Chapter 8. Res Judicata and Estoppel

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Introduction

The topic of my paper is '*Res judicata* and estoppel' and I have been asked to address the following question:

> How should an arbitral tribunal respond when the same issue or dispute has already been decided by a national court or another arbitral tribunal?

This question follows on logically from the paper by Professor Vicuna on *lis pendens*, which is a question that arises when the same claim is, at the same time, being advanced, but remains undecided, before an arbitral tribunal and a national court, or before another tribunal. I am now looking at the position when an issue or a dispute had been decided in prior proceedings.

I am fortunate in being able to draw upon the work of the International Commercial Arbitration Committee of the International Law Association, (1) of which I am the Rapporteur, and, in particular, the contributions of its Chairman, Professor Filip De Ly, its previous Chairman Professor Pierre Mayer, (2) and one of its members, Professor Bernard Hanotiau. (3) That Committee was mandated to study and report on *res judicata* in arbitration, and presented an Interim Report on *res judicata* at the ILA's 71st Conference in Berlin in August 2004. This paper, however, represents my own personal observations and should not be attributed to the International Law Association or any of its members. (4)

There are a number of published awards that address questions of *res judicata*, (5) but there is limited guidance to arbitrators as to how they should respond to such questions.

After reviewing some of the potential situations where a party might want to rely upon a previous judgement or award, I will briefly summarise the doctrines of *res judicata* and estoppel, and I will then address how a tribunal might respond to an argument that it is bound to adopt a previous ruling on the law or the facts.

Potential Situations where *Res Judicata* Might be Argued

A party in arbitration proceedings might seek to rely upon a prior decision of a court or another arbitral tribunal in a number of situations. (6)

1 Between two arbitral tribunals

The same matter might arise, for example, in two different arbitrations between the same parties because, inter alia: (i) proceedings have been started under different alleged agreements but relating to the same legal relationship (*e.g.*, a battle of forms is a typical example of

such a situation); (ii) the parties have entered into a number of different agreements relating to the same project; (iii) one party argues in subsequent proceedings that a prior award did not exhaust the differences existing between the parties; (iv) an amendment to a claim or a counterclaim cannot be instituted before the constituted arbitral tribunal for whatever reason (*e.g.,* late filing) and the claimant (or the respondent) is forced to institute parallel arbitration proceedings; or (v) the terms of agreement(s) between the parties require more than one arbitration to be commenced (such as under some insurance policies).

Res judicata might also arise between two arbitral tribunals, but involving only one common party, such as in employer/contractor/subcontractor disputes, or in chain sales contracts.

2 Between state courts and arbitral tribunals

Res judicata questions seem to appear much more frequently between courts and tribunals than between different arbitral tribunals. [(7)] A party may institute parallel proceedings before state courts for legitimate reasons (*e.g.,* that party genuinely considers that there is no agreement to arbitrate) or for illegitimate reasons (*e.g.,* in order to frustrate the arbitration by, amongst other things, obtaining an anti-suit injunction preventing the arbitration from continuing and/or thereby attempting to ensure that any arbitral award will

not be enforced in that jurisdiction). The arbitral tribunal may have to consider the *res judicata* effect of the state court's decision on jurisdiction as well as any decision on the merits.

In addition, a party might have obtained a decision from a court on an ancillary question, such as whether a document is forged. There may have been a criminal prosecution relating to some aspect of the dispute.

Less sensationally, an administrative court or tribunal may have rendered a decision, for example on whether an agreement is anti-competitive.

3 Between a supranational court or tribunal and an arbitral tribunal

Increasingly, arbitral tribunals may have to have regard to the effects of prior decisions of supranational courts or tribunals.

This is particularly true in investment protection treaty cases. Questions of *res judicata* might arise because both the immediate investor and one or more of its parent companies may be entitled to bring claims against the host state based on the same alleged treaty violation (such as in the separate arbitrations brought against the Czech Republic by CME Czech Republic BV, under the Netherlands – Czech Republic Treaty, and its majority shareholder, Ronald Lauder, under the US – Czech Republic Treaty). Or several different investors may bring similar claims arising out of the same government measure (such as the multitude of claims presently being brought against Argentina). Or similar claims may be brought by the same or different parties asking for an identical interpretation to be given to similar treaty language (as occurred in the *SGS* v. *Pakistan*, and *SGS* v. *Philippines* cases). [(8)]

Arbitral tribunals may also have to have regard to relevant prior decisions of, for example, the European Court of Justice and the European Court of Human Rights.

Issues of Law and the Doctrine of Precedent

Let me deal briefly with issues of law.

Assuming that the parties have not agreed that the tribunal should decide *ex aequo et bono*, the tribunal must decide the dispute before it in accordance

with the governing law of the relationship between the parties. In contract disputes, that is generally the governing law of the contract. A tribunal must also apply any applicable mandatory laws.

While disregard of the law may not always be a ground for setting aside an award, tribunals are mandated to apply existing law and generally seek to do so as best they can.

Where the governing law is a Common Law system, one naturally expects an arbitral tribunal to apply relevant prior decisions of the courts of that legal system, because the law is articulated in such decisions (in addition to applicable legislation). The Common Law has a doctrine of *stare decisis*, [(9)] which does not apply to private arbitral tribunals, but nevertheless arbitral tribunals are expected to act as a first instance court and apply the law as enunciated by the House of Lords, Court of Appeal and previous High Court decisions.

Where the governing law is a Civil Law legal system, the tribunal might consider itself to be less influenced by prior court decisions and to have more freedom to construe and apply the applicable Civil Code. Nevertheless, a review of arbitral awards applying a Civil Law governing law shows that such arbitral tribunals generally pepper their awards with references to court decisions.

But in both legal systems, the prior decision of an arbitral tribunal on a question of law has no precedential value. [(10)] It might be that a tribunal follows a prior interpretation of the law found in a published award, but it will do so only because it finds that interpretation persuasive and not because it considers itself bound to do so.

On the international law plane, there are no domestic court decisions that can be relied upon – only decisions of supranational courts, such as the International Court of Justice, or, more commonly, awards of arbitral tribunals. But again, there is no *stare decisis* or precedent, and prior decisions are followed because the later tribunal finds them persuasive (or, at least, does not want to differ from the prior decision of an eminent international lawyer).

The effect of a prior interpretation of investment treaty wording arose in *SGS* v. *Philippines*. In a prior award, in a similar dispute – *SGS* v. *Pakistan* – the Tribunal had found that the treaty wording in the Switzerland – Pakistan Treaty excluded contract claims. The later Tribunal, in *SGS* v. *Philippines*,

was asked to adopt this interpretation of the Switzerland – Philippines Treaty. This was a question partly of law and partly of fact. The later Tribunal declined to adopt the same interpretation as the earlier Pakistan tribunal. The Philippines Tribunal said this: [(11)]

> "As will become clear, the present Tribunal does not in all respects agree with the conclusions reached by the *SGS* v. *Pakistan* Tribunal on issues of the interpretation of arguably similar language in the Swiss-Philippines BIT. This raises a question whether, nonetheless, the present Tribunal should defer to the answers given by the *SGS* v. *Pakistan* Tribunal. The ICSID Convention provides only that awards rendered under it are 'binding on the parties' (Art.53(1)), a provision which might be regarded as directed to the *res judicata* effect of awards rather than their impact as precedents in later cases. In the Tribunal's view, although different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the event it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and each Respondent State (see Schreuer, The ICSID Convention: A Commentary, at 1082). Moreover there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision. [footnote: Indeed there is no guarantee that ICSID decisions will be published: see ICSID Convention, Art.48(5).] There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals. It must be initially for the control mechanisms provided for under the BIT and the ICSID Convention, and in the longer term for the development of a common legal opinion or *jurisprudence constante*, to resolve the difficult legal questions discussed by the *SGS* v. *Pakistan Tribunal* and also in the present decision."

Similarly, another ICSID tribunal said: [(12)]

> "There has been much argument regarding recent cases, notably *SGS* v. *Pakistan* and *SGS* v. *Philippines*. However, this Tribunal is not called upon to sit in judgement on the views of other tribunals. It is only called to decide this dispute in the light of its specific facts and the law, beginning with the jurisdictional objections".

Returning to the fundamental question posed by the organisers of this conference (namely, how should an arbitral tribunal respond when the same legal issue has already been decided by a national court or another arbitral tribunal?), I would answer that the tribunal must seek to apply the law as decided by the national courts of the governing law but need only consider decisions of other tribunals.

Nevertheless, if a prior award is relevant, I would suggest that the later tribunal, as a matter of courtesy to the earlier tribunal and the party that seeks to rely on it, should explain why it disagrees, as the *SGS* v. *Philippines* tribunal did in its award.

Issues of Fact and *Res Judicata*

There is greater uncertainty concerning the effect of prior decisions of fact. And it is on questions of fact and the legal effects of facts that issues of *res judicata* and estoppel arise.

Before discussing how a tribunal should respond to these questions, I must briefly describe the doctrine and application of *res judicata*.

It is probably uncontroversial that the term *res judicata* refers to the general doctrine that an earlier and final adjudication by a court of competent jurisdiction is conclusive in subsequent proceedings involving the same object or relief, the same legal grounds and the same parties (the so-called 'triple-identity test').

Likewise, arbitral awards are generally regarded as having *res judicata* effect, to a greater or lesser extent. (13)

But the application of *res judicata* in Common Law countries and in Civil Law countries varies considerably, and it even varies in application amongst countries within the Common Law family, and amongst countries within the Civil Law family. I refer to the ILA Interim Report on *Res Judicata* for a more detailed review. (14)

1 English Common Law and the Pleas of Estoppel

The doctrine of *res judicata* is well established in case law in the English Common Law. (15)

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Res judicata, in the Common Law, is a rule of procedure, which – if accepted —has the effect of precluding the other party from contradicting the earlier determination in the later proceedings.

The *res judicata* effect of an earlier decision is raised by a party in subsequent proceedings by pleading: (16)

- cause of action estoppel; or
- issue estoppel.

Cause of action estoppel precludes a party from asserting a particular cause of action which has been rejected in an earlier decision. Conversely, it precludes a party denying a cause of action that has been accepted in an earlier decision. For 'cause of action', one can also read 'claim'. (17)

There are five conditions to the application of cause of action estoppel: (1) same cause of action; (2) the same parties (or their privies); (3) previous decision by a court of competent jurisdiction; (4) the previous decision is final and conclusive and on the merits; and (5) there are no other special circumstances that should deny it application *(e.g.,* the prior court decision was in breach of agreement to arbitrate; a breach of natural justice; fraud; public policy; etc.).

Issue estoppel precludes a party in subsequent proceedings from contradicting an issue of fact or the legal consequences of a fact that has already been distinctly raised and finally decided in earlier proceedings.

The cause of action may be different, but the other same four conditions as for cause of action estoppel apply, save that not only must the issue be the same in the two proceedings, but it must have been an essential or necessary element in the cause of action or defence in the earlier proceedings. In addition, new facts may have more force in denying the application of issue estoppel than they would in denying the application of cause of action estoppel, but it must be shown that the further material which has become available is relevant to the correctness or incorrectness of the earlier finding, and could not by reasonable diligence have been adduced in the earlier proceedings.

Foreign judgements can have *res judicata* effect similar to domestic judgements. However, the foreign judgement must have *res judicata* effect at the place it was made; and, the judgement must first be recognised at the place it is being relied upon for it to have any preclusive effect there. (18)

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It is fundamental to the application of *res judicata* that the parties are the same or their privies. The 'parties' to English court proceedings are the specific individuals or entities appearing on the record of those proceedings. In limited circumstances, entities that are not named litigants will be treated as parties (*e.g.,* a joint tortfeasor who stands by and allows litigation to be conducted by other joint tortfeasors). There are three categories of 'privy' in English law: (1) privies in blood (such as ancestors or heirs); (2) privies in title (such as a person who succeeds to the rights or liabilities of a party upon insolvency); and (3) privies in interest (such as a trustee who sues on behalf of a beneficiary; a partner and his co-partner; but companies and their shareholders – even controlling shareholders – are generally considered not to be privies).

In addition, the principle of mutuality requires that each party (or their privies) to the subsequent proceedings must have been a party to the earlier proceedings, and must claim or defend in the subsequent proceedings in the same right as they claimed or defended in the earlier proceedings.

The rules of estoppel by *res judicata* are rules of evidence. As such, *res judicata* may be waived; nevertheless, the court may *ex officio* consider re-litigation of the same dispute by the same parties as an abuse of process and not allow it.

The rules described above apply to decisions *in personam*. A judgement *in rem* has for its primary object the determination of the title to property or status of a person, property or thing. The general rule is that, provided the prior court has jurisdiction over the *res*, the judgement *in rem* will be conclusive against all the world.

It has been held since at least 1783 that an arbitral award can justify a plea of cause of action and issue estoppel. (19) More recently (1965), Diplock LJ said: (20)

> "Issue estoppel applies to arbitration as it does to litigation. The parties, having chosen the tribunal to determine the disputes between them as to their legal rights and duties, are bound by the determination of that tribunal on any issue which is relevant to the decision of any dispute referred to that tribunal".

The same requirements apply to arbitral awards as to judgements: there must be a final award on the merits pronounced by a tribunal of competent jurisdiction; and the award must be recognised in England.

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2 United States Common Law

The doctrine of *res judicata* in the United States is generally similar to that in England, albeit that it does vary amongst States. A party to the prior judgement (or its privies) may raise the pleas of: (1) claim preclusion (*i.e.,* cause of action estoppel); (21) or (2) issue preclusion (*i.e.,* issue estoppel). (22)

Similar rules of privity generally apply to claim preclusion as apply in England, but mutuality is no longer a requirement for issue preclusion, so that in some circumstances issue preclusion may be pleaded by a third party to stop the other party from re-litigating issues that have been decided against it in prior proceedings (and even, in some limited circumstances, to preclude a third party from contesting an issue that has been decided in favour of the claimant in prior proceedings).

In general, a valid and final award by a competent arbitral tribunal has the same effects under the rules of *res judicata*, subject to the same exceptions and qualifications, as a judgement of a court. (23)

Thus, claim preclusion and issue preclusion apply in general with respect to prior arbitral awards. (24)

3 European Civil Law

In many European Civil Law jurisdictions, *res judicata* as it applies in domestic legal proceedings is codified. (25)

The Civil Law concept of *res judicata* is similar to the Common Law notions of cause of action estoppel or claim preclusion. However, there is no notion of issue estoppel or preclusion. This is because, generally, a more formalistic approach is taken and it is only the operative order of the court (the '*dispositif*') that has *res judicata* effect.

In France, (26) for example, the principle is referred to as '*autorité de la chose jugée*', and it is prescribed in legislation. Art.480 of the New Code of Civil Procedure states (in translation): (27)

> "The judgement which decides in its holdings all or part of the main issue, or one which rules upon the procedural plea, a plea seeking a peremptory declaration of inadmissibility or any other incidental application, shall from the time of its pronouncement, become *res judicata* with regard to the dispute which it determines."

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In addition, Art.1351 of the French Civil Code states (in translation):

> "The force of *res judicata* takes place only with respect to what was the subject matter of the decision. It is necessary that the thing claimed be the same; that the claim be based on the same grounds; that the claim be between the same parties and brought by them and against them in the same capacity."

In Civil Law countries, the *res judicata* effect of a foreign judgement is generally conditional upon recognition of that judgement in the *lex fori*.

Under the French model, and in most other Civil Law jurisdictions, identity of the parties is construed strictly. First, they must be the same, or their universal successors (such as in the case of a legal merger), or successors having a specific title (such as an assignee). Secondly, a party in parallel or subsequent proceedings must act in the same capacity.

The defence of *res judicata* is characterised as procedural and belonging to the *lex fori*.

In France and the Netherlands, a defence based on *'autorité de la chose jugée'* is to be raised by a party and not by a court on its own motion. Such a defence is also deemed to be waived if a party fails to raise it. Accordingly, *res judicata* is not generally considered part of public policy. [(28)] However, in Germany and Switzerland, the court may raise *res judicata ex officio*. [(29)]

Many Civil Law countries have also codified *res judicata* provisions regarding arbitral awards. [(30)] For example, Art.1476 of the French New Code of Civil Procedure states (in translation):

> "The arbitral award, from the moment that it has been given, shall carry the authority of *res judicata* in relation to the dispute which it has determined."

This provision also applies to 'awards made abroad or made in international arbitration' (per Art.1500 NCCP). [(31)]

4 International Law

As well as applying in national court proceedings, *res judicata* is a well-recognised principle of international law. [(32)]

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For example, the distinguished Tribunal in *Amco* v. *Indonesia* (Resubmission: Jurisdiction) [(33)] (1988), chaired by Judge Higgins, approved the formulation of the principle stated in the Orinoco Steamship Company case [(34)] (1910), as follows:

> "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and distinctly determined by a court of competent jurisdiction as a ground for recovery, cannot be disputed".

Likewise, the Tribunal in *Waste Management* v. *Mexico* [(35)] (2002), chaired by Professor Crawford, stated:

> "There is no doubt that *res judicata* is a principle of international law, and even a general principle of law within the meaning of Art.38(1)(c) of the Statute of the International Court of Justice".

I will now turn to the question posed: how should an arbitral tribunal respond when the same issue or dispute has already been decided by a national court or another arbitral tribunal?

Issues for Tribunal

I suggest that any arbitral tribunal faced with an argument that a prior issue or dispute has already been decided should ask itself the following questions.

1 What is the applicable law?

The first step that the tribunal should take is to determine the applicable law for determining questions of *res judicata* and estoppel, because, as described above, these concepts are not universally the same.

Given that questions of *res judicata* and estoppel are generally regarded as procedural, it might be thought that the tribunal need only look to the law of the place of arbitration. (36) But it is not, however, quite that simple.

Both Common Law and Civil Law systems generally require that the court or tribunal to look at both: (1) the law at the place where the prior decision was made (*i.e.,* the emitting legal system), in order to satisfy itself that the prior decision is final and binding and made by a competent tribunal; and (2) the place of arbitration, in order to determine what effect should then be given to such a decision.

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The place where the prior decision was made might place some constraint or limitation on the scope of *res judicata*. For example, under that law, only the *dispositif* might have *res judicata* effect. This should then be respected at the place of arbitation.

However, it may be that the *lex contractus* has also to be considered. Although neither Common Law nor Civil Law systems generally regard the governing law of the parties' relationship to be relevant for applying *res judicata*, I am aware of one ICC arbitration, which was taking place in Paris, in which the parties agreed that a question relating to *res judicata* should be determined by New York law, which was the governing law of the parties' contract.

In addition, the parties' agreement to specific arbitral rules might be said to give effect to *res judicata* by contract. For example, if the prior award is an ICC award, it might be argued that by agreeing to the ICC Rules, the parties had agreed that the award would be binding (per Rule 28(6)), and that they had therefore agreed not to re-argue the same dispute. Further, because the award must include the tribunal's reasons (per Rule 25(2)), these too must be binding, which would effectively implement the doctrine of issue estoppel. (37)

Rather than applying domestic rules of *res judicata*, the tribunal could maybe decide that a more autonomous approach should apply in international arbitration, and that it should apply harmonised concepts (whatever they may be). The tribunal might find inspiration from the UNIDROIT 2004 Draft Principles of Transnational Civil Procedure, (38) which contain a provision on *res judicata*, which states:

> "28.2 In applying the rules of claim preclusion, the scope of the claim or claims decided is determined by reference to the claims and defences in the parties' pleadings, including amendments, and the court's decision and reasoned explanation.
>
> 28.3 The concept of issue preclusion, as to an issue of fact or application of law to the facts, should be applied only to prevent substantial injustice."

The ALI / UNIDROIT Working Group endorses the application of cause of action estoppel. However, it recommends application of issue estoppel only to prevent substantial injustice, and the accompanying commentary states

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that the more limited concept in Principle 28.3 is derived, *inter alia*, from the principle of good faith as understood in the Civil Law.

Generally, however, I would suggest that the tribunal – as law and practice stand today – must apply the *res judicata* rules of the place of arbitration.

Having determined the applicable law, the tribunal must apply the rules prescribed by that law. And there are a number of additional questions it must ask itself.

2 Is a prior award on jurisdiction binding?

One of the most difficult situations for a tribunal is when it is faced with a prior decision that another court or tribunal has jurisdiction over the dispute. Does this have *res judicata* effect?

If it is a decision of the courts at the place of arbitration, then the tribunal must abide by that decision. But if it is a foreign court or tribunal, the Common Law answer seems to be negative, while the answer is more qualified in Civil Law jurisdictions. It would seem that the answer depends upon whether that prior decision would be recognised by the courts of the place of arbitration: if it would, then it should be respected by the later arbitral tribunal. (39)

3 Is *res judicata* a question of admissibility or jurisdiction?

A preliminary question that the tribunal might have to address is whether *res judicata*/estoppel goes to admissibility or jurisdiction. This might be important because, for example, there may be a limitation period in which a party must raise any jurisdictional challenge (*e.g.,* UNCITRAL Art.21(3) – no later than statement of defence, or counter-claim). Or, if jurisdictional, it may give rights of early appeal to the court (*e.g.,* English Arbitration Act 1996, section 32).

On one analysis, a claim that is finally determined by a court or tribunal is extinguished and no subsequent tribunal has jurisdiction to determine that claim. On another analysis, a subsequent tribunal has jurisdiction so long as it is properly constituted, but it should not admit evidence that contradicts a prior determination of the same claim.

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The consensus seems to be that *res judicata* and estoppel are rules of evidence and go to admisssibility.

4 Is the prior judgement/award recognised or enforceable at the place of arbitration?

It is generally a requirement for the application of *res judicata* that a foreign judgement/award must be recognised at the place of arbitration. The question arises as to whether it is necessary merely that the foreign judgement/award is capable of recognition, or must it be formally recognised, to have *res judicata* effect. Or to put it another way, can the arbitral tribunal itself determine whether such judgement/award would be *prima facie* recognised and/or enforced pursuant to the applicable law, or must this be left to the domestic courts to determine? If the former, this could entail the tribunal having to determine issues under the New York Convention.

5 Is the triple identity test met?

Both Common Law and Civil Law systems articulate the test of *res judicata* as requiring: same parties; same subject matter/grounds (*causa petendi*); and same object/relief (*petitum*) (see *e.g.,* Art.1351 of the French Civil Code, quoted above). This test has also been confirmed by arbitral tribunals. [(40)] 'Triple identity' is often said to be a strict requirement.

The same question arises in the context of European Council Regulation No.44/2001 and its predecessors (*i.e.,* the Brussels and Lugano Conventions). The ECJ appears to favour a strict test, for both the 'same cause of action' [(41)] and the same parties. [(42)]

It is clear that courts and tribunals prefer the certainty that comes from applying the triple identity test strictly.

This issue has arisen recently in bilateral investment cases, in particular in *Lauder* v. *Czech Republic* and *CME Czech Republic BV* v. *Czech Republic*, [(43)] about which much has already been written. Although the factual basis of the claims were exactly the same, and Lauder controlled CME, the CME tribunal concluded that *res judicata* did not apply where the two claims were brought under different treaties, and the claimants were different. This was upheld by the Svea Court of Appeal, applying Swedish law. Investment treaties often give rights to shareholders to bring claims for loss caused to a

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company by the host state, whereas shareholders do not usually have such rights under domestic law or international law, [(44)] and accordingly multiple claims by several shareholders in the investment chain may potentially be brought against the host state based on the same event. Because of this, it is arguable that a different approach to *res judicata* is called for in investment treaty cases.

Strict application of the test can put 'form over substance' and ignore the underlying realities and be inconsistent with the strong policy grounds giving rise to the doctrine of *res judicata* (in particular, the avoidance of double jeopardy and of inconsistent decisions). Applying a strict test in arbitration, where there is little or no opportunity to join a third party, or have another tribunal stay its proceedings to await the outcome of another arbitration, can cause injustice. A number of commentators favour an approach that looks at the underlying nature of a dispute and not at its formal classification, particularly in the context of investment treaty claims against states. [(45)]

6 Is it just the *dispositif* that has *res judicata* effect?

Next, a tribunal has to decide whether just the *dispositif*, or the *dispositif* and the reasoning has *res judicata* effect.

In Germany, it is said that just the *dispositif* has *res judicata* effect.

In Switzerland, France, Belgium and the Netherlands, it may be possible to look at elements of the reasoning, but the precise extent to which the reasoning is binding is far from clear. For example, Swiss Federal Supreme Court has recently held that: '*Res judicata* only relates to the

dispositif of the decision or the award. It does not cover the reasoning. However, one sometimes needs to look at the reasoning of the decision to know the exact meaning and extent of the *dispositif* [(46)] .

In ICC Case No. 3267 (1984), [(47)] a tribunal chaired by Professor Reymond, applying Swiss law, when asked to consider the *res judicata* effect of its earlier partial award, held that 'the binding effect of its first award is not limited to the content of the order thereof adjudicating or dismissing certain claims, but that it extends to the legal reasons that were necessary for such order, *i.e.,* to the *ratio decidendi* of such award'.

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ICC Cases Nos 2745 and 2762 (1977) [(48)] may also be cited as examples of application of the extended doctrine. These cases involved chain sales contracts. In ICC Case No. 1762 (1970), the first buyer in the chain was held to be liable to the subsequent party in the chain. In the motivation (but not in the dictum) of the award, it was held that the first buyer could not invoke force majeure or breach by further companies in the chain to escape from liability. When the subsequent party was sued in ICC Case No. 2745 by the following party in the chain, it brought Case No. 2762 against the first buyer seeking to be held harmless if it were to be found liable. The cases being joined, the arbitral tribunal held that it was bound by the prior ICC award in Case No. 1762 disposing of the relationship between the same parties as in Case No. 2762. In the opinion of the tribunal, it would be paradoxical not to be bound by another prior ICC award. Also, the tribunal sitting in Paris held that *res judicata* is to be determined in accordance with French concepts, being the law of the place of the arbitration chosen by the parties. German law as the law of the sales contract was not to be applied. The larger French notion of *res judicata* extending to the elements of the reasoning which form the necessary support for the holding was followed rather than the stricter German concept of the *dictum* only.

In England and the US, it is undoubtedly the case that the reasoning may have *res judicata* effect, because the essential elements of the reasoning give rise to issue estoppel.

A related question arises as to what documents might be presented to the second tribunal to enable it to understand what issues have been decided by the earlier decision, *i.e.,* whether an applicant should be entitled to rely only on the prior award and its reasoning, or may also rely on the parties' pleadings, or also on evidence submitted to the tribunal.

7 Are the prior proceedings confidential?

Where the applicant relies on a prior award, the tribunal may have to decide whether the prior award and/or the accompanying pleadings and evidence are confidential or not, and if so whether they can be submitted in the second arbitration.

This question arose in the Privy Council case of *Aegis* v. *European Re* [(49)] (2002) (on appeal from the Court of Bermuda). Two different claims by the same insurer against the same re-insurer, under the same insurance contract,

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arising out of the same underlying facts, were submitted to two different arbitral tribunals. European Re won the first arbitration, and sought to rely on the award in the second arbitration, and raise a plea of issue estoppel. Aegis obtained an injunction, based upon a confidentiality clause in the contract prohibiting European Re from submitting the first award in the second arbitration. The Privy Council held that any obligation of confidentiality does not apply as between the same parties in the second arbitration.

8 Has there been a waiver? Is *res judicata* part of public policy?

An issue may arise before the tribunal as to whether a potential *res judicata* claim has been waived. The answer to this question, as well as depending on the facts, may depend upon whether *res judicata* is part of the public policy of the applicable law.

In most jurisdictions, *res judicata* is not considered to be a principle of public policy, and it must be raised by a party, and therefore it can be waived by a party. In others jurisdictions (*e.g.,* Germany), it may be raised *ex officio* by the court.

In a recent Swiss decision, there was a suggestion that even procedural awards gave rise to *res judicata*, which was a part of procedural public policy. But this case concerned a tribunal that had departed from its own prior decision, which gives rise to public policy issues of due process as much as *res judicata*. [(50)]

9 Are there relevant exceptional circumstances?

Even if a prior decision meets the conditions for having *res judicata* effect, the tribunal should ask itself whether there are circumstances why *res judicata* should not be applied. For example, is there new evidence which became available after the closure of the prior

proceedings that casts doubt on the earlier findings? Is there an inconsistency with another existing enforceable judgement or award? Are there any arbitrability or public policy considerations?

10 Would there be an abuse of process?

In the converse situation, where the conditions for *res judicata* are not met, I would suggest that a tribunal nevertheless should consider whether it should not allow the second claim from proceeding, on grounds of abuse of process or abuse of rights.

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In English law, cause of action estoppel and issue estoppel concern a cause of action or issue that has been considered by a court and finally determined. The courts further extended the estoppel doctrine to preclude a party in subsequent litigation from raising subject matter (a claim or an issue) which the party, by the exercise of due diligence, could and should have brought before the court in the earlier proceedings. This is referred to as the 'rule in *Henderson* v. *Henderson*'. [(51)] However, after the decision of the House of Lords in *Johnson* v. *Gore Wood & Co.* [(52)] (2000), this doctrine is considered as a category of the 'abuse of process' doctrine, rather than an extension of the principles of estoppel. [(53)]

In its most general sense, the doctrine of abuse of process prescribes that subsequent proceedings should be precluded if it is necessary for a court to prevent a misuse of its procedure in the face of unfairness to another party, or to avoid the risk that the administration of justice might be brought into disrepute among right-thinking people. The doctrine rests upon the inherent power of the court to prevent a misuse of its procedures even though a party's conduct may not be inconsistent with the literal application of the procedural rules (*e.g.,* if the subsequent proceedings were thought to be unjustifiably vexatious and oppressive).Its application is wholly discretionary.

In the United States, there is no general 'abuse of process' doctrine akin to that in England. The Restatement explains that there are many reasons why a party might have chosen not to raise an issue; and the interests of conserving judicial resources, of maintaining consistency, and of avoiding oppression or harassment of the adverse party are less compelling when the issue on which preclusion is sought has not actually been litigated before. [(54)] However, New York law may be less tolerant. In the ICC arbitration I referred to previously, the tribunal applying New York law found that the claimant should have asserted its present claim by way of counterclaim or defence in earlier ICC proceedings and that having had a full and fair opportunity to do so and, not having done so, was barred from bringing a second action seeking relief inconsistent with the earlier award. Whilst this was an application of the New York doctrine of claim preclusion, [(55)] it is akin to the English concept of abuse of process.

In European Civil Law, likewise, there is no principle of abuse of process (although Civil procedural law may subscribe to a doctrine of 'abuse of rights').

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International law recognises a doctrine of abuse of rights, but it is extremely rarely applied. [(56)]

It is a controversial proposition to suggest that a doctrine of abuse of process has any role in international arbitration. [(57)] An argument based on abuse of process was raised in the Lauder and CME arbitrations, but it was not addressed in the tribunals' awards, and the Svea Court of Appeal did not recognise it as an applicable principle. Nevertheless, to address the problem of multiple claims under one or more investment treaties, I suggest that this doctrine deserves further attention.

Conclusion

I do not have definitive answers to the questions I have raised, but I hope that my comments will assist tribunals when they are faced with an argument that the same issue or dispute has already been decided by a national court or another tribunal.

The risk of multiple and conflicting awards based on the same facts has been described as a 'fissure in the global adjudication system' and has been identified as contributing to a crisis in the global adjudication system. [(58)] The doctrines of *lis pendens* and *res judicata* are intended to avoid such a crisis. In my opinion, the differences in the scope and application of *res judicata* as between legal systems and even between countries make the present state of the law unsatisfactory. I suggest that a more coherent and harmonized approach is called for, and even an autonomous regime for international arbitration in which the application of *res judicata* is not dependent upon the rules at the place of arbitration.

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1) The ILA Committee's 2004 Interim Report on *res judicata* can be found at www.ila-hq.org.

2) Pierre Mayer, 'Litispendance, connexité et chose jugée dans l'arbitrage international', in *Liber Amicorum Claude Reymond (Litec, Paris, 2004)* at pp.195–203.

3) Bernard Hanotiau, 'Problems raised by complex arbitrations involving multiple contracts – parties – issues', *18 Journal of International Arbitration 356-360 (2001)*; and Hanotiau, 'Quelques réflexions à propos de l'autorité de chose jugée des sentences arbitrales', in *Liber amicorum Lucien Simont* (Bruylant, Brussels, 2002) at pp.301-309; and Hanotiau, 'The Res Judicata Effect of Arbitral Awards, in Complex Arbitrations: Perspectives on Their Procedural Implications', *ICC International Court of Arbitration Bulletin* (Special Supplement 2003) ICC Publishing SA, Paris, at p.43.

4) I am also grateful to colleagues at Clifford Chance, London, for their assistance with research, including Marie Berard.

5) See *e.g.,* the cases published in the four volumes of *Collection of ICC Arbitral Awards* (ICC Publishing, Paris); in the *Yearbook Commercial Arbitration* (Kluwer, The Hague); the Kluwer Arbitration website www.arbitration.com and arbitration CD-Rom; and the cases cited by Bernard Hanotiau, *supra* footnote 3; and by Dominique Hascher, 'L'autorité de la chose jugé des sentences arbitrales', in *Travaux du Comité Français de DIP* (Pédone, 2004).

6) See *e.g.,* Pierre Mayer, *supra* footnote 2.

7) See *e.g.,* 'Arbitral Tribunals or State Courts: Who must defer to whom?', *ASA Special Series No 15, 2001.*

8) For the awards in the Czech and SGS cases, and any future awards involving Argentina, see http://ita.law.uvic.ca.

9) See *Halsbury's Laws of England*, 4th Edn. (Reissue) (Butterworths, London, 2003) Vol. 37 under 'Judgements and Orders', Para.1237.

10) See *e.g.,* Pierre Mayer, *supra* Klaus Peter Berger, 'The International Arbitrators' Application of Precedents', *9 Journal of International Arbitration (1992) 5* ; and Rolf Schutze, 'The Precedential Effect of Arbitration Decisions', *11 Journal of International Arbitration 69 (1994).*

11) Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, Para.97. ICSID Case No. ARB/02/06. The tribunal comprised Ahmed El-Kosheri (Egypt), James Crawford (Australia) and Antonio Crivellaro (Italy). The decision can be found at http://www.ita.uvic.law.ca.

12) *Joy Mining Machinery Ltd* v. *Egypt*, Award on Jurisdiction, 6 August 2004, Para.80. ICSID Case No. ARB/03/11. The tribunal comprised Orrego Vicuna (Chile – President), Laurie Craig (USA) and C.G. Weeramantry (Sri Lanka). The decision can be found at http://www.asil.org/ilib/JoyMining_Egypt.pdf.

13) See *e.g.,* Redfern & Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, London, 1999) at p.395; Fouchard, Gaillard & Goldman on *International Commercial Arbitration* (Kluwer, The Hague, 1999) at Para.1419; and Mauro Rubino-Sammartano, *International Arbitration Law and Practice*, 2nd Edn. (Kluwer, The Hague, 2001) at pp.787–797.

14) See *ILA Interim Report 2004, supra* footnote 1.

15) See *Halsbury's Laws of England*, 4th Edn. (Reissue) (Butterworths, London, 2003) Vol.16(2) under 'Estoppel', Paras.977-993; Peter Barnett, *Res Judicata, Estoppel and Foreign Judgements* (Oxford University Press, 2001); Keith Handley, Spencer Bower, Turner & Handley on the *Doctrine of Res Judicata*, 3rd Edn. (Butterworths, London, 1996).

16) For a recent application of the English law principles, see *Blackburn Chemicals Ltd* v. *Bin Kemi AB* (2004) EWCA Civ 1490.

17) A 'cause of action' is now called a 'claim' in the new English Civil Procedure Rules.

18) In England, for example, a foreign judgement might be recognized according to the rules of: the Common Law; the Administration of Justice Act 1920; the Foreign Judgements (Reciprocal Enforcement) Act 1933; or the Brussels or Lugano Conventions or European Council Regulation No 44/2001.

19) *Doe Davy* v. *Haddon* (1783) *3 Doug KB 310*. See Mustill & Boyd, *Commercial Arbitration*, 2nd Edn. (Butterworths, London, 1989 and 2001 Companion) at pp.409-415; and *Merkin, Arbitration Law* (LLP, London, looseleaf) at Para.16.116.

20) *Fidelitas Shipping Co Ltd* v. *V/O Exportchleb* [1965] 1 Lloyd's Rep 223 (CA).

21) *Res judicata* is often used to refer to the entire topic of former adjudication, including both claim and issue preclusion; however, some cases and commentators refer to claim preclusion as *res judicata*, and issue preclusion as collateral estoppel.

22) See American Law Institute (Edn.), *Restatement: Second: Judgements*, Chapter 3, Paras.13-33 ('Restatement').

23) Restatement, Para.84(1), and exceptions to the general rule at Para.84(2)-(4). See *e.g.,* Gary Born, *International Commercial Arbitration in the United States*, 2nd Edn. (Kluwer, The Hague, 2001) at p.914.

24) See *e.g.,* Andreas Lowenfeld, 'Arbitration and Issue Preclusion: a view from America', in ASA Special Series, *supra* footnote 7, at p.55; and Richard Shell, '*Res judicata* and Collateral Estoppel: Effects of Commercial Arbitration', *35 UCLA Law Rev 623 (1988)*.

25) In France, Civil Code Art.1351 and New Code of Civil Procedure Art.480; in Belgium, Code of Civil Procedure Art.23–27; in the Netherlands, Code of Civil Procedure Art.236; in Germany, Code of Civil Procedure Art.322–327. Notably, in Switzerland, it is not codified. And see Jan Kropholler, *Europäisches Zivilprozeßrecht*, 7th Edn. (Recht und Wirtschaft, Heidelberg, 2002).

26) See *e.g.,* Vincent & Guinchard, Procédure civile, 26th Edn. (Dalloz, 2001), Chapitre 3; Guinchard, *Droit et Pratique de la Procédure Civile* (Dalloz, 2002/2003), Titre 2, Chapitre 1; Cadiet & Jeuland, *Droit Judiciaire Privé*, 5th Edn. (Litec, 2004), Chapitre 2; and Perrot & Fricéro, 'Autorité de la chose jugée', in *Jurisclasseur Procédure Civile*, Fascicule 554 (1998 and updates).

27) Taken from http://www.legifrance.gouv.fr.

28) See *e.g.,* Cadiet & Jeuland, *supra* footnote 26, at p.942; but also see Guinchard, *supra* footnote 26, at pp.4999–5000, listing exceptional circumstances where *res judicata* is considered part of public policy ('ordre public') and may be raised by the Court.

29) For Germany, see Koch and Diedrich, *Civil Procedure in Germany* (C.H. Beck, Munich, 1998) at p.70. For Switzerland, see Fabienne Hohl, Procédure civile (Bern, 2001), Tome I, Introduction et théorie générale, at p.244.

30) In France, NCCP Art.1476; in Belgium, Code of Civil Procedure Art.1703; in the Netherlands, Code of Civil Procedure Art.1059(1); in Germany, Code of Civil Procedure Art.1055; in Switzerland, Act on Private International Law Art.190.

31) See *e.g.,* Matthieu de Boisséson, *Le Droit Francais de l'Arbitrage: Interne et International* (Joly, 1990) at p.811; Fouchard, Gaillard & Goldman on *International Commercial Arbitration* (Kluwer, The Hague, 1999) at Paras.12, 24, 1419, and 1567; and Delvolvé, Rouche & Pointon, *French Arbitration Law and Practice* (Kluwer, The Hague, 2004) at pp.194-196.

32) See Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, 1953) at pp.336-372; Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996* (Kluwer, The Hague, 1997), Vol III, at pp.1655-1661; Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press, 2003) at pp.27-28, 164-173 and 245-255; Vaughan Lowe, '*Res judicata* and the Rule of Law in International Arbitration', *8 African Journal of International and Comparative Law 38 (1996)*; and August Reinisch, 'The Use and Limits of *Res Judicata* and *Lis Pendens* as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes', *3 The Law and Practice of International Courts and Tribunals 37 (2004)* .

33) *Amco Asia Corp* v. *Indonesia* (Resubmission: Jurisdiction), *ICSID, 27 ILM 1281 (1998)* at Para.30. The tribunal comprised Rosalyn Higgins (UK – President), Marc Lalonde (Canada) and Per Magid (Denmark).

34) *1 Hague Court Reports 226 (PCIJ) (1910)*.

35) *Waste Management Inc* v. *Mexico* (Mexico's Preliminary Objection), ICSID, *41 ILM 1315 (2002)*. The tribunal comprised James Crawford (Australia – President), Eduardo Gomez (Mexico) and Benjamin Civiletti (USA).

36) To take just one recent example, a recent Swiss award held that 'it is settled law by now that an arbitral tribunal sitting in an international arbitration in Switzerland must apply the same rules as would a Swiss court in matters of *res judicata*', A v Z, Order No. 5 of 2 May 2002, *ASA Bulletin*, Vol. 21 No. 4 (2003) at p.810. The tribunal comprised Marcus Wirth (Chairman), Gabrielle Kaufmann-Kohler and Franz Kellerhans. See also ICC Cases Nos 2745 and 2762 (1977), in *Collection of ICC Arbitral Awards 1974-1985* (ICC Publishing, Paris, 1990), at p.326, applying French law being the place of arbitration (also described later in this chapter).

37) See V.V. Veeder QC, 'Issue Estoppel, Reasons for Awards and Transnational Arbitration', in 'Complex Arbitrations: Perspectives on their Procedural Implications', *ICC International Court of Arbitration Bulletin* (Special Supplement 2003) at p.73.

38) Joint American Law Institute/UNIDROIT Working Group on Principles and Rules of Transnational Civil Procedure (UNIDROIT, Rome, 2004) (available at http://www.unidroit.org.)

39) See *e.g., Swiss Federal Supreme Court, ATF 127 III 279*, and *ATF 121 III 495*. See also Honsell, Vogt, Schnyder & Berti, *International Arbitration in Switzerland* (Kluwer, 2000) at p.572; and Francois Perret, 'Parallel Actions Pending Before an Arbitral Tribunal and a State Court: The Solution under Swiss law', in *ASA Special Series* , *supra* footnote 7, at p.65, discussing *Compania Minera Condesa S.A.* v. *BRGN-Perou SAS, ATF 124 III 83*; and Lalive, Poudret & Reymond, *Le droit de l'arbitrage interne et international en Suisse* (Lausanne, 1989) at p.421.

40) See *e.g.,* ICC Case No. 6363 (1991), in *Collection of ICC Arbitral Awards 1991-1995* (ICC Publishing, Paris, 1997), at pp.108, 118; and ICC Case No. 9787 (1998), in *XXVII Yearbook Commercial Arbitration 181 (2002)* at p.186.

41) 'Le même objet et la même cause' in the French version. The ECJ has held that this should be given a Convention wide meaning, see *Gubisch Maschinen Fabrik KG* v. *Palumbo*, Case No. 144/86 [1987] ECR 4861; The Tatry, Case No. C-406/92 [1994] ECR I-5439. More recently, see *Meyer* v. *Commission of the European Communities*, Court of First Instance, 13 February 2003, Case No. T-333/01; *P&O European Ferries (Vizcaya) SA* v. *Commission of the European Communities*, Court of First Instance, 5 August 2003, Cases T-116/01 and T-118/1; and *Kobler* v. *Republic of Austria*, ECJ, 30 September 2003, Case No. C-224/01. And see *e.g.,* Hélène Gaudemet-Tallon, *Compétence et exécution des jugements en Europe, Règlement n°44/2001 et Conventions de Bruxelles et de Lugano*, 3rd Edn. (LGDJ, 2002).

42) See *e.g., Drouot Assurances S.A.* v. *CMI Industrial Sites* and *Protea Assurances* Case, C-351/96, (1998) ECR I – 3075, where the court articulated the test to be whether the interests of the two parties are 'indissociable' from one another, and that this test is for the national court to apply.

43) The awards in the two arbitrations can be found at http://www.ita.uvic.law.ca.

44) See Barcelona Traction Case (*Belgium* v. *Spain*) Second Phase, (1970) ICJ Rep 3.

45) See *e.g.,* Reinisch, *supra* footnote 32; Vaughan Lowe, AJICL, *supra* footnote 32; see also Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001), Art.25, Para.216.

46) Swiss Federal Supreme Court, 3 April 2002, *ATF 128 III 191*, and see *e.g.* Bernard Corboz, 'Le recours au Tribunal fédéral en matière d'arbitrage international', in *Semaine Judiciaire (2002)*, Part II (Doctrine), Vol.1, at p.19; see also Hohl, *supra* footnote 29, at p.246.

47) *Collection of ICC Arbitral Awards 1986-1990* (ICC Publishing, Paris, 1994) at p.332.

48) *Collection of ICC Arbitral Awards 1974-1985* (ICC Publishing, Paris, 1990) at p.326.

49) *Associated Electric* and *Gas Insurance Services Ltd (Aegis)* v. *European Reinsurance Co. of Zurich (European Re)* [2002] UKPC 1129, [2003] 1 WLR 1041.

50) Swiss Federal Supreme Court, 3 April 2002, *ATF 128 III 191, supra* footnote 46.

51) (1844) 6 QB 288.

52) (2000) 2 AC 1.

53) See, *e.g.,* Barnett, *supra* footnote 15, at 183; and recently, *Blackburn Chemicals Ltd* v. *Bin Kemi AB, supra* footnote 16.

54) Restatement, Para.27, comment e.

55) See also *e.g., Henry Modell & Co. Inc.* v. *Reformed Protestant Dutch Church of City of New York*, 68 NY 2d. 456 at p.464 (1986).

56) See *e.g.,* Yuval Shany, *supra* footnote 32, at pp.255–26; and Waste Management, *supra* footnote 35, at Paras.48–50.

57) Mustill & Boyd doubt whether the rule in *Henderson* v. *Henderson* applies in arbitration, *supra* footnote 19 at p.413. The issue was raised in Aegis but the Privy Council held that it was not relevant, *supra* footnote 49, Para.16.

58) Charles Brower, Charles Brower II and Jeremy Sharpe, 'The coming crisis in the global adjudication system', *19 Arbitration International 415 (2003)*; and see also Brower and Sharpe, 'Multiple and Conflicting International Awards', *4 Journal of World Investment 211 (2003)*.