

PART VIII

FINAL JUDGMENT, APPEALS AND REVIEW

CHAPTER 2

RES JUDICATA

*Yin Jin*¹

<https://www.cplj.org/publications/8-2-res-judicata>

TABLE OF CONTENTS

1 Introduction	1
2 The Legitimacy of Res Judicata	3
3 The Objective Scope of Res Judicata.....	5
3.1 Two Approaches to Observing the Objective Scope of Res Judicata	5
3.2 Claim Preclusion	6
3.2.1 Common Core	6
3.2.2 Defining a Claim or Cause of Action.....	6
3.3 Issue Preclusion	9
3.3.1 The binding effect of Judgment Outcome	9
3.3.2 Examples and Reasons for Not Recognizing Issue Preclusion	11
3.3.3 Unification Challenges	13
3.3.4 Choice of Model Law.....	14
4 The Subjective Scope of Res Judicata	15
4.1 Common Core.....	15
4.2 Chinese law as the Sole Exception	16
4.2.1 Absoluteness of Res Judicata	16

¹ Associate Professor at Law School of Renmin University of China.

4.2.2 Background	17
4.3 Role of Explicit Provisions	17
4.3.1 Res Judicata Relativity Predates Legislative Provisions	17
4.3.2 Res Judicata Relativity as an 'Unwritten Principle'	22
4.4 Contradictory Judgments	24
4.4.1 The Essential Nature of Civil Litigation	24
4.4.2 No Contradictory Legal Relationships	25
4.4.3 No Contradictory Enforcement	27
4.4.4 The Legitimacy of Contradictory Judgments	28
4.4.5 Retrial and Contradictory Judgments	29
4.5 The Structure and Principles of Civil Procedure Law	30
4.5.1 Res Judicata Relativity as the Logical Starting Point	30
4.5.2 Res Judicata Relativity as a Minimum Standard	32
4.5.3 Res Judicata Relativity as the Optimal Option	33
4.6 Lessons for Chinese Law	34
5 Conclusion	35
Abbreviations and Acronyms	36
Legislation	37
International/Supranational	37
National	37
Cases	38
National	38
Bibliography	42

1 INTRODUCTION

- 1 The question of whether to allow the re-litigation of previously adjudicated matters is fundamental to every judicial system. Although not universal, most judicial systems provide a negative answer to this question: matters that have already been litigated may not be re-litigated. The specific rules that govern which matters, under what conditions, and for or against whom adjudicated matters are precluded constitute the doctrines and laws concerning *res judicata*.
- 2 In civil law jurisdictions, the exclusionary or binding effect of adjudicated matters is primarily regulated through explicit legislative provisions. Examples include Art 322 of the German Code of Civil Procedure,² Art 1355 of the French Civil Code,³ Art 2909 of the Italian Civil Code,⁴ Art 114 of the Japanese Code of Civil Procedure,⁵ and Art 216 of the South Korean Code of Civil Procedure.⁶
- 3 However, some civil law countries lack explicit legislative provisions regarding *res judicata*, yet both judicial practice and legal scholarship recognize its binding effect. Switzerland provides an example⁷ where legislators intentionally entrusted the rules of

² (1) Judgments can only become *res judicata* to the extent that the claim raised, or the counterclaim has been decided.

(2) If the defendant has asserted a counterclaim for set-off, the decision that the counterclaim does not exist can become *res judicata* up to the amount for which the set-off was asserted.

³ The authority of *res judicata* applies only to what was the subject of the judgment. It is necessary that the matter requested is the same; that the request is based on the same cause; that the request is between the same parties and made by them and against them in the same capacity.

⁴ The determination contained in the final judgment is binding for all purposes between the parties, their heirs, or successors in interest.

⁵ (1) A final judgment has *res judicata* effect only regarding what is included in the operative part of the judgment.

(2) The determination of the validity or invalidity of a claim asserted for set-off has *res judicata* effect up to the amount claimed for the set-off.

⁶ (1) A final judgment has *res judicata* effect only regarding what is included in the operative part of the judgment.

(2) The determination of whether a claim asserted for set-off is valid has *res judicata* effect only up to the amount claimed for the set-off.

⁷ See B Berger, A Güngerich, C Hurni und R Strittmatter, *Zivilprozessrecht* (2nd edn, Stämpfli 2021) para 1090-1108.

res judicata to the judiciary and legal scholarship when unifying its civil procedure law, deliberately omitting specific provisions in legislation⁸.

- 4 In common law jurisdictions, specific rules regarding res judicata are primarily created by judges through precedent.⁹ Consequently, explicit provisions are rarely found in legislative enactments, although statutes remain important legal sources of civil procedure law. For instance, UK's Civil Procedure Rules 1998 do not mention res judicata or related legal concepts. Similarly, the US Federal Rules of Civil Procedure do not establish a res judicata system but only mention it as an important type of affirmative defense in Rule 9(c)(1).
- 5 While each state in the United States has its own civil procedure law, leading to diversity in res judicata systems, the core issues remain consistent across jurisdictions: determining which contents of prior judgments are binding, under what conditions, and for or against whom. Similar res judicata systems exist in other common law countries such as Canada¹⁰ and Australia.¹¹
- 6 Chinese Civil Procedure Law presents a unique case. The Chinese Civil Procedure Law does not explicitly mention the concept of res judicata. However, its Art 127(5) explicitly states that for cases that have acquired legal effect (final), if a party initiates a new litigation, the plaintiff shall be informed to apply for retrial. This provision essentially establishes the core content of the res judicata system: matters already litigated may not be re-litigated unless overturned through retrial. In Chinese judicial practice, expressions such as 'ne bis in idem'¹², 'prohibition of repeated litigation',¹³ and 'res

⁸ *Botschaft zur Schweizerischen Zivilprozessordnung (ZPO) vom 28. Juni 2006* (Message on the Swiss Code of Civil Procedure (ATCCP) of 28 June 2006), BBl 2006, 7221, 7345.

⁹ D R Coquillette, G P Joseph, G M Vairo and C D Varner, *Moore's Federal Practice* (vol 18, 3rd edn, LexisNexis 2023) § 131.11[1].

¹⁰ See D J Lange, *The Doctrine of Res Judicata in Canada* (5th edn, LexisNexis 2021).

¹¹ See J Reinhardt, 'Australia' in W Vandenbussche (ed), *IEL Civil Procedure* (Wolters Kluwer 2017) Part IV Ch 2, para 110.

¹² Supreme People's Court of PRC, Civil Ruling 312/2022; Supreme People's Court, Civil Ruling 65/2022; Supreme People's Court, Civil Ruling 15/2022.

¹³ Supreme People's Court, Civil Ruling 553/2021; Supreme People's Court, Civil Ruling 137/2019; Supreme People's Court, Administrative Ruling 9150/2017.

judicata/force of adjudicated matters'¹⁴ are commonly used, indicating the system's longstanding presence.

- 7 From a comparative law perspective, the challenge of res judicata systems lies in the details of their rules. While no two res judicata systems are entirely identical, there are common rules. For example, a successful plaintiff cannot obtain a more favourable judgment by initiating new litigation on the same matter, and an unsuccessful defendant cannot contest a prior judgment through new litigation. These common rules form the basis for international legal uniformity.
- 8 Even within civil law jurisdictions, understanding a country's res judicata system solely through explicit legislative provisions is challenging and may not reveal its full extent.¹⁵ Generally, a comprehensive observation of a country's judicial practice, and even a careful comparison of the specific contents of prior and subsequent litigations, is necessary to ascertain the country's true approach. For example, while Chinese judges may inform us that only the operative part (outcome or conclusion) of the judgment has res judicata effects, in practice, parties rarely succeed in challenging the preliminary legal relationships or even facts established or found in prior litigations when the second litigation is involving a different cause of action. Therefore, preliminary issues also have res judicata effects in Chinese law.¹⁶
- 9 This paper aims to reveal a macroscopic view of res judicata systems, highlighting the policies commonly respected by major judicial systems and potential directions for unification in comparative civil justice.

2 THE LEGITIMACY OF RES JUDICATA

- 10 The application of res judicata can either extinguish previously enjoyed rights or create previously non-existent rights. For instance, when a plaintiff succeeds in a lawsuit for loan repayment, if res judicata applies to unclaimed interest, it extinguishes the plaintiff's previously held right to interest.¹⁷ Similarly, in personal injury cases, if the

¹⁴ Supreme People's Court, Civil Ruling 327/2023; Supreme People's Court, Civil Judgment 816/2022; Supreme People's Court, Civil Ruling 1012/2023.

¹⁵ F Ferrand, 'Unscharfe Konturen und Widersprüche in der französischen Rechtskraftlehre' (2017) 22 *Zeitschrift für Zivilprozess International* 29.

¹⁶ Intermediate People's Court of Nantong City, Civil Ruling 226/2018; Intermediate People's Court of Wuxi City, Civil Judgment 1318/2023; Intermediate People's Court of Shenyang City, Civil Judgment 2806/2021.

¹⁷ Primary People's Court of Li County, Civil Ruling 150/2024.

apportionment of liability determined in a prior suit has res judicata effect on subsequent litigation, it means the plaintiff can claim medical expenses and lost wages in the subsequent suit based on the liability apportionment established in the prior suit, even if the defendant was adjudged to bear an excessively high proportion of responsibility in the prior suit.¹⁸

- 11 As res judicata ‘makes white, black; black, white; the crooked, straight; the straight crooked’,¹⁹ its application often generates controversy. For example, an American judge has acknowledged that ‘[t]he defense of res judicata is universally respected but actually not very well liked’.²⁰ However, this system promotes both public interest and private protection, making it a highly successful institution inherent to civil procedure law across various judicial systems.
- 12 Especially within the common law jurisdictions, judicial practice and scholarship have consistently emphasized the dual value of res judicata.²¹ For the state and society, res judicata can promote finality and conserve judicial resources by preventing repetitive litigation.²² This also avoids contradictory or conflicting judgments, thereby enhancing judicial credibility.²³ To avoid adverse effects from res judicata, parties strive to assert all favourable facts and legal claims during litigation, aiding in dispute resolution in a single proceeding.
- 13 For individuals, res judicata can prevent them from being subjected to multiple lawsuits by the opposing party regarding the same dispute, freeing them from the burden and disturbance of litigation.²⁴ Common law systems, particularly the Anglo-American legal tradition, place special emphasis on the interests of defendants, who are entitled to

¹⁸ High People’s Court of Shandong Province, Civil Ruling 1450/2020; Intermediate People’s Court of Dali Bai Autonomous Prefecture, Civil Ruling 21/2020.

¹⁹ *Masterson v C.I.R.*, No. 10659 (Court of Appeals — Fifth Circuit, US) 141 F.2d 391, 395.

²⁰ *Riordan v Ferguson*, (United States District Court, S.D. New York) C.C.A.2d, 1945, 147 F.2d 983, 988.

²¹ A Zuckerman, *Zuckerman on Civil Procedure, Principles of Practice* (4th edn, Sweet & Maxwell 2021) para 26.72-26.73.

²² J H Friedenthal, M K Kane, A R Miller and A N Steinman, *Civil Procedure* (6th edn, West Academic Publishing 2021) 623.

²³ K M Clermont, *Principles of Civil Procedure*, (6th edn, West Academic Publishing 2021) 387; A Zeuner and H Koch, ‘Effects of Judgments (Res Judicata)’ in M Cappelletti (ed), *International Encyclopedia of Comparative Law*. Vol XVI. Civil Procedure (Mohr Siebeck 2014) 9-25.

²⁴ R C Casad and K M Clermont, *Res Judicata, A Handbook on its History, Doctrine, and Practice*, (Carolina Academic Press 2001) 29.

expect plaintiffs to present all favourable facts and legal grounds in a single proceeding and arrange their new lives according to the judgment made in this proceeding.

3 THE OBJECTIVE SCOPE OF RES JUDICATA

3.1 Two Approaches to Observing the Objective Scope of Res Judicata

- 14 In discussing judgment binding effects, the first step is determining which parts of the judgment bind subsequent litigations. This involves identifying whether it is solely the judgment's outcome that possesses binding force or if factual determinations and legal relationships also carry binding significance for a second litigation. This constitutes the objective scope of res judicata, also denoted as objective limits.²⁵ Following the determination of the objective scope, the subsequent section can discuss the individuals upon whom the judgment imposes binding constraints, referred to as the subjective scope or subjective limits of res judicata.
- 15 Every judgment on the merits typically addresses a dispute concerning at least one substantive legal relationship. Res judicata primarily signifies that the subject matter adjudicated in judgments cannot be re-litigated. The most significant manifestation of this principle lies in the preclusive effect of prior judgments on subsequent litigation, famously known as the prohibition against double jeopardy (*ne bis in idem*).
- 16 Additionally, prior judgments may constrain subsequent litigation in another way: even when subsequent litigation involves different subject matters, determinations made in prior judgments regarding critical legal issues, facts, and legal relationships maintain a binding effect, serving as the basis for subsequent judgments.
- 17 The first effect refers to the exclusionary force of the judgment on subsequent litigation, also termed claim preclusion. The second effect refers to the binding force of the rationales behind the judgment on subsequent litigation, also termed issue preclusion.²⁶ Subsequent discourse will note that while the first effect is a common feature across all judicial systems, the second effect is primarily prevalent in common law systems, although civil law systems are not entirely unacquainted with it.

²⁵ R W Millar, 'The Premises of the Judgment as Res Judicata in Continental and Anglo-American Law' (1940) 39(1) Michigan Law Review 1, 2.

²⁶ See C A Wright and A R Miller, *Federal Practice and Procedure, Jurisdiction and Related Matters* (vol 18, 3rd edn, Thomson West 2016) § 4402.

3.2 Claim Preclusion

3.2.1 Common Core

- 18 Claim preclusion refers to the principle that the claims asserted by parties in litigation, as well as the judgments rendered by courts on those claims, cannot be relitigated. Any nation adhering to the doctrine of res judicata acknowledges this minimal level of judgment efficacy, making it the core of res judicata.²⁷ Whether within civil law systems or common law systems, whether as a legal exporting or importing nation,²⁸ and even within civil law jurisdictions where statutory provisions regarding res judicata might be absent, the exclusionary force of judicial decisions is universally recognized. This principle, preventing re-litigation of adjudicated matters, constitutes shared content across judicial systems and forms a common asset of civil procedural law from a comparative perspective.

3.2.2 Defining a Claim or Cause of Action

- 19 The concept of claim preclusion should exist in all judicial systems to prevent indefinite re-litigation of matters. However, the realization of this core value hinges upon a concept that cannot be universally defined, namely the 'cause of action'. The cause of action represents the smallest unit of litigation, determining the scope of judicial decisions and consequently claim preclusion. Aside from the term 'cause of action', there are other terms used to express the concept, such as claim, subject matter or object of litigation.
- 20 Common law systems often adopt a broad conception of the cause of action, resulting in a wide scope of claim preclusion. Particularly in contemporary American law, both federal and most state jurisdictions utilize the transaction theory to define the cause of action. This theory posits that a cause of action arises from a single transaction or a series of connected transactions, rather than from isolated events or individual rights. According to Restatement (Second) of Judgments § 24(1), the cause of action 'extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose'.
- 21 Thus, the cause of action is determined solely by the facts themselves, theoretically unaffected by further restrictions determined by the parties. In other words, parties

²⁷ K M Clermont, 'Res Judicata as Requisite for Justice' (2016) 68(6) Rutgers University Law Review 1067.

²⁸ C F Goodman, *Justice and Civil Procedure in Japan* (Oxford UP 2004) 420.

have no power to further limit the scope of the cause of action through their own factual assertions or legal standings. Instead, parties must adhere to this broad conception of the cause of action. Failure by parties to assert multiple potential rights may result in the loss of the opportunity to subsequently assert those rights that were not raised in the prior litigation.

- 22 In common law systems, a single transaction or event typically affords only one opportunity for litigation, requiring parties to assert all possible rights in a single lawsuit. The Restatement (Second) of Judgments § 24(2) suggests that a transaction be pragmatically determined by considering factors such as temporal, spatial, origination, or motivational connections among facts, as well as trial convenience and consistency with the parties' expectations, business practices, or usage. This approach enables courts to adjudicate all disputes arising from a particular set of facts in a unified proceeding, thereby avoiding fragmented litigation and promoting the finality of judgments.
- 23 Civil law systems, notably German law, are more cautious. They emphasize parties' litigation claims (Antrag) over factual circumstances. Only those factual circumstances radiating from a party's litigation claims may be subject to the restrictions of claim preclusion. The German Code of Civil Procedure itself reflects this emphasis on parties' assertions. Pursuant to § 322(1) of the Code, only judgments concerning rights asserted by parties enjoy claim preclusion.
- 24 German law's emphasis on parties' assertions is evident in the limitations of res judicata placed on partial claims (Teilklage). For instance, the plaintiff claims that the defendant owes him EUR 8000, but the plaintiff is entitled to only sue the defendant for EUR 2000. After the dismissal of the lawsuit's claim, the plaintiff still has the right to sue the defendant again for the remaining EUR 6000. The court should proceed to substantive examination, and there is even a possibility of supporting the plaintiff's second lawsuit.²⁹ German law imposes such strict limitations on the specific scope of claim preclusion, a method of operation unimaginable in American law. The current German law adopts the so-called procedural theory, where the substantive legal bases of legal theories underlying parties' claims cannot further segment the cause of action.³⁰
- 25 In terms of claim preclusion, the most conservative approach is arguably found in Chinese law. Under Chinese law, both the litigation claims asserted by parties and the

²⁹ See D Leipold, 'Stand und Entwicklungstendenzen der deutschen Streitgegenstandslehre' (1977) 42(2) *Nihon Hogaku* (Journal of Law) 1, 12.

³⁰ L Rosenberg, K H Schwab and P Gottwald, *Zivilprozessrecht* (18th edn, C.H. Beck 2018) § 93 para 10.

substantive legal bases potentially applicable to those claims can further segment the cause of action. For example, if the plaintiff in a previous lawsuit neglected to assert interest for an entire period or a specific time frame, the plaintiff may bring a new lawsuit solely asserting interest.³¹ Likewise, in disputes regarding personal injury compensation, if the plaintiff omitted claims for lost wages in a previous lawsuit, the plaintiff may raise lost wages separately in a new lawsuit.³² This reflects the notion that the cause of action can be segmented by parties' litigation claims.

- 26 In Chinese law, in addition to parties' litigation claims, the substantive legal bases or legal theories asserted by parties can further segment the cause of action. For instance, concerning the same bank transfer, the plaintiff may initially sue for the return of funds after the termination of a sales contract. Upon the failure of this lawsuit, the plaintiff may then bring a lawsuit for the return of unjust enrichment, with the possibility of success in this lawsuit, namely, a judgment ordering the defendant to return unjust enrichment resulting from the same bank transfer to the plaintiff.³³ Moreover, the plaintiff may even initiate three successful lawsuits based on different substantive legal bases, despite the court not supporting the plaintiff's litigation claims in any of the three lawsuits.³⁴ This implies that the defendant may face harassment through multiple lawsuits over the same transaction, a scenario inconceivable under American law.
- 27 From a historical perspective of legal development, various judicial systems generally tend to expand the scope of causes of action. This approach offers several advantages. Firstly, it promotes the concentration of litigation, requiring parties to present all relevant facts and legal bases in a single lawsuit, thereby facilitating the comprehensive resolution of disputes. Secondly, by redefining the scope of causes of action, particularly by constructing a concept of causes of action independent of substantive civil law, civil procedural law can pursue its goals freely, such as enhancing litigation efficiency, reducing conflicting judgments, and adjusting trial content freely according to the

³¹ Primary People's Court of Longfeng District, Civil Judgment 1871/2017; Primary People's Court of Xinzhou District, Civil Judgment 2129/2020.

³² Primary People's Court of Panshan County, Civil Judgment 2000/2017.

³³ Intermediate People's Court of Shizuishan City, Civil Judgment 1371/2023; Primary People's Court of Huinong District, Civil Judgment 52/2023.

³⁴ Intermediate People's Court of Hefei City, Civil Judgment 11602/2021; Intermediate People's Court of Xuzhou City, Civil Judgment 1128/2018; Primary People's Court of Feng County, Civil Judgment 57/2017.

progress of litigation.³⁵ Of course, with the expansion of the scope of causes of action, parties' litigation risks also increase, as parties may forfeit rights they could have enjoyed due to claim preclusion and assume obligations that did not previously exist.

- 28 In summary, causes of action can be delineated from three perspectives: historical events, parties' litigation claims, and the substantive legal bases asserted. American law primarily defines causes of action based on historical events, whereas German law further segments cause of action based on parties' litigation claims, and Chinese law places the greatest emphasis on the substantive legal bases asserted by parties. In fact, historically both German and American law also valued substantive legal bases;³⁶ however, due to the independence and liberalization of civil procedural law, substantive legal bases have lost prominence in defining the subject matter of litigation in the two jurisdictions.

3.3 Issue Preclusion

3.3.1 *The binding effect of Judgment Outcome*

- 29 Issue preclusion, integrating the common concerns of the civil law and common law systems, should be defined as the binding effect of facts or legal determinations outside the outcome of a prior judgment on subsequent litigation. When recognized, facts or legal determinations established in a prior litigation, even if the subsequent litigation involves different causes of action, become the basis for the judgment in the subsequent litigation. Specifically, the subsequent litigation must render its judgment based on the facts and legal bases established in the prior litigation. While claim preclusion primarily exerts a negative impact on subsequent litigation by rejecting it for violating the principle of ne bis in idem, issue preclusion positively incorporates prior findings into subsequent litigation.
- 30 Issue preclusion is widely recognized in common law countries, but civil law countries are also beginning to acknowledge it. For example, Greek law explicitly recognizes issue

³⁵ See K Koshiyama, *Rechtskraftwirkungen und Urteilsanerkennung nach amerikanischem, deutschem und japanischem Recht* (Mohr 1996) 18; C A Wright and M K Kane, *Law of Federal Courts* (8th edn, West Academic Publishing 2017) 651.

³⁶ The Harvard Law Review Association, 'Developments in the law: Res Judicata' (1952) 65(5) Harvard Law Review 818, 824.

preclusion through statutory provisions like those in American law.³⁷ According to Art 331 of the Greek Code of Civil Procedure of 1985, res judicata extends to collateral legal relationships beyond the operative part of the judgment if the court has jurisdiction over them.³⁸ Similarly, influenced by Spanish law, Brazil also acknowledges issue preclusion through statutory provisions.³⁹ Art 503 of the Brazilian Code of Civil Procedure of 2015 subjects preliminary legal questions to res judicata if effectively contested in prior litigation and the court had jurisdiction.⁴⁰

- 31 Generally, issue preclusion arises only when the following four conditions are met: (1) the issues in the prior and subsequent litigation are identical; (2) the issues have been substantively litigated; (3) the issues were essential to the judgment in the prior litigation; and (4) the prior and subsequent litigation involves the same parties.⁴¹
- 32 These conditions for issue preclusion demonstrate its differences from claim preclusion. While claim preclusion can extend to facts or legal relationships not asserted or contested, issue preclusion only applies to facts or legal relationships that have been

³⁷ See K D Kerameus and P J Kozyris (ed), *Introduction to Greek Law* (Kluwer 1988) 258; K D Kerameus, 'Judicial System and Civil Procedure in Greece' in: T Ansay and J Basedow (ed), *Structures of Civil and Procedural Law in South Eastern European Countries* (Berliner Wissenschafts-Verlag 2011) 141-142; P Yessiou-Faltsi, 'Greece' in W Vandenbussche (ed), *IEL Civil Procedure* (Wolters Kluwer 2019) Part IV Ch 2, para 247; K Beys, 'Die objektiven Grenzen der Rechtskraft im griechischen Recht' in: W F Lindacher, D Pfaff, G H Roth, P Schlosser und E Wieser (ed), *Festschrift für Walther J. Habscheid zum 65. Geburtstag*, (Giesecking 1989) 18.

³⁸ Res judicata extends to issues that were incidentally decided and constitute a prerequisite for the main issue, provided the court had subject matter jurisdiction to decide on these incidental issues.

³⁹ See T A A Wambier, 'What is "covered" by res judicata in Brazilian Civil Procedural Law: the current law and perspectives of change' (2012) 17 *Zeitschrift für Zivilprozess International* 393; L G Marinoni, 'Res Judicata over issues and third parties' (2019) 24 *Zeitschrift für Zivilprozess International* 343.

⁴⁰ A decision that fully or partially adjudicates the merits has the force of law (res judicata) within the limits of the main issue expressly decided.

§ 1 The provisions of the main paragraph apply to the resolution of a prejudicial issue, expressly and incidentally decided in the process, if:

- I - the resolution of this issue is necessary for the judgment of the merits;
- II - there was prior and effective adversarial proceedings, not applicable in the case of default;
- III - the court has jurisdiction over the subject matter and the parties to resolve it as a main issue.

§ 2 The provision of § 1 does not apply if there are evidentiary restrictions or limitations to cognition in the process that prevent an in-depth analysis of the prejudicial issue.

⁴¹ M K Kane, A R Miller and A N Steinman, *Civil Procedure in a nutshell* (9th edn, West Academic 2022) 238-239.

subject to factual dispute or legal argumentation. Claim preclusion is exclusionary, dismissing entire subsequent litigation as repeat lawsuits, while issue preclusion only precludes relitigating specific facts or legal relationships.

3.3.2 Examples and Reasons for Not Recognizing Issue Preclusion

- 33 From a historical perspective of legal development, issue preclusion in common law systems stems from the old Germanic law in civil law systems.⁴² This system aligns well with the doctrine of estoppel in English and American law. Specifically, facts and legal relationships determined in prior litigation are considered acts of the parties and cannot be denied, hence the former 'collateral estoppel'.⁴³
- 34 Civil law countries generally oppose issue preclusion, especially the positive binding force of factual and legal determinations outside the operative part of the judgment on litigations of different causes of action. They emphasize distinguishing between judgment outcome binding force and the reasoning behind them. In this regard, the Austrian Supreme Court has a classic description:⁴⁴

The legal relationship or right is prejudicial when the decision of the process depends wholly or partly on its existence or non-existence, without, however, the legal relationship or right being identical to the claim asserted in the lawsuit.

⁴² See W S Byassee, 'Collateral Estoppel Without Mutuality: Accepting the Bernhard Doctrine' (1982) 35(6) Vanderbilt Law Review 1423, 1427.

⁴³ See R W Millar, 'Historical Relation of Estoppel by Record to Res Judicata' (1940-1941) 35(1) Illinois Law Review 41.

⁴⁴ OGH 3 Ob 532/53, Judgment 12 August 1953.

- 35 When codifying the German Code of Civil Procedure, both affirmative⁴⁵ and negative⁴⁶ attitudes regarding issue preclusion existed. Ultimately, the negative view prevailed,⁴⁷ as evidenced by the wording of Art 322(1) of the German Code of Civil Procedure, which states that only judgments concerning rights asserted by parties in litigation have res judicata. Facts or legal determinations expressly or implicitly outside the outcome of the judgment do not have binding force.⁴⁸ This legislative choice has been endorsed by academia, with proponents arguing that it aligns with the principle of party disposition and helps avoid ambush judgments while reducing the risk of excessive litigation.⁴⁹
- 36 Germany's approach directly influenced Japanese law. Art 114(1) of the Japanese Code of Civil Procedure explicitly states that only the operative part of the judgment has res judicata.⁵⁰ Like German law, if parties wish to invoke issue preclusion in subsequent litigation involving different causes of action, they may file an intermediate confirmation lawsuit in the prior litigation.⁵¹ The court's determination in this regard may have a binding effect on subsequent litigation. However, unlike issue preclusion in English and American law, the occurrence of such binding force depends on parties raising specific litigation claims in the prior litigation and is limited to the judgment concerning those claims in the prior litigation. It is worth noting that after World War II, Japanese civil

⁴⁵ F C von Savigny, *System des heutigen römischen Rechts* (vol 6, De Gruyter 1847) §§ 291 ff; B Windscheid, *Lehrbuch des Pandektenrechts* (vol 1, 1st edn, Julius Buddeus 1867) § 130, 5b.

⁴⁶ See *Allgemeine Gerichtsordnung für die Preußischen Staaten* (General Court Regulations for the Prussian States (1781-1794), 13th title, § 38: 'Die Kollegia und Urtelfasser müssen sorgfältig Acht geben, daß überall die wirkliche Entscheidung und deren Gründe deutlich von einander unterschieden, und nicht etwas, das zu der erstern gehört, in die letztern, noch auch umgekehrt, mit eingemischt werde: indem bloße Entscheidungsgründe niemals die Kraft eines Urteils haben sollen.' [Colleagues and authors of judgments must be careful to ensure that the actual decision and its reasons are clearly distinguished from each other, and that nothing belonging to the former is mixed into the latter, or vice versa: reasons for a decision should never have the power of a judgment.]

⁴⁷ See K Hahn und E Stegemann (ed), *Die gesamten Materialien zur Zivilprozessordnung* (vol 1, 2nd edn, R.v Decker 1881) 290 ff.

⁴⁸ R Stürner, 'The ELI/UNIDROIT Model European Rules of Civil Procedure: An Introduction to Their Basic Conceptions' (2022) 86(2) *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 421, 459.

⁴⁹ P Gottwald, '§ 322' in W Krüger und T Raucher (ed), *Münchener Kommentar zur Zivilprozessordnung* (vol 1, 6th edn, C.H. Beck 2020) para 85.

⁵⁰ A final judgment has res judicata effect only with respect to the matters contained in the dispositive part of the ruling.

⁵¹ Y Taniguchi, P C Reich and H Miyake, *Civil Procedure in Japan* (3rd edn, Juris 2018) 501.

procedure law was influenced by American law, and Japanese law has been debating whether to adopt American-style issue preclusion.⁵²

- 37 The Chinese Civil Procedure Law does not explicitly define the objective scope of *res judicata*. However, due to the Chinese courts' emphasis on maintaining unified determinations of facts and laws across different litigations and their efforts to avoid conflicting judgments, issue preclusion is practically widespread in Chinese law. This occurs despite the judicial distinction between the reasoning behind judgments and the judgments themselves, with only judgments deemed to have *res judicata*.⁵³ In practice, issue preclusion in Chinese law even has a broader scope than in American law and occurs more easily due to fewer restrictions.
- 38 In Chinese law, any significant facts or legal determinations made in prior litigation can serve as the basis for subsequent litigation, leaving parties with little opportunity to assert contrary assertions in subsequent litigation. For example, if a judgment in a prior litigation determines the validity of a contract, when a party raises a contrary claim in subsequent litigation, the court may deem it to constitute issue preclusion, leading to the dismissal of the entire subsequent litigation for constituting a repeat lawsuit.⁵⁴ Similarly, in personal injury compensation disputes, a defendant's partial responsibility determined in their absence may bind subsequent litigation about newly incurred damages, preventing the defendant from asserting less liability.⁵⁵ This has led to German law concerns to occur in Chinese reality, where parties have no objections to the judgment outcome but still appeal the reasoning behind it, seeking the higher court to correct the erroneous determinations of facts and laws by the lower court.⁵⁶

3.3.3 Unification Challenges

- 39 Different judicial systems' choices regarding whether facts or legal determinations made in prior litigation should bind different causes of action in subsequent litigation are deliberate and result from different value tendencies, making unified rule formation difficult. There is also controversy over whether issue preclusion functions to reduce

⁵² M Ito, *Civil Procedure Law* (Cao YJ tr, 4th edn, Peking UP 2019) 369-372.

⁵³ Intermediate People's Court of Wuhan City, Civil Judgment 1871/2023.

⁵⁴ Intermediate People's Court of Beijing City, Civil Ruling 9714/2017.

⁵⁵ High People's Court of Shanghai City, Civil Ruling 548/2020.

⁵⁶ Intermediate People's Court of Huludao City, Civil Ruling 979/2021; Intermediate People's Court of Shaoxing City, Civil Ruling 413/2020; Intermediate People's Court of Chengdu City, Civil Ruling 14924/2020.

litigation and alleviate the burden on courts. Scholars who oppose the expansion of the objective scope of res judicata argue that issue preclusion, like claim preclusion, increases the likelihood of over-litigation as its scope broadens.⁵⁷ Determining the exact scope of res judicata is not a matter of logical deduction or directly derivable from the essence of res judicata itself.⁵⁸ When it comes to specific rules, different judicial systems are generally free to choose and have the power to weigh different policies and values.⁵⁹ However, chosen rules should meet the parties' expectations and provide procedural safeguards.⁶⁰

3.3.4 Choice of Model Law

- 40 Model laws are increasingly accepting issue preclusion. The early Principles of Transnational Civil Procedure did not fully accept issue preclusion; it only applied when it could lead to substantive unfairness. This approach recognized the binding force of facts or legal determinations from prior litigation on subsequent litigation through the principle of good faith rather than an independent legal rule.⁶¹ The ELI/UNIDROIT Model European Rules of Civil Procedure, on the other hand, are more inclusive of issue preclusion.⁶² According to Art 149(2) of this law, res judicata also covers necessary and incidental legal issues that are explicitly decided in a judgment where parties to subsequent proceedings are the same as those in the proceedings determined by the prior judgment and where the court that gave that judgment could decide those legal issues.⁶³ This provision nearly adopts the issue preclusion of American style but limits its effect to cases involving the same parties.

⁵⁷ Y Sinai, 'The Downside of Preclusion: Some Behavioural and Economic Effects of Cause of Action Estoppel in Civil Actions' (2011) 56(3) McGill Law Journal 673, 684.

⁵⁸ See Gottwald (n 49).

⁵⁹ R D Freer, *Civil Procedure* (3rd edn, Aspen 2022) Ch 11.2, 640.

⁶⁰ Ferrand (n 15) 74-75; A Zeuner and H Koch, 'Effects of Judgments (Res Judicata)' in M Cappelletti (ed), *International Encyclopedia of Comparative Law*. Vol XVI. Civil Procedure (Mohr Siebeck 2014) 9-105.

⁶¹ American Law Institute/UNIDROIT, *Principles of Transnational Civil Procedure* (Cambridge UP 2005) 48.

⁶² A Stadler, V Smith and F G Inchausti (ed), *European Rules of Civil Procedure: A commentary on the ELI/UNIDROIT Model Rules* (Edward Elgar 2023) para 16.012.

⁶³ See European Law Institute (ELI) and International Institute for the Unification of Private Law (UNIDROIT) (ed), *ELI-UNIDROIT Model European Rules of Civil Procedure* (Oxford UP 2021) 195-196.

4 THE SUBJECTIVE SCOPE OF RES JUDICATA

4.1 Common Core

- 41 The subjective scope of res judicata refers to the specific individuals or entities bound by adjudicated matter with exclusionary or binding force. Remarkably, there is a rare unification in both civil law and common law systems regarding res judicata: it generally binds only the parties involved, with a few exceptions such as successors in rights or obligations, heirs of the parties, and possessors of the disputed subject matter.⁶⁴ This principle can be termed as the relativity of res judicata (res judicata relativity).
- 42 As observed by Walther J Habscheid, the relativity of res judicata is a universal phenomenon.⁶⁵ Major countries and regions in both civil law and common law systems have recognized the principle of the relativity of res judicata. For example, Art 325(1) of the German Code of Civil Procedure and Art 115(1)(1) of the Japanese Code of Civil Procedure explicitly establish the relativity of res judicata.
- 43 In common law jurisdictions, the relativity of res judicata has also gained legal recognition through precedent.⁶⁶ For instance, under English law, the condition for res judicata to occur is ‘between the parties or their successors in rights’.⁶⁷ In American law, the relativity of res judicata is even referred to as a ‘cardinal principle’⁶⁸ because ‘every person is entitled to his day in court’, and extending res judicata to persons not participating in litigation violates the ‘first principle of justice’.⁶⁹
- 44 Within the civil law system, whether provided in procedural or substantive law, whether explicitly stipulated by statute or derived through legal interpretation, the relativity of res judicata is a common rule. For example, according to Art 1355 of the French Civil

⁶⁴ Zeuner and Koch (n 60) 9-108.

⁶⁵ W J Habscheid, *Schweizerisches Zivilprozess- und Gerichtsorganisationsrecht* (2nd edn, Helbing & Lichtenhahn 1990) para 502.

⁶⁶ *Hansberry v Lee*, No. 29 (Supreme Court, US) [311 U.S. 32, 40 (1940)]; See A R Kamp, ‘The History Behind *Hansberry v. Lee*’ (1987) 20(3) U.C. Davis Law Review 481.

⁶⁷ *R (Coke-Wallis) v Institute of Chartered Accountants in England and Wales* (Supreme Court, UK) [2011] UKSC 1; N Andrews, *Andrews on Civil Processes: Court Proceedings, Arbitration & Mediation* (2nd edn, Intersentia 2019) 457.

⁶⁸ See M W K, ‘Res Judicata: The Requirement of Identity of Parties’ (1943) 91(5) University of Pennsylvania Law Review and American Law Register 467.

⁶⁹ *Bigelow v Old Dominion Copper Mining & Smelting Co.*, No 191, 192 (Supreme Court, US) [225 U.S. 111 (1912)].

Code and Art 2909 of the Italian Civil Code, *res judicata* requires that the case be ‘between the same parties’ or ‘under the parties’. Similarly, although Austrian and Swiss legislation does not explicitly stipulate the relativity of *res judicata*, it is an undisputed principle in the civil procedure laws of both countries.

- 45 Through legal reception, the relativity of *res judicata* has spread to other countries, such as Japan and South Korea, whose legal systems have been primarily influenced by German law. For example, Art 115(1) of the Japanese Code of Civil Procedure states:

A final and conclusive judgment shall be binding upon the following: 1. The parties; 2. Other persons who became parties through the original parties; 3. The heirs of the parties listed in the preceding two items; 4. The persons who possess the subject matter of the claim for the benefit of the parties listed in the preceding three items.

4.2 Chinese law as the Sole Exception

4.2.1 *Absoluteness of Res Judicata*

- 46 While the relativity of *res judicata* is a prevailing rule in comparative civil procedure law, ‘Chinese law does not recognize the relativity of *res judicata*’.⁷⁰ Due to the absence of subjective limitations, the *res judicata* effect of Chinese judgments is absolute, meaning that judgments bind all individuals.⁷¹ Under the absolute form of *res judicata*, because ‘the effectiveness of a final judgment can extend to third persons beyond the parties’,⁷² non-parties can only protect their substantive rights by seeking to change or revoke the original judgment (retrial by third person).⁷³

⁷⁰ J H Hu and Y A Liao, ‘On the Lawsuit of Third-Party Revocation’ (2007) 5 *Politics and Law* 123, 127; Z X Wu and L Shen, ‘The Third-Party Revocation Lawsuit and the Litigation Agency System After the Amendment of the Civil Procedure Law’ (2012) 23 *People’s Judicature* 16, 18; J F Lin, ‘The Current Status and Obstacles of the Institutionalization of the Principle of Relative *Res Judicata* in China’ (2016) 1 *Modern Law Science* 130; Z Y Wu, ‘The Standing of the Plaintiff in the Third-Party Revocation Lawsuit’ (2014) 3 *Chinese Journal of Law* 148, 166.

⁷¹ Lin (n 70) 131.

⁷² Wu and Shen (n 70).

⁷³ For example, the third-party revocation lawsuit provided for in Art 59(3) of the Chinese Civil Procedure Law, and the application for retrial by an outsider provided for in Art 238 of the Chinese Civil Procedure Law.

4.2.2 Background

- 47 'The theory of res judicata has not been institutionalized in China',⁷⁴ and the Civil Procedure Law 'does not explicitly stipulate the relativity of res judicata'.⁷⁵ In contrast, countries like Germany and Japan, which are frequently referenced by Chinese academics and practitioners, have explicitly stipulated the relativity of res judicata. The absence of explicit provisions regarding the relativity of res judicata has become a 'major flaw'⁷⁶ in the Chinese Civil Procedure Law.
- 48 One reason for this difference is the reliance on explicit provisions of enacted law as the sole legal source for the relativity of res judicata. Another reason is that Chinese courts cannot tolerate contradictory judgments. However, the relativity of res judicata institutionally and legally acknowledges the legitimacy of contradictory judgments. As Chinese scholars have noted, 'Chinese courts have an extremely low tolerance for contradictory judgments'⁷⁷ and adopt a 'strict prohibition'⁷⁸ attitude towards them. In summary, the absence of explicit legal provisions and the prohibition of contradictory judgments are two key reasons why Chinese Civil Procedure Law does not recognize the relativity of res judicata. The following will refute the prevailing views in Chinese judicial practice and scholarship on three points.

4.3 Role of Explicit Provisions

4.3.1 Res Judicata Relativity Predates Legislative Provisions

- 49 Art 325(1) of the German Code of Civil Procedure and Art 115(1) of the Japanese Code of Civil Procedure explicitly establish res judicata relativity, whereas the Chinese Civil Procedure Law lacks similar provisions. The absence of explicit legislative provisions regarding res judicata relativity is a distinguishing feature of Chinese law compared to German and Japanese law. If res judicata relativity in German and Japanese law was indeed established by their legislative provisions, or if these legislations had changed from absolute to relative res judicata, it could be argued that res judicata relativity in these countries' civil procedure laws originated from legislative provisions. The

⁷⁴ X M Zhang, 'Research on the Mission of the Third-Party Revocation Lawsuit' (2018) 4 Law and Social Development 140, 149.

⁷⁵ W P Zhang, 'The Principle of Relative Res Judicata: Basis, Exceptions, and Institutionalization' (2015) 1 Chinese Journal of Law 68.

⁷⁶ Ibid.

⁷⁷ Wu (n 70) 156.

⁷⁸ Wu and Shen (n 70).

differences between German and Japanese law and Chinese law can thus support the comparative conclusion that ‘Chinese law does not recognize *res judicata* relativity’. Conversely, if German and Japanese legislation did not establish *res judicata* relativity, nor did they shift from absolute to relative *res judicata*, and if *res judicata* relativity existed prior to legislative provisions, then legislative provisions would not be the original legal source of *res judicata* relativity. In this case, it would be incorrect to assert that ‘Chinese law does not recognize *res judicata* relativity’ based solely on the absence of explicit legislative provisions, as this would misapply comparative legal materials.

- 50 Germany and Japan share three common features regarding *res judicata* relativity in their current laws. First, both countries’ legislative provisions explicitly establish *res judicata* relativity. According to Art 325(1) of the German Code of Civil Procedure, a judgment with *res judicata* binds the parties. Similarly, Art 115(1) of the Japanese Code of Civil Procedure states that a judgment binds the parties. ‘Binding the parties’ means that the judgment results are conclusive for the parties, regardless of whether the judgment is favourable or unfavourable to them, and the parties cannot further dispute it. Second, both countries’ legislative provisions clearly define the scope of *res judicata* expansion. Unlike absolute *res judicata*, which binds all individuals, *res judicata* relativity extends only to specific individuals with substantive or procedural connections to the parties. According to Art 325-327 of the German Code of Civil Procedure and Art 115 of the Japanese Code of Civil Procedure, *res judicata* can, under certain conditions, extend to include the parties’ successors in rights, possessors of the subject matter of the claim, and litigation representatives, among others. Third, both theoretical and practical discussions focus on the specific scope of *res judicata* expansion and its legitimacy. In relation to the principle of *res judicata* relativity itself, German and Japanese literature generally regard it as self-evident and discuss it only briefly.⁷⁹
- 51 However, Art 325 of the German Code of Civil Procedure did not exist at the time of the law’s original enactment but was added 21 years later. The current German Code of Civil Procedure originates from the Code enacted in 1877 and effective from 1879.⁸⁰ At that time, the 1877 Code only stipulated the objective scope of *res judicata* (ie, what is bound by *res judicata*) but did not specify the subjective aspect (ie, who is bound by *res judicata*). It was not until 1898, with the Amendment Act to the Civil Procedure Law⁸¹

⁷⁹ See W Lüke, *Zivilprozessrecht* (11th edn, C.H. Beck 2020) § 32, 350 para 19; M Ito, *Civil Procedure Law* (Cao YJ tr, 4th edn, Peking UP 2019) 372.

⁸⁰ (German) Code of Civil Procedure of 30. January 1877.

⁸¹ *Gesetz, betreffend Aenderungen der Civilprozeßordnung vom 17. Mai 1898* (Law concerning amendments to the Code of Civil Procedure of 17 May 1898).

that six new provisions were added after Art 293 of the 1877 Code. Among these, Art 293c, 293d, and 293e eventually became Art 325, 326, and 327 of the current Code. According to the Enactment Act of the Amendment Act of 1898⁸² and the Civil Code Enactment Act in 1896,⁸³ these provisions came into effect on January 1, 1900. From that date, legislative provisions regarding res judicata relativity were included in the German Code of Civil Procedure. During this period, res judicata relativity had already become a legal constraint on judicial practice.⁸⁴ The legislative rationale for Art 325 explicitly stated:⁸⁵

In Art 293c (i.e., the current Art 325), the draft establishes the principle that a judgment with res judicata binds the parties and successors in rights who become parties after the litigation. This principle is based on the essence of res judicata and aligns with current law.

- 52 This indicates that German legislators at the time considered res judicata relativity an integral part of the German Code of Civil Procedure.
- 53 Res judicata relativity is considered a natural component of res judicata ('based on the essence of res judicata'), which may explain why German legislators did not explicitly stipulate it. As Heinrich Bienhold commented:

This principle (res judicata relativity) is so clear, so inherent, that the previous Civil Procedure Law (i.e., the 1877 Code) did not explicitly provide for it, despite the presence of norms concerning res judicata (i.e., Art 293 of the 1877 Code). This

⁸² *Einführungsgesetz zu dem Gesetze, betreffend Aenderungen der Civilprozeßordnung vom 17. Mai 1898* (Introductory law to the law concerning amendments to the Code of Civil Procedure of 17 May 1898).

⁸³ *Einführungsgesetz zum Bürgerlichen Gesetzbuche vom 18. August 1896* (Introductory law to the Civil Code of 18 August 1896).

⁸⁴ R Schmidt, *Die Änderungen des Civilprozessrechts nach den Novellen des Jahres 1898* (Duncker & Humblot 1898) 60.

⁸⁵ *Begründung der Entwürfe eines Gesetzes betreffend Aenderungen des Gerichtsverfassungsgesetzes und der Strafprozessordnung sowie eines Gesetzes betreffend Aenderungen der Civilprozessordnung und eines zugehörigen Einführungsgesetzes* (Explanatory statement for the drafts of a law on amendments to the Judicial Constitution Act and the Code of Criminal Procedure as well as a law on amendments to the Code of Civil Procedure and an associated introductory law), 1897 *Reichstagsvorlage* (legislative proposal of the parliament 1897), p 50.

necessary subjective limitation can be indirectly inferred from Art 293 of the Civil Procedure Law.⁸⁶

- 54 This perspective aligns with the prevailing practice at the time, where res judicata relativity was inferred from the explicit provisions regarding the objective scope of res judicata in the German Code of Civil Procedure.⁸⁷
- 55 The explicit stipulation of res judicata relativity 21 years later was due to the need to specify exceptions with the enactment of the German Civil Code. Based on the natural connection between principles and exceptions, German legislators incidentally stipulated the principle of res judicata relativity. On the one hand, res judicata relativity was a self-evident principle in German law. Friedrich Stein, a scholar who greatly influenced the German Code of Civil Procedure, once said:

Due to the establishment of the res judicata system, the state must endure the risk of court errors (understood as erroneous judgments) still having binding force. If the res judicata system is established for convincing reasons of public interest and if the principle of self-responsibility of the parties justifies the risk of the res judicata system, the result is that res judicata can only bind parties who have participated in the litigation.⁸⁸

- 56 On the other hand, there is a practical need to break res judicata relativity. These rules are considered exceptions to the principle of res judicata relativity, justified by specific reasons that legislators need to formalize into legislative provisions. As stated in the legislative rationale for Art 325 of the German Code of Civil Procedure:⁸⁹

⁸⁶ H Bienhold, *Ueber die Grenzen der subjektiven Rechtskraft nach der neuen Civilprozessordnung und dem Bürgerlichen Gesetzbuch* (Culemann 1899) 11.

⁸⁷ L von Seuffert, *Civilprozessordnung für das Deutsche Reich: nebst dem Einführungsgesetze vom 30. Januar 1877* (1st edn, C.H. Beck 1879) § 293 ZPO, 361 Übersicht I; L Gaupp und F Stein, *Die Civilprozeßordnung für das Deutsche Reich* (vol 1, 3rd edn, Mohr 1898) § 293 CPO, 652 Anm. V.4.

⁸⁸ F Stein, *Die Zivilprozeßordnung für das Deutsche Reich* (vol 1, 4th edn, Mohr 1902) § 325 ZPO, 730 Anm. I.

⁸⁹ *Begründung der Entwürfe eines Gesetzes betreffend Aenderungen des Gerichtsverfassungsgesetzes und der Strafprozessordnung sowie eines Gesetzes betreffend Aenderungen der Civilprozessordnung und eines zugehörigen Einführungsgesetzes* (Explanatory statement for the drafts of a law on amendments to the Judicial Constitution Act and the Code of Criminal Procedure as well as a law on amendments to the Code of Civil Procedure and an associated introductory law), 1897 Reichstagsvorlage (legislative proposal of the parliament 1897), p 49-50.

Similar to Art 293d and 293e, Art 293c concerns which persons are bound by a judgment with res judicata. Currently (in 1897), this relationship is mainly regulated by state laws (local regulations). Given its relationship with this issue and the Civil Code, it is necessary for imperial law to regulate it.

- 57 This indicates that German legislators viewed the justification for res judicata expansion as primarily arising from substantive civil law, necessitating explicit regulation during the amendment of the German Code of Civil Procedure. In fact, the specific provisions regarding res judicata expansion in the German Code of Civil Procedure are closely tied to substantive civil law, such as those concerning the binding effect on successors in rights and bona fide acquirers. In conclusion, German legislative provisions did not establish res judicata relativity, nor did they transition from absolute to relative res judicata. Instead, the legislative focus was on integrating local regulations regarding res judicata expansion.
- 58 Compared to German law, Japanese law development shows similarities but also reflects the special trajectory of legal reception. Like the 1877 German Code of Civil Procedure, the 1890 Japanese Code of Civil Procedure did not specify the subjective scope of res judicata but only addressed the objective scope in Art 244.⁹⁰ As Rolf Stürner has noted, the 1890 Japanese Code of Civil Procedure was, to a considerable extent, a literal translation of the 1877 German Code of Civil Procedure.⁹¹ This is also confirmed by the legislative process. As Japanese scholar Hiroyuki Matsumoto has pointed out, the final draft that became the 1890 Japanese Code of Civil Procedure was submitted in the form of 'a translation of the 1877 German Code of Civil Procedure'.⁹² Since Art 325 of the German Code of Civil Procedure was not explicitly introduced until 1898, and there was no normative basis for legislative reception at the time, this likely explains why res judicata relativity was not included in the 1890 Japanese Code of Civil Procedure.
- 59 Although the 1890 Japanese Code of Civil Procedure did not contain explicit provisions regarding the subjective aspect of res judicata, Japanese law introduced res judicata

⁹⁰ The specific content of Art 244 of the 1890 Japanese Code of Civil Procedure is: 'The res judicata effect of a judgment is confined to the scope of its operative provisions.'

⁹¹ R Stürner, 'Gegenstand und Formen der Rezeption im neueren Prozessrecht' in Institute of Comparative Law Waseda University (ed), *Recht in Ost und West* (Waseda UP 1988) 288.

⁹² Matsumoto H, 'Die Rezeption des detuschen Zivilprozessrechts in der Meiji-Zeit und die weitere Entwicklung des japanischen Zivilprozessrechts bis zum Zweiten Weltkrieg' (2007) 120(1) *Zeitschrift für Zivilprozess* 3, 20.

relativity through legal doctrine.⁹³ Similar to German law, the main controversy in Japanese law concerned the specific scope of res judicata expansion. At that time, Japan's highest judicial institution strictly adhered to res judicata relativity, considering that judgments only bind the parties and their general successors in rights (such as heirs), but do not extend to the parties' specific successors in rights (such as purchasers of the subject matter of the litigation).⁹⁴ To clarify the specific scope of res judicata expansion, Japanese legislators, referring to Art 325 of the German Code of Civil Procedure, added provisions regarding the subjective scope of res judicata in 1926, which became Art 201 of the 1926 Japanese Code of Civil Procedure. In 1996, Japanese legislators slightly adjusted the wording of Art 201 (without changing its substance) and incorporated it into the new law as Art 115, which remains in effect today.⁹⁵ Therefore, Japanese legislative provisions regarding res judicata relativity did not establish the principle itself but aimed to define norms surrounding its expansion and specific scope.

4.3.2 Res Judicata Relativity as an 'Unwritten Principle'

- 60 Like the Chinese Civil Procedure Law, neither the Austrian Code of Civil Procedure nor the Swiss Code of Civil Procedure explicitly establishes res judicata relativity.⁹⁶ However, unlike the interpretation of the Chinese Civil Procedure Law by Chinese courts, both the judicial systems⁹⁷ and legal doctrines⁹⁸ in Austria and Switzerland regard res

⁹³ N Masutaro, *Principles of Civil Procedure Law* (Volume Middle Volume, Yuhikaku, Mizuno, Kingkodo, 1908) 568-569; S Ichiro, *Principles of Civil Procedure Law* (26th edn, Meiji UP 1922) 343-344.

⁹⁴ T Ueda, 'Das Spannungsverhältnis zwischen der Rechtssicherheit und der Gewährleistung der prozessualen Stellung Dritter im Hinblick auf die Erstreckung der Urteilstwirkungen – Erstreckung der Rechtskraft, Reflexwirkung und Interventionswirkung' in G Baumgärtel (ed), *Grundprobleme des Zivilprozessrechts* (vol 1, Vollkommer 1976) 195.

⁹⁵ The specific content of Art 115 of the current Japanese Code of Civil Procedure is: 'A final and binding judgment is effective for the following persons: (i) the parties; (ii) a person for whose benefit a party has become a plaintiff or defendant; (iii) successors of the persons listed in the preceding two items, after the conclusion of oral arguments; (iv) persons who possess the object of the claim for the benefit of the persons listed in the preceding three items. (Para 1) The provisions of the preceding paragraph apply mutatis mutandis to the declaration of provisional execution. (Para 2)'.

⁹⁶ W H Rechberger und D A Simotta, *Grundriss des österreichischen Zivilprozessrechts* (9 edn, Manz 2017) 550 para 957; S Baumgartner, A Dolge, A R Markus and K Spühler, *Schweizerisches Zivilprozessrecht* (10th edn, Stämpfli 2018) 187 para 198 (Chapter 7).

⁹⁷ OGH 1 Ob 318/75, SZ 48/142, Judgment 22 December 1975; *i.S. Evers & Co. v Bank für Handel und Effekten (AG)*, BGE 93 II 329 E. 3b (Federal Court, Germany), Judgment 26 September 1967, 333.

⁹⁸ G E Kodek und P G Mayr, *Zivilprozessrecht* (5 edn, Facultas 2021) 344 para 922; A Staehelin, D Staehelin und P Grolimund, *Zivilprozessrecht* (3 edn, Schulthess 2019) § 24, 480 para 15.

judicata relativity as an integral part of their respective civil procedure laws. All three countries belong to the group of codified law nations, where legislative enactments hold primary importance as legal sources. The status of res judicata relativity in Austrian and Swiss law can provide useful evidence for China's comparative law: even in the absence of explicit legislative provisions, res judicata relativity can still be considered an integral part of the Chinese Civil Procedure Law and serve as a legal constraint on judicial authorities.

- 61 The current Austrian Code of Civil Procedure originates from the Austrian Code of Civil Procedure of 1895. During the drafting process of the 1895 Code, both Art 428 of the 1893 'Government Draft'⁹⁹ and Art 412 of the 1894 'Standing Committee Draft'¹⁰⁰ explicitly established res judicata relativity. According to these two identical drafts, res judicata only binds the parties and their successors in rights (paragraph 1), and only binds third parties in cases of special legal provisions (paragraph 2). However, the 1895 'Plenary Draft' intentionally removed the mentioned provisions,¹⁰¹ not because res judicata relativity was denied, but due to concerns that an incomplete enumeration of res judicata expansion might undermine the law and its application.¹⁰² Although there are no explicit legislative provisions, this does not prevent res judicata relativity from becoming an 'unwritten basic rule' (ungeschriebener Grundsatz) of Austrian civil procedure law.¹⁰³ Similar to the argument regarding Chinese law, the legal status of res judicata relativity in Austrian law also derives from fundamental principles and systems such as the principle of debate and the right to be heard.¹⁰⁴
- 62 Switzerland, unlike Austria, did not enact a unified Code of Civil Procedure applicable to all federal states until 2008, which notably lacks detailed specifications regarding the

⁹⁹ Bundesministerium für Justiz (Federal Ministry of Justice), *Materialien zu den neuen österreichischen Zivilprozessgesetzen* (vol I, Manz 1897) 158.

¹⁰⁰ Bundesministerium für Justiz (Federal Ministry of Justice), *Materialien zu den neuen österreichischen Zivilprozessgesetzen* (vol I, Manz 1897) 940.

¹⁰¹ Bundesministerium für Justiz (Federal Ministry of Justice), *Materialien zu den neuen österreichischen Zivilprozessgesetzen* (vol II, Manz 1897) 488.

¹⁰² Bundesministerium für Justiz (Federal Ministry of Justice), *Materialien zu den neuen österreichischen Zivilprozessgesetzen* (vol II, Manz 1897) 323.

¹⁰³ T Klicka, in A Konecny (ed), *Kommentar zu den Zivilprozessgesetzen* (vol 3.2, 3rd edn, Manz 2018) § 411, 257 para 102.

¹⁰⁴ W H Rechberger und T Klicka, '§ 390' in W H Rechberger und T Klicka (ed), *ZPO*, (5 edn, Verlag Österreich 2019) 1518 para 27; C Brenn, '§ 411 ZPO' in J Höllwerth und H Ziehensack (ed), *ZPO Taschenkommentar* (1st edn, LexisNexis 2019) 1583 para 41.

scope of res judicata.¹⁰⁵ In comparison, the Austrian Code of Civil Procedure still provides for the objective scope of res judicata in its Art 411. Thus, at the legislative level, the Swiss Code of Civil Procedure and the Chinese Civil Procedure Law are similar, as neither explicitly establishes the entire res judicata system (including its operation, and objective, subjective, and temporal scopes). During the enactment of the Swiss Code of Civil Procedure, although there were opportunities to codify the res judicata system,¹⁰⁶ Swiss legislators deliberately chose not to, instead granting judicial systems and legal doctrines the power to shape the specific content of the res judicata system.¹⁰⁷ In conclusion, despite the absence of explicit provisions regarding the entire res judicata system, res judicata relativity remains an implicit rule of Swiss civil procedure law, with scholarly and practical efforts focused solely on the specific scope of res judicata expansion.¹⁰⁸

4.4 Contradictory Judgments

4.4.1 *The Essential Nature of Civil Litigation*

- 63 In Chinese judicial practice, strict measures are in place to prevent contradictory judgments, typically addressed through retrial proceedings where one judgment is annulled, or both are merged into a new judgment.¹⁰⁹ As scholars have noted, ‘Chinese courts have a very low tolerance for contradictory judgments’.¹¹⁰ However, the relativity of res judicata is the institutional basis and theoretical foundation for producing contradictory judgments. According to the relativity of res judicata, third parties are generally not bound by res judicata. Even when res judicata applies between

¹⁰⁵ *Schweizerische Zivilprozessordnung vom 19. Dezember 2008* (Swiss Code of Civil Procedure of 19 December 2008).

¹⁰⁶ The reasons why Swiss legislators can codify the res judicata system are twofold. Firstly, relevant judicial practices and doctrines have matured. Whether it is the mode of operation of res judicata or the objective, subjective, and temporal limitations of res judicata, there are corresponding established theories to support them. Secondly, the res judicata system is generally explicitly provided for in cantonal legislation in Switzerland. For example, Art 191(1) of the Zurich Civil Procedure Code of 1976 stipulates: ‘Between the parties or their successors in rights, with regard to rights or obligations already adjudicated, the orders or confirmations in the operative part of the judgment bind subsequent actions in the courts.’

¹⁰⁷ *Botschaft zur Schweizerischen Zivilprozessordnung (ZPO) vom 28. Juni 2006* (Message on the Swiss Code of Civil Procedure (SCCP) of 28 June 2006), BBl 2006, 7221, 7345.

¹⁰⁸ Baumgartner, Dolge, Markus and Spühler (n 96) 193 para 232 (Chapter 7).

¹⁰⁹ Wu and Shen (n 70).

¹¹⁰ Wu (n 70) 156.

parties, third parties remain free to initiate new litigation (separate actions). Due to third parties introducing new facts and legal arguments in these separate actions, contradictory judgments are inevitable. If contradictory judgments are considered a byproduct of the relativity of *res judicata*, then, apart from the absence of explicit provisions in the Chinese Civil Procedure Law, the reason Chinese courts do not recognize the relativity of *res judicata* is also their inability to tolerate the contradictory judgments that the relativity of *res judicata* would tacitly permit at the institutional and legal levels.

- 64 Contradictory judgments under the relativity of *res judicata* are termed so because they reach mutually contradictory conclusions about substantive legal relationships. For example, in a lawsuit between parties A and B, a judgment might confirm A as the owner, while in a lawsuit between parties C and B concerning the same object, the judgment might confirm C as the owner, thus contradicting the principle of ‘one object, one ownership’. Similarly, in a lawsuit between parties D and E, a judgment might confirm that E owes D a sum of money, but in a subsequent lawsuit involving parties F, D, and E, another judgment might confirm that E does not owe D this sum, presenting entirely opposite conclusions regarding the same substantive legal relationship. However, the issue lies in the fact that these procedural conclusions, although contradictory from the perspective of substantive law, conform to the essential nature of civil litigation.
- 65 As detailed in the following section, the framework of civil litigation between ‘two parties’ and the principle of debate in the Chinese Civil Procedure Law determine that judgments are only conclusions for specific scenarios. If we consider that judgments do not fully reflect the entire substantive legal relationship but are directly influenced and constrained by the parties’ facts and legal assertions, we can recognize that contradictory judgments precisely meet the requirement of being ‘based on facts’ as stipulated in Art 7 of the Chinese Civil Procedure Law. Of course, the facts serving as the basis for the judgment must be specific to the case and established through legally prescribed procedures, grounded in evidence, rather than general facts extending beyond the case at hand.¹¹¹

4.4.2 No Contradictory Legal Relationships

- 66 Although contradictory judgments under the relativity of *res judicata* render conflicting determinations regarding substantive legal relationships, they do not create

¹¹¹ S M Wang (ed), *Interpretation of the Civil Procedure Law of the People’s Republic of China* (Law Press 2012) 10.

contradictory substantive and procedural legal relationships. This is based on two reasons. First, because procedural res judicata theory is implemented, judgments do not alter substantive legal relationships; hence, contradictory judgments do not create contradictory substantive legal relationships. In contrast, early substantive res judicata theory held that judgment results must be consistent with substantive legal relationships.¹¹² Correct judgments confirm substantive legal relationships, while incorrect judgments alter them.¹¹³ If a judgment confirms a non-existent substantive right, it creates it; if a judgment denies an existing substantive right, it extinguishes it.¹¹⁴ According to substantive res judicata theory, contradictory judgments would create contradictory substantive legal relationships. For example, if a judgment confirms A's ownership in a lawsuit against B, it will confer A with ownership status under substantive law. If another judgment confirms C's ownership in a separate lawsuit against B concerning the same object, it will also confer C with ownership status, violating the 'one object, one ownership' principle. However, according to procedural res judicata theory, courts render judgments only on procedural matters, and these judgments do not alter substantive legal relationships. They merely prevent subsequent courts from issuing judgments that conflict with previous ones. Thus, contradictory judgments are simply different conclusions reached by the court on the same substantive legal relationship.

- 67 Second, the principle of res judicata relativity limits the binding effect of judgment to the parties involved, ensuring that contradictory judgments do not generate conflicting procedural legal relationships. For example, under the relativity of res judicata, a judgment confirming ownership in a lawsuit brought by A against B indicates that the court has ruled in favour of A being the owner in the dispute between A and B. Similarly, a judgment confirming ownership in a lawsuit brought by C against B concerning the same object indicates that the court has ruled in favour of C being the owner in the dispute between C and B. This principle operates similarly to how two valid sales contracts for the same object can both be valid under the 'one object, two sales' scenario: two contradictory judgments that only bind the parties involved do not create a conflict in procedural law.

¹¹² I Saenger, § 322 ZPO' in I Saenger (ed), *Zivilprozessordnung, Handkommentar* (9th edn, Nomos 2021) para 9.

¹¹³ P Gottwald, '§ 322 ZPO' in W Krüger und T Raucher (ed), *Münchener Kommentar zur Zivilprozessordnung* (vol 1, 6 edn, C.H. Beck 2020) para 7.

¹¹⁴ L Rosenberg, K H Schwab and P Gottwald, *Zivilprozessrecht* (18 edn, C.H. Beck 2018) § 152,933 para 3.

4.4.3 No Contradictory Enforcement

- 68 Contradictory judgments ultimately reach opposing conclusions regarding substantive legal relationships. If such contradictory judgments create factual or legal obstacles for the true holders of rights, they may prompt negative evaluations by the courts. To prevent the occurrence of contradictory judgments, courts might prohibit third parties from initiating separate actions. Once contradictory judgments have been made, courts may require modifications or revocations of the original judgments to resolve the contradictions. This approach ultimately influences how courts accept and apply the principle of *res judicata* relativity.
- 69 In fact, contradictory judgments under the relativity of *res judicata* do not create obstacles to the realization of rights for true right holders, nor do they lead to conflicting enforcement measures. For example, if both A and C sue B for the return of property based on ownership claims, and both obtain judgments in their favour, the true owner (C) can still secure possession of the property regardless of B's compliance or enforcement measures. Specifically, if B has already complied or been enforced, and A has obtained possession of the property, C can seek possession by suing A for the return of the property. If enforcement against B is ongoing or imminent, C can object to A's claim as a third party under Art 238 of the Chinese Civil Procedure Law, thereby preventing enforcement against B. Additionally, if B still holds the disputed property, C can apply for enforcement directly against B.
- 70 Consider another example: if A transfers property to C, whether the transfer is legitimate or fraudulent, to avoid debts owed to B, B can either challenge A's legitimate transfer to C under Art 539 of the Chinese Civil Code or claim that A's fraudulent transfer is invalid under Art 146(1) of the Chinese Civil Code. If C sues A and obtains a favourable judgment against A, and C subsequently applies for enforcement against A, B can invoke Art 535(1) of the Chinese Civil Code to stand in for A and object to the enforcement.¹¹⁵ This allows B to block enforcement against A. Once China recognizes or establishes the action of enforcement debtor objections (like Art 767 of the German Code of Civil Procedure), B can even seek defensive judicial protection to prevent C from initiating enforcement proceedings against A.¹¹⁶ If A has already complied or been enforced, C can use the rights granted by Art 539 and 542 of the Chinese Civil Code to recover the property

¹¹⁵ Y Jin, 'Influence of Litigation and Execution on Creditor's Right of Revocation' (2020) 11 *Law Science* 35, 48-50.

¹¹⁶ Y Jin, 'On the Necessity of the Debtor's Objection Lawsuit—Focusing on the Special Function of Defensive Judicial Protection' (2019) 7 *Law Science* 54, 59-60.

transferred to C and use it to satisfy A's debts. These mechanisms ensure that contradictory judgments do not hinder the rights of true owners or result in conflicting enforcement outcomes, thereby preserving the integrity of legal remedies under Chinese law.

- 71 In conclusion, the civil litigation and enforcement relief system based on the relativity of *res judicata* effectively protects the rights of true substantive right holders. As outlined above, compared to third-party revocation actions or retrial procedures under absolute *res judicata*, the right to initiate separate actions granted to third parties under the relativity of *res judicata* provides a superior mechanism for safeguarding substantive rights and ensuring procedural fairness.

4.4.4 *The Legitimacy of Contradictory Judgments*

- 72 While Chinese courts oppose the occurrence of contradictory judgments,¹¹⁷ the Chinese Civil Procedure Law acknowledges their legitimacy, with Art 59(1) serving as its normative basis. This provision states that third parties with independent claims 'have the right to bring lawsuits', conferring upon them the choice to either participate in existing litigation or initiate separate actions. This right to initiate separate actions is both a theoretical consensus¹¹⁸ and a practical reality: 'If the court invites them to participate in the lawsuit *ex officio*, they have the right to choose to participate as a third party with independent claims or to bring separate actions as plaintiffs in other courts.'¹¹⁹ Since third parties with independent claims neither agree with the plaintiff's nor the defendant's claims,¹²⁰ based on their independent substantive rights to the disputed object,¹²¹ contradictory judgments are an inevitable result of their independent actions. Thus, Art 59(1) of the Chinese Civil Procedure Law reflects the legislature's acceptance of contradictory judgments arising from the actions of third parties with independent claims.

¹¹⁷ Lin (n 70).

¹¹⁸ W J Tang (ed), *Civil Procedure Law* (2nd edn, Peking UP 2014) 136; W Jiang (ed), *Civil Procedure Law* (5th edn, Higher Education Press 2016) 116; Y X Wang, H P Chen and J B Liu, *Key Lectures on Chinese Civil Procedure Law* (2nd edn, Higher Education Press 2021) 215.

¹¹⁹ High People's Court of Xinjiang Uygur Autonomous Region, Civil Ruling 1880/2021; High People's Court of Hunan Province, Civil Judgment 607/2020; High People's Court of Guizhou Province, Civil Ruling 2752/2017.

¹²⁰ Wang (n 111) 117.

¹²¹ Supreme People's Court, Civil Judgment 746/2021; Supreme People's Court, Civil Ruling 40/2020; Supreme People's Court, Civil Judgment 826/2019.

4.4.5 Retrial and Contradictory Judgments

- 73 The Chinese Civil Procedure Law traditionally uses retrials to eliminate contradictory judgments. This raises the question: Does the retrial procedure outlined in Chapter 16 of the Law reflect an intent to eliminate such contradictions? If so, this approach may conflict with the principle of relative *res judicata*. The issue of addressing contradictory judgments through retrials primarily concerns the grounds for retrial. Contradictory judgments result in mutually exclusive conclusions about substantive legal relationships. In other words, in cases of contradictory judgments, at least one judgment's confirmation of a substantive legal relationship will be inconsistent with the true substantive legal relationship. The question then becomes: Does this inconsistency constitute grounds for retrial?
- 74 According to Art 209 of the Chinese Civil Procedure Law, when a court initiates a retrial *ex officio*, the original effective judgment must be 'clearly erroneous'. When a party applies for a retrial, the case must meet one of the 13 retrial grounds listed in Art 211 of the Chinese Civil Procedure Law. Furthermore, under Art 219 of the Chinese Civil Procedure Law, when a retrial is initiated by the procuratorate's protest or proposal, it must either meet one of the 13 retrial grounds listed in Art 211 or demonstrate that the original effective judgment harmed state or public interests.
- 75 As previously mentioned, in line with the essential nature of civil litigation—to avoid creating contradictory substantive and procedural legal relationships and to prevent conflicting enforcement—it is difficult to categorize such cases as 'clearly erroneous' judgments. Since retrials are intended to correct miscarriages of justice, the grounds for retrial primarily focus on rectifying serious procedural flaws, such as the failure to cross-examine major evidence, the illegal composition of trial organizations, the unlawful deprivation of the parties' right to debate, or judgments made in *absentia* without proper summons.
- 76 In fact, under the predominant structure of civil litigation and the principle of debate in the Chinese Civil Procedure Law, judgments that confirm substantive legal relationships may not fully reflect the true substantive legal relationships. If mere inconsistency were enough to constitute a retrial ground, the retrial procedure could risk becoming paralyzed. Therefore, contradictory judgments should be regarded as a neutral concept, distinct from erroneous judgments. The separate action right within ordinary litigation procedures is sufficient to protect the substantive legal status of third parties. The retrial procedure, which should be initiated with caution, neither needs to nor should address the issue of contradictory judgments.

4.5 The Structure and Principles of Civil Procedure Law

- 77 The existence of explicit provisions regarding the relativity of res judicata in a country or region's civil procedure law does not definitively determine whether that jurisdiction recognizes the concept, even among civil law countries. As previously mentioned, contradictory judgments under relative res judicata not only reflect the essential nature of civil litigation but have also been affirmed by the Chinese Civil Procedure Law. The argument that the relativity of res judicata does not exist in the Chinese Civil Procedure Law due to the absence of explicit provisions and the prohibition of contradictory judgments is untenable.
- 78 Thus, in the absence of explicit legal provisions, should judgments under the Chinese Civil Procedure Law bind only the parties involved (relative res judicata), or should they bind everyone (absolute res judicata)? Essentially, this question involves interpreting the Chinese Civil Procedure Law. Relative and absolute res judicata are rules with clear distinctions, but they are mutually exclusive. This issue of interpretation can be concretely framed as determining which rule aligns with the overall system of the Chinese Civil Procedure Law. In fact, relative res judicata aligns with the structure of civil litigation, as well as the fundamental principles and systems of the Chinese Civil Procedure Law, while absolute res judicata conflicts with it.

4.5.1 Res Judicata Relativity as the Logical Starting Point

- 79 Res judicata, as a legal mechanism for the final resolution of disputes, functions by binding certain subjects—typically the parties to the judgment—to its conclusion. When determining who is bound by res judicata, a natural distinction arises: those who participate in the determination of the judgment should be bound by it, while those who do not participate should not be. Under the relative procedural framework of civil litigation and the principle of debate in the Chinese Civil Procedure Law, judgments are primarily determined by the parties involved, and thus those parties should be bound by res judicata. Conversely, judgments determined by the parties do not reflect the substantive legal status of non-parties, and therefore non-parties should not be bound by res judicata.
- 80 In civil litigation, whether the dispute concerns specific legal relationships (such as monetary claims) or absolute legal relationships (such as ownership), a relative structure of the 'two parties' exists. For instance, although ownership in substance has erga omnes effects, actions concerning ownership confirmation or recovery still occur between specific parties, resulting in a relative tripartite legal relationship (plaintiff, defendant, and court). However, both absolute and relative substantive legal relationships affect

interests beyond the parties involved. Absolute legal relationships aside, relative legal relationships also impact interested parties outside the legal relationship's subjects. For example, whether Party A has a monetary claim against Party B directly affects the interests of Party A's creditor, Party C. According to Art 535 of the Civil Code, if Party A fails to exercise its rights against Party B, Party C may, under certain conditions, exercise Party A's rights against Party B. Additionally, according to Art 538 of the Civil Code, if Party A renounces its rights against Party B, Party C can revoke Party A's act. This demonstrates that third parties still have legal interests in relative legal relationships, and the law may grant third parties the right to intervene directly in relative legal relationships under certain conditions. Considering these factors, it becomes clear that the 'two parties' structure of relative litigation cannot fully reflect the entirety of substantive legal relationships involving all parties, especially the substantive legal status of non-participating non-parties. Judgments between parties derived from a relative structure naturally should not bind non-parties.

- 81 Art 12 and 13(2) of the Chinese Civil Procedure Law also establish the principles of debate. Under this principle, the parties are the masters of civil litigation. Firstly, according to Art 123 and 122(3) of the Chinese Civil Procedure Law, the initiation of litigation procedures and the subject matter of court trials (claims) are determined by the parties. Secondly, according to Art 67(1) of the Chinese Civil Procedure Law, the evidence on which facts rely is primarily provided by the parties, and the facts on which judgments are based are mainly determined by the parties. Thirdly, according to Art 148, 171, 180, and 206 of the Chinese Civil Procedure Law, parties can also determine the course of litigation through actions such as withdrawal of claims, appeals, withdrawal of appeals, and applications for retrial. Finally, according to Art 53 and 54 of the Chinese Civil Procedure Law, parties can directly influence the judgment by reconciliation, admission, or abandonment of claims. These provisions demonstrate that judgments between parties do not even reflect the true substantive legal relationships between parties, but merely reflect the specific claims asserted by the parties' substantive legal relationships.
- 82 Under the 'two parties' structure of civil litigation and the principle of debate in the Chinese Civil Procedure Law, judgments between parties are specific results determined by the parties, rather than reflecting the objective and real substantive legal relationships.¹²² The constraint of judgments only on parties is a natural conclusion. Therefore, if a country or region's civil procedure law adopts a relative 'two parties'

¹²² See C Althammer, § 325 ZPO' in R Bork und H Roth (ed), *Stein/Jonas, Kommentar zur Zivilprozessordnung* (vol 4, 23rd edn, Mohr Siebeck 2018) para 2.

structure and is governed by the principles of debate, the relativity of res judicata should be the logical starting point of the civil procedure law of that country or region: unless there are exceptional legitimate reasons, res judicata should only bind the parties.¹²³

4.5.2 Res Judicata Relativity as a Minimum Standard

- 83 Res judicata refers to the binding force of judgment results. For the subjects bound by it, res judicata generally represents a legal burden. Judgments unfavourable to one party naturally impose a burden, while those favourable to one party and unfavourable to another also impose a burden on the latter. To justify this legal burden, adequate procedural safeguards should be provided for the subjects bound by res judicata.¹²⁴
- 84 According to Art 52 of the Chinese Civil Procedure Law, procedural safeguards apply throughout the entire process of civil litigation and enforcement, including aspects such as appointing agents, filing recusal applications, collecting and providing evidence, conducting debates, requesting mediation, filing appeals, and applying for enforcement. The principle of procedural safeguards not only legitimizes the binding force of judgments on the parties but also provides defense for non-parties not bound by res judicata. On one hand, parties receive sufficient procedural safeguards during the litigation process, and to finally resolve disputes between parties, parties should be bound by judgment results. On the other hand, non-parties do not receive corresponding procedural safeguards and thus should not be bound by judgment results. If res judicata were absolute, judgment results would bind non-parties as well, which would essentially be a judgment in absentia without a summons, a practice that seriously violates the principle of procedural safeguards (see Art 207(10) of the Chinese Civil Procedure Law).
- 85 Furthermore, according to Art 2 and 8 of the Chinese Civil Procedure Law, protecting the litigation rights of civil litigation subjects is the task of the Chinese Civil Procedure Law, and the principle of equal litigation rights for litigation subjects is a fundamental principle of the Chinese Civil Procedure Law. Parties and non-parties receive entirely different levels of procedural safeguards, and binding judgment results on non-parties not only hinder the realization of the tasks of the Chinese Civil Procedure Law but also violate the principle of equal litigation rights for litigation subjects. Finally, when

¹²³ P Gottwald, § 325 ZPO' in W Krüger und T Raucher (ed), *Münchener Kommentar zur Zivilprozessordnung* (vol 1, 6th edn, C.H. Beck 2020) para 1; M Ito, *Civil Procedure Law* (YJ Cao tr, 4th edn, Peking UP 2019) 372-273.

¹²⁴ See Lin (n 70) 132.

interpreting the Chinese Civil Procedure Law, the principle of equality should be followed, namely to treat equals equally, unequals unequally, and similar cases appropriately modified.¹²⁵ Based on the different litigation statuses of non-parties and parties, non-parties and parties should be treated differently when determining the scope of subjects bound by judgment results. In summary, judgment results between parties should not bind non-parties as a minimum standard of procedural safeguards.

4.5.3 *Res Judicata Relativity as the Optimal Option*

- 86 According to Art 2 of the Chinese Civil Procedure Law, protecting the civil rights of civil subjects is also a task of the Chinese Civil Procedure Law. The attitudes of *res judicata*, whether relative or absolute, towards parties are consistent: judgment results bind parties. The difference lies in the procedural protection of substantive rights for non-parties. If *res judicata* is relative, non-parties have the right to maintain their substantive rights through separate actions. If *res judicata* is absolute, non-parties can only maintain their substantive rights by modifying or revoking the original judgment. So, which approach is more advantageous for protecting the substantive rights of non-parties? If separate actions are more favourable for protecting the substantive rights of non-parties, then relative *res judicata* should be considered the interpretive conclusion of the Chinese Civil Procedure Law because it is more conducive to achieving the objectives of the Chinese Civil Procedure Law. Conversely, the reverse is true.
- 87 In fact, comparing separate actions and the requirements for third-party revocation lawsuits stipulated in Art 59(3) of the Chinese Civil Procedure Law reveals that separate actions are more favourable for protecting the substantive rights of non-parties. Firstly, compared to separate actions, third-party revocation lawsuits have additional subjective requirements such as ‘due to reasons beyond one’s control, one did not participate in the litigation’. This means that once a third party knows or should know of ongoing litigation, they should participate; otherwise, they will lose the right to file a third-party revocation lawsuit. Secondly, compared to separate actions, third-party revocation lawsuits also have additional temporal requirements. For example, if a non-party has the right to maintain their ownership through separate actions, their right to file a normal lawsuit has no time limit. If a non-party is required to maintain their ownership through a third-party revocation lawsuit, they can only file a lawsuit within ‘six months from the date on which they knew or should have known that their civil rights were infringed’. Thirdly, compared to separate actions, third-party revocation lawsuits also have

¹²⁵ R Stürner, ‘Die Rolle des dogmatischen Denkens im Zivilprozessrecht’ (2014) 127 (3) *Zeitschrift für Zivilprozess* 271, 276.

additional restrictions such as ‘but there is evidence to prove’. This ‘moderate substantive review’¹²⁶ existing at the time of filing a lawsuit indicates that third-party revocation lawsuits have higher procedural requirements than separate actions. As mentioned earlier, the potential contradictory judgments arising from separate actions do not create conflicting substantive or procedural legal relationships, nor do they lead to conflicting compulsory enforcement. The civil litigation and enforcement relief system based on the relativity of *res judicata* is fully capable of handling the effectiveness and compulsory enforcement issues of the original effective judgment. Concerns about separate actions not addressing the legal effect of the original effective judgment are unnecessary.¹²⁷

- 88 The conclusion that separate actions based on the relativity of *res judicata* are more favourable for protecting the substantive rights of non-parties also helps us to reconsider the legal policy of ‘holding the wrongdoer accountable’. Regarding ‘holding the wrongdoer accountable’, the viewpoint of Chinese courts is representative: ‘All judgments with clear errors are corrected, and the way to correct them has always been through retrial procedures.’¹²⁸ This indicates two points: first, Chinese courts ‘do not recognize the relative effectiveness of judgments’.¹²⁹ Second, Chinese courts tend to protect the substantive rights of non-parties by changing or revoking the original judgment. In comparison, the conscious relativity of *res judicata* limits the binding force of judgment results to the parties involved, thereby directly preventing erroneous judgments from being made at the source. From this perspective, compared to the absoluteness of *res judicata* that acknowledges mistakes, the relativity of *res judicata*, which avoids making mistakes, is an expected conclusion for better safeguarding the substantive rights of non-parties. As scholars have said, ‘in terms of protecting the rights of third parties, the principle of the relativity of *res judicata* is the most stringent’.¹³⁰

4.6 Lessons for Chinese Law

- 89 The historical development of the relativity of *res judicata* in the continental legal system has two implications for Chinese law. First, it is inappropriate to simply compare Chinese law with German, Japanese, or other statutory laws and conclude that ‘China does not

¹²⁶ W P Zhang, *Civil Procedure Law* (5th edn, Law Press 2019) 419.

¹²⁷ Wang (n 111) 121.

¹²⁸ Wu and Shen (n 70).

¹²⁹ Lin (n 70) 131.

¹³⁰ See X Z Liu, ‘Some Reflections on the Third-Party Revocation Lawsuit’ (2014) 11 *Research on Civil Procedure Law* 65, 68.

recognize the relativity of *res judicata* solely based on the absence of explicit statutory provisions. Second, the historical development of the relativity of *res judicata* in Germany, Japan, Austria, and Switzerland can provide evidence for the assumption that the Chinese Civil Procedure Law may incorporate the relativity of *res judicata* as a component. On one hand, like the pre-1898 German Civil Procedure Law, the pre-1926 Japanese Civil Procedure Law, and the current Austrian and Swiss Civil Procedure Laws, the Chinese Civil Procedure Law does not explicitly stipulate the relativity of *res judicata*. On the other hand, the relativity of *res judicata* is an integral part of the pre-1898 German Civil Procedure Law, the pre-1926 Japanese Civil Procedure Law, and the current Austrian and Swiss Civil Procedure Laws. Because the structure, system, fundamental principles, and regulations of the Chinese Civil Procedure Law do not substantially differ from those of the pre-amendment German law, Japanese law, and current Austrian and Swiss laws, then even without explicit statutory provisions, the relativity of *res judicata* may still be considered a component of the Chinese Civil Procedure Law.

5 CONCLUSION

- 90 Res judicata is a widely accepted principle across judicial systems. It plays a crucial role in civil procedure laws by promoting public interests, conserving judicial resources, and protecting individuals from repeated litigation. Historically, there has been a noticeable trend towards broadening its scope. First, as the concept of cause of action expands, the range of prior judgments that prevent subsequent lawsuits also increases. Second, more judicial systems are recognizing the binding effect of prior judgments' determinations on reasoning and facts, even in cases involving different causes of action. Both continental and Anglo-American legal systems generally agree that *res judicata* applies only to the parties directly involved in the case, with third parties being bound only in rare and exceptional cases. However, the Chinese law's stance—that *res judicata* binds all individuals—stems from a misinterpretation of comparative law and an excessive concern with avoiding contradictory judgments.

ABBREVIATIONS AND ACRONYMS

Art	Article/Articles
ATCCP	Code of Civil Procedure (Austria)
BBl	Bundesblatt (Switzerland)
Ch	Chapter
ed	editor
edn	edition
p	page
para	paragraph
PRC	People's Republic of China
tr	translated
UP	University Press
vol	volume
ZPO	Zivilprozessordnung

LEGISLATION**International/Supranational**

ELI-UNIDROIT Model European Rules of Civil Procedure

Principles of Transnational Civil Procedure

National

Allgemeine Gerichtsordnung für die Preußischen Staaten

Austrian Code of Civil Procedure (Zivilprozessordnung, Gesetz vom 1. August 1895)

Federal Rules of Civil Procedure

French Civil Code (Code civil)

German Code of Civil Procedure (Zivilprozessordnung)

Italian Civil Code (Codice civile)

Japanese Code of Civil Procedure (民事訴訟法)

South Korean Code of Civil Procedure (민사소송법)

Swiss Code of Civil Procedure (Schweizerische Zivilprozessordnung)

The Chinese Civil Procedure Law (中华人民共和国民事诉讼法)

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