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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

Germany

Dr. Christian A. Heinze, LL.M. (Cantab.)
Max-Planck-Institute for Comparative and International Private Law
Mittelweg 187
D-20148 Hamburg
Germany

In the following answer, I will continuously refer to the German code of civil procedure (Zivilprozessordnung, hereinafter ZPO). The German text of the ZPO can be found on the Internet[1]. A full new official publication of the whole law was issued in 2005[2]. I have prepared a German-English synopsis of most of the relevant provisions of the ZPO which is attached as an annex to this answer (separate file germany_annex.doc).

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:

German law recognises three types of judicil decisions: Urteile (judgments), Beschlüsse (orders) and Verfügungen (procedural directions). Only Urteile and Beschlüsse can have res judicata effect.

A German judgment typically comprises five elements: A formal heading (containing docket number, name of parties, name of counsel etc..), the legal ruling ("Tenor") which constitutes the operative part of the judgment, a statement of facts (containing the claims raised, arguments of the parties and all relevant facts upon which the decision is based), the grounds for the for the decision and, at the end of the judgment, the signatures of the judges who made the ruling.

The Court is required to provide a clear, complete and comprehensive explanation for its decision. Further, there is a constitutional right to be heard, such that a Court must address essential parts of the factual allegations of one party to a question which is central to the case. Finally, an extensive obligation is imposed on German Courts to engage with the parties and provide the opportunity for both sides to supplement and amend their pleadings as appropriate given the view the Court has taken of the case.

Some terminology can be usefully identified: condemnatory judgments order a defendant to do or not do something, while constitutive judgments create, change or end legal rights or relationships and declaratory judgments pronounce the existence or non-existence of a legal relationship. All three types are capable of res judicata effect. Contradictory judgments based on contentious proceedings are contrasted with non-contradictory judgments, e.g. judgments in default, judgment by defendant's acceptance of the claim. Interlocutory judgments, which cannot have res judicata effect, must be distinguished from final judgments which can. Interlocutory judgments bind the Court that issued it and do so from the moment of being issued. In contrast final judgements can have substantive res judicata effect but will only do so once there is no further possibility of ordinary appeal. Finally judgments with reservation must be distinguished from those without. The former are incapable of substantive res judicata effect and instead have inner-procedural force.

Full response:

(1) Concept of judgment (NB 1):

German law distinguishes three forms of judicial decisions, Urteile (judgments, § 313 ZPO), Beschlüsse (orders, § 329 ZPO) and Verfügungen (procedural directions/dispositions, § 329 ZPO), see § 160 (1) No. 6 ZPO. Verfügungen are only used to direct and channel the court proceedings in an organisational manner, e.g. send the files from one institution to another, set the time for answers to pleadings or set the date and time of hearings. They can be disregarded for the purposes of this study as they do not end court proceedings and have no res judicata effect[3]. Beschlüsse, on the other hand, can have res judicata effect[4]. They are however mainly concerned with procedural matters such as costs (§ 104 ZPO), the amount in dispute (§ 62 Gerichtskostengesetz) or the execution of the judgment, whereas the decision on the substance of the claim is issued in almost all cases in the form of a judgment (Urteil). The answer shall therefore focus on the res judicata effect of judgments (Urteile). The provisions on judgments can be found in §§ 300-329 ZPO.

[1] http://bundesrecht.juris.de/bundesrecht/zpo/gesamt.pdf.
[2] Zivilprozessordnung in der Bekanntmachung vom 5. Dezember 2005, Bundesgesetzblatt I p. 3202; 2006 I p. 431; 2007 I p. 1781.
[3] Zöller(-Vollkommer), ZPO (2007)[26], § 329 No. 44 ("§ 322 ff. sind nicht anwendbar").
[4] The basic distinction between an Urteil and a Beschluss is the fact that an Urteil normally (for exceptions § 128 (2) ZPO) requires an oral hearing whereas Beschlüsse (normally) do not (§ 128 (4) ZPO).

Relevant courts in civil and commercial matters are the civil courts (Amtsgericht, Landgericht, Oberlandesgericht, Bundesgerichtshof) and the employment courts (Arbeitsgericht, Landesarbeitsgericht, Bundesarbeitsgericht). Within the Landgericht, there are specialised chambers. For disputes between commercial actors, special commercial chambers (Kammer für Handelssachen) exist within the Landgericht which are staffed by a professional judge and two lay judges drawn from the commercial environment of the litigants. The employment courts are also staffed by both professional judges and lay judges, the latter being nominated by trade unions and employer associations. The other civil courts are staffed by professional judges only. Recent reforms in German civil procedure have led to the result that most cases are tried in the first instance (also at the Landgericht) by one judge alone (§§ 348, 348a ZPO). The Oberlandesgericht normally decides in senates of three judges, the Bundesgerichtshof in senates of five.

(2) Form and structure:

The form of German judgments is addressed in § 313 ZPO, § 311 (1) ZPO and § 315 (1) ZPO (see annex of provisions). As a result of these provisions, a German judgment (Urteil, a Beschluss is subject to slight modifications[5]) usually consists of the following elements:

I) Überschrift and Rubrum, §§ 311 (1), 313 (1) No. 1-3 ZPO (heading and caption), containing the docket number, the heading "Urteil", the formula "In the name of the people", the designation of the parties, their legal representatives and legal counsel, the designation of the court, the names of the judges who participated in making the decision and the date on which the oral hearing was closed. Normally, this information is contained in one sentence:

Verkündet am 12.1.2008 Aktenzeichen: 12 O 123/07	Pronounced 12.1.2008 Docket-No.: 12 O 123/07
Urteil	Judgment
Im Namen des Volkes	In the name of the people
In dem Rechtsstreit des	In the case of
Christian Heinze, Mittelweg 187, 20148 Hamburg	Christian Heinze, Mittelweg 187, 20148 Hamburg
Prozessbevollmächtigter: Rechtsanwalt Dr. Florian Haase, Neuer Wall 37, 20148 Hamburg	Legal counsel: Rechtsanwalt Dr. Florian Haase, Neuer Wall 37, 20148 Hamburg
gegen	against
British Institute of International and Comparative Law, vertreten durch Jacob van der Velden, Russell Square 22, London CB2 1 FX	British Institute of International and Comparative Law, legally represented by Jacob van der Velden, Russell Square 22, London CB2 1 FX
Prozessbevollmächtigte: Dr. Katja Schwab, Prinzenallee 38, 22148 Dortmund	Legal counsel: Dr. Katja Schwab, Prinzenallee 38, 22148 Dortmund
hat die 7. Zivilkammer des Landgerichts Hamburg durch den Vorsitzenden Richter am Landgericht Schlau und die beisitzenden Richter Klug und Gnädig auf die am 7.10.2006 geschlossene mündliche Verhandlung für Recht erkannt:	the 7th civil chamber of the Hamburg district court has on the oral hearing closed on 7.10.2006 found through the presiding judge Schlau and the associate judges Klug and Gnädig for law:

II**)** Urteilsformel or Tenor, § 313 (1) No. 4 ZPO (operative part/dispositive of the judgment, the legal ruling). The operative part contains the decision on the claims and counterclaims as the parties have petitioned, on the costs of the proceedings according to §§ 91 seq. ZPO and on the provisional enforceability of the judgment according to §§ 708 seq. ZPO. The Tenor is essential to determine the scope of res judicata attributed to the judgment. The operative part (Tenor) follows directly the introductory sentence as cited above, i.e. after "für Recht erkannt", the text continues:

Der Beklagte wird verurteilt, an den Kläger 10.000 Euro nebst Zinsen in Höhe von 5 Prozentpunkten über dem Basiszinssatz der Deutschen Bundesbank ab dem 1.10.2007 zu zahlen.	The defendant is ordered to pay 10.000 Euro to the claimant plus interest in the amount of 5 percent points above the base lending rate of the Deutsche Bundesbank for the time beginning 1.10.2007.

[5] § 313 ZPO does not apply to a Beschluss, but Beschlüsse which affect the rights of the parties must at least contain the name of the court and the parties and the reasons for the decision, Rosenberg/Schwab/Gottwald, Zivilprozessrecht (2004)[16], § 60 No. 49.

Der Beklagte trägt die Kosten des Rechtsstreits.	The defendant bears the costs of the proceedings.
Das Urteil ist gegen Sicherheitsleistung in Höhe von 110% des jeweils zu vollstreckenden Betrages vorläufig vollstreckbar.	The judgment is provisionally enforceable against security in the amount of 110% of the enforced sum.
Or, alternatively or cumutativley (if the claim is fully or partially rejected)	
Die Klage wird abgewiesen.	The claim is rejected.
Der Kläger trägt die Kosten des Rechtsstreits.	The claimant bears the costs of the proceedings.
Das Urteil ist gegen Sicherheitsleistung in Höhe von 110% des jeweils zu vollstreckenden Betrages vorläufig vollstreckbar.	The judgment is provisionally enforceable against security in the amount of 110% of the enforced sum (*Explanation: enforceability relates to costs only*).

III) Tatbestand, § 313 (1) No. 5 ZPO (statement of facts of the judgment)

The Tatbestand (statement of facts of the judgment) follows after the Tenor. Its contents are defined by § 313 (2) ZPO, requiring that the Tatbestand (the statement of facts of the judgment) shall only point out the claims raised and the relating means of attack and defense in their main contours, highlighting the petitions/prayers for relief (Anträge) entered by the parties. For the particulars of the facts and the matters in dispute, reference shall be made to the written pleadings, the court record and other supporting documents. Due to the constitutional right to be heard (Art. 103 (1) Grundgesetz), the statement of facts of the judgment has to contain all factual details and motions forming the basis of the court decision[6].

In practice, the Tatbestand is structured as follows:

Introductory sentence, summarising the purpose of the action ("Die Parteien streiten um Schadensersatz aus einem Verkehrsunfall"),

Facts which are not disputed by the parties ("Unstreitiges"), written in present tense and simple past.

Factual allegations of the claimant which are contended by the defendant and therefore in dispute between the parties ("streitiges Klägervorbringen", normally starting with: "Der Kläger behauptet") and the claimant's legal positions (in very brief form, starting with: "Der Kläger ist der Ansicht").

Petitions or prayers for relief of the parties in which they state their demands (Anträge, e.g. payment of 10.000 Euro on the part of the claimant and dismissal of the action on the part of the defendant). The petitions are highlighted in indented text.

Factual allegations of the defendant (streitiges Beklagtenvorbringen, starting with: "Der Beklagte behauptet") which are disputed between the parties, and the defendant's legal positions ("Der Beklagte ist der Ansicht").

The procedural history of the case, written in present perfect, e.g. that the court has taken evidence on a particular point ("Das Gericht hat Beweis erhoben über die Frage").

IV) Entscheidungsgründe, § 313 (1) No. 6 ZPO (the grounds of the decision)

The Entscheidungsgründe (grounds of the decision) follow after the Tatbestand. Their contents are defined by § 313 (2) ZPO, requiring that the grounds of the decision shall contain a short summary of the considerations upon which the decision is based with regard to facts and law. In practice, the grounds are written in a particular style (Urteilsstil, judgment style) which starts by stating the result ("The claim is admissible and justified in substantive law") and explains step by step why the action is admissible (why the court has jurisdiction, why the parties have capacity to sue etc.) and why the claim is or is not or is partially justified under substantive law (because there is a contract, the contract has been breached, the damages claimed are justified etc.). Requirements which are not in dispute in the given case are not discussed in detail. The judgment shall concentrate on the points which were in factual or legal dispute between the parties. At the end of the grounds, the decisions on costs and provisional enforceability are explained (usually in a very brief manner).

V) Unterschriften der Richter, § 315 (1) ZPO (signature of the judges)

The judgment ends with the signatures of the judges who participated in it, see § 315 (1) ZPO.

[6] Koch/Diedrich, Civil Procedure in Germany (1998), No. 115.

(3) Legal provisions dealing with the drafting and reasoning in judgments (NB 2)

The drafting and the provision of reasons for judgments is governed by § 313 ZPO (see above). This rule requires a clear, comprehensible and complete explanation of the court's decision; it is not sufficient to point just to the legal texts on which the judgment is based or to replicate the texts of the relevant provisions[7]. It must be possible for the parties (with help of their lawyers) and the superior court to understand the reasons for the decision. Commentators tend to criticize German court judgments (in particular on the appellate level) rather for being too detailed and long than for being too short[8]. In fact, the reasoning in German judgments tends to be rather detailed with the judges (at least at the Oberlandesgerichte and the Bundesgerichtshof) referring to scholarly writing and/or earlier judgments of other courts[9]. § 313a and § 313b ZPO permit to drop or shorten the statement of facts and the ground of the decision in certain cases (judgment by waiver or acceptance, default judgments).

The influence of Art. 6 ECHR is noted in commentaries on the ZPO[10], but it seems to add nothing new to German procedural law because the Federal Constitutional Court (Bundesverfassungsgericht) has required in earlier jurisprudence on the German constitutional right to be heard (Art. 103 (1) Grundgesetz) that the reasons of the judgment shall address the allegations of fact and law essential both for the claim and the defence ("wesentliche, der Rechtsverfolgung und Rechtverteidigung dienende Tatsachenbehauptungen")[11]. If the court does not address essential parts of the factual allegations of one party to a question which is central to the case, it is presumed that the court did not consider these allegations in its decision and thereby violated the constitutional right to be heard (Art. 103 (1) Grundgesetz), unless the factual allegations related to a point which was legally irrelevant for the decision according to the position taken by the court[12]. It should be added that under German procedural law the court is required to discuss the factual and legal aspects of the case with the parties and their lawyers in the proceedings. The court has to work towards giving the parties the opportunity to supplement their pleadings, specify relevant evidence and enter appropriate motions (§ 139 ZPO). The parties should thus not be surprised by the judgment because the court should have discussed the relevant matters and its legal opinion with them and their lawyers in the oral hearing at the latest[13]. It may be that in reality not every German court lives up to the standards of § 139 ZPO (which was broadened in recent reform in 2002), and some judges tend to think that this is requiring too much advise to the parties, but at least the law requires a "materielle Prozessleitung" ("substantial guidance of the proceedings") by the judge.

(4) Terminology

As mentioned above, German law distinguishes between three different forms of judicial decisions, Urteile (judgments, § 313 ZPO), Beschlüsse (court orders, § 329 ZPO) and Verfügungen (court directions, § 329 ZPO), see § 160 (1) No. 6 ZPO. Verfügungen are only used to direct and channel the court proceedings in an organisational manner, e.g. send the files from one institution to another, set the time for answers to pleadings of the opposing party or set the date and time of hearings. They can be disregarded for the purposes of this study as they do not end court proceedings and have no res judicata effect[14].

Beschlüsse, on the other hand, can have res judicata effect[15]. Whether or not they have res judicata effect depends on whether their content is capable of having res judicata effect[16]. Beschlüsse are mainly concerned with procedural

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[7] Stein/Jonas(-Leipold), ZPO (1998)[21], volume 4/1, § 313 No. 61.

[8] See Baumbach/Lauterbach/Albers/Hartmann, ZPO (2007)[65], § 313 No. 32-34 who resent that German judges tend not to make use of the possibility to draft shorter judgments and tend to give too many quotations and write legal opinions rather than judgments.

[9] Koch/Diedrich, Civil Procedure in Germany (1998), No. 115.

[10] Baumbach/Lauterbach/Albers/Hartmann, ZPO (2007)[65], § 313 No. 33 (quoting ECHR No. 30544/96, Garcia Ruiz/Spain, NJW 1999, 2429).

[11] BVerfGE 47, 182 (189); BVerfGE 54, 43 (46); BVerfGE 58, 353 (357).

[12] BVerfG NJW 1994, 2279 (2279): "Geht das Gericht auf den wesentlichen Kern des Tatsachenvorbringens einer Partei zu einer Frage, die für das Verfahren von zentraler Bedeutung ist, in den Entscheidungsgründen nicht ein, so läßt dies auf die Nichtberücksichtigung des Vortrags schließen, sofern er nicht nach dem Rechtsstandpunkt des Gerichts unerheblich oder aber offensichtlich unsubstantiiert war (vgl. BVerfGE 86, 133 (146) = NVwZ 1992, 401)"

[13] BVerfG NJW-RR 2002, 69 (70).

[14] Zöller(-Vollkommer), ZPO (2007)[26], § 329 No. 44 ("§ 322 ff. sind nicht anwendbar").

[15] The basic distinction between an Urteil and a Beschluss is the fact that an Urteil normally (for exceptions § 128 (2) ZPO) requires an oral hearing whereas Beschlüsse (normally) do not (§ 128 (4) ZPO).

[16] Stein/Jonas(-Leipold), ZPO (1998)[21], volume 4/1, § 322 No. 60; see also BGH NJW 1981, 1962 (1963); BGH NJW 1985, 1335 (1336).

matters such as costs (§ 104 ZPO), the amount in dispute (§ 62 Gerichtskostengesetz) or the execution of the judgment, whereas the decision on the substance of the claim is issued in the form of judgment (Urteil).

Other distinctions of judgments to be found in German law and doctrine are between:

(a) Condemnatory judgments ordering the defendant to do or not to do something, e.g. pay a certain amount of money or refrain from certain acts of unfair competition (Leistungsurteil), declaratory judgments (Feststellungsurteil, § 256 ZPO), and constitutive judgments that create, change or end a legal right or status, e.g. divorce, dissolution of a company (Gestaltungsurteil). All these judgments are judgments on the merits capable of having res judicata effect, but they differ in their operative parts (Tenor) depending on the remedy sought[17].

(b) Substantive judgments/judgments on the merits (Sachurteil) and procedural judgments which just contain decisions on procedural questions, e.g. dismissing the claim as inadmissible for lack of jurisdiction (Prozessurteil). Both are capable of having res judicata effect, the effect of the procedural judgments however being limited to the procedural reasons for which the action was dismissed (i.e. the plaintiff may bring a new action if he cures these procedural defects).

(c) Contradictory judgments based on contentious proceedings (streitiges Urteil) and non-contradictory judgments (nichtstreitige Urteile) such as judgments by default (Versäumnisurteil, §§ 330, 331 ZPO), judgment by admission/defendant's acceptance of the claim (Anerkenntnisurteil, § 307 ZPO) and judgment by waiver of the plaintiff/plaintiff"s withdrawal (Verzichtsurteil, § 306 ZPO)[18]. All of these judgments are capable of having res judicata effect.

(d) Final judgments (Endurteil, § 300 ZPO) and interlocutory or preliminary judgments (Zwischenurteil, §§ 280, 303, 304 ZPO). Interlocutory judgments may concern the cause of the action (Zwischenurteil über den Grund, § 304 ZPO) or incidental procedural questions between the parties (§ 303 ZPO, see also §§ 71, 238 (1), 268, 387 ZPO) including the procedural admissibility (Zulässigkeit) of the action (§ 280 ZPO). While final judgments bring the proceedings to an end, interlocutory judgments decide only incidental or preliminary matters. As a consequence, interlocutory judgments do not bring the proceedings to an end, but rather contain a ruling on a preliminary point which is binding on the court which has issued it (§ 318 ZPO) and may be appealed, usually only together with the final judgment (§ 512 ZPO), exceptionally also separately (§§ 280, 304 ZPO)[19]. If there is a dispute between a party and a third party, it may be decided by Zwischenurteil as well (in the case of Nebenintervention, §§ 71, 66 ZPO). Interlocutory judgments between the parties (echte Zwischenurteile, §§ 280, 304 (2) ZPO) have no substantive res judicata effect (materielle Rechtskraft) because these judgments do not finally determine the outcome of the litigation, but only settle preliminary points[20]. They do however have inner-procedural binding force (innerprozessuale Bindungswirkung, § 318 ZPO) in the sense that the court which issued the judgment is bound by it unless the Vorbehaltsurteil or Zwischenurteil is reversed on appeal. This intra-procedural binding effect is similar to substantive res judicata (materielle Rechtskraft)[21]. It takes however effect already when the judgment is issued, whereas substantive res judicata (materielle Rechtskraft) requires under German law that formal res judicata (formelle Rechtskraft, § 705 ZPO) has taken effect, i.e. there is no ordinary appeal entered (or there is no ordinary appeal possible, e.g. against decisions of the Bundesgerichtshof).

A special form of interlocutory judgment (Zwischenurteil) are judgments of appeal courts which reverse the judgment of the lower court and remand the case for further proceedings (aufhebende und zurückverweisende Urteile, §§ 538 (2), 563 ZPO). These judgments have no res judicata effect because they do not end the proceedings[22]. They do however have inner-procedural binding force for the lower courts, § 563 (2) ZPO.

(e) Partial final judgments (Teilurteil, § 301 ZPO) and full final judgments (Vollendurteil, § 300 ZPO). Partial final judgments may be issued if part of the matter in controversy is ready for decision and the partial decision does not affect the latter decision on the rest of the matter (§ 301 ZPO). Partial judgments are capable of appeal, enforcement and res judicata effect.

(f) Judgments with reservation (Vorbehaltsurteile, §§ 302, 599, 602, 605a ZPO). These judgments normally come into play if the plaintiff sues in summary proceedings relying entirely on documentary evidence or on a bill of

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[17] Koch/Diedrich, Civil Procedure in Germany (1998), No. 123.
[18] Some commentators regard judgment by waiver of the plaintiff (Verzichtsurteil) and by acceptance of the defendant (Anerkenntnisurteil) as contradictory judgments in a broader sense, Schilken, Zivilprozessrecht (2006)[5], § 12 No. 573.
[19] Koch/Diedrich, Civil Procedure in Germany (1998), No. 126.
[20] Stein/Jonas(-Leipold), ZPO (1998)[21], volume 4/1, § 322 No. 58.
[21] Stein/Jonas(-Leipold), ZPO (1998)[21], volume 4/1, § 318 No. 1.
[22] Stein/Jonas(-Leipold), ZPO (1998)[21], volume 4/1, § 322 No. 59.

exchange (Urkunden- und Wechselprozess, §§ 592 seq. ZPO). In these proceedings the court may reserve any defenses of the other party which cannot be evidenced by written documents for later proceedings (Nachverfahren) and issue a judgment with reservation which the plaintiff may seek to enforce at the risk that he is liable if he loses in the later proceedings. However, no substantive res judicata effect (materielle Rechtskraft) is attributed to judgments with reservations (Vorbehaltsurteile, §§ 302, 599 ZPO) because the litigation on which the decision is reserved (e.g. set-off) remains pending[23]. Again, the judgment with reservation has inner-procedural binding force (§ 318 ZPO).

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:

In terms of the actual judgment, the determination of the claim and the findings of fact are kept in distinct sections of the judgment: the Tenor dealing with the former and the Tabestand and the Entscheidungsgründe dealing with the latter. This clearly demarcated distinction becomes material at the execution stage (the executive organs focusing solely on the Tenor) and for res judicata. Judgments are only capable of substantive res judicata effect to the extent they decide the demands expressly raised in the statement of claim/counterclaim. The court is precluded from awarding anything which has not been specifically demanded and as such the res judicata effect of the judgment is similarly limited to the issues actually decided in the Tenor.

Nonetheless the facts and the determination of the claim are linked to the extent that the demand for relief can only be understood by looking to the facts upon which the claim is based. Further it is recognised that the Tenor may be interpreted with a view to the reasons (and therefore the facts) underpinning it, where the operative part is unclear.

On appeal the Court cannot generally look to the facts determined by the lower court unless there are concrete circumstances which cast doubt at the correctness of the factual determination, requiring a new determination of the facts.

Full Response:

As described above, there is a clear separation in the drafting of German judgments between the operative part (Tenor) on the one hand and the findings of fact (Tatbestand) and the grounds of the decision (Entscheidungsgründe) on the other hand. § 313 ZPO obliges the court to clearly distinguish between the different parts of the judgment. §§ 313a, 313b ZPO make it clear that there may be even judgments without a statement of facts and grounds for the decision. It is however not possible to have a judgment without an operative part because the operative part is the very core of the judgment. The reason for this is the function of the operative part: it is essentially the answer to the parties' petitions/prayers for relief. The court decides whether and to what extent the claimant is entitled to the relief sought or whether the defendant is entitled to the dismissal of the claim. The operative part therefore has to fully decide on the parties' petitions and not leave any petition undecided "hanging in the air". The distinction between facts, reasons and operative is both formal (in the drafting of the judgment) and substantive (as it is relevant for enforcement and the scope of res judicata). It is reflected in different terminology (Urteilsformel/Tenor on the one hand and Tatbestand and Entscheidungsgründe on the other) and different sections of the judgment.

The distinction between the operative part (Tenor) and the reasons becomes relevant at the stage of enforcement: the operative part is the basis of the enforcement by the execution organs. It must be sufficiently clear and precise to make it possible for the execution organs to enforce the judgment (e.g. identify without any doubt the objects of enforcement) without having recourse to the statement of facts, the grounds for the decision, the court's file or the pleadings. Therefore, German courts require in particular complaints seeking injunctive relief to be drafted in such a way that it is immediately clear from the operative part of the judgment (Tenor) what the defendant shall be required to do or not to do and regard the execution organs to be bound by the operative part of the judgment (Tenor)[24]. It is normally not permitted to extend the scope of the operative part of the judgment by referring to the facts of the case or the reasoning of the court. Rather the parties shall be encouraged to state their demands as precisely as possible in their petitions to have the court rule on them and make it clear in the operative part of the judgment what the enforceable content of the decision shall be.

[23] Stein/Jonas(-Leipold), ZPO (1998)[21], volume 4/1, § 322 No. 56.

[24] OLG Köln GRUR-RR 2005, 34 (35) – Elektrothrombose; Schuschke/ Walker(-Schuschke), Vollstreckung und Vorläufiger Rechtsschutz (2002)[3], § 890 No. 22.

The distinction between the operative part of the judgment and the reasons is also important for the purposes of res judicata. According to § 322 (1) ZPO, judgments are only capable of substantive res judicata (materielle Rechtskraft) to such extent as they decide the demand raised by the statement of claim or counterclaim. According to § 308 ZPO, the court may not award anything (except costs of the proceedings) which a party has not specifically demanded. In order to determine what the court has decided, it is necessary to read the Urteilsformel/Tenor because this is the place where the judge states clearly what she has decided. In the example given in the explanatory note on the patent-licensing agreement, the operative part of the judgment would read: "The defendant is ordered to pay 200.000 Euro to plaintiff (plus decisions on costs and provisional enforceability)". In the grounds for the decision (Entscheidungsgründe), the court would address the questions mentioned (validity of the patent, jurisdiction, admissibility of the claim, applicable law to the contract etc.) if relevant, but none of the elements of reasoning of the court would become binding on the parties. The only thing which would be binding is that the defendant has to pay 200.000 Euro damages (for breach of the licensing agreement). Should any party wish to extend the scope of res judicata, she may seek declaratory relief on a question of law which is incidental to the judgment (Zwischenfeststellungsklage, § 256 (2) ZPO).

The scope of res judicata is thus limited to the extent that the court has decided on the demands asserted by the parties in their complaint or counterclaim. The demand (Streitgegenstand) is not explicitly defined in the ZPO. According to the Bundesgerichtshof, the demand (Streitgegenstand) is determined by the plaintiff's prayer for relief (Antrag des Klägers, e.g. defendant to be ordered to pay 5.000 Euro) (or, in the case of a counterclaim, the defendant's) and the facts on which the prayer for relief is based (e.g. payment of 5.000 as repayment of a loan or as damages for breach of contract etc.)[25]. Even if the facts of the case (as summarised in the Tatbestand) and the operative part of the judgment (Urteilsformel/Tenor) are separated in the drafting of the judgment, there is nevertheless a connection between them because the demand (Streitgegenstand) can only be determined by looking to the facts of the case on which the plaintiff based his claim (e.g. to know whether a payment of 5.000 Euro was ordered as damages for breach of contract, as repayment of a loan etc.). This becomes particularly important if a claim is dismissed because the operative part in this case just states "The claim is dismissed" without specifying which claim (i.e. based on which facts) was dismissed. Even if there is a clear distinction between the operative part of the judgment (Urteilsformel/Tenor) and the reasons (Entscheidungsgründe), it is common opinion that the operative part of the judgment may be interpreted with a view to the reasons[26]. This requires however that the operative part is unclear. If the operative part is clear and contradicts the reasons of the judgment, the operative part (Urteilsformel) prevails[27]: An unambiguous wording of the operative part may not be altered by referring to the reasons of the judgment[28]. The reasons and the facts of the case (Entscheidungsgründe und Tatbestand) can thus only influence the scope of res judicata if there is doubt on the interpretation of the operative part (Tenor)[29].

The fact that the identity of the demand can only be determined with a view to the facts of the case should however not lead to the conclusion that a later court is bound by the determination of facts of the earlier court: this is not the case. In the license example, a later court would only be bound by the decision that D is bound to pay P 200.000 Euro for breach of a license contract. It would not in any way be bound by the factual findings of the earlier court e.g. on the validity of the license contract, on the validity of the right which was licensed etc.

Concerning the review of the decision of a lower court on appeal (Berufung and Revision), the higher courts will review the decision of the trial court to determine whether the result reached by the lower court is well-founded in law. As concerns the factual basis, the court deciding on Berufung (appeal in fact and law) normally has to base its decision on the facts as determined by the lower court unless there are concrete cirumstances which cast doubt at the correctness or completeness of the relevant factual determination and therefore require to determine the facts anew (§ 529 (1) No. 1 ZPO). The appellate court may also consider new facts which may be introduced according to certain requirements (§ 529 (1) No. 2 ZPO). The factual examination of the Bundesgerichtshof on appeal in law (revision) is in general limited to the facts as they appear in the judgment of the appeal court and the minutes of the

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[25] BGHZ 117, 1 (5); BGHZ 123, 137 (140); BGHZ 124, 164 (166).
[26] Jauernig, Zivilprozessrecht (2003)[28], 257.
[27] Stein/Jonas(-Leipold), ZPO (1998)[21], vol. 4/1, § 322 No. 179; Thomas/Putzo, ZPO (2007)[28] § 322 No. 18; Musielak(-Musielak), ZPO (2007)[5] § 313 No. 13; undecided by BGH NJW 1997, 3447 (3448).
[28] BGH NJW-RR 2002, 136 (136 seq.); for the primacy of the operative part over the reasons see also BGH NJW 1985, 2022.
[29] BGH NJW 1985, 2022 (2022):„Maßgebend für den Inhalt der Entscheidung und damit die Reichweite ihrer materiellen Rechtskraft nach § 322 Abs. 1 ZPO ist in erster Linie der Wortlaut des Tenors. Im Interesse der Rechtssicherheit und der Rechtskraft unterliegt diese „einschränkende" Auslegung engen Grenzen. Nur dort, wo über seinen Inhalt Zweifel möglich sind, dürfen Tatbestand, Entscheidungsgründe und das zugrunde liegende Parteivorbringen zur Ermittlung dessen, worüber rechtskräftig entschieden worden ist, herangezogen werden (BGH NJW 1961, 917; BGH NJW 1962, 1109; BGH NJW 1979, 1046 (1047); BGH NJW 1982, 2257)."

appeal court (§ 559 (1) ZPO), unless it is claimed that the lower courts specifically violated the procedure (§§559 (1), 551 (3) No. 2b ZPO).

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 can only acquire binding effect if it has been formally pronounced and it is no longer subject to ordinary appeal. As such German law recognises four forms of binding effect which a judgment can acquire. First a judgment will bind the court which has issued it even if subject it is subject to appeal. This is termed inner-procedural binding effect. Second a judgment can acquire formal res judicata either by no ordinary appeal being available or by the time period for appeal lapsing. Third a judgment can acquire substantive res judicata effect if it meets the conditions in §705 ZPO and is a form of judgment capable of such effects. Finally a judgment may have certain effects as a result of a provision of substantive law, e.g. the guarantor may request release from his guarantee if the creditor has obtained an enforceable judgment against him. The effects of judgments as a result of substantive law have nothing to do with res judicata, but rather rooted in the relevant provisions of substantive law.

Once a judgment has obtained formal/substantive res judicata, a judgment can only exceptionally be challenged by either an action for nullification or restitution or a motion for restoration to one's original legal position. In the event that a judgment is reversed in this manner and a subsequent judgment was premised on the reversed judgment (though this a largely theoretical possibility) an action for restitution arises. In the event that two judgments are rendered on the same subject matter between the same parties, the majority view is that the earlier judgment takes precedence.

Full Response:

German law distinguishes four different forms of "binding" effects of judgments. It is therefore necessary to distinguish between these four effects to answer the question under which prerequisites judgment have binding character. One preliminary remark on "validity" and "finality" as explained in the questionnaire guidelines: For any judgment effect under German law, it is necessary that the judgment be formally pronounced. Before a formal pronouncement, the judgment has merely the character of a draft and is regarded as a "non-judgment" (Nichturteil)[30]. After the judgment has been formally pronounced, it is "final" in the sense that the issueing court may not change it (§ 318 ZPO). It is however possible for the appellate court to change the judgment on (an admissible) appeal. The judgment of the lower court is therefore "final" in the sense that it may not be changed by the issueing court, but it is still not "final" because it may be changed by an appellate court on appeal. As long as it is still possible to lodge an appeal, the judgment has no res judicata effect and is not binding for other courts[31]. As concerns "the judgment's ability to withstand an attack in the form of a request for relief from judgment", an appellate court may reverse the judgment on appeal. This possibility is not limited to the conditions of "subject matter jurisdiction", territorial jurisdiction and adequate notice, but also extends to errors in substantive law. If an appeal is no longer possible, i.e. formal res judicata has taken effect, the judgment may only be attacked on the limited grounds spelled out in §§ 578-580 ZPO and § 233 ZPO. Only very extreme deficiencies of the judgment may lead to the result that the judgment is deemed to be non-existent (Nichturteil) or that it has no effects at all (wirkungsloses Urteil). These are however rare circumstances. A non-existent judgment (Nichturteil) "exists" if the judgment has not been formally pronounced or no court, but rather an administrative agency has issued a "judgment". A non-effective judgment is a judgment which is issued outside any court proceedings (e.g they have been ended by settlement before the judgment is issued) or suffers from such great deficiencies that it has no effects at all (e.g. is directed against a party which is immune from the jurisdiction of the German court, N.B. a mere lack of personal jurisdiction is not sufficient)[32].

After this short preliminary remark, I turn to the different forms of "binding" effects of judgments in German law and their requirements.

[30] OLG Brandenburg NJW-RR 1996, 766 (767).
[31] Schilken, Zivilprozessrecht (2006)[5], § 12 No. 609, pointing out that a judgment should only have binding effect for other proceedings if it has become res judicata.
[32] Jauernig, Zivilprozessrecht (2003)[28], 246.

(1) First of all, a judgment binds the court which has issued it even if an appeal is pending or still possible. This inner-procedural binding effect (innerprozessuale Bindungswirkung, § 318 ZPO: "The court is bound by the decision contained in final and interlocutory judgments pronounced by it") is very similar to substantive res judicata (materielle Rechtskraft)[33]. It takes however effect already when the judgment is issued, whereas substantive res judicata (materielle Rechtskraft) requires under German law that formal res judicata (formelle Rechtskraft, § 705 ZPO) has taken effect, i.e. there is no ordinary appeal entered (or there is no ordinary appeal possible, e.g. against decisions of the Bundesgerichtshof). It means that the court may not change the judgment (exceptions §§ 319, 320, 321a ZPO, e.g. spelling or typing mistakes) and is bound by it in the following proceedings. This effect normally only becomes relevant if part of the proceedings are still pending in the same instance because on appeal it is obviously possible to reverse the judgment.

(2) The second effect of a judgment is that it may become formal res judicata (formelle Rechtskraft). This is dealt with in § 705 ZPO. It requires that either there is no ordinary appeal possible (e.g. against judgments of the Bundesgerichtshof) or that the time period for appeal has lapsed without filing an appeal or that the parties have waived their right to appeal. If a party files an inadmissible appeal, formal res judicata takes effect (according to majority opinion) after the appeal has been dismissed[34]. Once a judgment is formally binding, it can only be attacked by an action for nullification or restitution (Wiederaufnahmeklage, §§ 578-580 ZPO) or a motion for restoration to one's original legal position (Wiederaufnahme in den vorigen Stand, §§ 233 seq. ZPO).

(3) Once an ordinary appeal is no longer possible and the judgment has thus aquired formal res judicata effect (formelle Rechtskraft) in the sense of § 705 ZPO, the judgment has also substantive res judicata effect (§ 322 ZPO) if it is a form of judgment which is capable to have such effects.

(4) Formal (§ 705 ZPO) and substantive res judicata (§ 322 ZPO) and the inner-procedural binding effect (§ 318 ZPO) must be distinguished from the effects a judgment may have as a result of substantive law (Tatbestandswirkung or Reflexwirkung). For example, according to § 775 (1) No. 4 BGB the guarantor may request release from his guarantee if the creditor has obtained an enforceable judgment against him. Such substantive law effects have nothing to do with the procedural effects of judgments, but are rather rooted in the substantive law provisions which have as one of their substantive requirements the existence of a judgment with or without res judicata effect.

(5) NB: Please indicate whether judgments (may) have binding effect while an appeal is pending or during any period for the lodging of an appeal.

Judgments have binding effect in the sense that they are binding on the court which issued them (innerprozessuale Bindungswirkung, § 318 ZPO, see above (1)) even if an appeal is still possible. They may also be provisionally enforced even if an appeal is still pending or possible (§§ 704 seq. ZPO)[35]. However, they have no binding effect in the sense of res judicata while an appeal is pending or during any period for the lodging of an appeal (§ 705 ZPO). As a result, it is not possible to invoke the res judicata effect in other proceedings or rely on the binding force of a judgment which is under appeal.

(6) NB2: Please describe the effect of challenges (attacks) to the judgment on its binding effect. In addition, please consider the consequences of the setting aside of a judgment for its binding effect.

As pointed out above, judgments have no res judicata effect until an ordinary appeal is no longer possible. As judgments have no res judicata effect as long as an ordinary appeal is still possible, it is rare that a judgment is set aside and this has an effect on a binding effect it previously had. It seems to be only thinkable if the judgment has become res judicata, but is set aside under the narrow grounds of §§ 233, 578-580 ZPO. It may be added that if the judgment had been enforced while the appeal was pending and the appellate court reverses the judgment, the defendant is entitled to damages (§ 717 (2) ZPO). But this relates to the provisional enforceability of the judgment and has nothing to do with its res judicata effects.

(7) NB3: Finally, please indicate (1) the consequences of a reversed judgment that previously had binding effect on a subsequent judgment in which the preclusive effects of the former judgment were invoked, and (2) which judgment prevails if a party fails to invoke its binding effect, or a court fails to give a judgment preclusive effect, and as a result, a subsequent inconsistent judgment is rendered.

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[33] Stein/Jonas(-Leipold), ZPO (1998)[21], vol. 4/1, § 318 No. 1.

[34] GemS OGB BGHZ 88, 353 (357); Stein/Jonas(-Münzberg), ZPO (2004)[22], § 705 No. 12.

[35] For details see Heß, Study No. JAI/A3/2002/02 on making more efficient the enforcement of judicial decisions within the European Union: Transparency of a Debtor's Assets, Attachment of Bank Accounts, Provisional Enforcement and Protective Measures (2004).

Question (1) seems to be a rather theoretical constellation under German law because (a) the subsequent judgment would have to rely on a judgment which had res judicata effect, but is later reversed on the narrow grounds of §§ 233, 578-580 ZPO and (b) the reversed judgment was relied on in the subsequent proceedings even though the scope of res judicata under German law is narrow. For the situation described in Question (1), § 580 No. 6 ZPO provides that an action for restitution arises in the event that the judgment of a court on which the judgment is based has been set aside by another final judgment. The effect of an action for restitution is a reopening of the earlier proceedings.

Question (2) is disputed in German law. The majority opinion (including the courts) gives preference to the earlier judgment[36]. This opinion is supported by § 580 No. 7 a ZPO which opens the action for restitution against the later judgment in the event that the party discovers a prior final judgment given in the same matter.

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:

Most judgments are capable of having substantive res judicata. The scope of res judicata is, though, narrow and covers neither preliminary matters nor elements of the judgment's reasoning. Should a party wish for the judgment to have broader res judicata effect, he must seek an additional declaratory judgment to create res judicata over matters which were only incidentally relevant for the decision in the main action (e.g. in an action for contractual damages, the defendant may seek not only a dismissal of the action for damages, but also a declaratory finding that the contract is invalid, thereby extending res judicata to the question of validity of the contract.

Judgments which are incapable of having preclusive effects include interlocutory judgments, since such judgments do not finally determine the outcome of the litigation, judgments with reservations, i.e. judgments which are based entirely on documentary evidence such that a Court my reserve any defence of the other party which cannot be evidenced by written documents, settlements and terminations of a case by a withdrawal of the complaint since in both cases no judgment is issued.

Full Response:

(1) Most judgments in German law are capable of having preclusive effects in the sense of substantive res judicata (§ 322 ZPO). The scope of the res judicata depends on which subject matter of the proceedings (Streitgegenstand) the court has made a decision (§ 322 ZPO). This is primarily reflected in the operative part (Urteilsformel/Tenor) and may be interpreted (but not changed) by the facts and the reasoning of the judgment. It is important to note that neither preliminary matters nor elements of the reasoning form part of the res judicata. If for example P sues D for patent infringement and the court grants damages, finding in the reasons that the patent is valid and D has infringed it, another court is bound neither by the finding of validity nor by the finding of infringement: res judicata is limited to the finding that D owes P damages in the amount of X Euro for infringing his patent. If any party wants to extend the scope of res judicata, it is open for her to request additional declaratory judgment on preliminary points if these preliminary questions constitutive a legal relationship in the sense of § 256 (2) ZPO (Zwischenfeststellungsklage). If the party does so and the court rules on the issue, the declaratory judgment may establish the particular legal relationship by issueing a declaratory Tenor ("It is declared that …"). A declaratory judgment must be specifically asked for by any party. The narrow scope of res judicata, coupled with the possibility of additional declaratory relief, is thought of to honour best the autonomy of the parties in deciding how far their action and accordingly res judicata shall extend.

An example for the limited scope of res judicata is the hidden partial suit (verdeckte Teilklage): if P and D had an accident and P sues for 5.000 Euro damages and wins, he is not barred from suing for another 5.000 Euro further damages even if he did not explicitly say in his first action that 5.000 Euro shall be only part of what he is entitled

[36] BGH NJW 1981, 1517 (1518); BAG NJW 1986, 1831 (1832); Musielak(-Musielak), ZPO (2006)[5], § 322 No. 15; other opinion: Stein/Jonas(-Leipold), ZPO (1998)[21], vol. 4/1, § 322 No. 226.

to[37]. The reason for the limited res judicata is that the scope of res judicata depends on the petition of the plaintiff and the facts on which this petition is based. If P petitions only for 5.000 Euro, the court may only give 5.000 Euro (§ 308 ZPO), and consequently the scope of res judicata is limited to 5.000 Euro damages. As the court has not ruled on the damages exceeding 5.000 Euro, there is no res judicata for that claim. Partial claims are inadmissible only in those cases in which an indivisible interest is sought to compensate, such as compensation for harm and suffering (Schmerzensgeld).

(2) Judgments which are capable of having preclusive effect in the sense of materielle Rechtskraft (§ 322 ZPO) include:

(a) Judgments ending the whole proceedings in the relevant instance (§ 300 ZPO), whether they are condemnatory ("D has to pay 5.000 Euro to P", Leistungsurteil), declaratory ("It is declared that P is the owner of the car number …", Feststellungsurteil) or constitutive[38] ("The marriage between P and D is divorced", Gestaltungsurteil). In the case of condemnatory judgments, it will normally be clear from the operative part of the judgment how far the res judicata extends (e.g. D is ordered to hand over a specific chattel). Problems may arise with injunctions ordering a party not to do something. While the scope of the injunction must be clear from the operative part of the judgment, the jurisprudence accepts an extension of the prohibition to those changes of the defendant's conduct which touch the core of the prohibition (core theory, Kerntheorie)[39].

(b) Judgments which are affirmative or deny the claim. For judgments which deny the claim, it is inevitable to look at the facts and the reasons of the case to determine the scope of res judicata because the operative part says only: "The claim is dismissed". Only the petitions/prayers for relief (Anträge) of the plaintiff as reported in the statement of facts (Tatbestand) will make it clear to which claim the dismissal refers[40]. If the plaintiff's action has been dismissed, he is barred from bringing an action with the same demand (e.g. damages for breach of contract) based on the same facts. He may only bring a new action if he can point to a different demand (e.g. injunctive relief) or to different facts (e.g. a breach of contract which occurred after the oral hearing in the first action was closed). If he brings an action based on new facts, the judge in the second proceedings is not bound by the incidental findings of the judge in the first action: For example, if the judge in the first action dismissed the case because she thought that there was no contract, the judge in the second action can take a different view on the existence of a contract if the action relates to a different breach of contract (even though the question of existence of a contract is the same).

(c) Judgments which concern the full claim or part of the claim (§§ 300, 301 ZPO, Teilurteil)[41]. Partial judgments on part of the claim have to be distinguished from judgments on interlocutory legal points within the same claim such as the admissibility of the claim, the cause of an action or a preliminary procedural matter (§§ 303, 304, 280 ZPO). The "early determination of a particular issue of law or fact" cited in the question as an example for a partial judgment would probably be decided in the form of an interlocutory judgment and not in the form of a partial judgment. Interlocutory judgments are not capable of substantive res judicata (materielle Rechtskraft, § 322 ZPO) because they do not end a separate part of the proceedings, but decide only a preliminary question[42]. They are however capable of formal res judicata (§ 705 ZPO) in the sense that they may not be attacked after the time limit for appeal has lapsed. The situation is different in the case of a "Zwischenurteil" against a non-party (§§ 71, 135, 372a, 387 ZPO)[43].

(d) Judgments which concern the subject matter of the claim or decisions concerning procedural aspects of the claim. In the case of procedural judgments dismissing an action for procedural reasons (e.g. lack of jurisdiction), the res judicata effect is limited to the same cause of action and the same procedural defect[44]: If the plaintiff brings the same action at the same court under the same procedural circumstances, res judicata of the earlier procedural judgment will bar the action. If the plaintiff brings the action for the same claim in a different court which has jurisdiction, there is no res judicata bar[45]. No substantive res judicata effect is attributed to judgments of superior

[37] BGH NJW 1997, 1990; BGH NJW 1997, 3019 (3020 seq.); BGH NJW 2002, 2167 (2168).
[38] An earlier position made an exception for constitutive judgments, but it seems today to be unanimous position that constitutive judgments have res judicata effect as well, Stein/Jonas(-Leipold), ZPO (1998)[21], vol 4/1, § 322 No. 65 seq.
[39] BGHZ 5, 189 (193 seq.); BGHZ 126, 287 (296).
[40] BGH NJW 1993, 33 (334); BGH NJW 1993, 3204 (3205).
[41] BGH NJW 1992, 511 (512); Musielak(-Musielak), ZPO (2007)[5], § 322 No. 75.
[42] Musielak(-Musielak), ZPO (2007)[5], § 322 No. 75.
[43] Stein/Jonas(-Leipold), ZPO (1998)[21], vol. 4/1, § 322 No. 59.
[44] OLG Brandenburg NJW-RR 2000, 1735 (1736); Musielak(-Musielak), ZPO (2007)[5], § 322 No. 44.
[45] Musielak(-Musielak), ZPO (2007)[5], § 322 No. 44.

courts which reverse and remand the action. Such judgments have only inner-procedural binding force for the lower court, § 563 (2) ZPO.

(e) Judgments which are given on the merits or without consideration of the merits such as judgments by consent (Anerkenntnisurteil, § 307 ZPO) or judgment by waiver (Verzichtsurteil, § 306 ZPO)[46].

(f) Judgments which are not based on contentious proceedings, in particular judgments by default (Versäumnisurteile, §§ 330, 331 ZPO). Judgments by default have the same res judicata effect as normal judgments on the merits based on contentious proceedings[47].

(g) Execution orders (Vollstreckungsbescheide, § 700 ZPO) resulting from payment order proceedings (Mahnverfahren)[48] and court orders (Beschlüsse) are capable of res judicata if (in the case of court orders) they have a content which is capable of substantive res judicata (i.e. goes beyond the proceedings in which they were issued)[49]. Examples for Beschlüsse having res judicata effect are orders which decide on the costs of the proceedings (§ 104 ZPO)[50] or execution orders resulting from payment order proceedings (Vollstreckungsbescheide, § 700 ZPO)[51]. Examples for those which have no such effect are orders to hear a witness in a particular trial (Beweisbeschluss) or orders which deny legal aid[52].

(h) Even if details are in dispute, judgments ordering provisional or protective measures (Arrest or einstweilige Verfügung, §§ 922, 938 ZPO) are in general regarded to have a limited res judicata effect for later proceedings for interim relief (there is no binding effect for proceedings on the merits). As a consequence, a motion to grant provisional measures which has been rejected cannot be repeated unless the applicant points to new facts which have not been considered in the earlier proceedings[53]. Furthermore, an interim judgment ruling on the existence or non-existence of a claim to be protected in provisional proceedings can only be disregarded in later provisional proceedings if the circumstances have changed[54].

(i) One final remark: It should be noted that the "Verfahren nach billigem Ermessen" pursuant §§ 495a seq. ZPO which is mentioned in the questionnaire guidelines (footnote 6, p. 7) is no procedure for provisional measures, but rather similar to small claims procedures on the merits. Judgments resulting from the "Verfahren nach billigen Ermessen" are no provisional measures. They are capable of formal and substantive res judicata effect as any other judgment.

(3) Judgments which are not capable of having preclusive effects in the sense of materielle Rechtskraft (§ 322 ZPO) include:

(a) Interlocutory judgments (for an explanation of their different forms see Question I A) between the parties (echte Zwischenurteile, §§ 280, 304 (2) ZPO). Such judgments have no substantive res judicata effect (materielle Rechtskraft) because they do not finally determine the outcome of the litigation, but only settle preliminary points[55]. They do however have inner-procedural binding force (innerprozessuale Bindungswirkung, § 318 ZPO) in the sense that the court which issued the judgment is bound by it unless the Vorbehaltsurteil or Zwischenurteil is reversed on appeal. This intra-procedural binding effect is very similar to substantive res judicata (materielle Rechtskraft)[56]. It takes effect already when the judgment is issued, whereas substantive res judicata (materielle Rechtskraft) requires under German law that formal res judicata (formelle Rechtskraft, § 705 ZPO) has taken effect, i.e. there is no ordinary appeal entered (or there is no ordinary appeal possible, e.g. against decisions of the Bundesgerichtshof). A special form of interlocutory judgment (Zwischenurteil) are judgments by appeal courts which reverse the judgment

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[46] MünchKomm(-Gottwald), ZPO (2008)[3], vol. 1, § 322 No. 26.
[47] BGH NJW-RR 1987, 831 (832); BGH NJW 2003, 1044; Musielak/Musielak, § 322 No. 54.
[48] BGH NJW 1987, 3256 (3257).
[49] Musielak(-Musielak), ZPO (2007)[5], § 322 No. 6, § 329 No. 17.
[50] BGH NJW 1997, 743.
[51] BGH NJW 1987, 3256 (3257).
[52] BGH NJW 2004, 1805 (1806).
[53] Musielak(-Huber), ZPO (2007)[5], § 922 No. 11.
[54] MünchKomm(-Gottwald), ZPO (2008)[3], vol. 1, § 322 No. 33; OLG Frankfurt NJW 1968, 2112 (2113): „Diese [die materielle Rechtskraft] äußert sich darin, daß für das Sicherungsverfahren – nicht für den Hauptsacheprozess – Bestehen bzw. Nichtbestehen von Anspruch und Arrestgrund (bzw. Anspruch und Verfügungsgrund) bindend festgestellt werden und das Gericht in einem späteren Verfahren hiervon nur abweichen kann, wenn nach Erlaß des Arrestbefehls (bzw. der einstweiligen Verfügung) veränderte Umstände eingetreten sind, die ebenso wie bei einem Urteil einer anderweitigen Beurteilung nicht entgegenstehen."
[55] Stein/Jonas(-Leipold), ZPO (1998)[21], vol. 4/1, § 322 No. 58.
[56] Stein/Jonas(-Leipold), ZPO (1998)[21], vol. 4/1, § 318 No. 1.

of the lower court and remand the case for further proceedings (aufhebende und zurückverweisende Urteile, §§ 538 (2), 563 ZPO). These judgments have no res judicata effect because they do not end the proceedings[57]. They do however have inner-procedural binding force for the lower courts, § 563 (2) ZPO.

(b) Judgments with reservation (Vorbehaltsurteile, §§ 302, 599, 602, 605a ZPO). These judgments normally come into play if the plaintiff sues in summary proceedings relying entirely on documentary evidence or on a bill of exchange (Urkunden- und Wechselprozess, §§ 592 seq. ZPO). In these proceedings, the court may reserve any defenses of the other party which cannot be evidenced by written documents for later proceedings (Nachverfahren) and issue a judgment with reservation which the plaintiff may seek to enforce at the risk that he is liable if he loses the later proceedings. No substantive res judicata effect (materielle Rechtskraft) is attributed to judgments with reservations (Vorbehaltsurteile, §§ 302, 599 ZPO) because the litigation for which the decision is reserved (e.g. set-off) remains pending[58]. Again, the judgment with reservation has inner-procedural binding force (§ 318 ZPO).

(c) Termination of a case by withdrawal of the complaint (Klagerücknahme, § 269 ZPO). In this case, there is no judgment issued, but only a court order limited to costs. Accordingly, there is no res judicata effect as to the substance of the claim; the plaintiff may bring the same action in later proceedings. However, the defendant in the earlier action can require the earlier plaintiff to pay his costs for the earlier procedure before the new action proceeds.

(d) Settlements, whether made of record or not, have no res judicata effect because there is no concept of "consent judgment" in German law[59]. Settlements can however be raised in later litigation as having altered the position in substantive law, but this is an effect different to res judicata.

[57] Stein/Jonas(-Leipold), ZPO (1998)[21], vol. 4/1, § 322 No. 59.
[58] Stein/Jonas(-Leipold), ZPO (1998)[21], vol. 4/1, § 322 No. 56.
[59] Murray/R. Stürner, German Civil Justice (2004), 356.

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.[60] 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:

German judgments can have claim preclusive effects, but of a limited scope, extending only to the procedural claims (Streutgegenstand) which the parties lay before the court. German law distinguishes, in the claim preclusive effect context, between substantive res judicata (materielle Rechtskraft) and Interventionswirkung which relates to the effect of third-party notice and joinder of third parties. Rechtskraft is limited to the Streutgegenstand of the proceedings i.e. the plaintiff's petition of relief and the circumstances from which the Claimant derives his right to claim the relief.

The preclusive effect of judgments is taken to be from the last oral hearing before the court, and as such res judicata only bars proceedings which are based on facts which could have been entered in the earlier proceedings. Objections based on new facts are not precluded by res judicata.

Full Response:

German judgments are capable of having claim preclusive effects. However, their claim preclusive effects are more limited than res judicata in the Anglo-American world because the binding effects of German judgments extends only to the procedural claims (Streitgegenstand) which the parties lay before the court to decide, not to those claims which could have been raised or which may have arisen out of the same transaction or occurrence[61].

[60] 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.

[61] Murray/R.Stürner, German Civil Justice (2004), 357.

In German law, a distinction is made between two forms of claim preclusive effects (in a broader sense).

(1) The first claim preclusive effect is based on what is normally referred to as (substantive) res judicata (materielle Rechtskraft). Materielle Rechtskraft takes effect between the parties of the proceedings. The relevant provision in the code of civil procedure is § 322 (1) ZPO which states that "judgments have legal force (res judicata effect) only to such an extent as they decide the demand raised by the statement of claim or counterclaim". The preclusive effect of Rechtskraft is therefore limited to the extend that the judgment decides the demand raised by the statement of claim or counterclaim ("insoweit fähig, als über den durch die Klage oder Widerklage erhobenen Anspruch entschieden ist"), in other words, the "Streitgegenstand" of the proceedings. The "Streitgegenstand" is, according to majority opinion and continuous jurisprudence of the courts, defined by

(a) the plaintiff's (or, in case of a counterclaim, the defendant's) petition/prayer of relief ("Antrag", e.g. D to be ordered to pay 5.000 Euro, D to be ordered to refrain from a particular act of unfair competition etc.) as it has been made in the complaint and is reported in the facts of the case (Tatbestand), and

(b) the circumstances/factual context from which the plaintiff derives her right to claim what she claims (Lebenssachverhalt) (zweigliedrig prozessualer Streitgegenstandsbegriff). This two-part definition of the Streitgegenstand is supported by § 253 (2) No. 2 ZPO (defining the contents of the complaint).

(2) The second preclusive effect (Interventionswirkung, §§ 74 (3), 68 ZPO) relates to the effect of third-party notice (Streitverkündung, § 72 ZPO) and joinder of an intervening third party (Nebenintervention, § 66 ZPO). I will discuss this effect and all questions related to it in the answer to question II A 7.

(3) NB: There is an old argument about the nature of claim preclusive effects (materielle Rechtskraft). Some writers in older doctrine were of the opinion that the effect of res judicata relates to substantive law, that the judgment would be constitutive for the situation in substantive law ("res iudicata facit ius inter partes"). The dominant position today is, however, that the effect of res judicata is of procedural nature only and leaves the situation in substantive law unchanged[62]. Arguments against the substantive interpretation of res judicata are that it cannot explain decisions on erga omnes rights such as property because res judicata normally takes only effect between the parties and leaves the relationship with third parties unchanged, that it cannot explain the res judicata effect of procedural judgments, and that there is no legal basis to presume that a judgment changes the situation in substantive law. The argument about the nature of claim preclusive effects seems to be rather theoretical as it cannot answer questions about the scope or effects of such effects as they arise in practice[63].

(4) NB1: The relevant point in time for the preclusive effect of judgments is normally the time when the last oral hearing before the court was closed (§ 296a ZPO: "Nach Schluss der mündlichen Verhandlung, auf die das Urteil ergeht, können Angriffs- und Verteidigungsmittel nicht mehr vorgebracht werden", translation: "After the oral hearing has been closed pursuant to which judgment is delivered, means of attack or defense can no longer be advanced by the parties."). Exceptions to this rule are found in §§ 139 (5), 156, 283 ZPO. They relate to a reopening of the oral hearing (§ 156 ZPO), to arguments brought forward in a late pleading with permission of the court (§ 283 ZPO) and a party's declaration following directions of the court which the party could not answer to in the oral hearing (§ 139 (5) ZPO). If it is a written procedure only (§ 128 (2) ZPO), the relevant point in time is the date as determined by the court up to which the parties are allowed to enter written pleadings (§ 128 (2) ZPO).

The rationale behind the rule is that res judicata shall only bar proceedings which are based on facts which could have been entered in the earlier lawsuit. Objections based on new facts are not barred by res judicata and may be relied on in actions against enforcement of the judgment (§ 767 (2) ZPO). Another exception to the temporal scope of "materielle Rechtskraft" is found in § 323 ZPO. For judgments imposing recurrent payments falling due in the future (e.g. maintenance payments based on family law), § 323 ZPO permits that upon a material change in the circumstances which were determinant for the judgment imposing the payments for fixing the amounts or the duration of their disbursements, each party is entitled to demand by way of amendment claim (Abänderungsklage) an amendment of the judgment (§ 323 (1) ZPO).

2. Policies underlying claim preclusive effects

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

Summary:

[62] Schilken, Zivilprozessrecht (2006)[5], § 31 No. 1007 seq.; MünchKomm(-Gottwald), ZPO (2008)[3], vol. 1, § 322 No. 9 seq.
[63] MünchKomm(-Gottwald), ZPO (2008)[3], § 322 No. 12.

The desire to avoid re-litigation and promote "legal peace" between parties are stand as the main policy considerations for claim preclusive effect. However in determining the doctrine's scope, these considerations are balanced with the need to promote legal certainty (by ensuring a rule which clearly defines the scope of claim preclusive effect) and respect party autonomy and expectations.

Full Response:

The justification brought forward for substantive res judicata (materielle Rechtskraft) in the sense of § 322 ZPO is similar to the quotation in the questionnaire guideline "ut sit finis litium". An endless continuation and re-litigation of the same cause of action makes it impossible to come to "legal peace" (Rechtsfrieden) between the parties and in society at large and is regarded as incompatible with the rule of law ("Rechtsstaat")[64]. German law takes however a slightly different stand as concerns the protection of the defendant (or the plaintiff) to be twice proceeded against for the same cause of action (nemo debet bis vexari pro una et eadem causa)[65]. Given the narrow scope of "materielle Rechtskraft" which is limited to the "procedural demand" (§ 322 (1) ZPO, "Streitgegenstand") which consists of the request of relief by the plaintiff and the facts on which this request is based ("Antrag" and "Lebenssachverhalt"), preliminary and incidental questions of fact and law which were decided in the earlier proceedings do not (unless one party moves for additional declaratory judgment, § 256 (2) ZPO) form part of the claim preclusive effect. The idea this is that "materielle Rechtskraft" should encompass a pronouncement of a specific legal consequence (Rechtsfolge) in the operative part of the judgment (Urteilsformel/Tenor) which is determined primarily by the parties' request for relief. Broader preclusive effects on matters of fact and law which were touched only as preliminary or incidental matters in the earlier proceedings would bring the risk of surprise for the parties. They would be bound by preclusive effects they did not expect. Furthermore, the broader concept of res judicata brings about a risk of legal uncertainty because it is unclear how broad the preclusive effects are. The drafters of § 322 (1) ZPO (who were aware of broader concepts of res judicata which existed in different German states before procedural law was unified in Germany in 1877) rather preferred a comparatively narrow scope of "Rechtskraft" in German law (excluding facts and reasons of the judgment and excluding preliminary matters) which was regarded as better respecting party autonomy and party expectations. If one of the parties wishes to extend the rather narrow Rechtskraft of § 322 (1) ZPO, she has the opportunity to request additional declaratory judgment on preliminary points if these constitute a legal relationship in the meaning of § 256 ZPO[66]. Another argument in favour of the narrow claim preclusive effects of § 322 (1) ZPO was legal certainty: by referring primarily to the operative part of the judgment (Tenor/Urteilsformel), it is in most cases clear how far the preclusive effect extends[67]. It is not necessary to undergo difficult inspections of "connected transactions" or "the same nucleus of operative facts" to determine the scope of claim preclusion. For these reasons, I would add the respect for party autonomy and party expectations and a concern for legal certainty as part of the policies underlying claim preclusive effects in German law.

3. Conditions for claim preclusive effects

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

Summary:

The conditions for claim preclusive effect are "same cause of action" and "same parties".

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[64] BVerfGE 73, 322 (327 seq.); Musielak(-Musielak), ZPO (2007)[5], § 322 No. 1; Zeuner, Festschrift BGH (2000), vol. III, 337 (339).

[65] To the following Zeuner, Festschrift Zweigert (1981), 604 (612 seq.)

[66] Hahn/Stegemann, Die gesammten Materialien zu den Reichs-Justizgesetzen, Band 2: Materialien zur Zivilprozeßordnung, 2nd ed. 1881, 291 seq. (= Motive, 226): "Die Rücksicht auf den Willen der Parteien, die Rücksicht auf das Richteramt fordeNo daher eine Beschränkung des Umfangs der Rechtskraft, ähnlich derjenigen Beschränkung, welche Unger und Wetzell für das gemeine Recht, das Obertribunal für die preußischen Gebiete vertheidigen, - und diese Rücksichten erscheinen als so überwiegend, daß sich der Entwurf von denselben leiten lassen mußte. (…) Durch die in § 243 [today: § 256] geregelten Inzidentfeststellungsklagen (…) gelangt (man) also (…) zu einem Ergebnisse, welches im wesentlichen dem v. Savigny'schen Standpunkte entspricht, nur daß er nicht das Gesetz, sondern den Willen der Parteien darüber bestimmen lässt, was mit einer über den Bereich des Prozesses hinausreichenden Rechtskraft entschieden werden soll"; for a critical assessment of the historic debate see Reischl, Die objektiven Grenzen der Rechtskraft im Zivilprozeß (2002), 136 seq.

[67] R. Stürner, Festschrift Schütze (1999), 913 (916, 933 seq.).

The preclusive effects of judgments is limited to the "Streitgegenstand" which comprises two elements: (1) the specific request for relief sought by the Claimant (Antrag) and (2) the essential facts which the Claimant would have established to obtain the relief in default of the Defendant's appearance (Lebenssachverhalt). Further claim preclusion extends only as far as the procedural claim extends: thus if the claimant only sued for partial damages, he is not precluded from re-litigating for the remainder. German law therefore takes a narrow definition of "same claim".

Claim preclusive effects will not cover findings of fact, even if these are contained in the reasons of the judgment and the judgment is based upon them; nor are findings of law or defences raised by the Defendant (save set offs) covered and thus either can be raised again in a future action between the parties. However it is recognized that claim preclusive effect will extend to the "contradictory opposite" e.g. if C recovers damages from D, this judgment precludes D from later trying to recover the money paid by claiming that C has been unjustly enriched.

Full Response:

(1) NB and NB 2: As mentioned before, § 322 (1) ZPO limits the preclusive effects of res judicata to the extent that the judgment decides the demand raised by the complaint or counterclaim. The "demand" is determined by the "Streitgegenstand" ("prozessualer Anspruch" and "Streitgegenstand" are synonyms in the ZPO[68]) which is defined (according to the majority opinion and the jurisprudence of the courts) by two elements:

(a) the specific request for relief sought by the plaintiff as expressed in his petitions (Antrag) and reiterated in the operative part of the judgment (Urteilsformel/Tenor) if the plaintiff's action is successful (e.g. "D is ordered to pay 5.000 Euro to P" or "D is ordered to refrain from mowing his lawn in the time from 22:00 to 6:00"), and

(b) the facts on which the plaintiff based his claim, understood as a precise statement of the subject matter and the basis of the claim raised ("Lebenssachverhalt, aus dem der Kläger die begehrte Rechtsfolge herleitet"[69], see § 253 (2) No. 2 ZPO). The "Lebenssachverhalt" does not encompass the whole historic incident, but only those facts from which the plaintiff deduces his right to relief as expressed in his petitum. As a rule of thumb, the "Lebenssachverhalt" will normally consist of those facts which the plaintiff needs to assert to make it possible to obtain judgment by default if the defendant does not appear in court ("Schlüssigkeit", § 331 ZPO).

If either "Antrag" or "Lebenssachverhalt" change, the "Streitgegenstand" changes, and the matter is beyond the scope of claim preclusion under § 322 (1) ZPO. As a result of the concentration on the plaintiff's request for relief, the "Rechtskraft"in German law is primarily concerned with the expression of a specific legal consequence in the operative part of the judgment ("Tenor"). According to majority opinion in Germany, the "procedural claim" ("prozessualer Anspruch" or "Streitgegenstand") must not be confused with substantive law claims ("materiellrechtlicher Anspruch"). If P has a right for damages against D because of a car accident which is based both on strict liability (§ 7 Straßenverkehrsgesetz) and general delictual fault liability (§ 823 (1) BGB), there are two substantive law claims (§ 7 Straßenverkehrsgesetz and § 823 (1) BGB), but only one procedural claim. Claim preclusion under § 322 (1) BGB goes as far as the procedural claim extends: if the defendant could have relied on further substantive law defenses against the claim and failed to argue them or at least failed to provide the factual material for these defenses (under German law, the court will examine the facts of the case on all possible legal points, "iura novit curia"), he will be precluded from argueing these defenses in the future even if they were not at all argued in the earlier proceedings. However, claim preclusion never (for an exception in case of set-off in § 322 (2) ZPO see below (3)) goes further than the procedural claim: if P in the above example sues only for partial damages (e.g. only for damages for personal injury or even only part of the damages for personal injuries), he will not be barred by res judicata from sueing again for further damages (e.g. damages to property or damages for remaining personal injuries).

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[68] Schilken, Zivilprozessrecht (2006)[5], § 6 No. 218.

[69] BGH NJW 1999, 1407: „Nach der prozeßrechtlichen Auffassung vom Streitgegenstand im Zivilprozeß, der sich der *BGH* angeschlossen hat (vgl. insb. BGHZ 117, 1 [5f.]), wird mit der Klage nicht ein bestimmter materiellrechtlicher Anspruch geltend gemacht; vielmehr ist Gegenstand des Rechtsstreits der als Rechtsschutzbegehren oder Rechtsfolgenbehauptung aufgefaßte eigenständige prozessuale Anspruch. Dieser wird bestimmt durch den Klageantrag, in dem sich die vom Kl. in Anspruch genommene Rechtsfolge konkretisiert, und den Lebenssachverhalt (Anspruchsgrund), aus dem der Kl. die begehrte Rechtsfolge herleitet. In diesem Sinne geht der Klagegrund über die Tatsachen, welche die Tatbestandsmerkmale einer Rechtsgrundlage ausfüllen, hinaus.Zu ihm sind alle Tatsachen zu rechnen, die bei einer natürlichen, vom Standpunkt der Parteien ausgehenden, den Sachverhalt „seinem Wesen nach„ erfassenden Betrachtungsweise zu dem zur Entscheidung gestellten Tatsachenkomplex gehören, den der Kl. zur Stützung seines Rechtsschutzbegehrens dem Gericht zu unterbreiten hat."

(2) In German law, "materielle Rechtskraft" does not extend to findings of fact even if these facts are contained in the reasons of the judgment and the judgment is based on them[70]. It is also not possible to have a declaratory judgment (§ 256 ZPO) on findings of fact because § 256 ZPO limits declaratory judgments to legal relations between the parties[71]. In this regard, the "Interventionswirkung" goes beyond the effect of "materielle Rechtskraft" (§ 68 ZPO). Neither does "materielle Rechtskraft" extend to findings of law which are necessary to reach the finding of the court[72]. If the court condemns a party to pay rent under a lease, the court may incidentally find that a valid lease contract exists between the parties. This finding is however not binding for later proceedings[73]. The parties may extend the scope of "materielle Rechtskraft" by asking for declaratory relief under § 256 (2) ZPO (Zwischenfeststellungsklage). By the same token, "materielle Rechtskraft" does not extend to defenses of the defendant which were argued in the action. Even if the court rejected in an action for contractual damages the defense that the contract is invalid, the defendant may bring forward the same defense in a future action against him with a different "Streitgegenstand"[74], e.g. an action for injunctive relief under the same contract.

(3) The only exception to the rule that defenses do not form part of "materielle Rechtskraft" is found in § 322 (2) ZPO for the case of set-off: German law extends the scope of "Rechtskraft" to counterdemands by the defendant which are asserted in the proceedings by way of set-off, under the condition that the court decides about the counterdemand. Example: P sues D for 5.000 Euro as payment on a sales contract. D asserts set-off with a counterdemand against P based on a loan which D gave P. If the court comes to the result that the claim based on the sales contract exists, it will examine whether D's counterdemand exists. If the court comes to the result that the loan repayment cannot be claimed by D, the judgment on the loan will have res judicata effect according to § 322 (2) ZPO. § 322 (2) ZPO therefore extends the scope of res judicata to claims asserted by way of set-off even though the fact that set-off was raised can only be seen in the facts and reasons of the judgment (Tatbestand and Entscheidungsgründe) and not in its operative part (Tenor/Urteilsformel).

(4) Extensions of the claim preclusive effects under § 322 (1) ZPO beyond the "Streitgegenstand" as defined by "Antrag" and "Lebenssachverhalt" are very limited[75]. An accepted extension relates to the "contradictory opposite" ("kontradiktorisches Gegenteil"): if the plaintiff has succeeded in demanding a certain sum as damages because of breach of contract, this judgment bars a later action of the defendant to recover the money paid on the basis of unjust enrichtment. In spite of academic critique of the narrow approach in matters of related claims ("Ausgleichszusammenhänge")[76] or in the case of "hidden partial claims" (verdeckte Teilklagen)[77], the majority opinion and the courts stick to the narrow concept of "Rechtskraft" as defined by "Antrag" and "Lebenssachverhalt".

(5) In a comparative perspective, for an understanding of the scope of German "Rechtskraft", it may be helpful to resort to two criteria which have been proposed in a comparative study by Zeuner[78]:

(a) The first criterion would be whether preliminary questions of fact or law which were in dispute between the parties fall within the preclusive effects of res judicata. This is not the case in German law which restricts the preclusive effect to the procedural claim (prozessualer Anspruch or Streitgegenstand, § 322 (1) ZPO) and excludes any preliminary findings of law or fact. German law is certainly narrower in this regard than Anglo-American law, but probably also narrower than French law[79]. "Rechtskraft" is limited to the operative part of the judgment. Any finding of law or fact which is incidental or preliminary does not fall within the scope of "Rechtskraft". While it is true that the operative part of the judgment may be interpreted with reference to the facts or the reasons of the judgment, this does not make the facts or reasons in any way binding for future proceedings. The narrow approach of German law in that regard is justified by party autonomy and mitigated by the possibility for any party to request declaratory judgment on those preliminary matters which amount to a legal relationship between the parties (§ 256 (2) ZPO). The reasons for this narrow concept are a concern for party autonomy, party expectations and legal certainty.

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[70] BGH NJW-RR 1988, 199 (200).
[71] Schilken, Zivilprozessrecht (2006)[5], § 31 No. 1022.
[72] BGH NJW-RR 1999, 376 (377).
[73] BGH NJW-RR 1999, 376 (377).
[74] BGH NJW-RR 1988, 199 (200).
[75] R. Stürner, Festschrift Schütze (1999), 913 (916).
[76] Reischl, Die objektiven Grenzen der Rechtskraft im Zivilprozeß (2001), 180 seq.; against an extension BGH NJW-RR 1986, 1066.
[77] For partial claims BGH NJW 1994, 3165 (3166); BGH NJW 1997, 1990; for doubts see Reischl, Die objektiven Grenzen der Rechtskraft im Zivilprozeß (2001), 259 seq.
[78] For the following Zeuner, Festschrift Zweigert (1981) 603 (614 seq.).
[79] For details Zeuner, Festschrift Zweigert (1981) 603 (618 seq.).

(b) The second criterion would be whether claim preclusion – within the defined cause of action or "Streitgegenstand" – extends to all possible substantive law questions (within what the relevant legal system regards as the same claim) whether they were argued by the parties or not. In this regard, German law seems to take a middle position between French law which seems to restrict claim preclusion to those issues which were actually argued in the case and Anglo-American law which seems to extend claim preclusion to all issues which could have been argued in the case[80]. An example may illustrate this: if P sues D for the price owed on a sales contract and D fails to argue a substantive law defense (i.e. fails to present the facts for proving that the goods were defective or fails to claim prescription or fails to argue that the contract is invalid), D will be ordered to pay and will lose his defences within the "Streitgegenstand" even if they were not at all argued in the proceedings. This does not mean that D cannot in the context of an action with a different "Streitgegenstand" argue that the goods were defective, the contract is invalid etc. However, as far as the "Streitgegenstand", i.e. the price owed on the sales contract is concerned, D cannot at a later stage argue that he had an additional defense that was not subject of the earlier proceedings if the defense could have been argued in the earlier proceedings. In German law, the preclusion of any means of attack and defense whether argued or not is mitigated by the fact that the "Streitgegenstand" is narrower than the Anglo-American "cause of action" and that incidental or preliminary questions are beyond the scope of "materielle Rechtskraft".

(c) To sum up, the approach to determine the "same claim" (consideration (a) above) under German law seems to be closer to the French, Belgium and Dutch concept than to the broad common law concept, but German law seems - as far as the preclusive effect of preliminary questions is concerned - to take an even more restricted approach than the French model (which was known to the drafters of the ZPO in 1877)[81]. On the question of preclusion of questions not argued by the parties (consideration (b) above), German law seems to be broader than French law as it unites several substantive law claims and defenses to one procedural claim whether they were argued in the proceedings or not (as long as they form part of the same demand, "Streitgegenstand")[82]. Needless to say that the German approach to res judicata is narrower than the jurisprudence of the ECJ on Art. 21 Brussels Convention/Art. 27 Brussels Regulation.

(7) To illustrate the above, the scope of the Streitgegenstand in German law shall be described by a few examples. Please skip them if the information given above is regarded sufficient for the purposes of the study.

(a) P has a right for damages against D because of a traffic accident. He initially claims only 5.000 Euro, not clarifying that this shall only be a partial claim ("verdeckte Teilklage"). The court awards 5.000 Euro. P can later sue for further 10.000 Euro because the original action was limited by the "Antrag" to the "first" 5.000 Euro, thus not having preclusive effect on an action for the remaining damages. An exception to this admissibility of the "verdeckte Teilklage" is made only if the claim is for an indivisible right, e.g. damages for pain and suffering. If P's action was for material damages (to his car, costs for doctors etc.), the first judgment has no preclusive effect on the second action. If D wants to make sure that no further action for damages will be possible (and does not rely for this purpose on prescription), he can counterclaim in the first action for a negative declaration (§ 256 (2) ZPO) stating that he (D) is not obliged to pay any damages to P as a result of the traffic accident on … at … .

(b) P has a right for damages against D because of a traffic accident. As he cannot fully substantiate the amount of his damage, he asks the court for a declaratory judgment stating that D is liable for any damage caused to P by this accident. Later on, P can calculate precisely how high his damages are. He asks the court instead of declaratory judgment for a comdemnatory judgment condemning D to pay 20.000 in damages. In this situation, the "Streitgegenstand" has changed because P has changed his request for relief (Antrag) from a declaratory judgment to a condemnatory judgment. This is – even if the facts of the case remain the same – sufficient to change the "procedural demand".

(c) P sues D for an injunction based on a trade mark violation. After obtaining the injunction, he sues for damages for the same violation. This is possible because the earlier judgment had a different request for relief (injunction instead of damages). The later court is not bound by the findings of the earlier court. If either P or D wanted to have

[80] For details Zeuner, Festschrift Zweigert (1981) 603 (618 seq.).

[81] Zeuner, Festschrift Zweigert (1981), 603 (604 seq.); Leipold, Festschrift Zeuner (1994), 431 (432 seq.), comparing German and French law, R. Stürner, Festschrift Schütze (1999), 913 (933 seq.).

[82] Zeuner, Festschrift Zweigert (1981) 603 (608), comparing German and French law: „Sieht man sich genauer um, so wird man jedoch bald gewahr, daß sich die französische Lösung nicht nur von der angloamerikamschen, sondern trotz gewisser Verwandtschaften des Ansatzes auch von der deutschen in wichtigen Punkten unterscheidet. Im Ergebnis erkennt sie der Rechtskraft teils eine geringere, teils aber auch eine größere Reichweite zu als diese" (At a closer look, the French solution differs not only from the Anglo-American, but also – despite some similarities – from the German solution in important points. All in all, French law recognises a partially broader and partially narrower scope of claim preclusion than German law).

a binding judgmnent on the existence of trade mark infringement, they could have asked for declaratory judgment (§ 256 (2) ZPO).

(d) D has bought something in P's store and left a bill of exchange as payment in the amount of 5.000 Euro. P may proceed against D on the original right to payment under the sales contract (§ 433 (2) BGB) and the right to payment under the bill of exchange (Art. 9 Wechselgesetz). If P sues D for 5.000 Euro and bases this claim on the sales contract, this is regarded as a different cause of action than an action for 5.000 Euro based on the bill of exchange because the facts P has to assert are different in both cases (even if the petitum – payment of 5.000 Euro – is identical). If P loses on the sales contract, he is thus not barred by § 322 (1) ZPO to enter a second claim based on the bill of exchange.

(8) NB 3: The requirement of the same parties applies in Germany (§ 325 (1) ZPO). Details will be presented in the answers to questions II 8 to 14.

(9) NB 4: Judgments on appeal have no res judicata effect in German law (§ 705 ZPO, see above question I C).

4. Invoking claim preclusive effects

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

Summary:

Claim preclusive effects of a judgment must be considered by the Court ex officio irregardless of the stage of proceedings. Should dispute arise as to the existence/content of an earlier judgment, which will be rare, the burden of proof relies on the party attempting to invoke preclusive effects. Where the Court determines that a claim is barred by the preclusive effects of an earlier decision the Court will issue a judgment stating that the new action is procedurally inadmissible. Equally if the earlier judgment only decides an element of the present proceedings, the Court will take that particular element as finally determined and may not deviate from that determination. This does not amount to issue preclusion, but rather recognition that an earlier final judgment has already specifically determined a material element of the second claim.

Full Response:

(1) NB-NB 2: Claim preclusive effects based on § 322 (1) ZPO (materielle Rechtskraft) must be considered by the court ex officio (von Amts wegen) in any situation the proceedings may be. As the court will normally not know of earlier proceedings between the parties, earlier judgments are usually brought to the court's attention by one or both of the parties. If that is done, the court will look at the judgment [normally the whole judgment is submitted, including the judgment order (Tenor/Urteilsformel), the statement of facts (Tatbestand) and the grounds for the decision (Entscheidungsgründe)] in order to determine whether it has preclusive effect according to § 322 (1) ZPO and how far this effect extends. If one party claims that the copy of the judgment handed in is a forgery, the court may request the files of the first court which issued the judgment in which the original judgment can be found (at least for 5 years after the judgment has been issued). It is hard to imagine that one party would hand in a forged judgment because this forgery should normally be easily discovered by referring to the files of the first court, resulting in criminal proceedings against the party who handed in a forged judgment. Therefore, it seems to be unlikely that a question of preclusive effects would ever have to be decided on the rules on burden of proof because the existence and contents of a judgment will normally be undisputed between the parties, and the question of its preclusive effects is a matter of law to which the rules of burden of proof do not apply. Nevertheless, if there are factual uncertainties on the existence of an earlier judgment, the burden of proof will fall on the party for which it is beneficial to rely on preclusive effects. Defeating the preclusive effects of an earlier judgment is only possible by an action for nullification or restitution on the narrow grounds of §§ 578-580 ZPO or by an action under § 233 ZPO. If motions under §§ 578-580 ZPO or § 233 ZPO are entered to attack the earlier judgment and the preclusive effects of the earlier judgment have a potential impact on the later proceedings, the later court would implicitly or explicitly stay his proceedings (§ 148 ZPO) and wait for the outcome of the motions under §§ 578-580 or § 233 ZPO in the first proceedings.

(2) NB 3: If a court comes to the conclusion that the claim before it is barred by claim preclusive effects (materielle Rechtskraft, § 322 (1) ZPO) of an earlier judgment because it has the same object ("Streitgegenstand") as the earlier judgment, the court will issue a judgment stating that the new action is procedurally inadmissible (procedural theory of Rechtskraft)[83]. If the new action does not have the same object ("Streitgegenstand") as the earlier action, but a particular element of the later action has been decided in earlier proceedings (e.g. an earlier court has found that the

[83] BGH NJW 1993, 333 (334); BGH NJW 2004, 1252 (1253).

defendant shall refrain from a certain action and the defendant nevertheless commits such an action and the plaintiff now sues for damages, "präjudizielles Rechtsverhältnis"), the court will take the particular element as finally determined by the earlier judgment and may not deviate from this judgment. However, the fact that a prior judgment may establish beyond contest an element of a second claim does not mean that there is issue preclusion in Germany. Only a final judgment which directly establishes a material element of the second claim will be given res judicata effect[84].

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:

It is clearer to discuss the "limits" to claim preclusive effects rather than "exceptions" to it. Four limits exists. First objective limits, that is the restriction of claim preclusive effects to the Streitgegenstand. Second temporal limits, such that preclusive effect takes effect only from the date of the last oral hearing before the court; material having emerged since then not being covered by the earlier judgments preclusive effect. Third subjective limits i.e. the definition of "same parties". Fourthly a category of limits termed "piercing the res judicata" which encompasses (1) actions for reopening the proceedings, (2) actions for annulment, and (3) in exceptional circumstances actions in substantive tort law , which provides that where a judgment has been immorally acquired and is contrary to substantive law it can be set aside. Further, where a party through no fault of his own was prevented from entering a timely appeal, he can claim to be reinstated to his earlier situation.

As to actions for reopening the proceedings the law provides for a reopening of a judgment where either "a particularly serious lack of correct procedure" or "an obvious disintegration of the correctness of the judgment" is evidenced. An action for restitution is available in a broader series of cases. However such an action will only be available if the issue it raises could not have been addressed during the first proceedings or on appeal.

Based on these general principles, the limits of claim preclusive effect can be readily determined. For example where a case was dismissed due to it being voluntarily withdrawn, no res judicata effect ensues, since the Court issues no judgment in this case, but only a cost order. Equally if recognizing claim preclusive effect would be contrary to public policy this can be dealt with either by the actions for reopening proceedings, in particular a violation of ECHR rights triggers an action for restitution, or by §826 BGB. Outside these provisions there is no general notion that a judgment cannot be relied upon because it is an abuse of process or procedurally unreasonable, though that said claims incorporated in judgments are nonetheless subject to general substantive law restraints which apply to all rights. As such concepts such as estoppel and forfeiture may operate as substantive (unlike the other limits which are merely procedural) limits to the preclusive effect of a decision.

If a Court violates a jurisdictional or procedural limit in issuing a judgment, this will not normally affect the judgment's preclusive effects (save in the case of very grave errors), though parties obviously have recourse to appeal.

Full Response:

Rather than speaking of "exception", I would prefer to label the "exceptions" as the limits of claim preclusive effects. German law defines objective (sachliche), subjective (subjektive) and temporal (zeitliche) limits of claim preclusive effects. The objective limits refer to the limitation of "materielle Rechtskraft" to the "procedural demand" ("Streitgegenstand") as presented by the parties' prayers for relief. These limits have been discussed in the answer to question II A 3.

The subjective limits refer to the parties bound by "Rechtskraft" and will be discussed in the answers to questions II A 6-10. The temporal limits have been addressed in the answer to question II A 1 NB 1 (usually closing of the last oral hearing before the court).

Another category of limits to claim preclusive effects are labelled "piercing the res judicata" ("Durchbrechung der Rechtskraft"). Piercing res judicata is possible

(1) if the requirements for an action for reopening the proceedings ("Wiederaufnahme des Verfahrens", §§ 578-580 ZPO) are fulfilled, or

[84] Murray/R. Stürner, German Civil Justice (2004), 361.

(2) if, in the case of judgments ordering recurring payments falling due in the future (in particular maintenance actions), there is a material change in those circumstances which were determinant for the judgment imposing the payments so that an action for amendment of the judgment is possible (Abänderungsklage, § 323 ZPO), or

(3) in very limited circumstances, if the requirements for an action in substantive tort law based on § 826 BGB are fulfilled. This requires that the judgment on which the preclusive effect is based has been immorally (against public policy) acquired ("subreption of a judgment") and is contrary to substantive law ("sittenwidrige Erschleichung oder Ausnutzung eines als unrichtig erkannten rechtskräftigen Titels")[85]. Such an action will in most cases lie only against enforceable court orders which have been obtained as a result of a special procedure in which the merits of the claim are not even superficially examined ("Mahnverfahren", enforcement order proceedings similar to the procedure established by EC regulation 1896/2006). If the debtor does not object at two occasions in that procedure, the court will issue an enforceable order without examining the merits of the action. In particular in consumer credit actions, there has been abuse of this procedure by creditors against inexperienced debtors which led the legislator to exclude consumer credit actions from this procedure (§ 688 (2), § 690 (1) No. 3 ZPO).

Against this background, I will address the questions asks in the explanatory notes.

NB:

(4) judgment was not on the merits:

(a) Dismissal of a case due to lack of jurisdiction. As explained earlier, in the case of procedural judgments dismissing an action for procedural reasons (e.g. lack of jurisdiction), the res judicata effect is limited to the same cause of action and the same procedural defect[86]: If the plaintiff brings the same action at the same court under the same procedural circumstances (e.g. lack of jurisdiction), res judicata of the earlier procedural dismissal will bar the action. If the plaintiff brings the action for the same claim under different procedural circumstances (e.g. sues in the competent court), there is no res judicata effect[87]. No substantive res judicata effect is attributed to judgments of superior courts which reverse and remand the action. Such judgments have only inner-procedural binding force for the lower court, § 563 (2) ZPO.

(b) Dismissal of the case due to prematurity of action. In this situation, the res judicata will only bar a later action on the same facts. If e.g. an action has been finally dismissed because a sum was not yet due and the sum has become due after the last oral hearing before the court in the first action, a new action can be entered because the fact that the claim is due constitutes a new fact which is outside the temporal scope of res judicata in the first action.

(c) Dismissal of the case due to the statute of frauds. There is no statute of frauds in German law, at least not in the common law sense.

(d) Dismissal of the case due to the statute of limitations. This does not make a difference for the res judicata effect. It should be kept in mind that the scope of res judicata is more limited in German law than in common law systems, i.e. a dismissal of a damages claim has no effect on an action for an injunction because the prayer for relief (Antrag) and as a consequence the Streitgegenstand is different.

(e) Summary proceedings. A form of summary proceedings similar to summary judgment in the US style (FRCiv 56) does not exist in German law. There is no need for such a procedure because there are no civil juries in Germany. Judgments in small claim procedures have the same res judicata effect as other judgments. Judgments in proceedings for provisional measures have limited res judicata effect.

(f) Dismissal of the case due to voluntary withdrawal. In case of voluntary withdrawal pursuant § 269 ZPO (as opposed to the waiver of the claim under § 306 ZPO which in practice never occurrs), no judgment is issued by the court, only a cost order which usually shifts the costs of the proceedings to the plaintiff who voluntarily withdrew his action. Therefore, voluntary withdrawal according to § 269 ZPO does not have res judicata effect (beyond a decision on costs), whereas a judgment as a result of waiver of claim has. Withdrawal according to § 269 ZPO without the other party's consent is only possible before the oral hearing has started. The defendant can claim that the plaintiff reimburse his costs before he may go ahead with a new action.

(g) Dismissal of the case due to involuntary dismissal. I do not understand what is meant by this category. If it means a judgment by default against the plaintiff, such judgment has res judicata effect.

[85] BGH NJW 1987, 3256 (3257); BGH NJW 1988, 971 (972); BGH NJW 1998, 2818; BGH NJW 1999, 1257 (1258).
[86] OLG Brandenburg NJW-RR 2000, 1735 (1736); Musielak(-Musielak), ZPO (2007)[5], § 322 No. 44.
[87] Musielak(-Musielak), ZPO (2007)[5], § 322 No. 44.

(f) Dismissal of the case due to insufficient evidence. This has no influence on the scope of res judicata, i.e. the judgment would have full res judicata effect. For a (very limited) reopening based on newly found evidence, see § 580 No. 7 ZPO.

(5) Jurisdictional or procedural limitations of the court normally do not lead to exceptions in the claim preclusive effects. If they are disregarded by the court, the parties should enter appeal to correct the judgment. Only very grave errors (e.g. disregarding immunity from German courts) lead to the judgment being without effect. In the international area, disregarding exclusive jurisdiction (Art. 22 Brussels Regulation) may lead to non-recognition of the judgment (Art. 35 Brussels regulation).

(6) Judicial permission to pierce preclusive effects of judgments may be granted if either the requirements for reopening the proceedings are met ("Wiederaufnahme des Verfahrens", §§ 578-580 ZPO) or if the party could not enter timely appeal without its fault and can therefore claim to be reinstituted in its earlier situation ("Wiedereinsetzung in den vorigen Stand", § 233 ZPO).

(a) §§ 233 seq. ZPO deal with the situation that a party was prevented, without his fault, from complying with a mandatory time period or with the period for filing the grounds for an appeal, an appeal of law or an objection. In this situation the party shall, upon his motion, be granted a reinstatement of previous status. A reinstatement to previous status can only be granted within one year (§ 234 (3) ZPO).

(b) §§ 578 seq. ZPO deal with the rare cases in which a civil judgment may be reopened. The grounds for reopening are either a "particularly serious lack of correct procedure" or "an obvious disintegration of the correctness of the judgment"[88]. Very serious procedural defects such as unproper constitution of the court, lack of impartiality of a judge or lack of required legal representation of a party in the proceedings make an action for annulment possible, for some objections only if they could not be raised in appeal. For details I refer to § 579 ZPO as translated in the annex.

The action for restitution under § 580 ZPO addresses a broader scope of serious defects in the prior proceedings and includes a reopening in case of

(aa) a false material statement under oath by the opposing party (§ 580 No. 1 ZPO),

(bb) forgery of documents received in evidence (§ 580 No. 2 ZPO),

(cc) false testimony by a witness or expert (§ 580 No. 3 ZPO), or

(dd) criminal conduct by a party or judge in connection with the judgment (§ 580 No. 4 and 5 ZPO).

(ee) an earlier judgment on which the judgment is based has been set aside by another final judgment (§ 580 No. 6 ZPO),

(ff) discovery of a prior final judgment given in the same matter or another document, the use of which would place the party in a position to bring about a decision more beneficial for her (§ 580 No. 7 ZPO),

(gg) and, after a recent change, in the event that the European Court of Human Rights finds a violation of the European Convention on Human Rights or of one of its protocols and the judgment is based on this violation (§ 580 No. 8 ZPO).

In the cases of § 580 No. 1 to 5, an action for restitution can only take place in the event that a final sentence has been passed for a criminal offense or in the event that the initiation or completion of the criminal process cannot take place for reasons other than lack of evidence (§ 581 (1) ZPO). The action for restitution is permissible only in the event that the party, without his fault, was unable to assert the grounds for restitution in the earlier proceedings, including, but not limited to, by means of a motion to set aside, an appeal or by the way of joining an appeal (§ 582 ZPO). A complaint for restitution will therefore be unsuccessful if it is based on any defect that was or could have been addressed during the first instance proceedings or during any second instance appeal. Furthermore, unlike the action for annulment under § 579 ZPO, an action for restitution may only be based on defects which were causal of the judgment[89]. As it can be seen from the narrow drafting of § 580 No. 7 ZPO, the reopening of proceedings based on newly discovered evidence is limited to documentary evidence and does not include other forms of evidence such as witness testimony or evidence by examination (Augenschein)[90]. The new evidence must be of moment to the outcome of the case without the need for supplementary expert or lay testimony and must have existed already at the time of the prior proceedings (but have been inaccessible to the party). Documentary evidence which merely casts

[88] Murray/R. Stürner, German Civil Justice (2004), 362.
[89] Murray/R. Stürner, German Civil Justice (2004), 363.
[90] Murray/R. Stürner, German Civil Justice (2004), 363.

doubt on the credibility of witness testimony is normally not sufficient[91]. If the plaintiff for restitution can successfully establish a ground for reopening of the proceedings, the reopening leads to a continuation of the earlier proceedings.

(7) Party agreement. It is open to the parties to agree to a waiver of their rights under a judgment. Normally this is done by way of settlement. If one party tries to enforce the judgment in spite of a waiver in an agreement, the other party can enter an action pursuant § 767 ZPO and present the waiver as a new fact which is not precluded by the judgment because it came into effect after the last oral hearing in the proceedings.

(8) Preclusive effect would be contrary to public policy. This exception to preclusive effects is recognised in two ways. First of all, certain deficiencies of the judgment are enumerated as a ground for nullification or restitution and allow a reopening of the proceedings (for details see §§ 578-580 ZPO, the translation included in the annex and the answer above). The new § 580 No. 8 ZPO opens a ground for reopening the proceedings if the ECHR has found that the rights (including Art. 6 ECHR) of the ECHR have been violated and the judgment is based on this violation. A second avenue to challenge judgments which are contrary to public policy is the narrow scope of the substantive tort action under § 826 BGB.

(9) The possibility to reopen proceedings in which a final judgment has been delivered because new evidence has been discovered is addressed in § 580 ZPO, in particular § 580 No. 7 ZPO (see above answer under 6).

(10) Beyond what is regulated in §§ 578-580 ZPO and accepted as contrary to public policy under § 826 BGB, there is no general notion that a judgment may not be relied upon because of procedural unreasonableness or abuse of process. Nevertheless, claims which are incorporated in judgments are nevertheless subject to the general substantive law restraints which apply to all rights and are based on the substantive law concept of good faith (Treu und Glauben, § 242 BGB). If for example the judgment creditor makes the judgment debtor believe that he will not enforce the judgment (without formally waiving his rights) and later proceeds to execution, he may be estopped from doing so by the notion of "venire contra factum proprium". Another notion based on § 242 BGB which may lead to a loss of rights embodied in a judgment is the doctrine of forfeiture ("Verwirkung"). If considerable time has passed in which no enforcement of the title was sought (element of time, Zeitelement) and there is some action or behaviour of the judgment creditor which reasonably leads the debtor to believe that he will not enforce his judgment (element of circumstance, "Umstandsmoment"), § 242 BGB may constitute a substantive law barrier to enforcement of the judgment. This however is not related in particular to the procedural concept of res judicata, but rather a substantive law break on the exercise of rights which applies to any substantive right. The general prescription period for the enforcement of claims embodied in court judgments is 30 years (§ 197 (1) No. 3 BGB).

(11) NB 2: The policies underlying the reopening of proceedings is that very grave procedural or substantive errors, in particular criminal conduct on the part of one party, should exceptionally overcome res judicata for reasons of substantial justice and that the consequences of criminal conduct should not be perpetuated.

(12) NB 3: See answer above under (10), in particular the remarks on § 242 BGB as a limitation to substantive rights.

[91] Murray/R. Stürner, German Civil Justice (2004), 364.

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:

Both parties are prevented from bringing fresh proceedings against the same party based on the same claim (Streitgegenstand). The Court must consider of its own motion the effect of an earlier judgment and must dismiss the new proceedings as inadmissible via a procedural judgment if the subsequent claim is in breach of res judicata. If the subsequent claim concerns an element which has been finally determined by an earlier decision, the court will be bound by that earlier decision.

Full Response:

(1) NB: Both claimant and defendant are prevented by a judgment on a particular claim from bringing fresh proceedings against the same party based on what is considered to be the same claim (same "Streitgegenstand"). The final judgment in the former suit is regarded as a "negative pre-requisite to suit" (negative Prozessvoraussetzung) in the new case[92]. The court is required to consider the earlier judgment on its own motion ex officio (von Amts wegen). The effect is that the new proceedings will be dismissed as inadmissible (unzulässig) by procedural judgment. If the second suit does not involve the same cause of action, but rather concerns an element which has been finally determined by an earlier judgment (e.g. a declaratory judgment finds that P owns a particular piece of land, and now D is sued for using this land), the second court will not dismiss the later action, but rather be bound by the earlier conclusive decision (in the example the declaration in the earlier judgment that P owns the property cannot be challenged by D again). This is no form of issue preclusion because the earlier judgment establishes only those elements which were subject of the earlier claim (mostly if the earlier claim was for declaratory judgment).

(2) NB 2: Non-existence of an earlier judgment is a negative pre-requisite to suit (negative Prozessvoraussetzung) for the later suit to be admissible.

(3) NB 3: There is no distinction between the parties. The scope of res judicata depends, as explained above, on the nature of the earlier judgment (procedural or substantive etc., see above).

(4) NB 4: As mentioned above, judgments under appeal are in German law not capable of claim preclusive effects (§ 705 ZPO). However, if the second proceedings relate to the same "Streitgegenstand" as the first proceedings which are under appeal, the second proceedings would be inadmissible for reasons of lis alibi pendens (entgegenstehende Rechtshängigkeit, § 261 (3) No. 2 ZPO) and would be dismissed by procedural judgment.

(5) NB 5: The claim for wages for a later time period constitutes a different procedural claim (Streitgegenstand) because it is based on a different set of facts (work in a later time period) than the earlier action. Therefore, no res judicata (judgments under appeal have no res judicata effect anyway) and no lis alibi pendens because of the different procedural claim (Streitgegenstand). The second court may freely decide the issue. It would probably informally not deal with the issue to wait for the judgment of the court of appeal, but it is by no means bound by it.

7. Other participants

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

Summary:

[92] Rosenberg/Schwab/Gottwald, Zivilprozessrecht (2004)[16], § 150 No. 10.

Preclusive effects extends only to the parties, their legal successors and co-claimants/defendants. Where a party wishes to extend the effect of a judgment he can issue a third party notice to achieve preclusive effect different from res judicata termed "Interventionswirkung", the effect of which is preclude the third party from later asserting arguments contrary to the first judgment. Claim preclusive effects based on §68 ZPO must be considered by the Court ex officio at whatever stage of the proceedings it is raised. Interventionswirkung is broader than res judicata in that it precludes the third party questioning the factual or legal basis of the Court's decision. It does not however extend to factual or legal findings unnecessary to the earlier decision.

Full Response:

(1) As the questionnaire points out correctly, the claim preclusive effects of German judgments under § 322 (1) ZPO is limited to the parties and their legal successors (§ 325 (1) ZPO). The parties to a lawsuit are not limited to a single plaintiff and a single defendant, but may extend to a number of additional co-plaintiffs and/or co-defendants. A group of more than one plaintiff or defendant is called "Streitgenossenschaft" (suit group), either "aktive Streitgenossenschaft" (if on the side of the plaintiff) or "passive Streitgenossenschaft" (if on the side of the defendant). A "Streitgenossenschaft" is possible if the claims asserted are based on the same factual or legal ground (§ 59 ZPO, e.g. several claims by plaintiffs who have been injured by the same negligent conduct of the defendant) or the claims are similar as matter of law (§ 60 ZPO). Parties joined as co-plaintiffs or co-defendants ("Streitgenossen") have the position of a full party in the lawsuit and are bound by the judgment according to § 322 (1) ZPO. While German law permits to make a counterclaim against a third party which is not yet party to the proceedings, it limits this possibility in general to a counterclaim which must be directed against both the original plaintiff and a third party (parteierweiternde Widerklage)[93]. Only in exceptional circumstances (e.g. in case of assignment) is it possible to direct the counterclaim solely against the third party (isolierte Drittwiderklage)[94]. Even if some commentators have observed that the possibility of third-party counterclaims has been allowed more liberally in recent years[95], it still holds true that German procedural law does in general not permit an action against a third party for indemnity or guarantee to be commenced within the main proceedings in which the question of the party seeking liability or indemnity is established[96].

(2) As an alternative, German procedural law provides that a party who wants to extend the effect of a judgment beyond the parties to a third person can issue a third-party notice (Streitverkündung, § 72 ZPO) to achieve a preclusive effect different from res judicata which German law calls "Interventionswirkung" (§§ 74 (3), 68 ZPO). The same effect applies if a third person intervenes voluntarily in a lawsuit to support one party (Nebenintervention, § 66 ZPO). Interventionswirkung only concerns third parties who have either intervened in a lawsuit between two parties (Nebenintervention, § 66 ZPO) or have been forced into a lawsuit between two parties as a result of third party notice (Streitverkündung, § 72 ZPO).

An intervening third party may join the proceedings if he is interested that in a lawsuit pending between other parties one particular party shall prevail (§ 66 (1) ZPO). A third-party notice can be effected if a party to a lawsuit believes that he is entitled to raise a claim against a third party on account of a guarantee or indemnity, in case the lawsuit ends to his detriment, or if the party in the lawsuit handles the claim of a third party (§ 72 ZPO). A classic example of third-party notice is the case that D is sued by P and D holds insurance for the damage he allegedly caused to P. If the court deciding the action between P and D holds D liable, this judgment would not in itself be binding on the insurance company because it was no party to the proceedings. Therefore, D has an interest in binding the insurance to the findings of the court in the action P-D. This can be done by effecting third-party notice on the insurance company, the effect of which is that in later proceedings the third party, as related to the main party (D), will not be heard when the third party asserts that the controversy as presented to the judge has led to an incorrect decision (§§ 74 (3), 68 ZPO). A translation of the relevant provision of the ZPO is included in the annex.

(3) The consequence of "Interventionswirkung" (§§ 68, 74 (3) ZPO) is that vis-à-vis the main party, the intervenor will not be heard when he asserts that the case as presented to the judge was decided incorrectly (§ 68 ZPO). If in the earlier action the court found that a certain good delivered from D to P was defective and D bought that good from the third party T and joined T by third-party notice, T may not argue in the later proceedings for

[93] BGH NJW 2007, 1753.
[94] BGH NJW 2007, 1753.
[95] Hess/Pfeiffer/Schlosser, Report on the Application of Regulation Brussels I in the Member States, para. 235 quoting BGH NJW 2007, 1753.
[96] R. Stürner, Festschrift Geimer (2002), 1307 (1313). A possible problem could also bet hat the court in which the main proceedings are pending lacks jurisdiction over the third party because there is no equivalent to Art. 6 No. 2 Brussels Regulation in domestic law.

reimbursement of D against T that the good was not defective. The court would thus, unless T has defences which are not barred by findings of the earlier judgment, find in favour of D and condemn T to pay reimbursement to D.

(4) The "Interventionswirkung" (§§ 68, 74 (3) ZPO) requires that the judgment on which it is based has become formally binding (formal res judicata, formelle Rechtskraft)[97]. Concerning third party intervention (§ 66 ZPO), the relevant point in time for "Interventionswirkung" is the time of the joinder of the third party (§ 68 ZPO). Concerning third-party notice, the decisive time is the time at which the joinder became possible as the consequence of the third-party notice (§ 74 (3) ZPO).

(5) NB: (1) The relevant terminology is "Interventionswirkung" (effect of the judgment on non-parties, §§ 68, 74 (3) ZPO), "Nebenintervention" (§ 66 ZPO) and "Streitverkündung" (§ 72 ZPO).

(6) The nature of the preclusive effect (Interventionswirkung) is procedural and based on §§ 68, 74 (3) ZPO. In the case of third-party notice, there are further substantive law consequences of the third-party notice, the most important being that the period of prescription for the claim against the party receiving third-party notice stops (§ 209 No. 4 BGB). Interventionswirkung takes effect in two situations: either if a third person has actually intervened in the lawsuit which is possible if the third person has a legal interest in the success of one party in an action pending between other persons (Nebenintervention, § 66 (1) ZPO, e.g. the members of a commercial partnership who are liable for the debts of the commercial partnership, §§ 128, 129 HGB), or, more commonly, if a party has been served with third-party notice according to §§ 72, 73 ZPO. Third-party notice can be initiated by a party who believes that he could, in the event of an unsuccessful outcome of the proceedings, claim warranty or indemnity against a third party or by a party who is asserting the claim of a third party. Third-party notice is given through the court. It is affected by filing a pleading of third-party notice with the court in which the ground of third-party notice (e.g. possibility to claim warranty) and the status of the action (normally all documents so far exchanged in the lawsuit are included) are stated. The pleading will be served by the court on the third party, and a copy thereof is given to the opponent of the party seeking third-party notice. The third-party notice is only effective on service thereof on the third party (for the form of third-party notice see § 73 ZPO).

The party receiving third-party notice faces basically two options: either it joins the suit, thereby acquiring the position not of a party, but of a "Nebenintervenient" (auxiliary intervenor) as described in §§ 66 seq. ZPO (§ 74 (1) ZPO). Alternatively, it may not join the proceedings, with the result that the suit continues without it (§ 74 (2) ZPO). In any event, the Interventionswirkung of § 68 ZPO is applied against the third party, with the deviation that, rather than the time of intervention, the determinative time is the time at which intervention was possible by reason of the third-party notice (§ 74 (3) ZPO).

(7) Claim preclusive effects based on § 68 ZPO (Interventionswirkung)[98] must be considered by the court ex officio (von Amts wegen) in any situation the proceedings may be. Normally, the parties draw the attention of the court to the judgment which presumedly the Interventionswirkung derives from.

(8) The scope of "Interventionswirkung" (§ 68 ZPO) goes beyond res judicata (§ 322 (1) ZPO) in that the third party is precluded from questioning the factual or legal basis of the court's decision[99]: „Die mit der Streitverkündung verbundene Bindungswirkung, die darin besteht, daß der Streitverkündete im Regreßprozeß gegen ihn nicht mit der Behauptung gehört wird, der Prozeß sei unrichtig entschieden, bezieht sich nicht nur auf den Inhalt der Entscheidung, also das festgestellte Rechtsverhältnis oder die ausgesprochene Rechtsfolge, sondern zusätzlich auf alle tatsächlichen und rechtlichen Grundlagen der Entscheidungsgründe des Vorprozesses[100]."

The Interventionswirkung is, however, limited in a number of ways:

(a) First of all, the preclusive effect of Interventionswirkung is limited to the findings of the court in the first judgment. The preclusive effect does not extend to factual or legal findings which were not necessary for the earlier decision[101].

(b) The preclusive effect is further limited to the facts tried before the court. Even if similar facts may be in question in related cases (e.g. in a chain of sales contracts), the preclusive effects of the judgment are limited to the facts of the actual case as decided[102]. If the decision in the judgment was based on a non liquet or the burden of proof, the

[97] BGH NJW 1969, 1480 (1481).
[98] BGHZ 16, 217 (228); BGHZ 96, 50 (54).
[99] BGH NJW 1992, 1698 (1699); BGH NJW 1988, 1378 (1379).
[100] BGH NJW 1998, 79 (80).
[101] OLG Hamm NJW-RR 1996, 1506 (1506); OLG Köln NJW-RR 1992, 119 (120).
[102] Stein/Jonas(-Bork), ZPO (2004)[22], vol. 2, § 68 No. 8.

preclusive effect is limited to the fact that the particular issue could not be resolved and had to be decided according to the burden of proof[103].

(c) As the intervening party may only support the main party, it is not bound by findings in the judgment which were in the earlier lawsuit favourable to the main party and could therefore not be attacked by the intervenor[104]. Only findings of the court which were disfavourable for the main party are therefore in a later lawsuit binding according to §§ 74, 68 ZPO.

(d) According to § 68 second half-sentence ZPO, the intervenor may be heard with the assertion that the main party conducted the action in a defective manner to the extent that he was prevented from asserting means of attack or defense by the state of the action as it was at the time of his intervention, or that he was prevented by declarations and pleadings of the main party to assert means of attack or defense, or that means of attack or defense of which the intervening party had no knowledge had not been asserted by the main party intentionally or by gross negligence.

(e) According to the courts, there is no preclusive effect of Interventionswirkung to the detriment of the main party which has been supported by the intervenor in the earlier suit, i.e. the Interventionswirkung works only to the benefit of the main party which the intervenor supported[105]. However, if the earlier judgment includes findings which are both to the benefit and to the detriment of the main party and the main party invokes the earlier judgment in a follow-on suit against the intervenor, the main party is also bound to the negative findings in the earlier suit[106]. It is not possible to rely only on the advantageous findings of the earlier judgment (no "picking of the raisins").

(f) The preclusive effect of the Interventionswirkung is limited to the relationship between the main party supported by the intervenor and the intervenor and does not extend to the opponent of the main party. It is however extended to the legal successors of the intervenor by analogy to § 325 ZPO[107].

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:

Only two concepts of group representation are recognized in German law: association or interest group complaint and model proceedings established by the Capital Markets Model Case Act (KapMuG). The former is usually found in the fields of consumer and unfair competition law, where a typical case involves a group/association as claimant suing for injunctive relief. In the consumer law field, the preclusive effects of a judgment are modified by Unterlassungsklagengesetz (injunctive suit act). Crucially, any third party can invoke an earlier judgment wherein the Court ruled that certain contract terms used by the Defendant were unlawful, in its litigation against the Defendant. This has broader effect than res judicata per §322 ZPO in that it also gives preclusive effect to the essential reasons for the earlier judgment. However a Court will not consider the earlier judgment ex officio but will only do so after a party claims the effect.

"Model proceedings" under KapMuG consist of situations of ten or more suits for violation of securities law which involve identical issues. In this situation §§7, 14 and 16 KapMuG allows for a stay on the individual proceedings and a common question to be referred to the Oberlandesgericht. This judgment will bind all the plaintiffs in all the individual disputes.

In both types of group representation the nature of the preclusive effect is procedural.

Full Response:

[103] BGH NJW 1983, 820 (821): „Eine beweismäßige Benachteiligung des Streitverkündeten durch die Interventionswirkung läßt sich dadurch vermeiden, daß man als Gegenstand der durch die Erstreckung auf die Entscheidungselemente erweiterten Interventionswirkung nur die Feststellung betrachtet, daß die betreffende Tatfrage nicht zu klären ist. Nur dies muß sich der Streitverkündete im Folgeprozeß entgegenhalten lassen"; OLG Saarbrücken NJW-RR 2002, 622 (623).
[104] BGH NJW 1998, 79 (80).
[105] BGH NJW 1987, 1894 (1895); BGH NJW 1997, 2385 (2386). For a critique see Stein/Jonas(-Bork), ZPO (2004)[22], vol. 2, § 68 No. 20 seq.
[106] RGZ 153, 271 (274); BGH NJW-RR 1989, 766 (767).
[107] Stein/Jonas(-Bork), ZPO (2004)[22], vol. 2, § 68 No. 23 seq.

In general, there are only two different concepts in German law which may be considered as a form of group or representative action[108]. The first concept is the association or interest group complaint (Verbandsklage) which is well established in the field of consumer and unfair competition law. The Verbandsklage in unfair competition law dates back to the 1896[109]. It has been extended to consumer law and the law to control unfair terms in standard form contracts. Today, interest group complaints are largely based either on the Unterlassungsklagengesetz (which is based on, but goes goes beyond EC directive 98/27/EC on injunctions for protection of consumer interests) and the law against unfair competition (Gesetz gegen den unlauteren Wettbewerb, UWG), but not limited to these areas[110]. The interest group complaint ressembles the classic two-party model of litigation, with the claimant being the interest group and the defendant being the party accused of unfair practices or unfair terms in standard form contracts. The interest group complaint seeks in almost all cases injunctive relief.

The judgment in the field of consumer law is subject to the rules of res judicata as modified by §§ 9-11 Unterlassungsklagengesetz (injunctive suit act). These provisions require the court to include in the operative part of the judgment (Tenor) the wording of the terms which are considered unlawful, the kind of legal transactions to which the judgment applies and the injunctive order to refrain from using or recommending terms which have the some content (§ 9 (1) Unterlassungsklagengesetz). If the defendant continues to use the terms the court found to be unlawful, any party to a standard form contract (who was not party to the court proceedings) including the respective terms may claim invalidity of the contractual term against the defendant as a result of the judgment (§ 11 Unterlassungsklagengesetz). § 11 Unterlassungsklagengesetz therefore extends the scope of res judicata by making it possible for any third party to invoke invalidity of the contractual term based on the judgment between the interest group and the party using the contractual term. The binding effect under § 11 Unterlassungsklagengesetz is close to the concept of res judicata[111], but goes beyond it in extending its effect to the essential reasons for the judgment[112]. Unlike res judicata under § 322 ZPO, the court will consider the binding effect under § 11 Unterlassungsklagengesetz not ex officio, but only if a party claims the effect[113]. Beyond § 11 Unterlassungsklagengesetz, there is no extension of the res judicata effect of a judgment in an association or interest group complaint to third parties who were not party to the initial suit. As a result, other interest groups or even the members of the relevant interest group or association are not bound by the judgment and could start separate proceedings[114].

The other form of "collective action" in a broad sense are "model proceedings" (Musterverfahren) established by the recent Capital Markets Model Case Act (Kapitalanlegermusterverfahrensgesetz, KapMuG[115]). Model proceedings under the KapMuG are designed as interlocutory proceedings[116] to deal with mass securities litigation where a large number of individual claims turn on the same question (e.g. claims against the Deutsche Telekom which turn on the question whether securities laws were violated in the emission of shares because certain real estate was not correctly valued in the emission prospectus). In such a situation of ten or more suits for violation of securities laws which involve identical issues, §§ 7, 14 and 16 of the Capital Markets Model Case Act permit to stay the individual parallel proceedings and refer common questions to the Oberlandesgericht which renders a master decision (Musterentscheidung) binding for all the plaintiffs of the individual disputes as far as the particular issue is concerned: "The model case ruling shall be binding on the courts trying the matter, whose decisions depend on the result of the model case or on the legal question to be resolved in the model case proceedings" (§ 16 (1) first sentence KapMuG)[117]. Furthermore, the legislator has distinguished between two different effects of the master

[108] For a recent English language study, see Baetge, Class Actions, Group Litigation and Other Forms of Collective Litigation (2007), available under http://www.law.stanford.edu/display/images/dynamic/events_media/Germany_National_Report.pdf.
[109] For a historical perspective Schaumburg, Die Verbandsklage im Verbraucherschutz- und Wettbewerbsrecht (2006), 24-33.
[110] For an account Baetge, Class Actions, Group Litigation and Other Forms of Collective Litigation (2007), 5-7 available under http://www.law.stanford.edu/display/images/dynamic/events_media/Germany_National_Report.pdf.
[111] Basedow AcP 182 (1982), 335 (345 seq.).
[112] MünchKomm(-Gottwald), ZPO (2008)[3], vol. 1, § 322 No. 18.
[113] MünchKomm(-Gottwald), ZPO (2008)[3], vol. 1, § 322 No. 18.
[114] MünchKomm(-Gottwald), ZPO (2008)[3], vol. 1, § 325a No. 11; cp. BGHZ 123, 30 (34).
[115] Act on the Initiation of Model Case Proceedings in respect of Investors in the Capital Markets, the English text can be found at www.bmj.bund.de/kapmug.
[116] M. Stürner, 26 Civ. Just. Q. 250, 264 (2007).
[117] § 16: Effect of the Model Case Ruling
(1) The model case ruling shall be binding on the courts trying the matter, whose decisions depend on the establishment made on the model case or the legal question to be resolved in the model case proceedings. The order shall be defined as taking final and binding effect to the extent that a ruling has been handed down in regard to the

decision. According to § 16 (1) second sentence KapMuG, the order shall be defined as taking final and binding effect to the extent that a ruling has been handed down in regard to the subject matter of the model case. The legislator wanted to clarify with this sentence that the model proceedings have an own cause of action (Streitgegenstand) which can become subject of res judicata and can be recognised and enforced under Art. 32 seq. Brussels Regulation (BR). However, scholars have pointed out that the interlocutory nature of the proceedings could hinder recognition and enforcement of the decision under Art. 32 BR[118].

A further effect of the model case ruling is dealt with in § 16 (1) third sentence, § 16 (3) KapMuG: "Without prejudice to subsection (2), the model case ruling shall have effect for and against all interested parties summoned, irrespective of whether the interested party itself has expressly complained of all the points of dispute. (…) The model case ruling shall also have effect for and against the interested parties summoned, who did not intervene in the appeal on points of law proceeding." This binding effect is in its effects similar to the Interventionswirkung (§§ 74, 68 ZPO)[119]. As § 68 second sentence, § 16 (2) KapMuG allows for certain exceptions to the binding effect[120]. The legislator has anticipated that the binding effect under § 16 (1) third sentence should be subject to recognition and enforcement in the Brussels Regulation similar to the Interventionswirkung (Art. 65 (2) BR). There are however doubts whether a decision in an interlocutory proceeding could ever profit from recognition under Art. 33 BR[121]. The binding effect under § 16 KapMuG extends only to those parties who were summoned to the proceedings, irrespective whether they participated in the proceedings or not or whether they withdrew their main action later (§ 16 (1) fourth sentence KapMuG). It does however not extend to those parties who did not start proceedings and could therefore not be summoned to the model case proceedings[122].

Outside the KapMuG, judgments in parallel or similar proceedings have binding effect for third parties only if the parties have contractually agreed to settle the issue in model proceedings and accept the model ruling as binding for their dispute ("Model case contract", Musterprozessvertrag). The binding effect in this situation results from the contract, not from procedural law.

NB (1) For the interest group complaint, the terminology is not very different to the two party model. Apart from the requirements for a more extensive operative part of the judgment to make it clear which clause or conduct in which context has been found unlawful (§ 9 Unterlassungsklagengesetz), third parties (consumers) may invoke the finding of the court that a particular contract clause is unlawful in their contractual relationships with the defendant even though the third party consumers were no party to the first action (§ 11 Unterlassungsklagengesetz). For the capital markets model case act, the law speaks of a binding effect on the lower courts of the model decision of the Oberlandesgericht (§ 16 KapMuG, Wirkung des Musterentscheids).

(2) The nature of the preclusive effect is in both cases procedural. In the case of the model decision of the Oberlandesgericht, this seems to be quite clear because § 325a ZPO makes explicit reference to the KapMuG. In the case of § 11 Unterlassungsklagengesetz, the nature of the effect is disputed in legal doctrine, but it seems most

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subject matter of the model case. Without prejudice to subsection (2), the model case ruling shall have effect for and against all interested parties summoned, irrespective of whether the interested party itself has expressly complained of all the points of dispute. This shall also apply if the interested party has withdrawn its complaint in the main proceedings. Main proceedings shall be recommenced upon submission of the final and binding model case ruling by a party to the model case proceedings.
(2) Upon final and binding conclusion of the model case proceeding, the interested parties summoned shall only be heard in legal disputes brought against the opposing party which assert that the main party's presentation of the case was inadequate, provided that, on account of the stage the model case proceeding was in at the time they were summoned or on account of statements and actions of the main party, the interested parties summoned were hindered from availing themselves of means ofcontestation or defense, or such means of contestation or defense of which they were not aware were not availed of by the main party, either intentionally or due to gross negligence.
(3) The model case ruling shall also have effect for and against the interested parties summoned, who did not intervene in the appeal on points of law proceeding.

[118] MünchKomm(-Gottwald), ZPO (2008)[3], § 325a No. 4.
[119] For differences MünchKomm(-Gottwald), ZPO (2008)[3], § 325a No. 5.
[120] § 16 (2) KapMuG: Upon final and binding conclusion of the model case proceeding, the interested parties summoned shall only be heard in legal disputes brought against the opposing party which assert that the main party's presentation of the case was inadequate, provided that, on account of the stage the model case proceeding was in at the time they were summoned or on account of statements and actions of the main party, the interested parties summoned were hindered from availing themselves of means ofcontestation or defense, or such means of contestation or defense of which they were not aware were not availed of by the main party, either intentionally or due to gross negligence.
[121] MünchKomm(-Gottwald), ZPO (2008)[3], § 325a No. 8.
[122] MünckKomm(-Gottwald), ZPO (2008)[3], § 325a No. 9.

convincing to regard it as a special form of extension of res judicata to the benefit of a third party (the consumer) who was no party to the proceedings[123].

The effect of § 11 Unterlassungsklagengesetz requires a judgment which has formal res judicata effect (§ 705 BGB) between the interest group claimant and the defendant who has used the unfair term. In the case of § 16 KapMuG, the binding effect requires that the Oberlandesgericht has issued a model case ruling after reference from a trial court. Such a ruling binds the interest parties summoned to the model proceedings (Beigeladene). The parties summoned to the model proceedings (Beigeladene) are the plaintiffs and defendants of the original proceedings which have been stayed awaiting the decision in the model proceedings (§ 8 (3) KapMuG). The effect extends also to those interested parties summoned who did not intervene (§ 16 (3) KapMuG).

(3) The effect of § 11 Unterlassungsklagengesetz may be invoked by the consumer who is faced in a lawsuit with a term which has been found in an earlier action between a consumer association and the company using it to be unfair. Furthermore, the interest group may seek to enforce the judgment by normal enforcement proceedings if the defendant continues the conduct which was subject of the court injunction.

In the case of § 16 KapMuG, the binding effect is an immediate effect of the model case ruling: "The model case ruling shall be binding on the courts trying the matter, whose decisions depend on the establishment made on the model case or the legal question to be resolved in the model case proceedings", § 16 (1) KapMuG.

(4) Exceptions to the model case ruling are addressed in § 16 (2) KapMuG. The rule is similar to the exceptions to the Interventionswirkung in § 68 ZPO second half-sentence as described above: "Upon final and binding conclusion of the model case proceeding, the interested parties summoned shall only be heard in legal disputes brought against the opposing party which assert that the main party's presentation of the case was inadequate, provided that, on account of the stage the model case proceeding was in at the time they were summoned or on account of statements and actions of the main party, the interested parties summoned were hindered from availing themselves of means of contestation or defense, or such means of contestation or defense of which they were not aware were not availed of by the main party, either intentionally or due to gross negligence" (§ 16 (2) KapMuG).

An exception to the binding effect of § 11 Unterlassungsklagengesetz is described in § 10 Unterlassungsklagengesetz. The rule basically says that a company whose conctractual term has been found unlawful is no longer bound by this finding against any consumer (as it would be the case under § 11 Unterlassungsklagengesetz) if the Bundesgerichtshof later finds in the lawsuit of a competitor using the same term that the term is in fact admissible.

NB 2: In the case of the KapMuG, the effects of the model case ruling are limited to the interested parties summoned, i.e. the plaintiffs and defendants of the other lawsuits pending which were stayed to wait for the model case ruling. In the case of the Unterlassungsklagengesetz, the positive effects of the judgment (inadmissibility of a particular contractual clause used by a particular company) may be relied on by any party to a standard form contract with the company whose clause has been found unlawful. Naturally, the result of the interest group action is binding on the parties of the lawsuit, i.e. the interest group and the defendant. A model similar to US law which would extend the binding effects of a judgment (or even a mere settlement) to all members of a particular class unless they opted out of the lawsuit appears to me to be highly problematic as far as rights of due process are concerned. Therefore, German law has been reluctant in extending the effects of either the interest group action or the model case ruling (beyond the parties and the interested parties summoned) to any possible plaintiff who might be in the same situation. I am not certain whether the recognition of a US style class action judgment against parties bound by it merely because they did not opt out would not be contradictory to public policy because it violates the due process rights of the class members (Art. 6 ECHR, Art. 103 Grundgesetz). If any European harmonisation of res judicata should be proposed as a result of this study, the area of complex and representative litigation is a field where any harmonisation should proceed with caution and not be enacted without safeguarding at the same time the procedural rights of any party which might be bound by the judgment. Finally, it should be made sure that any harmonisation of the BR is in line with proposals for representative actions which the Commission plans for consumer and competition law.

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:

[123] Staudinger(-Schlosser), §§ 305-310 BGB, UKlaG (2006), § 11 UKlaG No. 4.

Preclusive effect extends only to the parties, their legal successors (where succession took place after or while the litigation was pending) or a party acquiring possession of the thing involved in the litigation (where transfer occurred after or while litigation was pending and unless the transferee took in good faith without notice §325(2)). Extending res judicata effects to non parties is termed "Rechtskrafterstreckung", the legal basis for which is §§325-327 ZPO or a special provision outside the ZPO

As such given the general rule, preclusive effect does not extend to sureties of debts where the creditor has obtained judgment against the debtor, companies(if they are independent legal entities) within the same corporate group, assignees where the assignment took place before pendency of the suit or other family members were judgment has been obtained against another family member. Partners are however bound by judgments against the partnership.

Full Response:

According to § 325 (1) ZPO, a final judgment constitutes res judicata only for and against the parties and the persons who either became legal successors of the parties after the occurrence of pendency of the action or acquired possession of the thing involved in the litigation. As a result, a judgment is res judicata only between the parties to the litigation and third persons claiming by, through or under those parties[124]. A transferee or legal successor of a party in the ownership of a particular object or claim is bound by the judgment if the transfer or succession occurred after pendency of the suit (§ 325 (1) ZPO) unless the transferee qualifies as a good faith transferee without notice (§ 325 (2) ZPO). The process of extending the res judicata effects to non-parties is called "Rechtskrafterstreckung". The legal basis is §§ 325-327 ZPO or a special provision outside the ZPO.

(1) Surety and principal debtor. The res judicata of a successful judgment of the creditor against the principal debtor does not extend to a third person who has guaranteed that debt (Bürge)[125]. As a result, the guarantor may still argue in a suit of the creditor against him that the debt he has guaranteed does not exist or was not due etc. even if the creditor obtained a judgment against the principal debtor. The different treatment of the accessory liability of guarantors and the accessory liability of members of a commercial partnership (Offene Handelsgesellschaft) is justified by the argument that the obligation of the guarantor is more independent from the debt of the principal debtor than the debt of the member of the commercial partnership from the debt of the commercial partnership. On the other hand, if the action of the creditor against the principal debtor is dismissed (i.e. the debtor is successful), the guarantor may rely on that judgment as he is only obliged to pay if the main debt exists.

(b) Companies between the same corporate group. There is no extension of res judicata between different companies (if they are independent legal entities) within the same corporate group[126].

(c) Members of a partnership. A member of a registered commercial partnership is bound by a judgment against the partnership having to do with the business of the partnership because the provisions of the substantive law (§§ 128, 129 HGB) make members of a partnership legally (accessory) responsible for the liabilities of the partnerhips to which they belong[127]. The member of the partnership may not object to the existence of the liability of the commercial partnership if a final judgment condemns the partnership to pay a certain sum. Only certain objections which are not related to the liability of the partnership remain possible.

(d) Assignor and assignee. The new creditor is no legal successor if the claim was assigned before pendency of the suit. If the assignment occurred after the suit became pending, the new creditor (assignee) is bound by the judgment according to § 325 (1) ZPO. The assignment has no impact on the pending suit, § 265 (2) ZPO. The assignor continues to be party of the proceedings and sues on a claim which already belongs to the assignee, i.e. he sues on another party' right in his own name (Prozessstandschaft). The assignee has no right to enter the proceedings if the defendant objects (§ 265 (2) ZPO), he may only intervene according to § 66 ZPO. At the stage of execution, the assignee may request that the name of the judgment creditor is changed to his name so that he can enforce it (§ 727 (1) ZPO).

(e) Family members. Unless a family member is legal successor of another by way of inheritance, judgments against one family member have no effect for or against the other members of the family[128].

(f) Associations. I am not sure what is meant by "associations". A judgment against a legal entity such as a company has no effect against its members.

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[124] Murray/R. Stürner, German Civil Justice (2004), 359.
[125] BGH NJW 1993, 1594 (1595); BGH NJW 1995, 2161 (2162).
[126] BPatG GRUR 1985, 126.
[127] BGH NJW 1996, 658; Murray/R. Stürner, German Civil Justice (2004), 360.
[128] BSG NJW 1989, 2011.

(g) Co-obligors and co-obligees. According to § 425 (2) BGB, a final judgment against a co-obligor (Gesamtschuldner) has only effect against the co-obligor who was party to the court proceedings. The other co-obligor(s) is not bound by it (§ 425 (1) BGB). According to § 429 (3) BGB, § 425 BGB applies accordingly to a judgment against one of several co-obligees.

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?

As a result of § 325 (1) ZPO, the majority opinion in German civil procedure limits the effect of res judicata to the parties and their legal successors and does not accord any res judicata effect in relation to third parties.

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:

Beyond the effects of §322(1) set out above, German judgments do not have preclusive effects. As such there is no concept of issue preclusion in German law. As such it is not possible to provide answers to the rest of this section.

Full Response:

Beyond the effects described above as a result of § 322 (1) (materielle Rechtskraft) and §§ 68, 74 (3) (Interventionswirkung), German judgments do not have preclusive effects. While it is true that the facts and the reasons of the judgment may become relevant to determine the scope of the claim preclusion, findings of fact and law in earlier judgments do not bind courts in later proceedings. The only part of the judgment that is binding is the decision of the court on the procedural claim which is limited to the "Streitgegenstand" and its "contradictory opposite", e.g. payment of 10.000 Euro damages for breach of contract (and the opposite, i.e. sueing for return of the 10.000 Euro based on unjust enrichment). A judgment does not bind later courts on preliminary questions such as the existence of the contract, the breach of its conditions etc. If the plaintiff or defendant wish to extend the preclusive effects of a judgment, it is open to them to request declaratory judgment on preliminary legal relationships such as the existence of a contract etc. (§ 256 (2) ZPO). The concept of issue preclusion which apparently arose in old Germanic law[129] and survived in Anglo-American procedure was lost under the influence of Roman law in Germany[130]. Questions B 2 – B 10 are therefore not applicable to German law.

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:

[129] Gál SZ GA 33 (1912), 315 (316).
[130] Cohn, Festschrift Nipperdey (1965), vol. I, 875 (886, 888); R. Stürner, Festschrift Schütze (1999), 913 (915); Murray/Stürner, German Civil Justice (2004), 358 (361).

Abuse of procedure renders a claim inadmissible, though in practice the importance of this doctrine is limited. In the res judicata context two concepts related to abuse of process can be noted. First §580 No.4 ZPO (action for restitution cf.above) preludes res judicata if the other part has been convicted of a criminal act in relation to the proceedings, most notably procedural fraud. Second §826 BGB exceptionally allows for res judicata to be dispensed with based on a substantive law action in tort. Thus if the judgment is incorrect in substantive law, which the judgment creditor knew, and was obtained in an offensive manner against public policy, §826 BGB will be engaged.

However a general extension of res judicata based on abuse of process has not developed, though some commentators suggest on the basis of §242 BGB (prohibition of abuse of rights) that such could be developed. As such it is not possible to provide useful answers to the rest of this section.

Full Response:

While an abuse of procedure is regarded as inadmissible in German law of civil procedure (§ 242 BGB), the practical importance of that doctrine is rather limited[131]. In the specific context of res judicata, two concepts deserve to be mentioned which are at least loosely related to abuse of process. On the one hand, § 580 No. 4 ZPO (see above) allows to set res judicata aside if the other party has been convicted of a criminal action related to the proceedings, most notably procedural fraud. A second avenue which allows to challenge res judicata is a substantive law action based on tort (§ 826 BGB). If the judgment is incorrect in substantive law, the judgment creditor had knowledge of the incorrectness and the judgment was obtained in an offensive manner which is against public policy ("subreption of a judgment"), the debtor has a claim based on § 826 BGB that the creditor does not enforce the judgment. An example is the case that a professional party (e.g. bank) obtained a judgment against an inexperienced party (consumer) by using the procedure to obtain an execution order (Mahnverfahren). In this procedure, the German court will not check whether the claim is well-founded if the debtor does not object in one of two opportunities[132]. It seems that today the application of § 826 BGB to challenge res judicata is limited mostly to the exploitation of the particular structure of the German collection proceedings (Mahnverfahren). In any event, the possibility to challenge res judicata under § 826 BGB should not be misunderstood as an easy way to reassess the correctness of the judgment. In almost all cases of regular court proceedings, an action based on § 826 BGB to challenge res judicata is doomed to fail.

The doctrines presented above do not extend, but rather limit the scope of res judicata in that they allow to escape it under exceptional circumstances. An extension of judgment preclusive effects based on abuse of process has to my knowledge not been observed in the courts. However, some authors in procedural law doctrine propose to apply the prohibition of abuse of rights (§ 242 BGB) if a party asserts invalidity of the contract as a defense for being sued for the price in the first suit and claims the validity of the contract in a later suit[133]. This seems to be an application of the "venire contra factum proprium" category of § 242 BGB. I am however not aware of any court judgment which has applied § 242 BGB in such a manner. It may be argued that such an approach is contradictory to the narrow concept of res judicata as expressed in § 322 (1) ZPO and not sound in principle because the other party could have petitioned for a declaratory judgment in the earlier proceedings (§ 256 ZPO) if it desired a final determination of the validity of the contract. I would therefore doubt whether German courts would endorse this approach. In any event, given the flexible handling of § 242 BGB and the lack of court judgment on the matter, it is not possible to give clear answers to the following questions on wider preclusive effects.

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.

[131] Taruffo(-Hess), Abuse of Procedural Rights (1999), 151 (151).
[132] For details see Taruffo(-Hess), Abuse of Procedural Rights (1999), 151 (172 seq.).
[133] Jauernig, Zivilprozessrecht (2003)[28], § 63 III 2, p. 256.

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:

The following have been recognized as judgments under the Brussels Regieme: execution orders, provisional measures so long as these were not granted in ex parte proceedings , cost orders provided a specified amount is stated in the order, provisionally enforceable foreign judgments – though the German court may opt to require security for enforcement until any appeal has been heard.

The following will not be recognized under the Brussels Regime: Court order to collect court fees owed to the state since such concerns a public law claim and is therefore outside the scope of the Brussels regime, Decisions issued by other organs as courts, judgments from third countries e.g. a judgment of a member state which simply recognizes a third state judgment can't be recognized via the Brussels regime.

It is unclear whether evidentiary orders should be regarded as judgments within Art 32 BR.

Full Response:

In the following, I will provide a list of "decisions" (in a broad sense) which have (or have not) been recognised by German courts under Brussels or Lugano regime. The list is not conclusive as not any imaginable form of foreign judgment has been subject to recognition procedures in Germany. It is also clear that those judgments which clearly fall within the scope of Art. 32 seq. BR are less likely to become subject of litigation up to appellate courts. Therefore, the fact that a form of foreign judgment is not mentioned in the list does not mean that it would not be recognised in Germany. As there is no Austrian rapporteur, I will occasionally (without any claim to conclusiveness) refer also to case law of the Austrian courts, in particular to the Oberster Gerichtshof. In the list I have pointed out if the decision made explicit reference to one of the ECJ judgments mentioned in the question. It goes without saying that German courts and doctrine recognise that the definition of judgment is an autonomous one based on the Brussels regulation, the explanatory reports and the case law of the ECJ. As the questionnaire asks to refrain from detailed analysis of the Brussels regulation, I will not reiterate the abstract definitions which are found in German case law and doctrine and taken from European law. Instead, I will rather concentrate on individual decisions of German courts. The abbreviations of courts mean:

LG: Landgericht (first instance court for actions from 5.000 Euro)

OLG: Oberlandesgericht (court of appeal from Landgericht). In Berlin, the OLG is called Kammergericht (KG).

BGH: Bundesgerichtshof (highest civil court)

ArbG: Arbeitsgericht (first instance court in labour law disputes)

OGH: Austrian Oberster Gerichtshof (highest civil court in Austria)

(1) Execution orders

(a) OLG Celle NJW-RR 2007, 718 (citing Maersk Olie): Italian "decreto ingiuntivo" is a judgment in the sense of Art. 32 BR and therefore to be enforced under Art. 32 seq. BR even if the order is provisionally enforceable under Italian law before the proceedings have ended and the judgment is final. In this situation, the judgment creditor seeking enforcement would normally be required to give security pursuant Art. 46 (3) BR. Same opinion ("decreto ingiuntivo" judgment in the sense of Art. 25 BC/Art. 32 BR): OLG Düsseldorf OLGR Düsseldorf 2007, 458; OLG Zweibrücken RIW 2006, 709; OLG Frankfurt OLGR Frankfurt 2005, 964 and apparently Austrian OGH EuLF 2006, II-81.

(b) OLG Düsseldorf OLGR Düsseldorf 2006, 876: Italian "decreto ingiuntivo immediamente esecutivo" not enforceable if it was issued without prior hearing of the defendant because the Denilauler-jurisprudence of the ECJ is still good law under the BR (see also below the corresponding decisions concerning the same issue in the context of provisional measures). Similar judgment by OLG Zweibrücken IPRspr 2005, No. 157, 430: An Italian "decreto ingiuntivo" cannot be declared enforceable under Art. 32 seq. BR if it has been issued ex parte, i.e. without the defendant having the opportunity to be heard before the order is issued.

(c) LG Freiburg 22.5.2002 2 O 165/02 (Juris): Austrian "Zahlungsbefehl" enforceable judgment in the sense of Art. 32 BR. Right to be heard is guaranteed in that procedure because the "Zahlungsbefehl" becomes enforceable only after the period for objections has expired.

(2) Provisional or protective measures

(a) BGH ZIP 2007, 396 (citing Denilauler): provisional measures which were issued in non-contradictory proceedings (i.e. ex parte measures) cannot be recognised under Art. 32 BR. The Denilauler-jurisprudence of the ECJ which was decided under the Brussels Convention is still good law under the Brussels regulation. This decision of the BGH ends a split between different German courts of appeal: while the OLG Schleswig OLGR Schleswig 2005, 520 had held (based on parts of the legal doctrine) that the Denilauler-jurisprudence was no longer good law under the BR, the OLG Zweibrücken IPRspr 2005, No. 157, 430 and the OLG Düsseldorf OLGR Düsseldorf 2006, 876 held the contrary opinion. The judgement of the BGH reverses the Schleswig decision. It has been criticised by academics for not submitting the issue to the ECJ[134].

(b) OLG Zweibrücken RIW 2006, 863: An Italian provisional judicial payment order (ordinanza ingiuntiva de pagamento, Art. 186ter Codice di procedura civile) can be declared enforceable under Art. 32 seq. BR. Same opinion: Austrian OGH ZfRV 2000, 231.

(c) BGH NJW 1999, 2372; OLG Hamm NJW-RR 1995, 189: A French ordonnance de référé (if issued inter partes) is a judgment in the sense of Art. 25 BC.

(d) OLG Brandenburg InVo 1999, 394: An Italian provisional measure corresponding to the German Arrest is a judgment in the sense of Art. 25 BC.

(e) OLG München RIW 2000, 464: A provisional attachment (Arrest) is a judgment in the sense of Art. 25 BC.

(3) Cost orders

(a) Austrian OGH ZfRV 2000, 30: Court decisions on costs are judgments in the sense of Art. 25 Lugano Convention.

(b) BGH NJW-RR 2006, 143: The order of the president of the Paris chamber of lawyers on the fees of a French attorney (decision du batonnier) which has been declared enforceable by the President of the Paris Tribunal de grande instance (expedition executoire) constitutes a judgment in the sense of Art. 32 BR which has to be declared enforceable by a German court under the BR (confirmation of earlier appellate jurisprudence, e.g. OLG Hamm IPRspr 2003, No. 188, 618; OLG Koblenz IPRax 1987, 24).

(c) OLG Düsseldorf IPRax 1996, 415: Dutch cost order declared enforceable by a Dutch court on the basis of the fixation of lawyers' fees by the Dutch lawyers' association is a judgment enforceable under Art. 25 seq. BC (seems to be the same issue as decided by BGH NJW-RR 2006, 143).

(d) OLG Hamm NJW-RR 1995, 189: If a decision on costs only states which party has to bear the costs without in any way specifying the amount, the judgment cannot be enforced because it has no enforceable content.

(4) Provisionally enforceable foreign judgements

OLG Düsseldorf RIW 2004, 391 = IPRspr 2004, No. 156, 347: Appeal against a provisionally enforceable French judgment does not hinder declaring the French judgment enforceable in Germany. However, the German judge may stay the proceedings for granting an execution permission (Vollstreckungsklausel) until the French appeal has been decided (Art. 46 (1) BR). The stay of proceedings depends on the likelihood of success of the appeal in France.

(5) Court judgments which are based on arbitration awards or declare such awards enforceable

The enforcement of court judgments which declare arbitration awards enforceable under the BR is disputed in German case law and doctrine. Some argue that an enforcement under the BR should be permitted at least in situations in which according to the Anglo-American "doctrine of merger" the arbitration award becomes completely absorbed by the enforcement order of the court (BGH NJW 1984, 2763, 2765).

OLG Frankfurt IPRspr 2005, No. 153, 414 = IHR 2006, 212 (note Borges IHR 2006, 206) held that an English judgment which not merely declares an arbitration award enforceable, but also contains an independent condemnation judgment can be enforced as "judgment" in the sense of Art. 32 BR.

(6) Court orders to collect court fees owed to the state

KG Berlin KGR Berlin 2005, 881: The bill for court fees (Gerichtskostenrechnung) which is an enforceable title to claim court fees (as opposed to attorney's fees) from a defendant who has lost court proceedings is no judgment enforceable under Art. 32 BR because it concerns a public law claim (of the state against the litigant for court fees). Same opinion: BGH IPRspr 2000, No. 178, 391 (advance payment for costs of an appeal in law); OLG Schleswig RIW 1997, 513.

[134] Heinze, ZZP 120 (2007), 303 (320 seq.).

(7) Court judgments which do not specify the amount of interest owed (see also in more detail under III A 3 regarding specificity of foreign judgments)

OLG Saarbrücken 7.4.2004, 5 W 4/04-1 (Juris): judgment in a French adhesion procedure enforceable under Art. 32 BR including interest even if the French judgment does not specify the amount of interest.

Similar OLG Hamm NJW-RR 1995, 189: French judgment ordering to pay legal interest sufficiently precise for enforcement.

(8) Decisions issued by other organs as courts (for the court-approved orders for attorney fees in French and Dutch law see above under cost orders)

(a) OLG Köln InVO 2006, 489=EuLF 2006, II-96-II-98: An Italian "atto di precetto" which is a document issued by an Italian lawyer as a demand to pay to the debtor and which is required by Italian law before an enforcement may start is no judgment in the sense of Art. 32 BR.

(b) OLG Saarbrücken IPRax 2001, 238: A "titre executoire" issued by a French "huissier" for non-payment on a check is no judgment in the sense of Art. 25 BC. It does however constitute an enforceable public document in the sense of Art. 50 BC (citing Owens Bank for the definition of judgment and the judicial organ issueing the judgment).

(9) Judgments from third countries

(a) OGH Wien ZfRV 2002, 24: BC not applicable to proceedings which concern the enforcement of a civil judgment issued in a third country.

(b) OLG Frankfurt IPRspr 2005, No. 153, 414 = IHR 2006, 212: The judgment of another EU Member State which merely recognises a third state judgment cannot be recognised under the BR (no exequatur of the exequatur).

(10) Evidentiary orders

Whether or not evidentiary orders are to be regarded as judgments in the sense of Art. 32 BR is an issue which is in dispute in German courts and academic writing[135]. The situation is complicated by the existence of the European evidence regulation and the judgment of the ECJ in St.Paul Dairy (Case C-104/03) which seems to hold obiter that the evidence regulation shall take precedence over the BR as lex specialis (see also Att.-Gen. Kokott in Tedesco, Case C-276/06, the case has been settled before judgment of the ECJ). I have argued in a different place that orders

[135] In favour of qualifying evidentiary measures as provisional measures in the sense of Art. 24 BC/Art. 31 BR Cass. civ. Journal du droit international 120 (1993) 156 (157) – Soc. Krupp Widia c. Soc. Schlumberger; OLG Hamburg IPRax 2000, 530 (530); Rechtbank Brüssel GRUR Int. 2001, 73 (74); R. Stürner, IPRax 1984, 299 (300); Meilicke, NJW 1984, 2017 (2018); Heiss, Einstweiliger Rechtsschutz im europäischen Zivilrechtsverkehr (1987), 55-57; Morbach, Einstweiliger Rechtsschutz in Zivilsachen (1988), 331; Albrecht, Das EuGVÜ und der einstweilige Rechtsschutz in England und in der Bundesrepublik Deutschland (1991), 107-109 (if it is a protective measure); Ahrens, Festschrift Schütze (1999), 1 (9); Dörschner, Beweissicherung im Ausland (2000), 163; MünchKomm(-Gottwald), ZPO (2001)[2], Art. 24 EuGVÜ No. 2, now in favour of application of the EC evidence regulation MünchKomm(-Gottwald), ZPO Aktualisierungsband (2002)[2], Art. 31 EuGVO No. 1; Spickhoff, IPRax 2001, 37 (39); Treichel, GRUR Int. 2001, 690 (697 f.); Treichel, Die Sanktionen der Patentverletzung und ihre gerichtliche Durchsetzung im deutschen und französischen Recht (2001), 60-62; Gaudemet-Tallon, Compétence et exécution des jugements en Europe (2002)[3], Nr. 309, 249 (see also Nr. 307, 247 Fn. 11); Schlosser, EU-Zivilprozessrecht (2003)[2], Art. 1 EuGVO No. 6; Ibbeken, Das TRIPs-Übereinkommen und die vorgerichtliche Beweishilfe im gewerblichen Rechtsschutz (2004), 198-200; Hye-Knudsen, Marken-, Patent- und Urheberrechtsverletzungen im europäischen InteNoationalen Zivilprozessrecht (2005), 198; Mankowski, JZ 2005, 1144 (1149 f.); Berger(-Otte), Einstweiliger Rechtsschutz in Zivilsachen (2006), Kap. 18 No. 141; Linke, Internationales Zivilprozessrecht (2006)[4], No. 330; Grabinski, Festschrift Schilling (2007), 191 (195). Against a qualification of evidentiary measures as provisional measures in the sense of Art. 31 BR Att.-Gen. Kokott, Rs. C-176/05, Tedesco, No. 90-93 with reference to the ECJ decision St. Paul Dairy; Gilles(-Spellenberg/ Leible), Transnationales Prozeßrecht (1995), 293 (312 f.); Stadler, Festschrift Geimer (2002), 1281 (1302); Müller, Grenzüberschreitende Beweisaufnahme im Europäischen Justizraum (2004), 93; Geimer/Schütze(-Geimer), Europäisches Zivilverfahrensrecht (2004)[2], Art. 31 No. 32; Kofmel-Ehreneller, Der vorläufige Rechtsschutz im internationalen Verhältnis (2005), 13; Saenger(-Dörner), Handkommentar ZPO (2006), Art. 31 EuGVVO No. 7; Rauscher(-Leible), Europäisches Zivilprozeßrecht (2006)[2], Art. 31 Brüssel-I VO No. 13; Zöller(-Geimer), ZPO (2007)[26], § 363 ZPO No. 155; sceptical also Rauscher(-von Hein), Europäisches Zivilprozessrecht (2006)[2], Art. 1 EG-BewVO No. 51; Schack, Internationales Zivilverfahrensrecht (2006)[4], No. 429; Nagel/Gottwald, Internationales Zivilprozessrecht (2007)[6], § 15 No. 72 seq. (in favour of jurisdiction for protection of evidence according to national rules).

to take or preserve evidence - to the extent that they do not fall under the evidence regulation, i.e do not amount to a cross-border taking of evidence - should fall under the BR if they have a content which can be enforced[136]. A non-exclusivity of the evidence regulation makes particular sense if the evidence is located in a country where the main proceedings are not pending. It should be possible for the party seeking to secure the evidence either to proceed via the evidence regulation or apply directly to the court where the evidence is located for a provisional measure (Art. 31 BR) to secure that evidence. The second avenue will usually be far quicker than to proceed under the evidence regulation. This is however by no means an uncontroversial position. The German case law on that issue (before the evidence regulation went into force) is as follows:

OLG Hamm RIW 1989, 566: A judgment ordering taking evidence is purely procedural decision and therefore no judgment in the sense of Art. 32 BR.

OLG Hamburg IPRax 2000, 530: A judgment in evidentiary proceedings constitutes a provisional measure under Art. 24, 25 BC.

(11) Astreinte/periodic payment orders (Art. 49 BR)

(a) OLG Naumburg 3.8.2007, 6 W 74/07 (Juris): An order to pay an astreinte may only be enforced under Art. 33, 49 BR if the order is final in the state of origin (this applies only to the astreinte, not the enforcement of the judgment itself).

(b) OLG Köln InVO 2004, 473: If the amount of a penalty under Art. 49 BR has not been specified by the foreign court, the order cannot be recognised under Art. 49 BR.

2. Procedural aspects of recognition

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

Summary:

Recognition of foreign judgments takes effect without any special procedure and may be decided incidentally in a lawsuit. In addition German law provides, as recognized in Art 33(2) BR, for a special procedure by which recognition can be sought in §25, 26 AVAG. In practice this procedure seems little used as there is no case law on the provision. A key distinction between the two methods for recognition is that where recognition is an incidental question the Court must ex officio decide if a ground of non-recognition exists, whereas in the procedure under Art 33(2) BR the grounds for non-enforcement can only be raised on appeal.

Full Response:

NB:

(a) Art. 33(1) BR is understood to be in line with the position of German law that the recognition of foreign judgments takes effect without any special procedure and may also be decided incidentally in a lawsuit[137]. Art. 33(2) BR opens in addition to the ipso iure recognition under Art. 33(1) BR the possibility for a special procedure in which a judgment on recognition may be sought. In Germany, the procedure of Art. 33(2), 38 seq. BR is supplemented by the German law on carrying out recognition and enforcement of foreign judgments (Anerkennungs- und Vollstreckungsausführungsgesetz, AVAG). For the recognition procedure under Art. 33(2) BR, the relevant provisions are §§ 25, 26 AVAG (see below and the further provisions in the annex).

Abschnitt 6. Feststellung der Anerkennung einer ausländischen Entscheidung	**Chapter 6. Determination of recognition of a decision issued by a foreign court**
§ 25 Verfahren und Entscheidung in der Hauptsache (1) Auf das Verfahren, das die Feststellung zum Gegenstand hat, ob eine Entscheidung aus einem anderen Staat anzuerkennen ist, sind die §§ 3 bis 6, 8 Abs. 2, die §§ 10 bis 12, § 13	**§ 25. Procedure and decision on the subject matter of the case.** (1) §§ 3-6, 8 (2), §§ 10-12, §§ 13 (1)-(3), §§ 15 and 16, as well as § 17 (1)-(3) shall be applied mutatis mutandis to the procedure for determination of whether a decision issued by

[136] Heinze, Einstweiliger Rechtsschutz im europäischen Immaterialgüterrecht (2007), 109 seq.
[137] Schlosser, EU-Zivilprozessrecht (2003)[2], Art. 33 No. 1.

Abs. 1 bis 3, die §§ 15 und 16 sowie § 17 Abs. 1 bis 3 entsprechend anzuwenden. (2) Ist der Antrag auf Feststellung begründet, so beschließt das Gericht, dass die Entscheidung anzuerkennen ist.	a foreign state is to be recognized. (2) If the application for determination is well-founded, the court shall rule that the decision is to be recognized.
§ 26 Kostenentscheidung In den Fällen des § 25 Abs. 2 sind die Kosten dem Antragsgegner aufzuerlegen. Dieser kann die Beschwerde (§ 11) auf die Entscheidung über den Kostenpunkt beschränken. In diesem Falle sind die Kosten dem Antragsteller aufzuerlegen, wenn der Antragsgegner nicht durch sein Verhalten zu dem Antrag auf Feststellung Veranlassung gegeben hat.	**§ 26. Decision on costs.** In cases covered by § 25 (2), the opponent shall be ordered to pay the costs. The opponent may limit the appeal (§ 11) solely to the decision on the costs. In this case the applicant shall be ordered to pay the costs, provided the opponent did not give cause for the application for determination on account of his conduct.

A judgment merely declaring recognition pursuant Art. 33(2) BR seems not to be sought very often because there is no case law reported on the provision. The literature suggests that the text of Art. 33(2) BR is a little imprecise because subject of recognition are only the effects of the foreign judgment which it has under the law of the state of origin[138]. Art. 33(2) BR does not apply either to any effects a judgment might have under substantive law (Tatbestandswirkung). Example: The question whether a judgment of a foreign court stops or extends the period of limitation under a contract is decided by the lex causae applicable to the contract[139].

In doctrinal writing, there is some debate whether only the positive declaration that a foreign judgment is recognised may be sought (as the text of Art. 33(2) BR suggests)[140] or whether the principle of procedural equality demands that also a negative declaration (that a judgment cannot be recognised) can be requested[141]. The controversy does not seem to have much practical impact: even if the procedure under Art. 38 seq. and the AVAG was not available for a negative declarations, such a declaration could be sought under the regular provision on declaratory judgments in § 256 ZPO. Art. 33(3) BR is mainly understood as clarifying that any court may incidentally decide on the recognition of the foreign judgment in proceedings concerning that judgment. Schlosser points out that this understanding would make Art. 33(3) BR redundant in view of the same rule in Art. 33(1) BR. He argues that the further effect of the rule is to give to the court (in which proceedings depend on the determination of an incidental question of recognition) jurisdiction under Art. 33(3) BR, § 256 (2) ZPO to issue a declaratory judgment on the recognition of the foreign judgment. In other words, a court seised under the circumstances of Art. 33(3) BR becomes competent to issue a declaratory judgment parallel to the courts competent under Art. 33(2), 39 BR, § 3 AVAG.

Finally, while the creation of the procedure under Art. 33(2) BR is welcomed, it is regretted that not much effort was put into the design of that procedure. The simple reference to the procedure for enforceability in Art. 38 seq. BR does not take into account that the judgment under Art. 33(2) BR is a declaratory judgment while the enforceability judgment is constitutive, establishing enforceability of the foreign judgment in the state of recognition[142]. For example, it is questioned whether the ex parte procedure under Art. 41 BR is justified in the light of Art. 6 ECHR if a declaratory judgment is sought under Art. 33(2) BR because the interest of quick execution and surprise of the debtor is not relevant if a mere declaratory judgment is sought[143].

(b) + (c): In the answer to this question, a distinction must be made between proceedings for a declaration of enforceability under Art. 33(2), 38 seq. BR and court proceedings in which the matter of recognition comes up as an incidental question outside the procedures of Art. 33(2), 38 seq. BR. In the procedure under Art. 33(2), 38 BR, the

[138] Geimer/Schütze(-Geimer), Europäisches Zivilverfahrensrecht (2004)^2, Art. 33 No. 80.
[139] Geimer/Schütze(-Geimer), Europäisches Zivilverfahrensrecht (2004)^2, Art. 33 No. 82.
[140] Kropholler, Europäisches Zivilprozeßrecht (2005)^8, Art. 33 No. 7.
[141] Schlosser, EU-Zivilprozessrecht (2003)^2, Art. 33 No. 4; Geimer/Schütze(-Geimer), Europäisches Zivilverfahrensrecht (2004)^2, Art. 33 No.85 seq.
[142] Geimer/Schütze(-Geimer), Europäisches Zivilverfahrensrecht (2004)^2, Art. 33 No. 74.
[143] Geimer/Schütze(-Geimer), Europäisches Zivilverfahrensrecht (2004)^2, Art. 33 No. 104.

answer follows from Art. 41 BR. The grounds for non-enforcement of Art. 34, 35 BR can only be raised in appeal, Art. 43, 45 BR. For court proceedings in which recognition comes up as an incidental question and which therefore do not fall under Art. 38 seq. BR, the court has to determine ex officio whether a ground of non-recognition exists[144].

There is hardly any case law on the application of Art. 26 BC/Art. 33 BR[145]. I have however found a few German decisions which might be interesting. These decisions are also relevant for the effects of recognition (question II A 4 below).

(1) ArbG Berlin 8.11.2006, 86 Ca 405/06 (Juris): The parties in this case were argueing about the effectiveness of a time limitation in an employment contract. The plaintiff had been working as driver for the Spanish embassy in Berlin. Upon retirement, the parties agreed to have a further one year contract. After the embassy refused to extend the contract for a further year, the plaintiff sought declaratory judgment of the Berlin Arbeitsgericht finding that the limitation in the contract was invalid and therefore the contract had been concluded for an indefinite time (an employment contract concluded for an indefinite time can only be terminated on specific grounds under German employment law). While that action was served via diplomatic channels, the plaintiff initiated a second action in Madrid. The Madrid court dismissed the second action, and the plaintiff appealed. The German Arbeitsgericht decided to stay the German proceedings under Art. 33(1), 37(1) BR until the matter is finally decided in Madrid or the Spanish action is stayed.

The Arbeitsgericht found that Germany had jurisdiction for the matter as the plaintiff did not perform a sovereign function (acta jure imperii). It therefore applied the BR and stayed the proceedings under Art. 37 BR because it held that it had to recognise and give effect to the Spanish first instance judgment even if the Spanish court had (maybe inadvertently) violated the lis pendens provisions of Art 27, 30 No. 1 BR in disregarding the earlier lis pendens of the German action. It held further that the fact that the Spanish court applied Spanish law to the contract even though there had been a choice of German law did not permit non-recognition of the Spanish judgment because it may not be reviewed in substance (Art. 36 BR). The German court held that the purpose of Art. 37 BR demanded that double proceedings and inconsistent judgments should be avoided. The German court therefore stayed its proceedings and anticipated that the Spanish court of second instance – once it knew of the German proceedings – would stay its proceedings under Art. 27 BR in favour of the German action. In any event, it wanted to avoid inconsistent judgments in both jurisdictions.

Even if the Berlin judgment is sound in principle, it should also have inquired whether Spanish judgments have under Spanish procedural law any binding effect at all while an appeal is pending (German judgments would not). If Spanish judgments have no such effect, the application of Art. 37 BR was wrong because there were no binding effects under the law of the state of origin which could have been recognised under Art. 33 BR[146].

(2) OLG München NZBau 2000, 468 (citing Hoffmann, facts simplified): The plaintiff sued an Italian bank for payment under a guarantee. The plaintiff was general contractor for a construction project in Germany. The plaintiff had subcontracted the construction services to an Italian construction company which promised delivery at a specific date and promised further to pay a contractual penalty if that date would not be kept. The guarantee of the Italian bank secured that contractual penalty obligation. The issue before the German court was whether it could order the Italian bank to pay under the guarantee even if the Italian court of Ravenna had issued a preliminary order (Art. 669 sexies (2), 700 Codice di procedura civile) that the bank should not pay. The Munich court held that Art. 26 BC (Art. 33 BR) constituted no obstacle for a judgment against the bank. Based on an expert for Italian law, the court pointed out that it was bound under the Hoffmann judgment of the ECJ by Art. 26 BC/Art. 33 BR to extend to Germany any effect that the Italian provisional order had in Italy (Wirkungserstreckung). According to Art. 669 novies (4) Codice di procedura civile, the Italian provisional order did however not have the effect of barring a later foreign judgment on the merits because the Italian provisional measure loses its effect if a foreign court had found that the right secured by the provisional measure did in fact not exist. Therefore the Munich court came to the result that the Italian provisional judgment was no obstacle to a contrary judgment on the merits, upon which the Italian judgment would lose its effects.

(3) OLG Karlsruhe NJW-RR 1994, 1286: A French court had divorced the marriage of the parties and ordered the defendant to pay 3.000 FF as monthly maintenance. The plaintiff sued the defendant for maintenance in the German courts. The OLG Karlsruhe dismissed this action as inadmissible because it was bound to recognise the French judgment under Art. 26 BC. Based on expert evidence, it pointed out that the French maintenance judgment

[144] Schlosser, EU-Zivilprozessrecht (2003)[2], Art. 33 No. 2; ArbG Berlin 8.11.2006, 86 Ca 405/06 (Juris).
[145] The Hess/Pfeiffer/Schlosser, Study JLS/C4/2005/03 on the application of Brussels I (2007), No. 537 reported not a single case of application.
[146] For the limitation of Art. 37 BR to situations in which there is indeed something to recognise under Art. 33 BR Schlosser, EU-Zivilprozessrecht (2003)[2], Art. 37 No. 2.

("ordonnance de non-conciliation contradictoire") was comparable to a German maintenance judgment on the merits and not merely a provisional measure. It therefore barred the later German action.

(4) OLG Frankfurt RIW 1985, 411: The fact that a party has claimed damages for extra-court judicial costs according to Art. 700 Nouveau Code de Procedure civile bars a later action or set-off in a German court in respect of those costs which the French court did not award.

(5) OLG München 18.12.2006, 21 U 4066/06 (Juris): If an Austrian court had dismissed an action to declare a right from a notarial deed as extinct, the German court is bound by that decision and may not declare that deed unenforceable under § 767 ZPO.

NB 2: Again, two situations must be distinguished. If the foreign creditor seeks enforceability of his judgment in Germany, German courts are bound by Art. 41, 53 BR to declare the judgment enforceable and can only in appeal under Art. 43 BR take into consideration that the judgment was later set aside. If a declaratory judgment of the German court had been issued before the foreign judgment was revoked, §§ 27, 29 (1) of the German law supplementing the BR (AVAG) apply which deal with foreign judgments which have been set aside (see below).

Abschnitt 7. Aufhebung oder Änderung der Beschlüsse über die Zulassung der Zwangsvollstreckung oder die Anerkennung	**Chapter 7. Setting aside or modification of decisions on authorization of enforcement or recognition**
§ 27 Verfahren nach Aufhebung oder Änderung des für vollstreckbar erklärten ausländischen Titels im Ursprungsstaat	**§ 27. Procedure following the setting aside or modification of the title declared enforceable in the country of origin.**
(1) Wird der Titel in dem Staat, in dem er errichtet worden ist, aufgehoben oder geändert und kann der Verpflichtete diese Tatsache in dem Verfahren der Zulassung der Zwangsvollstreckung nicht mehr geltend machen, so kann er die Aufhebung oder Änderung der Zulassung in einem besonderen Verfahren beantragen. (2) Für die Entscheidung über den Antrag ist das Gericht ausschließlich zuständig, das im ersten Rechtszug über den Antrag auf Erteilung der Vollstreckungsklausel entschieden hat. (3) Der Antrag kann bei dem Gericht schriftlich oder durch Erklärung zu Protokoll der Geschäftsstelle gestellt werden. Über den Antrag kann ohne mündliche Verhandlung entschieden werden. Vor der Entscheidung, die durch Beschluss ergeht, ist der Berechtigte zu hören. § 13 Abs. 2 und 3 gilt entsprechend. (4) Der Beschluss unterliegt der Beschwerde nach den §§ 567 bis 577 der Zivilprozessordnung. Die Notfrist für die Einlegung der sofortigen Beschwerde beträgt einen Monat. (5) Für die Einstellung der Zwangsvollstreckung und die Aufhebung bereits getroffener Vollstreckungsmaßregeln	(1) If a title is set aside or modified in the country in which it was made and if the party against whom enforcement is sought can no longer assert this fact in the procedure for authorization of enforcement, it may lodge an application for the setting aside or modification of the admission in a special procedure. (2) The court that decided on the application for the issuance of an enforcement clause in the first instance shall have exclusive jurisdiction to rule on said application, (3) The application may be lodged with the court in writing or by placing it on record with the court registry. The court may decide on the application without an oral hearing. The party applying for enforcement shall be heard before a decision is taken in the form of a court order. § 13 (2) and (3) shall apply mutatis mutandis. (4) The court order is subject to miscellaneous appeal in accordance with §§ 567 to 577 of the Code of Civil Procedure. The statutory time limit within which such immediate appeal must be filed is one month. (5) §§ 769 and 770 of the Code of Civil Procedure shall be applied mutatis mutandis to cessation of enforcement and cancellation of enforcement measures already taken. An

sind die §§ 769 und 770 der Zivilprozessordnung entsprechend anzuwenden. Die Aufhebung einer Vollstreckungsmaßregel ist auch ohne Sicherheitsleistung zulässig.	enforcement measure may be cancelled without provision of security.
§ 28 Schadensersatz wegen ungerechtfertigter Vollstreckung (1) Wird die Zulassung der Zwangsvollstreckung auf die Beschwerde (§ 11) oder die Rechtsbeschwerde (§ 15) aufgehoben oder abgeändert, so ist der Berechtigte zum Ersatz des Schadens verpflichtet, der dem Verpflichteten durch die Vollstreckung des Titels oder durch eine Leistung zur Abwendung der Vollstreckung entstanden ist. Das Gleiche gilt, wenn die Zulassung der Zwangsvollstreckung nach § 27 aufgehoben oder abgeändert wird, sofern die zur Zwangsvollstreckung zugelassene Entscheidung zum Zeitpunkt der Zulassung nach dem Recht des Staats, in dem sie ergangen ist, noch mit einem ordentlichen Rechtsmittel angefochten werden konnte. (2) Für die Geltendmachung des Anspruchs ist das Gericht ausschließlich zuständig, das im ersten Rechtszug über den Antrag, den Titel mit der Vollstreckungsklausel zu versehen, entschieden hat.	**§ 28. Damages for unwarranted enforcement.** (1) If the authorization of enforcement is cancelled or modified in response to the miscellaneous appeal (§ 11) or the miscellaneous appeal on points of law (§ 15), the party applying for enforcement is obliged to compensate the party against whom enforcement is sought for damage the latter incurred as a result of enforcement of the title or of having to pay to avert enforcement. The same shall apply if the authorization of enforcement is cancelled or modified in accordance with § 27 insofar as, at the time when the enforcement was admitted, the decision authorized for enforcement was still appealable by regular means of appeal under the law of the country in which it was issued. (2) The court that decided on the application to add an enforcement clause to the title in the first instance shall have exclusive jurisdiction for claims for damages.
§ 29 Aufhebung oder Änderung ausländischer Entscheidungen, deren Anerkennung festgestellt ist Wird die Entscheidung in dem Staat, in dem sie ergangen ist, aufgehoben oder abgeändert und kann die davon begünstigte Partei diese Tatsache nicht mehr in dem Verfahren über den Antrag auf Feststellung der Anerkennung (§ 25) geltend machen, so ist § 27 Abs. 1 bis 4 entsprechend anzuwenden.	**§ 29. Setting aside or modification of decisions of foreign courts that have been recognized.** If the decision is cancelled or modified in the country in which it was issued and if the person benefiting from such setting aside/modification is no longer able to assert this fact in the proceedings concerning the application for determination of recognition (§ 25), § 27 (1)-(4) shall apply *mutatis mutandis*.

If on the other hand one party wishes to rely on the res judicata effects of a foreign judgment to resolve an incidental question in another lawsuit and invokes the automatic recognition incidentally under Art. 33(1) BR, the German court would give the judgment the same effects it has in its home country (Wirkungserstreckung)[147]. If the foreign judgment has been reversed or set aside in the country of origin and has therefore no more binding effects in the home country, there is no effect which could be extended to Germany.

[147] Geimer/Schütze(-Geimer), Europäisches Zivilverfahrensrecht (2004)^2, Art. 33 No. 8.

NB 3: As Art. 37 BR can only become relevant if the law of the state of origin attributes binding effect to judgments which are not yet final and under appeal, the practical impact of the provision is limited. German doctrine points out that the provision is applicable only to the case of incidental recognition (Art 33(3) BR) because for the procedure under Art. 33(2) BR Art. 46 takes precedence[148]. For an application of the provision, see the decision of the Arbeitsgericht Berlin above.

NB 4: As concerns Art. 26 LC/Art. 33 BR, there are no relevant differences between the Brussels and the Lugano regime. The same law (AVAG) applies to both BR and Lugano, and there are only minor differences for the Lugano regime (§§ 35, 36 AVAG).

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 grounds for non-recognition are rarely engaged (only five reported decisions). While a frequent problem for German Court's is the lack of specificity of foreign judgments, German Courts will often remedy this defect by using information either from the reasoning or the from external sources to give the judgment sufficient certainty. Further German courts have held that a lack of reasoning in a judgment will not render it unrecognisable. However where the imprecision is so grave that the judgment cannot be recognized, German courts will refuse to recognize it. Thus if a judgment as to costs only states which party must bear the cost but says nothing as to the amount, the judgment will not been enforced.

Judgments which violate the right to be heard under the German Constitution or which violate the right to a fair legal process per Art 6 ECHR or which have been obtained by fraud will not be recognized. However the German Courts will still recognize judgments even where there have been procedural irregularities. Thus an Italian default judgment issued in a procedure with different mandatory rules to German civil procedure was still recognized, the BGH stressing only severe infringements of the rule of law would amount to a violation of public policy justifying non-recognition.

German Court are well aware of their duty not to review the substance of foreign decisions per Art 36 BR; such being borne out in the case law.

Full Response:

As the report by Hess, Pfeiffer and Schlosser has pointed out, the grounds for non-recognition are only rarely applied in Germany. Only in five reported cases (two of them procedural) a violation of the German ordre public has been found, and the importance Art. 27 No. 2 BC used to have has significantly declined after the amendments in Art. 34 No. 2 BR[149].

In the following answer, I will concentrate on the decisions on Art. 34 BR and pay lesser attention to the older case law on Art. 27 BC. Instead of reiterating the abstract definitions which emanate from ECJ case law, I have tried to summarise judgments which deal with problems in the application of Art. 34 and 36 BR.

A particular procedural problem not mentioned in your questionnaire which arose in a number of cases in Germany was a lack of specificity and detail in the foreign judgment (e.g. as regards the rate of interest, the time when interest starts to run etc.). The German courts have tried to remedy this by completing the foreign judgment from information in its reasoning or from external sources and in most cases made the enforcement of the foreign judgment possible, but it might be a good idea to introduce a European standard form for judgments if the judgments are to be enforced abroad. In such a form, recurring problems could be addressed (interest rates and date on which interest starts to run, costs etc.). The form could also ask the foreign judge to draft his order as specific of possible to make it easier for a foreign judge to enforce the judgment. I am aware that the diversity of judgments makes a complete formalisation impossible. However, at least for money judgments I think this might be a good idea[150].

[148] Geimer/Schütze(-Geimer), Europäisches Zivilverfahrensrecht (2004)^2, Art. 37 No. 1 (because of the reference in Art. 33(2) BR to the procedure in Art. 38 seq. BR).
[149] Hess/Pfeiffer/Schlosser, Study JLS/C4/2005/03 on the application of Brussels I (2007), No. 539 seq, 546, 552.
[150] See the corresponding proposal by Hess/Pfeiffer/Schlosser, Study JLS/C4/2005/03 on the application of Brussels I (2007), No. 511.

One further remark: A problem which seems to come up consistently in German case law is the enforcement of foreign execution orders. After the regulation 1896/2006 on the European Enforcement Order came into force and regulates cross-border execution orders while submitting them to a minimum standard, I think there is an argument for pre-emption of national laws on this subject. You might consider excluding the application of national execution order procedures to cross-border relations and (to add teeth to the prohibition and enforce the sole application of regulation 1896/2006) excluding execution orders based on national rules (instead of regulation 1896/2006) from recognition and enforcement under the BR regime.

(1) Lack of reasoning

(a) OLG Saarbrücken 3.3.2004, 5 W 212/03 (Juris); OLG Karlsruhe FamRZ 2002, 839: A lack of written reasoning in a judgment is not contrary to German public policy (Art. 34 No. 1 BR). It has however been argued in legal doctrine (so far without explicit support by the courts) that a lack of reasoning makes it more difficult to decide whether a judgment is in conformity with the ordre public. Remaining doubts on the compatability of the judgment with the German ordre public, it is proposed, should be resolved in favour of the party claiming non-recognition[151].

Austrian OGH ZfRV 2000, 231: A lack of reasoning in an Italian provisional payment order according to Art. 186ter Codice di civil procedura does not constitute a violation of Austrian ordre public because both the existence and the reasons of the foreign judgment can be determined from the context of the court records. The court did not discuss whether a lack of reasoning could ever constitute a violation of ordre public.

Due to the stricter position of French courts on this point, German law provides for a possibility to supplement reasons for German judgments which would otherwise be issued without reasons in order to make enforcement abroad possible (see §§ 313a, 313b ZPO, § 30 AVAG).

(2) Lack of notice in circumstances other than Art. 34 No. 2

German courts tend to be rather reluctant to regard a lack of notice outside Art. 34 No. 2 as a ground for non-recognition under Art. 34 No. 1 BR. In general, a defendant who has been served in such a manner that he has knowledge of the proceedings abroad seems to be under an "obligation" to follow the foreign proceedings and to intervene on his behalf. On the other hand, if the defendant did not have knowledge of the proceedings and service was only constructive (effected through public service) even though it would have been possible to research the defendant's address abroad through public register and effect actual service, courts have regarded this as a violation of the German constitutional right to be heard and refused recognition.

(a) BGH IPRax 2002, 395: Any lack of notice outside Art. 34 (2) BR can be considered as a violation of German public policy under Art. 34 (1) BR if it violates the right to be heard under the German constitution (Art. 103 (1) Grundgesetz). However, the constitutional right to be heard is normally satisfied if the defendant has been notified of the foreign proceedings and has had the opportunity to participate personally or by representation of a lawyer. If the date of an oral hearing at the Dutch court was translated incorrectly so that the date of hearing did not exist, the defendant should have inquired at the Dutch court about the correct day of hearing. He cannot claim a defense to enforcement of the Dutch judgment on the basis of Art. 34 No. 1 BR.

(b) OLG Zweibrücken IPRax 2006, 487: A Belgian court had initated service under the European Service Regulation. The German receiving authorities did not serve the document to the German defendant, because the address of the German party was incorrect. The document was sent back to the Belgian Court (Article 7 (2) Service Regulation). The Belgian court did not apply Article 19 (2) of the Service Regulation and issued default judgment. The OLG Zweibrücken applied Article 34 (2) JR and declared the judgment unenforceable. In addition to this, the Court held that the recognition would also infringe Article 34 (1) JR, because the Belgian judgment would infringe the procedural garantuees of Article 103 (1) of the German Constitution and Article 6 ECHR.

(c) OLG Frankfurt OLGR Frankfurt 2005, 962: If the defendant has been informed about the proceedings pending abroad, it is up to him to be informed about the status and the result of the foreign proceedings. The fact that he did not receive a court order making an Italian court decree enforceable does not constitute a violation of German public policy.

(d) BGH NJW-RR 2007, 638: A debtor who did not participate in the foreign proceedings was not hindered in his effective defense if the complaint and the summons to appear in court were served in such a manner (at his private and commercial address) that he could have taken notice of them.

(e) OLG Hamm 9.1.2007, 29 W 33/96 (Juris): The enforcement of a Polish maintenance judgment under the Hague maintenance convention 1973 was refused because the defendant did not have knowledge of the proceedings. The Polish court affected public service in Poland even though it would have been possible to find out the defendant's

[151] Geimer/Schütze(-Geimer), Europäisches Zivilverfahrensrecht (2004)^2, Art. 34 No. 66.

address in Germany through a simple inquiry to a German public register. The court held that affecting public service where another form of service would have been possible violates the constitutional right to be heard under Art. 103 Grundgesetz and therefore constitutes a violation of German public policy.

(f) OLG Zweibrücken NJW-RR 2006, 207 (obiter): The fact that the document instituting the proceedings is written in a language not in accordance with Art. 8 European Service Regulation is a fact which impairs the possibility for the defendant to defend himself adequately in the action.

(g) OLG Köln InVo 2006, 364 (citing Maersk Olie): Even though the document instituting the proceedings was not adequately served on the defendant, the defendant may not claim non-recognition of the resulting judgment if he commenced proceedings to challenge the judgment in the state of origin, even if these proceedings were regarded inadmissible because the delay to challenge the judgment had lapsed. In that case, the OLG Köln held that the defendant should have applied for reinstatement in the Italian proceedings to challenge the execution order in Italy after he had received notice of the first act of execution within the 10 days Italian law allows for such an application. This is a harsh judgment because effectively the defendant has lost all his objections against the Italian judgment because he did not apply for reinstatement at the Italian court within 10 days after the first act of execution became known to him. However, it seems to be an inevitable result of the last sentence of Art. 34 (2) BR.

(h) OLG Zweibrücken NJW-RR 2006, 207: The burden of proof for an exception of non-recognition under Art. 34 BR lies with the judgment debtor. Mere formal defects in the service of the document instituting the proceedings do not suffice for non-recognition of the judgment. The defect in serving the judgment must be so grave that it impairs the possibilities of the defendant to effectively defend against the action.

(i) OLG Hamm IPRspr 2003, No. 188, 618: The formally correct service of the document instituting the proceedings is under Art. 34 No. 2 BR (in contrast to Art. 27 No. 2 BC) no longer a ground for non-recognition. Formally correct service may not be interpreted as a requirement to enable the defendant to arrange for his defence in the sense of Art. 34 No. 2 BR because this would make the change from Art. 27 No. 2 BC to Art. 34 No. 2 BR meaningless.

(3) Violation of the right to a fair legal process (Art. 6 (1) ECHR)

As you will know, the Krombach case in which the ECJ recognised Art. 6 ECHR as part of European public policy and the role of Art. 34 No. 1 BR to include procedural defects in the proceedings originated from a reference of the BGH[152]. German courts and legal doctrine welcomed the Krombach judgment, but at the same time hold the view that a violation of the procedural ordre public will be very rare in the European area because judgments in all Member States (1996) are normally made as a result of proper procedures (explicitly so OLG Hamm IPRax 1998, 202 on French judgments). According to doctrine, the fundamental principles of procedure which will be enforced via the ordre public include the independence and impartiality of the court, the right to be heard as guaranteed by Art. 103 Grundgesetz, the procedural equality of the parties and the right to a fair trial[153].

In the following, I will present a few examples of procedural deviations from German law or errors which have all not been regarded as a violation of the ordre public.

(a) BGH 23.6.2005, IX ZB 64/04 (www.bundesgerichtshof.de) refused to apply Article 34(1) BR to an Italian default judgment issued in a procedure which differs from mandatory rules of German civil procedure law. The BGH held that only severe infringements on the rule of law (Article 20 (3) German Constitution) would amount to a violation of public policy. In that case, the debtor claimed that he had not been informed by the Italian court that the lawsuit would proceed even if his lawyer resigned from his office and was not replaced. The BGH rejected this position and pointed out that the Italian court had acted in accordance with Italian civil procedure law.

(b) OLG Frankfurt 30.6.3005, 20 W 485/04 (Juris): A violation of German procedural ordre public cannot be found on the basis of mere deviations from mandatory German rules of civil procedure. Rather it is required that the foreign proceedings deviated from fundamental principles of German procedure in such a manner that the resulting judgment cannot be regarded as a judgment based on the rule of law. It is required that the foreign proceedings violate elementary principles of procedure.

(c) OLG Köln RIW 2004, 866: The fact that a judgment was served in Dutch language on a German defendant does not amount to a defense against recognition under Art. 34 No. 1 or 2 BR. Art. 34 No. 2 BR requires only service of the document instituting the proceedings, and the lack of a translation does not constitute a procedural defect which is sufficient to violate German public policy (in the case, the defendant was represented by a lawyer in the foreign proceedings, and there was some indication that the defendant could understand the foreign language).

[152] Reference: BGH EuZW 1998, 205; final decision: BGH NJW 2000, 3289.
[153] Geimer/Schütze(-Geimer), Europäisches Zivilverfahrensrecht (2004)^2, Art. 34 No. 25.

(d) OLG Köln IPRspr 2004 No. 169, 379: The fact that a German debtor could not personally travel to Italy to defend in civil proceedings because he feared to be arrested for an earlier criminal conviction and that he lacked the money to pay an Italian lawyer to defend him in the proceedings does not make the resulting judgment unenforceable (cp. similarity to facts in Krombach). The fact that the objection against an Italian execution order requires certain formal standards (must be drafted as a formal complaint) constitutes no ground justifying non-enforcement of the Italian judgment.

(e) OLG Köln RIW 2004, 865: The fact that the motion for appeal was not adequately served on the defendant does not constitute a ground of non-recognition if the document instuting the proceedings was correctly served.

(f) OLG Köln IPRspr 2004 No. 155, 340: The fact that under Italian civil procedure (Art. 292 Codice di procedura civile) pleadings and procedural acts need not be notified to a party in default constitutes no violation of the German ordre public.

(g) OLG Köln IPRspr 2002, No. 186, 483: An error of the foreign court in the attribution of the burden of proof constitutes no violation of the German ordre public.

(h) OLG Köln InVo 2007, 31: The finding of a Luxembourg court that a party has to pay damages for harassive and abusive proceedings does not violate the German ordre public.

(i) OLG Oldenburg IPRspr 2003, No. 182, 594: The enforcement of a Dutch “dwangsom” does not violate German ordre public (even if under German law such penalty payments go the fisc and not the private creditor).

4. Lack of detail or specificity in the operative part of the foreign judgment

As explained above, the operative part of German judgments must be drafted as precisely as possible to allow the execution organs to enforce the judgment on the basis of the operative part only. In general, all information required to enforce the title should be found in the operative part (for interest e.g. rate of interest and date from when it is calculated). Furthermore, sprecificity and clarity of court orders (and laws) is regarded as part of the constitutional rule of law (Rechtsstaatsprinzip) because anybody subjected to state power must know exactly what is required from him to comply with the state orders. A lack of specificity in the operative part of foreign judgments has been a problem in a number of German cases on the Brussels regime. It has been held by German courts (e.g. BGH EuZW 1993, 389; OLG Hamm IPRspr 2003, No. 183, 596) that a lack of specificity (Bestimmtheit) of foreign judgments may lead to a ground of non-recognition under Art. 34 No. 1 BR. However, the requirements are lower than for German judgments. Only grave imprecisions will lead to non-recognition of the judgment. Normally the German courts will try to remedy the lack of specificity or completeness of the foreign judgment in the enforceability proceedings by adding the lacking information from the reasons of the foreign decision or other sources (BGH DB 1986, 113). The Austrian OGH ZfRV 2004, 156 has also stressed that a lack of specificity in a foreign judgment (ironically a German maintenance judgment which referred only to the maintenance owed under the German maintenance regulations) does not lead to unenforceability of the judgment, but must be remedied by the Austrian courts in the enforceability proceedings as far as possible (e.g. by looking to the German maintenance regulations and calculating the exact sum owed).

Therefore, the different drafting style of judgments might be a major practical impediment for the free circulation of judgments in Europe. Maybe a European standard form for the operative part of court judgments which could be asked for in the state of origin if a cross-border execution is intended could remedy this problem.

In the following, I have listed a few examples of lack of specificity of foreign judgments. In almost all cases the defect did not lead to non-recognition, but the German courts rather completed the foreign judgments by having recourse to external documents or the reasoning.

(a) BGH NJW 1993, 1801: Foreign judgments which order payment of interest (and compensation for inflation) according to foreign laws without specifying the exact rate and time for interest must, if possible, be completed by the German courts in the proceedings for enforceability. If the judgment cannot be completed and the date or rate of interest remains unknown, the judgment will not be enforceable on that point. See also OLG Celle NJW-RR 2007, 718: Italian judgment ordering that interest shall be paid but referring for the beginning of the interest period to the date when different payments fell due which were not explained in the judgment could (as far as the interest was concerned) not be enforced by the German courts because the German court could not calculate the exact interest owed.

(b) OLG Hamburg InVo 1998, 257: Italian judgment which orders to pay inflation compensation and interest is enforceable if the claimant presents in the German enforceability proceedings information of the Italian authorities about the rate of the inflation compensation. As the rate of interest found by the foreign court could not be determined, the German court will order payment of the legal rate of interest.

(c) OLG Hamm NJW-RR 1995, 189: if a decision on costs only states who has to bear the costs without in any way specifying the amount (Kostengrundentscheidung), the judgment cannot be enforced because it has no enforceable content.

(d) OLG Düsseldorf InVO 1997, 307: The content and amount owed under a Belgian judgment must be determined from the foreign judgment or comparable sources in order to prepare the judgment for execution in Germany.

(e) OLG Karlsruhe ZZP Int. 1996, 91: English Mareva Injunction sufficiently specific to be enforced in Germany.

(f) OLG Hamm IPRspr 2003 No. 183, 596: French injunction "to stop the activity of unfair competition concerning the shoe model … from the collection in any form and in any place" regarded as sufficiently specific even though a German injunction with this wording would probably not be enforceable (a German injunction would have the specify which exact actions shall be prohibited).

(g) OLG Saarbrücken IPRspr 2001, No. 181, 380: French judgment which orders ex-tenants to pay a compensation for using the property in the amount which they would have had to pay if the lease had not been cancelled is sufficiently specific because the rent can be determined from the reasons of the judgment.

(h) OLG Köln IPRspr 2004 No. 169, 379: Italian "decreto ingiuntivo" must be specified by German courts for enforcement as regards interest (rate and time period), value added tax and the contribution to the lawyer's pension scheme.

5. Fraud (procedural abuse)

(a) BGH NJW 2004, 2386: A foreign judgment obtained by fraud falls under the exception to recognition and enforcement of Art. 34 (1) BR. Due to the prohibition for a re-examination of the foreign judgment (Art. 29 BC), the allegation of fraud must be established by the judgment debtor by presenting detailed and substantiated proof which supports a finding of fraud (same opinion BGH BGHZ 144, 390). A party who has not challenged the judgment in the country where the proceedings took place can still claim non-recognition for procedural fraud in German enforcement proceedings (BGH NJW 1999, 3198 concerning a US judgment).

6. Any other reason connected to the judgment

(a) OLG Saarbrücken IPRax 2001, 238: The fact that under French law the "huissier" may issue a "titre executoire" for non-payment on a cheque (which constitutes not a judgment, but an enforceable public document under Art. 50 BC) does not violate German ordre public.

(b) LG Freiburg 22.5.2002 2 O 165/02 (Juris): The fact that Austrian payment order should not have been issued under the Austrian code of civil procedure because the debtor lives abroad does not make that judgment unenforceable in Germany.

(c) OLG Düsseldorf OLGR 2007, 458: The legal instruction under an Italian "decreto ingiuntivo" that objections are possible against the decreto in 50 days after notification and that in absence of objections execution will follow is not misleading in the sense that apart from the delay of 50 days no other formalities have to be observed. It therefore does not constitute a violation of the German ordre public or leads to an invalid service in Germany.

(d) BGH NJW 1992, 3096: Calculation of lawyer's fees in foreign suit as a quota litis (contingency fees) does not constitute a violation of German ordre public.

(e) Austrian OGH EuLF 2006, II-81: The fact that an Italian "decreto ingiuntivo" is provisionally enforceable even though it is no final first instance judgement does not violate Austrian ordre public. The execution itself may not be stayed according to Art. 46 BR, it is only possible to require security if a judgment is not final under laws of the state of origin (Art. 46 (3) BR).

NB2 (application of Art. 29 BC/Art. 36 BR):

It seems to me that German courts are well aware of the fact that foreign judgments may not be reviewed. A few examples may illustrate the application of Art. 29 BC/Art. 36 BR:

(a) BGH NJW 1999, 2372: A French judgment holding a guarantor of a debt liable is only subject to very limit scrutiny under the concept of unconscionability (Sittenwidrigkeit, § 138 BGB) even if the German constitutional court (Bundesverfassungsgericht) has held that German fundamental rights require such a control under German civil law.

(b) OLG Karlsruhe IPRspr 2005, No. 152, 412: A French judgment by default (jugement repute contradictoire) is enforceable in Germany even if the French court disregarded without any explanation a German choice of law clause and a German choice of court agreement if the defendant could have defended himself against that judgment in France.

(c) BGH IPRax 1985, 101: Art. 29 BC concerns also the calculation of the debt. The German court may not control whether the French court issueing the judgment correctly calculating the sum owed by the defendant.

(d) OLG München 18.12.2006, 21 U 4066/06 (Juris): If an Austrian court has rejected the defense of "Sittenwidrigkeit" in an action to take away the enforceability of a notarial deed, a German court may not refuse recognition for a violation of public policy.

(e) OLG Köln OLGR Köln 2003, 67 = IPRspr 2002, No. 194, 500: If both the complaint and the foreign judgment in default were correctly served on the defendant, the judgment debtor may not later claim in the German enforceability proceedings that the foreign judgment which is based on the substantive law of the country of origin is based on the wrong substantive law because he (the judgment debtor) has neither the foreign state's nationality nor has he ever lived there nor has he agreed with the judgment creditor on the application of that state's law.

(f) OLG Frankfurt OLGR Frankfurt 2005, 964: No revision au fond in the procedure for recognition of a foreign judgment (Art. 45 BR).

(g) OLG Saarbrücken 7.4.2004, 5 W 4/04-1 (Juris): A French judgment is enforceable even if the amount of interest leads to damages which would not have been available under German law, no violation of German ordre public.

(h) OLG Hamm NJW-RR 1995, 189: A German court may not review the jurisdiction of French court even if it is claimed that the French court took jurisdiction in breach of an arbitration agreement.

(i) ArbG Berlin BB 2007, 388: The application of foreign employment law even though German employment law should have been applied does not amount to an ordre public violation.

(j) OLG Köln IPRspr 2004 No. 169, 379: The fact that an Italian "decreto ingiuntivo" was issued against a debtor abroad even though Art. 633 Codice di procedura civile does not allow this constitutes no defense to enforcement as long as the decreto was not issued in ex-parte proceedings (citing Maersk).

NB3: German courts are concerned with the effects of recognition of the foreign judgment, not with the judgment itself.

4. Effects of recognition

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

Summary:

The effect of recognition is termed "Wirkungserstreckung" (extension of judgment effects) and means that any effect that the judgment has under the state of origin's procedural law have to be extended to Germany, even if such goes beyond the German conception of res judicata. The only limit is the ordre public per Art 34 BR.

Full Summary:

The effect of recognition under the Brussels/Lugano Regime is described by the German word "Wirkungserstreckung" (extension of judgment effects). It means that any effects of the foreign judgment have to be extended to Germany as they exist under the state of origin's procedural law (including claim preclusion, issue preclusion or other effects) even if these effects go beyond the scope of German res judicata[154]. On the other hand, foreign judgments cannot have an effect in Germany which they would not have in their state of origin[155]. The only limit to "Wirkungserstreckungs" is the ordre public (Art. 34 BR).

As a result, any claim preclusive effect (Präklusionswirkung), constitutive effect (Gestaltungswirkung), intervention effect (Interventionswirkung), effect of third-party notice (Streitverkündungswirkung) or evidendiary effect (Beweiswirkung) of the foreign judgment has to be extended to Germany[156]. If a foreign judgment on the same

[154] OLG Karlsruhe NJW-RR 1994, 1286; OLG München NZBau 2000, 468; Austrian OGH Wien ZfRV 2005, 116; OLG Düsseldorf IHR 2007, 211; Geimer/Schütze, Europäisches Zivilverfahrensrecht (2004)^2, Art. 33 No. 13.
[155] OLG Hamm FamRZ 1993, 213: „Die Wirkungen ausländischer Entscheidungen richten sich nach der Theorie der Wirkungserstreckung grundsätzlich nach dem Recht des ausländischen Staates. Italienische Entscheidungen (hier: betreffend Kindesunterhalt) können also in der Bundesrepublik keine weiterreichenden Wirkungen haben, als ihnen nach italienischem Recht zukommt."
[156] Geimer/Schütze(-Geimer), Europäisches Zivilverfahrensrecht (2004)^2, Art. 33 No. 42 seq.

subject matter can be recognised under Art. 33 BR, a later German action involving the same cause of action is dismissed as procedurally inadmissible ("unzulässig")[157].

The procedural effects of a judgment must be distinguished from the effects a judgment might have under substantive law ("Tatbestandswirkung", e.g. the fact that the plaintiff has won a judgment might stop or extend the period of limitations). Such effects are decided by the substantive law applicable by virtue of the private international law (e.g. the law applicable to a contract)[158].

NB: Examples for the application of the "extension of effects" doctrine can be found in the judgments reported under II A 2 above. The majority of cases under the BR seem to involve not the mere recognition of foreign judgments, but rather the declaration of enforceability under Art. 38 seq. BR. I have also the impression that the doctrine of "extension of effects" (Wirkungserstreckung) is well known by German courts. The only thing the courts sometimes have to wrestle with is to determine which effects the foreign judgments have according to the law of the state of origin. Normally, these questions are solved by expert opinions on foreign law, the knowledge of the court itself (in particular in border regions) or advice of foreign ministries of justice.

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?

Yes. The details (scope, parties bound etc.) depend on the procedural law of the state of origin ("Wirkungserstreckung", see above II A 4).

NB: The nature of the claim preclusive effects of foreign judgments seems to be procedural. For instance, the OLG Karlsruhe dismissed a later claim in Germany as procedurally inadmissible because another EU judgment had to be recognized (for the facts see above)[159].

NB 2: An example is the decision OLG Karlsruhe NJW-RR 1994, 1286 (for facts see above).

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?

The policy considerations are those considerations which led the European legislator to promulgate the BR.

3. Law applicable to claim preclusive effects

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

Summary:

Claim preclusive effects of judgments recognized under the Brussels Regime follows from the conclusion that the judgment is recognised under the Brussels Regulation in conjunction with the rules of the State of Origin concerning the claim preclusive effects of the judgment (per Art 33 as interpreted in *Hoffmann v. Krieg*).

[157] OLG Karlsruhe NJW-RR 1994, 1286.
[158] Geimer/Schütze(-Geimer), Europäisches Zivilverfahrensrecht (2004)^2, Art. 33 No. 59 seq.
[159] OLG Karlsruhe NJW-RR 1994, 1286.

Full Response:

The answer for Germany is (2): the conclusion that the judgment is recognised for these purposes applied in conjunction with the rules of the State of Origin concerning the claim preclusive effects of the judgment.

NB: Examples for the application of the "extension of effects" doctrine can be found in the judgments reported under II A 2 above. The majority of cases under the BR seem to involve not the mere recognition of foreign judgments, but rather the declaration of enforceability under Art. 38 seq. BR. I have also the impression that the doctrine of "extension of effects" (Wirkungserstreckung) is well known by German courts. The only thing the courts sometimes have to wrestle with is to determine which effects the foreign judgments have according to the law of the state of origin. Normally, these questions are solved by expert opinions on foreign law, the knowledge of the court itself (in particular in border regions) or advice of foreign ministries of justice.

NB 2: The legal basis cited for the extension of effects doctrine is the interpretation of Art. 33 BR as determined by the Hoffmann v. Krieg judgment of the ECJ[160].

4. Conditions for claim preclusive effects

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

If the requirements for recognition under the BR are met, a foreign judgment will be given exactly the same effects it has under its domestic law. If it has been repealed and therefore lost all its effects, necessarily there are no effects which could be extended to Germany. If there are doubts what the effects under foreign law are, the German law has to determine ex officio the content of the foreign law, if necessary with the help of expert evidence (§ 293 ZPO). As I chose option (2) for question III B 3 above, I will not elaborate further on this answer.

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 identity of claims has to be determined by applying the law of the state of origin of the judgment. Further due to ECJ jurisprudence, German courts give the "identity of claims" in Art 27 BR a broader meaning than that which applies in national law.

Full Response:

As pointed out before, the identity of claims for the purposes of the recognition of foreign judgments has to be determined by applying the law of the state of origin of the judgment. The following remarks on the identity of claims in the Brussels/Lugano regime refer to the application of the lis pendens provision (Art. 27 BR).

Due to the ECJ jurisprudence on the matter, German courts give the "identity of claims" in Art. 27 BR a broad meaning. The concept is broader than the national German concept of "Streitgegenstand" which applies to the lis pendens rule (§ 261 (3) No. 2 ZPO) in domestic proceedings (and to the res judicata provision in § 322 (1) ZPO). The following account of the case law focuses on appellate and supreme court jurisprudence and the more recent judgments.

(a) BGH NJW 2002, 2795 (citing The Tatry and Gubisch): The same claim under Art. 21 BC includes the case that one action aims at a declaratory judgment finding that the termination of an agency contract without notice was justified (Kündigung aus wichtigem Grund) and the other action involves a damages claim based on the presumption that the termination of the contract was unlawful.

(b) BGH NJW 1997, 870 (citing Gubisch and The Tatry): The rule of German procedural law that the legal interest (Rechtsschutzinteresse) in a declaratory judgment disappears if the matter is determined in a later action in which a condemnatory judgment is sought which cannot be withdrawn unilaterally cannot be applied to the relationship between declaratory and condemnatory action under the BC. Under the convention, only the priority rule applies.

(c) BGH NJW 1995, 1758: An action for the declaration of invalidity of a contract and an action for repayment of money which has been paid on that contract concern the same cause of action.

[160] E.g. Geimer/Schütze(-Geimer), Europäisches Zivilverfahrensrecht (2004)[2], Art. 33 No. 1 footnote 1.

(d) Austrian OGH GRUR Int. 2005, 1039: Two actions for trademark infringement which seek (partially) an injunction for the same territory (Austria) have the same cause of action even if the later action requests in addition an order for publication of the judgment.

(e) Austrian OGH GRUR Int. 2002, 936: If a German court in an unfair competition action did not clarify that its injunction shall also concern Austrian territory and the German court based its judgment solely on citations of the provisions of the German law against unfair competition, the German judgment is to be interpreted as being restricted to Germany. An action for an injunction for Austrian territory does not constitute the same cause of action and is not barred by Art. 21 BC.

(f) OLG Düsseldorf IPRspr. 2000, No. 128, 271 (citing Gubisch and The Tatry): Art. 21 does not bar parallel proceedings for infringement of the same European patent in Germany and France because these proceedings concern different causes of action. The different national parts of a European patent have to be regarded as different claims in spite of the approximation of parts of European patent law by the European Patent Convention. The judgment is reinforced by the later GAT/LuK and Roche Nederland decisions of the ECJ in 2006.

(g) OLG Hamburg IPRax 1999, 168 (citing The Tatry): If a party has declared set-off with a specific claim in proceedings in Sweden, Art. 21 BC bars a set-off with the same claim in proceedings in Germany. [NB: The judgment seems to be no longer good law due to the Gantner Electronic decision of the ECJ].

(h) OLG Hamm IPRspr 2003, No. 171, 552: An action of the buyer for the remaining sales price and an action of the seller for damages/delivery of non-defective goods because of the delivery of defective goods do not constitute the same cause of action.

(i) OLG Köln GRUR-RR 2005, 36: A German action for an injunction prohibiting an Austrian company to offer sport betting services without permission of German authorities in Germany does not concern the same cause of action as an Austrian action for damages based on the unlawfulness of a cease-and-desist-warning for these services (Abmahnung). Explanation: to avoid a negative decision on costs due to immediate acceptance of the claim (§ 93 ZPO) and to avoid court proceedings, it is common in German IP and competition disputes that the potential plaintiff sends a cease-and-desist-warning to the potential defendant. If the defendant agrees to stop the allegedly unlawful conduct and subjects to a contractual penalty for breach of his promise, the plaintiff will not be able to sue for an injunction because he already obtained a contractual promise from the defendant to stop the activity. If however a cease-and-desist-warning is sent for alleged infringement of an IP right which is unjustified (in particular because the alleged infringement is no infringement), the defendant can claim damages from the plaintiff. The OLG Köln held that damages can however not be claimed if the cease-and-desist-warning relates not to an IP infringement, but to mere unfair competition. Therefore, the Austrian court would not have to decide on the lawfulness of the conduct and dismiss the damages action in any event so that there would be no conflict with the German proceedings. The decision seems to be on the borderline and probably inspired by the desire not to have an Austrian court litigating questions of permission of sports gambling in Germany in the costume of an unfair competition action.

(j) OLG Köln OLGR Köln 2004, 85 (citing Gubisch and The Tatry): An action for negative declaration (that nothing is owed under a certain contract) and an action for damages on the same contract constitute the same cause of action.

(k) OLG Köln VersR 1998, 1513: An action for payment of the sales price and an action for repayment of the sales price have the same cause of action.

(l) OLG München IPRspr 2000 No. 143, 310 (citing The Tatry): An action for declaratory judgment finding that an agency contract has been terminated without notice because there had been good cause for an immediate termination of that contract (wichtiger Grund) and an action for indemnification of the commercial agent after termination of the contract which can only be successful if the contract has not been terminated for good cause constitute the same cause of action. Only claims of the commercial agent which are independent from the lawfulness of the immediate termination of the contract do not concern the same cause of action as the action for declaratory judgment.

(m) OLG Stuttgart IPRax 2002, 125 (citing Gubisch and The Tatry): An action for declaratory judgment finding that a contract with a commercial agent was lawfully terminated without notice for good cause (wichtiger Grund) and an action of the commercial agent for damages for unlawful termination of the contract concern the same cause of action because at the root of both actions lies the question whether the contract could be lawfully terminated without notice (if this was the case, no damages are owed).

(n) OLG München RIW 2000, 712 (citing Gubisch and The Tatry): An action for damages for non-delivery of the goods under a sales contract and an action for damages and rescission of the contract for lack of cooperation in the fabrication of these goods constitute the same cause of action because they concern both the question who is responsible for the failure of the contract.

(o) OLG Stuttgart IPRspr 2003, No. 174, 564 (citing Gubisch and The Tatry): If both parties claim damages on a sales contract (one for non-delivery of the contractually promised goods, the other for non-acceptance of the delivered goods), the actions concern the same cause of action.

(p) OLG Hamburg OLGR Hamburg 1997, 149; LG Hamburg GRUR Int. 2002, 1025: An action on the merits in one EU member state does not bar provisional measures in another EU member state because actions on the merits and actions for provisional relief do not constitute the same cause of action in the sense of Art. 21 BC.

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:

German Courts determine the identity of parties using the law of the state of origin of the judgment.

Full Response:

The question whether a particular foreign judgment is enforceable against a particular party is determined by the law of the state of origin of the judgment[161]. The following remarks on the identity of parties refer to the application of the lis pendens provision (Art. 27 BR), not the rules on recognition of foreign judgments.

(a) BGH NJW 1986, 662: Proceedings of the child for maintenance and proceedings of the mother for child maintenance do not concern the same parties.

(b) LG Düsseldorf GRUR Int. 1998, 804 (see also OLG Düsseldorf GRUR Int. 2000, 776): If a licensee enforces the rights of a patent owner in his (i.e. the licensee's) own name with the permission of the patent owner under the doctrine of "Prozessstandschaft" (representative action/standing to sue doctrine), the patent owner is a party to the proceedings in the sense of Art. 21 BC because he would be bound by the eventual judgment. It would open the door to abuse if one would give Art. 21 BC a strictly formal meaning of "the same party".

(c) OLG München InstGE 2, 78: The term "identity of the parties" in Art. 21 BC must be given a euro-autonomous meaning. It is irrelevant whether the role of the parties in the relevant proceedings have switched (i.e. foreign defendant is home plaintiff and vice versa). Art. 21, 22 BC do not apply if the party to the later proceedings is the personally liable owner of the company which was party to the earlier lawsuit because the company and its owner are two legally separate entities.

(d) OLG München NZBau 2000, 468 (citing The Tatry and Gubisch, leaving open the application of Drouot): The switch of party role (plaintiff and defendant) in the proceedings does not hinder an identity of the parties in the sense of Art. 21 BC. It is however necessary that the parties are in both proceedings contradictorily opposing each other ("between the parties", Art. 21 BC). If the two parties opposing each other in a later suit are on the same side in the earlier proceedings (e.g. as co-defendants) in another Member State, Art. 21 BC does not apply.

(e) OLG Karlsruhe IPRspr. 2002, No. 181, 472: A plaintiff in foreign proceedings who is third party intervenor ("Streithelfer") in the German proceedings is not the same party for the purposes of Art. 27 BR.

(f) OLG Köln IPRax 2004, 521 (criticized by legal doctrine for being too broad, Geimer IPRax 2004, 505; Kropholler, Europäisches Zivilprozeßrecht (2005)8, Art. 27 No. 5 footnote 12): A party A had issued proceedings against the defendant D in Athens for a claim under a sales contract. After the Greek proceedings had been initiated, A assigned the claim under the sales contract to B who initiated proceedings against D in Germany. The German court held that the foreign proceedings between the assignor of the claim and the defendant and the German proceedings between the assignee and the defendant constitute proceedings between the same parties in the sense of Art. 27 BR and therefore stayed the German proceedings. The German court did not inquire whether Greek procedural law ordered an extension of res judicata to the assignee if the assignment took place after the proceedings had started (as German law does in § 325 ZPO). It held that under the broad interpretation of Art. 27 BR it was sufficient that one country (here Germany) extended res judicata to the parties of both proceedings because this would already be sufficient to create a risk of irreconcilable judgments in the sense of Art. 34 No. 3 BR. To prevent that danger, Art. 27 BR had to be given a broad interpretation to prevent that danger.

[161] OLG Hamm IPRax 1998, 202.

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:

Claim preclusive effects follow automatically from recognition under the Brussels Regime and such effects must be regarded by the German Court ex officio even if the preclusive effects must be pleaded under the law of the state of origin of the judgment.

Full Response:

NB:

(1) The claim preclusive effects follow automatically from its recognition under the Brussels/Lugano regime (if the judgment has claim preclusive effects under the law of its state of origin).

(2) The claim preclusive effects of a Brussels/Lugano state judgment must – according the majority opinion – be regarded by the German court ex officio (von Amts wegen) even if they must be pleaded under the law of the judgment's state of origin[162]. This exception to the doctrine of "Wirkungserstreckung" is justified by the argument that the question how preclusive effects are invoked is not a question of recognition, but rather a modality of recognition which is – for lack of a specific rule in the BR – governed by the lex fori of the recognising state. This does however not mean that the German court will investigate on its own whether the foreign judgment is still good law or whether it has been repealed. The parties are under the obligation to present the necessary facts to the court, but the court has to draw the conclusions from the facts presented without special motions of any party. The fact that the claim preclusive effects must be regarded ex officio means that they cannot be precluded in litigation and that there is no time limit to consider them.

(3) The requirements for proof of the effects of the judgment are set out in Art. 53, 54 BR.

(4) See answers on III. A. 3. and III. B. 8.

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:

The judgment will be subject to the same limits and exceptions to claim preclusive effects as apply under the law of the state of origin of the judgment as well as the exceptions to preclusive effect recognized in Arts 34, 35 BR. Finally the Bundesgerichtshof has recently held that parties may bring additional substantive objections against foreign judgments which arose after the rendering of the foreign judgment via § 12 AVAG.

Full Response:

A judgment recognised in Germany will be given the same effects as it has on his home state. Therefore, the same limitations and exceptions to claim preclusive effects apply as they apply in the state of origin. Beyond that, exceptions to claim preclusive can be found in Art. 34, 35 BR (for the application of these provisions in German law see above).

Finally, there is a debate in Germany whether the parties may bring additional substantive objections (e.g. that the debt owed under the judgment has been paid after the judgment was handed down, that there has been set-off or that the claim has been assigned to a third party) against foreign judgments which arose after the rendering of the foreign judgment according to § 12 AVAG[163]. The Bundesgerichtshof held recently that this is possible[164]. Other appellate

[162] Kropholler, Europäisches Zivilprozeßrecht (2005)[8], vor Art. 33 No. 12. Other opinion Geimer/Schütze(-Geimer), Europäisches Zivilverfahrensrecht (2004)[2], Art. 33 No. 35.

[163] § 12 (1) AVAG reads as follows: "In the miscellaneous appeals directed against the authorisation of the enforcement of a judgment, the party against whom enforcement is sought may also raise objections against the claim itself insofar as the reasons on which

courts have admitted those objections which are undisputed between the parties or based on uncontested evidence[165]. Authors have expressed doubt on these positions because they seem to contradict Art. 45(1) BR. This debate seems to concern primarily the procedure for a declaration of enforceability under Art. 38 seq. BR and therefore to be beyond the scope of this study. Still, the same argument could be made mutatis mutandis for the mere recognition under Art. 33 BR and the resulting claim preclusive effects.

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?

Under the doctrine of "Wirkungserstreckung", this depends on the law of the state of origin of the judgment. As I have chosen answer (2) under III. B. 3., I will not elaborate further on this question.

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?

If they have such effects under the law of their state of origin, these effects will be extended under the doctrine of "extension of effects" ("Wirkungserstreckung")[166]. As there is no difference made between claim preclusive effects and issue preclusive effects for the purpose of "Wirkungserstreckung", I refer for the answers to questions III C 2-7 to my earlier remarks on claim preclusion.

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?

The policy considerations are those considerations which led the European legislator to promulgate the BR.

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?

Issue preclusive effects of judgments recognized under the Brussels Regime follows from the conclusion that the judgment is recognised under the Brussels Regulation in conjunction with the rules of the State of Origin concerning the issue preclusive effects of the judgment (per Art 33 as interpreted in Hoffmann v. Krieg).

4. Conditions for issue preclusive effects

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

If the requirements for recognition under the BR are met, a foreign judgment will be given exactly the same effects it has under its domestic law. If it has been repealed and therefore lost all its effects, necessarily there are no effects

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they are based came about after the judgment was issued."

[164] BGH NJW 2007, 3433 (citing Coursier).

[165] OLG Düsseldorf NJW-RR 2005, 933; OLG Köln IPRspr 2004, No. 169, 379; HR 2005, 216; other opinion OLG Oldenburg NJW-RR 2007, 418.

[166] Geimer/Schütze(-Geimer), Europäisches Zivilverfahrensrecht (2004)2, Art. 33 No. 13.

which could be extended to Germany. If there are doubts what the effects under foreign law are, the German law has to determine ex officio the content of the foreign law, if necessary with the help of expert evidence.

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.

Issue preclusive effects follow automatically from recognition under the Brussels Regime and such effects must be regarded by the German Court ex officio even if the preclusive effects must be pleaded under the law of the state of origin of the judgment.

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.

The judgment will be subject to the same limits and exceptions to issue preclusive effects as apply under the law of the state of origin of the judgment as well as the exceptions to preclusive effect recognized in Arts 34, 35 BR. Finally the Bundesgerichtshof has recently held that parties may bring additional substantive objections against foreign judgments which arose after the rendering of the foreign judgment via § 12 AVAG.

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?

This is determined by the law of the state of origin of the judgment.

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?

As mentioned above, judgments will be given the same effects they have in their state of origin. The question whether wider preclusive effects based on a notion of procedural abuse would be recognised in Germany therefore depends on whether such effects would be qualified as part of the effects of the foreign judgment to be recognised under Art. 33 BR or whether such effects would be regarded to fall into a category of abuse of process independent of Art. 33 BR, e.g. as a form of tort. I am not aware of any German case law on this point. It may be added that the other side of abuse of process, i.e. an exception to instead of an extension of res judicata, is recognised under German law because (procedural) fraud in the foreign proceedings makes a judgment unenforceable under Art. 34 No. 1 BR (see above). A tort action based on § 826 BGB which is possible in limited circumstances against a German judgment is not possible under the Brussels/Lugano regime because Art. 34, 35 BR form a conclusive regulation of the grounds for non-enforcement of foreign judgments[167].

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)?

It is generally understood that authentic instruments or court approved settlements have no res judicata effect and no preclusive effects[168]. The debtor must however advance any uncontested objections against enforcement of the authentic instrument in the procedure under Art. 43 BR, otherwise they will be precluded under §§ 14 (1), 55

[167] M. Stürner RabelsZ 71 (2007), 597 (633).
[168] Geimer/Schütze(-Geimer), Europäisches Zivilverfahrensrecht (2004)^2, Art. 57 No. 27, 58.

AVAG[169]. Judgments by consent are thought not to fall under Art. 57, 58 BR, but rather to be recognised as judgments under Art. 32 seq. BR[170]. An additional remark: Schlosser points out that the English text "court approved" in Art. 58 BR is not correct[171].

[169] Geimer/Schütze(-Geimer), Europäisches Zivilverfahrensrecht (2004)^2, Art. 57 No. 59.
[170] Geimer/Schütze(-Geimer), Europäisches Zivilverfahrensrecht (2004)^2, Art. 58 No. 13.
[171] Schlosser, EU-Zivilprozessrecht (2003)^2, Art. 58.

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:

Outside the Brussels Regime, judgments are recognized under §328 ZPO. The main differences between the two schemes of recognition are that under §328 ZPO the foreign court must have jurisdiction over the claim according to German standards, the foreign judgment must be final and their must be reciprocity. The effect of recognition of third state judgments is unclear, one position favours applying the same approach as under the Brussels regime, while another contends that the judgment should only have the same effect that a German judgment in the case would have.

Full Response:

Outside the Brussels/Lugano regime and international treaties, the recognition of foreign judgment is dealt with by § 328 ZPO. The provision reads:

§ 328 Anerkennung ausländischer Urteile	§ 328 Recognition of foreign judgments
(1) Die Anerkennung des Urteils eines ausländischen Gerichts ist ausgeschlossen:	(1) The recognition of a foreign judgment shall be excluded:
1. wenn die Gerichte des Staates, dem das ausländische Gericht angehört, nach den deutschen Gesetzen nicht zuständig sind;	1. in the event that courts of the state to which the foreign court belongs have no jurisdiction according to German laws,
2. wenn dem Beklagten, der sich auf das Verfahren nicht eingelassen hat und sich hierauf beruft, das verfahrenseinleitende Dokument nicht ordnungsmäßig oder nicht so rechtzeitig zugestellt worden ist, dass er sich verteidigen konnte;	2. In the event that the defendant, who has not submitted to the proceedings and raises such plea, has not been served with the written pleadings initiating the proceedings in the regular way or in a timely manner, so that he was not in a position to defend himself;
3. wenn das Urteil mit einem hier erlassenen oder einem anzuerkennenden früheren ausländischen Urteil oder wenn das ihm zugrunde liegende Verfahren mit einem früher hier rechtshängig gewordenen Verfahren unvereinbar ist;	3. in the event that the judgment is inconsistent with a judgment issued here or with an earlier foreign judgment which is subject to recognition or in the event that the proceedings on which the judgment is based are inconsistent with proceedings which have become legally pendent here earlier;
4. wenn die Anerkennung des Urteils zu einem Ergebnis führt, das mit wesentlichen Grundsätzen des deutschen Rechts offensichtlich unvereinbar ist, insbesondere wenn die Anerkennung mit den Grundrechten unvereinbar ist;	4. in the event that the recognition of the judgment would give rise to a result that is manifestly incompatible with central principles of German law, in particular if the recognition would be inconsistent with fundamental rights;
5. wenn die Gegenseitigkeit nicht verbürgt ist.	

(2) Die Vorschrift der Nummer 5 steht der Anerkennung des Urteils nicht entgegen, wenn das Urteil einen nichtvermögensrechtlichen Anspruch betrifft und nach den deutschen Gesetzen ein Gerichtsstand im Inland nicht begründet war oder wenn es sich um eine Kindschaftssache (§ 640).	5. in the event that reciprocity is not assured. (2) The provision of no. 5 shall not bar the recognition of the judgment in the event that the judgment concerns a claim other than a pecuniary claim and no domestic jurisdiction existed according to German law or in the event that it concerns a child-parent matter (§ 640).

The main differences to the Brussels regime are the requirement of jurisdiction of the foreign court according to German standards (§ 328 (1) No. 1 ZPO), the requirement of reciprocity (§ 328 (1) No. 5 ZPO) and the requirement that the foreign judgment needs to be final (i.e. no more ordinary appeal possible, no recognition of provisional measures). The requirement of finality is extended from § 723 (2) ZPO (which deals with the procedure for enforcement of foreign judgments) to the recognition stage; it is however subject to academic criticism[172]. Mere recognition is for judgments in civil or commercial matter not subject to a special procedure, it is decided incidentally by the judge according to the criteria of § 328 ZPO. In case of doubt it is possible to seek declaratory judgment (§ 256 ZPO) on the issue.

The effects of recognition of a third-state judgment are subject to considerable academic debate. While one position favours applying the same approach as under the Brussels regime ("extension of effects" of the foreign judgment, Wirkungserstreckung) and thus looking to the law of the state of origin for the effects of the judgment, the opposing position proposes to give foreign judgments only (to a maximum) the same effects as a German judgment in the case would have ("nostrification" or "equalisation", Gleichstellung).

[172] E.g. Kropholler, Internationales Privatrecht (2007)[6], § 60 III 3.