



THEMIS COMPETITION 2018
Semi – final C: European Civil Procedure

**The Mechanism of Automatic Recognition in Regulation 1215/2012 –
 Does It Also Require a Move Towards an Autonomous Concept of Res
 Judicata?**

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Greek Team

Tutor

Aikaterini Paraskevi Papadatou

Pelayia Yessiou – Faltsi

Vasiliki Papamichalopoulou

Despina Simopoulou

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1. Preliminary Remarks

One of the pioneer amendments introduced by Regulation 1215/2012¹ is the abolishment of the *exequatur*. In particular, according to article 38 of Regulation 44/2001² the main prerequisite for enforcing a judgment in another Member State was to declare it enforceable through a judicial procedure to this Member State. The EU legislator recognized the importance of mutual trust in the field of free movement of judgments and adopted the position that the judgments should be enforced “as quick and easy as true local ones”³. Therefore, the new article 39 of Regulation 1215/2012 provides that “*a judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required*”. It is a common ground that the preliminary stage for the abovementioned automatic enforceability is the automatic recognition of the judgment in question.

A judgment and its automatic recognition may have multiple consequences; one of major significance is that the litigant parties are bound by the judgment and are barred from bringing new actions based on the same factual circumstances, the so called *res judicata* effect. However, given the divergencies in the concept of *res judicata* within the 28 Members States, is it possible to automatically recognise a judgment without a uniform concept of *res judicata*? The CJEU⁴ had to deal with one aspect of this issue on the *Gothaer Case*⁵, in which it had to answer whether procedural judgments are covered by Regulation

¹ 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 (recast), Official Journal of the European Union, L. 351/1, 20.12.2012.

² Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Official Journal of the European Communities, I.12/1, 16.01.2001.

³ See among many others, Briggs, *The Conflict of Laws*, Third Edition, Clarendon Law Series, Oxford University Press, 2013, p. 161.

⁴ For reasons of consistency, the Court of Justice of the European Union is referred to as CJEU, regardless its previous name as European Court of Justice (“ECJ”).

⁵ Case C- 456/11 *Gothaer Allgemeine et al v. Samskip*, ECLI:EU:C:2012:719.

44/2001 and if the ratio decidendi of a judgment relating to the validity of a jurisdiction clause binds the courts of another Member State.

In this report we are discussing these strenuous questions by first examining the concept of res judicata in some characteristic legal orders of the EU (see Part 2). Then by demonstrating how the CJEU interpreted the various concepts arising from the respective EU legislation and specifically how it reached to an autonomous interpretation in relative to res judicata concepts, such as lis pendens (see Part 3). Within this framework, we try to answer the abovementioned question by analyzing how the CJEU dealt with the concept of res judicata in Gothaer Case (see Parts 4-6).

2. Overview of the “Res Judicata” Concept as Construed under National Laws

Despite the general effect of European procedural law over the formation of fundamental procedural principles and the interpretation and application of national procedural laws through the principles of equivalence and effectiveness, both in common law and civil law systems, the doctrine of “res judicata” forms an exception. The res judicata doctrine is so profoundly established in all national legal systems that modern litigation seems incomplete without it.

According to the res judicata doctrine, a decision *inter partes* on matters decided by a court is binding.⁶ In other words, res judicata impedes successive litigation of the same claim or issues between the same parties, once a final judgement (i.e. a court decision that cannot be further appealed) on this subject-matter is issued. The objective of the doctrine is rooted in public policy considerations and effective justice, so that a new trial, on the same matter, between the same litigants, cannot be opened; as a result an immediate termination of arguments is achieved. In that way, the pitfalls of litigants shifting positions, multiplication of suits, conflicting judgments and legal uncertainty are avoided.

⁶ Andrews, *Res Judicata and Finality: Estoppel in Context of Judicial Decisions and Arbitration Awards*, in *Issues of Estoppel and Res Judicata in Anglo-American and Greek Law*, 2012, p. 18.

It is undeniably true that *res judicata* is still specified by national legal systems.⁷ This is unavoidable, since there are not any explicit EU rules on that doctrine at national level.⁸ In this section we will thus attempt to demonstrate briefly the objective limits, the subjective limits and the preclusive effect of the *res judicata* doctrine among some major legal systems represented in the European Union, including the existing different nations.⁹

According to article 1351 of French Civil Code¹⁰, for the determination of the scope of *res judicata*, “the triple identity test” of “*parties, cause et objet*” is necessary. This means that if the three conditions “same parties, same legal basis and the same subject-matter of relief”¹¹ are met, a subsequent action is barred.¹² Also, pursuant to the French approach, only the operative part (*dispositive*) of a judgement has preclusive effects; as a result, the reasoning does not fall under the scope of *res judicata*¹³. Likewise, identical provisions are found in the national procedural law of Belgium and Luxembourg.¹⁴

The above mentioned so-called triple identity test applies also in Spain, but a little bit differently than France concerning the preclusive effects of *res judicata*; it appears to

⁷ Pfeiffer, *Rechtsvergleichende Übersichten zu Deutschland, England und Frankreich finden sich z.B. bei, Grenzüberschreitende Titelgeltung in der europäischen Union*, 2012.

⁸ Stürner, *Rechtskraft in Europa*, in: Reinhold Geimer (Hrsg.), *Wege zur Globalisierung des Rechts in Festschrift für Rolf A. Schütze*, 1999, p. 913.

⁹ Zeuner, *Rechtsw erg (eichende Bemerkungen zur objektiven Begrenzung der Rechtskraft im Zivilprozeß*, in: Herbert Bernstein et. al. (Hrsg.), *Festschrift für Konrad Zweigert*, 1981, 603. Mehr Rechtsordnungen deckt ab: Koch, *Unvereinbare Entscheidungen i.S.d. Art. 27 Nr. 3 und 5 EuGVÜ und ihre Vermeidung*, 1993; Kornezov, *Res judicata of national judgments incompatible with EU law: Time for a major rethink?* in *Common Market Law Review*, Issue 3, 2014.

¹⁰ Art. 1351 Code Civil: *L'autorité de la chose jugée n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement. Il faut que la chose demandée soit la même ; que la demande soit fondée sur la même cause ; que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité.*

¹¹ Art. 480 Code de procédure civile : *Le jugement qui tranche dans son dispositif tout ou partie du principal, ou celui qui statue sur une exception de procédure, une fin de non-recevoir ou tout autre incident a, dès son prononcé, l'autorité de la chose jugée relativement à la contestation qu'il tranche.*

¹² Vincent & Guinchard. *Procédure Civile*. 26th ed., Dalloz, 2001, par. 463.

¹³ Judgment of 12 Feb. 2004, *Cour de cassation* (2 Ch. civ.) pourvoi n° 02-11331, Bull., II, n° 55, p. 46; Judgment of 13 May 2009, *Cour de cassation* (Ass. plénière), pourvoi n° 08-16033, BICC n° 703.

¹⁴ Art. 23 Code judiciaire de Belgique and Art. 1531 Code civil du Luxembourg.

be broader, since they also extend to these legal and factual arguments of the subject matter that the litigants could effectively raise during the first proceedings but they did not¹⁵.

In the light of article 2909 of the Italian Civil Code¹⁶, on one hand the subjective limits of *res judicata* require identity of the parties, and on the other hand the objective limits of *res judicata* are determined by the subject-matter of the judgment on the grounds of the alleged claim (*petitum*) and the factual and legal core of that claim (*causa petendi*). Adding to that, the preclusive effects of *res judicata* extend not only over the operative part of the decision, but also over the decisive reasons and the preliminary issues judged, on the grounds of which the aforementioned operative part must be interpreted.¹⁷

Continuing with the European continental civil law systems, the German system demonstrates a narrower version of *res judicata*. Pursuant to an approach of the German doctrine, the goal of *res judicata* is to “*guarantee certainty in litigation and to preclude repeated relitigation of matters already litigated and decided*”.¹⁸ The prevailing rule is that a judgement binds the litigant parties concerning the subject matter of claims asserted and decided, but the litigants are not barred from coming up with new suits on grounds of claims that were not submitted for adjudication.¹⁹ Every time the issue of *res judicata* is raised before a court, the judge has to examine and compare the formal causes of action and the factual core of the claim under examination; with those of the already decided case and if the court finds differences between these two, the new case will not be dismissed.²⁰

¹⁵ Art. 400 LEC : “...*todos los hechos, fundamentos o títulos jurídicos que resulten conocidos o puedan invocarse al tiempo de interponerla, sin que sea admisible su alegación para un proceso ulterior.*”

¹⁶ Art. 2909 Codice civile : L'accertamento contenuto nella sentenzapassata in giudicato [324 c.p.c.] fa stato a ogni effetto tra le parti, I loro eredi o aventi causa [1306].

¹⁷ Kornezov, supra n. 9, p. 816 .

¹⁸ Murray & Sturmer, *German Civil Justice*, 2004, p. 355.

¹⁹ Sinai, *Reconsidering Res Judicata: A Comparative Perspective*, in *Duke Journal of Comparative & International Law*, vol. 21, 2011, p. 353-400.

²⁰ Murray & Sturmer, supra n.18, p. 358; see also case law on German *res judicata* doctrine : BGH, judgment of 17.3.1964 — Ia ZR 193/63, BGHZ 42, 340, 344; Judgment 19.12.1991 — IX ZR 96/91, BGHZ 117,1, 5; Judgment 5.11.2009 — IX ZR 239/07, BGHZ 183, 77, 80; BGH, judgment of 8.2.1965 — VIil ZR 121/63, BGHZ 43, 144, 145; Judgment 25.2.1985 — VIII ZR 116/84, BGHZ 94, 29, 33; Judgment 7.7.1993 — VIil

The preclusive effects of *res judicata*, according to German Law, are restricted to the operative part of the judgment and do not extend to the factual or legal matters examined nor to incidental and preliminary rulings made in the reasons of the decision.²¹ These issues could fall under the scope of *res judicata* only if the litigant has sought separate declaratory relief on every individual issue which is coincidental to the judgement.²²

Pursuant to the Greek Code of Civil Procedure (grCCP), *res judicata* is treated as a legal effect stemming from the judgement and applies to valid judgments on the merits, which are formally and substantially final.²³ Conforming to contemporary Greek doctrine and case law, the *res judicata* effect has a “positive” and a “negative” function. On one hand in its positive function, *res judicata* operates as a partial bar in the subsequent action by preventing relitigation of all issues decided in a previous suit; on the other hand in its negative function it does not allow any subsequent court to decide on the merits of a case when identical to the one already decided.²⁴ While only legal relationships brought before a court and have been judicially determined, fall into the scope of *res judicata*, neither judicial determinations on the factual allegations of the litigants nor thoughts of a court on the interpretation of legal norms can develop this effect. Only the operative part of the judgement has a conclusive effect in a subsequent action, so the reasons adduced in the decision are excluded from the scope of *res judicata* effect. This *res judicata* effect requires identity of the cause of action (same factual and legal base of the claim) and of course identity of the parties. As a result, a subsequent relief sought based on a different legal base is excluded from the scope of *res judicata*. Adding to that, defenses are also precluded if they were decided or could have been decided in the previous proceedings; by way of exception, in this case a defence can be examined in a following proceeding if it is based

ZR 103/92, BGHZ 123,137,140; Judgment 5.11.2009 — IX ZR 239/07, BGHZ 183, 77, 80; *Musielak*, in: *Musielak/Voit*, ZPO, 13. Edition 2016, Section 322, par. 16-17.

²¹ Rosenberg, Schwab and Gottwald, *Zivilprozessrecht*, 16th ed., (2004), Beck ed., par. 152.

²² Art. 256(2) ZPO; Kornezov, *supra* n. 9, p. 817.

²³In consonance with article 321 grCCP, *a judgment that is not subject to regular appeal is formally and substantially final*. Kondylis, *Res Judicata according to the Code of Civil Procedure*. 2007 (in Greek), p. 283.

²⁴ Yessiou-Faltsi, *Civil Procedure in Hellas*. Sakkoulas/Kluwer, 1995, p. 238-239.

on a self-standing claim, which can constitute the cause of a principal action (art. 330 grCCP). Last but not least, Greek law in contrast to most continental systems, extends res judicata beyond the basic object of litigation to some preliminary issues, if these constitute a legal relationship per se for example, an accessory claim for interest (art. 331 grCCP).

In common law systems, like in England and Wales, the doctrine of res judicata has various facets: cause of action estoppel, issue estoppels and the doctrine of merger.²⁵ Firstly, the cause of action estoppel arises when a relief sought in the later proceedings is identical to that adjudicated in the former action and involves the claim on the grounds of the same subject matter and events, between the same parties.²⁶ Secondly, issue estoppel concerns the examination of issues which are essential for the interpretation of the cause of action and applies once one of the litigants involved in the former decision tries to re-open the case in subsequent proceedings between the same parties basing their new suit on a different cause of action.²⁷ Last but not least, the doctrine of merger expresses the need for the litigant to bring all their allegations for compensation which steam from the same event together in a single action.²⁸

The above brief analysis establishes that the scope and limits of the res judicata doctrine differ among the national legal systems in EU. Also, as far as which part of the final judgement becomes binding under the res judicata effect, two main approaches have prevailed among the legal systems of Member States: (a) the stricter attributes binding effect only to the operative part of judgement (France, Germany, Greece), and (b) the broader approach includes in the binding effect of res judicata also the decisive reasoning of the judgement (Italy, Belgium, Luxembourg, England, Spain).

²⁵ Barnett, *Res Judicata, Estoppel and Foreign Judgments*, 2001, par. 1.38-1.40, 1.41, 1.46.

²⁶ Andrews, *supra* n. 7, p. 22.

²⁷ Makridou, *Principles of Preclusion and Res Judicata: Reflections from the prerspectives of Greek and American Law*, in *Issues of estoppel an Res Judicata in Anglo-American and Greek Law*, 2012, p. 83.

²⁸ *Brunsdon v. Humphrey* [1884] 14 QBD141 (CA) 147; *Thoday v. Thoday* [1964] P181 (CA) 197-198; *Arnold v. With National Westminster Bank plc* [1991] 2 AC 93 (HL) 104; *AndAnother v. Republic of India India Steamship Co Ltd.* [1993] AC 410 (HL). *Zurich insurance Co pic v. Hayward* [2011] CP Rep 39 (CA), par. 45-47.

3. The Autonomous EU Law Concepts

Since the beginning of the implementation of the Brussels Convention²⁹, the CJEU faced a fundamental issue regarding the interpretation of the concepts that were part of the Convention. More specifically, the CJEU had to answer the question whether several concepts should be interpreted by reference to the national law of a Member State, or with a different and autonomous interpretation given in the framework of EU Law. In the latter case, the interpretation given at the concepts included in the EU legislation would be based on common criteria for all the Member States, independent from the meanings that national laws attribute to them. Since a concept may not have the same meaning in all European legal orders, the aforementioned approach would help to achieve a uniform application of EU Law; and to establish and improve equality between Member States regarding rights and obligations, as well as to ensure that the objectives, which EU Law sets, are attained.

Facing such issue, the CJEU concluded that the interpretation of the concepts found in EU Law should be mainly interpreted in an autonomous way³⁰. Only when EU Law expressly stipulates that a concept must be defined pursuant to the national law of a Member State, is the interpreter expected to detect the crucial meaning of the concept in the national law at issue. For example, under this conception of the CJEU, the term “civil and commercial matters” that was referred in the Brussels Convention, was interpreted autonomously, in accordance with the objectives, as well as the scheme of the Convention and the general principles, which steam from the corpus of the national legal systems. On the contrary, the term “company”, which was referred in article 48 of the EC Treaty, was interpreted pursuant to the national legislation of each Member State, since the Treaty provided that “...*companies or firms formed in accordance with the law of a Member State...*”.

²⁹ 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version), Official Journal of the European Communities, L 299, 31/12/1972 P. 0032 - 0042.

³⁰ Case 29/76 *LTU Lufttransportunternehmen GmbH & Co v Eurocontrol*, [1976] 01541, ECLI:EU:C:1976:137; see also Torralba-Mendiola & Rodríguez-Pineau, *Two's Company, Three's a Crowd: Jurisdiction, Recognition and Res Judicata in the European Union* in *Journal of Private International Law*, vol. 10, no. 3, 2014, p. 403–430.

In conclusion, the CJEU has adopted steadily the following assumption: unless otherwise clearly stipulated, an autonomous interpretation must be made. The CJEU initiates its examination by taking for granted the need to proceed to an autonomous interpretation of each concept³¹. Only if there are strong evidences, the CJEU shall proceed to an interpretation that is based on national laws of Member States. The basis of the aforementioned assumption was not only article 220 of the Rome Convention, which was the cornerstone of the Brussels Convention, but also the subsequent right and obligation of the CJEU to proceed to an autonomous interpretation.

Following the above mentioned developments, it is now important to notice that the method of interpretation that was used by the CJEU regarding the concepts included in the Brussels Convention applies also to Regulation 44/2001, as well as to Regulation No 1215/2012. Particularly, when the provisions of the Regulations and those of the Brussels Convention are similar or equivalent, then the assumptions that the CJEU has made regarding the interpretation of the latter were also applied to the former given that this ensures the continuity in the interpretation³².

4. A first step towards the creation of an Autonomous concept of Res Judicata?

In the light of the foregoing, a major issue, relevant to the aforementioned that the CJEU had dealt with, was to define the content of one of the most important elements of *lis pendens*. More specifically, the CJEU has interpreted the concept of “the same cause of action”, that can be found in both *lis pendens* and *res judicata*, autonomously. It should be mentioned that the concept of “the same cause of action” was firstly cited in article 21 of the Brussels Convention, then in article 27 paragraph 1 of Regulation 44/2001 and finally in article 29 paragraph 1 of Regulation 1215/2012.

³¹ See, inter alia, Case C-103/05 *Reisch Montage* [2006] ECR I-6827, par. 29, Case C-372/07 *Hassett and Doherty* [2008] ECR I-0000, par. 17 and Case C-167/08 *Draka NK Cables and Others* [2009] ECR I-3477, par. 19.

³² Case C – 645/11 *Land Berlin v Ellen Mirjam Sapir etc*, ECLI:EU:C:2013:228, par. 31, Case C – 49/12 *The Commissioners for Her Majesty’s Revenue & Customs v Sunico ApS etc*, ECLI:EU:C:2013:545, par. 32.

Particularly, the judgments handed over in Case C-144/86, Gubisch Maschinenfabrik KG v Giulio Palumbo³³ and Case C-406/92, The owners of the cargo lately laden on board the ship "Tatry" and the owners of the ship "Maciej Rataj"³⁴, have a fundamental importance; and were the first to give to the concept of *lis pendens* and mainly to the concept of "the same cause of action" their content. Since the abovementioned case, the CJEU had concluded that the autonomous concept of "the same cause of action" is defined by the total of factual circumstances and not - only - by the petition of an action. Thus, in order to conclude, if *lis pendens* created by the first action leads to the suspension and then to the rejection of the second trial created by the second action, we must not only examine and compare the petitions of the lodged actions, but we must also examine and compare the core of the disputes. In other words, between two or more actions, there exists "the same cause of action" when the grounds of each litigation can lead to contradictory judgments. This applies regardless if the possible contradictory judgments arise from the main or a preliminary issue of a lawsuit or regardless the quality of the requested judicial protection (e.g. if the first action is a declaratory action and the second action is an action to perform). As a result, in both cases, the CJEU decided that, despite the fact that the petitions were different, the lodged actions had the same cause of action, since the factual circumstances could have led to contradictory judgments; and, thus, *lis pendens* was created.

As already stated, the concept of "the same cause of action" is not only a central concept in *lis pendens*, but of noteworthy importance in other procedural institutions, particularly *res judicata*. The concept of "same cause of action", as interpreted to satisfy the needs of the institution of *lis pendens*, also constitutes a central element of the institution of *res judicata*. Indeed, already in case C-42/76, *Jozef de Wolf v. Harry Cox BV*³⁵, the CJEU implied for the first time the concept of *res judicata*. In particular, the CJEU ruled that "*to accept the admissibility of an application concerning the same subject-matter and brought between the same parties as an application upon which judgment has already been*

³³ Case C – 144/86, *Gubisch Maschinenfabrik KG v Giulio Palumbo*, ECLI:EU:C:1987:528.

³⁴ Case C - 406/92, *The owners of the cargo lately laden on board the ship "Tatry" and the owners of the ship "Maciej Rataj"*, 1994 I-05439 ECLI:EU:C:1994:400.

³⁵ C-42/76, *Jozef de Wolf v. Harry Cox BV*, [1976] 01759, ECLI:EU:C:1976:168.

delivered by a court in another contracting state would therefore be incompatible with the meaning of the provisions quoted (i.e. Articles 26 and 29 of the Brussels Convention)". Thus, from the above ruling, it became clear that "the same cause of action" is a key element to res judicata too.³⁶

5. The Autonomous Concept of European Res Judicata according to CJEU

a. The three doctrines as to the effects of foreign judgements

As already analysed in part 2, both the res judicata and its objective limits are not interpreted in the same way in the 28 jurisdictions of the European Union. On the other hand, Regulation 44/2001 and Regulation 1215/2012 do not provide for a definition of res judicata, nor require that a judgment to be recognised has to be considered as res judicata in its country of origin³⁷. However, the above create various issues whenever a judgment rendered in one Member State has to be recognised in another Member State, since it is not clear which effects such judgment can develop to the Member State of recognition. According to the doctrine of "equalization of effects", i.e. the effects that a foreign judgment can create in the country of recognition have to be similar to the effects produced by the domestic judgments in this given country³⁸. On the contrary, the doctrine of "extension of effects" supports the view that the effects of a foreign judgment in the country of recognition have to be the same as in the country of origin³⁹. Finally, the

³⁶ For further analysis about the relation between lis pendens and res judicata within the context Gothaer, see Koops, *Der Rechtskraftbegriff der EuGVVO-Zur Frage der Unvereinbarkeit der Entscheidung Gothaer Allgemeine Versicherung/ Samskip GmbH mit der EuGVVO*, in IPRax, 2018, p. 11.

³⁷ The identical articles 36 (1) of Regulation 1215/2012 and 33 (1) of Regulation 44/2001 only state that "a judgment given in a Member State shall be recognised in the other Member States without any special procedure being required".

³⁸ This theory has been supported by English Courts; see, inter alia, *Mr Marc Rich & Co AG v. Societa Italiana Impianti PA* (No 1) [2] 1992 Lloyd's Rep 624 (CA); *Berkeley Administration Inc v. McClelland* [1995] IL Pr 201 (CA 214, 221); *Berkeley Administration inc v. McClelland* (No 2) [1996] IL Pr 772 (CA), p. 781-782.

³⁹ *Layton & Mercer, European Civil Practice*, 2004, par. 24.010.

abovementioned has been opted by the doctrine of “cumulative effects” under which a foreign judgement may produce the same effects as in its country of origin provided that these effects do not exceed the effects of the domestic judgments⁴⁰⁴¹. The above doctrines were the starting point for the attempt to create an autonomous concept of res judicata by the CJEU.

b. The CJEU’s Initial Case Law

In case C-145/1986 Horst Ludwig Martin Hoffmann v Adelheid Krieg (hereinafter referred to as Hoffmann) the CJEU ruled in favor of the doctrine of “extension of effects”. Its rationale was based on the aim of the Brussels Convention i.e. on the facilitation of the free movement of judgments. The CJEU cited that “*a foreign judgment which has been recognised by virtue of article 26 of the convention must in principle have the same effects in the state in which enforcement is sought as it does in the state in which judgment was given*”⁴².

Following the Hoffmann ruling, the CJEU proceeded one step further. In Case C-420/07 Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams (hereinafter referred to as Apostolides), the CJEU confirmed the Hoffmann ruling and added that “*there is however no reason for granting to a judgment, when it is enforced, rights which it does not have in the Member State of origin ... or effects that a similar judgment given directly in the Member State in which enforcement is sought would not have*”⁴³.

⁴⁰ Roth, *Europäischer Rechtskraftbegriff im Zuständigkeitsrecht?*, IPRax, 2014, p. 136 and p. 138. Geimer, *Internationales Zivilprozessrecht*, 2015, par. 2776, 2780.

⁴¹ Yesiou-Faltsi, *Enforcement Law in International Enforcement Procedure*, 2006 par. 69, 41 and supra n. 36, p. 12.

⁴² Case C-145/1986 Horst Ludwig Martin Hoffmann v Adelheid Krieg, ECLI:EU:C:1988:61, par. 10, in which the Jenard Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1979 C 59, p. 48) is also cited.

⁴³ Case C-420/07 Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams, ECLI:EU:C:2009:271, par. 66.

From the above two rulings, it became clear that the CJEU's position was in favor of the doctrine of "extension of effects", since the effects of recognition are determined by the state of origin, while the effects of enforcement are determined by the state of execution⁴⁴.

c. The Gothaer Case and the Autonomous Concept of Res Judicata

In Case C-456/11 *Gothaer Allgemeine et al v. Samskip*⁴⁵ (hereinafter referred to as *Gothaer*), the CJEU overturned its case law and created an autonomous concept of res judicata, pursuant to which the effects of a judgment are not determined by the laws of the state of origin, but by EU Law⁴⁶.

Specifically, in 2006, Krones AG sold a brewing installation and engaged to Samskip GmbH the transport of the installation from Antwerp to Guadalajara (Mexico). Samskip GmbH issued the relevant bill of lading stating Krones AG, as the shipper and the byer/recipient, as the consignee. Further, the bill of lading included a jurisdiction and a choice of Law clause designating that the Courts of Iceland had jurisdiction, while the bill of lading was governed by Icelandic Law. The consignment was damaged during transport and both Krones AG and the recipient assigned their claims against Samskip GmbH to their insurers. The recipient and the insurers brought an action against Samskip GmbH before the Belgian Courts. In 2009, the Antwerpen Court of Appeals (*Hof van beroep te Antwerpen*) ruled that a) the recipient was not entitled to bring an action against Samskip GmbH and b) the insurers were successors of Krones AG; thus, the insurers were entitled to bring an action against Samskip GmbH, but they were also bound by the jurisdiction and choice of Law clause. With this reasoning the Antwerpen Court of Appeals ruled that the Belgian Courts did not have authority to hear the case. In 2010, despite that the Belgian Court's decision has become final, both the insurers (i.e *Gothaer Allgemeine Versicherung AG*, *ERGO Versicherung AG*, *Versicherungskammer Bayern-Versicherungsanstalt des öffentlichen Rechts*, *Nürnberger Allgemeine Versicherungs-AG*) and Krones AG brought

⁴⁴ Torralba-Mendiola & Rodríguez-Pineau, supra n. 30, p. 404.

⁴⁵ See *Gothaer*, supra n. 5

⁴⁶ Torralba-Mendiola & Rodríguez-Pineau, supra n. 30 at p. 424- 425 and supra n. 36, p. 13.

an action against Samskip GmbH before the German Courts. During the joint proceedings Samskip GmbH argued that the Belgian Court's decision was binding for the German Court for both the lack of jurisdiction of the Belgian Courts (that was the operative part of the judgement), as well as the jurisdiction of the Icelandic Courts (that was included in the ratio decidendi of the judgment); hence, both cases should be dismissed on the grounds of lack of jurisdiction. The German Court (Landgericht Bremen) ordered the stay of the proceedings and referred to the CJEU for a preliminary ruling⁴⁷. The questions raised by the German Court were:

- (a) *“Are Articles 32 and 33 of Regulation No 44/2001 to be interpreted as meaning that the term “judgment” also covers in principle those judgments which are restricted to the finding that the procedural requirements for admissibility are not satisfied (so-called “procedural judgments”)?”*
- (b) *Are Articles 32 and 33 of Regulation No 44/2001 to be interpreted as meaning that the term “judgment” also covers a judgment ending proceedings by which a court declines international jurisdiction on the basis of a jurisdiction clause?*
- (c) *Having regard to the case-law of the Court of Justice on the principle of extended effect (Case 145/86 Hoffmann [1988] ECR 645), are Articles 32 and 33 of Regulation No 44/2001 to be interpreted as meaning that each Member State is required to recognise the judgments of a court of another Member State on the effectiveness of a jurisdiction clause agreed on by the parties, where the finding as to the effectiveness of the jurisdiction clause has become final under the national law of that court – even where the decision on the point forms part of a procedural judgment dismissing the action?”*⁴⁸

Regarding the first two questions, the CJEU deemed that the issue in question was whether a judgment declining jurisdiction based on a valid jurisdiction clause (i.e. a “procedural judgement”) falls within the scope of article 32 of Regulation 44/2001. The CJEU stated that the term “judgment” as defined in article 32 of Regulation 44/2001 (now article 2a of Regulation 1215/2015) is rather broad and includes all types of judgments

⁴⁷ Regarding the facts of the case, see Gothaer, *supra* n. 5 par. 12 – 21.

⁴⁸ *Ibid* par. 21.

regardless their content⁴⁹, while “*the provisions of Regulation 44/2001 (now Regulation 1215/2012) must to be interpreted independently, by reference to its scheme and purpose*”⁵⁰. Further, according to the CJEU, the objectives of Regulation 44/2001, such as a) to simplify the respective formalities, in order to establish a rapid and simple recognition and enforcement of judgments from the Member States and b) to establish the free movement of judgments in civil and commercial matters, as well as the principle of mutual trust between the Courts of the Member States justify a wide interpretation to the term “judgement”⁵¹. In the light of the above, the CJEU ruled that:

*“Article 32 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that it also covers a judgment by which the court of a Member State declines jurisdiction on the basis of a jurisdiction clause, irrespective of how that judgment is categorised under the law of another Member State”*⁵².

Subsequently, the CJEU moved to the third question. Though the Hoffman ruling was the starting point of its reasoning, the CJEU underlined the importance of the principle of mutual trust between the Courts of the Member States, when they have to apply common rules of jurisdiction⁵³. Following this, the provisions of article 36 of Regulation 44/2001 (article 52 of Regulation 1215/2012) combined with the principle of mutual trust, prohibit the Court of the Member State of recognition from reviewing the jurisdiction of the court of the Member State of origin⁵⁴. Accordingly, this exclusion necessarily restricts the authority of the court of the Member State of recognition to ascertain its own jurisdiction to the extent that is bound by the decision of the court of the Member State of origin. In addition, the requirement of the uniform application of EU law implies that “*the specific scope of that restriction must be defined at European Union level rather than vary*

⁴⁹ Ibid par. 23. See also the remark of the Attorney General Yves Bot in p 33 of his opinion that “*I can therefore start by regarding as immaterial the definition of a ‘procedural judgment’ in German law.*”

⁵⁰ See Gothaer, supra n. 5 par. 25.

⁵¹ Ibid par. 26 – 32.

⁵² Ibid, operative part of the judgment.

⁵³ Ibid par. 36.

⁵⁴ Ibid par. 37 – 39.

according to different national rules on res judicata”⁵⁵. Moreover, according to the CJEU, “*the concept of res judicata under European Union law does not attach only to the operative part of the judgment in question, but also attaches to the ratio decidendi of that judgment, which provides the necessary underpinning for the operative part and is inseparable from it*”⁵⁶. Hence, the CJEU ruled that:

*“Articles 32 and 33 of Regulation No 44/2001 must be interpreted as meaning that the court before which recognition is sought of a judgment by which a court of another Member State has declined jurisdiction on the basis of a jurisdiction clause is bound by the finding – made in the grounds of a judgment, which has since become final, declaring the action inadmissible – regarding the validity of that clause”*⁵⁷.

6. After Gothaer – What comes next ?

The broad interpretation of res judicata adopted by the CJEU in Gothaer raises various considerations.

Firstly, as already stated hereinabove, with its ruling in Gothaer, the CJEU overturned its previous case law within the framework of recognition and execution of judgments and the doctrine of “extension of effects”; it is no longer the Member State of origin that determines the effects of the judgments, but the European Union Law. Therefore, if the national law of a Member State limits the res judicata effect to the operative part of a judgment and does not extend it to the decisive part, its judgments will have different and broader effects when they are to be recognised in another Member State. This may affect the litigants’ behavior. Indeed, the litigants will have to initiate litigation for all the aspects that might be covered by this new European concept of res judicata and not only for the aspects covered by the concept of res judicata of the Member State in which proceedings are initiated.⁵⁸

⁵⁵ Ibid par. 39.

⁵⁶ Ibid par. 40.

⁵⁷ Ibid operative part of the judgment.

⁵⁸ Torralba-Mendiola & Rodríguez-Pineau, supra n. 30 p. 425.

Furthermore, in *Gothaer* the CJEU dealt with the “positive function” of *res judicata*, in the field of recognition and enforcement of judgments. However, the CJEU’s position on the “negative function” of *res judicata* is quite different. In particular, the “negative function” of *res judicata* arose in cases where a national judgment was incompatible to EU legal provisions relating to the economic interests of the EU (e.g. competition, state aid, tax). In these cases, the CJEU recognised the importance of *res judicata* and that the relevant national procedural rules have to be interpreted, in order to give full effect to EU Law⁵⁹. However, in order to overrule judgements that were incompatible with EU Law, the CJEU ruled that the national interpretation of *res judicata* has to be set aside. Subsequently, the CJEU gave a narrower interpretation of *res judicata* that is applied only to the operative part of a judgment and not to its *ratio decidendi*⁶⁰.⁶¹ It is, thus, clear that the CJEU interpretation of *res judicata* varies; and depends on the EU principle/interest that the CJEU seeks to protect. However, this approach does not promote EU integration and legal certainty.

Several scholars raised the question whether the autonomous concept of *res judicata* should be extended beyond jurisdiction agreements and procedural judgments. In particular: should EU concept of *res judicata* apply to judgments ruling on the merits of the case? The wording of the CJEU’s ruling, as well as the underlying reasoning of *Gothaer*, that Regulation 44/2001 establishes common EU rules on jurisdiction that have to be followed by all Member States, seem to provide for a negative answer. This position can be also supported by the new version of article 54(1), Clause 2 of Regulation 1215/2012,

⁵⁹ See Case C-126/97 *Eco Swiss Time Ltd v Benetton International NV* [1999] ECR I-3055, ECLI:EU:C:1999:269, Case C-224/01, *Köbler v. Republik Österreich*, [2003] ECR I-10239, ECLI:EU:C:2003:513, Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA* [2007] ECR I-6199, ECLI:EU:C:2007:434.

⁶⁰ See the CJEU’s reasoning in Case C-2/08 *Amministrazione dell’Economia e delle Finanze and Agenzia delle entrate v. Fallimento Olimpiclub Srl* [2009 I-07501], ECLI:EU:C:2009:506, in which it was ruled that the Italian concept of *res judicata* (that applies to both the operative part of the judgment and the decisive part) was putting “*extensive obstacles to the effective application of the Community rules on VAT*” and thus, it should be set aside.

⁶¹ For a comprehensive analysis of the CJEU’s respective case law, see Torralba-Mendiola & Rodríguez-Pineau, *supra* n. 30, p. 423 and Kornezov, *supra* n. 9, p. 809–842.

stating that “*such adaptation (i.e. of a measure or an order unknown in the Member State of execution) shall not result in effects going beyond those provided for in the law of the Member State of origin*”. This new provision seems to be a confirmation of the Hoffman ruling and of the fact that the EU legislator continues to be in favor of the doctrine of “extension of effects”. Under this conception, the CJEU’s case law on Gothaer should be understood as concerning procedural judgments on jurisdiction agreements only⁶².

Furthermore, if we accept that the autonomous concept of *res judicata*, as developed in Gothaer, applies to judgments ruling on the merits of the case as well, this ruling becomes even more ambiguous. This becomes apparent, if we take into account that the CJEU ruled that the *res judicata* applies to both the operative part and the *ratio decidendi*, “*which provides the necessary underpinning for the operative part and is inseparable from it*”⁶³. Hence, it is clear that the *res judicata* effect applies also to preliminary issues. However the type of preliminary issues that are covered is not clear. In other words, the CJEU has not clarified, if the *res judicata* effect covers the *ratio decidendi* in *stricto sensu*, or it also covers the parts that are not very decisive, but they merely assist the Court to reach its decision⁶⁴. Thus, the objective limits of *res judicata* are not clear. In any case, it is noted that the application of *res judicata* effect to preliminary issues promotes the principle of procedural economy, since the second court will not have to examine the same issue (either as a preliminary issue or as a main one) again. It is apparent that the importance of both issues requires straight clarification by the CJEU.

On the other hand, it is a common ground that the CJEU has the tendency to give the same interpretation to concepts, or to provide the same solutions, in issues within a specific field of law (in our case procedural law). This position is also supported by Gothaer Case too; in particular, the CJEU’s reasoning that “*the concept of res judicata under European Union law does not attach only to the operative part of the judgment in question, but also attaches to the ratio decidendi of that judgment, which provides the necessary*

⁶² For a further analysis on this issue, see Torralba-Mendiola & Rodríguez-Pineau, *supra* n. 30 at p. 425 – 426 and Wilke, *The impact of the Brussels I Recast on important Brussels case law*, *Journal of Private International Law*, 11:1, 128-142, 2015, p. 141.

⁶³ See Gothaer, *supra* n. 5 par. 40.

⁶⁴ Torralba-Mendiola & Rodríguez-Pineau, *supra* n. 30, p. 425.

underpinning for the operative part and is inseparable from it”⁶⁵ derives from the cases cited by the CJEU, i.e. Joined Cases C-442/03 P and C-471/03⁶⁶ and Case C-221/10⁶⁷. These latter cases concerned European Union procedural law. Thus, it appears that the CJEU gave the same interpretation of res judicata in different issues which arose as well in the field of procedural law.

Nonetheless, a uniform application of the res judicata concept without any distinction to both procedural judgments and judgments ruling on the merits seems to serve legal certainty. Besides this, if we accept that the autonomous concept of res judicata should apply only to the recognition of judgments pursuant to Regulation 44/2001 (now Regulation 1215/2012), national courts would not be restricted from applying any narrower national concept of res judicata to domestic cases. This situation could not contribute to the creation of a European judicial area, but it actually would have an opposite effect. In particular, a narrower concept of national res judicata permits a litigant party to initiate new proceedings, in order to neutralize the proceedings brought to another Member State, while this would not be possible to other Member States with a broader concept of national res judicata⁶⁸.

As to the positive effects of the Gothaer, we should mention that first and foremost, a European concept of res judicata in the field of recognition and enforcement of judgments ensures the European integration and promotes the free and easy circulation of judgments. Nevertheless, when it comes to jurisdiction agreements, the binding effect of both the operative part and the ratio decidendi ensures that a litigant party will not deviate from its obligation by initiating proceedings in one Member State despite of already having an unfavorable final judgment in another Member State.

⁶⁵ See Gothaer, supra n. 5 par. 40.

⁶⁶ Cases: C-442/03 P, P & O European Ferries (Vizcaya) SA and C-471/03 P, Diputación Foral de Vizcaya v Commission of the European Communities, ECR I-4845, par. 44.

⁶⁷ Case C-221/10 P Artogodan v Commission [2012] ECR, par. 87.

⁶⁸ Torralba-Mendiola & Rodríguez-Pineau, supra n. 30, p. 425.

7. Epilogue

In the light of the above, it may be time for the EU legislator to go one step further to the integration of procedural law and draft a Regulation which will provide uniform rules regarding res judicata. The legal background of this Regulation could possibly be articles 67 par. 4 and 81 of TFEU that constitute the core basis for the adoption of uniform EU rules in procedural law. This Regulation will expressly specify the main aspects, e.g types of judgements on which it will be applicable, subjective and objective limits, preliminary issues, etc. In this way, legal certainty will be achieved in a matter which causes significant controversies.

To sum up, these remarks are the legal conclusion of our team, without, however, excluding any other different legal point of view, since in the field of legal science – as it was well stated by the US Supreme Court – :

“Few answers will be written ‘in black and white’. The greys are dominant and even among them the shades are innumerable”⁶⁹.

(*) The cover of our report is one more result of our team’s collaboration and it is designed by our team.

⁶⁹ The Estin v. Estin Case (334 U.S. 541, 545).