Objective scope of *res judicata* of arbitral awards – Is there room for discretion?[1]

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1. Introduction

The principle of *res judicata* implies that a judgment or arbitral award is final and binding and thus deploys conclusive and preclusive effects in relation to subsequent proceedings.[3]

It is one of the legal concepts regularly encountered in international arbitration, for which civil and common law traditions offer significantly diverging approaches. This is notably true with respect to the objective scope of *res judicata*, i.e. the extent to which the various elements of a specific decision constitute a final and binding adjudication.[4] Given the specificity of international arbitration and its independence from national civil procedure laws, arbitral tribunals seem to be particularly exposed to the different ideas existing on the matter.[5]

With respect to procedures conducted before arbitral tribunals seated in Switzerland, the Swiss Federal Tribunal had the opportunity to address various issues touching upon the extent of *res judicata* in its landmark decision DFT 141 III 229[6] rendered on 29 May 2015 (also known as the "US law firm decision").

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1 This article is partly based on a speech held by Niklaus Zaugg at the ASA/ArbAut/LIS Dreiländer-Konferenz in Schaan on 30 September 2016.

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3 DFT 4A_568/2013 of 16 April 2014 cons. 2.2.

4 N. Zaugg, Verfahrensgliederung in der internationalen Schiedsgerichtsbarkeit – Wirkungsweise von Teil- und Zwischenschiedssprüchen unter dem 12. Kapitel IPRG, 2014, N 310 et seqq.

5 This article is confined to the discussion of the objective scope of *res judicata* of foreign arbitral awards in subsequent arbitral proceedings pending before an arbitral tribunal seated in Switzerland.

6 DFT 4A_633/2014 (141 III 229) of 29 May 2015, ASA Bulletin 3/2015, 599 et seqq.

2. The US law firm decision of the Swiss Federal Tribunal

2.1 The facts

In the US law firm case, a US law firm and an attorney practising in Germany had entered into a contract labelled as Business Combination Agreement ("BCA").

Pursuant to sections 5.2 and 5.3, as well as schedule 5 of the BCA, the US law firm was required to pay to the German attorney a yearly floor amount of EUR 2 million provided that the German attorney "*devot[ed] his/her full time and efforts to the business of [the US law firm] going forward consistent with his/her past practices and concentrations as a partner of [the German law firm], which is to be considered based on a holistic approach taking into consideration all relevant aspects (…), including, among others, billable and total hours, availability, vacation, quality of work, turn-over from billable hours, general market conditions in a specific industry and potential effects of the business combination contemplated herein, it being understood that no single aspect alone shall be decisive and that it will be taken into account to which extent these factors are under the control of the respective […] Partner [of the German law firm]*."[7]

In April 2010, the German attorney initiated arbitral proceedings against the US law firm before an arbitral tribunal seated in Frankfurt.[8] In these proceedings, the German attorney claimed, *inter alia*, the payment of the difference between the yearly floor amounts of EUR 2 million and the amounts effectively received from the US law firm for the years 2009 and 2010. The arbitral tribunal dismissed the German attorney's claim. It held that the floor amounts were contingent upon the German attorney having fulfilled the prerequisites relating to activities, devotion and performance as provided for in section 5.3 of the BCA. As the German attorney had not fulfilled these conditions, he was, in the view of the arbitral tribunal, not entitled to the yearly floor amounts for 2009 and 2010.[9]

In April 2013, the German attorney commenced a second arbitration, this time before an arbitral tribunal seated in Zurich. In these proceedings, he requested from the US law firm the difference between the yearly floor amounts of EUR 2 million and the amounts actually received for the years

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7 DFT 4A_633/2014 (141 III 229) of 29 May 2015, ASA Bulletin 3/2015, 599, sec. A.b.

8 The parties had agreed to shift the place of arbitration from Zurich – as provided for by the arbitration clause contained in the BCA – to Frankfurt: DFT 4A_633/2014 (141 III 229) of 29 May 2015, ASA Bulletin 3/2015, 600, sec. A.c.

9 DFT 4A_633/2014 (141 III 229) of 29 May 2015, ASA Bulletin 3/2015, 600, sec. A.c.

2011 and 2012. The Zurich tribunal did not consider itself to be bound by the reasoning contained in the award issued by the Frankfurt tribunal. The Zurich tribunal argued that, although the German attorney had not met the expectations with respect to "billable and total hours" and "turn-over from billable hours", the majority of the criteria stipulated in section 5.3 of the BCA had been fulfilled. Against this background, and in light of the "holistic approach" provided for in section 5.3 of the BCA, the Zurich tribunal upheld the German attorney's claim as a matter of principle and issued a corresponding award in September 2014.[10]

Against this award, the US law firm filed an appeal before the Federal Tribunal. The US law firm maintained that the Zurich tribunal had violated procedural public policy pursuant to Article 190(2)(e) of the Swiss Private International Law Act ("PILA") because it had wrongfully disregarded the *res judicata* effect of the Frankfurt award.

2.2 The main findings of the Federal Tribunal

Confronted with the US law firm's plea of violation of public policy, the Federal Tribunal in the first place confirmed its previous case law according to which the disregard of the *res judicata* effect of a previous arbitral award by an arbitral tribunal seated in Switzerland constitutes a violation of procedural public policy pursuant to Article 190(2)(e) PILA.[11] Hence, an arbitral tribunal seated in Switzerland may expose its award to annulment if the *res judicata* effect of a previous award has not been respected.[12] However, the Federal Tribunal made clear that such risk exists only if the foreign award can be recognised in Switzerland, pursuant to Article 194 PILA, in connection with Article V of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[13] In the case at hand, there was no reason to reject the recognition of the Frankfurt award in Switzerland.

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10 DFT 4A_633/2014 (141 III 229) of 29 May 2015, ASA Bulletin 3/2015, 601, sec. B. The arbitral tribunal nevertheless reduced the *quantum* of the German attorney's claim due to his contributory negligence: DFT 4A_633/2014 (141 III 229) of 29 May 2015, ASA Bulletin 3/2015, 601, sec. B.

11 DFT 4A_633/2014 (141 III 229) of 29 May 2015, ASA Bulletin 3/2015, 607, cons. 3.2.1; DFT 4A_508/2013 (140 III 278) of 27 May 2014, ASA Bulletin 4/2015, 869, cons. 3.1.

12 B. Berger, No Force of Res Judicata for an Award's Underlying Reasoning, ASA Bulletin 3/2015, 654.

13 DFT 4A_633/2014 (141 III 229) of 29 May 2015, ASA Bulletin 3/2015, 608, cons. 3.2.2; DFT 4A_508/2013 (140 III 278) of 27 May 2014, ASA Bulletin 4/2015, 869 et seq., cons. 3.1.

As a next step, the Federal Tribunal had to determine the applicable law to assess the extent of the *res judicata* effect of the Frankfurt award. In this context, the Federal Tribunal referred to its previously established concept of the *controlled transfer of a foreign award's effects* ("kontrollierte Wirkungsübernahme"). This principle takes into account that the *res judicata* effect originates from the foreign arbitral award. It can, therefore, not be attributed more extensive effects in Switzerland than it deploys in the jurisdiction of its origin.[14] Hence, the effects of the foreign award are, as a first step, "transferred" to Switzerland. Yet, such transfer is "controlled" by the idea that the impact of a foreign award cannot go beyond the effects of an identical decision hypothetically rendered in Switzerland.[15] According to the Federal Tribunal, the *res judicata* effect of a foreign award is, therefore, to be determined, in a second step, on the basis of the Swiss *lex fori*.[16]

The statutory Swiss *lex fori* and *lex arbitri* are both silent on the (objective) scope of *res judicata*. However, in its constant case law, the Federal Tribunal has held that arbitral awards have the same effect as binding and enforceable judicial decisions.[17] Accordingly, in the view of the Federal Tribunal, the *res judicata* effect of both court judgments and arbitral awards is confined to their operative (or dispositive) part.[18] The reasons of a respective decision are exempted from *res judicata*.[19] They may be consulted solely in order to determine the extent of the dispositive part of an award.[20]

On the basis of these findings, the Federal Tribunal pointed out that neither the US law firm nor the German attorney had incorporated into their prayers for relief the issue of how to correctly interpret the disputed BCA

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14 DFT 4A_633/2014 (141 III 229) of 29 May 2015, ASA Bulletin 3/2015, 609, cons. 3.2.3.

15 DFT 4A_633/2014 (141 III 229) of 29 May 2015, ASA Bulletin 3/2015, 609, cons. 3.2.3.

16 DFT 4A_633/2014 (141 III 229) of 29 May 2015, ASA Bulletin 3/2015, 609, cons. 3.2.3; DFT 4A_508/2013 (140 III 278) of 27 May 2014, ASA Bulletin 4/2015, 871, cons. 3.3; DFT 4A_374/2014 of 26 February 2015, ASA Bulletin 3/2015, 589 et seq., cons. 4.2.2; DFT 4A_508/2010 of 14 February 2011, ASA Bulletin 1/2012, 117, cons. 3.3.

17 DFT 4A_633/2014 (141 III 229) of 29 May 2015, ASA Bulletin 3/2015, 610, cons. 3.2.4; DFT 4A_374/2014 of 26 February 2015, ASA Bulletin 3/2015, 587, cons. 4.2.1; DFT 128 III 191, 195 cons. 4a.

18 DFT 4A_633/2014 (141 III 229) of 29 May 2015, ASA Bulletin 3/2015, 610, cons. 3.2.4; DFT 128 III 191, 195 cons. 4a.

19 DFT 4A_633/2014 (141 III 229) of 29 May 2015, ASA Bulletin 3/2015, 610, cons. 3.2.4; DFT 128 III 191, 195 cons. 4a. With respect to (potential) exceptions to this principle cf. D. Summermatter/A. Sidiropoulos, Rechtskraft und Rechtsschutzinteresse bei Teilklage und negativer Feststellungswiderklage: oder: darfs ein bisschen mehr sein?, HAVE 2013, 229 et seq.

20 DFT 4A_633/2014 (141 III 229) of 29 May 2015, ASA Bulletin 3/2015, 610 et seqq., cons. 3.2.4 and 3.2.6; DFT 128 III 191, 195 cons. 4a.

clause. As a consequence, this aspect was not considered by the Federal Tribunal to be a part of the *formal subject matter of the dispute* ("Streitgegenstand"), which delimits the scope of *res judicata* and is reflected in the dispositive part of an award. In the view of the Federal Tribunal, the Zurich tribunal did not, therefore, violate procedural public policy (Article 190(2)(e) PILA) when it decided the matter based on its own interpretation of the BCA clause.[21] Rather, according to the Federal Tribunal, it would have amounted to a violation of public policy if the Zurich tribunal had wrongfully considered itself bound by the Frankfurt tribunal's interpretation of the disputed contract clause and, as a consequence, had refused to assess this aspect of the dispute on its own.[22]

3. The criticism of the Federal Tribunal's US law firm decision

3.1 Introductory remark

Some of the findings contained in the Federal Tribunal's US law firm decision have been criticised by legal scholars and arbitration practitioners. The main issues raised by the critics are briefly set out and commented on in the following paragraphs.

3.2 *Res judicata* and the concept of public policy pursuant to Article 190(2)(e) PILA

Several legal scholars have expressed doubt as to whether the concept of *res judicata* forms part of public policy, as reaffirmed by the Federal Tribunal in the US law firm decision.[23]

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21 DFT 4A_633/2014 (141 III 229) of 29 May 2015, ASA Bulletin 3/2015, 611 et seq., cons. 3.2.6.

22 DFT 4A_633/2014 (141 III 229) of 29 May 2015, ASA Bulletin 3/2015, 611 et seq., cons. 3.2.6.

23 S. Schaffstein, The doctrine of *res judicata* before international commercial arbitral tribunals, 2016, N 6.237 and N 4.71 with reference to the French *lex arbitri*; Ch. Söderlund, Lis Pendens, Res Judicata and the Issue of Parallel Judicial Proceedings, Journal of International Arbitration 2005, 304; B. Hanotiau, Quelques réflexions à propos de l'autorité de chose jugée des sentences arbitrales, in Liber Amicorum Lucien Simont, 2002, 303. Cf. also the International Law Association, Final Report on Res Judicata and Arbitration, Toronto Conference (2006), Arbitration International 2009, 81.

Indeed, when considering the principle of *res judicata* in a public policy context, one should bear in mind that an important point of reference in capturing the contents of public policy pursuant to Article 190(2)(e) PILA are the fundamental principles of legal and moral nature known in all civilised nations.[24] Against this background, it is hard to argue that all deviations from the (narrow) Swiss notion of *res judicata*, even if they do not bring into question the core of *res judicata* as such, should be considered incompatible with such fundamental principles.[25]

Hence, public policy considerations should indeed be confined to the core purpose of the principle of *res judicata*, which is to create legal security and ensure procedural efficiency.[26] They should, therefore, not *per se* bar arbitral tribunals seated in Switzerland from applying another, potentially more comprehensive *res judicata* concept on prior arbitral awards.

3.3 The Swiss *lex fori* and the arbitrating parties' expectations

Under the assumption that public policy does not dictate adherence to the narrow Swiss concept of *res judicata*, its application and the Federal Tribunal's respective reference to the Swiss *lex fori* have also been considered inadequate for international arbitration.[27]

It is argued that the *lex fori* should not at all come into play in the context of international arbitration proceedings.[28] Moreover, it is held that the "Swiss approach" to *res judicata* does not sufficiently bar the parties from re-arbitrating matters that, although not appearing in the operative part of a previous award, have necessarily been dealt with as preliminary issues. This is

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24 DFT 4P.278/2005 (132 III 389) of 8 March 2006, ASA Bulletin 3/2006, 554, cons. 2.2.2; DFT 128 III 234, 243 cons. 4c.

25 N. Voser/J.Raneda, Recent Developments on the Doctrine of *Res Judicata* in International Arbitration from a Swiss Perspective: A Call for a Harmonized Solution, ASA Bulletin 4/2015, 776 et seq. By contrast, B. Berger, op.cit., 654, points out that, pursuant to the case law of the Federal Tribunal, the notion of public policy according to Art. 190(2)(e) PILA is also subject to the "sensitivities and the essential values" of our national civilisation, "where certain values are favoured over others"; cf. DFT 4P.278/2005 (132 III 389) of 8 March 2006, ASA Bulletin 3/2006, 554, cons. 2.2.2.

26 N. Voser/J.Raneda, op.cit., 742.

27 N. Erk, Parallel Proceedings in International Arbitration: A Comparative European Perspective, 2014, 167; Ch. Seraglini, Le droit applicable à l'autorité de la chose jugée dans l'arbitrage, Revue de l'arbitrage 1/2016, 65; S. Schaffstein, op.cit., N 4.191.

28 N. Voser/J.Raneda, op.cit., 765 et seq.

perceived as not sufficiently accommodating the arbitrating parties' expectation of a comprehensive and thus efficient resolution of their dispute.[29]

It is true that, due to the specificity of international arbitration, there is no room for the Swiss *lex fori* in the sense of codified Swiss civil procedure law to directly apply to international arbitration proceedings conducted before arbitral tribunals seated in Switzerland.[30] The Federal Tribunal's reference to the *lex fori,* therefore, seems to be somewhat infelicitous. However, nothing prevents the Federal Tribunal from taking into account principles of domestic law when filling a gap in the provisions of chapter 12 PILA.

This seems to be all the more justified as, from the arbitrating parties' perspective, a uniformly extensive scope of *res judicata* does not seem to be compelling:

Whilst in a majority of cases the parties may wish to have their matter adjudicated in a comprehensive manner, there may be other party interests to which a narrow understanding of *res judicata* is more advantageous. For instance, it is easier for parties and arbitral tribunals confronted with a previous award to identify its scope of *res judicata* if it is clearly indicated by the award's operative part.[31] Accordingly, such restrictive approach is less prone to new controversies over the exact extent of the objective scope of *res judicata*.[32] Likewise, under a narrow *res judicata* understanding, the parties are unlikely to be taken by surprise by the unexpected *res judicata* effect relating to issues to which they did not attach any particular attention in the first proceedings.[33] Rather, the parties

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29 G. Born, International Commercial Arbitration, 2014, 3743 et seqq.; N. Erk, op.cit. 167; S. Schaffstein, op.cit., N 4.04 et seq., N 4.193 and N 5.114.

30 D. Hochstrasser/S. Fuchs in Basler Kommentar IPRG, 2013, N 132 of the introduction to chapter 12 of the PILA.

31 P. Mayer, L'autorité de chose jugée des sentences entre les parties, Revue de l'arbitrage, 1/2016, 105; P. Oberhammer in Kurzkommentar ZPO, 2014, N 53 in relation to Art. 236 ZPO; W.J. Habscheid, Die Rechtskraft nach schweizerischem Zivilprozessrecht, SJZ 1978, 205; A. Zeuner/H. Koch, Effects of Judgments (Res Judicata): Chapter 9 in International Encyclopedia of Comparative Law, Volume XVI: Civil Procedure, 2012, N 9-103.

32 P. Oberhammer, op.cit., N 53 in relation to Art. 236 ZPO.

33 P. Oberhammer, op.cit., N 53 in relation to Art. 236 ZPO; D. Schwander, Die objektive Reichweite der materiellen Rechtskraft – Ausgewählte Probleme: Ein Beitrag zum Verhältnis von materiellem Recht und Zivilprozessrecht, 2002, 6; S. Rüetschi, Vorfragen im schweizerischen Zivilprozess, 2011, N 356; E. Schumann, Die Zwischenfeststellungsklage als Institut zwischen Prozessrecht und materiellem Recht, in Festschrift für Apostolos Georgiades zum 70. Geburtstag, 2006, 547 et seq.; W. Grunsky, Rechtskraft von Entscheidungsgründen und Beschwer, ZZP 1963, 175; A. Zeuner, Die objektiven Grenzen der Rechtskraft im Rahmen rechtlicher Sinnzusammenhänge: Zur

remain in full charge of deciding what aspect of a dispute they wish to have finally adjudicated, and at what point in time.[34]

As a result, there may well be cases in which the parties have a legitimate interest in following the Federal Tribunal's approach to *res judicata* and having such effect confined to the operative part of an arbitral award.

3.4 *Res judicata* and transnational principles

The different views and domestic concepts on the objective scope of *res judicata* have repeatedly triggered a call for the application of internationally harmonised standards. Some authors have advocated the elaboration of transnational *res judicata* rules based on the arbitrating parties' expectations.[35]

To this end, the International Law Association ("ILA") has established certain cornerstones relating to *res judicata,* which are deemed to properly reflect the arbitrating parties' concern of having their disputes arbitrated in an efficient and comprehensive manner.[36] In recommendation 4 of the ILA Recommendations, it is stipulated that arbitral awards should have "conclusive and preclusive effects in the further arbitral proceedings as to […] determinations and relief contained in its dispositive part as well as in all reasoning necessary thereto."[37] In the same recommendation, it is held that *res judicata* should cover "issues of fact or law which have actually been arbitrated and determined by [the arbitral tribunal], provided any such determination was essential or fundamental to the dispositive part of the arbitral award." Hence, the transnational approach suggested by the

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Lehre über das Verhältnis von Rechtskraft und Entscheidungsgründen im Zivilprozess, 1959, 43; A. Zeuner/H. Koch, op.cit., N 9-102.

34 L. Droese, Res iudicata ius facit – Untersuchung über die objektiven und zeitlichen Grenzen von Rechtskraft im schweizerischen Zivilprozessrecht, 2015, 419 et seq. Cf. also Ch. Poncet/L. Mockler, Res Judicata: A Contribution to the Debate on Claim Preclusion in International Arbitration, in Liber Amicorum en l'honneur de William Laurence Craig, 2016, 324.

35 B. Berger/F. Kellerhals, International and Domestic Arbitration in Switzerland, 2014, N 1671; N. Voser/J.Raneda, op.cit., 774 et seq.; S. Schaffstein, op.cit., N 6.139 et seqq. and N 6.228; G. Born, op.cit., 3769 and 3771.

36 International Law Association, Final Report on Res Judicata and Arbitration, Toronto Conference (2006), Arbitration International 2009, 67 et seqq. ("ILA Final Report").

37 International Law Association, Resolution No. 1/2006, Annex 2: International Law Association Recommendations on Res Judicata and Arbitration available at http://www.ila-hq.org ("ILA Recommendations").

ILA by and large reflects the broad *res judicata* concept known in common law jurisdictions as *issue estoppel* or *collateral estoppel* doctrines.[38]

However, the principles elaborated by private bodies, such as the ILA, do not have any immediate authority on arbitral tribunals.[39] This holds true at least for as long as such transnational rules on procedural issues do not reflect a broadly acknowledged *best practice*.[40] The reality shows that the fundamental gap between the civil law and the common law traditions still stands in the way of a broadly acceptable transnational concept of *res judicata*.[41] The respective discrepancies have neither been bridged by the ILA Recommendations[42] nor any other concept, which could be regarded as international *best practice*.[43]

It is to be assumed that the Federal Tribunal took into account this lack of international consensus in the US law firm decision. It expressed the view that the concerns addressed by the ILA recommendations, and other transnational unification attempts, do not justify the abolishment of its well-established practice on the *controlled transfer of a foreign award's effects*.[44]

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38 A. Sheppard, Res judicata and estoppel, in Parallel State and Arbitral Procedures in International Arbitration, 2005, 224 et seq. and 227; Ch. Seraglini, op.cit., 70 and 74.

39 DFT 4A_633/2014 (141 III 229) of 29 May 2015, ASA Bulletin 3/2015, 611, cons. 3.2.5; M. Stacher, The Authority of Para-Regulatory Texts, in ASA Special Series No. 37: The Sense and Non-sense of Guidelines, Rules, and other Para-regulatory Texts in International Arbitration, 2015, 113, 119 et seq. and 125.

40 Cf. N. Voser, Best Practices: What has been achieved and what remains to be done?, in ASA Special Series No. 26: Best Practices in International Arbitration, 2006, 2 and 6; B. Gottlieb, Authority of Para-Regulatory Texts in International Arbitration, in Selected Papers on International Arbitration, Volume 2, 2012, 54.

41 Ch. Seraglini, op.cit., 53, 68 and 69 et seq.; G. Born, op.cit., 3740; B. Berger/F. Kellerhals, op.cit., N 1671 seem to take a different view.

42 N. Voser/J.Raneda, op.cit., 774.

43 N. Zaugg, op.cit., N 339; Ch. Seraglini, op.cit., 71 and 73. In order to be considered *best practice*, transnational rules are notably required to be regarded as the "best" solution by leading arbitration practitioners from different legal backgrounds: N. Voser, op.cit., 2 and 6; B. Gottlieb, op.cit., 54.

44 DFT 4A_633/2014 (141 III 229) of 29 May 2015, ASA Bulletin 3/2015, 611, cons. 3.2.5.

4. Should arbitral tribunals seated in Switzerland be entitled to discretionarily determine the objective scope of *res judicata*?

4.1 The call for a discretionary power of arbitral tribunals

Given the lack of a pertinent *best practice* and the interest of numerous arbitrating parties in having their disputes resolved comprehensively, some scholars opine that arbitral tribunals seated in Switzerland should be empowered to discretionarily determine the extent of *res judicata* of a foreign award.[45]

Res judicata being regarded as an issue of procedural law, it is held that the respective power of discretion is part of the arbitral tribunals' entitlement to shape the proceedings in the absence of a respective agreement of the parties (Article 182(2) PILA).[46] When doing so, arbitral tribunals are expected to take into account the parties' expectations and the legal traditions involved in the specific arbitration.[47]

The following section will address the question of whether the legal framework provided by chapter 12 PILA leaves any room for arbitral tribunals seated in Switzerland to deal with the issue of *res judicata* as they deem fit.

4.2 Is there room for a discretionary power of arbitral tribunals?

Article 182(2) PILA empowers arbitral tribunals to shape the arbitral proceedings by way of *procedural orders*.[48] This type of decision is subject to reconsideration by the arbitral tribunal.[49] By contrast, its competence to finally decide upon preliminary issues, such as the admissibility of a claim, originates from the parties' agreement to arbitrate and the arbitral tribunal's relating empowerment to decide upon the dispute in the form of an award.[50]

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45 N. Voser/J.Raneda, op.cit., 776.

46 N. Voser/J.Raneda, op.cit., 766; L.G. Radicati di Brozolo, Res judicata, in ASA Special Series No. 38, 2011, 136; N. Erk, op.cit., 167.

47 N. Voser/J.Raneda, op.cit., 769; S. Schaffstein, op.cit., N 5.112.

48 M.E. Schneider/M. Scherer in Basler Kommentar IPRG, 2013, N 41 in relation to Art. 182 PILA; cf. also Ch. Poncet/L. Mockler, op.cit., 319.

49 B. Berger/F. Kellerhals, op.cit., N 1113.

50 N. Zaugg, op.cit., N 253 et seqq.; S. Schaffstein, op.cit., N 5.74. Cf. with respect to the admissibility of declaratory relief in international arbitration St. Leimgruber, Die negative

The absence of a previous and binding adjudication on a matter identical to the one submitted to the (second) arbitral tribunal is generally considered a condition of admissibility.[51] As a result, Article 182(2) PILA does not provide for a valid entry point for arbitral tribunals to bindingly determine the scope of *res judicata* of a previous award as they consider best.[52]

Neither does an arbitral tribunal's power of discretion in determining the objective scope of the *res judicata* effect of a previous award seem to fit into the further structure of chapter 12 PILA. Whilst it is true that arbitral tribunals should not be prevented from taking a flexible approach to the issue of *res judicata* for public policy considerations (Article 190(2)(e) PILA), they should be reluctant in doing so due to another ground for annulment set out in Article 190(2) PILA. The principle of *ne eat iudex ultra petita* (Article 190(2)(c) PILA) implies that an arbitral tribunal seated in Switzerland is prohibited from issuing a decision – with *res judicata* effect – which would go beyond the *claims* submitted to it.[53] The reference to "demandes"[54] in the authoritative French version of Article 190(2)(c) PILA[55] implies that *res judicata* can attach only to what the parties have *claimed* in their *formal prayers for relief*. Hence, if an arbitral tribunal's findings on preliminary matters, which were not made the object of the parties' prayers for relief, were suddenly awarded *res judicata* effect in Switzerland, it would seem to be inconsistent with the idea that the parties should not be confronted with any non-solicited final adjudications.[56, 57]

Feststellungsklage vor internationalen Schiedsgerichten mit Sitz in der Schweiz, 2013, N 297.

51 DFT 4A_508/2013 (140 III 278) of 27 May 2014, ASA Bulletin 4/2015, 871, cons. 3.1; Ch. Seraglini, op.cit., 57 et seq.

52 Cf. also G. Born, op.cit., 3741.

53 A. Heini in Zürcher Kommentar IPRG, 2004, N 27 in relation to Art. 190 PILA; W.J. Habscheid, Schweizerisches Zivilprozess- und Gerichtsorganisationsrecht: Ein Lehrbuch seiner Grundlagen, 1990, N 535; W. Wiegand, Iura novit curia vs. ne ultra petita – Die Anfechtbarkeit von Schiedsgerichtsurteilen im Lichte der jüngsten Rechtsprechung des Bundesgerichts, in Festschrift für Franz Kellerhals zum 65. Geburtstag, 2005, 133 et seq.; P. Oberhammer, op.cit., N 53 in relation to Art. 236 ZPO.

54 By contrast, in the German and Italian versions of Article 190(2)(c) PILA reference is made to the seemingly broader term of "Streitpunkte" and "punti litigiosi".

55 DFT 116 II 639, 641 et seq., cons. 3a; G. Kaufmann-Kohler, Articles 190 et 191 LDIP: Les recours contre les sentences arbitrales, ASA Bulletin 1/1992, 72.

56 Cf. M. Kummer, Das Klagerecht und die materielle Rechtskraft im schweizerischen Recht, 1954, 114; J. Landbrecht, Teil-Sachentscheidungen und Ökonomie der Streitbeilegung, 2012, 96; Rüetschi, op.cit., N 99.

57 However, it is questionable whether such a second award rendered under chapter 12 PILA would be subject to annulment on the basis of Article 190(2)(c) PILA as the principle of *ne*

Finally, a power of discretion of arbitral tribunals in determining the scope of *res judicata* of previous awards would significantly hamper the evolution of a consistent and well-established practice in law. The issue of *res judicata* would thus not cease to imply considerable legal uncertainty.[58]

In light of the above, empowering arbitral tribunals to discretionarily determine the objective scope of *res judicata* would not seem to be the appropriate remedy to reconcile the different views and expectations arbitrating parties may have on the issue.

4.3 The approach suggested in this article

The missing discretion of arbitral tribunals in determining the objective scope of *res judicata* does not necessarily imply that parties, who wish to have their dispute settled in a comprehensive manner, are doomed to re-arbitrate all preliminary issues already addressed in a first arbitration. Rather, *de lege lata*, there is already a way for the parties to extend the objective scope of *res judicata*.

Both the German and the Austrian Civil Procedure Codes provide for the parties' entitlement to file prayers for declaratory relief covering preliminary issues, such as the validity of a contract or the principle of liability, in order to have such aspects adjudicated with *res judicata* effect. Such prejudicial declaratory relief is known as "Zwischenfeststellungsklage" in Germany and "Zwischenantrag auf Feststellung" in Austria.[59] The institute has been established by the German and Austrian legislators for the purpose of counterbalancing the potential downsides of the narrow *res judicata* concepts applicable in these jurisdictions.[60] Prejudicial declaratory relief may cover all preliminary issues potentially relevant in subsequent proceedings.[61] It is available to both claimants, in the form of an additional prayer for relief ("objektive Klagenhäufung"), and respondents, in the form of a counterclaim.[62] A specific interest ("Feststellungsinteresse") in obtaining

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eat iudex ultra petita seems to be directed only to the arbitral tribunal having issued the award in the first place.

58 Ch. Seraglini, op.cit., 62 and 65; N. Voser/J.Raneda, op.cit., 769; S. Schaffstein, op.cit., N 5.93.

59 § 256(2) ZPO (Germany) and § 236(1) ZPO (Austria).

60 D. Summermatter/A. Sidiropoulos, op.cit., 233 with further references. For a short overview of these institutes from a Swiss law perspective cf. N. Zaugg, op.cit., N 286 et seqq.

61 N. Zaugg, op.cit., N 286 et seqq. and N 291 et seqq. with further references to German and Austrian case law.

62 N. Zaugg, op.cit., N 287.

prejudicial declaratory relief is not required, as such condition is substituted by the criteria of the prejudicial nature of the preliminary issue to be determined by the court.[63]

For civil procedures conducted in Switzerland, the institute of prejudicial declaratory relief is not codified, but widely accepted among legal scholars.[64] Likewise, the Federal Tribunal has implicitly acknowledged its admissibility under certain circumstances.[65] In international arbitration, where the requirements for the admissibility of declaratory relief are generally lower than in civil procedures,[66] the availability of prejudicial declaratory relief seems to be all the more justified.[67]

In the US law firm case, the use of prejudicial declaratory relief would have allowed the US law firm to request in its prayers for relief that the Frankfurt tribunal declare the "billable and total hours" and "turnover from billable hours" conditions necessary for the German attorney's entitlement to the yearly floor amount. Accordingly, the respective decision of the Frankfurt tribunal would have become part of the *formal subject matter of the dispute* ("Streitgegenstand"), and it would most likely have appeared in the award's operative part. Hence, this aspect of the dispute would have been finally resolved even under a principally narrow understanding of *res judicata*. As a consequence, the Zurich tribunal would have been barred from reconsidering the Frankfurt tribunal's interpretation

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63 H. Roth in Stein/Jonas, Kommentar zur Zivilprozessordung, 2008, N 112 in relation to § 256 dZPO; J. Hager, Die Zulässigkeit der Zwischenfeststellungsklage, KTS – Zeitschrift für Insolvenzrecht, 1993, 41.

64 St. Berti, Zur materiellen Rechtskraft nach schweizerischem Zivilprozessrecht, in Verfahrensrecht am Beginn einer neuen Epoche: Festgabe zum Schweizerischen Juristentag 2011 – 150 Jahre Schweizerischer Juristenverein, 2011, 234 et seq.; W.J. Habscheid, op.cit., SJZ 1978, 205 et seq.; M. Guldener, Schweizerisches Zivilprozessrecht, 1979, 210; M. Kummer, op.cit., 53; D. Summermatter/A. Sidiropoulos, op.cit., 233.

65 DFT 84 II 685, 692 cons. 2; DFT 99 II 172, 174 cons. 2; DFT 2C_110/2008 of 3 April 2007 cons. 7; DFT 4A_589/2011 of 5 April 2012 cons. 4.1. However, in DFT 4A_438/2008 of 17 November 2008, ASA Bulletin 2/2011, 383 et seq., cons. 2.3, the Federal Tribunal has qualified a separate award on prejudicial declaratory relief as an interim award being deprived of any *res judicata* effect, without asking to what extent such decision may be significant beyond the pending proceedings. This triggers some doubts as to whether the Federal Tribunal generally accepts prejudicial declaratory relief as a remedy for the parties to determine the limits of *res judicata* of an arbitral award on their own. For a critical commentary on the respective case law cf. N. Zaugg, op.cit., N 266 et seqq.

66 St. Leimgruber, op.cit., N 433 et seqq. and N 440 et seqq.

67 N. Zaugg, op.cit., N 302 et seqq. and N 439 et seqq.; St. Leimgruber, op.cit., N 412 et seqq.

of the relevant clause of the BCA,[68] and the German attorney's claim would have been dismissed.

Hence, the criticised outcome in the US law firm case may have been prevented if the US law firm had made use of its power to extend the *res judicata* effect of the Frankfurt award by means of prejudicial declaratory relief.

5. Conclusion

Entitling arbitral tribunals to discretionarily extend the objective scope of *res judicata* of previous awards would truly accommodate the legitimate interest of many parties to have their disputes arbitrated in a comprehensive manner. However, such empowerment of arbitral tribunals not only conflicts with the statutory provisions of the Swiss *lex arbitri*, it also endangers the parties' need for legal certainty and, as the case may be, their interest to have certain aspects of their dispute omitted from a final adjudication.

Against this background, the request for arbitral tribunals to have discretionary powers to determine the scope of *res judicata* does not seem to be the appropriate remedy to circumvent the narrow Swiss concept of *res judicata* defended by the Federal Tribunal. Rather, as a starting point, the Federal Tribunal's concept of the *controlled transfer of a foreign award's effects* should be upheld. Only under this premise, the parties have the ability to autonomously decide what aspects of a dispute they want to have finally adjudicated, and at what point in time. Such needs may be addressed by each party through the shaping of their prayers for relief.

The approach advocated in this article adequately accommodates the parties' concerns to have their dispute adjudicated comprehensively and efficiently. At the same time, due to its compatibility with the Swiss *lex arbitri* and the practice of the Federal Tribunal, the extension of *res judicata* based on the parties' prayers for relief is rather unlikely to give rise to successful appeals before the Federal Tribunal.

Hence, there is indeed room for discretion with respect to the determination of the objective scope of *res judicata* of arbitral awards – but

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[68] This can also be derived from the Federal Tribunal's remark that, in the US law firm case, the interpretation of the contractual clause at issue had not itself been made a part of the *formal subject matter of the dispute* ("Streitgegenstand") on which the Frankfurt tribunal would have had to decide with *res judicata* effect: DFT 4A_633/2014 (141 III 229) of 29 May 2015, ASA Bulletin 3/2015, 611 et seq., cons. 3.2.6. Cf. also B. Berger, op.cit., 655.

it should be left entirely in the hands of the parties. It is only under such an approach that two of the most salient features of international arbitration – flexibility and the principle of party disposition – can be further reinforced.

Niklaus ZAUGG, *Objective scope of res judicata of arbitral awards – Is there room for discretion?*

Summary

In its landmark decision DFT 141 III 229 – also known as the "US law firm decision" –, the Swiss Federal Tribunal confirmed its previously established doctrine on the *controlled transfer of a foreign award's effects* ("Kontrollierte Wirkungsübernahme") when determining the objective scope of *res judicata* of a foreign arbitral award. The concept implies that the binding effect of a foreign award cannot go beyond the determinations contained in its operative (or dispositive) part.

Such narrow approach to *res judicata* has been criticised by various authors. It is considered inappropriate in the context of international arbitration because arbitrating parties ordinarily wish to have their disputes resolved in a comprehensive manner. Given the lack of any pertinent and authoritative transnational principles, it is further argued that arbitral tribunals should be vested with the power to discretionarily determine the scope of *res judicata* of a previous award. In doing so, arbitral tribunals are expected to notably take into account the legal traditions and the parties' expectations involved in a specific arbitration.

It is suggested by the author of this article that an arbitral tribunal's entitlement to discretionarily determine the objective scope of *res judicata* of a previous award not only conflicts with the provisions of the Swiss *lex arbitri* but also with the parties' need for legal certainty and, as the case may be, their interest to have certain aspects of a dispute omitted from a final adjudication. The legitimate interest of parties in having a dispute settled in a comprehensive manner should be addressed by enabling them to flexibly decide what aspects of a dispute they wish to submit to a final adjudication, and at what point in time. The respective intentions of the parties should be communicated to the arbitral tribunal by filing or abstaining from filing corresponding applications for *prejudicial declaratory relief*.