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Preliminary remarks on Art. 32 - 37 Lugano Convention

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I. Subject matter and concept of recognition

1. As a result of the principle of territoriality, judicial decisions, as acts of state sovereignty, have legal consequences exclusively in the state in which the judgment was given.[1] In order for a decision to have legal consequences in another state, it must in principle be recognised. [2]***Recognition*** is an act of state sovereignty, whereby a foreign decision or certain legal consequences of the decision (in the case of partial recognition) are admitted for the domestic legal system. Accordingly, recognition means that the decision is accepted as binding and is no longer called into question. [3]The *consequence of* recognition is that the foreign decision is accorded certain legal consequences in Switzerland. [4]If, on

[1] Spühler/Rodriguez, para. 323; Linke/Hau, para. 12.1; Donzallaz, para. 1749 f.; Matscher, p. 265.
[2] Markus, para. 1452.
[3] Martiny, § 1 n. 68.
[4] Stein/Jonas - Oberhammer, Before Art. 32 to 56 EuGVVO n. 2; cf. Jametti, p. 10.

the other hand, the decision is not recognised, the decision has no legal consequences in the recognising state. [5]

2. Recognition must be distinguished from the declaration of enforceability.[6] With the declaration of ***enforceability*** the judgment is admitted for enforcement in the State of enforcement (see Article 38(1) Lugano Convention) and thus becomes enforceable.[7] The declaration of enforceability can thus be regarded as an actual intermediate procedure between recognition and enforcement. The principle applies that a prior recognition is a prerequisite for a declaration of enforceability.[8][9] In the scope of application of the Convention, however, this principle must be relativised to the extent that the grounds for refusal of recognition pursuant to Art. 34 f. Lugano Convention are only to be examined. Lugano Convention are only to be examined if the opposing party to enforcement lodges an appeal against the declaration of enforceability already granted (cf. Art. 43 (1) Lugano Convention in conjunction with Art. 45 (1) Lugano Convention).[10] Accordingly, a declaration of enforceability does not require that recognition has already been granted. Rather, it presupposes that the decision to be enforced fulfils the requirements for recognition and has an enforceable (but not necessarily recognisable) [11]content. [12]

3. There is no *general* obligation under international law to recognise foreign judgments.[13] However, such an obligation is provided for by the provisions of Articles 32 - 37 of the Lugano Convention. These are the actual core provisions of the Convention.[14] The provisions regulate the recognition of a decision of a Contracting State (so-called State of origin or State of judgment) in another Contracting State to the Lugano Convention (so-called State of recognition).[15] This means that judgments given in a Contracting State are valid throughout the territory of the Convention. [16]The provisions of the Convention supersede the national law of the Contracting States within their scope of application. [17]National law may therefore be invoked only to the extent that the Convention itself refers to it.[18] The regulatory content of Art. 32 et seq. Lugano Convention is, however, limited. They regulate only the recognition procedure and the conditions for recognition. [19]

[5] Stein/Jonas - Oberhammer, Art. 33 EuGVVO n. 16; Martiny, § 1 n. 68.
[6] Markus, para. 1454.
[7] Markus, para. 1455 f. and 1482.
[8] Jametti, p. 32.
[9] Jametti, p. 32; Walter/Domej, p. 412 f.; Matscher, p. 268.
[10] Linke/Hau, para. 12.3.
[11] Jametti, p. 32; Markus, para. 1455.
[12] Markus, para. 1455.
[13] Donzallaz, para. 1751; Markus, para. 1452; Walter/Domej, p. 409; Matscher, p. 265.
[14] See Hess, para. 6.204 and BSK LugÜ - Schuler/Marugg, Art. 33 LugÜ n. 1.
[15] Cf. Schnyder - Domej/Oberhammer, Preliminary Remarks Art. 32 - 37 LugÜ n. 4.
[16] Wieczorek/Schütze - Loyal, Before Art. 36 - 57 Brussels Ia Regulation N. 1.
[17] CR LugÜ - Bucher, Introduction aux art. 32-56 LugÜ N. 4; Walter/Domej, p. 457; Wieczorek/Schütze - Loyal, Vor Art. 36 - 57 Brüssel Ia-VO N. 4; cf. also Rauscher - Mankowski, Art. 2 Brüssel Ia-VO N. 3.
[18] Walter/Domej, p. 457.
[19] Wieczorek/Schütze - Loyal, Before Art. 36 - 57 Brussels Ia Regulation n. 1; Walter/Domej, p. 457; Cf. Schnyder - Domej/Oberhammer, Preliminary Remarks Art. 32 - 37 Lugano Convention n. 1.

II. Scope of application and cognition of the recognition court

4. The scope of application of the recognition provisions is limited in ***territorial-personal terms to judgments*** of Contracting States (Art. 32 Lugano Convention). Judgments of a State that is not a party to the Convention are not covered by the scope of application (with the exception of their blocking effect pursuant to Art. 34 para. 4 Lugano Convention)[20]. Such judgments are to be recognised according to the autonomous national law of the recognising state (i.e. in Switzerland according to the IPRG or another applicable international law treaty).[21] It is irrelevant, however, on which basis of jurisdiction the treaty state court based its jurisdiction.[22] Accordingly, judgments rendered on the basis of an exorbitant jurisdiction under Article 3(2) or Article 4(2) of the Lugano Convention may also be recognised and declared enforceable in accordance with the provisions of the Convention. Similarly, it is not a prerequisite that the dispute underlying the decision to be recognised had an international character. [23][24]Accordingly, judgments on purely domestic matters are also eligible for recognition. [25]

5. From a ***factual point of view, it is*** also a prerequisite that the decision to be recognised has been given in a legal dispute which is covered by the material scope of the Convention (Art. 1 Lugano Convention).[26] It must therefore be a decision in a civil and commercial matter (Art. 1 para. 1 Lugano Convention), whereby none of the grounds for exclusion pursuant to Art. 1 para. 2 Lugano Convention may be present. [27]

6. Finally, ***special conventions*** governing jurisdiction, recognition or enforcement to which all or some of the Contracting States are parties also take precedence over the Convention (Art. 67 Lugano Convention).

7. The recognition court decides independently on the application of the recognition and enforcement provisions of the Convention. [28]In so doing, however, the recognising court is bound by the findings of fact of the court of origin in accordance with Article 35(2) of the Lugano Convention. [29]

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[20] Schnyder- Domej/Oberhammer, Preliminary Remarks Art. 32 - 37 Lugano Convention N. 4; cf. MüKo ZPO - Gottwald, Art. 36 Brussels Ia Regulation N. 3.
[21] Schnyder - Domej/Oberhammer, Preliminary Remarks Art. 32 - 37 LugÜ N. 4; MüKo ZPO - Gottwald, Art. 36 Brussels Ia Regulation N. 3; SHK LugÜ - Walther, Art. 32 LugÜ N. 8.
[22] Walter/Domej, p. 459; MüKo ZPO - Gottwald, Art. 36 Brussels Ia Regulation N. 2; BSK LugÜ - Schuler/Marugg, Art. 32 LugÜ Rz. 3; SHK LugÜ - Walther, Art. 32 LugÜ N. 6; CR LugÜ - Bucher, Introduction aux art. 32-56 LugÜ N. 3.
[23] CR LugÜ - Bucher, Introduction aux art. 32-56 LugÜ N. 3; Schnyder - Domej/Oberhammer, Vorbemerkungen Art. 32 - 37 LugÜ N. 4.
[24] SHK LugÜ - Walther, Art. 32 LugÜ n. 6.
[25] SHK LugÜ - Walther, Art. 32 LugÜ n. 8; Schnyder - Domej/Oberhammer, Preliminary Remarks Art. 32-37 LugÜ n. 4; Czernich/Kodek/Mayr - Kodek, Art. 36 EuGVVO n. 3; Geimer/Schütze, Art. 36 EuGVVO n. 2.
[26] SHK LugÜ - Walther, Art. 32 LugÜ n. 2.
[27] SHK LugÜ - Walther, Art. 32 LugÜ n. 3.
[28] Czernich/Kodek/Mayr-Kodek, Art. 36 EuGVVO N. 2; BSK LugÜ - Schuler/Marugg, Art. 32 LugÜ N. 8; SHK LugÜ - Walther, Art. 32 LugÜ N. 2; see also Kropholler/von Hein, Art. 32 EuGVO N. 3.
[29] BSK LugÜ - Schuler/Marugg, Art. 32 LugÜ n. 8; Geimer/Schütze, Art. 36 EuGVVO n. 17.

III. The principles of the recognition system of the Lugano Convention

A. Free movement of judgement

8. The parallel system to the Lugano[30] system (the Brussels I system)[31] has as its main purpose the free movement of judgments of the Member States. This is to guarantee effective cross-border legal protection.[32] All the provisions of the Brussels I Regulation are tailored to this purpose.[33] For example, by standardising the law of jurisdiction, objections to recognition on the grounds of lack of jurisdiction of the court of origin should be prevented as far as possible. The Lugano Convention similarly intends to facilitate the mutual recognition of treaty-based judgments. [34][35]Accordingly, the promotion of the free movement of judgments of the Contracting States ("free movement of judgments") is the main purpose of both systems. [36]

9. The ***free movement of judgments*** was developed within the European Community as a regulatory concept in connection with the free movement of goods and is based on the country of origin principle under Union law. The ***country of origin principle*** found its origin in the recognition of administrative acts in the admission of goods within the European Community. In application of this principle, goods and services authorised in the Member State of origin were treated in the receiving State as domestic products and services. [37]With the principle of mutual recognition of Member State decisions in the Brussels I system, this principle was transferred to procedural law.[38] In this respect, a foreign judgment of a Member State should be treated in the same way as a domestic

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[30] The ***Lugano system is*** a collective term for international law agreements between the EU, Iceland, Norway and Switzerland governing international jurisdiction and the recognition and enforcement of treaty-based judgments in civil and commercial matters. The term covers both the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988 (aLugÜ) and the LugÜ [Kistler/Daphinoff, fn. 4].

[31] The ***Brussels I system is*** a collective term for conventions and regulations of the European Community (EC) or the EU, which regulate international jurisdiction in civil and commercial matters between the EU member states as well as the recognition and enforcement of member state judgments. This term includes the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention), Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels Regulation), OJ L 12, 1, 2001, and the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Regulation). 2001 L 12, 1, and Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (EuGVVO), OJ 2012 L 351, 1). The original ECHR was replaced on 1 May 2002 by the aEU Regulation for all Member States (with the exception of Denmark). Finally, on 10 January 2015, the EuGVVO entered into force in place of the aEuGVVO. Unlike the Brussels Convention, which was a treaty under international law, the Brussels I Regulation and the Brussels Regulation are secondary Union law which is in principle directly applicable to the Member States [Kistler/Daphinoff, footnote 3].

[32] Jenard Report, p. 3; ECJ judgment Horst Ludwig Martin Hoffmann v. Adelheid Krieg of 4 February 1988 C-145/86, para. 10; Hess, para. 6.204; Czernich/Kodek/Mayr-Kodek, Art. 36 EuGVVO n. 2; on the parallelism of the Lugano and Brussels I systems: BGE 135 III 185 E. 3.2; Markus, Lugano-Sicht, p. 801; Oberhammer/Koller/Slonina, § 15 N. 5.

[33] Hess, para 6.204; see also ECJ Wolf Naturprodukte judgment of 21 June 2012 C-514/10, para 25.

[34] Jakowski, p. 45.

[35] Preamble LugÜ; Pocar Report, para. 128; Markus, para. 1592; CR LugÜ - Bucher, Introduction aux art. 32-56 LugÜ N. 1.

[36]Pocar Report, para 128; Schnyder - Domej/Oberhammer, Preliminary Remarks Art. 32 - 37 LugÜ n. 2; see Markus, para 1592 as well as ECJ Pula Parking d.o.o v. Sven Klaus Tederahn, 9 March 2017 C-551/15, para 51.

[37] Hess, para. 3.22.

[38] Hess, para. 3.21; Althammer/Tolani, p. 236; see also Oberhammer/Koller/Slonina, § 15 para. 176.

judgment. [39]Consequently, a Member State judgment should also be recognised in such a way that a review is only carried out to enforce fundamental interests of the recognising State. [40]

10. In order to achieve this objective, obstacles to recognition have been continuously abolished and the recognition procedure simplified since the conclusion of the original Brussels Convention.[41] The same is true of the parallel Lugano system. [42]The provisions of the Convention must therefore be interpreted in such a way as to minimise the obstacles to the cross-border recognition of judgments of Contracting States within the Convention.[43] Consequently, the concept of judgment under Article 32 of the Lugano Convention is to be understood comprehensively.[44] Furthermore, judgments given in a Contracting State are to be recognised automatically and "without any special procedure" in another Contracting State (Article 33(1) Lugano Convention).[45] Finally, the grounds for non-recognition in the Convention are to be interpreted narrowly and limited to what is strictly necessary to achieve their objective.[46] Based on this principle, a favourability principle is sometimes assumed for the Convention, according to which the national recognition law is still applicable if it contains provisions that are more favourable to recognition.[47] However, the exhaustive nature of the Convention's recognition rules argues against such a favourability principle. Moreover, the recognition rules also serve to protect the defendant. [4849]This protection risks being undermined if national law that is more favourable to recognition could be applied. [50]

B. Principle of trust

11. In order to guarantee such freedom of judgment, a particular degree of mutual trust in the administration of justice of the Contracting States is required. It is only such confidence that justifies the greatest possible waiver of judicial review in the recognition of judgments of the Contracting States. [5152]The Convention's freedom of judgment is therefore based on the principle of mutual trust (the so-called ***principle of trust***).[53] As a direct consequence of the principle of legitimate expectations, decisions of Contracting

[39] Hess, para. 3.28; see also Oberhammer/Koller/Slonina, § 15 para. 176.
[40] Oberhammer/Koller/Slonina, § 15 para. 176.
[41] Cf. Hess, para. 3.27 ff.
[42] LugÜ Dispatch, p. 1805; BSK LugÜ - Schuler/Marugg, Art. 33 LugÜ n. 1.
[43] Unalex Commentary - Schwartze, Preliminary Remarks Recognition and Enforcement N. 3.
[44] Unalex Kommentar - Schwartze, Vorbemerkungen Anerkennung und Vollstreckung N. 1; judgment of the ECJ Gothaer Allgemeine Versicherung AG and others of 15 November 2012 C-456/11, para. 26.
[45] Cf. Rauscher - Leible, Art. 36 Brussels Ia Regulation n. 1.
[46] Judgments of the ECJ Apostolides of 28 April 2009 C-420/07, para. 35; Dieter Krombach v. André Bambierski of 28 March 2000 C-7/98, para. 21; Solo Kleinmotoren GmbH v. Emilio Bloch of 2 June 1994 C-414/92, para. 20; but cf. the reservations in Schnyder - Domej/Oberhammer, Vorbemerkungen Art. 32 - 37 LugÜ, which in my view are justified.
[47] Siehr, p. 527 f.; MüKo ZPO - Gottwald, Art. 36 Brussels Ia Regulation n. 7; Geimer/Schütze, Art. 36 EuGVVO n. 34.
[48] CR LugÜ - Bucher, Introduction aux art. 32-56 LugÜ N. 4; SHK LugÜ - Walther, Art. 32 LugÜ N. 3; Walter/Domej, p. 447; cf. Rauscher - Leible, Art. 2 Brussels Ia Regulation N. 3.
[49] Schnyder - Domej/Oberhammer, Preliminary Remarks Art. 32 - 37 LugÜ N. 2.
[50] Cf. Schnyder - Domej/Oberhammer, Preliminary Remarks Art. 32 - 37 LugÜ n. 3.
[51] Cf. Donzallaz, para. 1761 et seq. and recital 26 of the Regulation.
[52] Hess, para. 3.28; see also recital 26 of the Regulation.
[53] Cf. Oberhammer/Koller/Slonina, § 15 n. 178; recital 26 of the ECtHR; judgment of the ECJ of 9 March 2017 C-551/15 Pula Parking d.o.o v Sven Klaus Tederahn, paras 50 and 53; Markus, para 1592.

States cannot in principle be reviewed by another Contracting State.[54] Consequently, the principle of legitimate expectations means that each Contracting State court regards the decisions of other Contracting State courts as equivalent to its own decisions. [55]This principle is nowhere to be found explicitly in the Convention, which is why it is sometimes argued that Swiss courts are not bound by it. It [56]should be noted, however, that numerous provisions of the Convention are based on the principle of legitimate expectations.[57] For example, the principle of confidence forms the basis for the prohibition of indirect examination of jurisdiction under Article 35(3) of the Lugano Convention.[58] Likewise, the prohibition of substantive review (prohibition of révision au fond, Art. 36 Lugano Convention) is based on this principle. [59]Accordingly, it can be assumed that Swiss courts must also observe the principle of trust. [60]

C. Effective protection of defendants and prevention of irreconcilable decisions

12. Unrestrained freedom of movement of judgments also entails risks. For example, if there is no possibility of review of the decision by the recognising state, the protection of the rights of the parties (especially the defendant) may be undermined.[61] Furthermore, sovereign interests of the recognising state may also be jeopardised. In order to prevent such abuses, the Convention provides, on the one hand, for obstacles to recognition which are intended to ensure ***effective protection of the defendant.***[62] These ensure, inter alia, that the defendant has been granted the right to be heard (Art. 34 No. 2 Lugano Convention) and that the protective jurisdiction for policyholders under Art. 8 et seq. and for consumers under Art. 8 et seq. Lugano Convention is respected. Lugano Convention and for consumers pursuant to Art. 15 et seq. Lugano Convention are complied with (Art. 35 para. 1 Lugano Convention). On the other hand, both the lis pendens bar under Art. 27 Lugano Convention and the grounds for refusal of recognition under Art. 34 nos. 3 and 4 Lugano Convention seek to ***prevent irreconcilable decisions***.[63] On the one hand, the recognition of such conflicting decisions would be unreasonable for the parties, as it would be unclear for them which decision they would have to follow in their conduct.[64] On the other hand, conflicting judgments would also damage the reputation of the judicial institutions, reducing confidence in the uniformity of justice. In order to prevent such a collision, the lis pendens bar already takes effect at the level of the cognizance

[54] Geimer/Schütze, Einleitung EuGVVO N. 101.
[55] Opinion of Advocate General Yves Bot delivered on 6 September 2012 in Gothaer Allgemeine Versicherung and Others C- 456/11, para 72.
[56] SHK LugÜ - Dasser, Art. 27 LugÜ n. 38; Markus/Giroud, p. 245.
[57] So also SHK LugÜ - Dasser, Art. 27 LugÜ n. 38.
[58] Schnyder - Domej/Oberhammer, Art. 35 LugÜ n. 1.
[59] ECJ Gothaer Allgemeine Versicherung AG and Others judgment of 15 November 2012 C-456/11, para 37; see also Jenard Report, p. 46: "*Where review of the merits of the decision is excluded, this reflects full reliance on the administration of justice in the sentencing State...*".
[60] Kistler/Daphinoff, p. 512; see also BGE 138 III 304 E. 5.3.1.
[61] Cf. Schack, Anerkennung, p. 453 f.
[62] Oberhammer/Koller/Slonina, § 15 para. 176.
[63] BGE 138 III 174 E. 5.2; Cf. Althammer/Tolani, p. 228.
[64] Cf. also Oberhammer/Koller/Slonina, § 15 n. 26.

proceedings.[6566] Accordingly, the Contracting State court subsequently seised must stay its proceedings if proceedings concerning the same claim are pending before different Contracting State courts (Art. 27 (1) Lugano Convention). [67]If, despite this lis pendens bar, irreconcilable judgments are rendered, the grounds for refusal of recognition set out in Art. 34 nos. 3 and 4 Lugano will apply at the recognition level.[68] According to these provisions, a judgment will not be recognised if it is irreconcilable either with a judgment in the State of recognition (no. 3) or with an earlier judgment from another State (no. 4).

IV. Legal consequences of recognition

13. While the Convention sets out in detail the conditions and procedure for recognition, it contains no explicit provision on the legal consequences of recognition. [69]This ultimately raises two questions: First, under what law are the legal consequences of a recognised judgment to be determined? Secondly, which legal consequences are amenable to recognition at all and thus capable of recognition?

A. Determination of the legal consequences of recognition

1. General theories of recognition consequences

14. The legal basis on which the legal consequences of recognition are determined is disputed in the doctrine. According to the theory ***of the extension of effects*** advocated by the majority of scholars, the same legal consequences are to be accorded to the recognised decision in the state of recognition as are accorded to it in the state of origin.[70] Accordingly, on the basis of this theory, the effects of the decision are to be determined on the basis of the law of the state of origin.[71] The opposite pole to the theory of extension of effect is the so-called ***theory of equal effect.***[72] According to this theory, the same effects are attributed to the recognised judgment as to a comparable judgment in the state of recognition.[73] Accordingly, the legal consequences of the judgment would have to be determined in accordance with the *lex fori of the state of recognition.*[74] Finally, the (restrictive) ***accumulation theory assumes that, on the*** one hand, the decision in the state of recognition should not have more effects than it has in the state of origin. On the other hand, the effects of the decision must not go further than those of similar judgments in

[65] Althammer/Tolani, p. 228.
[66] Althammer/Tolani, p. 232 f.; judgments of the ECJ Gubisch Maschinenfabrik v Palumbo of 8 December 1987 C-144/86, para. 8; Tatry v Maciej Rataj of 6 December 1994 C-406/92, para. 32; Overseas Union Insurance Ltd and others v New Hampshire Insurance Company of 27 June 1991 C-351/89, para. 15 f.
[67] BGE 138 III 174 E. 5.2.
[68] BGE 138 III 174 E. 5.2.
[69] Cf. Stein/Jonas - Oberhammer, Art. 33 EuGVVO n. 10.
[70] Schnyder - Domej/Oberhammer, Art. 33 n. 10; BSK LugÜ - Schuler/Marugg, Art. 33 LugÜ n. 7; SHK LugÜ - Walther, Art. 33 LugÜ n. 6; Walter/Domej, p. 473; probably also Markus, para. 1648; Stein/Jonas - Oberhammer, Art. 33 EuGVVO n. 10; Geimer/Schütze, Art. 36 EuGVVO n. 71; Czernich/Kodek/Mayr - Kodek, Art. 36 EuGVVO n. 32; Althammer/Tolani, p. 248; Krüger, p. 313; Rauscher - Leible, Art. 36 Brussels Ia-VO n. 4.
[71] Martiny, p. 168.
[72] Schack, Recognition, p. 450.
[73] Fundamental: Matscher, p. 277; Schack, para. 883.
[74] Matscher, p. 279; Martiny, p. 168.

the state of recognition. [75]Thus, the accumulation theory can be understood as the actual "intersection" of the two "circles" of the extension of effects theory and the equal effects theory. [76]

2. Legal consequences of recognition within the Lugano Convention

a. Effect extension theory

15. The ***official reports on***[77] the Brussels Convention seem to be in favour of the theory of the extension of effects. For example, the Jenard Report states that recognition 'confers on judgments the effects which they have in the State in the territory of which they were given'. [78]Similar observations can be made in the Evrigenis & Kerameus Report. [79]

16. The ECJ, in its *Hoffmann* jurisprudence, also seems to favour the theory of extension of effect.[80] In it, the Court adopted the above-mentioned passage of the Jenard report and emphasised that the Convention should, as far as possible, establish the free movement of judgments.[8182] However, the Court qualified this statement by stating that a recognised judgment must (only) in principle produce the same effects in the recognising State as in the State of origin. The phrase "in principle" implies that there are exceptions to the principle of the extension of effects. In later judgments, the ECJ maintained this relativisation. In doing so, it specified that a judgment is not to be accorded legal effects upon its enforcement which it does not have in the Member State of origin or which a judgment of the same kind given directly in the State of enforcement does not produce.[83] [84]This case law is sometimes understood in the doctrine as an endorsement of the theory of cumulation. [85]

17. In the aforementioned case law, however, the ECJ clearly differentiates between the legal consequences of recognition and those of a declaration of enforceability. The aforementioned limitation of effects refers exclusively to the legal consequences of a

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[75] Fundamental: Droz, para. 440; Roth, p. 138; Opinion of Advocate General Marco Darmon of 9 July 1987 in the case of Horst Ludwig Martin Hoffmann v. Adelheid Krieg C-145/86, para. 20; Donzallaz, para. 1829 et seq.; Schmidt, p. 60; Gaudemet-Tallon/Ancel, p. 550; Schack, para. 886.
[76] Schack, Recognition, p. 450 f.
[77] In general, conventions between EU Member States (such as the Brussels Convention) which fall within the EU's sphere of competence are accompanied by an explanatory official report. These reports are not binding on the ECJ. However, the ECJ regularly refers to the reports as a guide in its judgments, which illustrates their importance (Kistler/Daphinoff, p. 481).
[78] Jenard - Report, p. 43; Kropholler/von Hein, before Article 33 ECR n. 9.
[79] Evrigenis & Kerameus - Report, para 75.
[80] BSK LugÜ - Schuler/Marugg, Art. 33 LugÜ n. 7; Markus, para. 1648; SHK LugÜ - Walther, Art. 33 LugÜ n. 6; Walter/Domej, p. 473; Stein/Jonas - Oberhammer, Art. 33 EuGVVO n. 10; Paulus/Pfeiffer/Pfeiffer - Pfeiffer/Pfeiffer, Art. 36 Regulation (EU) No. 1215/2012 N. 13; Kropholler/von Hein, before Art. 33 EuGVVO N. 9; Czernich/Kodek/Mayr - Kodek, Art. 36 EuGVVO N. 32.
[81] Judgment of the ECJ of 4 February 1988 C-145/86 Horst Ludwig Martin Hoffmann v Adelheid Krieg, para. 10.
[82] Judgment of the ECJ of 4 February 1988 C-145/86 Horst Ludwig Martin Hoffmann v. Adelheid Krieg, para. 11; Wieczorek/Schütze- Loyal, Art. 36 Brussels Ia Regulation n. 13.
[83] Pfeiffer, para 133.
[84] ECJ Apostolides, 28 April 2009 C-420/07, para 66; Prism Investments, 13 October 2011 C-139/10, para 38; Società Immobiliare Al Bosco Srl, 4 October 2018 C-379/17, para 40.
[85] Schack, Anerkennung, p. 454; Gaudemet - Tallon/Ancel, p. 550; Donzallaz, para. 1829 et seq.

declaration of enforceability.[86] There are good reasons for this. Unlike recognition, a declaration of enforceability is not intended to give a foreign judgment the same effects as in the country of judgment. On the contrary, a declaration of enforceability confers on the foreign judgment the same effect as an enforceable domestic judgment.[87] Accordingly, the declaration of enforceability puts the foreign judgment on a par with a domestic judgment. This also follows logically from the fact that subsequent enforcement is governed by the domestic law (*lex fori*) of the state of enforcement. [88]Accordingly, the relativisation made cannot be interpreted as an endorsement of the theory of cumulation in recognition. [89]

18. Rather, it can be inferred from the case-law in *Hoffmann* that the Court's relativisation was merely intended to clarify the differentiation between the effect of recognition and the effect of a declaration of enforceability. Thus, the ECJ was asked whether the duty of recognition under Article 26 of the Brussels Convention (Article 33 of the Lugano Convention) obliges it to give a judgment of a Contracting State the same effect as it has in the State of origin and whether it should therefore be enforced in the same cases as there.[90] The Court reformulated this question and held that a judgment recognised under Article 26 of the Brussels Convention must in *principle have* the same effect in the State addressed as in the State of origin.[91] With this reformulation, the ECJ implies that it should first be clarified in principle whether a judgment has the same effects in the state of recognition as in the state of origin. In contrast, the Court only wanted to answer the question of whether the decision must therefore also be enforced under the same conditions as in the state of origin in a second step. This is also apparent from the further reasoning of the judgment, in which the Court finally states that the decision need not be enforced precisely if enforcement is not possible under the law of the State of enforcement. [92]

19. Overall, therefore, the ECJ follows the theory of extension of effect for the legal consequences of recognition. However, there is an exception for the effect of enforceability. On the one hand, this effect is only conferred on the decision by the recognising state when it is declared enforceable (Article 38(1) Lugano Convention).[93]On the other hand, its effect is governed by the theory of cumulation, whereby the decision

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[86] Wieczorek/Schütze-Loyal, Art. 36 Brussels Ia Regulation n. 13; see also ECJ Apostolides judgment of 28 April 2009 C-420/07, para. 66: "*If, in that regard, **recognition is** intended in principle to attach to judgments the effects which they have in the Member State in whose territory they were given..., it is not acceptable to attribute to a judgment, when it is **enforced,** legal effects which it does not have in the Member State of origin.*"

[87] ECJ Società Immobiliare Al Bosco Srl judgment of 4 October 2018 C-379/17, para 25.

[88] ECJ Società Immobiliare Al Bosco Srl judgment of 4 October 2018 C-379/17, para 26.

[89] Advocate General Darmon's opinion on the Hoffmann jurisprudence rather shows clear indications against the cumulation theory. Thus, although he also supported the theory of cumulation and therefore proposed the following answer to the Court: "*The effects of a judgment recognised under the Convention... cannot exceed those which a corresponding domestic judgment would produce in the requested State...*". (Opinion of Advocate General Marco Darmon of 9 July 1987 in Horst Ludwig Martin Hoffmann v Adelheid Krieg C-145/86, paras 20 and 37). However, the ECJ did not adopt these statements in its decision (ECJ judgment of 4 February 1988 C-145/86 Horst Ludwig Martin Hoffmann v. Adelheid Krieg, para. 10 f.). This is to be interpreted as an implicit rejection of the accumulation theory.

[90] Judgment of the ECJ of 4 February 1988 C-145/86 Horst Ludwig Martin Hoffmann v Adelheid Krieg, para. 7.

[91] Judgment of the ECJ of 4 February 1988 C-145/86 Horst Ludwig Martin Hoffmann v Adelheid Krieg, para. 9.

[92] Judgment of the ECJ of 4 February 1988 C-145/86 Horst Ludwig Martin Hoffmann v Adelheid Krieg, para. 18.

[93] Domej, Lugano Payment Order, p. 203.

is not accorded any effects with the declaration of enforceability that would not be produced by a decision issued in the state of enforcement. [94]

b. Case law of the Federal Supreme Court

20. In its case law, the Federal Supreme Court also seems to follow the theory of extension of effect. It is true that the Federal Supreme Court held in BGE 135 III 670 that the recognition of a foreign judgment in principle has the same effect as a domestic judgment. [95]However, in its later case law, the Federal Supreme Court clarified, based on the *Hoffmann* case law, that a judgment recognised under the Lugano Convention must in principle have the same effect in the requested state as in the state of judgment. [96]

c. Autonomous concept of legal force

21. It is unclear to what extent the ECJ assumes an autonomous understanding of res judicata as a further exception to the theory of extension of effect.[97] The ECJ provided the first approaches for such an understanding in the *De Wolf/Cox*[98] judgment.[99] The Court of Justice considered it incompatible with the meaning of the recognition provisions to reopen proceedings between the same parties on a matter already adjudicated by a court of a Contracting State. Otherwise, the second court could contradict an earlier treaty state judgment and thus violate the recognition obligation. [100]Although the ECJ did not yet provide an actual autonomous definition of res judicata in this decision, [101]it did justify the bar on res judicata on the basis of a European autonomous purpose (namely the prevention of irreconcilable judgments). [102]Accordingly, the Court considered it necessary to provide for a *ne bis in idem defence in the* context of European civil procedure law in the case of complete identity of the subject-matter of the dispute. [103]

22. An autonomous scope of law was then advocated by the ECJ in the *Gothaer*[104] judgment. The decision concerned a trial judgment in which a Belgian court declared itself without jurisdiction on the basis of the validity of a choice of court agreement in favour of the courts of the contracting state Iceland. For the German court, which was subsequently seised of the case, the question arose as to whether it was also bound by the preliminary

[94] ECJ Società Immobiliare Al Bosco Srl, 4 October 2018 C-379/17; Apostolides, 28 April 2009 C-420/07, para 66; Prism Investments, 13 October 2011 C-139/10, para 38; cf. also Article 54(1) of the Brussels Convention.
[95] BGE 135 III 670 E. 1.3.1.
[96] BGE 143 III 693 E.3.4.3; 146 III 157 E. 6.5; cf. also BGE 129 III 626 E. 5.2.3.
[97] Cf. Roth, p. 138; Althammer/Tolani, p. 243; Koops, p. 13.
[98] Judgment of the ECJ De Wolf v Cox of 30 November 1976 C-42/76.
[99] Althammer/Tolani, p. 234; Stein/Jonas-Oberhammer, Art. 33 EuGVVO n. 11.
[100] Judgment of the ECJ De Wolf v Cox of 30 November 1976 C-42/76, para 9/10.
[101] It must be taken into account that in this case-law it was also not necessary to form an autonomous concept of res judicata for the assumption of a conflict of res judicata. Thus, the subject-matters of the two national proceedings were already identical according to all national concepts of subject-matters (Althammer/Tolani, p. 235).
[102] Stein/Jonas-Oberhammer, Art. 33 EuGVVO n. 11; Koops, p. 14.
[103] Althammer/Tolani, p. 235.
[104] Judgment of the ECJ Gothaer Allgemeine Versicherung AG and others of 15 November 2012 C-456/11.

assessment of the validity of the choice-of-court agreement.[105] The Court held that, under European Union law, the concept of res judicata encompassed not only the operative part of the decision in question but also its statement of reasons, in so far as it bore on the operative part of the judgment and was therefore inseparable from it.[106] Accordingly, such a procedural decision is binding both with regard to the decision on the lack of jurisdiction of the Court of First Instance made in the operative part of the judgment and with regard to the validity of the agreement on jurisdiction found in the reasons for the judgment, which is supported by the operative part of the judgment.[107] The Court thus formed an autonomous concept of res judicata, which covers both the main issue judged and any preliminary issues judged. The concrete scope of this concept of res judicata is, however, highly disputed in the doctrine. The [108][109]scope of this concept of res judicata depends on whether the decision was due to the particularities of the individual case or whether its findings can be generalized. [110]

23. The ECJ seems, at least *prima vista, to* limit its finding to decisions in which a Contracting State court declines jurisdiction on the basis of the validity of a choice of court agreement in favour of another Contracting State.[111] This can also be seen from the fact that the Court continues to be guided by the principle of the extension of effect theory.[112][113] On the other hand, the arguments used by the Court can be generalised. On the one hand, the Court based its reasoning primarily on Article 35 (3) aEuGVVO (Article 35 (3) Lugano Convention), according to which the jurisdiction of the sentencing state may not be reviewed in the recognition and enforcement of a treaty state decision. According to the Court, the review of "intermediate results" would also be contrary to this prohibition, insofar as the result would be to call into question the decision of the Contracting State court. [114][115]The prohibition of indirect review of jurisdiction applies, in principle, to [116]all jurisdictional decisions of the Contracting States, and this reasoning could therefore be extended to such jurisdictional decisions in general. However, the ECJ justifies its autonomous concept of res judicata with the fact that the decision was based on the

[105] Judgment of the ECJ Gothaer Allgemeine Versicherung AG and others of 15 November 2012 C-456/11, para. 21.
[106] Judgment of the ECJ Gothaer Allgemeine Versicherung AG and others of 15 November 2012 C-456/11, para. 40.
[107] Judgment of the ECJ Gothaer Allgemeine Versicherung AG and others of 15 November 2012 C-456/11, para. 41.
[108] Markus, para. 1465; Koops, p. 13; Jakowski, p. 68.
[109] Thus, some doctrine restricts this concept of res judicata to decisions on lack of jurisdiction based on an agreement on jurisdiction in favour of a contracting state (e.g. Althammer/Tolani, p. 248; BSK LugÜ Schuler/Marugg, Art. 32 LugÜ n. 22). In contrast, another part of the doctrine extends this concept of res judicata in general to procedural judgments on international jurisdiction (e.g. Roth, p. 139). Finally, some doctrine even recognises in this case law the possibility of extending this concept of res judicata to judgments on the merits (e.g. Bach, p. 58).
[110] So rightly: Bach, p. 58.
[111] Judgment of the ECJ Gothaer Allgemeine Versicherung AG and others of 15 November 2012 C-456/11, paras 40 and 43.
[112] ECJ Gothaer Allgemeine Versicherung AG and others judgment of 15 November 2012 C-456/11, para 34; see Jakowski, p. 67.
[113] Bach, p. 58; Jakowski, p. 65.
[114] ECJ Gothaer Allgemeine Versicherung AG and others judgment of 15 November 2012 C-456/11, para 39; Bach, p 58.
[115] Judgment of the ECJ Gothaer Allgemeine Versicherung AG and others of 15 November 2012 C-456/11, para. 38.
[116] Subject to Art. 35(1) Lugano Convention.

common jurisdiction rules of the aEuGVVO. [117]At most, a limitation of the autonomous concept of res judicata to cases in which the decision was based on a Convention rule on jurisdiction that applies uniformly in all Member States can be recognised in this. [118]

24. However, as the ECJ also based its decision on the prohibition of review of the content of a judgment under Article 36 of the Brussels Regulation (Article 36 of the Lugano Convention), it is at least questionable whether this understanding of res judicata might not even be applicable to judgments on the merits.[119] Possible indications for such a comprehensive scope of res judicata can be found in the discussion on a possible, autonomous ***European concept of the subject matter of a dispute***.[120] This is based on the case law of the Court of Justice on the scope of the lis pendens bar (Art. 27 (1) Lugano Convention). Here, the ECJ also assumes an autonomous scope of the lis pendens bar and focuses on whether the respective applications essentially concern the same issue (so-called core issue theory). In doing so, the Court seems to assume a blocking effect in particular if the assessment of the applications depends on the same preliminary question.[121][122] Therefore, the lis pendens bar also covers both the main issue to be adjudicated and the preliminary issue to be adjudicated.[123] Accordingly, it could be argued that the lis pendens bar and the autonomous concept of res judicata are based on the same concept of the subject matter of the dispute. However, it can be objected to this that an extension of res judicata to preliminary issues is a decision of legal policy that is independent of the concept of subject-matter of the dispute.[124]Thus, the concept of the subject-matter of the dispute is decisive for the "broad effect" of res judicata, [125]but not for its "deep effect"[126]. [127]Accordingly, there is at least no compelling correlation between the scope of the subject matter of the dispute and the question of whether preliminary issues also participate in the binding force of res judicata. [128]

25. A closer look at the case-law of the ECJ also reveals that the focus is less on a common concept of the subject-matter of the dispute than on a common purpose. Thus, the Court seems to attach particular weight to the purpose of preventing irreconcilable decisions.[129] In order to achieve this goal, the ECJ's case law assumes both a broad lis pendens bar

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[117] Judgment of the ECJ Gothaer Allgemeine Versicherung AG and others of 15 November 2012 C-456/11, para. 40.
[118] Tsikrikas, p. 220.
[119] Bach, p. 58; Rauscher - Leible, Art. 36 Brussels Ia Regulation n. 8; see also Oberhammer/Koller/Slonina, § 15 para. 188.
[120] Cf. in detail: Althammer, p. 115 ff.
[121] Judgments of the ECJ Gubisch Maschinenfabrik / Palumbo of 8 December 1987 C-144/86, para. 11 and 16; Tatry / Maciej Rataj of 6 December 1994 C-406/92, para. 47; Sogo, p. 950; BSK LugÜ - Mabillard, Art. 27 LugÜ n. 29 ff; CR LugÜ - Bucher, Art. 27 LugÜ n. 11.
[122] Koops, p. 14; cf. also Seperrer, p. 137.
[123] Althammer, p. 156.
[124] Cf. Seperrer, p. 125 f.; Krüger, p. 131; Droese, p. 400; Oberhammer, Materielle Rechtskraft, p. 209; Jakowski, p. 69 f.
[125] The broad effect refers to the horizontal scope of res judicata. This is based on the subject matter of the dispute and determines which claims have been adjudicated (Droese, p. 400).
[126] The depth effect determines whether substantive res judicata is to be limited to the subject matter of the dispute or also includes any preliminary issues (Droese, p. 400).
[127] Krüger, p. 130 f.
[128] Krüger, p. 108; Seperrer, p. 125; Oberhammer, Materielle Rechtskraft, p. 209; Droese, p. 400; Jakowski, p. 69 f.
[129] ECJ judgments De Wolf v Cox, 30 November 1976 C-42/76, para 9/10; Gothaer Allgemeine Versicherung AG and others, 15 November 2012 C-456/11, para 38.

[130]and a comprehensive autonomous binding effect of res judicata.[131] If the objective of preventing irreconcilable decisions is consistently pursued, there are also good reasons for the Court to assume an international res judicata effect oriented towards the core theory. [132]Thus, as is well known, the grounds for refusal of recognition in Art. 34 nos. 3 and 4 Lugano Convention provide that recognition may be refused if the judgment is "irreconcilable" with a domestic or earlier foreign judgment. Incompatibility is presumed if the judgments in question have mutually exclusive legal consequences. [133]In principle, however, a judgment unfolds legal consequences [134]only to the extent that its findings become res judicata at all.[135] In this sense, the recognition of a decision which is deemed to be irreconcilable within the meaning of the case law of the ECJ on lis pendens can only be prevented if the preliminary issues assessed also become res judicata. Otherwise, it would be possible for a party to re-litigate the same preliminary issue, not during the trial but after its end, which would also entail the risk of a diverging assessment and thus a decision incompatible with the earlier judgment. Nevertheless, it should not be assumed here that the subject-matter of the dispute is identical. Thus, the blocking effect at the level of lis pendens pursuant to Art. 27 Lugano Convention should have a broader effect than at the level of recognition pursuant to Art. 34 nos. 3 and 4 Lugano Convention.[136] This results from the fact that during proceedings it is still unclear how the court will decide. Accordingly, there is only the risk of irreconcilable decisions. At the time of recognition, on the other hand, it is clear what the court has decided, which is why it is possible to assess conclusively whether there is any conflict between the decisions. This allows the concept of irreconcilable decision to be drawn more narrowly at the level of recognition than at the level of lis pendens.

26. It is questionable, however, to what extent the ECJ is prepared to pursue this purpose at the expense of other considerations of expediency. Certain limitations result at least from the previous case law of the ECJ, according to which the review of the jurisdiction of a court by the court of another Contracting State is explicitly prohibited. [137]This case law would hardly be compatible with binding the court declared competent to the decision of the court of origin. Rather, the court declared to have jurisdiction must be able to rule independently on its own jurisdiction. On the other hand, limitations result from the right to the guarantee of justice as well as the right to a fair trial and the associated right to a fair hearing pursuant to Art. 6 para. 1 ECHR. All contracting states are obliged to respect both the Lugano Convention and the ECHR, although from the Swiss perspective, in the event of a conflict with the ECHR, the relevant case law of the ECJ should not be taken into account. Accordingly, in order to preserve the right to be heard, it must at least be

[130] Böhm, p. 153; judgments of the ECJ Gubisch Maschinenfabrik v Palumbo of 8 December 1987 C-144/86, para. 8; Tatry v Maciej Rataj of 6 December 1994 C-406/92, para. 32; Althammer, p. 131.
[131] ECJ Gothaer Allgemeine Versicherung AG and others, 15 November 2012 C-456/11, para 38; De Wolf v Cox, 30 November 1976 C-42/76, para 9/10.
[132] So also Oberhammer, Internationale Rechtshängigkeit, p. 431.
[133] BGE 138 III 261 E. 1.1; judgment of the ECJ Horst Ludwig Martin Hoffmann v. Adelheid Krieg of 4 February 1988 C-145/86, para. 22.
[134] An exception to this is the effect of enforceability, which can occur before a decision even becomes final.
[135] Koops, p. 14.
[136] Otherwise, there is a risk of a too far-reaching blocking effect of res judicata, which would go beyond the objective of preventing unavoidable judgments (cf. Krüger, p. 136).
[137] ECJ Gazprom judgments of 13 May 2015 C-536/13, para 33; West Tankers of 10 February 2009 C-185/07, para 29; Turner of 27 April 2004 C-159/02, para 26; Overseas Union Insurance Ltd and Others v New Hampshire Insurance Company of 27 June 1991 C-351/89, para 24.

ensured that the parties have been able to fully express their views on the relevant preliminary issue.[138]

27. On the whole, based on the *Gotha* case law, it can (still) be assumed that the content of autonomous res judicata is limited to jurisdiction decisions on choice of court agreements. However, the ECJ seems to generally tend in favour of a more comprehensive binding force of res judicata. Admittedly, it has to be taken into account that the ECJ in the mentioned case law has so far rather decided on a case-by-case basis, which is why a generalisation of these judgments can only be assumed with caution.[139] Nevertheless, it is clear from the case law that the ECJ attaches great importance to the prevention of irreconcilable rulings and is also prepared, for this purpose, to restrain national legal understandings in favour of a uniform autonomous regulation.

B. Legal consequences eligible for recognition

28. In general, all effects of judgments under procedural law are deemed to be capable of recognition.[140] Accordingly, according to the general opinion, the effects of substantive res judicata, the formative effect, the effect of notice of dispute and the effect of intervention are deemed to be capable of recognition.[141] These effects are to be distinguished from the non-recognizable effects of the substantive judgment. [142]These are not brought about by the decision itself, but only by a norm of substantive law (in particular the effect of the facts). [143]

1. Substantive legal force

29. ***Substantive res*** judicata is probably the most important effect of a judgment to be recognised.[144] According to Swiss law, substantive res judicata means that a formally final judgment is decisive in any subsequent proceedings between the same parties. [145]On the one hand, it has a *blocking effect*, which in principle[146] prohibits any court in subsequent proceedings from intervening in proceedings on the same subject matter and between the same parties (Art. 59 para. 2 lit. e CCP; *ne bis in idem*).[147] On the other hand, substantive res judicata has a *binding effect.* Accordingly, in subsequent proceedings the

[138] Thus, Art. 1 para. 1 Lugano Protocol 2 merely provides for an obligation to take due account of the case law of the ECJ. There is therefore no formal obligation to comply with the decisions of the Court (BSK LugÜ - Oetiker/Weibel, Art. 1 Protocol 2 LugÜ n. 10). Therefore, consideration may be dispensed with if this appears to be directly necessary in order to comply with other international obligations. In contrast, the ECHR constitutes a directly binding basis under international law.
[139] Cf. Althammer, p. 151.
[140] Geimer, para. 2799; Paulus/Pfeiffer/Pfeiffer - Pfeiffer/Pfeiffer, Art. 36 Regulation (EU) No. 1215/2012 n. 17.
[141] SHK LugÜ - Walther, Art. 33 LugÜ n. 6; Schnyder- Domej/Oberhammer, Art. 33 LugÜ n. 12.
[142] Schnyder - Domej/Oberhammer, Art. 33 LugÜ n. 14; Geimer/Schütze, Art. 36 EuGVVO n. 135; Paulus/Pfeiffer/Pfeiffer - Pfeiffer/Pfeiffer, Art. 36 VO (EU) No. 1215/2012.
[143] Paulus /Pfeiffer/Pfeiffer - Pfeiffer/Pfeiffer, Art. 36 Regulation (EU) No 1215/2012 n. 17.
[144] BSK LugÜ - Schuler/Marugg, Art. 33 LugÜ n. 10; Schack, n. 867; Rauscher - Leible, Art. 36 Brussels Ia Regulation n. 5.
[145] BGE 142 III 210 E. 2; 139 III 126 E. 3.1.
[146] An exception is assumed if the plaintiff can assert an interest worthy of protection in the repetition of the earlier decision (BGE 139 III 126 E. 3.1).
[147] BGE 145 III 143 E. 5.1; 139 III 126 E. 3.1; KuKo ZPO - Weber/Oberhammer, Art. 236 ZPO N. 40; BK ZPO - Killias, Art. 236 Rz. 29.

court is bound by the substance of the subject matter of the earlier proceedings. [148]Consequently, in subsequent proceedings the court cannot contradict the subject-matter of the dispute that has already been adjudicated. Therefore, if the adjudicated subject matter of the dispute arises as a preliminary question in the subsequent proceedings, the court must base its own judgment on the corresponding decision of the previous proceedings as binding.[149] Finally, substantive res judicata has a *preclusive effect.* Accordingly, substantive res judicata excludes attacks on all legally relevant facts that already existed at the time of the judgment, provided that they could have been introduced into the proceedings by the parties with reasonable diligence, but were not introduced.[150] Such a fact cannot therefore alter the relevance of a judgment, even though it was not taken into account in the final decision. Accordingly, a judgment includes all facts that are normatively attributable to the subject matter of the dispute, irrespective of whether they were actually before the adjudicating court for adjudication.[151]Under Swiss law, the scope of substantive res judicata is determined objectively on the basis of the subject matter of the dispute, [152]which consists of the legal claim and the facts of life. From a [153]subjective point of view, res judicata is in principle only binding on the parties to the proceedings and their legal successors. [154]

30. It must be borne in mind that there are substantial differences between the individual legal systems of the Contracting States with regard to the scope and legal nature of res judicata.[155] If - as is the case in the mainstream - the theory of extension of effect is followed, the scope of res judicata is determined on the basis of the law of the state of origin.[156] If, on the other hand, the ECJ's *Gothaer jurisprudence* recognises an autonomous binding effect of res judicata, then within its scope of application both the adjudicated main issue (according to the Swiss understanding, the adjudicated subject matter of the dispute) and any preliminary issues become res judicata. [157]

2. Design effect

31. Judgments that are directly directed towards the creation, annulment or amendment of a right have a ***formative effect.*** In contrast to judgments on actions for performance or declaratory relief, which merely enforce a legal consequence that already exists outside the proceedings, a judgment on the form of an action creates a legal consequence that did not previously exist.[158] Such judgments therefore bring about the change in the substantive or procedural legal situation sought by the plaintiff. Consequently, the effect

[148] BGE 145 III 143 E. 5.1; 139 III 126 E. 3.1; KuKo ZPO - Weber/Oberhammer, Art. 236 ZPO N. 43 f.; Droese, p. 219.
[149] KuKo ZPO - Oberhammer/Weber, Art. 236 ZPO N. 44.
[150] BGE 139 III 126 E. 3.1; Droese, p. 237.
[151] Droese, p. 237; BGer 5A_438/2007 of 20 November 2007 E. 2.2.1; BGE 116 II 738 E. 2.b.
[152] BGE 139 III 126 E. 3.1; KuKo ZPO - Weber/Oberhammer, Art. 236 ZPO N. 48 ff; Baumgartner/Lustenberger, p. 96.
[153] BGE 139 III 126 E. 3.2.3.
[154] KuKo ZPO - Weber/Oberhammer, Art. 236 ZPO N. 55; BK ZPO -Zingg, Art. 59 ZPO N. 136 et seq. and 144 et seq.; judgment of the BGer 5A_434/2012 of 18 December 2012 E. 3.3.1.1.
[155] Schack, Recognition, p. 447.
[156] Geimer, para. 2804.
[157] Judgment of the ECJ Gothaer Allgemeine Versicherung AG and others of 15 November 2012 C-456/11, para. 40.
[158] Geimer/Schütze, Art. 36 EuGVVO n. 116.

of the judgment is the substantive or procedural change in law that occurs when a judgment on the form of an action becomes final. Under the Convention, the formative effect is capable of recognition irrespective of whether it qualifies as a procedural or substantive effect under the law of the state of origin. The [159][160][161]extent of the formative effect is determined by the *lex causae of* the State of origin. [162]

3. Intervention and notice of dispute effect

32. The ***intervention effect*** presupposes that a third party becomes involved in the proceedings in support of a party to the proceedings because it has its own legal interest in the success of the proceedings of the party it supports.[163] The judgment on the dispute between the parties to the proceedings has a binding effect in subsequent proceedings between the supported party and the intervening party. [164]In contrast to the intervening effect, in the case of the intervening ***effect*** the initiative to participate in the proceedings does not come from the intervening party but from a party to the proceedings.[165] Accordingly, a litigant (proclaimed party) may invite a third party (proclaimed party) to participate in the litigation if it believes that it has a claim against the proclaimed party if it is unsuccessful. To the extent that the proclaimed party participates in the litigation, it has the status of an intervenor.[166]recognisability of both the intervention and the proclamation effects under the Convention follows directly from Art. II(3) Protocol 1 Lugano Convention. [167]

4. Effect of the facts

33. On the other hand, the ***effect of*** the ***facts is*** not capable of recognition.[168] The effect is that substantive law attaches legal consequences to the existence of a judgment. It therefore represents a change in the law that occurs as a result of the judgment (e.g. the commencement of a new limitation period under Art. 137 para. 2 CO).[169] Similar to the effect on the form of the judgment, the effect on the facts is also effected by the substantive law. The difference, however, lies in the fact that the decision as to the form of the act is aimed at the effect of the form of the act. In contrast, the effect of the facts is neither the subject matter of the legal claim nor is it pronounced by the court in the judgment. Rather, the effect of the facts is automatically ordered by the substantive law. [170]Accordingly, the *lex causae* also determines the question as to which factual effects a

[159] Geimer/Schütze, Art. 36 EuGVVO n. 117.
[160] KuKo ZPO - Weber/Oberhammer, Art. 236 ZPO N. 22.
[161] Schnyder - Domej/Oberhammer, Art. 33 LugÜ n. 12; Czernich/Kodek/Mayr - Kodek, Art. 36 EuGVVO n. 34; BSK LugÜ - Schuler/Marugg, Art. 33 LugÜ n. 15.
[162] Cf. Stein/Jonas - Oberhammer, Art. 33 EuGVVO n. 13.
[163] Geimer/Schütze, Art. 36 EuGVVO n. 119; cf. for Switzerland: Art. 74 ff. ZPO.
[164] Geimer/Schütze, Art. 36 EuGVVO n. 119.
[165] Geimer/Schütze, Art. 36 EuGVVO n. 123.
[166] Geimer/Schütze, Art. 36 EuGVVO n. 124.
[167] Schnyder - Domej/Oberhammer, Art. 33 LugÜ n. 12; SHK LugÜ - Walther, Art. 33 LugÜ n. 7.
[168] Geimer/Schütze, Art. 36 EuGVVO n. 137; Schnyder - Domej/Oberhammer, Art. 33 LugÜ n. 14; Stein/Jonas - Oberhammer, Art. 33 EuGVVO n. 14.
[169] KuKo ZPO - Weber/Oberhammer, Art. 236 ZPO N. 24.
[170] Geimer/Schütze, Art. 36 EuGVVO N. 136; KuKo ZPO - Weber/Oberhammer, Art. 236 ZPO N. 24.

particular foreign judgment produces. [171]Thus, in accordance with OBERHAMMER, THE decisive factor in assessing whether an effect is capable of recognition should be whether the effect to be recognised was bindingly expressed in the decision to be recognised.[172] It is therefore essential that the legal consequence to be recognised is ordered by the judgment itself. If, on the other hand, the legal consequence occurs merely by reflex on the basis of a norm of substantive law, the legal consequence is not capable of recognition. [173]Similarly, the ***enforceability of*** a judgment is not capable of recognition. Under the Convention, the effect of enforceability is conferred originally by the State in which enforcement is sought by means of a declaration of enforceability (Article 38(1) Lugano Convention). [174]

34. On the other hand, judgments that are unknown in the country of recognition may also be recognised. For example, French guarantee or intervention judgments and Irish *mareva* or *freezing injunctions* may also be recognised in Switzerland. [175]

C. Procedural assertion of the effects of the decision

35. Finally, it is disputed whether the ***procedural assertion of the effects of the decision*** (e.g. whether res ***judicata*** is to be taken into account ex officio or only upon objection) is governed by the law of the state of origin or the state of recognition. According to the majority, this is determined by the *lex fori of* the state of recognition.[176] If the theory of extension of effect is followed consistently, the effect of res judicata in the State of recognition should not be different from that in the State of origin. Accordingly, the question of whether res judicata should be taken into account should also be assessed on the basis of the law of the State of origin. [177]

[171] Geimer/Schütze, Art. 36 EuGVVO n. 137; Schnyder - Domej/Oberhammer, Art. 33 LugÜ n. 14; Stein/Jonas - Oberhammer, Art. 33 EuGVVO n. 14; BSK LugÜ - Marugg/Schuler, Art. 33 LugÜ n. 15.
[172] Stein/Jonas - Oberhammer, Art. 33 EuGVVO n. 14.
[173] Cf. Stein/Jonas - Oberhammer, Art. 33 EuGVVO n. 14.
[174] Cf. SHK LugÜ - Staehelin/Bopp, Art. 38 LugÜ N. 4 f.
[175] SHK LugÜ - Walther, Art. 33 LugÜ n. 7.
[176] BSK LugÜ - Schuler/Marugg, Art. 33 LugÜ n. 11; OFK IPRG/LugÜ - Kren Kostkiewicz, Art. 33 LugÜ n. 6; MüKo ZPO - Gottwald, Art. 36 Brussels Ia Regulation n. 13; Czernich/Kodek/Mayr - Kodek, Art. 36 EuGVVO n. 34.
[177] So also Geimer/Schütze, Art. 36 EuGVVO n. 105; Schnyder - Domej/Oberhammer, Art. 33 LugÜ n. 10.

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