report, Part II.A.3, p15).

Claim (5): In principle no preclusive effects for lack of identical parties (see National Report, Part II.A.3, p14 and Part II.A.6, p20) and lack of identity of prayers for relief (see National Report, Part II.A.3, p15). However, the Federal Supreme Court has explicitly left the question of preclusive effects in this constellation undecided (see National Report, Part II.A.6, p20).

Scenario 4C

H's claim (1), as in 5A above, is unsuccessful, after which his insurance company compensates him for the Euro 1000 and the value of the watch.

(2) H's insurance company claims Euro 1000 against F.

What effect would the judgment in claim (1) have in claim (2)?

Claim partially (with regard to the first EUR 500) precluded (see National Report, Part II.A.1 p12, Part II.A.3 p14 et seq). Extension of preclusive effect notwithstanding lack of identical parties because of (potential) succession to a right (see National Report, Part II.A.9 p22).

Contract claim example

D and E enter into negotiations for the distribution by D of widgets manufactured by E and agree heads of terms. The parties subsequently fall out.

Scenario 5A

(1) D brings a claim against E seeking an injunction to restrain E from distributing widgets through another company in breach of an alleged exclusive distribution arrangement. E successfully defends the claim on the ground that no contract was concluded.

(2) D brings a claim against E seeking damages for the same breach of the alleged exclusive distribution arrangement. E does not enter an appearance in the action.

What effect would the judgment in claim (1) have in claim (2)?

No preclusive effects for lack of identity of prayers for relief (see National Report, Part II.A.3, p15) and limitation of preclusive effects to the judgments operative part (see National Report, Part II.B.1, p24).

Scenario 5B

As 5A above, but E does defend the action, again on the ground that no contract was concluded.

Would this fact make any difference to the conclusions in 5A above?

No.

Scenario 5C

As 5A above, but in claim (1) E seeks and obtains a declaration that no contract was concluded.

Would this fact make any difference to the conclusions in 5A above?

Yes. Binding effect with regard to the question of the non-existence of the contract (*Präjudizialitätswirkung*) (see National Report, Part II.A.1 p12, Part II.A.3 p15 and Part II.B.1 p24).

Scenario 5D

As 5A above, but E's defence in claim (1) is unsuccessful.

What effect would the judgment in claim (1) have in claim (2)?

No preclusive effects for lack of identity of prayers for relief (see National

Report, Part II.A.3, p15) and limitation of preclusive effects to the judgments operative part (see National Report, Part II.B.1, p24).

Scenario 5E

As 5A above, but claim (2) is brought by the assignee of D's "contractual" rights.

Would this fact make any difference to the conclusions in 5A above?

No. However, in case of identical prayers for relief, extension of preclusive effect notwithstanding lack of identical parties because of (potential) succession to a right (see National Report, Part II.A.9 p22).

Scenario 6

As 5A above, but in claim (1) D obtains judgment by default.

Would this fact make any difference to the conclusions in 5A above?

No (see National Report, Part I.D., p10 in addition).

United States[2]

Tort claim example (1)

In June 2007, a jet-ski piloted by A but owned by B, also on board as a passenger, collides with a jet-ski piloted by C. A and B suffer personal injuries, and both jet-skis are damaged beyond repair

Scenario 1

(1) B brings a fault based tort claim against C seeking damages for personal injury, including lost income during June 2007 resulting from his personal injury. C successfully defends the claim on the ground that A was solely to blame.

(2) B brings a second fault based tort claim against C seeking damages for (a) additional lost income during June 2007, and (b) medical costs, resulting (in each case) from his personal injury.

(3) B brings a fault based tort claim against A seeking damages for personal injury.

B's insurer pays B's claim for the value of the jet-ski less a deductible

(4) B brings a fault based tort claim against C seeking to recover, by way of damages for damage to property, his insurance deductible.

(5) B's insurer brings a fault based tort claim against A and C seeking to recover, by way of damages for damage to property, the amount paid to B.

- **What effect would the judgment in claim (1) have in claims (2), (3), (4) and (5)?**
  - **Claim (2) would be barred by claim preclusion (See US Report, Parts II.A.1 & 3).**
  - **Claim (3): the claim against A will not be precluded because B's claim against C and B's claim against A are distinct claims (US Report, Part II.A.3).**
  - **Claim (4): this claim would be barred in most jurisdictions because the claim for personal injury damages and the claim for property damage arise out of the same transaction or occurrence (the accident) (US Report Part II.A.3).**
  - **Claim (5): This issue has presented some difficulty in the United States and was not discussed in the US National Report. According to the treatise written by Wright and Miller (Federal Practice and Procedure, Vol. 18 § 4415) most jurisdictions have held that once an insurer becomes subrogated to part of a claim, an action by either the insured or the insurer will not preclude a second action by another. However, there is a minority of jurisdictions which do not allow the claim to be split in this way and will apply preclusion.**

[2] The responses to the case study scenarios were prepared by Ms Justine Stefanelli and Professor Rhonda Wasserman.

- **What effect would a judgment in claim (4) (whether in favour of or against B) have in claim (5)?**

  - **If the judgment is in favour of B, B's insurer can use the judgment against C to recover what was paid out to B because of issue preclusion and the application of non-mutual offensive collateral estoppel (US Report, Part II.B.3).**

  - **Please refer to the discussion above regarding Claim (5).**

Scenario 2A

(1) B brings a fault based tort claim against A and C seeking damages for personal injury. B succeeds against both A and C.

(2) A brings a fault based tort claim against C seeking damages for personal injury. C relies on A's contributory fault as a total or partial defence.

What effect would the judgment in claim (1) have in claim (2)?

> **C will only be able to rely on A's contributory fault as a defence if A and C were in an adversarial relationship in suit 1. Therefore, unless either A or C filed a cross-claim against the other, the judgment in suit 1 as to A's contributory fault could not be used to preclude re-litigation of A's fault (US Report, Part II.B.7).**

Scenario 2B

As 2A above, but C successfully defends claim (1) on the ground that A was solely to blame, with the result that A alone is liable to B.

What effect would the judgment in claim (1) have in claim (2)?

> **In this situation, A and C's relationship was adversarial in nature and so C can use the judgment in suit 1 against A who was a party to the first action (US Report, Part II.B.7).**

Scenario 3

B dies as a result of the accident

(1) A, as B's personal representative, brings a fault based tort claim against C seeking damages for B's personal injury/wrongful death.

(2) A brings a fault based tort claim against C seeking damages for his own personal injury.

(3) B's family members (including A) bring a fault based tort claim against C seeking damages for grief/loss of dependency.

What effect would the judgment in claim (1) have in claims (2) and (3)?

- **Suit (1) would have no effect in suit (2) because A is acting as B's personal representative (i.e. in a different capacity) and not in his own interest (US Report, Part II.A.3).**

- **Regarding suit (3), again, A is acting in a different capacity and so in that regard, his claim in suit (3) will not be precluded; regarding the other family members, in New York it would depend on whether the claim is considered derivative of any claims that the deceased may have. Where the claim is derivative, it will be precluded (US Report, Parts II.A.3 and II.B.9).**

Tort claim example (2)

Two thieves, F and G, enter H's house and steal a Swiss watch and Euro 1000.

Scenario 4A

(1) H successfully brings a claim against F for Euros 500.

(2) H brings a further claim against F for the remaining Euros 500.

(3) H brings a claim against F for the value of the watch.

(4) H brings a claim against G for Euros 1000.

(5) F brings a claim against G for Euros 250 seeking a contribution towards the amount of his liability towards H in claim (1).

What effect would the judgment in claim (1) have in claims (2), (3), (4) and (5)?

- **Claim (2) would be barred by claim preclusion, specifically the doctrine of merger (US Report, Part II.A.3).**

- **Claim (3) would also be barred by claim preclusion [merger] (US Report, Part II.A.3).**

- **Claim (4): it is likely that the claim against G is not precluded, although H can only have one of the judgments satisfied (US Report, Part II.A.3).**

- **The judgment in (1) would have no effect in (5) because this issue has not yet been litigated and since G was not a party to suit 1, G is not bound by the judgment (US Report, Part II.B.3).**

Scenario 4B

H's claim (1) is unsuccessful.

Would this fact make any difference to the conclusions for claims (1), (2), (3) and (4) in 4A above?

- **The result in claims (2) and (3) would not change substantively; however, because H was unsuccessful in (1), H would be precluded in suits (2) and (3) based on the doctrine of bar, rather than merger (US Report, Parts II.A.1 & 3).**

- **Claim (4) remains the same, but G may be able to invoke non-mutual defensive collateral estoppel (US Report, Parts II.A.1 & 3 and Part II.B.3).**

Scenario 4C

H's claim (1), as in 4A above, is unsuccessful, after which his insurance company compensates him for the Euro 1000 and the value of the watch.

(2) H's insurance company claims Euro 1000 against F.

What effect would the judgment in claim (1) have in claim (2)?

Please consult the response above in relation to Scenario 1 and Claim (5).

Contract claim example

D and E enter into negotiations for the distribution by D of widgets manufactured by E and agree heads of terms. The parties subsequently fall out.

Scenario 5A

(1) D brings a claim against E seeking an injunction to restrain E from distributing widgets through another company in breach of an alleged exclusive distribution arrangement. E successfully defends the claim on the ground that no contract was concluded.

(2) D brings a claim against E seeking damages for the same breach of the alleged exclusive distribution arrangement. E does not enter an appearance in the action.

What effect would the judgment in claim (1) have in claim (2)?

In principle, D would be barred by claim preclusion in suit (2); however, because E did not appear, the matter would not be raised before the court and D may obtain a default judgment against E. E may be able to attack the validity of the default judgment in collateral proceedings (US Report, Parts I.C and II.A.1 & 3).

Scenario 5B

As 5A above, but E does defend the action, again on the ground that no contract was concluded.

Would this fact make any difference to the conclusions in 5A above?

D is barred by claim preclusion (US Report, Parts II.A.1 & 3)

Scenario 5C

As 5A above, but in claim (1) E seeks and obtains a declaration that no contract was concluded.

Would this fact make any difference to the conclusions in 5A above?

This does not make any difference; claim preclusion applies.

Scenario 5D

As 5A above, but E's defence in claim (1) is unsuccessful.

What effect would the judgment in claim (1) have in claim (2)?

Please refer to response to Scenario 5A.

Scenario 5E

As 5A above, but claim (2) is brought by the assignee of D's "contractual" rights.

Would this fact make any difference to the conclusions in 5A above?

The claim would be precluded based on claim preclusion as long as A, as the assignee, has the power to discharge the obligation owed unto him (US Report, Part II.A.9).

Scenario 6

As 5A above, but in claim (1) D obtains judgment by default.

Would this fact make any difference to the conclusions in 5A above?

No, the default judgment would be equally capable of having claim preclusive effects (US Report, Parts I.D and II.A.3).