BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW

PROJECT REFERENCE: JLS/2006/FPC/21 – 30-CE-00914760055

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

Project Director:
Jacob van de Velden

Project Research Fellow:
Justine Stefanelli

Project Consultant:
Andrew Dickinson

Project Research Assistants:
Edward Ho
Aniket Mandevia
Floor Rombach
Daniel Vasbeck

REPORT

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

England and Wales

Andrew Dickinson

British Institute of International and Comparative Law

Charles Clore House

17 Russell Square

London

WC1B 5JP

United Kingdom

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.

Summary:

The term judgment encompasses any decision given by a court on questions at issue between the parties in proceedings properly before the court. Presently the distinction between a judgment and an order is unclear, the Civil Procedure Rules 1998 (CPR) failing to provide either a clear definition or usage of either term. In common usage though, a judgment is a final decision of the Court, while an order is any other decision.

Several distinct classifications of judgment are readily identified. "Judgments *in rem*" resolve disputes as to the status of some particular subject matter and therefore takes effect *erga omnes*, while "judgments *in personam*" take effect only between the parties before the Court. Further "final" judgments can be distinguished from "interlocutory" judgments, as can "money" judgments (i.e. judgments on either liquidated or unliquidated claims) from "non-money judgments" (such as injunctions, order for specific performance). Finally judgments can be distinguished by the circumstances in which they were given e.g. consent, default, summary etc.

Judgments, and the reasons for the decision, may be delivered immediately following the end of the hearing (*ex tempore*) or be reserved and issued after further consideration. In this latter case a judgment will only become binding once it has been formally handed down by the Court. In cases of urgency, the Court may render judgment, reserving reasons to be given at a later date. After the judgment has been handed down, the formal record of the judgment must be drawn up and perfected by sealing. The record of the judgment may be drawn up by the Court or by the parties.

The CPR provides that all judgments and orders must state the name and judicial title of the person who made it, the date it was given and the judgment must be sealed by the Court (CPR r.40.2(2)). The English judiciary are afforded considerable latitude as to the structure, style, form and content of the reasons for judgment. Guidance for more junior judges is offered by the Judicial Studies Board, who stress that while there is no need to deal with every argument, the judge must make clear the principles which underlie and justify the decision. The Court of Appeal has discussed the obligation imposed by Art 6 ECHR to provide reasons for a decision, in particular stressing that any judgment must enable an appellate court to understand why the Judge reached his decision.

Full Response:

Concept and terminology

As a matter of English law, the term "judgment", and the term "order" with which it is commonly linked, may broadly be said to include any decision given by a court on a question or questions at issue between the parties to a proceeding properly before the court.[1] In this connection, the reference to "court" may be taken to include not only so-called "courts of record" (including, for example, the High Court, County Courts, Crown Court, Employment Appeals Tribunal, Court of Appeal and the future Supreme Court[2]) but other courts and tribunals exercising the judicial authority of the State.[3]

Formerly, technical distinctions were drawn between "judgments" and "orders" in English civil proceedings. The term "judgment" was used to describe a final[4] decision obtained in an "action", i.e. civil proceedings commenced in

[1] Halsbury's Laws of England (4th ed), vol 26, para 501.
[2] From 2009, the Supreme Court will assume the appellate jurisdiction presently exercised by the Judicial Committee of the House of Lords (see Constitutional Reform Act 2005, Part III).
[3] "The law hath respect, not only to Courts of Record and judicial proceedings there, but even to all other proceedings where the person who gives judgment or sentence hath judicial authority, and you show no fault in the sentence" (*Philips v Bury* (1693) 2 Term Rep 346, at 357 (Holt CJ)).
[4] See I.C below.

the High Court by a writ or in the County Court by a plaint. The term "order" was used to describe certain final decisions obtained in proceedings which were not "actions" or any decision which was not final.

Following introduction of a new rules of civil procedure by the Civil Procedure Rules 1998 (CPR)[5] (which replaced writs, plaints and other forms of originating process in civil proceedings with the unimaginatively named "claim form") the distinction between "actions" and other types of proceeding has been abandoned in favour of the single concept of "claim". The terms "judgment" and "order" are not defined in the CPR, but are used in various contexts, sometimes individually and sometimes in combination. Many of these provisions have been carried over from the former rules, apparently unthinkingly.[6] In this connection, the leading commentary on the CPR comments:[7]

> "It remains to be seen whether anything important has been lost, and whether any unwelcome problems have been caused, by maintaining in the CPR the expressions 'judgment' and 'order' when it appears that one is not a synonym for the other, but yet no basis for distinguishing between them can be derives from the rules themselves … It could be argued that, under the CPR, a 'judgment' is a final decision of the court in a claim, and that 'order' is any other decision."

This latter view reflects the understanding, and usage, of many legal practitioners. Outside the CPR, it may be necessary to accord technical meanings to the terms "judgment" and "order".[8]

The word "judgment" is also commonly used to describe the statement of reasons given for a decision, final or otherwise[9], and the word "order" is also commonly used to describe the formal, written record of the court's decision, whether following trial or otherwise.[10] It is, however, the decision itself which is binding and to which the concept of "judgment" in its primary sense must attach.[11]

The term "decree" is also sometimes used to describe a final judicial decision, closely resembling but not identical with a "judgment" in the technical sense described above.[12] The term remains in use, for example, in certain admiralty[13] and family[14] proceedings.

In the following paragraphs within this Part, the term "judgment" will be used to describe a judicial decision, of whatever description, the term "record of judgment" will be used to describe the formal document setting out the terms of the judgment and the term "reasons for judgment" will be used to describe the document setting out the reasons given by the court for the judgment.

Judgments, in the sense just described, are capable of being categorised in various ways. One fundamental distinction recognised by English law is between "judgments *in rem*"[15] and "judgments *in personam*". According to one source:[16]

> "A judgment *in rem* is an adjudication pronounced upon the status of some particular subject matter by a tribunal having competent authority for that purpose. Such an adjudication being a solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is as declared, it precludes all persons from saying that the status of the thing or person adjudicated upon was not such as declared by the

---

[5] SI 1998/3132. The CPR apply to most proceedings in county courts, the High Court and the civil division of the Court of Appeal. The House of Lords and tribunals have their own rules of procedure. As the CPR apply to most English proceedings with a cross-border aspect, the following commentary is focussed on their terms and effect.
[6] *Knight v Rochdale Healthcare NHS Trust* [2003] EWHC 1831 (QB); [2003] 4 All ER 416, at [19] (Crane J).
[7] The Rt Hon Lord Justice Brooke and others (eds), *Civil Procedure* (2007), vol 1, para 40.1.1.
[8] Ibid. *Knight v Rochdale Healthcare*, fn 6 above, provides a good example of this, the question being whether a decision bearing the heading "consent order" was a "judgment" for the purposes of the Limitation Act 1980.
[9] An English lawyer, in referring to the judgment of a particular judge, is usually referring to the reasons given by that judge for a particular decision.
[10] eg in referring to "service of a court order".
[11] See further 1.B below.
[12] *Re Binstead* [1893] 1 QB 199 (CA). Whereas "judgments" were given in "actions"; "decrees" were given in "causes" or "suits".
[13] e.g. a "limitation decree".
[14] e.g. a "decree nisi" or "decree absolute" in divorce proceedings.
[15] For examples of judgments *in rem* under English law, see Halsbury's Laws of England (online), vol 16(2), para 973.
[16] *Jowitt's Dictionary of English Law* (2nd ed., 1977) cited with apparent approval by Lord Mance in delivering the opinion of the Privy Council in *Pattni v Ali* [2006] UKPC 51; [2007] 2 AC 85, at [21]. Note that, in certain situations, judgments may have an *in rem* or *in personam* effect depending on whether decision favours one party or another (see H M Malek & others (ed), *Phipson on Evidence* (16th ed, 2005), para 44-09).

> adjudication. Thus the court having in certain cases a right to condemn goods, its judgment is conclusive against all the world that the goods so condemned were liable to seizure. So a declaration of legitimacy is in effect a judgment *in rem*. A judgment of divorce pronounced by a foreign court is in certain cases recognised by English courts, and is then a judgment *in rem* … Judgments *in personam* are those which bind only those who are parties or privies to them; as in an ordinary action of contract or tort, where a judgment given against A cannot be binding on B unless he or someone under whom he claims was party to it."

Significantly, just as a judgment *in rem* may create or destroy a particular status of a person or thing, so judgment *in personam* may under English law create and destroy obligations as between the parties to litigation. Indeed, through operation of the doctrine of merger (see II.B.1) English judgments create new obligations which take the place of those originally sued upon.

Another terminological distinction is drawn between "final" judgments and "interlocutory" judgments. Most straightforwardly, the former category can be said to include only judgments which finally determine the matters in issue between the parties[17], all other judgments falling within the latter category.[18] The concept of a "final" judgment is important, for example, in relation to the rules governing appellate jurisdiction, where the contrast between "final" and other decisions has a technical statutory meaning.[19] Similarly, English judges and lawyers might contrast an "interim injunction", a court order regulating the conduct of the parties pending trial of a claim, and a "final injunction" as being one granted following trial or other determination of a claim.[20] The criteria for granting interim and final injunctive relief are quite different.[21]

Judgments may also be categorised according to the remedy which they impose or other provision which they make. Thus, judgments may be "money" or "non-money" judgments, the former category including judgments on both liquidated (e.g. debt) and unliquidated (e.g. damages for personal injury) claims and the latter category including, for example, injunctions, orders for specific performance of contractual obligations, orders for the possession of land and declaratory judgments. Further, in the course of proceedings, courts may give procedural orders relating to the conduct of proceedings. Such orders are commonly described as "orders for directions".

Finally, but without exhausting the possible ways in which judgments may be categorised according to law and practice in England, judgments may be described by reference to the circumstances in which they were given. Thus, judgments given following trial of a claim may be distinguished from consent judgments and orders[22], default judgments[23], judgments on an admission[24] and summary judgments.[25]

Processes

Judgments, and the reasons for judgment, may be delivered by the court immediately following the end of the hearing of the particular matter (*ex tempore*) or be reserved and issued ("handed down") following further reflection (*curia advisari vult*). Normally, the judgment will be given in public, although in certain circumstances the judgment or part of it may be confidential to the parties. [26]

In the former case, the proceedings will normally be tape recorded and the transcript of that tape recording will constitute the official record of the decision and the reasons given for it.[27] The parties' legal representatives are also under a duty to take a note of the judgment, so that this may form the basis for an agreed note of the judgment, if a

---

[17] *Bozson v Altrincham* [1903] 1 KB 547 (CA).
[18] *Smith v Cowell* (1880) 6 QBD 75 (CA).
[19] Access to Justice (Destination of Appeals) Order 2000, Art 1. See CPR PD52, para 2A.1-4; *Roerig v Valiant Trawlers* [2002] EWCA Civ 21; [2002] 1 WLR 2304, at [42]-[46] (Waller LJ). See also *White v Brunton* [1984] QB 570 (CA), in which the test laid down in *Bozson*, n 17 above, was rejected in this context.
[20] See D Bean, *Injunctions* (8th ed, 2004), para 1.01.
[21] Ibid, ch 2 and 3; CPR, Part 25.
[22] CPR, r 40.6.
[23] CPR, Parts 12 and 13. Under CPR, r 12.1, "default judgment" is defined (for the purposes of the CPR) to mean judgment without trial where a defendant (a) has failed to file an acknowledgment of service, or (b) has failed to file a defence.
[24] CPR, Part 14.
[25] CPR, Part 24 setting out a procedure by which the court may decide a claim or a particular issue without trial (see CPR, r 24.1).
[26] See *Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314; [2005] QB 207; *Three Rivers DC v Bank of England* [2005] EWCA Civ 933.
[27] CPR PD39, para 6.1; CPR 52PD, para 5.12.

transcript is not available.[28] The transcript may be submitted to the judge or members of the court for approval, in particular before it is formally reported.

In the latter case, the reasons for judgment will often be prepared in writing and the written document will take the place of any tape recording through the court's direction[29], although it should be noted that this does not displace the court's duty to hand down the judgment in court.[30] It is increasingly common for courts to make draft written reasons for judgment available to the parties and their legal advisers in advance so as to enable them to consider the reasons and their consequences before the judgment is handed down.[31] In these circumstances, the document is confidential to the parties and the individuals advising them; and any wider disclosure may constitute a contempt of court.[32] Until it is handed down in court, the judgment is not binding on the court or the parties.[33] The practice of circulating drafts in advance seems to have encouraged parties to seek to re-open issues at the subsequent handing down hearing, albeit with modest success.[34]

Particularly if there is a degree of urgency, the court may announce its judgment and state that reasons will be given at a later date.[35] This is more common in criminal and administrative than civil cases, and has been criticised as inappropriate in a heavily fought case where the result is unlikely to be accepted by all parties.[36]

After the judgment has been delivered or handed down, the formal record of judgment must normally be drawn up and perfected by sealing. The CPR provide generally for the record of judgment to be drawn up by the court unless (a) the court orders a party to draw it up, (b) a party, with the court's permission, agrees to draw it up, (c) the court dispenses with the need to draw it up, or (d) it is a consent order drawn up in advance of its approval by the court.[37] In practice, particularly in the High Court[38] and Court of Appeal, the court requires parties to draw up the record of judgment and may ask them to seek to agree the precise wording to reflect the terms of judgment. A party required to draw up the record of judgment must file it no later than 7 days after the date on which he was ordered to do so, so that it can be sealed by the court.[39]

Once drawn up (and, if necessary, approved by the court[40]), the record of judgment will be sealed[41] and served on the relevant parties or their solicitors, either by the person drawing it up or by the court.[42] The court seal will bear the date on which it was affixed to the record of judgment.

---

[28] CPR PD52, para 5.12(2) and 5.14; Halsbury's Laws of England (online), vol 37, para 1077 referring to *Letts v Letts* (1987) The Times, 8 April.
[29] CPR PD39, para 6.1.
[30] *Owusu v Jackson* [2002] EWCA Civ 877, [23]-[28]. See also *Thomas v Johnstone (No 1)* (2006) unreported, 18 February (CA).
[31] See the arrangements in PD40E as wells as those for appeals in PD52, paras 15.12-15.14; also *Prudential Assurance Co Ltd v McBains Cooper* [2000] 1 WLR 2000 (CA) (ruling that, although it was open to the parties to settle the action between notification and delivery of the draft judgment, that did not prevent the judgment from being handed down if the court considered that step to be in the public interest); compare *Liverpool Roman Catholic Archdiocesan Trust v Goldberg* [2001] 1 WLR 2337 (Evans-Lombe J); *Gurney Consulting Engineers v Gleeds Health & Safety Ltd* [2006] EWHC 536 (TCC) (Judge Coulson QC).
[32] See, eg, *CPS v P* [2007] EWHC 1144 (Admin); [2007] 4 All ER 648 (Admin Ct); *Baigent v Random House Group Ltd sub nom The Lawyer* [2006] EWHC 1131 (Ch); (2006) The Times, 24 May (Peter Smith J).
[33] Once a judgment is handed down, however, it does not matter that the only available record is marked as a "draft" (see *Birmingham City Council v Yardley* [2004] EWCA Civ 1756; (2004) The Times, 13 December).
[34] See *Civil Procedure*, n 7 above, para 40.2.1
[35] See, eg, *Sithole v Thor Chemical Holdings Ltd* (1999) The Times, 15 February (CA); *Devani v Nottingham City Council* (EAT/827/01) [2003] All ER (D) 17. See also *Norsk Hydro ASA v State Property Fund of Ukraine* [2002] EWHC 2120 (Comm) in which the judge (Gross J) reserved his judgment but announced that he would notify the parties of it very shortly with reasons to follow and *Re-Source America Ltd v Platt Site Services Ltd* [2005] EWHC 2242 (TCC) in which one of the parties successfully applied for the judge to deliver judgment with reasons to follow.
[36] *Re M (Children)* [2007] EWCA Civ 177.
[37] CPR, r 40.3(1).
[38] In the Queen's Bench Division (excluding the Administrative Court), the presumption is that the parties will draw up the order (CPR, r. 40.3(4)).
[39] CPR, r 40.3(3).
[40] CPR, r 40.3(2)(a).
[41] CPR, r 40.2(2)(b).
[42] CPR, r 40.4.

Special procedures apply to the entry of judgments by default[43], on admission[44] or by consent.[45] In certain circumstances[46], court officers are authorised to enter these (and certain other kinds) of judgment without the need for a court hearing.[47] Nevertheless, such judgments are binding in the normal way and have preclusive effect.[48]

Form and structure

The form and structure of records of judgments must be considered separately from the form and structure of the reasons for judgment.

The CPR provide that every judgment or order (meaning, in this connection, the record of a judgment) must state the name and judicial title of the person who made it, with certain exceptions for situations in which judgments are made by a court officer.[49] In addition, every record of judgment must give the date on which it is given or made and must be sealed by the court.[50] Additional standard requirements apply in terms of content if a party applies for permission to appeal against a judgment at the hearing at which the judgment is made.[51]

Beyond these specific requirements, the form and content of a record of judgment is largely a matter for the individual judge or court to fix based on its determination of the matters in issue between the parties. The precise terms of the record of judgment will often be debated before the court after the judgment is given, and the court may leave the parties to seek to agree outstanding details to reflect the judgment and the reasons given for it.

There is a general (blank) Form of Judgment or Order (Form N24), which is commonly used by courts (particularly County Courts) when drawing up the record of judgments, as well as General Forms of Injunction (Forms N16 and 16(1)). In addition, numerous specific forms of records of judgment are prescribed by the CPR[52], but these may be modified as the circumstances require, provided that all essential information (including, in particular, guidance to the recipient) is included.[53] As noted above, however, many records of judgment (including most in the High Court and Court of Appeal) are drawn up by the parties' legal advisers using their own precedents and word processing systems. According to the almost universally adopted structure, the name of the court (and the individual judge, where relevant) will appear at the top of the record of judgment on the left hand side and the case number at the top on the right hand side. These details will be followed by a list of the parties and their positions (claimant, defendant etc) in the litigation, usually with the name centred in the page and the position on the right. The title of the judgment (e.g. "Order for Service out of the Jurisdiction") will then be given, often coupled with a reference to the relevant provision(s) of the CPR. At this point, recitals may be included to refer to the background to the judgment (e.g. any relevant application) and its factual basis (e.g. any hearing or witness statements submitted). The main part of the record of judgment, setting out the court's judgment, will be prefixed by appropriate introductory words, such as "IT IS ORDERED that" or "IT IS DECLARED that", with capital letters being used to emphasise the nature of the judgment. The terms of the judgment, in numbered paragraphs, will then be followed by the date on which the judgment was given, typically in the form "Dated the [day] day of [month] [year]". Finally, a backsheet identifies (usually on the right hand side only) the court, judge, parties, title of order and the legal advisers to the party drawing up the order.

There are very few guidelines as to the form and content of reasons for judgment. As to form, a practice direction issued in 2001 required that those of the High Court and Court of Appeal be prepared for delivery, or issued

---

[43] CPR, Part 12. See n 23 above.
[44] CPR, Part 14.
[45] CPR, r 40.6.
[46] See CPR, r 12.4(1) (default judgments), 14.4, 14.5, 14.6, 14.7, 14.9 (judgments on admission), 40.6(2) (judgments by consent), 47.11 (default costs certificates), 70.5 (orders to enforce awards as if payable under court order), 71.2 (orders to obtain information from a judgment debtor).
[47] CPR, r 2.5.
[48] See 1.C below.
[49] CPR, r 40.2(1).
[50] CPR, r 40.2(2).
[51] CPR, r 40.2(3).
[52] Including (for example) interim and final possession orders (Forms N26-28A, N31 N134, N136), default and other kinds of judgment for claimant (N30(1)-N30(3), N34), judgments for delivery of goods (N32-N32(4), N33), default, interim and final costs certificates (N255-N257), order for time (PF2), order for service out of the jurisdiction (PF6(B)), summary judgment (PF13-PF15), order for security for costs (PF44), order for case management directions (PF52), order for sale of a ship (ADM14), restricted limitation decree (ADM18), general limitation decree (ADM19), freezing injunctions and search order (CPR 25PD, Annex). For the full list of forms, see CPR 4PD, Tables 1-3.
[53] CPR 4PD, para 1.2.

following approval, with single spacing, paragraph numbering and without page numbering.[54] In appellate and other courts consisting of more than one judge, the paragraph numbering should continue sequentially throughout each judgment.[55] The main purpose of these changes was to facilitate the publication of decisions on the internet, so as to facilitate wider dissemination.[56] A further advantage of this development has been that it allows consistent references to cases to be given irrespective of whether the user has access to a particular series of reports or the original judgment in unreported form. The reasons for judgment given by most courts now also bear a neutral citation, a unique number given to each approved judgment.[57] As with records of judgment, the first page of the reasons for judgment will typically contain (in addition to the neutral reference) the name of the court and judge(s), the case number, the parties and their positions in the litigation and the date of judgment. In addition, the names of the advocates and the party or firm of solicitors instructing them will usually be given. The reasons for judgment will also make clear whether they are approved or unapproved by the court, and whether they are based on a transcript of the tape recorded hearing or a written document standing as the official record *in lieu* of the tape recording (see under *Processes* above). In the former case, the court reporting organisation which prepared the transcript will also be named. As well as paragraph numbering, section headings are increasingly used, and longer judgments now often contain an index at the beginning and, sometimes, appendices at the end.[58]

In terms of content, a current (Scots) member of the House of Lords has noted:[59]

> "In Continental systems, future judges are trained in writing judgments. They are taught how to produce documents whose form and language conform to well-established patterns. Writing such judgments demands great skill but the training is designed to ensure that the resulting products are uniform and impersonal, concealing the traits of the individual author – though insiders may be able to detect particular styles. In contrast, in Britain there are no set rules and the law imposes no specific requirements. For the most part, since all judges are independent, they are free to choose both the form and language of their opinions."

More recently, some guidance has been provided to more junior judges in the form of a short chapter on the delivery of judgments in the Civil Bench Book produced by the Judicial Studies Board.[60] This chapter contains the following guidance:[61]

> "It is not necessary to deal with every argument but the judgment must make plain the principles upon which you acted and the reasons that led you to your decision. …
>
> Every judgment should state the matter that has to be decided and any necessary context. Often this will require the setting out of a chronology. …
>
> A judgment is likely to depend upon findings of fact. In order to reach such findings it is necessary to set out the relevant evidence for either side (together with relevant arguments) and to state what your findings are and why. Moreover, it is always necessary to set out the reasons for preferring one witness over another.
>
> A judgment will also frequently depend upon decisions as to the law. Here it is essential to set out a summary of the arguments on either side (together with relevant quotations and/or legal references) and to set out clearly why one argument is preferred over another.
>
> If a decision depends upon an exercise of discretion it is essential that the reasons for the exercise in any particular way are clearly set out.
>
> Every judge will have a different style and approach although it is a brave judge who will depart from the well-tried and accepted format found in the law reports. However, at the end of the day it is clarity and precision that is likely to be the best guide."

The first point reflects, in summary form, the guidance provided by the Court of Appeal in the leading English case concerning the duty to give reasons imposed by Art 6.1 of the European Convention on Human Rights.[62] In that

---

[54] Practice Direction (Judgments: Form and Citation) [2001] 1 WLR 194, para 1.1. See also para 1.3 (County Court judgments).
[55] Ibid.
[56] Ibid, para 1.2. Many recent judgments of English courts and tribunals are to be found online, with free access, at www.bailii.org.
[57] Ibid, para 2; Practice Direction (Judgments: Neutral Citations) [2001] 1 WLR 346.
[58] For example in shipping cases, the reasons for judgment may include maps.
[59] The Rt Hon Lord Rodger, "The Form and Language of Judicial Opinions" (2002) 118 LQR 226, at 227.
[60] See http://www.jsboard.co.uk/publications/pdfs/5_delivery_of_judgments.pdf.
[61] Ibid, paras 5.2 and 5.5-5.9.

case, the Court of Appeal, having considered the jurisprudence of the European Court of Human Rights on this issue[63], stated:[64]

> "The Strasbourg Court, when considering Article 6, is not concerned with the merits of the decision of the domestic court that is under attack. It is concerned to see that the procedure has been fair. It requires that a judgment contains reasons that are sufficient to demonstrate that the essential issues that have been raised by the parties have been addressed by the domestic court and how those issues have been resolved. It does not seem to us that the Strasbourg jurisprudence goes further and requires a judgment to explain why one contention, or piece of evidence, has been preferred to another. The common law countries have developed a tradition of delivering judgments that detail the evidence and explain the findings in much greater detail than is to be found in the judgments of most civil law jurisdictions. We do not believe that the extent of the reasoning that the Strasbourg Court requires goes any further than that which is required under our domestic law, which we are about to consider. It remains to consider, however, the nature of the judicial decisions for which reasons are required under the Strasbourg jurisprudence.
>
> All of the Strasbourg decisions to which we have so far referred were considering judgments which determined the substantive dispute between the parties. The critical issue in each case was whether the form of the judgment in question was compatible with a fair trial. Where a judicial decision affects the substantive rights of the parties we consider that the Strasbourg jurisprudence requires that the decision should be reasoned. In contrast, there are some judicial decisions where fairness does not demand that the parties should be informed of the reasoning underlying them. Interlocutory decisions in the course of case management provide an obvious example. Furthermore, the Strasbourg Commission has recognised that there are some circumstances in which the reason for the decision will be implicit from the decision itself. In such circumstances Article 6 will not be infringed if the reason for the decision is not expressly spelt out by the judicial tribunal[65]."

The Court then turned to consider the duty to give reasons developed in common law jurisdictions, including England, independently of the Strasbourg jurisprudence. The Court (focussing on the effect which the absence of adequate reasons has on the appeals process) concluded:[66]

> "It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the Judge reached his decision. This does not mean that every factor which weighed with the Judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the Judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the Judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, in may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon.
>
> …
>
> When giving reasons a Judge will often need to refer to a piece of evidence or to a submission which he has accepted or rejected. Provided that the reference is clear, it may be unnecessary to detail, or even summarise, the evidence or submission in question. The essential requirement is that the terms of the judgment should enable the parties and any appellate tribunal readily to analyse the reasoning that was essential to the Judge's decision."

In an attempt to reduce the problems caused by inadequate reasons at the stage of an appeal, the Court proposed:[67]

---

[62] *English v Emery Reimbold & Strick Ltd* and conjoined appeals [2002] EWCA Civ 605; [2002] 1 WLR 2409.
[63] Ibid, at [8]-[11] referring to *Ruiz Torija v Spain* [1994] 19 EHRR 553; *Van de Hurk v The Netherland*s [1994] 18 EHRR 481; *Hiro Balani v Spain* [1994] 19 EHRR 566; *Helle v Finland* [1997] 26 EHRR 159; *Garcia Ruiz v Spain* [1999] 31 EHRR 589.
[64] Ibid, at [12]-[13].
[65] The Court referred to *X v Federal Republic of Germany* [1981] 25 DR 240; *Webb v UK* [1997] 24 EHRR CD 73.
[66] *English v Emery Reimbold & Strick Ltd*, n 62 above, at [19], [21]. The Court also approved (at [17]-[18]) the statement by Griffiths LJ in *Ealil Trust Co Ltd v Pigott-Brown* [1985] 3 All ER 119, at 122, that "there is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what he says shows the parties, and, if need be, the Court of Appeal the basis on which he acted".

> "If an application for permission to appeal on the ground of lack of reasons is made to the trial Judge, the Judge should consider whether his judgment is defective for lack of reasons, adjourning for that purpose should he find this necessary. If he concludes that it is, he should set out to remedy the defect by the provision of additional reasons refusing permission to appeal on the basis that he has adopted that course. If he concludes that he has given adequate reasons, he will no doubt refuse permission to appeal. If an application for permission to appeal on the ground of lack of reasons is made to the appellate court and it appears to the appellate court that the application is well founded, it should consider adjourning the application and remitting the case to the trial Judge with an invitation to provide additional reasons for his decision or, where appropriate, his reasons for a specific finding or findings. Where the appellate court is in doubt as to whether the reasons are adequate, it may be appropriate to direct that the application be adjourned to an oral hearing, on notice to the respondent."

Subject to these requirements, English judges are free to write their reasons for judgment to fit the circumstances of the cases before them. The result is that the content of reasons for judgment in England offer infinite variety, reflecting the judge's personal style and character as well as the nature and complexity of the particular case. Judgments can be short (although perhaps not by the standards of civil law jurisdictions)[68] or long.[69] They are sometimes entertaining[70], sometimes oppressively dull; normally clear and precise, but occasionally bordering on the incomprehensible. Occasionally, judgments become newsworthy for reasons other than their subject matter. In a recent copyright case concerning the best-selling novel, The Da Vinci Code[71], the trial judge attempted to inject some excitement into the proceedings by inserting his own code into his 71-page judgment.[72] Lloyd LJ, delivering his own reasons for judgment on appeal, was left unimpressed, commenting:[73]

> "Not surprisingly after a lengthy trial, his judgment is long, running to some 70 pages. Remarkably, he delivered it less than three weeks after the end of the hearing. As was noted at the time, he was prompted by the extensive use in DVC of codes, and no doubt by his own interest in such things, to incorporate a coded message in his judgment, on which nothing turns. The judgment is not easy to read or to understand. It might have been preferable for him to have allowed himself more time for the preparation, checking and revision of the judgment."

[Examples of judgments, and reasons for judgment, given by the Commercial Court and Court of Appeal at various stages of a single action (*MAN Nutzfahrzeuge AG v Freightliner Limited*) are annexed to this report, numbered as follows:

> Document 1: Order for service out of the jurisdiction of Part 20 (third party) claim by Defendant, 14 May 2003

---

[67] Ibid, at [25]. See also *Fawcett v Phoenix Inns* [2003] EWCA Civ 128. Note: the CPR require that a party wishing to appeal must obtain permission, either from the court giving judgment or from the court to which an appeal will be made. An application to the appeal court for permission will normally be made, in the first instance, in writing.

[68] Many unpublished procedural decisions will be given in no more than a few sentences. For an example of a short published (but unreported) decision, see *Board of Governors of the National Heart and Chest Hospital v Chettle* (1997) unreported, 23 October (CA).

[69] For example, the approved version of the trial judgment of Mance J in *Grupo Torras SA v Al-Sabah* (24 June 1999), a complex fraud action, runs to 255 pages. Over the years, the length of reasons in reported cases has increased greatly, no doubt spurred by advances in technology. For example, the reported reasons of the entire, 3 judge Court of Appeal in *Bozson v Altrincham UDC*, n 17 above, run to a little over 100 words. In a modern judgment, that number would usually be exhausted in the opening paragraph.

[70] No description of the form and content of reasons for judgment in England should pass without mention of Lord Denning, the former Master of the Rolls, and the undoubted master of this art. See B Simpson, "Lord Denning as Jurist" in J L Jowell and J P W B McAuslan, *Lord Denning: the Judge and the Law* (1984), 441; D R Klinck, "This Other Eden: Lord Denning's Pastoral Vision" (1994) 14 OJLS 25, but note the critical comments of Lord Rodger, n 59 above, 244-245. For an introduction to Lord Denning's style, the writer highly recommends his Lordship's judgments in *Jarvis v Swans Tours* [1973] 1 QB 233 and *Miller v Jackson* [1977] 1 QB 966 (both CA).

[71] *Baigent v Random House Group Limited* [2006] EWHC 719 (Ch) (Peter Smith J).

[72] See S Lyall "Puzzle Embedded in 'Da Vinci Code' Ruling", New York Times, 27 April 2006 (available at http://www.nytimes.com/2006/04/27/books/27code.html?ex=1303790400&en=a3a266bf96e131d9&ei=5088&partner=rssnyt&emc=rss); I Evans and S Bird, "Judge joins Da Vinci Fun with a code of his own", The Times, 27 April 2006 (available at http://www.timesonline.co.uk/article/0,,200-2153798,00.html); B Hoyle, "A nudge from the Da Vinci judge to help you crack his code", The Times, 28 April 2006 (available at http://www.timesonline.co.uk/article/0,,200-2155362,00.html).

[73] *Baigent v Random House Group Limited* [2007] EWCA Civ 247, at [3]. See also Mummery LJ, at [121].

Document 2: Order for directions made at case management conference, 13 July 2003

Document 3: Order for directions made at case management conference, 23 July 2004

Document 4: Order for service on partners of firm, 22 October 2004

Document 5: Order for directions made at case management conference, 21-22 October 2004

Document 6: Reasons for judgment (Gloster J, Commercial Court, Queen's Bench Division) in relation to item 1(1) of order at Document 5

Document 7: Order for pre-trial review, 3 December 2004

Document 8: Judgment (trial on liability issues) (Moore Bick LJ, Commercial Court), 28 October 2005

Document 9: Reasons for judgment at trial (see Document 8 above)

Document 10: Minute of order (payment on account of damages, permission to appeal, costs and quantum), 8 December 2005

Document 11: Order for directions made at case management conference (quantification of damages), 9 March 2006

Document 12: Order (timetable – quantification of damages, 12 February 2007

Document 13: Order by consent staying further proceedings between Claimant and Defendant following settlement (a so-called "Tomlin Order" attaching the settlement agreement in a confidential schedule)

Document 14: Appeal judgment (third party claim), 12 September 2007

Document 15: Reasons for judgment on appeal (see Document 14 above)

Relevant extracts from the CPR, and associated Practice Directions, and key standard forms are also annexed (see Documents 16 and 17).

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?

Summary:

While the term “judgment” encompasses both the decision of the Court and the reasons given for that decision, the right of appeal lies against only the decision and as such a party may not challenge a finding a fact of law or in the reasons for the decision without challenging the decision itself.

Full Response:

As noted (see 1.A above), English lawyers use the term "judgment" to describe both the decision of a court and the reasons given for that decision (the "reasons for judgment", as defined above). It is, however, the decision which is binding[74], and against which any appeal will lie. Thus, if a successful party does not wish to (or is unable to) contest the court's decision as reflected in the judgment, it is not open to that party to challenge a finding of fact or law in the reasons for judgment simply because it is not one he or she does not like.[75] If the court wishes to enable a successful party to appeal against a particular finding, it may make a declaration embodying that finding of fact or law.[76]

[74] As a result, where a decision has been given but publication of reasons is postponed (see 1.A above) the death of a member of the court between formal announcement of the decision and publication of those reasons does not invalidate the decision (see *R v Terry* [2004] EWCA Crim 2253; [2004] 1 WLR 3043 (CA), a criminal case).
[75] *Compagnie Noga D'Importation Et D'Exportations SA v Australia and New Zealand Banking* Group Ltd [2002] EWCA Civ 1142; [2003] 1 WLR 307 (CA), at [27] (Waller LJ), [51] (Tuckey LJ), [53] (Hale LJ) (CA). See also *Lake v Lake* [1955] P 336, at 343 (Evershed MR, CA).
[76] *Compagnie Noga D'Importation Et D'Exportations SA v Australia and New Zealand Banking Group Ltd*, above, at [28] (Waller LJ).

Nevertheless, it will very often be necessary to refer to the reasons for judgment (as well, for example, as the parties' statements of case) in order to ascertain what claims and issues were determined by the judgment.[77]

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.

Summary:

A judgment takes effect from the day it was given by the Court, unless the Court provides that it should take effect from some later date. The House of Lords has greater scope as to the point in time from which its judgments should take effect from including being able to direct that its judgments take effect from an earlier date. A special rule applies as regards judgments given against States in default of their appearance; in which case judgments do not take effect until 2 months after service on the State of the judgment and evidence in support of an application for permission to enter judgment. The operation and effect of a judgment is not suspended by the possibility of or an actual appeal.

The most common ways a judgment may be reversed are by an appeal or by an application to set aside a judgment for fraud or exceptionally by a Court amending a judgment which it has handed down but which has yet to be perfected by sealing or in the Court of Appal by the need to recall a decision in order to remedy "real injustice" or where the House of Lords has rendered an order which causes injustice to a party through no fault of thereon, thereby subjecting them to an unfair procedure.

Full Response:

Under the CPR, a judgment normally takes effect from the day when it is given or made in court[78], or such later[79] date as the court may specify, irrespective of the date on which the record of judgment is drawn up or sealed.[80] That is also the normal position for judgments of the House of Lords, although (a) it appears that the House may direct that its judgment will take effect at an earlier date, (b) if the decision of the House of Lords is to the effect that a judgment of a lower court should be affirmed, that judgment will remain operative from the date on which it was given, and (c) if the decision of the House of Lords is to the effect that a judgment of a lower court, formerly reversed by the Court of Appeal, should be restored, the lower court judgment will be treated as effective from the date on which it was originally given.[81]

The only invariable exception to this rule concerns judgments given in default of appearance against a State[82], which judgments do not take effect until 2 months after service on the State of (a) a copy of the judgment, and (b) a copy of the evidence in support of the applications for permission to enter judgment.[83]

A judgment remains binding unless and until it is reversed.[84] Normally, reversal of a judgment will follow a successful appeal; the fact, or future possibility, of a pending appeal does not suspend the operation of a judgment.[85] In addition a judgment may be reversed in the following circumstances:

1. A fresh action may be brought to set aside a judgment for fraud.[86]

---

[77] See further II.A.3 and II.B.3 below.
[78] Not, for example, when a draft written judgment is delivered to the parties.
[79] Under the former Rules of the Supreme Court (RSC), the court could direct that an order should be dated "as of some earlier or later day" (RSC Ord 42, r 3(2)), but the CPR appear only to permit the effect of a judgment to be postponed.
[80] CPR, r 40.7(1). See also *Holtby v Hodgson* (1889) 24 QBD 103 (CA).
[81] See *Nitrate Producers SS v Short Bros Ltd* [1922] 2 Ll L Rep 1 (HL).
[82] As defined in State Immunity Act 1978, s 14(1).
[83] CPR, r 40.10(1). See also State Immunity Act 1978, s 12(5).
[84] Even if a judgment is reversed on appeal, acts done pursuant to the judgment in the meantime are lawful (*Hillgate House Ltd v Expert Clothing Service and Sales Ltd* [1987] 1 EGLR 65 (Browne-Wilkinson VC)).
[85] Under CPR, r 52.7, unless (a) the appeal court or the lower court orders otherwise, or (b) the appeal is from the Immigration Appeal Tribunal, an appeal shall not operate as a stay of any order or decision of the lower court. Generally, the English courts will not lightly deprive a successful litigant of the fruits of his victory, and the burden lies on the appellant to show a risk of injustice if a stay is not granted.
[86] For a recent example, see *Kuwait Airways Corporation v Iraqi Airways Co* [2001] 1 WLR 429 (HL); [2003] EWHC 31 (Comm); [2005] EWHC 2524 (Comm) (both David Steel J). See further II.A.5 below.

2. 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, but that power will not be exercised unless a strong reason is shown.[87] Once, however, the judgment, order or other document embodying the decision has been sealed, the first instance court is *functus officio* and no longer has power to recall its decision at the instance of a party[88], although there remains a limited power to correct accidental slips or omissions in the judgment or order itself.[89]

3. The Court of Appeal[90], and possibly the High Court when sitting as an appeal court[91], has power in "exceptional circumstances" to recall its decision following a second appeal, in order to remedy "real injustice" which would otherwise be suffered. In *Matlaszek v Bloom Camillin*, Brooke LJ noted that 200 applications had been made to the Court of Appeal seeking the exercise of this power in a period of only one year, and all had been unsuccessful. He commented: [92]

> "This appears to suggest a widespread misunderstanding by litigants of the quite exceptional nature of the residual jurisdiction identified by this court in *Taylor v Lawrence*. The fact that the jurisdiction has been identified for the purposes of avoiding significant injustice in extraordinary circumstances must not be shown as giving any form of green light to the kind of applications that we have received today, unless those making it are completely satisfied that it does indeed fall within this particular rubric."

   Further, where there is an alternative means of recourse, for example a claim to set aside the judgment for fraud (see 1 above), the power of an appellate court to re-open its decision should not be exercised, except perhaps in the clearest of cases.[93] For a successful application to reopen an appeal on the grounds of fresh evidence, it must at the very least be shown that there is a powerful probability that an incorrect result was arrived at in the earlier proceedings.[94]

4. Equally, the House of Lords (as the ultimate court of appeal) has power to correct any injustice caused by its own order, but it will not do so save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House of Lords in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong.[95]

5. The CPR provide separately for applications to set aside or vary default judgments.[96] Such applications are made to the same level of court as that which granted the judgment.

6. Under the CPR, a person who is not a party but who is directly affected by a judgment or order may apply to have the judgment set aside or varied.[97] This rule is, however, substantially more limited than might at first appear. Although the circumstances in which this rule may be invoked are "far too numerous and varied to be easily succinctly and accurately stated"[98], examples include (a) a party with a claim to possession of land subject to an order of possession in proceedings between different persons, and (b) a non-party affected by an

---

[87] *Robinson v Fernsby* [2003] EWCA Civ 1820. The power is often referred to as the "Barrell jurisdiction" after *Re Barrell Enterprises* [1973] 1 WLR 19 (CA). For detailed discussion of the many cases addressing the limits of this power, see Brooke and others (ed), *Civil Procedure* (2007), para 40.2.1.
[88] *Earl of Malmesbury v Strutt & Parker* [2007] EWHC 2199 (QB).
[89] CPR, r 40.12 and Practice Direction 40B, para 4.
[90] *Taylor v Lawrence* [2002] EWCA Civ 90; [2003] QB 528.
[91] *Seray-Wurie v Hackney LBC* [2002] EWCA Civ 909.
[92] [2003] EWHC Civ 154, at [30].
[93] *Jaffray v Society of Lloyd's* [2007] EWCA Civ 586; *First Discount Ltd v Guinness* [2007] EWCA Civ 378.
[94] *Re U (A Child)* [2005] EWCA Civ 52; [2005] 1 WLR 2398.
[95] *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119, at 132 (Lord Browne-Wilkinson). In that case, a decision of the House of Lords which denied state immunity to ex-President Pinochet of Chile was set aside on the ground that one of the panel had not disclosed a connection with one of the intervening parties. The application was reheard by a different panel, with the same result (see [2000] 1 AC 147).
[96] CPR, Part 13. For an unusual case in which a claimant sought to set aside a default judgment which it had entered, in order to secure a (summary) judgment which would be enforceable in India, see *Messier Griesheim GmbH v Goyal MG Gases Pvt Ltd* [2006] EWHC 79 (Comm); (2006) The Times, 14 February.
[97] CPR, r 40.9.
[98] *Civil Procedure*, n 7 above, para 40.9.1.

injunction.[99] The rule is most likely to be deployed by a non-party seeking to set aside a default judgment, but notice of the non-party's application must first be given to the defaulting defendant.[100]

7. Certain other provisions of the CPR provide for judgments to be set aside otherwise than following a successful appeal.[101]

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.

Summary:

In principle any judgment may generate preclusive effects between the parties provided four conditions are met. First, the judgment must be a judicial decision, i.e. an adjudication on particular matters, and not simply an administrative decision or a disposal by act or agreement of the parties without any determination by a court. Second, the decision must have been made by a person competent to render the judgment. Third, the judgment must be final i.e. the issue has been conclusively determined such that the decision cannot be reopened by the Court. Finally, the judgment must be "on the merits", that is based upon finding of facts and the application (explicitly or otherwise) of principles of law to those facts, and not simply a result of a technical objection or want of prosecution. Default and consent judgments may be "final" and "on the merits" for these purposes.

Full Response:

Some of the more important classifications of judgments in English law and practice have been considered above (see I.A). Thus, judgments may be classified:

1. According to whether they (a) adjudicate on the status of a particular subject matter so as to bind even strangers to the action (judgment *in rem*), or (b) adjudicate on the rights and obligations existing between the parties to the action (judgment *in personam*).
2. According to whether they are "final" or "interlocutory".
3. According to the nature of the remedy or other provision which they impose.
4. According to the circumstances in which they were given, whether at trial, by default, admission, consent, following an application for summary judgment or otherwise.

As appears from the commentary in Part II below, the precise effects of a judgment will vary according to the nature and content of the judgment, and the reasons underlying it. In principle, however, any judgment may generate preclusive effects between the parties, their privies and other persons provided that the following criteria are satisfied:

(a) *Judicial decision:* There must be a truly judicial decision, ie an adjudication on particular matters, as opposed (for example) to an administrative decision such as a planning application[102] or the announcement of findings of a judicial investigation.[103] There will be no relevant decision for these purposes if the action has ended by discontinuance[104] or agreement[105] or on payment of money[106], although the position will be different if the court

---

[99] The standard form of freezing injunction (annexed to CPR PD25) provides (para 13) that: "Anyone served with or notified of this order may apply to the court at any time to vary or discharge this order (or so much of it as affects that person …"

[100] See Civil Procedure, n 7 above, para 40.9.5.

[101] See Civil Procedure, ibid, paras 40.9.2 and 40.9.3.

[102] See *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 AC 273 (HL).

[103] *The European Gateway* [1987] QB 206 (Steyn J). It is doubtful whether applications for judicial review, given their public character, are capable of having preclusive effects between the real applicant and respondent (see *Phipson on Evidence*, n 16 above, p 1349).

[104] Under CPR, rr 38.2-38.3, a claimant may discontinue all or part of a claim at any time by filing a notice of discontinuance, normally without the need for consent of the other parties or of the court. Under CPR, r 38.7, a claimant who discontinues a claim needs the permission of the court to make another claim against the same defendant if (a) he discontinued the claim after the defendant filed a defence, and (b) the other claim arises out of facts which are the same or substantially the same as those relating to the discontinued claim.

[105] *The Kronprinz* (1887) 12 App Cas 256 (HL).

[106] *Kelly v Hammond Co* (1886) 2 TLR 804 (QBD).

or tribunal has formally dismissed a claim following its withdrawal as opposed to allowing the claimant to discontinue.[107] The decision maker, however, need not be a "court of record". Indeed, he (or it) need not be described as a "court" or "tribunal"[108]; all that is required is that the act is of a judicial character.[109]

(b) *Competent decision maker:* Normally, the decision maker must have been competent to give judgment on the particular matter.[110] That proposition, which has been described as "elementary"[111] must, however, be qualified in at least three ways. First, the acts of a person who acts as a judge in the belief that his appointment is valid, whereas in fact it is not, must be upheld in the interests of the administration of justice.[112] In these circumstances:[113]

> "No doubt the general reputation of the law and the public's confidence in it must be protected as surely as the interests of individual parties who have proceeded on the assumption that a judgment in their case is perfectly valid, where that is exactly how it seems to all the world. Public confidence as well as individual parties are … protected by the requirement that there be a court of competent jurisdiction convened to hear the case, that the judicial officer be not a usurper and that he have a colourable title to sit where he does sit."

Secondly, many courts and tribunals are competent to determine questions of fact or law relating to their own competence, and a determination of those matters may have binding and preclusive effect even if it thereby extends the jurisdiction of the court or tribunal[114] or if the court or tribunal declines jurisdiction as a result of its determination.[115] Thirdly, a court ought not to disregard a previous order in the same proceedings which has not been appealed even if it considers that the order was made without jurisdiction.[116]

(c) *Finality:* The judgment must be "final", in the sense that a particular claim or matter has been raised and conclusively determined by the court[117] and that determination "cannot be varied, reopened or set aside by a court that delivered it or any other court of co-ordinate jurisdiction although it may be subject to appeal to a court of higher jurisdiction".[118] It is not, however, necessary that the decision should bring an end to the litigation; other judgments which finally determine a question during the course of proceedings may equally have preclusive effects, even though they may for certain purposes be described as "interlocutory".[119] If,

---

[107] *Barber v Staffordshire CC* [1996] 2 All ER 748 (CA). Compare *Ako v Rothschild Asset Management Ltd* [2002] EWCA Civ 236; [2002] 2 All ER 693 (CA), a decision followed by a change in the rules of the Employment Tribunals so as to allow discontinuance (see *Cockayne v British Association of Shooting and Conservation* [2007] All ER (D) 290 (Oct), in which the Employment Appeals Tribunal cited the rule change as justifying its decision not to follow *Ako*).

[108] In *Thrasyvoulou*, n 102 above, preclusive effect was given to the decisions of a planning inspector on a planning appeal.

[109] See K R Handley, *Spencer Bower, Turner & Handley on the Doctrine of Res Judicata* (3rd ed, 1996), paras 20-63; Halsbury's Laws of England (online), vol 16(2), paras 987-989. For certain purposes, the binding character of decisions also extends, under English law, to the decisions of domestic tribunals and arbitrators (see Halsbury's Laws of England, ibid, paras 990-991) as well as the decision of foreign courts and tribunals (see ibid, para 992 and Part IV below).

[110] Ibid, ch 4.

[111] *A-G for Trinidad & Tobago v. Eriché* [1893] AC 518, at 522-523 (PC).

[112] *Baldock v Webster* [2004] EWCA Civ 1869; [2006] QB 315.

[113] Ibid, at [15] (Laws LJ).

[114] *Watt v Ahsan* [2007] UKHL 51, at [32].

[115] *The Sennar (No 2)* [1985] 1 WLR 490 (HL), a foreign judgment case.

[116] *Cohen v Jonesco* [1928] 2 KB 1 (CA).

[117] *Eastwood & Holt v Struder* (1926) 31 Com Cas 251, at 256-257 (Roche J).

[118] *The Sennar (No 2)*, n 115 above, at 494 (Lord Diplock). See also *Spencer-Bower, Turner & Handley*, n 109 above, ch 5.

[119] See also *Stephenson v Garnett* [1898] 1 QB 677 (CA) in which a decision intended by the judge to be final, although not having that effect at law, was given effect by staying a later inconsistent action on the ground that it was "frivolous and vexatious".

however, a decision is subject to confirmation by the court[120] or may be revisited by the court on fresh evidence[121], it is not "final" for these purposes.

A default judgment is, however, treated as a final judgment unless and until it is set aside.[122] Here, "the question is not whether there can be an estoppel [*per rem judicatam*] but rather what the judgment prayed in aid should be treated as concluding and for what conclusion it is to stand".[123]

(d) *On the merits:* The judgment must be "on the merits", and not based (for example) on a technical objection[124], procedural default or want of prosecution.[125] "A decision on the merits is a decision which establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned."[126] In this sense, a decision on a procedural matter may be as much "on the merits" as a decision at trial. Further, the mere fact that a decision is not the subject of full or any argument does not prevent the resulting decision from being a decision "on the merits".[127] Default judgments[128], judgments on admission[129] or following a concession[130] and consent judgments[131] all satisfy this test.

[120] For example, an interim third party debt order (CPR, r. 72.4) or, in divorce proceedings, a *decree nisi*. In *Special Effects Ltd v L'Oreal SA* [2007] EWCA Civ 1; [2007] RPC 15, the Court of Appeal held that the co-existence of provisions for opposition to a trade-mark and a declaration of invalidity meant that opposition proceedings were not "final" for these purposes.

[121] For example, an interim injunction, case management directions or a decision to grant or refuse permission to appeal (see *Buttes Gas & Oil Co v Hammer* [1982] AC 888 (HL)). The limited power of appellate courts to re-open appeals (see I.A) above does not, however, prevent their decisions from being treated as "final" unless and until set aside.

[122] *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993 (PC).

[123] Ibid, at 1010. See further II.B.3 below.

[124] eg that the claim is premature, or the claimant suffering from an incapacity (see *Phipson on Evidence*, n 16 above, para 44-06).

[125] See also *Spencer-Bower, Turner & Handley*, n 109 above, ch 6.

[126] *The Sennar (No 2)*, n 115 above, at 499 (Lord Brandon).

[127] *SCF Finance Co Ltd v Masri (No 3)* [1987] QB 1028 (CA); *Barber v Staffordshire CC*, n 107 above.

[128] *Kok Hoong v Leong Cheong Kweng Mines Ltd*, n 122 above.

[129] *Boileau v Rutlin* (1848) 2 Exch 665, at 681.

[130] *Khan v Golecha International Ltd* [1980] 1 WLR 1482 (CA).

[131] *Re South American and Mexican Co, ex p Bank of England* [1895] 1 Ch 37 (CA).

II. Preclusive effects

This part of the questionnaire 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, this section is concerned with so-called rules of "res judicata" or their equivalent. References to "Claimant" are to the person seeking a remedy from the court, and references to "Defendant" are to the person against whom a remedy is sought.[132] The terminology used in this intended for guidance only and is not intended to exclude or restrict discussion of the legal concepts and terms which are relevant to your legal system. This section 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 Project. For the purpose of drafting the questionnaire, a distinction has been drawn between "claim preclusive effects" (see Part II.A) and "issue preclusive effects" (see Part II.B). These are intended to be descriptive categories, the former (which might also be described as "same claim preclusion") embracing rules of preclusion affecting the raising of claims which a legal system considers to have been determined in earlier proceedings and the latter embracing rules of preclusion affecting attempts to re-open issues of law or fact which a legal system regards as having already been determined in earlier proceedings. A third category of "wider preclusive effects" has been used (see Part II.C) to accommodate rules of preclusion which are considered to fall into neither of these categories. Those co-ordinating the Project recognise, however, that different legal systems will approach the categorisation differently depending on how they define the concepts of "claim" and "issue", and that terminology will vary (e.g. in England, reference is made to "cause of action estoppel", "issue estoppel" and to various other rules, including "abuse of process"). Rapporteurs are thus encouraged to be flexible and to fit their description of the law and practice of their legal system into the framework established below as they think most appropriate.

A. Claim preclusion

1. Existence and nature of claim preclusive effects

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

Summary:

English judgments may have claim preclusive effects in four different ways. First, a judgment may make lawful an action which would otherwise be unlawful; second, judgments *in rem* may by altering the status of a person or thing provide or preclude an answer to a claim. Third, a judgment creates a new cause of action which is substituted for the original cause of action by the doctrine of "merger" and fourth, by debarring a party from subsequently challenging the judgment through the doctrine of "cause of action estoppel".

Full Response:

"Claim preclusive effects" are here understood to refer to rules of preclusion affecting the raising of claims which a legal system considers to have been determined by a judgment in earlier proceedings.

Under English law, judgments may have claim preclusive effects in four different ways. First, by making lawful that which would otherwise be unlawful, for example the re-taking of possession of property[133], thereby providing an answer to an otherwise valid claim. Secondly, in the case of judgments *in rem*, by altering the status of a thing or

[132] Thus, for example, a person named as Defendant in legal proceedings who advances a counterclaim should be treated as "Defendant" for the purposes of the main claim against him (including, for example, any true defence of set-off) and "Claimant" for the purposes of the counterclaim.

[133] *Hillgate House Ltd v Expert Clothing Service and Sales Ltd*, n 84 above; *Brent LBC v Botu [*2001] 33 HLR 151 (CA).

person in such a way as to preclude or provide an answer to a claim.[134] Thirdly, by creating a new cause of action (often, but not always, a fresh obligation in the form of a judgment debt) which is substituted for the cause of action sued upon through operation of the so-called doctrine of "merger" or "former recovery". Fourthly, by debarring an unsuccessful claimant or defendant, and certain other persons, from challenging the correctness of a decision to accept or reject a claim at a later date, through a "cause of action estoppel"[135], a manifestation of the principle of estoppel by record, or similar bar. Of these, the last two are of particular significance for present purposes, and are considered in detail below. The first two effects are plainly substantive effects, which depend on the terms of the judgment and reflect the principle of effectiveness of judgments. They are not considered further in this Part.

The third effect is also best described as a substantive rule. The doctrine of merger cannot be described as a species of estoppel because, in the words of Lord Goff, "[t]he basis of the principle is that the cause of action, having become merged in the judgment, ceases to exist, as is expressed in the Latin maxim *transit in rem judicatam*".[136] The fourth effect (cause of action estoppel and, more generally, estoppel by record) is, at least for the purposes of domestic classification[137], probably[138] not substantive but operates by way of an evidential or procedural bar, preventing contradiction of the earlier decision.[139]

Both the doctrine of merger and estoppel by record in all its forms, including cause of action estoppel, normally co-exist with the binding character of a judgment. If the judgment is set aside, on appeal[140] or otherwise, the merged cause of action will be revived retroactively and the parties may re-assert or, as the case may be, deny the claims adjudicated at a re-trial or (unless this would constitute an abuse of process[141]) in later proceedings.

In general, a judgment relates back to the earliest moment of the day on which it is entered, but this rule is subject to exceptions, in particular if the precise time of judgment is made relevant by statute or if injustice would be caused by the principle.[142]]

2. Policies underlying claim preclusive effects

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

Summary:

Two policy considerations underlie claim preclusion: that the public interest lies in the end to litigation, that no party should be troubled twice by the same cause of action. Art 6 ECHR has also been influential recently both in supporting and in opposing claim preclusive effects.

---

[134] See *Phipson on Evidence*, n 16 above, paras 44-10 to 44-14.

[135] In *Specialist Group International Ltd v Deakin* [2001] EWCA Civ 777 (CA), Aldous LJ suggested (at [10]) that the term "cause of action estoppel" (and its counterpart, "issue estoppel") would not be recognised by educated members of the public as being an indication of the principles that there must be finality in litigation and a litigant should not be twice vexed on the same matter. He preferred the terms "cause of action finality" and "issue finality". With respect, these terms seem equally unenlightening, if not more so as they sever the link with the established usage of the estoppel terminology. Fortunately, perhaps, the new terms have not yet caught on.

[136] *Republic of India v India Steamship Co, The Indian Grace* [1993] AC 410 (HL), at 417 referring to *King v Hoare* (1844) 13 M & W 494, at 504 (Parke B); *Kendall v Hamilton* (1879) 4 App Cas. 504 (HL, at 526 (Lord Penzance) and 542 (Lord Blackburn). *The Indian Grace* concerned a foreign judgment, to which the doctrine of merger does not apply.

[137] For classification of cause of action estoppel for private international law purposes, see *Vervaeke v Smith* [1983] 1 AC 146, at 162 (Lord Simon, HL); Sir L Collins and others (ed), *Dicey, Morris & Collins on the Conflict of Laws* (14th ed, 2006), para 7-031.

[138] There is conflicting authority on this point – see *Phipson on Evidence*, n 16 above, para 44-15 noting that "[n]o practical consequences appear to follow from this problem or characterisation". See also the view expressed by Lord Millett in *Johnson v Gore-Wood* [2002] 2 AC 1 in the passage quoted at text to n 305 below.

[139] *The Indian Grace*, n 136 above, at 422-423 (Lord Goff).

[140] If the appeal court substitutes its own judgment, that judgment may itself have preclusive effects, replacing those of the original judgment (see *P&O Nedlloyd BV v Arab Metals Co (No 2)* [2006] EWCA Civ 1717; [2007] 1 WLR 2288, at [29] (Moore-Bick LJ, CA)).

[141] See II.C.1 below.

[142] Halsbury's Laws of England (online), vol 37, para 1224.

Full Response:

Both the doctrine of merger and cause of action estoppel are commonly justified by reference to the same two principles – that the public interest lies in the end to litigation (*interest reipublicae ut sit finis litium*) and that nobody should be troubled twice by one and the same cause (*nemo debet bis vexari pro una et eadem causa*).[143] Further, in *Wiltshire v Powell*, Arden LJ noted:[144]

> "*Res judicata* promotes the important public policy of finality in legal proceedings and thus legal certainty. In addition, a party has a right under article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as scheduled to the Human Rights Act 1998, to the proper enforcement of any judgment that he obtains: see *Hornsby v Greece* (1997) 24 EHRR 250."

Art 6 of the ECHR is also capable of being deployed to oppose the conclusive effect of a judgment. In an earlier decision, Aldous LJ had observed that: [145]

> "[I]t is important to bear in mind that the application of those principles involves the denial of the right of access to the courts conferred by common law and is a right protected by the European Convention for the Protection of Human Rights. Thus such principles should only be applied where the circumstances are such that their application is necessary to prevent misuse of the court's procedure amounting to an abuse of process. "

3. Conditions for claim preclusive effects

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

Summary:

There must be a (1) final decision (2) of a court (3) of competent jurisdiction (4) which determines a claim on the merits. (cf I.D). Moreover in the case of both merger and cause of action estoppel the "same cause of action" must be being attempted to again be re-litigated between the parties.

The doctrine of merger operates to extinguish all rights of the successful Claimant arising from the earlier cause of action, and instead merges these rights into the rights conferred by the judgment, to create an obligation of a higher nature. To determine whether a second action involves the "same cause of action" as the first, the Court inquires whether the same set of facts which entitled the claimant to an action in the first action underlie the second action. This can lead to similar cases being treated very differently. Merger will not apply where (1) the party had no opportunity in the first action of obtaining the relief sought in the second action or (2) the question in the second action could not have been decided in the former suit or (3) if in fact it was decided it was unnecessary to the decision. Merger affects any person entitled to bring a claim to enforce the cause of action which is superseded by the judgment.

Cause of action estoppel arises where the "same cause of action" is attempted to be relitigated after it has already been determined by a prior action involving the "same parties" and the "same subject matter". The estoppel operates to preclude litigation both of matters which were and matters which could have been raised in the first proceedings to establish or refuse the cause of action relied upon.

Full Response:

The basic conditions for invoking the claim preclusive effects of a judgment, whether by way or merger or cause of action estoppel have already been identified at I.D above. In summary, there must be a final[146] decision of a court or tribunal[147] of competent jurisdiction[148] which determines a particular claim on the merits.[149] In addition, although

---

[143] *Fraser v HLMAD Ltd* [2006] EWCA Civ 738; [2007] 1 All ER 383, at [35] (Moore-Bick LJ, CA).
[144] [2004] EWCA Civ 534; [2005] QB 116, at [36] (CA). See also the view expressed by Lord Millett in *Johnson v Gore-Wood* (n 138 above) in the passage quoted at text to n 305 below.
[145] *Specialist Group International v Deakin*, n 135 above, at [10]. The confusion by Aldous LJ of estoppel by record with the separate principle of abuse of process (see II.C below) seems unhelpful. The two streams of authority are closely related, but must be kept separate (*Johnson v Gore Wood* [2002] 2 AC 1, at 31 (Lord Bingham, HL)).
[146] See text to nn 102-109 above.
[147] See text to nn 110-116 above.
[148] See text to nn 117-121 above.
[149] See text to nn 122-131 above.

merger and cause of action estoppel must be considered separately, both apply in circumstances where the *same* cause of action as that determined by the judgment is raised subsequently in proceedings between the parties to the judgment or certain connected persons.

A judgment entered by default, consent or admission may also have claim preclusive effects unless and until it is set aside[150], provided that the party against whom it is relied on was not acting under a disability at the time judgment was entered.[151]

The doctrine of merger

Where a suit is brought upon a particular cause of action, judgment in favour of the claimant extinguishes all rights arising from that cause of action.[152] The cause of action is "merged" in the judgment, which creates an obligation of a higher nature.[153] Even if the original judgment remains unsatisfied, therefore, the claimant cannot bring new proceedings based on that cause of action, even if the relief claimed in those proceedings is different from that sought in the proceedings which led to judgment.

"One of the most difficult tasks in applying the doctrine of merger is to determine whether the second action involves the same cause of action as the first. It appears that a less technical approach to this issue has gained ground."[154] For these purposes, and as a starting point for analysis, a "cause of action" should be seen as being no more than the set of facts which entitles the claimant to seek a particular remedy against the defendant.[155] The remedy itself, and the legal basis for it, thus provide no part of the "cause of action" for these purposes. Significantly, however, the doctrine of merger does not apply "if the parties had no opportunity of obtaining in the former suit the relief sought in the latter nor if the question raised in the second suit was not, and could not properly have been decided in the former suit, nor if, though in fact raised and decided, it was unnecessary to the decision".[156]

This concept of "cause of action", when combined with principles of substantive law governing the availability of remedies, can give rise to differences in treatment which can be difficult to defend. Thus, a party who claims in the tort of negligence and obtains a judgment for damages for personal injury (or damage to an item or property) arising from a particular incident will not be permitted to bring a further action to recover additional damages of the same kind arising out of that incident, even if his injury or loss is exacerbated after judgment – damages must be assessed once and for all.[157] In contrast, it has been held (for example) that a negligence claim for property damage involves a different cause of action from a claim for damages for personal injury, so that recovery of judgment with respect to the former kind of injury does not, of itself[158], preclude a subsequent claim for damages for the latter kind of injury[159], although doubts have been expressed as to the correctness of this line of authority.[160]

A different conclusion is reached, however, if the claimant claims instead or additionally in contract, for which proof of loss is not an essential element of the cause of action.[161] Here, the critical question is whether the factual

---

[150] *Kinch v Walcott* [1929] AC 482 (PC).
[151] *Great North-West Central Rly Co v Charlebois* [1899] AC 114 (PC) (company); *Arabian v Tuffnall and Taylor Ltd* [1944] KB 685 (Wrottesley J) (minor). Where a minor is a party to an action, the court must approve any settlement or compromise (see CPR, r 21.10) and, where it does so, a judgment entered by consent will be binding. See also text to nn 202-206 below.
[152] *Phipson on Evidence*, n 16 above, para 44-17.
[153] Halsbury's Laws of England (online), vol 16(2), para 993. It is suggested that, from the viewpoint of private international law, the rule has overriding (mandatory) effect and applies irrespective of the law applicable to the underlying claim. There appears to be no English case directly in point.
[154] *Phipson on Evidence*, n 16 above, para 44-17.
[155] *Letang v Cooper* [1965] 1 QB 232, at 243 (Diplock LJ, CA); *The Indian Grace*, n 136 above, at 419 (Lord Goff, HL).
[156] *Phipson on Evidence*, n 16 above, para 44-20 and the cases there cited.
[157] *Brunsden v Humphrey* (1884) 14 QBD 141, at 147 (Bowen LJ, CA); *Conquer v Boot* [1928] 2 KB 336, at 340 (Sankey LJ, CA); *Buckland v Palmer* [1984] 1 WLR 1109, at 1116 (Griffiths LJ, CA). See also *Fraser v HLMAD Ltd* [2006] EWCA Civ 736; [2007] 1 All ER 383 (CA) (wrongful dismissal claim brought in tribunal with statutory cap on compensation barred later High Court action to recover further damages).
[158] The failure to bring both claims together may, however, be considered as an abuse of process, having wider claim preclusive effects (see *Talbot v Berkshire CC* [1994] QB 290 (CA), and II.C.1 below).
[159] *Brunsden v Humphrey*, n 157 above.
[160] *Buckland v Palmer* [1984] 1 WLR 1109, at 1116 (Griffiths LJ); *Talbot v Berkshire CC*, n 158 above, at 296 (Stuart-Smith LJ), 301 (Mann LJ). See also *Cahoon v Franks* (1968) 63 DLR (2d) 274, a decision of the Supreme Court of Canada, albeit dealing with a different issue.
[161] See *The Indian Grace*, n 136 above.

basis relied on as constituting the relevant breach of contract is the same[162], and that may be the case even if the claimant bases his claim on different contractual terms[163], although the causes of action will be different if two separate contracts are relied on.[164] Curiously, a claim in debt, to recover a liquidated sum due under a contract, is however treated as a different cause of action from a claim for damages for breach of the conduct, even if they arise from the same failure by the defendant to perform.[165]

In outline, a claimant who wishes to escape the doctrine of merger must seek to establish:[166]

1. that there were, in fact, two separate acts or omissions resulting in two separate wrongs;
2. that a single act or omission violates two separate interests protected by the law;[167]
3. that there exists a wrong which continued after the relevant cut-off date for the purposes of the earlier proceedings;[168]
4. that a single act or omission, not actionable without proof of damage, causes separate damage on two separate occasions.

The doctrine of merger, by its very nature, affects any person entitled to bring a claim to enforce the cause of action which is superseded by the judgment, who may be a different person from the original claimant. For example, in *Buckland v Palmer*, the claimant brought a claim against the defendant for her uninsured loss following a car accident, which claim was stayed following the defendant's voluntary payment of the amount due. The Court of Appeal held that the claimant's insurer could not bring a separate, subsequent action to recover the insured loss in the exercise of its right as a subrogated party to bring a claim in the insured's name. As there was no judgment, it was not necessary for the Court to consider the doctrine of merger, but Sir John Donaldson MR commented as follows:[169]

> "That leaves open the problem of what is to happen if the first action has proceeded to judgment. … I can see force in the argument that this would extinguish the cause of action by merger and thus frustrate the remainder of the plaintiff's claim. However I should be surprised and disappointed if this left the courts powerless to do justice if, for example, advantage had been taken of an ill-informed plaintiff by an experienced defendant who offered to submit to judgment in a small sum, well knowing that the plaintiff was under some misapprehension as to the effect upon his right thereafter to proceed with his substantial claim. … I would expect the courts to re-appraise the circumstances in which a judgment could be set aside, if justice so required."

The claimant may, however, bring successive proceedings in different capacities, in circumstances where the cause of action is different, because (for example) the interest protected is different.[170]

Equally, the effect of a judgment through the doctrine of merger may enure to the benefit of a person other than the original defendant, for example an insurer. At common law, by operation of the doctrine of merger, a judgment against one joint obligor (but not a joint and several obligor) generally had the effect of discharging all other joint obligors, whatever the nature of the obligation sued on.[171] That rule has now been reversed by statute. Section 3 of the Civil Liability (Contribution) Act 1978 provides:[172]

---

[162] *Conquer v Boot*, n 157 above. Compare *Bainbridge v Redcar & Cleveland BC* [2007] IRLR 494 (EAT).
[163] See H McGregor, *McGregor on Damages* (17th ed, 2003), para 9-003 and the cases there cited. See also *The Indian Grace*, n 136 above, at 420-421 (Lord Goff); *Meretz Investments NV v ACP Ltd* [2007] 1 Ch 197, at [211] (Lewison J).
[164] *Law Debenture Trust Corporation v Elektrim Finance NV* [2006] EWHC 1305 (Ch) (Judge Pelling QC).
[165] *Overstone Ltd v Shipway* [1962] 1 WLR 117 (CA); *Lawlor v Gray* [1984] 3 All ER 345 (Peter Gibson J).
[166] For a clear and detailed discussion of the case law on each of the following points, see *McGregor on Damages*, n 163 above, paras 9-003 to 9-014.
[167] See, eg, *Brunsden v Humphrey*, discussed in text to nn 157-159 above. See also *C (A Minor) v Hackney LBC* [1996] 1 WLR 789 (CA).
[168] See *Phipson on Evidence*, n 16 above, para 44-18 and the cases there cited.
[169] *Buckland v Palmer*, n 160 above, at 1115.
[170] See, eg, *Marginson v Blackburn BC* [1939] 2 KB 426 (CA), but note the doubts expressed in *McGregor on Damages*, n 163 above, para 9-008. See also *Phipson on Evidence*, n 16 above, para 44-21.
[171] See H Beale and others (ed), *Chitty on Contracts* (29th ed, 2004), paras 17-015-17-016.
[172] By s 4 of that Act, "[i]f more than one action is brought in respect of any damage by or on behalf of the person by whom it was suffered against persons liable in respect of the damage (whether jointly or otherwise) the plaintiff shall not be entitled to costs in any of those actions, other than that in which judgment is first given, unless the court

"Judgment recovered against any person liable in respect of any debt or damage shall not be a bar to an action, or to the continuance of an action, against any other person who is (apart from any such bar) jointly liable with him in respect of the same debt or damage."

Cause of action estoppel

Cause of action estoppel arises where the "cause of action" (see under *The doctrine of merger* above) in the later proceedings is identical to that in the earlier proceedings giving rise to judgment, the earlier proceedings having been between the same parties or their "privies" and having involved the same subject matter as those presently before the court.[173] The estoppel precludes re-litigation of a cause of action not only with respect to points actually decided, expressly or by necessary inference[174], but also points which might have been but were not raised and decided in the earlier proceedings for the purpose of establishing or refuting the existence of the cause of action.[175]

The estoppel more commonly operates so as to preclude the claimant in the original proceedings (or his "privy") from subsequently re-asserting a rejected claim, but may also operate so as to preclude the defendant in the original proceedings (or his "privy") from subsequently denying the validity of a claim which has been upheld.

By way of example of the former situation, in *Barber v Staffordshire CC*[176] the claimant made a claim in an industrial tribunal for redundancy payment following the termination of her employment by the defendant as a part-time teacher under three separate contracts of employment. The claim was withdrawn, with the court's sanction, following advice given to the claimant that she was not entitled to aggregate hours of work under separate contracts in order to satisfy the statutory requirements and the tribunal made an order dismissing her claim. Some time later, following a decision of the House of Lords that the relevant statutory provisions were incompatible with European Community law, she brought a second claim seeking redundancy payment and compensation for unfair dismissal. That claim was dismissed on the ground that it was barred by cause of action estoppel arising from the earlier decision. In *Cinpres Gas Injection v Melea Ltd*[177], the claimant challenged the grant of a patent to the defendant's predecessor in title on the ground that the claimed inventor (also a party to the original proceedings) had worked for him at the time of invention. That challenge failed, based on perjured evidence given by the inventor. Subsequently, after discovering the truth, the claimant brought proceedings under a different statutory provision claiming to be entitled to the patent and seeking its transfer. The Court of Appeal held that the two claims involved the same cause of action, ie a claim to be entitled to a patent and that (in principle) a cause of action estoppel applied. The claimant, however, succeeded in setting aside the estoppel on the ground of fraud attributable to the defendant.[178]

By way of example of the latter situation, in *Coflexip SA v Stolt Offshore MS Ltd*[179], the claimant brought proceedings against the defendant for patent infringement, and secured judgment in its favour for an injunction and damages to be assessed. Subsequently, a third party challenged the patent and secured its revocation, with the result that the patent fell to be treated as a nullity. As a consequence, the injunction was discharged, but the Court of Appeal held that the defendant was estopped in the inquiry as to damages from asserting that the patent was invalid, as that would involve impeaching the cause of action established by the earlier judgment.

Extrinsic evidence

In order to ascertain what was in issue between the parties in proceedings, the record of judgment, reasons for judgment, notes of evidence and the pleadings[180] may be referred to.[181] If, however, the terms of the judgment are

---

is of the opinion that there was reasonable ground for bringing the action". For the possibility that successive actions against persons jointly liable may involve an abuse of process, see *Morris v Wentworth-Stanley* [1999] QB 1004 (CA).

[173] *Arnold v National Westminster Bank plc* [1991] 2 AC 91, at 104 (Lord Keith, HL).

[174] See *Hoystead v Commissioner of Taxation* [1926] AC 155 (PC).

[175] *Arnold v National Westminster Bank plc*, n 173 above, at 105 (Lord Keith). Compare, however, *Blackburn Chemicals Ltd v Bim Kemi AB* [2004] EWCA Civ 1490 (CA), in which a point which might have been raised by way of defence had been reserved by the court for decision at a later date.

[176] See n 107 above.

[177] [2008] EWCA Civ 9.

[178] See text to n 200 below.

[179] [2004] EWCA Civ 213; [2004] FSR 34 (CA) following (with some hesitation) the earlier Court of Appeal decision in *Poulton v Adjustable Cover and Boiler Block Co* [1908] 2 Ch 430. See also *Unilin Beheer BV v Berry Floor NV* [2007] EWCA Civ 364.

[180] Under the CPR, the term "statements of case" is used to describe the pleadings, including the claim form, particulars of claim, defence and any reply.

[181] *Phipson on Evidence*, n 16 above, paras 42-16, 42-31 (esp text to fn 55-58).

clear, the reasons for judgment, pleadings or history of the proceedings are inadmissible to contradict the record of judgment.[182]

4. Invoking claim preclusive effects

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

A party wishing to invoke a claim preclusive effect, whether through operation of the doctrine of merger or cause of action estoppel, must generally plead and prove the judgment on which he relies.

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.

Summary:

Cause of action estoppel is, generally speaking, absolute unless fraud or collusion are alleged such as to justify setting aside the earlier judgment. Fraud must be proved by fresh evidence of matters which impeach the judgment and which could not have been discovered by the party with reasonable diligence before the judgment was delivered. Judgments by consent may be impeached on the additional grounds of incapacity, want of authority, mistake and uncertainty. Finally, cause of action estoppel may be "waived" as a result of agreement or via counter-estoppel.

The discovery of new facts, even those which could not have been discovered at the time of the first action, will not affect the operation of cause of action estoppel. The Court of Appeal has ruled that the "special circumstances" exception, which applies to issue estoppel, does not apply to cause of action estoppel, though the Court of Appeal has recently expressed disquiet with this position. Further cause of action estoppel still operates both where the decision from which the estoppel stems is under appeal and where the legal basis for the decision has been undermined by a subsequent decision in other proceedings.

Full Report:

Cause of action estoppel

Cause of action estoppel is absolute in relation to all points decided unless fraud or collusion is alleged (see below), such as to justify setting aside the earlier judgment The discovery of new factual matter, even if it could not have been found out by reasonable diligence for use in the earlier proceedings, does not permit the judgment to be re-opened, at least insofar as points which were actually decided are concerned.[183]

Arguably, however, it remains open to the House of Lords/Supreme Court, at least, to review this area of the law and, in particular, to decide that a court may refuse to give claim preclusive effect to the judgment on the ground of "special circumstances" in cases where the court did not decide, because they was not raised, points which might have been vital to the existence or non-existence of a cause of action but were not discoverable through the exercise of reasonable diligence[184] at the time of the judgment.[185] For the time being, that possibility has been firmly rejected by the Court of Appeal, which has confined the "special circumstances" exception to issue estoppel (see II.B

[182] *Gordon v Gonda* [1955] 1 WLR 885, at 892-893 (Evershed MR, CA) (pleadings and history of proceedings); *Patchett v Sterling Engineering Co* (1953) 71 RPC 61 (CA) (reasons for judgment). See also *Spencer-Bower, Turner & Handley*, n 109 above, ch 3.

[183] *Arnold v National Westminster Bank plc*, n 173 above, at 104 (Lord Keith). Neuberger LJ in *Coflexip SA v Stolt Offshore MS Ltd*, n 179 above, at [51] described this as "strict cause of action estoppel".

[184] If the material was discoverable at that time through the exercise of reasonable diligence, it matters not that the party has no remedy against his legal adviser (see *Wain v F Sherwood & Sons Transport Ltd* (1998) The Times, July 16).

[185] See *Arnold v National Westminster Bank plc*, n 173 above, at 104-105, 107 (Lord Keith). This view of the speech of Lord Keith in *Arnold v National Westminster Bank plc* was taken by Neuberger LJ in *Coflexip SA v Stolt Offshore MS Ltd*, n 179 above, at [51] and by Sullivan J in *R (East Hertfordshire DC) v First Secretary of State* [2007] EWHC 834 (Admin), at [21]-[22]. Neuberger LJ in *Coflexip* (ibid) described this as "abuse of process cause of action estoppel" but, confusingly, suggested that it was a species of issue estoppel (as to which, see II.B below).

below).[186] Nevertheless, in the most recent case on this point, the Court expressed disquiet at the current state of the law, as follows:[187]

> "We have to say that we are not entirely happy with the position. It would make for better justice in principle for a prior decision to be impugnable on the grounds for which a bill of review once lay, namely that there was fresh evidence not discoverable by reasonable diligence, which 'entirely changes the aspect of the case' (Lord Cairns' phrase in *Phosphate Sewage v Molleson* (1879) 4 App. Cas. 801). That appears to be the rule (or something like it) in Scotland, as noted by Lord Keith. No one suggests that the Scottish courts are markedly more burdened than those in England by attempts to re-litigate cases already decided. Both countries have their share (more than they would like) of such cases but the different rules do not, so far as we know, cause any significant difference between England and Wales on the one hand and Scotland on the other in either the number of such cases or their outcomes. Similarly the somewhat more liberal rule clearly applies in cases of 'issue estoppel' … without causing a mass of inconsistent judgments.
>
> …
>
> It is not necessary to say more about this point now other than that the whole subject of re-opening earlier decisions, whether on appeal or not, could do with clarification. Clearly the jurisdiction to re-open an earlier decision is related to the doctrine of *res judicata*. So also is the procedural question of whether you can attack an earlier decision collaterally in a later claim or must get it set aside first."

It is no answer to a cause of action estoppel that the decision is under appeal[188], or that the legal basis for the judgment has been undermined by a later judicial decision in other proceedings.[189] If the "special circumstances" exception were to be permitted for cause of action estoppel (see above), a change in the law providing a new legal argument might be argued to constitute sufficient ground for refusing to give effect to the estoppel[190], but (as noted above) current Court of Appeal authority is against this.[191]

A judgment may undoubtedly be set aside by fresh proceedings for fraud by, or attributable to[192], one party on the tribunal or (probably) on an another party[193], but such a plea will only be allowed if the unsuccessful party proves that fraud by fresh evidence of matters which impeach the judgment, and not merely collateral.[194] This must be evidence that was not available to him and that could not have been discovered with reasonable diligence before the judgment was delivered.[195] Equally, the preclusive effects of a judgment may (almost certainly[196]) be contested on

---

[186] *Barber v Staffordshire CC*, n 107 above, at 756-757 (Neill LJ, CA); *Coflexip SA v Stolt Offshore MS Ltd*, n 179 above, at [146] (Peter Gibson LJ and Sir Martin Nourse); *Cinpres Gas Injection Ltd v Melea Ltd*, n 177 above, at [97]-[98] (CA).

[187] *Cinpres Gas Injection Ltd v Melea Ltd*, n 177 above, at [100], [102].

[188] *Marchioness of Huntly v Gaskell* [1905] 2 Ch 656 (CA).

[189] *Re Waring, Westminster Bank v Burton-Butler* [1948] Ch 221 (Jenkins J), in which a decision of the Court of Appeal was held to continue to bind the parties although the legal conclusions had been overruled by the House of Lords in a later case.

[190] *Arnold v National Westminster Bank plc*, an issue estoppel case, concerned a change in the law.

[191] *Barber v Staffordshire CC* (see text to n 176above). See also the comments of Dillon LJ in the Court of Appeal in *Arnold* [1990] Ch 573, at 587-588.

[192] Mere fraud by a witness not attributable to a party will not (as the law stands) suffice (see *Cinpres Gas Injection Ltd v Melea Ltd* [2008] EWCA Civ 9).

[193] *Spencer-Bower, Turner & Handley*, n 16 above, para 369 suggests that fraud on the opposite party alone will not suffice, but compare Halsbury's Laws of England (online), vol 16, para 1210 and the authorities there cited. In any event, as the editor of the former work notes: "There is seldom deception of the one without the other".

[194] *Birch v Birch* [1902] P 130 (CA). See also *Koshy v Deg-Deutsche Investitions-Und-Entwicklungs GmbH* [2008] EWCA Civ 27, in which the claimant's decision to challenge an order by way of a (limited) appeal, which was unsuccessful, let to the dismissal of subsequent proceedings to set aside the order for fraud on the ground of abuse of process.

[195] *Owens Bank Ltd v Bracco* [1992] 2 AC 443, at 483 (Lord Bridge, HL).

[196] The editor of *Spencer-Bower, Turney & Handley*, n 109 above, para 361 seems in no doubt, but the decision of the Privy Council in *Kinch v Walcott*, n 150 above, concerning a consent judgment, seems opposed to this (see the comments of Lord Blanesburgh, at 493: "the only difference in this respect between an order made by consent and one not so made is that the first stands unless and until it is discharged by mutual agreement or is set aside by another order of the Court; the second stands unless and until it is discharged on appeal"). The editors of Halsbury's Laws of England, vol 16, para 1210, suggest that it is "theoretically possible" that a party to a judgment which has been obtained by fraud is entitled to ask the court to disregard it without bringing fresh proceedings to set it aside, but he "would have great difficulty in establishing fraud".

the basis of such fraud without bringing an action to set aside the judgment.[197] A judgment can also be impeached for collusion if the parties, even without fraud, were not truly opposed to each other.[198] Judgments by consent may be impeached not only on the ground of fraud and collusion, but also on the ground of incapacity[199], want of authority[200], mistake, uncertainty[201] or other grounds on which contracts may be set aside[202], but a fresh action must be brought for this purpose.[203]

Finally, cause of action estoppel may be "waived" by agreement or by a counter estoppel established through one party's representation that he will not seek to invoke the rule, and the other party's reliance on that representation.[204]

Doctrine of merger

In principle, a claimant may seek to set aside a judgment in his favour on the ground of the defendant's fraud.[205] Such cases, however, are likely to be rare.[206]

It is also more doubtful whether the doctrine of merger may be excluded by a counter estoppel[207], although there appears no reason why the parties may not, by a contract supported by consideration, agree to re-create the original cause of action.

---

[197] See *Cinpres Gas Injection Ltd v Melea Ltd*, n 177 above, at [107] concluding that the judgment was "unravelled" by fraud and "should be set aside". Note, however, the Court's comments at [102] (quoted at text to n 190 above), recognising that a collateral challenge might not be possible without first setting the judgment aside.

[198] *Phipson on Evidence*, n 16 above, para 44-08.

[199] In certain circumstances, incapacity may effectively render a judgment as much of a nullity as the underlying contract or contrary to public policy, so that it is set aside only in the most technical sense of correcting the record (see, eg, *Great North-West Central Rly Co v Charlebois*, n 151 above; *Re Jon Beauforte (London) Ltd* [1953] Ch 131).

[200] *Neale v Gordon Lennox* [1902] AC 465 (HL).

[201] Given, however, that the court is available to assist in clarifying orders, it will be a rare case in which a consent order is set aside for uncertainty (*Scammell v Dicker* [2005] EWCA Civ 405; [2005] 3 All ER 838 (CA)).

[202] *Wilding v Sanderson* [1897] 2 Ch 534 (CA).

[203] *Kinch v Walcott*, n 150 above.

[204] *The Indian Grace*, n 136 above, at 421-423 (Lord Goff, HL). See further *Republic of India v India Steamship Co Ltd (The Indian Grace) (No 2)* [1998] AC 878 (HL), in which the plea of estoppel in answer to the procedural bar arising under Civil Jurisdiction and Judgments Act 1982, s 34 was rejected.

[205] See text to nn 195-200 above.

[206] *Spencer-Bower, Turner & Handley*, n 109, para 434.

[207] Ibid, at 423 (Lord Goff), where the non-availability of the counter estoppel was assumed, without deciding the point.

In the previous section, the Questionnaire 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 you have addressed in the more general answers in the previous section will be involved when you consider these specific situations. Therefore, it is important that you provide an insight in this section 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?

Summary:

A successful Claimant may be precluded from re-litigating the same cause of action by operation of the doctrine of merger, while an unsuccessful Claimant and Defendant may be prevented by cause of action estoppel from asserting or, as the case may be, denying the same cause of action as decided in an earlier decision. However in order to be bound a party must have the same right and character in both proceedings; thus if a party acts in his own right in the first action but as a representative in the second he will not be bound.

Full Response:

Under English law, through operation of the doctrine of merger, a successful Claimant may be prevented by judgment on a particular claim from bringing fresh proceedings based on the same cause of action (see II.A.1-5). As noted above (see II.A.5), the doctrine of merger continues to apply even though the judgment in question is under appeal, and is subject to very limited exceptions.[208] The rule does not, however, preclude later proceedings based on a different cause of action, including a later, separate breach or failure to perform under the same contract.[209]

Equally, an unsuccessful party, Claimant or Defendant, may be prevented by cause of action estoppel from contesting an earlier judgment that a particular cause of action does or does not exist (see II.A.1-5). Again, the estoppel applies even though the judgment in question is under appeal, and is subject to very limited exceptions (see II.A.5).

In order to be affected, however, a party must sue or defend in the same right and character in both sets of proceedings.[210] Thus, a party may sue in one action in his own right and in a second action as the trustee or representative of another.[211]

7. Other participants

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

Summary:

This issue is most likely to arise in the context of issue preclsusion, though the same rules apply in this context too. Thus while some confusion exists over the issue, it would appear that estoppel is capable of operating as between co-defendants even if no claim is brought between them.

Full Response:

A question whether a judgment has preclusive effects as between the Claimant or Defendant and another participant in the litigation (most obviously, a co-defendant or defendant to a Part 20 – third party – claim) is most likely to arise in the context of rules of issue preclusion, and is therefore considered mainly at II.B.7 below.

---

[208] Thus, a Claimant who brings proceedings based on the same cause of action in circumstances where the original judgment based on that cause of action is under appeal is liable to have the second claim struck out.

[209] For example, a Claimant who has recovered lost wages is not precluded by the doctrine of merger from bringing a claim to recover a further sum with respect to his wages for a later period.

[210] *Phipson on Evidence*, n 16 above, para 44-26.

[211] Cf *Marginson v Blackburn BC*, n 170 above (CA), but compare *Black v Yates* [1992] QB 526 (Potter J) (a case under s 34 of the Civil Jurisdiction and Judgments Act 1982, discussed at III.B.4 below).

Two particular examples of claim preclusion as between a Defendant and a third party against whom the Defendant advances a claim for contribution or indemnity are considered at II.A.10 below.

8. Represented persons

Does your legal system provide for group/representative actions (including, for example, US-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?

Summary:

The CPR provide both for representative parties and Group litigation orders.

A party may be represented by another in five situations. First, where more than one person has the same interest in a claim, the Court may direct that the claim be continued by or against a person with the same interest as representative for the others. Second, the CPR allow for the representation of interested persons who cannot be ascertained in certain types of proceedings. Unless the Court orders otherwise any judgment in either of these two cases will bind all persons represented in the claim. Third, actions brought by or against trustees will bind the beneficiaries, unless the Court expressly provides otherwise. Fourth, where a deceased person lacks a personal representative and the Court appoints one to act on his behalf, or permits the claim to proceed in his absence, then any judgment will still bind the deceased. Fifth, where a company is entitled to a remedy and an action is begun by one of its members to obtain it for the company, then any judgment given in respect of the claim will bind both the individual seeking it and the company. These are termed "derivative claims".

Group litigation orders provide for the resolution by one or more test claims of common issues which have arisen in multiple claims. All claims covered by the order are entered onto a register, which clearly specifies the issues which are to be dealt with. 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.

Full Response:

The CPR provide both for representative parties and Group Litigation Orders, although the rules for both kinds of "collective litigation" are more restrictive than US-style class actions.[212]

Representative parties

Under CPR, r 19.6(1), where more than one person has the same interest in a claim (a) the claim may be begun, or (b) the court may order that the claim be continued, by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest. Any party may, however, apply for an order that a person should not act as a representative.[213] Examples of orders made under this rule, include (1) representation of an unincorporated association by one of its members[214], and (2) an order that one insurance syndicate be allowed to represent other syndicates with similar characteristics.[215]

CPR, r 19.7 applies to 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.[216] 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.[217]

Unless the court directs otherwise, any judgment or order given in a claim in which a party is acting as a representative under r 19.6 or r 19.7 is binding on all persons represented in the claim.[218] Such persons are

[212] See S Campbell, "English Classes", The Lawyer , 20 December 2007, available online at http://www.thelawyer.com/cgi-bin/item.cgi?id=130561. In February 2008, the Civil Justice Council published research which urged reform of the methods of collective redress in England and Wales, supporting the introduction of an "opt-out" class action (see http://www.civiljusticecouncil.gov.uk/files/collective_redress.pdf).
[213] CPR, r 19.6(2)-(3).
[214] *Artistic Upholstery Ltd v Art Forma (Furniture) Ltd* [1999] 4 All ER 277 (Lawrence Collins QC).
[215] *National Bank of Greece SA v Outhwaite* [2001] CLC 591 (Andrew Smith J).
[216] CPR, r 19.7(1). CPR, r 19.6 (see above) does not apply to a claim to which r 19.7 applies (CPR, r 19.6(5)).
[217] CPR, r 19.7(2).
[218] CPR, r 19.6(4); CPR, r 19.6(7).

considered to have been "present by representation".[219] 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".[220]

Under CPR, r 19.7A, 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.[221] 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.[222]

CPR, r 19.8 allows the court to 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/her absence.[223] If such an order is made, any judgment or order made or given in the claim is binding on the estate of the deceased.[224]

CPR, rr 19.9 and following apply to so-called "derivative claims" under the Companies Act 2006[225] or otherwise.[226] These are 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.[227] The company, body corporate or trade union for the benefit of which a remedy is sought must be made a defendant to the claim.[228] Under the Companies Act procedure, the derivative claimant, after issuing the claim form, must seek the court's permission to continue the claim.[229] Any judgment on a derivative claim binds the company as if it had brought the action.[230]

Under CPR, r 19.11, the court may make a Group Litigation Order (GLO) if there are likely to be a number of claims which give rise to common or related issues of fact or law.[231] A GLO will provide for the establishment of a register on which claims managed under the GLO will be entered and will specify the common issues which will identify GLO claims (GLO issues).[232] A GLO may also (a) transfer pending claims which raise one or more GLO issues to the court managing the claims, stay those claims pending further order or direct their entry onto the group register, (b) direct that new claims raising one or more GLO issues should be started in the management court and entered on the group register, and (c) give directions for publicising the GLO.[233] Subsequently, the court may give directions, including directions varying the GLO issues or providing for one or more claims in the group register to proceed as test claims.[234]

Where a judgment is given or made in a claim on the group register in relation to one or more GLO issues, (a) that judgment is binding on the parties to all other claims that are on the group register at the time the judgment is given unless the court orders otherwise, and (b) the court may give directions as to the extent to which that judgment is binding on the parties to any claim which is subsequently entered on the group register. Any party to a claim on the GLO register at the time judgment was given, but not subsequently, who is adversely affected by a judgment binding on him may seek permission to appeal the judgment.[235] If a GLO test claim is settled, another claim on the GLO register may be substituted in its place, and all judgments in the first test claim will be binding in the substituted claim unless the court orders otherwise.[236]

---

[219] *Commissioners of Sewers v Gellatly* (1876) 3 Ch 610, at 616 (Jessel MR).
[220] *Phipson on Evidence*, n 16 above, para 44-26. See CPR, Part 20.
[221] CPR, r 19.7A(1).
[222] CPR, r 19.7A(2).
[223] CPR, r 19.8(1)-(2).
[224] CPR, r 19.8(5).
[225] Part 11, Chapter 1.
[226] For example, in the case of a foreign company (see *Konamaneni v Rolls-Royce Industrial Power (India) Ltd* [2002] 1 WLR 1269 (Lawrence Collins J)).
[227] CPR, r 19.9(1).
[228] CPR, r 19.9(3).
[229] CPR, r 19.9A(2).
[230] *Beattie v Beattie Ltd* [1938] Ch 708, at 708 (Lord Greene MR, CA); *Konamaneni*, n 229 above, at [30].
[231] CPR, r 19.11(1).
[232] CPR, r 19.11(2).
[233] CPR, r 19.11(3).
[234] CPR, r 19.13.
[235] CPR, r 19.12. A party to a claim entered subsequently may, instead, apply for an order that the judgment or order in question is not binding on him (CPR, r 19.12(3)).
[236] CPR, r 19.15.

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?

Summary:

Cause of action extends to all persons deemed privy to the parties by blood, title or identity of interest. Real care must be taken in each case to ensure that there is a real privity of interest; thus an injunction granted against the Defendant's predecessor in title with respect to nuisance did not bind the Defendant.

"Privity of interest" has been given a flexible 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 and benefit from the earlier judgment where there is a sufficient degree of identity between B and C that it is "just" that the earlier judgment should enure to C's benefit and that the earlier judgment should bind C.

Full Response:

A cause of action estoppel (see II.A.1-5 above) extends not only to the parties, but also to persons considered to be their "privies" by (a) blood, (b) title, or (c) identity of interest.[237]

Thus, "judgments for or against an ancestor are evidence for or against his heir; those against a testator bind his executor, legatee or devisee; and the same rule applies to grantees, mortgagees and assignees, provided that their titles accrue subsequently to the judgment.[238] So a judgment against the holder of an office will bind his successor and one against a representative class, a future member of that class"/[239] There is, however, no absolute privity between (for example) husband and wife[240], nor between parent and child[241], nor between an indemnified party and an indemnifier[242], nor between a company and its shareholder.[243] Care must also be taken to ensure that there is truly a privity of interest between the Claimant or Defendant and the connected person with respect to the subject matter of the litigation – thus, for example, an injunction granted in favour of the claimant against the defendant's predecessor in title with respect to a nuisance committed by the latter did not bind the defendant.[244]

At least so far as the concept of "identity of interest" is concerned, the English courts appear to have moved in recent years towards a more flexible definition of "privity" for these purposes, although this development cannot easily be separated from developments in the doctrine of abuse of process discussed at II.C below.[245] In *Gleeson v J Wippell & Co* (like most other decisions of this kind, a case of issue preclusion), the claimant (a Miss Gleeson) brought an action for breach of copyright against a company (Denne) to whom the defendant (Wippell) had supplied the allegedly infringing article, but failed on the ground that the article did not infringe the claimant's copyright. The claimant then sued the defendant, which sought to rely on the judgment in answer to the claimant's claim. Megarry V-C[246] suggested:[247]

> "The requisite privity is said to be a privity either of blood, of title, or of interest: see *Zeiss No. 2*[248], at p. 910, per Lord Reid. Plainly there is no question of blood or title in this case, and so only privity of interest can be in question. One difficulty about this is the protean nature of the word 'interest', a term which at

---

[237] See *Phipson on Evidence*, n 16 above, para 44-27; *Spencer-Bower, Turner & Handley*, n 109 above, paras 231-232.
[238] For the requirement that title accrue subsequently to judgment, see *Wiltshire v Powell*, n 144 above.
[239] *Phipson on Evidence*, ibid.
[240] For an example of a case in which privity between husband and wife would have provided a complete answer, *Marginson v Blackburn BC*, n 170 above (CA).
[241] *C (A Minor) v Hackney LBC*, n 167 above.
[242] *Mercantile Investment and General Trust Co. v. River Plate Trust, Loan, and Agency Co* [1894] 1 Ch. 578.
[243] *Barakot Ltd v Epiette Ltd* [1998] 1 BCLC 283. See, however, the authorities from other common law jurisdictions cited by *Spencer-Bower, Turner & Handley*, n 109 above, para 232, fn 110.
[244] *A-G v Birmingham , Tame and Rea Drainage Board* (1991) 17 ChD 685 (CA).
[245] In *Johnson v Gore Wood & Co*, n 132 above, at 32, Lord Bingham approved part of Megarry J's reasons set out below as the "correct approach" in the context of a discussion focussing exclusively on abuse of process (see further II.C.1 below).
[246] Vice-Chancellor.
[247] [1977] 1 WLR 510, at 515.
[248] ie *Carl-Zeiss Stiftung v Rayner and Keeler (No 2)* [1967] 1 AC 853 (HL), discussed further at III.C.4 below.

> times seems almost capable of meaning all things to all men. Another difficulty is that, as Lord Guest pointed out in *Zeiss No. 2*, at p. 936, 'There is a dearth of authority in England upon the question of privies.' From such authorities as there are, it is by no means easy to distil any principle."

He continued:[249]

> "This is difficult territory: but I have to do the best I can in the absence of any clear statement of principle. First, I do not think that in the phrase 'privity of interest' the word 'interest' can be used in the sense of mere curiosity or concern. Many matters that are litigated are of concern to many other persons than the parties to the litigation, in that the result of a case will at least suggest that the position of others in like case is as good or as bad as, or better or worse than, they believed it to be. Furthermore, it is a commonplace for litigation to require decisions to be made about the propriety or otherwise of acts done by those who are not litigants. Many a witness feels aggrieved by a decision in a case to which he is no party without it being suggested that the decision is binding upon him.
>
> Second, it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the *alter ego* of the other: but it does seem to me that, having due regard to the subject matter of the dispute, *there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party*. It is in that sense that I would regard the phrase 'privity of interest.' …"

Turning to the case before him, the Judge asked himself the question:[250]

> "Would the decision in that action that Wippell had indirectly copied the Gleeson drawings be binding on Wippell, so that if sued by Miss Gleeson, Wippell would be estopped by the Denne decision from denying liability? [Counsel for Wippell] felt constrained to answer Yes to that question. I say 'constrained' because it appears that for privity with a party to the proceedings to take effect, it must take effect whether that party wins or loses. As was said by Buckley J. in *Zeiss No. 3* [1970] Ch. 506, 541 (where the question was rather different) 'The relationship cannot be conditional upon the character of the decision.' In such a case, Wippell would be unable to deny liability to Miss Gleeson by reason of a decision reached in a case to which Wippell was not a party, and in which Wippell had no voice. Such a result would clearly be most unjust. Any contention which leads to the conclusion that a person is liable to be condemned unheard is plainly open to the gravest of suspicions. A defendant ought to be able to put his own defence in his own way, and to call his own evidence. He ought not to be concluded by the failure of the defence and evidence adduced by another defendant in other proceedings unless his standing in those other proceedings justifies the conclusion that a decision against the defendant in them ought fairly and truly to be said to be in substance a decision against him. Even if one leaves on one side collusive proceedings and friendly defendants, it would be wrong to enable a plaintiff to select the frailest of a number of possible defendants, and then to use the victory against him not merely *in terrorem* of other and more stalwart possible defendants, but as a decisive weapon against them."

Thus, with respect to successive proceedings between (1) A and B and (2) A and C, in order for a judgment to have preclusive effects as between A and C, it must be equally clear that there is a sufficient degree of identity between B and C that it would be "just" both that (a) a judgment between A and B should enure to C's benefit, and (b) a judgment between A and B should bind C. Despite criticism elsewhere of Megarry VC's "degree of identity" test as "circuitous and not helpful in identifying when the necessary degree of identification is present"[251], the reasoning quoted above has been approved an in later cases, notably by the Court of Appeal in *Kirin-Amgen v Boehringer*

---

[249] Ibid, at 515 (emphasis added).
[250] Ibid, at 515-516.
[251] *Spencer-Bower, Turner & Handley*, n 109 above, para 231 referring to the decisions of the Australian Federal Court in *Trawl Industries Pty v Effem Foods Pty Ltd* (1992) 36 FCR, at 416; (1993) 43 FCR 510, at 540-541. The first instance judge in *Trawl Industries*, Gummow J, described the test as "a loosely phrased, however alluring, invitation to judicial idiosyncrasy".

Mannheim.[252] In that case, however, the Court held that a mere commercial interest in litigation, or the provision of witnesses to help a litigant's case, did not establish a sufficient privity of interest for this purpose. Aldous LJ concluded:

> "It is not possible to have in mind all the circumstances where privity of interest may arise and therefore it would not be right to try to formulate a definition. Each case has to be decided in light of its particular facts. However, it will only be where the person sought to be estopped has the same interest or an interest which has a sufficient degree of identification with that interest, so as to require that the decision should bind the other party in the second action, that the court will hold that there is privity of interest."

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?

Summary:

In personam judgments will generally only bind parties or their privies and not strangers to the action. A wide definition of "parties" has been adopted to include any person who could have intervened in proceedings but chose not to, thereby in effect narrowing the class of "strangers" who are deemed not to be bound by a judgment.

However a judgment may still have preclusive effects even against strangers as regards the resolution of questions of public/general interest, in bankruptcy, administration and patent cases and where there has been acquiescence or contract. These exceptions are in practice of very limited significance in cases falling within the scope of this study.

A more significant exception is that provided by the Civil Liability (Contribution) Act 1978, which precludes a party in contribution proceedings from denying a liability established by judgment in proceedings brought by the injured third party. Strangers may be bound in other specific circumstances to earlier judgments to which they were not a party/privy by specific legislation.

Full Response:

"At common law, a judgment *in personam* (whether delivered in civil or criminal proceedings) is no evidence of the truth either of the decision or of its grounds, between strangers, or a party and a stranger, except upon questions of public and general interest; in bankruptcy, administration and patent cases, to a limited extent; or when so operating by contract, admission or acquiescence."[253] The general rule is thus that estoppels by record must be mutual: the only persons who may rely on the claim preclusive effects are those who, had the decision been the other way, would have been bound by it, ie the parties and their privies.[254]

The exceptions referred to above, in which a judgment *in personam* may constitute evidence against strangers are of minimal significance in the present context. Most notably, perhaps, (a) a judgment as to the construction of the specification of a patent will generally be conclusive in other actions concerning the same patent, whether between the same parties, unless new facts are adduced[255], and (b) one party to a contract may expressly or impliedly agree to be bound by, or be estopped by conduct from contesting[256], a judgment in proceedings to which he is not party. The most common example of the latter situation (which does not involve an "estoppel by record" but a contractual estoppel) is a contract of liability insurance, where judgment against the insured may conclusively establish the

---

[252] *Kirin-Amgen v Boehringer Mannheim GmbH* [1997] FSR 289 (CA) (a foreign judgment case). See also *Wiltshire v Powell*, n 144 above, at [15]-[16] (Latham LJ, CA); *Shierson v Rastogi* [2007] EWHC 1266 (Ch) (Morritt C).

[253] *Phipson on Evidence*, n 16 above, para 44-76. See *Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 321; [2004] 1 Ch 1 (CA); *Simms v Conlon* [2006] EWCA Civ 1749; [2007] 3 All ER 802 (CA); also *Sun Life Assurance Co of Canada v The Lincoln National Life Assurance Co* [2004] EWCA Civ 1660; [2005] 1 Lloyd's Rep 606 (CA) giving effect to the same principle in the context of prior arbitration proceedings.

[254] Halsbury's Laws of England (online), vol 16(2), para 1008.

[255] *Phipson on Evidence*, n 16 above, para 44-83.

[256] See, eg, *Spencer-Bower, Turner & Handley*, n 109 above, para 224.

insured's "liability" for the purpose of entitling him to claim under the policy, although not necessarily the basis of that liability.[257]

A further statutory exception is provided by Civil Liability (Contribution) Act 1978. Under s 1(1) of that Act, 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). By s 1(6), 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 in England and Wales 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 third party.

In *House of Spring Gardens Ltd v Waite* (a foreign judgment case), the judgment debtor, one of three defendants, stood by while his co-defendants brought a fresh action seeking, unsuccessfully, to set-aside the judgment for fraud. In ruling that the judgment debtor was bound by the outcome of the fraud action, Stuart-Smith LJ referred with approval to the judgment of Megarry V-C in *Gleeson v Wippell* (see II.A.9 above), noting that:[258]

> "There is a further principle which in my judgment supplements what was said in that case by the Vice-Chancellor. It is to be found in the judgment of the Privy Council in *Nana Ofori Atta II v. Nana Abu Bonsra II* [1958] A.C. 95, 102-103, where Lord Denning said:
>
> > 'Those instances do not however cover this case, which is not one of active participation in the previous proceedings or actual benefit from them, but of standing by and watching them fought out or at most giving evidence in support of one side or the other. In order to determine this question the West African Court of Appeal quoted from a principle stated by Lord Penzance in *Wytcherley v Andrews* (1871) L. R. 2 P. & D. 327, 328. The full passage is in these words: 'There 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.' … [T]here is nothing in the principle itself which compels it to be limited to wills and representative actions. The principle, as Lord Penzance said, is founded on justice and common sense.'"

The principle here described, therefore, effectively gives an extended meaning to "parties" to include those who, in some sense, had a right to intervene in proceedings which would effectively determine his rights and obligations, but chose not to. In *House of Spring*, Stuart-Smith LJ noted that, if the fraud action had been successful, it would have enured to the benefit of the judgment debtor in that the judgment would have been set aside or rendered ineffective against him even though he had not participated. It was, accordingly, "just" that he should be bound by the judgment. It remains to be seen whether this extension of the preclusive effects of judgments under English law will be much used, or whether the abuse of process doctrine will be preferred as a basis for dealing with cases of this kind.[259]

As noted above, judgments *in rem* are capable, as a matter of substantive law, of binding strangers, but only as to questions of status thereby conclusively determined and not otherwise.[260] If a judgment *in rem* is to prevent strangers disputing any finding of fact besides the status which the judgment determined, the finding must be shown to be essential to the judgment and ascertainable without ambiguity from the record of judgment (and not only from a perusal of the judge's reasons).[261]

In addition, persons other than parties and their privies may be bound by a judgment as a result of specific legislation. One example which is often given of this is of company schemes of arrangement, which require

---

[257] *Chitty on Contracts*, n 171 above, para 41-088; *London Borough of Redbridge v Municipal Mutual Insurance Ltd* [2001] Lloyd's Rep IR 545, at 550-551 (Tomlinson J).

[258] [1991] 1 QB 241, at 252-253 (CA). Stuart-Smith LJ also reached the same conclusion through application of the abuse of process doctrine (at 254-255). Of the other members of the Court of Appeal, McCowan LJ reasoned only in terms of abuse of process and Fox LJ agreed with both judgments.

[259] See, for example, *Wiltshire v Powell*, n 144 above in which the principle was considered but not applied.

[260] See I.A.I above.

[261] Halsbury's Laws of England (online), vol 16(2), para 994.

sanction of the court. Under Companies Act 2006, s 899(3), "A compromise or agreement sanctioned by the court is binding on (a) all creditors or the class of creditors or on the members or class of members and (b) the company or, in the case of a company in the course of being wound up, the liquidator and contributories of the company". It should, however, be noted that it is the compromise or arrangement and not the judgment which is given binding effect by statute – approval of the court is merely a condition precedent for that effect.[262]

B. Issue preclusion

1. The existence and nature of issue preclusive effects

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

Summary:

By the doctrine of "issue estoppel" judgments are capable of having issue preclusive effects so as to preclude the re-opening of issues of law or fact which have already been determined in an earlier action. An "issue" is taken to be one of the conditions for establishing a cause of action. However, it has been stressed that parties would not be estopped to relitigate a fact which had previously been determined, where the existence or non-existence of the fact was not necessary for the cause of action to be established. This guidance has been suggested to be unhelpful and perhaps more useful is the later ruling on the issue in where it was established that while issue estoppel applies to decisions as to the legal consequences of particular facts as well as to the resolution of facts which have legal consequences, it has no wider effect. Further it is suggested that determinations on a pure point of law have no issue preclusive effect but bind through the operation of the principle of *stare decisis.*

Full Response:

"Issue preclusive effects" are here understood to refer to rules of preclusion affecting attempts to re-open issues of law or fact which a legal system regards as having already been determined in earlier proceedings.

In addition to the claim preclusive effects described above, a judgment may operate so as to debar a claimant or defendant, and certain other persons, from challenging the correctness of a decision on a particular issue, or a finding of fact. This, like cause of action estoppel, is a manifestation of the principle of estoppel by record. Whether or not the principle applies to the determination of an issue or a fact, it is normally described as an "issue estoppel", although the term "fact estoppel" (see below) or "factual estoppel" is sometimes separately used.[263]

For these purposes, an "issue" is to be regarded as one of the conditions for establishing a cause of action. In *Thoday v Thoday*, Diplock LJ noted:[264]

> "There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."

---

[262] Company schemes of arrangement have been held by English courts to be excluded from the Judgments Regulation by Art 1(2)(b), which refers to "judicial arrangements, compositions and analogous proceedings" (see *Re DAP Holdings NV* [2005] EWHC 2092; (2006) BCC 48 (Lewison J)). Whether that conclusion is correct, and the point is debatable, it seems doubtful whether a judicial decision sanctioning a scheme of arrangement would constitute a "judgment" within the meaning of Art 35 of the Regulation, at least for the purpose of giving preclusive effect to the scheme (see the decision of the ECJ in *Solo Kleinmotoren GmbH v Boch* (Case C-414/92) [1994] ECR I-2237, the further implications of which are considered at III.A.1 below).

[263] See eg *Pugh v Cantor Fitzgerald International* [2001] EWCA Civ 307, at [35] (Ward LJ, CA).

[264] [1964] P 181, at 198 (CA).

In the following paragraph of his judgment in *Thoday*[265], Diplock LJ suggested that "the determination by a court of competent jurisdiction of the existence or nonexistence of a fact, the existence of which is not of itself a condition the fulfilment of which is necessary to the cause of action which is being litigated before that court, but which is only relevant to proving the fulfilment of such a condition, does not estop at any rate *per rem judicatam* either party in subsequent litigation from asserting the existence or non-existence of the same fact contrary to the determination of the first court". In *Carl Zeiss (No 2)*, Lord Reid stated that he did not find the distinction between "issue estoppel" and "fact estoppel" easy to understand, adding:[266]

> "Suppose that as an essential step towards the judgment in an earlier case it was decided (a) that on a particular date A owed B £100 or (b) that on that date A was alive. The first is, or at least probably is, a question of law, the second is a pure question of fact. Are these findings to be treated differently when issue estoppel is pleaded in a later case? Or take marriage - an issue in the earlier case may have been whether there ever was a ceremony (a pure question of fact) or it may have been whether the ceremony created a marriage (a question of law). I cannot think that this would make any difference if in a later case about quite different subject matter the earlier finding for or against marriage was pleaded as creating issue estoppel."

More usefully, perhaps, in his judgment in another case, concerning the effect of an arbitration award, which followed *Thoday* but pre-dated *Carl-Zeiss (No 2)*, Diplock LJ appeared to refine his concept of an issue and its relationship to determinations of fact, as follows:[267]

> "Arbitration, like litigation, is concerned only with the legal rights and duties of the parties thereto. It is concerned with facts only in so far as they give rise to legal consequences. The final resolution of a dispute between parties as to their respective legal rights or duties may involve the determination of a number of different 'issues,' that is to say, a number of decisions as to the legal consequences of particular facts, each of which decisions constitutes a necessary step in determining what are the legal rights and duties of the parties resulting from the totality of the facts. To determine an 'issue' in this sense … it is necessary for the person adjudicating upon the issue first to find out what are the facts, and there may be a dispute between the parties as to this. But while an issue may thus involve a dispute about facts, a mere dispute about facts divorced from their legal consequences is not an 'issue.'"

On this view, issue estoppel applies to decisions as to the legal consequences of particular facts as well as decisions as to matters of disputed fact which have legal consequences (but not otherwise). As Diplock LJ pointed out such decisions may be made otherwise than at trial, but will equally be binding:[268]

> "In the case of litigation the fact that a suit may involve a number of different issues is recognised by the Rules of the Supreme Court … . Where the issue separately determined is not decisive of the suit, the judgment upon that issue is an interlocutory judgment and the suit continues. Yet I take it to be too clear to need citation of authority that the parties to the suit are bound by the determination of the issue. They cannot subsequently in the same suit advance argument or adduce further evidence directed to showing that the issue was wrongly determined. Their only remedy is by way of appeal from the interlocutory judgment and, where appropriate, an application to the appellate court to adduce further evidence: but such application will only be granted if the appellate court is satisfied that the fresh evidence sought to be adduced could not have been available at the original hearing of the issue even if the party seeking to adduce it had exercised due diligence."

In contrast, it is submitted that a decision on a pure point of law, independent of any finding of fact, will not create an issue estoppel, but will bind only though operation of the doctrine of judicial precedent.[269]

---

[265] Ibid.

[266] *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2*), n 251 above, at 916-917. See also Lord Upjohn, at 947. Lord Wilberforce (at 964) seemed more open to persuasion, having regard to the further explanation given by Diplock LJ in the *Fidelitas Shipping* case (see immediately below).

[267] *Fidelitas Shipping Co. Ltd. v. V/O Exportchleb* [1966] 1 QB 630, at 641-642 (CA). In contrast, Lord Denning MR (at 640) approved the distinction between "issue estoppel" and "fact estoppel" which Diplock LJ had drawn in *Thoday*.

[268] Ibid, at 642.

[269] See *Halsbury's Laws of England*, vol 16(2), para 977; *Fidelitas Shipping Co Ltd v V/O Exportchleb*, n 270 above, at 645 (Diplock LJ).

2. Policies underlying issue preclusive effects

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

The policies underlying issue estoppel (and factual estoppel) are the same as those underlying cause of action estoppel and the doctrine of merger.

3. Conditions for issue preclusive effects

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

Summary:

The basic conditions for issue preclusive effect are essentially the same as for claim preclusive effect and operates to preclude re-litigation both of points which were and points which could have been adjudicated on in earlier proceedings to support a finding on a particular issue. Courts will though proceed cautiously in determining the scope of an earlier judgment's issue preclusive effect, requiring any issue to be actually and necessarily determined by the earlier action. Determining whether an issue is the same in both cases has proven complex in negligence claims, where different actions based on the same facts often aim to draw fundamentally different legal conclusions from each other. Courts have though taken a broad approach, in favour of treating these issues as identical. A judgment retains its preclusive effect even if the legal basis for it is subsequently show to be wrong.

Full Response:

The basic conditions for invoking the issue preclusive effects of a judgment are essentially the same as those for cause of action estoppel (see II.A.3), although the focus here falls upon the question whether an "issue" (in the sense described above) which has already been determined by the judgment subsequently arises for decision in proceedings between parties to the judgment or certain connected persons.

Issue estoppel, like cause of action estoppel, not only precludes re-litigation of an issue with respect to points actually decided by the judgment (whether or not they were contested[270]) but also prevents a party from challenging a determination on a particular issue by reference to arguments or 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.[271]

Nevertheless, the English Courts will proceed cautiously in assessing whether an issue has actually been determined by an earlier decision, requiring that the issue be actually and necessarily determined[272], and the need to avoid looking too carefully for estoppels based on matters which were not in issue has been repeatedly emphasised.[273] In *Spens v Inland Revenue Commissioners*, Megarry J expressed the view that:[274]

> "[O]ne must enquire 'with unrelenting severity' whether the determination on which it is sought to found the estoppel is 'so fundamental to the substantive decision that the latter cannot stand without the former. Nothing less than this will do'."

The English courts will exercise particular caution in analysing default and consent judgments, so as to restrict their preclusive effect to that which has actually and necessarily decided by the judgment.[275] For example, a company which consented to judgment in an action brought by its directors to recover sums outstanding on their loan accounts was not subsequently precluded from bringing a subsequent claim asserting that the monies loaned were derived from unauthorised bonuses which the company was entitled to recover.[276]

---

[270] *Lennon v Birmingham CC* [2001] EWCA Civ 435; [2001] IRLR 826 (CA).
[271] *Arnold v National Westminster Bank plc*, n 173 above, at 106 (Lord Keith).
[272] *Phipson on Evidence*, n 16 above, para 44-31.
[273] *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)*, n 251 above, at 916-917 (Lord Reid), 947 (Lord Upjohn).
[274] [1970] 1 WLR 1173, at 1184 referring to the 2nd edition of Spencer-Bower & Turner, *Res Judicata*. See now *Spencer-Bower, Turner & Handley*, n 109 above, para 202. See also *Meretz Investments NV v ACP Ltd*, n 163 above, [212]-[213].
[275] *New Brunswick Railway Co v British and French Trust Corporation* [1939] AC 1, at 20-22 (Lord Maugham LC); *Kok Hoong v Leong Cheong Kweng Mines Ltd*, n 122 above, at 1021 (Viscount Radcliffe, PC); *Pugh v Cantor Fitzgerald International* [2001] EWCA Civ 307 (CA); *Specialist Group International Ltd v Deakin*, n 135 above.
[276] *Specialist Group International v Deakin*, above.

It seems to follow from the general proposition that only issues upon which the earlier judgment necessarily depended may give rise to issue estoppels 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).[277]

The requirement that the issue determined be the same in both cases has given rise to issues of some complexity in the area of negligence claims, in particular in running down cases, where 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. For example, 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. The balance of English authority appears to favour a broad approach, in favour of treating these issues as identical.[278]

In general, and subject to the "special circumstances" exception referred to below (see II.B.5), an issue estoppel will bind notwithstanding that the legal basis for the judgment has subsequently been shown to be wrong.[279]

4. Invoking issue preclusive effects

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

Issue estoppel, like cause of action estoppel, must be pleaded in the appropriate manner by the party wishing to rely on it (see II.A.4 above). He 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 estoppel[280] or to recover summary judgment on the ground that his opponent's claim or defence has no reasonable prospect of success.[281]

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.

Summary:

Issue estoppel may be challenged on the grounds of fraud and collusion and can be neutralised by agreement or counter estoppel by representation. Further, and unlike cause of action estoppel, issue estoppel may be inoperative where “special circumstances” exist which would make it unjust not to do so. Examples of “special circumstances” include a subsequent change in the law undermining the earlier decision or the discovery of new evidence which entirely changes the nature of an aspect of the case and which could not have been reasonably discovered before judgment.

Full Response:

Like a cause of action estoppel, an issue estoppel may be challenged on the ground of fraud or collusion, or neutralised by agreement or counter estoppel by representation (see II.A.5 above). In addition, and in contrast to cause of action estoppel, it is now clearly established that an issue estoppel may be re-opened where "special circumstances" which would make it unjust not to do so. In *Arnold v National Westminster Bank*, Lord Keith stated:[282]

> "In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was

[277] See text to n 76 above.
[278] See *Marginson v Blackburn BC*, n 70 above, and the other cases cited by *Phipson on Evidence*, n 16 above, para 44-36.
[279] *Watt v Ahsan* [2007] UKHL 51 (HL).
[280] CPR, r 3.4(2), on the grounds that (a) the relevant part discloses no reasonable grounds for bringing or defending the claim, and/or (b) is an abuse of the court's process or is otherwise likely to obstruct the just proposal of the proceedings.
[281] CPR, Part 24.
[282] *Arnold v National Westminster Bank plc*, n 173 above, at 109.

specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result."

Examples of circumstances which may (but which will not necessarily) justify re-opening the decision on a particular issue include (a) if there is a subsequent change in the law which undermines the earlier decision, and (b) if the party seeking to re-open the estoppel can bring forward new evidence which entirely changes the particular aspect of the case and could not by reasonable diligence have been discovered by him (or his legal advisers[283]) previously.[284] The "special circumstances" must, however, relate to the earlier determination of the issue, and not to some more general aspect of the case.[285] In addition, it must be shown that it would cause injustice to the party seeking to re-open the decision on a particular issue not to allow him to re-litigate the issue. Thus, in *Watt v Ahsan*[286], the House of Lords refused to allow a decision of the Employment Appeals Tribunal, which characterised the Labour Party as a "qualifying body" for the purposes of the law on racial discrimination, to be re-opened, although at the same time it approved a decision of the Court of Appeal in another case which had shown the EAT decision to be legally wrong. In the House of Lords view, it would be unjust if the issue estoppel did not apply to later proceedings between the same parties, as the Labour Party had become aware of the Court of Appeal decision but had taken no steps to appeal the EAT decision out of time.

In the previous section, the Questionnaire 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 you have addressed in the more general answers in the previous section will be involved when you consider these specific situations. Therefore, it is important that you provide an insight in this section 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?

In this connection, issue estoppel applies in the same way as cause of action estoppel (see II.A.6).

7. Other participants

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

Some older authorities suggest that issue estoppel may operate as between co-defendants, although there may be no claim directly between them (eg a claim for contribution), provided that the following conditions are satisfied:[287]

(1) there must be a conflict of interest between the defendants concerned;

(2) it must be necessary to decide this conflict in order to give the claimant the relief he claims; and

(3) the question between the defendants must have been finally decided.

In *Sweetman v Nathan*[288], however, Stanley Burnton J accepted the submission that these authorities all concerned property disputes and were not to be taken as supporting the application of issue estoppel between co-defendants in

[283] *Wain v F Sherwood*, n 187 above.
[284] *Arnold v National Westminster Bank plc*, n 173 above, at 108-111.
[285] Thus, it is not sufficient that fraud is proved if it does not provide a reason why particular evidence or a specific submission were not advanced in the first place (see eg *Sanctuary Housing Association v Baker* (1998) unreported, 4 November (CA)).
[286] n 282 above, at [34].
[287] Halsbury's Laws of England (online), vol 16(2), para 1005, citing *Cottingham v Earl of Shrewsbury* (1843) 3 Hare 627 at 638; *Munni Bibi v Tiroloki Nath* (1931) LR 58 Ind App 158, PC; cf *Lock v Norborne* (1687) 3 Mod Rep 141.
[288] [2002] EWHC 2548 (QB), at [49].

other cases. That said, in the following paragraphs[289], the judge referred with apparent approval to decisions in negligence cases in which a judgment in one case in which two parties were co-defendants has been held to give rise to an issue estoppel in later proceedings brought by one of those parties against the other. Although those cases appear not to have focussed on the question whether a judgment could create an issue estoppel between co-defendants, the conclusion seems correct.

8. Represented persons

If your legal system provides for group/representative actions (including, for example, US-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?

See II.A.8 above.

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?

An issue estoppel created by a judgment applies not only as between the parties, but also their "privies", in the sense described in II.A.9 above.

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?

Summary:

Generally strangers are not bound by the determination of issues in litigation to which they weren't party, though a limited exception is provided by the Civil Liability (Contribution) Act 1978.

Full Response:

The general position, subject to certain (limited) exceptions, is that a judgment *in personam*, and any issue estoppel arising from it, binds only the parties and their privies, but not strangers to the action (see II.A.10 above). Arguably, any person who has the right to intervene in proceedings which would effectively determine his rights and obligations, but who chooses not to, may be treated as a "party", and not as a stranger, for these purposes.[290]

In addition, under s 1(5) of the Civil Liability (Contribution) Act 1978 (see II.A.10 above), a judgment given in any action brought in any part of the United Kingdom by or on behalf of the person who suffered the damage in question against any person from whom contribution is sought under this section shall be conclusive in the proceedings for contribution as to any issue determined by that judgment in favour of the person from whom the contribution is sought. To have effect under this sub-section, (a) the judgment must have been given in earlier proceedings brought by the injured third party against the contribution defendant, not in proceedings brought by the contribution claimant, a scenario already considered at II.B.7 above[291], and (b) the issue must have been determined in favour of, not against, the contribution defendant.

---

[289] Ibid, at [50]-[51] referring to *Marginson v Blackburn Borough Council* [1939] 2 KB 426 (CA); *North West Water Ltd v Binnie & Partners* [1990] 3 All ER 547 (Drake J). These cases also raise the point, discussed above (see text to n 281 above) as to whether a finding of negligence vis-à-vis another party, or for the purposes of a defence of contributory negligence, involves the same issue as arises in a subsequent claim for negligence between co-defendants.

[290] *House of Spring Gardens Ltd v Waite*, discussed at II.A.10 above.

[291] Compare A M Dugdale, M A Jones and others (eds), *Clerk & Lindsell on Torts* (19th ed, 2006), para 32-30, suggesting that s 1(5) applies in this scenario as well.

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?

Summary:

Wider preclusive effects are taken to mean rules precluding the raising of claims or issues which though not deemed determined by an earlier judgment are in some sense related to determined claims or issues. Two doctrines appear to give judgments wider preclusive effect: waiver by election and abuse of process. It is suggested, however, that these doctrines operate on different and broader bases than the judgment itself and do not truly involve preclusive effects of judgments.

Waiver by election provides that where a claimant has several inconsistent and alternative claims against a defendant, he will, on electing to pursue one cause of action, be deemed to have waived the others. However in these situations it is the Claimant's election rather than the resulting judgment which has the relevant preclusive effect.

The doctrine of abuse of process is founded upon Wigram VC's decision in *Henderson v. Henderson* as interpreted in Lord Bingham's more modern decision in *Johnson*. Lord Bingham stressed that while similar to *res judicata*, the doctrine of abuse of process is clearly distinct, premised upon a broad merits-based judgment encompassing the public and private interests raised by the case to determine whether one party's conduct is an abuse of process such as to preclude further litigation. The critical issue is generally whether a second claim has been brought which could have been raised in the first action, such that the second action now appears to be an abuse of process. The "abuse" may though be an attempt in the second proceedings to collaterally attack a judgment which has already been rendered or, more widely, the conduct of a party as a whole in the two proceedings (whether there has been a judgment in the first action or not). Abuse of process is a broad doctrine and can be raised even in proceedings not involving the same parties or their privies.

Full Response

"Wider preclusive effects" are here understood to refer to rules which preclude the raising of claims of issues which are not considered to have been determined by an earlier judgment, but which are in some sense related to determined claims or issues

In essence, the rules of claim and issue preclusion under English law require the prior determination on the merits by judgment of a competent court of the same claim ("cause of action") or issue as arises subsequently in the same or in separate proceedings between the same parties or their privies.

As noted above (see, in particular, II.A.3 and II.B.3) the issue and claim preclusive effects of judgments may preclude the raising of points (whether legal submissions or evidence) which were not addressed to the court in order to contest a decision on a particular cause of action or issue. Further, the recent trend of decisions of the English court has been towards greater flexibility as to the identity of the persons ("parties" and "privies") bound by the claim and issue preclusive effects of judgments (see, in particular II.A.9-10 and II.B.9-10).

Strictly speaking, these mark the limits of the preclusive effects of judgments under English law. Nevertheless, it is necessary to consider two further doctrines which appear to give wider preclusive effects to judgments, namely (a) waiver by election, and (b) abuse of process. It will be submitted that, on closer examination, those preclusive effects are attributable to broader or different bases and not to the judgment itself

Waiver by election

A person may have claims, against the same person or different persons, which are truly alternative claims, in that they cannot be reconciled with each other. For example, under English law, (a) a principal whose agent has breached his fiduciary duties may recover damages or may require the fiduciary to account for his profits but may not enjoy the benefit of both remedies cumulatively, and (b) a contracting party who discovers that his counterparty

has acted as agent for an undisclosed principal must elect between his rights against the agent and those against the principal. In these circumstances, the claimant must elect in favour of one of those inconsistent claims, and will be considered to have waived the other.[292] In many cases, the point at which the claimant will be put to his election will be when judgment is given in his favour and the court is considering what order to make. In such cases, where the claimant elects to take judgment for one of two remedies for which he is equally entitled, it is possible to describe the claim for the other remedy as "merging" in the judgment. Thus, in *United Australia Ltd v Barclays Bank Ltd*, Lord Atkin stated:[293]

> "[O]n a question of alternative remedies no question of election arises until one or other claim has been brought to judgment. Up to that stage the plaintiff may pursue both remedies together, or pursuing one may amend and pursue the other: but he can take judgment only for the one, and his cause of action on both will then be merged in another."

Nevertheless, even in these cases, it is the claimant's election, albeit one which is manifested in the judgment, which has the claim preclusive effect. In other cases, (a) that election may be manifested in other ways: for example, by the mere fact of bringing proceedings[294], (b) the claimant may be allowed to postpone his election until he is able to make an informed decision as to which remedy will serve him best[295], (c) the claimant may not be put to election at the time judgment is entered either through the inadvertence of the court[296] or because the court considers that he is entitled to succeed on only one of the alternative claims[297], and (d) the election may be reversible, for example if the chosen remedy proves to be unenforceable.[298]

Abuse of process

The abuse of process doctrine is closely related to cause of action estoppel and issue estoppel. Indeed, both have been strongly influenced by a single decision, that of Wigram VC in *Henderson v Henderson*.[299] They are nevertheless separate, and must be kept as such. In the leading modern decision, *Johnson v Gore Wood*, Lord Bingham (having considered *Henderson* and later authorities) explained the concept of "abuse of process" as follows:[300]

> "It may very well be, as has been convincingly argued[301] … that what is now taken to be the rule in *Henderson v Henderson* has diverged from the ruling which Wigram VC made, which was addressed to *res judicata*. But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes

---

[292] See generally K R Handley, *Estoppel by Conduct and Election* (2006), paras 14-041-14-046, 15-002-15-004.
[293] [1941] AC 1, at 30 (HL).
[294] Handley, *Estoppel by Conduct and Election*, n 295 above, para 15-002.
[295] *Tang Man Sit v Capacious Investments Ltd* [1996] AC 514, at 521 (PC).
[296] Thus in *Tang Man Sit*, above, the court awarded both damages and an account of profits against a defaulting fiduciary. Here, he should normally be put to his election when the inconsistency is discovered.
[297] See eg *Petersen v Moloney* (1951) 84 CLR 91 (HC Aus). Here, the claimant may appeal the decision to refuse him the alternative remedy and, if successful on appeal, make an election at that point.
[298] *Johnson v Agnew* [1980] AC 367 (HL), in which a decree of specific performance was revoked and replaced with an award of damages based on termination of the contract.
[299] (1843) 3 Hare 100. For the submission that this decision has been "much misunderstood", see K R Handley, "A Closer Look at *Henderson v Henderson*" (2002) 118 LQR 397. See also the article cited at n 304 below.
[300] *Johnson v Gore Wood & Co*, n 138 above, at 30-31.
[301] His Lordship referred to G Watt, "The Danger and Deceit of the Rule in Henderson v Henderson : A new approach to successive civil actions arising from the same factual matter" (2000) 19 CLJ 287.

> account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

Lord Millett, in turn, emphasised the clear water between estoppel by record and abuse of process:[302]

> "It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is prima facie a denial of the citizen's right of access to the court conferred by the common law and guaranteed by article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953). While, therefore, the doctrine of *res judicata* in all its branches may properly be regarded as a rule of substantive law, applicable in all save exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the court from abuse and the defendant from oppression."

Thus abuse of process, unlike cause of action and issue estoppel, involves "a broad-merits based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case" in determining "whether in all the circumstances a party's conduct is an abuse". The Court of Appeal has recently held, however, that the strength of the claim and any delay by the claimant in putting forward his case will rarely be relevant to the question whether there has been an abuse, arguing that:[303]

> "[W]hen Lord Bingham spoke of a 'broad, merits based approach', the merits he had in mind were not the substantive merits, or otherwise, of the actual claim, but those relevant to the question whether the claimant could or should have brought his claim as part of the earlier proceedings. A defendant may feel harassed by having brought against him what appears to be a weak claim, but that factor should not count in this context. Whether the claim appears to be weak or strong, it is the fact of it being brought as a second claim, where the issue could have been raised as part of or together with the first claim, that may constitute the abuse.
>
> For similar reasons, … delay of itself is not relevant to whether the second claim is an abuse of process. Delay may be met with a defence under the Limitation Act, or an equitable defence such as laches. Absent any such factor, the mere fact that the claimant has brought his second claim late, but in time, is not relevant to the question whether bringing the new claim in a second set of proceedings is an abuse of process. Of course, things may have happened during the period of delay which are relevant, but nothing of that kind is relied on in the present case."

However, "a claimant who keeps a second claim against the same defendant up his sleeve while prosecuting the first is at high risk of being held to have abused the court's process. Moreover, putting his cards on the table does not simply mean warning the defendant that another action is or may be in the pipeline. It means making it possible for the court to manage the issues so as to be fair to both sides".[304]

Abuse of process is a very broad doctrine which is not restricted to proceedings involving the same parties or their privies. Greater caution will, however, be exercised by the courts before accepting a submission of abuse of process in proceedings between different sets of parties, particularly where the person against whom the submission is raised was a defendant in the first set of proceedings.[305] In *Dexter v Vlieland-Boddy*, Clarke LJ suggested:[306]

> "The principles to be derived from the authorities, of which by far the most important is *Johnson v Gore Wood & Co* [2002] 2 AC 1, can be summarised as follows. (i) Where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process. (ii) A later

[302] *Johnson v Gore Wood*, n 138 above, at 59.
[303] *Stuart v Goldberg* [2008] EWCA Civ 2, at [57]-[58] (Lloyd LJ, CA).
[304] Ibid, at [77] (Sedley LJ); also at [96] (Clarke MR).
[305] See *Simms v Conlon*, n 251 above.
[306] [2003] EWCA Civ 14, at [49].

action against B is much more likely to be held to be an abuse of process than a later action against C. (iii) The burden of establishing abuse of process is on B or C or as the case may be. (iv) It is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. (v) The question in every case is whether, applying a broad merits based approach, A's conduct is in all the circumstances an abuse of process. (vi) The court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression of B or C."

The court's power to strike out a claim is discretionary, but an application to strike out a claim on the ground of "abuse of process" is unlikely to turn on the exercise of a discretion. Either the proceedings are an abuse of the process, or they are not. It could not be right to strike the case out (on this ground) unless the court is satisfied that the claim is an abuse of the process, and if the court were so satisfied, it would be only in very unusual circumstances that it would not strike the claim out.[307]

The *Henderson v Henderson* abuse of process doctrine, unlike cause of action and issue estoppel, applies only where there are two separate sets of proceedings. It cannot be invoked in order to prevent a party from pleading at a late stage in litigation, by way of amendment, issues which might have been pleaded from the outset.[308] Similar considerations, however, underlie the court's discretion to allow amendments to the parties' statements of case at any stage in litigation (including after judgment).[309] If, however, a Claimant seeks to amend his statement of case to plead a new claim after the expiry of the relevant limitation period for that claim, the amendment will be allowed only if the new claim arises out of the same facts or substantially the same facts as a claim already pleaded.[310]

In some cases, the claimed "abuse" will focus on the terms of an earlier judgment, in particular when later proceedings are said to constitute a collateral attack on that judgment. In the most famous example of that type of case, *Hunter v Chief Constable*[311], a man convicted in 1975 of carrying out a terrorist bombing in Birmingham claimed damages in tort for an alleged assault by the police during his interrogation. That action was struck out as an abuse of process as amounting to a collateral attack on the criminal trial judge's ruling that the claimant's confession to the crime had been voluntary, based in turn on his finding that no assault had taken place. As matters turned out, the conviction was overturned by the criminal court in 1991 based (among other matters) on the discrediting of the confession[312], but *Hunter* remains a leading decision on abuse of process. The collateral attack which constitutes an "abuse" may also be on an earlier civil judgment.[313]

In other cases, however, the claimed abuse will focus more widely on a party's conduct as a whole in the two sets of proceedings. As Lord Bingham noted (above), "one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not". Indeed, significantly for present purposes, it is clear that it is not a pre-requisite of the abuse of process doctrine that the original proceedings should have resulted in a judgment at all,[314] nor that those proceedings have concluded.[315]

Conclusion

Accordingly, neither waiver by election nor the abuse of process doctrine attribute effects to judgments, although they have certain features in common with cause of action and issue estoppel.

2. Policies underlying wider preclusive effects

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

[307] *Stuart v Goldberg*, n 306 above, at [24] (Lloyd LJ).
[308] *Ruttle Plant Hire Ltd v Secretary of State for the Environment Food and Rural Affairs* [2007] EHHC 1733 (TCC) (Jackson J).
[309] CPR, Part 17.
[310] CPR, r 17.4 making provision in accordance with Limitation Act 1980, s 35.
[311] *Hunter v Chief Constable of West Midlands Police* [1982] HL 529 (HL).
[312] *R v McIlkenny* [1992] 2 All ER 417 (CA).
[313] See eg *Taylor Walton v Laing* [2007] EWCA Civ 1146.
[314] *Aldi Stores Ltd v WSP Group plc* [2007] EWCA Civ 1260, in which the original action concluded by settlement.
[315] The abuse may also consist of bringing concurrent proceedings vexatiously (see *Ebert v Venvil* [2000] Ch 484 (CA)).

The policy considerations underlying waiver by election and abuse of process are similar to those underlying cause of action and issue estoppel, namely the public interest in the finality of litigation.[316] The former doctrine is also concerned with the substantive objective of securing a legally coherent outcome to litigation, and the latter (as Lord Bingham noted in *Johnson v Gore Wood*[317]) with efficiency and economy in litigation procedure.

3. Conditions for wider preclusive effects

What are the conditions for the application of wider preclusive effects of a judgment?

See II.C.1 above

4. Invoking wider preclusive effects

How are wider preclusive effects invoked in your legal system?

A party wishing to rely on waiver by election in later proceedings must plead and prove the other party's conduct amounting to an irrevocable election.

A party claiming that proceedings are an abuse of process should apply promptly to strike out the proceedings on that ground.[318]

5. Exceptions to wider preclusive effects

Please verify whether the wider preclusive effects of judgments in your legal system are subject to generally accepted exceptions.

See II.C.1 above

In the previous section, the Questionnaire addressed general aspects of wider preclusive effects of judgments. The following numbered points address particular questions that may arise in relation to the operation of the preclusive effects of judgments in particular circumstances which may be subject to specific rules and conditions. It is appreciated that some of the issues you have addressed in the more general answers in the previous section will be involved when you consider these specific situations. Therefore, it is important that you provide an insight in this section into the particularities, if any, of the application of wider 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 (1) advancing, in the same proceedings or later proceedings, related claims against the Defendant or Claimant; and/or (2) from seeking the determination in such proceedings of other potentially related issues of fact and/or law?

See II.C.1 above

7. Other participants

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

See II.C.1 above

[316] See *Johnson v Gore Wood & Co*, text to n 303 above; *Tang Man Sit v Capacious Investments Ltd*, n 298 above, at 521-522.
[317] Ibid.
[318] CPR, r 3.4(b).

8. Represented persons

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

Summary:

Abuse of process can operate against persons who were not parties or privy to the judgment, and therefore can also operate against represented persons. Cf. *Ashmore v. British Coal Corp.*[1990] 2 QB 338

Full Response:

In *Ashmore v British Coal Corporation*[319], more than 1500 claims had been brought raising similar issues as to the application of equal pay legislation. Some of those claims were chosen by the industrial tribunal as sample claims with a view to resolving the matters in issue. This was not a formal group litigation, but an exercise in case management The other claims (including those of the claimant in *Ashmore*) were stayed pending decision in those sample claims. After the sample claims had been resolved in a manner unfavourable to the claimants, the claimant in *Ashmore* sought to continue her claim. It was, however, struck out as an abuse of process, being considered as a collateral attack on the decision in the sample cases.

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

To what extent, if at all, do the wider 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?

See II.C.1 above. In *House of Spring Garden v Waite*, discussed at II.A.9 above, the Court of Appeal relied in the alternative on the doctrine of abuse of process as a ground for precluding the recalcitrant defendant from contesting the judgment given in his co-defendants' action to set aside the judgment on the ground of fraud.

10. Strangers

To what extent, if at all, do the wider 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?

See II.C.1 above

[319] [1990] 2 QB 338 (CA).

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

This Part is concerned with the practice of your legal system 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 your 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 and of the Brussels and Lugano Conventions, as well as the decisions of the European Court of Justice referred to below, is not called for, except insofar as such analysis is necessary or appropriate to explain the practice of your legal system.

A. Recognition

1. Judgments recognised

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

Summary:

Interlocutory decisions, designed simply to organise the conduct of litigation are not considered capable of recognition under the Brussels Regime. However interlocutory decisions which resolve issues of substance clearly do fall within the Brussels Regime. Judgments rendered where there has been no service of Court documents on the Defendant will not be recognised under the Brussels Regime nor will judgments which declare enforceable an arbitral award. A judgment by consent or a default judgment are also deemed to be "judgments" for these purposes and are therefore capable of being recognized under the Brussels Regime.

Full Response:

There are relatively few reported decisions of the English courts concerning (a) the concept of a "judgment" under the Judgments Regulation or the Brussels/Lugano Conventions (together the "Brussels/Lugano Regime"), or (which is arguably just a different way of presenting the same question[320]), (b) the characteristics which a "judgment" must possess if it is to be recognised under the Brussels/Lugano Regime.

In this connection, it may be noted that the decision of the Court of Justice in *Owens Bank v Bracco*[321], which confirmed that the Brussels/Lugano Regime does not apply to proceedings concerning the recognition and enforcement of judgments emanating from non-Member/Contracting States, was given following a reference by the House of Lords in proceedings for the enforcement of a judgment from Vincent and the St Grenadines.[322]

Orders of a procedural character

In a 1992 decision of the High Court, an order made by a French court appointing experts to inspect works at a building in London was held to constitute a "judgment" within the meaning of Art 25 of the Brussels Convention, but not to be amenable to proceedings for recognition/enforcement under the Convention to the extent that it constituted an interlocutory decision which does no more than regulate procedural matters and which neither

[320] Both A Layton and H Mercer, *European Civil Practice* (2nd ed, 2004), paras 24.019-24.021 and the Deputy Judge in *CFEM Façades v SA v Bovis Construction Ltd* [1992] ILPr 561 (Simon Goldberg QC), discussed at text to nn 326-327 below, treat the two questions as separate. But the reasoning of Hobhouse J in *EMI Records Ltd v Modern Music Karl-Ulrich Waterbach GmbH* [1992] QB 115, discussed at text to nn 337-338 below, strongly suggests that his Lordship saw exclusion from the regime for recognition and judgment as denying the status of "judgment" under Art 25 of the Brussels Convention.

[321] (Case C-414/92) [1994] ECR 2237.

[322] *Owens Bank Ltd v Bracco* [1992] 2 AC 443.

governs the legal relationships of the parties nor affects their proprietary rights.[323] In the course of argument, the defendants referred to the following passage from the Schlosser Report, which appears to have strongly influenced the Judge in reaching this conclusion:[324]

> "Interlocutory decisions which are not intended to govern legal relations of the parties but to arrange the further conduct of the proceedings should be excluded from the scope of Title III of the proceedings."

The Judge also commented, however, that "[i]t is tempting to suggest that there may be judgments as defined in Article 25 which are susceptible to recognition even though incapable of enforcement but no specific argument was addressed to the point and it may well not be open in the face of the *Denilauler* case … It is clearly safest to treat questions of recognition and enforcement as being inextricably intermixed".

Interlocutory judgments

Although one English judge has suggested that the definition of "judgment" under Art 25 of the Brussels Convention "only bites upon some final determination permanently definitive of the substantive rights of the parties under the matter in dispute", with the consequence that a Dutch pre-trial attachment order very arguably did not qualify as a "judgment"[325], there can be no doubt in light of earlier and subsequent European[326] and English case law, that this view cannot be accepted (it was not, in any event, necessary for the decision in that case).[327] In an earlier English case, *Babanaft International Co SA v Bassatne*, Kerr LJ had concluded that a pre-judgment Mareva (freezing) injunction granted by an English court in aid of English proceedings, freezing specific assets of a defendant located in the territory of another EC state was entitled to recognition and enforcement by the courts of that state provided that (a) the subject matter of the English proceedings fell within the material scope of the Convention, and (b) the order was made *inter partes* (ie after due service on the defendant) or at any rate after the defendant had the opportunity to resist the claimant's application for the order.[328] Further, in *The Atlantic Emperor (No 2)*, Neill LJ commented (albeit in a case which concerned a binding decision on a preliminary issue) that the wording of Art 25 " plainly covers interlocutory as well as final judgments".[329] That comment was echoed by Clarke J in *The Tjaskemolen (No 2)*, a case concerning a Dutch order for the release of a vessel from arrest.[330]

In *Comet Group plc v Unika Computer SA*, an English mercantile judge followed the reasoning of the ECJ in *Mietz*[331] to refuse enforcement to a French provisional payment order on the ground that it did not satisfy the conditions laid down to establish its status as a provisional measure under Art 31 of the Judgments Regulation.[332] The Judge went further and ordered that the French claimant take steps in France to set aside that order. That aspect of the decision seemed curious at the time and cannot now stand with the later curtailment by the ECJ of anti-suit injunctions within the Brussels/Lugano Regime.[333]

Judgments made "without notice"

In *EMI Records v Modern Music*[334], Hobhouse J relied on the reasoning of the ECJ in *Denilauler v Couchet Frères* to deny recognition to a final mandatory order of a German court which had been made without service of the court documents on the defendant record company. He concluded:[335]

---

[323] *CFEM Façades v Bovis Construction*, n 323 above, esp at [35], [37], [61], [64]. See Layton & Mercer, n 323 above, para 24.034.
[324] Schlosser Report, para 187 (OJ C59, 127 [5.3.1979]). See *CFEM Façades*, n 323 above, at [52].
[325] *Virgin Aviation Services Ltd v CAD Aviation Services* [1991] ILPr 79, at [22] (Ognall J).
[326] Notably, *Denilauler v Couchet Frères* (Case 125/79) [1980] ECR 1553, para 17; *Mietz v Intership Yachting Sneek BV* (Case C-99/96) [1999] ECR I-2277; *Italian Leather SpA v WECO Polstermöbel GmbH* (Case C-80/00) [2002] ECR I-4995; *Maersk Olie & Gas A/S v Firma M de Haan en W de Boer* (Case C-39/02) [2004] ECR-9657, para 46. See also Schlosser Report, n 327 above, para 184.
[327] Layton & Mercer, n 323, para 24.034, fn 54 politely suggest that the view "goes too far".
[328] [1990] Ch 13, at 31 (Kerr LJ, CA). See also *Normaco Ltd v Lundman* (1998) unreported, 16 December in which a freezing order was certified for enforcement in Switzerland under the Lugano Convention.
[329] [1992] 1 Lloyd's Rep 624, at 630. The decision was a follow-up to that of the ECJ in *Marc Rich & Co AG v Società Italiana Impianti PA* (Case C-190/89) [1991] ECR I-3855.
[330] [1997] 2 Lloyd's Rep 476, at 478. The Judge, however, decided (at 479) that the Dutch judgment did not exclude the possibility of later arrest outside Holland, and so did not have preclusive effect.
[331] *Mietz v Intership Yachting Sneek BV* [1999] ECR I-2277.
[332] (2003) unreported, 18 March.
[333] *Turner v Grovit* (Case C-159/02) [2004] ECR I-3565.
[334] *EMI Records Ltd v Modern Music Karl-Ulrich Waterbach GmbH* , n 323 above.
[335] Ibid, at 123.

> "This order, having regard to the manner in which it was obtained, does not come within Title III at all. It is not an order of the relevant character; it is inconsistent with the scheme of the Convention read as a whole; and it is inconsistent with the essence of what was decided by the European Court of Justice."

The reasoning in this case has been criticised, however, on the ground that the judge failed to take into account the fact that there had been an opportunity for the defendant to apply to set the order aside.[336]

Judgments by consent, default and admission

In *Landhurst Leasing v Marcq*[337], the Court of Appeal 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. In this connection, the defendant argued that the following passages from the judgment of the ECJ in *Solo Kleinmotoren GmbH v Boch* required the conclusion that a judgment entered following a concession could not amount to a "judgment" for the purposes of Art 25 of the Brussels Convention:[338]

> "17 It follows from the foregoing that in order to be a 'judgment' for the purposes of the Convention the decision must emanate from a judicial body of a Contracting State deciding on its own authority on the issues between the parties.
>
> 18 That condition is not fulfilled in the case of a settlement, even if it was reached in a court of a Contracting State and brings legal proceedings to an end. Settlements in court are essentially contractual in that their terms depend first and foremost on the parties' intention …"

Beldam LJ, having referred also to the Opinion in *Solo Kleinmotoren v Boch* of Advocate General Gulmann, who had emphasised the distinction between judgments and court settlements, concluded:

> "In my view, 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))."

Although it was probably not necessary for the Court in *Landhurst Leasing* to carry its reasoning this far, for the judgment in question made clear 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.[339], the comments make perfect sense from the viewpoint of English law. A judgment by consent under English law can give rise to judicially enforceable obligations and undoubtedly has preclusive effects, in the same way as a judgment following trial.[340] It involves, therefore, a decision of a court deciding on its own authority the issues between the parties. A default judgment has comparable effect, even if it is entered by a court official acting in accordance with the authority vested in him by the CPR.[341] Any suggestion to the contrary[342] is, it is submitted, wrong.

Judgments upon arbitral awards

The Brussels/Lugano Regime has been held not to apply to a judgment declaring enforceable an arbitration award.[343]

---

[336] Layton & Mercer, n 323 above, para 26.057 referring to the observations of the ECJ in *Hengst Import BV v Campese* (Case C-474/93) [1995] ECR I-2113, para 14. The editors suggest, however, that the refusal of recognition in *EMI Records* may be supported on the ground that the German order was served without explanation of the possible recourse against it so that there had been a breach of the rights of the defence.

[337] (1997) unreported, 4 December.

[338] (Case C-414/92) [1994] ECR I-2237.

[339] Sir Christopher Slade, in his judgment, stressed that the judgment was not by consent.

[340] See II.I.D above.

[341] As Layton & Mercer note (n 323 above, para 25.007) "Article 32 itself makes it clear that a determination of costs or expenses by an officer of the court is included in the definition, but here too judicial procedure is required. … There seems to be no reason in principle why other decisions made by an officer of the court should not also be included, provided that the decision is of a judicial nature."

[342] U Magnus and P Mankowski, *Brussels I Regulation* (2007), p 537, text to fn 14 referring to G Cuniberti, RCDIP 89 (2000), 786, 788-789.

[343] *Arab Business Consortium International Finance & Investment Co v Banque Franco-Tunisienne* [1996] 1 Lloyd's Rep 485 (Waller J).

2. Procedural aspects of recognition

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

Summary:

No formal steps need to be taken to secure recognition, though a Party seeking to rely on a foreign judgment's preclusive effect must probably plead such in their statement of case. Further while recognition is automatic, it is still open for the Court to consider whether the foreign judgment is a "judgment" within the meaning of Art 33(1) BR and whether any of the grounds for refusing recognition in Arts 34 and 35 exist. Further Art 37 allows for a Court to stay proceedings in which recognition is sought, while the judgment sought to be recognized is on appeal in its state of origin.

Art 33(2) provides a procedure whereby an interested party may raise the issue of recognition of a judgment as the main and even the sole issue in a dispute. Art 33(3) by contrast allows a Court seised of proceedings to resolve as an incidental question the recognition of a judgment on which the outcome of the proceedings depend. These procedures are rarely used.

Full Response:

Art 33(1) of the Judgments Regulation is understood to require "automatic"[344] recognition of other Member State judgments, in that no formal steps (other than production of a copy of the judgment which satisfies the conditions necessary to establish its authenticity[345]) need be taken to secure recognition. It is submitted, however, that this does not prevent the English courts from imposing a procedural requirement that a party wishing to rely on a Contracting/Member State judgment as having preclusive effects in a particular case must also plead that judgment as part of his statement of case[346], as this is simply an aspect of the wider requirement that the parties must particularise their case and does not specifically relate to the recognition of judgments.[347]

Nor does Art 33(1) exclude the court's duty to consider whether the judgment is one which falls within the scope of the Brussels/Lugano Regime and whether there is any ground for refusing recognition under Arts 34 and 35.[348] The reference in the Jenard Report to "presumption in favour of recognition"[349] should not be understood as meaning that a judgment to which one of the grounds of non-recognition applies must be recognised and given full effect unless and until the party opposing recognition establishes a ground for refusal[350], or as requiring that party himself to make a formal application contesting the recognition.

Art 33(2), allowing an interested party[351] who raises the recognition of a judgment as the principal issue in a dispute to apply for a decision that the judgment be recognised, "is designed to deal with a situation where a person who is not a party to the action in which a judgment was given wishes to raise the judgment as a defence".[352] An, apparently rare, example of an application made under Art 33(2) appears in *Tavoulearas v Tsavliris*.[353] Here, the defendants in fiercely contested actions in the Commercial Court applied for the formal recognition of a judgment of a Greek court which declared that they were not liable to the claimant. It appears that the application was made at the court's direction in order to facilitate resolution of the matters in dispute between the parties.[354] The Commercial Court judge and Court of Appeal both rejected the application on the ground that the Greek judgment had been

---

[344] For hostility to the concept of "automatic" recognition, see P Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments* (1987), p 1376. The author seems alone in his stance on this point.
[345] Judgments Regulation, Art 53(1).
[346] See II.A.4 above.
[347] For a case in which, in proceedings before a Crown Court exercising a jurisdiction which was ruled on appeal to be "civil" in nature, a point on recognition of a Member State judgment was taken informally (see *Unic Centre Sarl v Crown Court at Harrow* [2000] 1 WLR 2112 (Newman J)).
[348] Layton & Mercer, n 323 above, para 26.003.
[349] Jenard Report (OJ C59, 44 [5.3.1979]).
[350] Layton & Mercer, n 323 above, para 26.003. See further the text to nn 391-393 below as to whether the court may raise an objection of its own motion.
[351] Layton & Mercer, n 323 above, 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.
[352] *Dicey, Morris & Collins*, n 137 above, para 14-224.
[353] [2006] EWHC 414 (Comm) (Tomlinson J); [2006] EWCA Civ 1772; [2007] 1 WLR 1573 (CA).
[354] See para [34] of the judgment of Tomlinson J, at the end of a very detailed summary of the history of the proceedings in England and Greece.

given in default of appearance and the requirements of Art 34(2) for giving effect to that judgment had not been satisfied.

In *Landhurst Leasing v Marcq*[355], Schiemann LJ (currently the UK's judge at the ECJ) gave the following example of a situation in which the procedure laid down in Art 33(2) might be relied on:

> "In an international loan agreement (and indeed in domestic ones) it is often a term that if the debtor has a judgment entered against him anywhere in the world, then the creditor is entitled to call in the loan. In such a case the creditor may well want to have the foreign judgment recognised, although he would not necessarily be entitled, or want, to enforce it."

Art 33(2) deals, in terms, only with applications for recognition, and not non-recognition. In this connection, it has been suggested that a party seeking to oppose recognition may do so only in accordance of the internal law of the state addressed.[356]

Art 33(3) allows a Member State court seised of proceedings to determine an incidental question of recognition on which the outcome of proceedings depends.[357] This provision, and its predecessor in the Brussels Convention[358], does not appear to have troubled the English courts.

Under Art 37, a Member State court may stay the proceedings in which recognition is sought if an ordinary appeal has been lodged against the judgment in its Member State of origin. In *Petereit v Babcock International Ltd* (a case under Art 38 of the Brussels Convention[359] concerning the stay of enforcement proceedings), the judge stated:[360]

> "The general principles as to the recognition of judgments, which are to be found in articles 26 to 30 *[of the Brussels Convention, now Judgments Regulation, Arts 33-37*], demonstrate in my opinion that, subject to the very circumscribed exceptions set out in articles 27 and 28, a judgment obtained in one contracting state is prima facie to be recognised and rapidly enforced in the other contracting states. Article 29 sets out the important principle that under no circumstances may a foreign judgment be reviewed as to its substance. Article 30 *[of the Brussels Convention, now Judgments Regulation, Art 38]*, however, expressly confers on the enforcing court a power that can be expected to militate against the rapid enforcement of judgments in contracting states, namely, a power to stay the proceedings if an ordinary appeal against the judgment has been lodged."

He suggested that the power to stay was "general and unfettered" but that "the enforcing court should not adopt a general practice of depriving a successful plaintiff of the fruits of the judgment by the imposition of a more or less automatic stay, merely on the ground that there is a pending appeal".[361]

In a recent case, a stay of enforcement proceedings was refused in circumstances where the Member State of origin had refused a similar application.[362]

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?

Summary:

The primary focus of English Courts as regards non-recognition in this context are the provisions in Art 34(3)-(4), as opposed to the public policy exception in Art 34(1). Public policy will only exceptionally be relevant. Thus in *Interdesco S.A. v. Nullifire Limited* the Court held that where a judgment was challenged on public policy grounds, it was preferable for the issue to be resolved by remedies available in the foreign jurisdiction and it would only be if none were available that English Courts would consider the issue.

---

[355] See n 340 above.
[356] Layton & Mercer, n 323 above, para. 26.009.
[357] Layton & Mercer, n 323 above, 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.
[358] Art 26(3). Article numbers of the Judgments Regulation in square brackets have been added for ease of reference.
[359] See Judgments Regulation, Art 46.
[360] [1990] 1 WLR 350, at 357-358 (Anthony Diamond QC).
[361] Ibid, at 358.
[362] *Banco Nacional de Comercio Exterior SNC v Empresa de Telecomunicaiones de Cuba SA* [2007] EWHC 2322 (Comm) (Tomlinson J).

Art 34(3) regarding irreconcilable judgments has been, in contrast to Art 34(4), the subject of some decisions though these have cast very little light on the applicable principles.

Full Response:

It is to be expected, in accordance with the case law of the ECJ[363], that the English Courts will address the compatibility of a Member State judgment with a judgment from one of the constituent legal systems of the UK or from another Member State or from a non-Member State solely in accordance with the provisions of Art 34(3)-(4) of the Judgments Regulation and not by reference to the public policy exception in Art 34(1). Although one cannot rule out the possibility that a situation might arise in which a Member State judgment could successfully be challenged on public policy grounds by reference to the nature and scope of its preclusive effects, assuming that the concept of "recognition" requires that they be given effect in England (see III.B to D below), such a situation must be regarded as wholly exceptional.[364]

In *Interdesco S.A. v Nullifire Limited*[365], registration of a French judgment in England was challenged on the ground that recognition would be contrary to public policy, on the basis of an allegation that the French court had been fraudulently deceived. The judgment debtor sought to rely for the first time on evidence that had not been before the foreign court. Phillips J considered 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. He added:[366]

> "Such 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."

In *Banco Nacional de Comercio Exterior SNC v Empresa de Telecomunicaiones de Cuba SA*[367], the judgment debtor contested enforcement of an Italian judgment on the ground that an arbitral award on which the judgment had, in part, been based had subsequently been set aside and that, in the circumstances, it would be contrary to public policy to enforce the judgment. That argument was rejected by the Commercial Court judge as an impermissible attempt to review the substance of the Italian judgment, duplicating the task to be performed by the Italian appellate court. Tomlinson J commented:[368]

> "It is common ground that recourse to public policy is to be had only in exceptional cases – see *Hoffmann v Krieg* [1988] ECR 645 at paragraph 21 and *Hendrikman v Druck* [1996] ECR 1-4943 at paragraph 23. It is for the national court to define the content of the public policy of its own State, although the European Court has the power to review the limits within which recourse may be had to that principle – see *Krombach v. Bamberski* [2000] ECR 1-1935 at paragraphs 22 and 23. The word 'manifestly' was added into the Regulation, not having been present in either the Brussels or the Lugano Conventions. In the opinion of Professor Adrian Briggs[369] '… it is unlikely that it adds anything of discernible substance.' Professor Briggs attempts his own encapsulation – 'The doctrine of public policy will prevent the recognition of a judgment in cases where the duty to confer recognition would require the court to contravene values which English law regards as being fundamental.' So stated, it is not immediately obvious that the somewhat arcane debate whether the Turin Judgment was dependent upon the findings in the now annulled arbitration award engages values which English law regards as being fundamental."

More difficult questions arise, perhaps, with respect to the application of Art 34(2) in circumstances where a Member State judgment has effects which go beyond the named parties to the original proceedings. In what circumstances is a person affected by the judgment to be treated as a "defendant" and entitled to the procedural protections set out in the case of judgments given in default of appearance? It does not appear that the English Courts have addressed this kind of issue. It is tentatively submitted that the answer to this question requires identification, not of the persons named as "defendant" in the Member State proceedings, but of the person(s) to whom the judgment is addressed, whether or not a named party and whatever his position in the proceedings. Thus,

---

[363] *Hoffmann v Krieg* (Case 145/86) [1988] ECR 645, para 21.
[364] Layton & Mercer, n 323 above, para 24.010 require "exceptional circumstances".
[365] [1992] 1 Lloyds' Rep 180. See also *SISRO v Ampersand Software BV* [1994] ILPr 55 (CA).
[366] Ibid, at 188.
[367] See n 365 above.
[368] Ibid, at [16].
[369] P Briggs and P Rees, *Civil Jurisdiction and Judgments* (4th ed, 2005), para 7.13.

if (for example) a Member State court in proceedings in which a company is the sole named defendant declares that one of the company's director's is jointly liable, the director may rely on Art 34(2).[370] Beyond this, however, the fact that a person is affected by a judgment (whether he is an "interested party" for the purposes of Art 34(2) – see III.A.2 above) does not entitle him to contest recognition of the judgment as against him on the ground that he did not have the opportunity to defend the proceedings.[371] Thus, a person (for example, a successor in title) connected to the defendant may be bound in these circumstances even if he was unaware of the proceedings.

Arts 34(3) and (4), and their predecessors in the Brussels Convention[372], directly address the question of the irreconcilability of the legal consequences of judgments[373], although the precise role to be played by the preclusive effects of two judgments in assessing their "irreconcilability" for these purposes is not clear.[374] Art 34(3) and its predecessor have been relied on in very few reported English cases, as follows:

1. In *Macaulay v Macaulay*[375], a case closely resembling *Hoffmann v Krieg*, an interim maintenance award granted by the Irish courts was held to be irreconcilable with a later English divorce decree. In a later case involving almost identical facts[376], the Judge held that the Irish order remained enforceable with respect to arrears accruing up to the date of the final English decree, adding that (if he had not been bound by the decision in *Macaulay*) he would have held that the Irish order would remain enforceable up to the time of payment of the lump sum award made in connection with the English divorce proceedings.[377]

2. In *Berkeley Administration Inc v McClelland (1994)*[378], 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. The appeal was argued, and judgment given, on an expedited basis[379], and the Court's reasoning is unfortunately not as clear as it might otherwise have been. In the course of his judgment, Dillon LJ referred specifically to Art 27(3) of the Brussels Convention (now Art 34(3) of the Judgments Regulation).[380] In the following paragraphs[381], he concluded that the French proceedings giving rise to judgment involved the "same parties" and the "same cause of action" as the English proceedings on the cross-undertaking. This line of reasoning appears to have been linked to the his Lordship's view as to the effect of the Convention in terms of supporting preclusive effects, and not to the possible application of Art 27(3) (which, if applied, would have produced the opposite result, ie non-recognition of the French judgment).[382] The former aspect of the judgment will be explored in further detail below.[383] For the time being, it suffices to note that the majority (Dillon LJ and Stuart-Smith LJ) does not appear to have been alerter to the possibility that the French judgment might be refused recognition under Art 27(3) on the ground that it was irreconcilable with judgments given and orders made by the English courts at an earlier stage of the proceedings. In a dissenting judgment, Hobhouse LJ was

---

[370] Alternatively, the judgment may be argued to infringe the director's rights under ECHR, Art 6(1) and justify refusal to enforce on public policy grounds under Art 34(1) of the Judgments Regulation (*Krombach v Bamberski* (Case C-7/98) [2000] ECR I-1935).

[371] For the position of third parties, see Layton & Mercer, n 323 above, para 24.030, referring to the decision of the ECJ in *Deutsche Genossenschafts Bank v SA Brasserie du Pêcheur* (Case 148/84) [1985] ECR 1981. For the view that third parties bound by the judgment may rely on Art 34(2), see Halsbury's Laws of England (online), vol 8(3), para 191, fn 7.

[372] Arts 27(3) and (5).

[373] *Hoffman v Krieg*, n 366 above, para 22.

[374] In *Italian Leather SpA v WECO Polstermöbel GmbH & Co* (Case C-80/00) [2002] ECR I-4995, the ECJ's assessment of "irreconcilability" appears to have been an impressionistic one, putting to one side questions as to the preclusive effects of judgments under national law.

[375] [1991] 1 WLR 179 (Fam Div).

[376] *R v West London Magistrates Court, ex p Emmett* [1993] 2 FLR 663 (Ward J).

[377] The comment seems, however, difficult to square with *Hoffmann v Krieg* itself.

[378] [1995] ILPr 201.

[379] Note the concerns expressed in this regard by Dillon LJ (ibid, at [2]) and Hobhouse LJ (ibid, at [55]).

[380] Ibid, at [28]. Stuart-Smith LJ agreed with Dillon LJ as to the result, but did not refer to the Convention. Hobhouse LJ dissented.

[381] Ibid, at [29]-[33].

[382] Note, however, that Lawrence Collins LJ in *Kolden Holdings Ltd v Rodette Commerce Ltd* [2008] EWCA Civ 1468, at [79] treated Dillon LJ's reasoning as concerning Art 27(3). The decision of the Court of Appeal in *Kolden* is examined at III.B.6 below

[383] See III.A.4 and III.B.1 below.

alive to this point[384], but preferred to base his reasoning on the ground that the French court had not determined the relevant issue.

3. In *Tavoulearas v Tsavliris*, discussed above[385], one of the objections taken by the English claimant to the recognition of the Greek default judgment was that it was founded on an assumption by the Greek court of jurisdiction[386] which was irreconcilable with an earlier judgment of the English Court of Appeal which had concluded that the English Court was first seised for the purposes of the Judgment Regulation. That argument was neatly side-stepped by the Judge who pointed out that none of the parties had drawn the Greek court's attention to the Court of Appeal judgment, so it had not considered whether it was first seised. Accordingly, there could be no question of any irreconcilability in the judgments.

In *Landhurst Leasing v Marcq*[387], the Court of Appeal held that Art 27(3) of the Brussels Convention did not justify a refusal to recognise a Contracting State judgment solely on the ground that there were proceedings pending before the English Court which might lead to an irreconcilable judgment.

There appears to be no reported English case which considers the application of Art 34(4) or its predecessor Art 27(5) of the Brussels Convention, in which recognition or enforcement of a Contracting/Member State judgment has been denied on the ground of its irreconcilability with an earlier judgment of a non-Contracting/Member State or another Contracting/Member State involving the same parties and the same cause of action.

It is debatable whether the Judgments Regulation, in particular, allows a Member State court to raise an objection to the recognition of a judgment of its own motion.[388] As a matter of practice, however, the way in which English adversarial system operates may make this debate an academic one in this jurisdiction. 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.[389] 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.[390] 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.

4. Effects of recognition

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

Summary:

The little discussion there has been by English Courts on the meaning and effect of recognition has been inconsistent and inconclusive. In *Berkeley Administration Inc v. McClelland,* Dillon LJ held that certain preclusive effects flowed from the fact of recognition under the Brussels Convention, so long as the "same cause of action" and the "same parties" within the meaning supplied by the ECJ in *Gubisch v. Palumbo* were involved. Hobhouse LJ in contrast recognised both cause of action and issue estoppel operating separately from recognition, and his reasoning seemed to suggest English law should determine when either of these preclusive effects were engaged.

Subsequent judgments have done little to clarify the issue and a range of views have been expressed by commentators in this field. Dicey, Morris and Collins argue that a judgment recognized under the Brussels Regime must be given the same preclusive effect as in the state of origin. By contrast Kaye suggests that the effect of a recognized judgment is to be determined by the laws applicable under general rules of private international law.

---

[384] Ibid, at [64], [89].
[385] See text to nn 357-358.
[386] See Judgments Regulation, Art 26(1).
[387] Discussed at text to n 340 above.
[388] Magnus & Mankowski, n 345 above, pp 560-562.
[389] See, for example, the criticism by the Privy Council of the Jersey Court of Appeal in *President of the State of Equatorial Guinea and Another v Royal Bank of Scotland International* [2006] UKPC 7, at [13]-[14].
[390] See the "disquiet" expressed by the Privy Council about the nature of the claims advanced by the claimant State in the *Equatorial Guinea* case, ibid, which undoubtedly influenced the submissions made to the English Court of Appeal in later proceedings (*Mbasogo v Logo Ltd* [2006] EWCA Civ 1370; [2007] QB 846). See also the pro-active interventions of both the Court of Appeal in the case of the "notorious, self-confessed traitor" George Blake (*Attorney-General v Blake* [2001] 1 AC 268, at 276-277 (Lord Nicholls, HL)).

Similarly, Briggs considers the preclusive effects of judgments as flowing from the application of English law principles. Finally Barnett concludes that recognition of a judgment under the Brussels Regime imports the claim preclusive effects of the state of origin though probably not any issue preclusive or wider preclusive effect.

Full Response:

There has been very little discussion by the English courts of the meaning and effect of "recognition" within the Brussels/Lugano Regime. Such discussion as there has been is inconsistent and inconclusive.

In *Berkeley Administration Inc v McClelland (1994)*[391], Dillon LJ drew inspiration from the decision of the ECJ in *Gubisch v Palumbo*[392] in concluding that recognition under Art 26 of the Brussels Convention carried with it certain preclusive effects, provided that the proceedings involved the "same cause of action" and the "same parties" within the meanings attributed to those terms in *Gubisch.* He commented:[393]

> "Recognition as I see it must mean recognition as having conclusive effect. Furthermore, where under Article 21 the proceedings are between the same parties and involve the same cause of action and the same subject matter, a judgment must in my judgment be binding under [Article[394]] 26 between all those parties."

His Lordship's conclusion in the case was that, as the proceedings leading to the French judgment did involve the "same parties" and the "same cause of action" as the pending English proceedings, the defendants were "precluded by *issue estoppel* in the context of Article 26 from maintaining to the full the case that has been put forward".[395]

In contrast, Hobhouse LJ in his dissenting judgment noted that "recognition … includes recognition for the purposes of cause of action estoppel and issue estoppel"[396], but the following parts of his judgment are consistent only with a view that English law (and not Art 26 or the law of the country from which the judgment originated) should supply the conditions for creation of the estoppel by record.[397] The third judge, Stuart-Smith LJ, agreed with Dillon LJ as to the result, but he made no reference to the Convention and his reasoning suggests an English law approach to the existence of issue estoppel. Both parties sought, and were refused, permission to appeal to the House of Lords.

In the following year, the same case returned to the Court of Appeal on a different, but related, point. That decision focussed on the "abuse of process" doctrine, and is addressed below.[398] Nevertheless, Scott VC, with whom the other members of the Court agreed, refused to attribute an "issue estoppel" effect to a point which (in his view) had not been determined by the judgment sought to be recognised. He concluded:[399]

> "To suggest that Article 26 demands that a non-finding be treated as creating an issue estoppel is, to my mind … wholly unacceptable. There is no European law authority that supports the argument, and commonsense seems to me to be offended by it. … [T]here is nothing in the passage that I have read from the Tribunal de Commerce judgment that barred [the Judge], *whether under Article 26 or under common law issue estoppel*, from holding …"

The italicised words suggest a reluctance on Scott VC's part to re-visit the issue as to the effect of recognition within the Brussels/Lugano Regime, or to endorse the view of Dillon LJ.[400] It is also perhaps notable that *Hoffmann v Krieg*, the most important decision of the ECJ in this area, was mentioned in neither case. In that case, the ECJ (referring to the Jenard Report[401]) stated:[402]

---

[391] See text to n 381 above.
[392] *Gubisch Maschinenfabrik KG v Palumbo* (Case 144/86) [1987] ECR 4861.
[393] [1994] I L Pr 201, at [28].
[394] The report refers here to "Order", which is assumed to be a typographical error.
[395] [1994] I L Pr 201, at [40]. The use in combination of Art 26 with the "issue estoppel" terminology of English law is puzzling, as these arguments had been relied on by the claimants in the alternative and Dillon LJ (in contrast to Hobhouse LJ – see the immediately following text) did not refer to English case law principles governing "issue estoppel".
[396] Ibid, at [75].
[397] Ibid, esp at [77], referring to *Carl Zeiss Stiftung v Rayner & Keeler Ltd*, n 251 above, a case concerning the issue preclusive effects of a foreign judgment at common law.
[398] See text to nn 527-531.
[399] [1996] I L Pr 772 (Scott VC).
[400] One writer suggests, it is submitted wrongly, that this passage supports the view that "The inference is clear. Article 26 is confined to recognition. Further effects in estoppel are for the recognition-State's law" (see P Kaye (ed), *European Case Law on the Judgments Convention* (1998), p 354).
[401] OJ C59, 42-43 [5.3.1979].

> "In that regard it should be recalled that 'the Convention seeks to facilitate as far as possible the free movement of judgments and should be interpreted in this spirit'. Recognition must therefore 'have the result of conferring on judgments the authority and effectiveness accorded to them in the state in which they were given.
>
> [A] foreign judgment which has been recognized by virtue of Article 26 *[of the Brussels Convention]* must in principle have the same effects in the State in which enforcement is sought as it does in the State in which the judgment is given."

Although the Court's language in *Hoffmann v Krieg* is not emphatic[403], and the context in which the statement was made provides further reason for caution, one would perhaps have expected a closer analysis of the ECJ's reasoning in this case to have been undertaken by the English court at some point since the Brussels Convention came into force in 1987. As appears in the following sections of this Part, several later English decision have addressed the consequences of recognition of a Contracting/Member State judgment under the Brussels/Lugano Regime in particular circumstances. None of them, however, has attempted to revisit the broader question as to the meaning and effect of "recognition" in Art 33 of the Judgments Regulation and Art 26 of the Brussels and Lugano Conventions.[404] The field has, thus, been largely left to the writers of legal texts who have expressed a range of views on the subject as follows:

1. Dicey, Morris and Collins (the leading English practitioners' work on private international law) suggests, with reference to *Hoffmann v Krieg*, that "a foreign judgment which is to be recognised under Art 33 must in principle has the same effect in the Regulation State in which recognition is sought as it does in the Regulation State in which it is given", adding that "[n]either the Regulation, nor the Conventions or their Official Reports, give an answer to the difficult question of the scope of the estoppel which arises when the foreign judgment dismisses a case on grounds which are regarded in some countries as procedural and in others as substantive".[405]
2. By way of contrast, another author argues in an entirely different direction, as follows:[406]

   > "[T]he procedures for recognition laid down in Article 26 [of the Brussels Convention] are limited to precisely that issue: recognition of the judgment.
   >
   > As will have been gathered, it is the present submission that the actual effects of recognition of a foreign judgment lie outside the Convention's sphere and within that of applicable national laws.
   >
   > …
   >
   > A careful distinction must accordingly be drawn between, on the one hand, the matter of the entitlement to recognition of a judgment of a foreign Contracting State's courts by English courts, which question lies within the Convention's sphere, and, on the other hand, the issue of the effects of recognition of such a judgment by the English courts or at least of its entitlement thereto, which is an issue beyond the Convention's scope and therefore subject to laws applicable under general rules of private international law."

3. Professor Briggs, a recognised expert on the Brussels/Lugano Regime, is also less receptive to the arguments founded on *Hoffmann v Krieg*. As far as re-litigation of claims is concerned, he appears to favour the view that the claim preclusive effects of Member State judgments flow not from the mere fact of their recognition but from the English law "principles of merger, res judicata, estoppel, or the like".[407] In relation to issue preclusive effects, he is more forceful in this view, commenting:[408]

---

[402] (Case 146/86) [1988] ECR 645, paras 10-11.
[403] Note, in particular, the words "in principle" in para 11. For the argument that the reference in that para to "enforcement" supports a further restriction to "enforceable" judgments, see P Barnett *Res Judicata, Estoppel and Foreign Judgments* (2001), para 7.59.
[404] The concept of "recognition" was touched on by the Court of Appeal in *Prudential Assurance Co Ltd v Prudential Insurance Co* [2003] EWCA Civ 327; [2003] 1 WLR 2295, at [47]-[48] (Chadwick LJ), but not decided. In the event, the Court refused to recognise a decision of the French Cour d'Appel in circumstances where that would have the effect of determining a matter with respect to which the English Court had exclusive jurisdiction under the Brussels/Lugano Regime.
[405] *Dicey, Morris & Collins*, n 137 above, para 14-225.
[406] P Kaye, n 347 above, pp 1385, 1403.
[407] Briggs & Rees, n 372 above, para 7.18.
[408] Ibid, para 7.19.

> "As far as European law is concerned, Article 33 appears to oblige a court to recognise judgments and orders. It does not, in terms at least oblige a court to give any or any particular effect to statements or reasons mentioned in the judgment. 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 legal 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 for European law, be entitled to be recognised."

In Professor Briggs' view, the issue preclusive effects in England of a Member State judgment must be determined by reference to the English law principle of issue estoppel (see II.B.1-5 above).

4. In contrast, the authors of another well-regarded commentary on the Regulation refer with approval to the passage of the Jenard Report cited in *Hoffmann v Krieg*[409] to support their analysis as follows:[410]

> "First, recognition involves equating the authoritative nature of a foreign judgment with a judgment delivered in the state addressed: the authority of the judgment. Secondly, it involves an extension of the effects of the foreign judgment into the legal order of the other contracting states: the effectiveness of the judgment. These two characteristics overlap, but it may be helpful to consider them separately."

In principle, the authors seem willing to accept that "the authority of decisions on questions of fact and of substantive law is extended into the legal order of the other Brussels-Lugano State", embracing questions of *res judicata*.[411] They recognise, that difficult questions may arise where a judgment has a greater or lesser effect in the Member State in which recognition is sought than the State where it was given[412], but conclude that only in exceptional cases should a judgment be deprived of its full effect or given a greater effect in the Member State in which recognition is sought than in the Member State of origin.[413]

5. In the most detailed English treatment of the subject, and the preclusive effects of foreign judgments in general, Dr Peter Barnett observes that:[414]

> "It would seem that no provision in the Convention directly and expressly addresses the problem of whether recognition entails equalising or extending the preclusive effects of the judgment[415] let alone how an English court verifies the res judicata status of the Convention judgment in order to attribute preclusive effect in subsequent proceedings in England especially (as to the latter) given that: jurisdictional review is prohibited, it matters not that the judgment is final and conclusive, and no account is made of the requirement that the judgment be on the merits."

Dr Barnett's subsequent analysis of the case law of the ECJ and the English courts, and comparison with the position in the United States under the "full faith and credit" clause leads him to conclude that (a) "recognition" of a Contracting/Member State judgment under the Brussels/Lugano Regime probably (i) imports the claim preclusive effects of the Contracting/Member State of origin, in terms of preventing contradiction of a claim already determined[416], (b) a judgment which is "enforceable" under the Brussels/Lugano Regime carries with it an autonomous preclusive effect insofar as re-assertion of the same cause of action between the same parties is

---

[409] See text to n 405 above.
[410] Layton & Mercer, n 323 above, para 24.006.
[411] Ibid, para 24.007. See also the example given at para 24.008, emphasising the need to examine with care the basis on which the dismissal was ordered.
[412] Ibid, para 24.009.
[413] Ibid, para 24.010.
[414] P Barnett, n 406, para 7.51.
[415] By "equalisation of effects", Professor Barnett contemplates that a Regulation judgment will have the same preclusive effects in another Member State as a corresponding judgment of a court of the receiving Member State. By "extension of effects", Professor Barnett contemplates that a Member State judgment "by reason of the principle of automatic recognition under Article 26" must be accepted by the receiving Member State as having the same preclusive effects as it had in the state in which it was delivered (see ibid, paras 7.09-7.10).
[416] Ibid, paras 7.58-7.68. In other words, Judgments Regulation, Art 33 and its predecessor contain an implied rule of applicable law applying the law of the Member State of origin to the claim preclusive effects of judgments.

concerned[417], and (c) "recognition" probably does not, however, carry with it any issue preclusive or wider preclusive effects, which will depend for their existence on the law of the receiving Member State.[418]

In the absence of further guidance from the ECJ in this area, it remains to be seen in what direction the English courts will move. As will be seen, and subject to one or two notable exceptions, the English courts have hitherto largely approached the question of the effects of recognition of judgments under the Brussels/Lugano Regime on an impressionistic basis, without recourse either to English law or to the law of the Member State of origin of the judgment. Although the ECJ's comments in *Hoffmann v Krieg*[419] appear strongly supportive of the view that it is the latter law which is paramount, at least insofar as claim preclusive effects are concerned, the keen debate among writers has yet to be carried over into the decisions of the English courts.

B. 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?

Summary:

Recognized judgments may have claim preclusive effects. Two distinct situations should be distinguished.

First an English Court would, applying the ECJ's decision in *De Wolf v. Cox*, probably rule that where a party has obtained a judgment enforceable under the Brussels Regime, he cannot bring proceedings in another Member State with the same cause of action and parties as led to the judgment already obtained.

Second it is clear that Member State judgments can preclude parties from re-litigating claims which have already been determined. The controversy exists over the basis upon which and the law by reference to which the claim preclusive effects of a judgment are to be determined. On balance, the better view may be that recognition of a Member State judgment imports with it the claim preclusive effects of that judgment under the Member State's law. This view seems to have the implicit support of the decisions in *The Tsakemolen (No.2) Air Foyle Ltd v. Center Capital.* In contrast Dillon LJ in *Berkelely Administration* (see above) seemed to advocate an autonomous regime by which to determine claim preclusive effects.

Full Response:

Judgments recognised under the Brussels/Lugano Regime may, without doubt, have claim preclusive effects[420] under English law. Two situations must be distinguished.

First, there is little doubt that the English courts would, in a suitable case[421], apply the decision of the ECJ in *De Wolf v Cox*[422] in concluding that, if a party has obtained a judgment which is enforceable under the Brussels/Lugano Regime, he cannot bring proceedings in another Member State involving the same cause of action and the same parties as the proceedings which led to the judgment. Thus, "[t]he judgment creditor cannot bring an action on the original cause of action. Nor, it seems, can he proceed by way of enforcement at common law".[423] In this connection, it seems correct to assert that:[424]

> "[*De Wolf v Cox*] seems to be based on the principle that the procedures of the Brussels-Lugano regime should not be abused, rather than on any notion that the cause of action merged in the original judgment."

The ECJ's decision in *De Wolf* is, in substantial part, mirrored in the provisions of s 34 of the UK Civil Jurisdiction and Judgments Act 1982, which provides:

---

[417] Ibid, paras 7.69-7.74 founded on the ECJ's decision in *De Wolf v Cox* (Case 42/76) [1976] ECR 1759 (as to which, see text to nn 424-430 below).
[418] Ibid, paras 7.75-7.93 (issue preclusion), 7.94-7.102 (abuse of process).
[419] See text to n 405 above.
[420] For the meaning of this term, see II.B.1 above.
[421] There appears to be no English reported decision directly applying *De Wolf v Cox*.
[422] See n 420 above.
[423] *Dicey, Morris & Collins*, n 137 above, para 14-222.
[424] Layton & Mercer, n 323 above, para 24.042.

> "No 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 …"

In the context of the Brussels/Lugano Regime, s 34 seems redundant.[425] Even if English law could successfully be argued to apply to the claim preclusive effects of a Contracting/Member State judgment[426], s 34 would in large part duplicate the rule in *De Wolf* and, to the extent that it has any wider effect, it could be argued to undermine the effectiveness of the rules of jurisdiction within the Brussels/Lugano Regime.

It has also been suggested that the decision in *De Wolf v Cox* might be extended to prevent re-assertion of a cause of action in circumstances in which the entitlement to enforcement of a judgment has not yet been established.[427]

Secondly, there is no doubt that a Contracting/Member 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. The judgment of Dillon LJ in *Berkeley Administration Inc v McClelland (1994)*, discussed in the preceding section[428], provides some support for the view that Art 33 of the Judgment Regulation and its predecessor support 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.[429] His Lordship appears to have been inspired by the statement of the ECJ in *Gubisch v Palumbo* that:[430]

> "[I]t would be incompatible with the meaning of Art 26 et seq *[of the Brussels Convention]* to accept the admissibility of an application concerning the same subject matter and brought between the same parties as an application on which judgment has already been delivered by a court in another Contracting State."

Against this view:

1. The passage from *Gubisch* just quoted must be understood in light of the ECJ's preceding reference to *De Wolf v Cox*, which (as noted above) concerns the effect of the enforcement processes in the Brussels/Lugano Regime in excluding the person entitled to the benefit of the judgment from advancing his claim otherwise than by enforcement of a judgment. It should not be seen, therefore, as laying down a wider scheme regulating claim preclusive effects of Contracting/Member State judgments on an autonomous basis.
2. The view taken by Dillon LJ, if accepted, would be capable of giving to a Contracting/Member State judgment an effect which is greater or narrower than it would have in its State of origin, contrary to principle suggested by the ECJ in *Hoffmann v Krieg*.[431]
3. The concepts of "same parties" and "same cause of action" are an inadequate substitute for rules of claim preclusion of the kind which all Contracting/Member States adopt in one form or another.[432] In particular, a decision to reject a claim on jurisdictional, procedural or technical grounds seem no less capable of satisfying those conditions, but 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.[433]
4. 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.[434] Nor has Dillon LJ's view been adopted by any court since.

---

[425] P Barnett, n 406 above, para 7.69 (fn 137). For a different view, that s 34 and not *De Wolf v Cox* should control re-litigation of claims already determined by a Contracting/Member State judgment, see P Kaye, n 347 above, pp 1365-1366.
[426] See III.A.4 above.
[427] Layton & Mercer, n 323 above, para 24.008 (fn 56), para 24.042 (fn 95).
[428] See III.A.4 above.
[429] See further III.B.5-6 below.
[430] [1987] ECR 4861, para 9.
[431] See text to n 405 above.
[432] See P Barnett in the passage quoted at text to n 417 above.
[433] See the example given by Layton & Mercer, n 323 above, para 24.008. *Dicey, Morris & Collins*, in the passage quoted at text to n 408 above, seem more hesitant.
[434] Dillon LJ also referred, in the final paragraph of his judgment to "issue estoppel", but in a way which is difficult to understand (see n 398 above).

As noted above[435], English legal texts tend (albeit not unanimously) to favour the view that "recognition" under the Brussels/Lugano Regime carries with it the claim preclusive effects which a judgment has under the law of its Contracting/Member State of origin. This seems the better view, in accordance with the reasoning of the ECJ in *Hoffmann v Krieg*[436], and is implicitly (if not expressly) supported by two later decisions of the English courts. In *The Tsaskemolen (No 2)*[437], 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.[438] In *Air Foyle Ltd v Center Capital*[439], 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.[440] 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*.

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?

Summary:

The underlying policy considerations appear under whichever view of claim preclusion is taken to be the overriding effect of EC law and the objective of free movement of judgments within the EU.

Full Response:

If the English courts were either (a) to adopt the reasoning of Dillon LJ in *Berkeley Administration v McClelland (1994)*[441], thereby creating an autonomous system of claim preclusion within the Brussels/Lugano Regime, or (b) to take the view that "recognition" of a judgment under the Brussels/Lugano Regime imports the claim preclusive effects of the Contracting/Member State of origin, that conclusion would require no further justification other than the current overriding effect of EC law within the English legal system[442] and the objective of the free movement of judgments within the EC which underlies the Judgments Regulation and its predecessor Conventions.[443] Further, as the ECJ has recognised the "principle of *res judicata*" as being an important one within the EC legal framework:[444]

> "[A]ttention 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 decisions which have become definitive after all rights of appeal have been exhausted[445] or the expiry of the time-limits provided for in that connection can no longer be called into question."

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

---

[435] See III.A.4 above.
[436] See text to n 405 above.
[437] [1997] 2 Lloyd's Rep 476 (Clarke J).
[438] Ibid, at 478-479.
[439] [2003] 2 Lloyd's Rep 753.
[440] Ibid, at [19], [45].
[441] Discussed at III.A.4 and III.B.1 above.
[442] European Communities Act 1972, s 2.
[443] Judgments Regulation, Recital (6).
[444] *Kapferer v Schlank & Schick GmbH* (Case C-234/04) [2006] ECR I-2585, para 20.
[445] Note that this is not a requirement for "estoppel by record" under English law (see text to n 191 above).

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?

This question has been addressed at III.B.1 above. The better view is that the English courts will apply the rules of claim preclusion of the Contracting/Member State of origin of a judgment.

4. Conditions for claim preclusive effects

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

Summary:

Taking the above view, the conditions for claim preclusive effect must be taken from the law of the judgment's state of origin. On the view of Dillon LJ in *Berkeley Administration*, by contrast, a judgment's preclusive effects will depend on the second action being between "the same parties" and the "same cause of action", using those terms as defined by the ECJ. Alternatively claim preclusive effects could be determined by reference to English Law principles, subject to some slight modifications.

Full Response:

On the view taken above[446], the conditions for the claim preclusive effects of a judgment under the Brussels/Lugano Regime must be taken from the law of the Contracting/Member State from which the judgment originates. On the alternative view, which appears to have been put forward by Dillon LJ in *Berkeley Administration Inc v McClelland (1994)*[447], a Contracting/Member State judgment should be given an (autonomous) conclusive effect in later proceedings between the "same parties" and involving the "same cause of action" as the proceedings giving rise to the judgment., adopting the meaning given to those terms in the *lis alibi pendens* provisions of the Brussels/Lugano regime.

If, on the other hand and contrary to both the view taken above and the alternative view of Dillon LJ, English law applies, the conditions would likely reflect those for the claim preclusive effects of foreign judgments generally, which, in turn, largely correspond to those which govern the claim preclusive effects of English judgments[448], save that:

1. The competence of the court giving judgment must be assessed in accordance with the requirements of English private international law, and not local law. Generally, for actions *in personam*, English private international law requires one of the following conditions to be satisfied: (a) that the person to whom the judgment is addressed was present in the territory over which the foreign court has jurisdiction at the time the proceedings were instituted, (b) that person was claimant, or counterclaimed, in the proceedings in the foreign court, (c) that person, as a defendant, submitted to the jurisdiction of the court by voluntarily appearing in the proceedings, or (d) that person agreed, in respect of the subject matter of proceedings, to submit to the jurisdiction of that court or of the courts of that country.[449] With reference to the Brussels/Lugano Regime, however, it seems extremely doubtful whether any review of the jurisdiction of the Contracting/Member State court giving judgment would be permitted outside the framework established by Judgments Regulation, Art 35 and Brussels/Lugano Conventions, Art 28 even if the claim preclusive effects of a judgment were held to fall outside the concept of "recognition" for these purposes. Such a review may not only infringe the principle of mutual trust between Member States which governs the application of the provisions of the Judgments Regulation and the Brussels Convention[450], but may also be argued to constitute indirect discrimination on grounds of nationality contrary to EC law.

---

[446] See III.B.1.
[447] See III.A.4 and III.B.1 above.
[448] See, generally, P Barnett, n 406 above, ch 4. For the conditions underlying the claim preclusive effects of judgments under English law, see II.B.1-5 above.
[449] *Dicey, Morris & Collins,* n 137 above, rule 36 and commentary.
[450] *Opinion 01/03 on the Lugano Convention* [2006] ECR I-1145, para 163; *Turner v Grovit* (Case C-159/02) [2004] ECR I-3565, para 72 (both ECJ).

2. Whether a judgment is "final and conclusive" must be determined by reference to the law of the country of origin of the judgment, rather than English law.[451]

3. The doctrine of merger, discussed at II.B.1-5 above, does not extend to foreign judgments.[452] Instead, a statutory rule, in the form of s 34 of the Civil Jurisdiction and Judgments Act 1982 creates a procedural bar to re-litigation of causes of action which have been determined in the claimant's favour by a judgment obtained outside England and Wales. As noted above[453], s 34 seems redundant in the case of judgments enforceable under the Brussels/Lugano Regime, in light of the ECJ's judgment in *De Wolf v Cox*.

4. Under s 3 of the Foreign Limitation Periods Act 1984, the determination of a matter wholly or partly by reference to the law concerning limitation of actions shall, to the extent that it has done so, be deemed to have determined the matter "on the merits" for the purposes of the law relating to the effect to be given to it in England and Wales.

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?

Summary:

The phrase “same cause of action” is used in both Art 21 and Art 34(2) of the Brussels Regulation, though English Courts have largely considered the concept in the former context. The key decision of the ECJ on Art 27, *The Tatry* followed a reference by the English court provided that the term “same cause of action” must be read to include the concept of both “same object” and “same cause of action” and that an action *in personam* brought by the shipowner and an action *in rem* against the shop may have the same cause of action. The ECJ also provided that a claim for damages and a declaration of non-liability may also on the facts be the same cause of action.. The concept of “same cause of action” is therefore given an independent autonomous meaning and differs fundamentally from when it is used in English law.

Full Response:

The single phrase "same cause of action" is used in the English language versions of the Brussels/Lugano instruments to signify situations in which there is considered to be an identity of claims. It is used in both (a) the first of the so called rules of *lis alibi pendens* (Judgments Regulation, Art 27 / Brussels/Lugano Conventions, Art 21), and (b) the exception to recognition/enforcement of Contracting/Member State judgments in the case of irreconcilability with a judgment from a non-Contracting/Member State or, in the case of the Judgments Regulation, another Member State (Judgments Regulation, Art 34(2) / Brussels/Lugano Conventions, Art 27(5)). To date, the English courts have largely considered the concept in the former context.[454]

At the outset, it may be noted that *The Tatry*[455], the most detailed and arguably the most important decision of the ECJ concerning the scope and effect of Art 21 of the Brussels Convention, was decided on a reference from the English Court of Appeal. Certain of the issues in that case concerned the meaning of the concept of "same parties" and will be considered in the following section. So far as the concept of "same cause of action" was concerned, *The Tatry* confirmed that (a) although the English language version of Art 21 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[456], (b) an action seeking to establish the liability of a party for loss caused has the same cause of action as an action by that party for a declaration that he is not liable for that loss[457] even if the two actions involved separate contracts in identical terms[458], and (c) an action *in personam* brought by a shipowner may have the same cause of action as an action *in rem* against a ship arising from the same incident,

---

[451] *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)*, n 251 above.
[452] See P Barnett, n 406 above, paras 4.28-4.77; *The Indian Grace*, n 136 above; *The Indian Grace (No 2)*, n 207 above (both HL); *Black v Yates* [1992] 1 QB 526 (Potter J).
[453] See text to nn 428-429 above.
[454] See, however, *Berkeley Administration Inc v McClelland* (1994), discussed at nn 394-402 above, in which Dillon LJ appeared to use the concept as part of an autonomous test governing the preclusive effects of judgments under the Brussels Convention.
[455] (Case C-406/92) [1994] ECR I-5439.
[456] Ibid, para 38 referring to *Gubisch Maschinenfabrik v Palumbo*, n 395 above, para 14.
[457] Ibid, para 45.
[458] Ibid, para 40.

where that action had (through the appearance of the shipowner) been continued solely *in personam* or both *in personam* and *in rem*.[459] These points had previously been addressed by the English Courts on more than one occasion.[460]

The English Courts had also been troubled by the question determined (negatively) by the ECJ in the *Mærsk* case[461], as to whether proceedings by a shipowner to establish a liability limitation fund involved the same cause of action as a claim by a victim of the incident in question to establish the liability of the shipowner.[462]

Prior to the decision in *The Tatry*, the English Courts had also held (for example) that (a) two negligence actions arising from the same incident involved the same cause of action even though the parties were reversed, so that the claimant in one action was the defendant in the other[463], (b) English proceedings for infringement of a trade mark and passing off in England did not involve the same cause of action as Irish proceedings alleging acts in Ireland facilitating breach by a third party of the same trade mark[464], (c) proceedings involving a related series of contracts involved the same cause of action only to the extent that the contracts relied on were the same, and not otherwise,[465] (d) an application for interim freezing relief in England did not involve the same cause of action as a substantive claim in France against the same defendant[466], and (e) an English contract action did not involve the same cause of action as Spanish executory proceedings on the same contract.[467]

Following the decision in *The Tatry*, the English Courts have held (for example) that (a) Spanish proceedings claiming unpaid sums on certain share transactions carried out by the defendant's subsidiaries for which the defendant was said to be responsible did not involve the same cause of action as English proceedings claiming damages for negligent misrepresentations said to have induced the wider transaction between the parties[468], (b) English proceedings initiated by a party seeking the determination of competing claims over property did not involve the same cause of action as French proceedings by one of the persons interested in that property seeking to establish the liability of the interpleading party[469], (c) a civil claim for the recovery of allegedly misappropriated money brought in the courts of Greek civil proceedings did not involve the same cause of action as English proceedings seeking to trace the money into other assets[470], and (d) proceedings in Germany challenging the validity of contractual provisions by reference to mandatory rules of German law involved the same cause of action as English proceedings seeking to uphold the validity of the same clauses based on English law (German law having no claim to apply under English rules of applicable law).[471]

In the last of these cases, Cooke J summarised the approach of the English Courts to Art 21 as follows:[472]

> "39. The term 'cause of action' in Article 27 is an independent autonomous term which is not to be confused with the use of the same term in English legal jargon. As pointed out in Case C-406/92 *The Tatry* [1994] ECR I-05439 at paragraph 38 and by Rix J in *Glencore International AG v Shell International Trading and*

---

[459] Ibid, para 46. The alternative formulation in the question put to the ECJ by the English Court of Appeal reflected a continuing debate as to whether, following release of the arrested vessel, the proceedings should be characterised solely as *in personam* proceedings (see *The Maciej Rataj* [1992] 2 Lloyd's Rep 552, at 561 (Neill LJ)).

[460] As to (a), see, eg, *Assurances Générales de France IART v The Chiyoda Fire and Marine Co (UK) Ltd* [1992] 1 Lloyd's Rep 325 (Judge Diamond QC). As to (b), see *AGF v Chiyoda*, ibid; *Kinnear v Falcoln Films* [1994] ILPr 731 (Phillips J); *The Filiatra Legacy* [1994] 1 Lloyd's Rep 513 (Saville J). As to (c), see *The Nordglimt* [1988] 1 QB 183 (Hobhouse J); *The Linda* [1988] 1 Lloyd's Rep 175 (Sheen J); *The Kherson* [1992] 2 Lloyd's Rep 261 (Sheen J).

[461] *Mærsk Olie & Gas A/S v Firma M de Haan en W de Boer* (Case C-39/02) [2004] ECR I-9657.

[462] *The Falstria* [1988] 1 Lloyd's Rep 495 (Sheen J); *The Happy Fellow* [1998] 1 Lloyd's Rep 13 (CA).

[463] *The Linda*, n 463 above.

[464] *La Gear Incorporated v Gerald Whelan & Sons Limited* [1991] FSR 670 (Mummery J). See also *Mecklermedia Corp v DC Congress GmbH* [1998] 1 All ER 148 (Jacob J).

[465] *Kloeckner & Co AG v Gatoil Overseas Inc* [1990] 1 Lloyd's Rep 177 (Hirst J).

[466] *Republic of Haiti v Duvalier* [1990] 1 QB 202, at 211-212 (Staughton LJ, CA). See also *Winter Maritime Ltd v North End Oil Ltd* [2000] 2 Lloyd's Rep 298 (Thomas J); *Miles Platt Ltd v Townroe* [2003] EWCA Civ 145.

[467] *Gamlestaden plc v Casa de Suecia SA* [1994] 1 Lloyd's Rep 433 (Potter J).

[468] *Sarrio SA v Kuwait Investment Authority* [1997] 1 Lloyd's Rep 113 (CA).

[469] *Glencore International AG v Shell International Trading & Shipping Co Ltd* [1999] 2 Lloyd's Rep 692 (Rix J). Compare the earlier decision in *Glencore International AG v Metro Trading International Inc* [1992] 2 Lloyd's Rep 632 (Moore-Bick J).

[470] *Haji-Ioannou v Frangos* [1999] 2 Lloyd's Rep 337 (CA).

[471] *J P Morgan Europe Ltd v Primacom AG* [2005] EWHC 508 (Comm); [2005] 2 Lloyd's Rep 665 (Cooke J). Claims for injunctive and other relief in England based on other provisions of the same contract were held not to involve the same cause of action as the German proceedings.

[472] Ibid, at [39]-[40].

Shipping Co Limited [1999] 2 Lloyds Reports 692 at page 694, the French and other versions of article 27 refer not simply to 'the same cause of action' but to two concepts - *'la meme objet et la meme cause*'. The latter 'comprises the facts and the rule of law relied on as the basis of the action' whilst the former means 'the end the action has in view' according to paragraphs 39 and 41 of the *Tatry* decision and as reinforced by the Court of Appeal in *Haji Ioannou v Frangos* [1999] 2 Lloyds Reports 337 at page 351.

40. Rix J in the *Glencore* decision stated that the court's task in identifying the *objet* of any action was to identify objectively the essential issue raised between the parties to that action."

He continued:[473]

"45. Fundamentally, it is the rights and obligations of the parties in relation to the same facts which, in my judgment, matters here. Each court will be concerned with the respective rights and obligations of the parties, however those are classified and determined by the national courts of each country. I consider therefore that, notwithstanding the different approach to the question of enforceability of the interest provisions and the consequent effect, the Declaratory Proceedings and the Mainz proceedings do involve the same cause of action within the meaning of article 27.

46. If I had applied the test set out in Briggs and Rees, *Civil Jurisdiction and Judgments* at paragraph 2.189[474], I would have come to a different conclusion, because it is there suggested that another way of determining this point is to ask whether a decision in one set of proceedings would be a conclusive answer to the questions raised in the other. …

47. It appears to me however that this is too narrow an approach, since otherwise it would be possible to argue that Article 27 did not apply to proceedings where a national court's decision, based on the application of its domestic law (which it found to be applicable under its rules of private international law) did not answer the question determinable by a different national court under its own law (which it regarded as applicable under its own rules of private international law). The way the claim is framed and the arguments in support of it may fall to be taken into account, but ultimately, the question must be seen broadly in terms of the judgment sought and not in terms of the issues raised on the way (see *The Happy Fellow* [1998] 1 Lloyd's Reports 12 at pp 17-18 and, by way of example, *The Sennar no 2* [1985] 1 Lloyd's Reports 521)."

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?

Summary:

Like “same cause of action”, the term “same parties” appears in multiple articles of the Brussels Regulation, and again Courts have mainly considered it in the context of Art 27 on *lis alibi pendens*. Generally Courts have taken a broad approach to the concept, looking to the substance of the situation (e.g. *Re Cover Europe Ltd*). Lawrence Collins LJ, in his recent decision in *Kolden Holdings Ltd v. Rodette Commerce Ltd* stressed that the term “same parties” has an independent autonomous meaning and that Court must look to the substance of the matter; thus though parties must be “identical” that identity is not destroyed by the mere fact of there being separate legal entities involved. A key consideration is whether two parties have identical and indissociable interests. Finally Lawrence Collins LJ stressed that a decision against one party must be *res judicata* as against the other (applying English law to determine this issue).

Full Response:

Like the phrase "same cause of action", the phrase "same parties" appears in both (a) the first of the so called rules of *lis alibi pendens* (Judgments Regulation, Art 27 / Brussels/Lugano Conventions, Art 21), and (b) the exception to recognition/enforcement of Contracting/Member State judgments in the case of irreconcilability with a judgment from a non-Contracting/Member State or, in the case of the Judgments Regulation, another Member State (Judgments Regulation, Art 34(4) / Brussels/Lugano Conventions, Art 27(5), as well as in (c) the exception to recognition/enforcement of Contracting/Member State judgments in the case of irreconcilability with a judgment of

[473] Ibid, at [45]-[47].
[474] This is a reference to the 3rd edition. Professor Briggs maintains the same view in the 4th edition of his work, n 372 above, para 2.199, referring to *JP Morgan v Primacom* at fn 1076 and 1089.

the Member State in which recognition/enforcement is sought (Judgments Regulation, Art 34(3) / Brussels/Lugano Convention, Art 27(3)).

The English courts have mainly considered this concept in the context of the *lis alibi pendens* rules.[475] Prior to decision in *The Tatry*, several English decisions addressed the points determined there by the ECJ, ie (a) whether Art 21 fell to be applied to the extent that two sets of proceedings involved the same parties even if not all the parties were the same[476], and (b) whether and, if so, to what extent an action *in personam* brought by a shipowner involves the same parties as an action *in rem* against a ship arising from the same incident.[477]

In other cases, both before and after *The Tatry*, the English Courts appeared to take a broad view of the concept of "same parties" looking to the substance of the matter rather than the formal title of the action. In *Berkeley Administration Inc v McClelland (1994)*[478], Dillon LJ considered that sufficient identity existed, in the particular circumstances of the case, between a parent company and its subsidiary incorporated for a particular purpose to enable them to be treated as the "same party".[479] In *Kinnear v Falconfilms*[480], Phillips J held that the personal representative of deceased who had brought proceedings in England was the "same party" as the heirs of deceased against whom a claim seeking to establish non-liability of the English defendants had been brought in Spain. In *Re Cover Europe Ltd*[481], a company and its liquidator were held to be the "same party". There were, however, limits to this generous approach: in *Mecklermedia Corp v DC Congress GmbH*[482], a licensee bringing proceedings in Germany was held not to be the "same party" as his licensor who brought proceedings against the same defendant in England.

The case law of the English courts and the ECJ[483] was recently considered at length by Lawrence Collins LJ in *Kolden Holdings Ltd v Rodette Commerce Ltd.*[484] In deciding that the assignee of a claim was the "same party" as the assignors, with the consequence that it could be said that the English court was "seised" of proceedings on the date on which they were originally brought by the assignors, Lawrence Collins LJ reasoned as follows:[485]

> "The starting point is that these general propositions can be derived from *The Tatry* and *Drouot*. First, the object of Article 27 is to prevent parallel proceedings in different Member States and to avoid conflicts between decisions and irreconcilable judgments: *The Tatry*, para 32; *Drouot*, para 17. Second, the term between 'the same parties' has an independent or autonomous meaning: *The Tatry*, para 47. Third, in considering whether two entities are the 'same party' for the purposes of applying the regulation, the court looks to the substance, and not the form: *The Tatry*. Fourth, although the parties must be 'identical' (T*he Tatry,* para 33; *Drouot*, para 18), this identity is not destroyed by the mere fact of there being separate legal entities involved: in The *Tatry* in the English proceedings the party was the sister-ship, and in the Dutch proceedings was the shipowner; in *Drouot* the barge owner and the hull insurer were held to be capable of being the 'same parties.' Fifth, whether they are identical for this purpose may depend on whether there is such a degree of identity between the interests of the entities that a judgment given against one of them would have the force of res judicata as against the other (*Drouot*, para 19). Sixth, it will also depend on whether the interests of the entities are identical and indissociable, and it is for the national court to ascertain whether this is in fact the case: *Drouot*, para 23. In the context of a subrogated claim the Court also emphasised that the insured would not be in a position to influence the proceedings: *Drouot*, para 19."

---

[475] See, however, *Berkeley Administration Inc v McClelland* (1994), discussed at nn 394-402 above, in which Dillon LJ appeared to use the concept as part of an autonomous test governing the preclusive effects of judgments under the Brussels Convention.
[476] [1994] ECR I-5439, para 36. See, eg, *Grupo Torras SA v Al Sabah* [1995] 1 Lloyd's Rep 374 (Mance J) reversed by the Court of Appeal following *The Tatry* ([1996] 1 Lloyd's Rep 7).
[477] Ibid, para 48. See, eg, *The Nordglimt*, *The Linda* and *The Kherson*, n 463 above. See also *The Deichland* [1990] 1 QB 361 (CA).
[478] See text to nn 394-402 above.
[479] See also *Turner v Grovit* [2000] 1 QB 345, at 363-364 (Laws LJ, CA).
[480] [1996] 1 WLR 920.
[481] [2002] EWHC 1861 (Leslie Kosmin QC).
[482] See n 467 above.
[483] In particular, *The Tatry*, n 458 above and *Drouot Assurance SA v Consolidated Metallurgical Industries* (Case C-351/96) [1998] ECR I-3075. For the view that the reasoning in *Drouot* may be capable of being applied in determining the preclusive effects of judgments under the Brussels/Lugano Regime, see K R Handley, "Res judicata in the European Court" (2000) 116 LQR 191.
[484] [2008] EWCA Civ 10
[485] Ibid, at [85].

Turning to the specific question raised for decision in *Kolden*, his Lordship made the following points:[486]

> "First, as I have said, the parties must be 'identical' (*The Tatry*, para 33; *Drouot*, para 18), but this does not mean that two separate legal entities cannot be 'identical' for this purpose, as is shown by the rulings in those cases.
>
> Second, a decision against one must be res *judicata* as against the other. In English law *res judicata* estoppels operate for or against not only the parties, but those who are privy to them in interest, and privies include any person who is identified in estate or interest, and accordingly "assignees will be bound as privies of the assignor" …[487]
>
> Third, their interests must be 'identical' and 'indissociable.' The word 'indissociable' is very rarely used in English legal parlance except where it has been used to translate the same French word in judgments of the European Court of Justice and the European Court of Human Rights, and acts of the European institutions. …[488]
>
> ..
>
> Fourth, in *Drouot* (para 19) the European Court mentioned, in the context of subrogation, the fact that the insured could not influence the proceedings. I accept Kolden's answer to the point made by the appellants that the original claimants could influence proceedings involving assignees, because they could seek to be added to the claim, e.g. in response to the appellants' contention that the Assignment is invalid. The answer is that the question of 'the same parties' is to be determined by looking at the claims, and not at the subsequent defences.
>
> This approach is supported by the European Court's decision on a similar question in relation to 'the same cause of action' in Article 27. For the purposes of Article 27, the question whether the 'same cause of action' is raised before the courts of two Member States is answered by looking at the claims made, and not at the defences raised at a later stage to those claims: Case C-11/01 *Gantner Electronic GmbH v Basch Exploitatie Maatschappij* [2003] ECR I-4207, para 30 …"

The recognition by Lawrence Collins LJ of a specific requirement that the decision against one party *must* be *res judicata* against the other, and the application of English law to determine whether that requirement is satisfied (conclusions which, it is submitted, do not necessarily follow from the ECJ's reasoning in *Drouot*), are of particular interest in the present context.

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.

Summary:

Since the judgment must be recognized by the English Court, the usual manner is for the issue of recognition to be raised in a Party's statement of case, though exceptionally Art 33(2) might be used.

Full Response:

As a pre-requisite to the claim preclusive effects of a judgment under the Brussels/Lugano Regime, the judgment must first be recognised by the English court. Normally, the issue of recognition and of claim preclusion will be raised by a party in his statement of case in support of or in opposition to a claim brought by him in England[489], or in support of an application to strike-out[490], or to obtain summary judgment[491], on the claim (or part of the claim) on the basis that it discloses no reasonable grounds for bringing the claim or has no reasonable prospect of success. More rarely, a party seeking to establish or refute recognition of a judgment under the Brussels/Lugano Regime may

[486] Ibid, at 88], [90], [92]-[93].
[487] The authorities referred to by his Lordship include the judgment of Megarry VC in *Gleeson v Wippell*, a case discussed at text to nn 249-253 above.
[488] His Lordship here referred to case law in tax and human rights cases.
[489] See III.A.2 above
[490] CPR, r 3.4.
[491] CPR, Part 24.

apply separately for recognition or non-recognition of the judgment[492] (in the former case, under Art 33(2) of the Judgments Regulation / Art 26(2) of the Brussels/Lugano Conventions; in the latter case, by a claim for declaratory relief) and then seek to deploy the declaration of recognition/non-recognition to support, defend or oppose English proceedings.

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.

Summary:

On the view taken above, English Courts could rely on any exception recognised in the law of the judgment's state of origin. It is unclear what the position is where national exceptions overlap with exceptions provided in the Brussels Regime on non-recognition. In the alternative, following Dillon LJ's view only the exceptions recognized in the Brussels Regulation would be operative.

Full Response:

On the view taken above[493], an English court would, in principle, be entitled to follow any exceptions to the claim preclusive effects of a judgment recognised by the law of the Contracting/Member State from which the judgment originates. More difficult questions will arise if those exceptions overlap with the grounds for non-recognition of a judgment under the Brussels/Lugano Regime or involve a review of the substance of the judgment, in apparent contradiction of the prohibition in Judgments Regulation, Art 36 / Brussels/Lugano Conventions, Art 29. In these circumstances, it is unclear whether these provisions of the Brussels/Lugano Regime will have an overriding effect so as to exclude certain arguments which could be advanced to oppose the preclusive effects of a judgment in its Contracting/Member State of origin. Similar issues would arise if, contrary to the view taken above, English law were to apply the claim preclusive effects of a judgment in England under the Brussels/Lugano Regime.[494]

On the alternative view, apparently put forward by Dillon LJ in *Berkeley Administration Inc v McClelland (1994)*[495], it seems likely that the only exceptions to the claim preclusive effects of judgments under the Brussels/Lugano Regime would be the permissible objections to recognition contained in Judgments Regulation, Arts 34-35 / Brussels/Lugano Conventions, Arts 27-28).

9. Persons affected by claim preclusive effects

To which persons or categories of persons do the claim preclusive effects of judgments recognised in accordance with the Brussels/Lugano Regime extend?

Summary:

Again on the view taken above, the persons covered by the preclusive effect of a judgment must be determined by reference to the law of the state of the judgment's origin. If Dillon LJ's view applies then preclusive effects cover the "same parties", as that phrase has been interpreted by the ECJ in the Brussels Regime context.

Full Response:

On the view taken above[496], the persons or categories of persons to whom the claim preclusive effects of a judgment recognised under the Brussels/Lugano Regime would extend must be determined by reference to the law of the Contracting/Member State from which the judgment originates. If, on the other hand, English law applies to the claim preclusive effects of such a judgment, the English rules (focussing on the concepts of "parties" and "privies")

[492] Ibid.
[493] See III.B.1.
[494] For the exceptions under English law to the claim preclusive effects of judgments, see II.A.5 above.
[495] See text to nn 394-402 above.
[496] See III.B.1.

will apply instead.[497] Finally, if (as Dillon LJ appears to have suggested in *Berkeley Administration Inc v McClelland (1994)*) the Brussels/Lugano Regime prescribes an autonomous regime of claim preclusive effects, judgments will have conclusive effect in later proceedings between the "same parties", within the meaning given to that term in the *lis alibi pendens* provisions of the Regulation and the Conventions.[498]

C. 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?

Summary:

Judgments recognized under the Brussels Regime may have issue preclusive effects. However the legal basis for these effects is unclear. The limited judicial practice on the point suggests that English Courts either approach the issue on the basis of English rules of issue estoppel (e.g. *Berkeley Administration Inc v McClelland* per Hobhouse LJ and Stuart Smith LJ) or as matter of impression as to what points were in fact decided in the Court of the Member State. There are equally widespread views amongst commentators on the issue and as such the position cannot be conclusively stated.

Full Response:

Again, there is no doubt that a judgment recognised under the Brussels/Lugano Regime may have issue preclusive effects[499] under English law. The difficulty lies in identifying the precise legal basis for those effects.

In principle, unless one accepts the view[500] that autonomous rules for claim preclusion are to be found in the concepts of "same parties" and "same cause of action" in the *lis alibi pendens* rules of the Brussels/Lugano Regime, there seems no reason why (outside the relatively narrow limits of the principle established by the ECJ in *De Wolf v Cox*) the same solution should not be deployed for both claim preclusion and issue preclusion. After all, (a) these are not terms of art used in the Judgments Regulation or the Brussels/Lugano Convention, and (b) it seems clear that some Member States adopt separate rules of issue preclusion, whereas others do not, preferring (in some cases) to rely on a more generous scope of claim preclusive effects.[501] Whatever solution is adopted, separation of "claim preclusive rules" and "issue preclusive rules" would be likely to involve very difficult issues of characterisation. Further, if (in accordance with the view taken above[502]) the preferred solution for the claim preclusive effects of a judgment involves applying the rules of the Contracting/Member State of origin, the failure to treat issue preclusive effects in the same way is likely distort the authority and/or effectiveness of the judgment in such a way as to undermine the principle stated by the ECJ in *Hoffmann v Krieg*.[503]

Nevertheless, it cannot be said with any certainty whether the English courts will consider the issue preclusive effects of judgments recognised under the Brussels/Lugano Regime on the same basis as their claim preclusive effects (see III.B above). Such limited evidence of judicial practice as is available suggests that the English courts will approach such issues of claim preclusion either (a) on the basis of English law rules of issue estoppel[504], or (b) as a matter of impression as to what points were, in fact, determined by the Contracting/Member State court.[505] Very limited support for the view that the law of the Contracting/Member State of origin should be applied may be

[497] See II.A.9-10 above.
[498] See III.B.6 above.
[499] For the meaning of this term, see II.C.1.
[500] See III.B.1 above.
[501] P Barnett, n 406 above, para 7.85.
[502] See III.B.1 above.
[503] See text to n 405 above.
[504] This seems to have been the view of two members of the Court of Appeal (Hobhouse LJ, in his dissenting judgment, and Stuart-Smith LJ) in *Berkeley Administration Inc v McClelland (1994)* (see text to n 437 above).
[505] See *Berkeley Administration Inc v McClelland (1996)*, n 402 above, at [42] (Scott VC).

derived from the following passage of the judgment of Saville LJ (with whom the other members of the Court of Appeal agreed) in *Boss Group Ltd v Boss France SA*:[506]

> "Finally, the defendants submitted that the plaintiffs were estopped from contending that the place of performance was other than in France by the decision of the Paris Court of Appeal. In my view this argument is quite unsustainable. It is clear from the material before us that the views of that court were expressed in the context of the provisional proceedings and are in no way binding *in France* on any court that might deal there with the matter on a substantive basis. To my mind it follows that the requirement of finality is absent, so that no question of estoppel can arise."

It is unclear, however, what submissions or evidence had been put to the Court on this point. The earlier decisions of the Court of Appeal in its 1994 and 1996 decisions in *Berkeley Administration v McClelland* do not appear to have been cited in argument.

As noted above, there is also greater disparity in approach between the English legal texts as to the treatment of matters of issue preclusion. In particular, Professor Briggs argues strongly that English law, and English law alone, should apply[507], and he is supported in this conclusion by Dr Barnett.[508] The editors of Dicey, Morris & Collins seem, albeit hesitatingly, to favour application of the law of the Contracting/Member State of origin[509], an approach also strongly favoured by the editors of Layton & Mercer.[510] As in the case of questions of claim preclusion (see III.B.1), this latter solution seems preferable, not least in that it avoids problems of characterisation in distinguishing between claim preclusive and issue preclusive effects.

The autonomous solution which appears to have been advanced by Dillon LJ in *Berkeley Administration Inc v McClelland (1994)*[511] seems unsuited to apply to questions of issue preclusion, as the approach taken by the ECJ to the concept of a "cause of action" for this purpose[512] does not contemplate sub-dividing each "cause of action" into individual issues of fact and law which must necessarily be determined by the court. Although Dillon LJ used the term "issue estoppel" in the final paragraph of his judgment, his choice of terminology may be questioned.[513]

2. Policies underlying issue preclusive effects

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

See III.B.2 above.

3. Law applicable to issue preclusive effects

Does your legal system consider that issue 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 issue preclusive effects of the judgment; (3) the conclusion that the Recognized judgment is recognised for these purposes applied in conjunction with the rules of your legal system concerning the issue 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 issue preclusive effects of an equivalent judgment of a non-Member/Contracting State; or (5) other reasoning?

See III.C.1 above.

---

[506] [1997] 1 WLR 351, at 359 (emphasis added), referred to by the editors of *Dicey, Morris & Collins* (alongside *Hoffmann v Krieg*) in a footnote to the passage quoted at text to n 408 above.
[507] See text to n 411 above.
[508] See text to n 421 above.
[509] See text to n 408 above, in a chapter for which Professor Briggs is named as the responsible editor.
[510] See text to nn 413-416 above.
[511] See III.A.4 and III.B.1 above.
[512] See, in particular, *The Tatry*, n 458 above, paras 37-45.
[513] See n 398 above.

4. Conditions for issue preclusive effects

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

Summary:

See III.B.4. Further, English Courts are liable to very cautious in accepting that a particular issue has already been determined by a foreign judgment.

Full Response:

See, generally, III.B.4 above.[514] Whichever approach is adopted in determining the issue preclusive effects of a judgment recognised under the Brussels/Lugano Regime, there is reason to believe that the English courts will, in practice, approach with caution any submission to the effect that a particular issue has been conclusively determined.[515] In *Carl Zeiss Stiftung v Rayner & Keeler (No 2)*, a case pre-dating the UK's accession to the Brussels Convention which concerned a German judgment said to give rise to an issue estoppel, Lord Reid gave the following reasons for that cautious approach:[516]

> "I can see no reason in principle why we should deny the possibility of issue estoppel based on a foreign judgment, but there appear to me to be at least three reasons for being cautious in any particular case. In the first place, we are not familiar with modes of procedure in many foreign countries, and it may not be easy to be sure that a particular issue has been decided or that its decision was a basis of the foreign judgment and not merely collateral or obiter. Secondly, I have already alluded to the practical difficulties of a defendant in deciding whether, even in this country, he should incur the trouble and expense of deploying his full case in a trivial case: it might be most unjust to hold that a litigant here should be estopped from putting forward his case because it was impracticable for him to do so in an earlier case of a trivial character abroad, with the result that the decision in that case went against him. … These two reasons do not apply in the present case. … But the third reason for caution does raise a difficult problem with which I must now deal.
>
> When we come to issue estoppel I think that, by parity of reasoning, we should have to be satisfied that the issues in question cannot be relitigated in the foreign country. …
>
> The need to prove whether West German law would permit these issues to be re-opened there appears to have escaped the notice of the appellants' advisers and your Lordships are left in considerable difficulty. On the one hand, there is always a presumption that the foreign law on any particular question is the same as English law unless the contrary is proved. On the other hand, it would be remarkable if German law had reached precisely the same stage of development on issue estoppel as the law of England has, and there are some indications in the German judgments that it has not. I have had an opportunity of reading the views of my noble and learned friend, Lord Wilberforce, on this matter. I do not dissent from them. But I must rest my judgment that there is here no res judicata or estoppel on there being no sufficient identity of parties in the West German proceedings and in the matter now before your Lordships."

There is, however, no doubt that an English court will be willing to conclude that, in an appropriate case, that a foreign judgment may have issue preclusive effects.[517]

5. Invoking issue preclusive effects

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

See III.B.5 above.

---

[514] For the conditions underlying the issue preclusive effects of judgments under English law, see II.B.3 above. For discussion of issue preclusion in relation to foreign judgments generally, see P Barnett, n 406 above, ch 5.
[515] See Briggs & Rees, n 372 above, p 517.
[516] [1967] 1 AC 853, at 918 (Lord Reid), also at 926 (Lord Hodson), 938 (Lord Guest), 949 (Lord Upjohn), 967 (Lord Wilberforce). See P Barnett, n 406 above, paras 5.17-5.20.
[517] See eg *Andre & Cie SA v Euro Asian Investment Corp* (2001) unreported, 2 February (Morison J); *Leibinger v Stryker Trauma GmbH* [2006] EWHC 690 (Comm) (Cooke J).

6. Exceptions to issue preclusive effects

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

See III.B.8 above.[518]

7. Persons affected by issue preclusive effects

To which persons or categories of persons do the issue preclusive effects of judgments recognised in accordance with the Brussels/Lugano Regime extend?

See III.B.9 above.

D. 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?

Summary:

It is assumed that there is no difference between foreign judgments and English judgment as regards wider preclusive effects, save perhaps if a Member State were to attribute, inherent to the judgment, wider preclusive effects under its law. In that case there might be an argument that this effect should be imported as part of the process of recognition. This possibility aside, it is suggested that English Courts simply apply the broad merits based approach adopted in *Johnson v. Gore Wood* to determine if there has been an abuse of process having regard to the circumstances surrounding the earlier action, whether in England or abroad.

Full Response:

Subject to one qualification, discussed below, there is no reason to believe that the position is any different than for English judgments (see II.D.1 above). Thus, the position appears to be that (a) a judgment recognised under the Brussels/Lugano Convention does not, in its own right, have any wider preclusive effects[519] under English law, and (b) such a judgment may nevertheless form part of the analysis which enables an English court to conclude that, *as a matter of English law*, pending English proceedings involve an "abuse of process" and ought to be dismissed.

In *The Tsaskemolen (No 2)*, a case referred to above on the question of claim preclusive effects[520], the shipowner also argued that the second arrest of the vessel in England constituted an "abuse of process" in light of the earlier arrest and release by order of the Dutch court of the vessel in The Netherlands. That argument was rejected, in light of a detailed appraisal of the parties' conduct including in relation to the Dutch proceedings[521], but on the basis of English law principles which focussed on the question whether the conduct of the arresting party was "vexatious or oppressive.[522] In particular, Clarke J noted:[523]

> "There has been some discussion between the experts on Dutch law as to whether it would now be possible to arrest the vessel again in Holland. It may well be that it would not, but the question is whether it would not be oppressive or vexatious to allow the security obtained as a result of the plaintiff's arrest in England to stand."

[518] For the exceptions to the issue preclusive effects of judgments under English law, see II.B.5 above.
[519] For the meaning of this term, see II.C.1 above.
[520] See text to n 440.
[521] [1997] 2 Lloyd's Rep 476, at 482-484
[522] Ibid, at 479-481.
[523] Ibid, at 483.

Two other decisions, although not directly in point, are perhaps worth noting. In *Berkeley Administration Inc v McClelland (1996)*[524], the Court was required to consider an application by the claimants to stay[525] other parts of the defendants' application for damages under the claimants' cross-undertaking[526], relying on Arts 21 and 26 of the Brussels Convention.[527] The defendants responded by asserting that the stay application had been raised too late and was an "abuse of process". Scott VC, giving the leading judgment, concluded that the English doctrine of "abuse of process", originating in the 1843 decision of Wigram VC in *Henderson v Henderson*[528], was "entirely consistent" with the Brussels Convention and did not render the exercise of rights conferred by the Brussels Convention and, in particular, Arts 21 and 26 either impossible or excessively difficult to exercise. The Judge's decision to strike out the claimants' stay application on the "abuse of process" ground was upheld. That conclusion relied exclusively, however, on an analysis of the claimants' conduct in failing to take these particular Convention points at an earlier stage in the English proceedings and not on any conduct in relation to the French proceedings.

In *Fennoscandia Ltd v Clarke*[529], the defendant argued that a claim brought in English proceedings should have been advanced in earlier proceedings between the same parties in Delaware. The defendant relied on the rule of Delaware law corresponding to the English *Henderson v Henderson* "abuse of process doctrine", which (it was accepted) was less flexible and, therefore, more favourable to the defendant.[530] The Court of Appeal, while accepting the defendant's submission that the claims could and should have been brought in Delaware and that English claim should not be allowed to proceed, relied exclusively on English law principles of "abuse of process".[531]

Dr Barnett, having addressed the question as to how the English doctrine of "abuse of process" might apply to a judgment recognised under the Brussels/Lugano Regime, concludes:[532]

> "There are obviously some complicated issues, but the general point – it is suggested – is clear, namely: that it will not so much be the Convention judgment (or, indeed, any foreign judgment) which directs the operation of the abuse of process doctrine, although fidelity to the *Henderson* rule requires that an assessment be made by reference to the degree of relevance of the subject-matter before the English court to the subject matter of the foreign judgment. Rather the discretion lies in the court – and, thus, necessarily the English court. …
>
> Nonetheless, an assessment as to whether a similar rule operates in the rendering court may be prudent given that Article 22 of the Conventions *[Article 28 of the Judgments Regulation]* may reveal a policy that is similar to that served by the Henderson rule."

Rather than focussing on whether the Contracting/Member State of origin has an "abuse of process" rule similar to that recognised under English law, or on a possible analogy with Art 22, it would seem better to focus on whether, in light of the procedural rules for raising claims or defences in the foreign court and other relevant considerations (eg costs), the claimant or defendant's conduct in raising a claim or issues for the first time in the English proceedings constitutes an "abuse of process" in the broad, merits-focussed sense described by the House of Lords in *Johnson v Gore-Wood*.[533]

Thus, the English "abuse of process" doctrine is not concerned with the "authority" or "effectiveness" of judgments in any meaningful sense, and there seems no reason why that doctrine should not be applied by an English court against the background of earlier proceedings before another Contracting/Member State, which may or may not have resulted in a judgment. Equally, there seems no reason why another Contracting/Member State court should be obliged to conclude that local proceedings must be dismissed on the ground of "abuse of process" against the background of an earlier English judgment simply because an English court would have taken that view if the second set of proceedings had been brought in England.[534]

---

[524] See n 401 above.
[525] Thereby, effectively bringing a halt to the proceedings.
[526] For a description of the earlier 1994 proceedings, see text to n 381 above.
[527] See now Judgments Regulation, Arts 27 and 33.
[528] For more detailed discussion of the doctrine, see II.C above.
[529] [1999] 1 All ER (Comm) 365 (CA).
[530] Ibid, at 372-373 (Kennedy LJ).
[531] Ibid, at 373-374 (Kennedy LJ), 375-375 (Sir Iain Glidewell).
[532] P Barnett, n 406 above, pp 289-290, referring to an article by Professor Briggs (1997) 68 BYBIL 339, 340-341 linking the approach taken by the House of Lords to Art 22 of the Brussels Convention in *Sarrio SA v Kuwait Investment Authority* [1999] 1 AC 32 to the *Henderson v Henderson* doctrine.
[533] See II.C.1 above.
[534] This seems entirely consistent with the reasoning of the ECJ in *Turner v Grovit* (Case C-159/02) [2004] ECR I-3565, para 28.

If, however, a Contracting/Member State were to attribute any wider preclusive effect to a judgment which could truly be said to be inherent in the authority or effectiveness of the judgment under the law of that Member State, it may be argued that such effect should be carried over, and given effect to, on recognition of the Brussels/Lugano Regime, on the same basis as for claim preclusive effects and issue preclusive effects.[535] It remains to be seen whether this point is of more than theoretical interest.

2. Policies underlying wider preclusive effects

What are the policy considerations for the wider preclusive effect of judgments in your legal system derived from the Brussels/Lugano Regime?

See II.C.2 and III.B.2 above.

3. The law applicable to wider preclusive effects

Does your legal system consider that wider claim and issue preclusive effects of a judgment recognised under the Brussels/Lugano Regime follow from (1) the conclusion that the Recognized 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 Recognized Judgment is recognised for these purposes applied in conjunction with the rules of the State of Origin concerning the effects of the Judgment; (3) the conclusion that the Recognized Judgment is recognised for these purposes applied in conjunction with the rules of your legal system concerning the effects of an equivalent local judgment; (4) the conclusion that the Recognized Judgment is recognised for these purposes applied in conjunction with the rules of your legal system concerning the effect of an equivalent judgment of a non-Member/Contracting State; or (5) other reasoning.

See III.D.1 above.

4. Conditions for wider preclusive effects

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

See II.C.1 above.

5. Invoking wider preclusive effects

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

See II.C.4 above.

6. Exceptions to wider preclusive effects

Please verify whether the wider preclusive effects of judgments recognised under the Brussels/Lugano Regime are subject to generally accepted exceptions.

See II.C.1 above.

7. Persons affected by wider preclusive effects

To which persons or categories of persons do the wider preclusive effects of judgments recognised in accordance with the Brussels/Lugano Regime extend?

See II.C.1 above.

[535] See III.B.1 and III.C.1.

E. Authentic instruments/court approved settlements

Do the preclusive effects described in Part III.B. to Part III.D above (or similar effects) extend to authentic instruments and court (approved) settlements within the meaning of Articles 57 to 58 of the Brussels Regulation (Articles 50 and 51 of the Brussels/Lugano Conventions)?

Summary:

The Brussels Regime does not seem to require the imposition of preclusive effects upon authentic instruments or court approved settlements.

Full Response:

There appears to be no requirement under Judgments Regulation, Arts 57-58, or Brussels/Lugano Conventions, Arts 50-51, that the preclusive effects described in Part III.B or C above should be extended to authentic instruments and court approved settlements. Those Articles deal only with *enforcement* of these instruments and settlements. A distinction must, here, be drawn between a court approved settlement, which does not constitute a "judgment" for the purposes of the Brussels/Lugano Regime, and a consent judgment, which (at least in the view of the English courts[536]) does.

There seems no reason why an authentic instrument or court approved settlement entered into in another Contracting/Member State may not form part of the background against which an English court may be asked to rule that English proceedings should be dismissed on the ground that they constitute an "abuse of process".

[536] *Landhurst Leasing v Marcq*, discussed at text to nn 340-343 above.

IV. Preclusive effects of third state judgments

This Part concerns the preclusive effects of "third state judgments", i.e. judgments from a State which is neither a EU Member State nor a Contracting State to the Lugano Convention. It has been included not only for the purposes of comparison with the domestic and Brussels/Lugano Regimes (as well as the rules in force in the United States of America, which is not a party to the Brussels or Lugano Conventions), but also so that the end product of the Project does not exclude completely this important aspect of the study of the cross-border effects of judgments. It is concerned mainly with the generally applicable rules of your legal system for the recognition of foreign judgments outside the Brussels/Lugano regimes, and not with special regimes applicable, by virtue of international treaty or otherwise, to judgments in specific subject areas or from particular foreign jurisdictions (save insofar as such regimes cast light on the general practice in your system). If third state judgments have preclusive effects in your legal system, both as a matter of general law and by virtue of international convention, please focus on the former rules, giving examples from international conventions only where necessary to highlight significant differences in treaty practice from that pertaining under the general law.

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

Summary:

Third state judgments may be recognized outside the Brussels Regime either by common law principles or depending on the State by certain statutes. The doctrine of merger does not apply in this context, rather s.34 of the Civil Jurisdiction and Judgments Act 1982 lays down a procedural bar. Recognition at common law of a third state judgment requires that the Court rendering the judgment was competent to do so and gave a final and conclusive decision on the merits. That the decision is contrary to public policy, or was obtained by fraud or in a manner contrary to natural justice or is irreconcilable with an earlier validly recognized decision are all grounds to refuse recognition. To establish issue or cause of action preclusion, after the judgment has been recognized, a party must show that the there is again the same parties with the same cause of action/same issue between them.

Full Response:

Third state judgments may be recognised under English law both in accordance with common law rules and, for judgments of certain states, by statute.[537]

Some of the principal differences between the rules and practices applied by English courts in relation to the preclusive effects of third country judgments and those applied in relation to the preclusive effects of English judgments have already been considered in Part III above (see, in particular, III.B.4 and III.C.4 above). Perhaps most significantly, the doctrine of merger by which an English judgment supersedes the cause of action on which it was founded does not apply to foreign judgments. Instead, s 34 of the Civil Jurisdiction and Judgments Act 1982[538] lays down a procedural bar.

At common law, a foreign judgment given by a court of a foreign country recognised as being competent to do so under the rules of English private international law[539] which is final and conclusive and on the merits[540] is entitled to recognition and may be relied on in proceedings in England[541], unless:

1. It is impeachable for fraud.[542]
2. Its recognition would be contrary to public policy.[543]

---

[537] See, in particular, Foreign Judgments (Reciprocal Enforcement) Act 1933, s 8.
[538] See text to n 428 above.
[539] See III.B.4 above.
[540] See *The Sennar (No 2)* [1985] 1 WLR 490 (HL) (decision on jurisdiction); *Desert Sun Loan Corp v Hill* [1996] 2 All ER 847 (CA) (decision on procedural issue).
[541] *Dicey, Morris & Collins*, n 137 above, rule 35(2).
[542] Ibid, rule 43.
[543] Ibid, rule 44.

3. The proceedings in which the judgment was obtained were opposed to natural justice.[544]
4. Recognition is prohibited by statute.[545]
5. It is inconsistent with an earlier judgment or a court in England or of another court of competent jurisdiction which is entitled to recognition in England.[546]

It has been noted that there is a close link between these conditions for recognition and the basic conditions for the claim and issue preclusive effects of a judgment under English law.[547] In order to establish a "cause of action estoppel" or "issue estoppel", the party invoking the foreign judgment must also show that the foreign judgment determined the same cause of action/the same issue between the same parties or their privies.[548] As noted above, an English court will proceed cautiously before concluding that a foreign judgment creates an issue estoppel[549], although it will uphold the estoppel if it is clearly established on the facts.[550]

[544] Ibid, rule 45.
[545] eg by an order made under the Protection of Trading Interests Act 1980.
[546] *Showlag v Mansour* [1995] 1 AC 431 (PC).
[547] See P Barnett, n 406 above, ch 2, 4, 5
[548] See II.A.3 and II.B.3 above.
[549] See III.C.4 above.
[550] See the cases referred to at n 520 above.