



RES JUDICATA AND ARBITRAL AWARDS

by German Derbushev

LL.M. SHORT THESIS

COURSE: International Commercial Arbitration

PROFESSOR: Markus A. Petsche, Ph.D.

Central European University

1051 Budapest, Nador utca 9.

Hungary

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ABSTRACT

The doctrine of *res judicata* ensures finality in dispute resolution by precluding already resolved issue from being re-litigated between the same sides. The parties opting for international commercial arbitration aim to resolve their dispute in an effective manner. Accordingly, it is important from practical perspective whether arbitral awards possess any preclusive effect at all, what specific rules define this preclusive effect and how can the parties arrange for the application of the most effective rules of preclusion to their arbitration.

This Thesis analyses and compares existing theoretical approaches to the sources of *res judicata* effect of arbitral awards with the approach taken by arbitral practice. It appears that while researchers strongly support international and *sui generis* transnational rules of preclusion, arbitral tribunals do not have a universally accepted approach and more often rely on the rules of preclusion of national legislation, more specifically, of the law of the arbitral seat.

INTRODUCTION

International commercial arbitration is a dispute resolution instrument that offers the parties an opportunity to settle their differences in the manner tailored to their needs. A good dispute resolution tool must be useful, which means, *inter alia*, that it must offer finality and predictability. In practice, this embodies, at least partially, in the *res judicata* doctrine: the same claim based on the same cause may not be re-litigated again between the same parties.

Res judicata is a legal principle known to earliest sources of law and accepted by a large number of existing legal systems and even recognized as one of the general principles of international law.¹ National legislation usually directly provide for the preclusive effect of judgements of national courts but often *res judicata* doctrine remains uncoded and is referenced as one of the general principles of the law.² While the idea that arbitral awards do possess preclusive effect appears to be universally accepted in theory and practice, the views on the exact source of rules which govern *res judicata* effect of arbitral awards differ.³

The sources of rules distinguished by legal scholars can broadly be categorized as international law sources (including international conventions and case law of international dispute resolution

¹ Jacob van de Velden, *Finality in Litigation: The Law and Practice of Preclusion – Res Judicata (Merger and Estoppel), Abuse of Process and Recognition of Foreign Judgments* (Kluwer Law International 2017) 30; Ugo A. Mattei et al. (eds), *Schlesinger's Comparative Law* (7th edn, Foundation Press 2009) 817

² Resolution of the Constitutional Court of Russia of 5 February 2007 No. 2-P; Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012) 26, 104

³ Gary Born, *International Commercial Arbitration*, vol 2 (Wolters Kluwer 2009) 2881; Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) para 9.179; Jay Alexander, Michael S. Goldberg, Ivan Marisin, Jonathan Sutcliffe, 'United Arab Emirates: When Does An Arbitration Award Acquire Res Judicata Status In Dubai?' (*Mondaq*, 25 July 2017)

<<http://www.mondaq.com/x/610964/Arbitration+Dispute+Resolution/When+Does+An+Arbitration+Award+Acquire+Res+Judicata+Status+In+Dubai>> accessed 13 October 2018; 'Res Judicata Effect of Prior Award is For Arbitrator, Not Court, to Decide' (*Schlam Stone and Dolan LLP*, 15 October 2017)

<<https://www.schlamstone.com/res-judicata-effect-of-prior-award-is-for-arbitrator-not-court-to-decide/>> accessed 13 October 2018

bodies), transnational rules (which have no direct connection to any particular domestic system and generally are developed by arbitral tribunals themselves), and national laws.

Each source offers its own advantages – but disadvantages, too. International law is free from constraints and peculiarities of domestic legal systems, but the exact rules may be unclear. Transnational rules could be arguably devised by the tribunals themselves and thus combine the most effective solutions available but the legal basis for their application is highly questionable. Finally, domestic laws usually contain highly detailed rules of preclusion applied to court judgements which could be “borrowed” by international arbitration. However, this path is also full of bumps: starting from the questionable idea of applying domestic rules to international arbitration and finishing with the question of the nature of *res judicata*: a procedural issue would be treated one way and a substantive – another (in fact, views diverge even of this matter⁴).

The source of *res judicata* effect is not a mere theoretical question. Depending on the legal basis, the requirements for *res judicata* to apply and its effect can vary significantly (including, *inter alia*, the understanding of the identity requirements or preclusive effect of the reasoning of the award). Accordingly, this Thesis has the following objectives:

1. To determine whether arbitral awards possess *res judicata* effect in subsequent arbitral proceedings;
2. To identify the source (or sources) of *res judicata* effect of arbitral awards; and

⁴ See, e.g. Filip De Ly, Audley Sheppard, ‘ILA Interim Report on Res Judicata and Arbitration’ (2009) 25 (1) Arbitration International 35; Bernard C. Gavit, ‘Jurisdiction of the Subject Matter and Res Judicata’ (1932) 80 (3) University of Pennsylvania Law Review and American Law Register 386

3. To identify the approaches employed by arbitral tribunals to determine such source or sources. On the basis of this study the most beneficial approach to the selection of the system of rules that governs *res judicata* will be determined.

At this point, there is considerable volume of research on the *res judicata* effect in international arbitration. The most complete perspective of *res judicata* issues was provided by G. Born in his treatise. Describing several approaches to the source of preclusive effect, G. Born visibly leans towards the international approach noting its compatibility with the New York Convention and the transnational nature of international arbitration. Most researchers seem to favor international approach as well, while others favor the application of domestic laws. At the same time, it appears that the clear principles determining the applicability of the particular national system of laws to this issue remain vague.

To achieve its objectives, the research will be focused on analyzing scholarly sources, arbitral awards rendered by tribunals seated in different jurisdictions and international, transnational and domestic rules applicable to the issue of *res judicata* effect of arbitral awards.

The domestic jurisdictions were selected for the purpose of this research on the basis of the following aims: to illustrate the differences between approaches of common- and civil-law legal systems; to select jurisdictions where it is common for the parties to select arbitral seats; to be able to obtain enough research data, and include the USA, Switzerland and France.

This thesis is structured as follows. The First Chapter serves as an introduction to the basic concepts related to *res judicata* doctrine and having practical significance. The sources of *res judicata* rules examined in the subsequent Chapters will be assessed in part against how effective they deal with the said basic concepts.

The Second Chapter deals with international and transnational sources of *res judicata* as viewed in legal theory. It will examine main sources, key traits of *res judicata* rules derived from international or transnational sources and their potential applicability in practice.

The Third Chapter is devoted to the evaluation of domestic approaches to preclusive effects of arbitral awards, both from theoretical perspective and on the example of the selected national jurisdictions. The aim of the third chapter is to evaluate whether national laws offer a consistent and useable approach to the rules of preclusion which justifies their application.

The Fourth Chapter's subject is the *res judicata* of arbitral awards in practice and the Chapter is divided in two parts. The first part is an analysis of practice of arbitral tribunals focusing on the sources of the rules of preclusion, with specific attention to the justification for choosing specific preclusion rule and its correlation with the seat of the particular tribunal. The second part's objective is to determine the most beneficial rules of preclusion for the application in international arbitration and suggest the required sources of such rules which could ensure the application of said beneficial rules.

CHAPTER I

Res Judicata: Issues of Application

This Chapter provides an overview of the doctrine of *res judicata* and its main concepts, both in general and in the specific context of international commercial arbitration. The Chapter's aim is to highlight *res judicata* issues which can have significant practical impact but for which no uniform solution is available. Accordingly, the sources of *res judicata* rules discussed in the subsequent Chapters will be analyzed with regard to whether those sources provide a clear and consistent answers to the below issues.

A. *Res judicata*: general issues

The principle of *res judicata* has two distinct effects: the positive effect, *i.e.* an obligation to comply with the decision on the dispute of the parties involved; and the negative effect, which prevents the parties from litigating the same subject matter of the resolved claim anew.⁵ The latter is also referred to as the 'preclusive effect' of a judgment.⁶ Only the latter falls within the scope of this thesis.

Although the principle of *res judicata* is generally accepted in the majority of legal systems worldwide, certain issues have no universally agreed approach and their treatment varies from jurisdiction to jurisdiction. Such issues include, *inter alia*, the exact requirements for the application of *res judicata*, its scope and its legal nature as a procedural or a substantive issue.

a) Application requirements

⁵ ILA Interim Report (n 4) 35

⁶ Van de Velden (n 1) 2; Silja Schaffstein, 'Chapter 18, Part VIII: Res Judicata in International Arbitration', in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide* (2nd edn, Kluwer Law International 2018) 2645

It is generally accepted that for the preclusive effect of the judgement to apply the following parameters must be identical in the prior and the subsequent proceedings: (a) the parties, (b) the object (or the relief) and (c) the factual and legal grounds for the claim, which is referred to as the “triple-identity test”.⁷

Party identity

The party identity requirement is treated more narrowly in civil law countries. The parties are considered ‘identical’ if they are the same as in the prior proceedings or successors of such parties.⁸

On the other hand, common law recognizes another category of persons to whom *res judicata* applies – the parties’ privies. A “privy” is a person ‘upon whom all the rights and obligations (...) devolve’.⁹ Additionally, in certain cases in common law *res judicata* effect may extend to third parties (*i.e.* issue preclusion, which will be discussed below).

Object and legal grounds

Civil law countries more or less strictly follow the requirement of identity of the claim and its legal basis.¹⁰ The specifics of certain civil law legal systems in this regard will be described in the subsequent Chapters. Common law countries’ doctrines recognize the identity of the cause of action, *i.e.* the combination of facts and circumstances which give rise to the claim for a remedy, as a decisive factor.¹¹

⁷ ILA Interim Report (n 4) 36; Born (n 3) 3738

⁸ ILA Interim Report (n 4) 52

⁹ *ibid* 44

¹⁰ Greta Walters, ‘Fitting a Square Peg into a Round Hole: Do Res Judicata Challenges in International Arbitration Constitute Jurisdictional or Admissibility Problems?’ (2012) 29 (1) *Journal of International Arbitration* 651 655

¹¹ van de Velden (n 1) 46; Peter Birks (ed), *English Private Law* (Vol II, OUP 2000) para 19.367; ILA Interim Report (n 4) 42

The exact definition of the “cause of action” concept can be unclear.¹² As stated by Diplock L.J. in a decision of 1964, ‘a cause of action is simply a factual situation’ which gives a legal right to obtain remedy.¹³ The case law treatment of this varies. On the one hand, in 1993 the House of Lords held that when a single contractual breach gives rise to several distinct ‘particulars of damage’, it constitutes the cause of action for all claims for damage.¹⁴ In the *Indian Grace* case the ship carrying munitions caught fire, and some of the cargo was thrown away by the crew while some was damaged in the heat. The cargo owners first commenced an action in India for insufficient delivery (with regard to the ejected cargo) and then in England with regard to the damage done by the fire to the actually delivered cargo.¹⁵ The plaintiffs argued that the cause of action in each case constitutes of the facts that must be proven to obtain respective relief: the lesser quantity of goods in the first action and the lower quality of goods in the second.¹⁶ This approach was expressly rejected by the House of Lords in line with earlier case law dealing with different types of damage from the same contractual breach as arising from one and the same cause of action.¹⁷

On the other hand, in non-contractual matters the approach could be different. In 1884 the English Court of Appeal drew a line between damage to person and damage to a vehicle arising out of the

¹² Peter R. Barnett, *Res Judicata, Estoppel, and Foreign Judgments: The Preclusive Effects of Foreign Judgments in Private International Law* (OUP 2001) 120

¹³ *Letang v Cooper* [1965] 1 Q.B. 232 (CA) 242, 243

¹⁴ *Republic of India and Another Appellants v India Steamship Co. Ltd.* [1993] UKHL [1993] A.C. 410 420 (the “**Indian Grace**”)

¹⁵ Francis D. Rose, ‘The Action *in Rem* in English Law’ in Eric Van Hooydonk (ed), *English and Continental Maritime Law: After 115 Years of Maritime Law Unification: a Search for Differences between Common Law and Civil Law* (Maklu 2003) 55, 56

¹⁶ The *Indian Grace* Case (n 14) 419

¹⁷ *Conquer v Boot* [1928] 2 K.B. 336 (HCJ) 342

same accident.¹⁸ The Court reasoned that the subject matter and necessary evidence in both claims was different and further added that the two types of damages were ‘essentially separable’.¹⁹

As a consequence, one has to distinguish between different situations where *res judicata* might arise under common law. However, as a general rule, cause of action would include factual basis rather than legal.

b) Scope of application

Generally, in civil law countries the preclusive effect of *res judicata* is attached only to the dispositive part of the judgement (*i.e.* its operative part) and the reasoning of the judgement are considered only for its interpretation. On the other hand, common law affords preclusive effect to the reasoning of the judgement.²⁰ The exact scope of the preclusive effect plays an important role in practice with regard to issue preclusion.

c) Res judicata effect

The main objective of *res judicata* is to prevent a decision on the matter which was already decided, and it is the same in the legal systems where *res judicata* is recognized. However, there are different approaches to the identification of “matters” that were “decided” not only in common and civil law systems but between different jurisdictions of the same legal family.

Claim preclusion / Concentration of claims

Res judicata can have preclusive effect not only with regard to the particular claim, which was decided earlier but to all claims arising out of the same cause of action. This is a traditional

¹⁸ *Brunsdon v Humphrey* (1884) 14 Q.B.D. 141 (CA) 150 - 152

¹⁹ *ibid* 149, 151

²⁰ Eduardo Zuleta, ‘Post-Award Advocacy: The Relationship Between Interim and Final Awards – Res Judicata Concerns’ in Albert Jan van den Berg (ed), *Arbitration Advocacy in Changing Times* (Kluwer Law International 2011) 237

approach in common law countries, where under the “cause of action estoppel” (also termed “claim preclusion”) all claims arising out of the same cause of action are precluded in the subsequent proceedings.²¹ As mentioned above, the “cause of action” is largely related to the underlying facts. As such, under common law *res judicata* has a broad scope barring claims that could have been brought by the party but in fact were not²², thus indirectly preventing parties from splitting claims between different proceedings.

While civil law countries generally adhere to the triple-identity test under which only an identical claim triggers the application of *res judicata*, some jurisdictions employ the “concentration principle” having substantively same effect.²³ As the French Cour de Cassation put it, the principle of concentration precludes claims demanding ‘the same thing’ on the basis of the same facts from being advanced in subsequent proceedings.²⁴ Whether this doctrine is at all applicable to arbitration remains an open question.

Issue preclusion

The common law doctrine of issue preclusion (also termed “issue estoppel” or “collateral estoppel”) precludes subsequent contesting of issues of fact and law determined in earlier proceedings. In common law, issue preclusion may only arise with regard to issues actually in dispute and resolved in the judgement, and only to such issues which were fundamental for the judgement.²⁵ Certain jurisdictions permit issue preclusion to be invoked in the proceedings

²¹ ILA Interim Report (n 4) 42, 47

²² Born (n 3) 3735

²³ *ibid* 3738

²⁴ Laura Weiller, 'Société G et A Distribution v. Société Prodim, Cour de Cassation (1re Ch. civile), Not Indicated, 28 May 2008' (2008) 3 *Revue de l'Arbitrage* 461 464

²⁵ Bernard Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions* (Kluwer Law International 2006) 243

involving third parties who did not participate in the original proceedings.²⁶ Arguably, issue preclusion is not recognized in civil law²⁷ but in certain jurisdictions judicial practice and legislation provide for very similar solutions.²⁸

Scholarly views appear to differ regarding the question whether *res judicata* is a narrow concept involving only claim preclusion or can be extended to issue preclusion as well²⁹ but for the purpose of this thesis issue preclusion will be analyzed as an element of *res judicata* doctrine.

B. *Res judicata*: issues in international arbitration

Although *res judicata* may arise on many occasions in international arbitration, this thesis is concerned with *res judicata* effect of a prior award before a subsequent arbitral tribunal. This situation may arise in a number of circumstances:³⁰

- Disputes arising out of same legal basis brought before different tribunals. This situation may arise, for example, due to a battle of forms;
- Disputes arising out of same factual circumstances brought before different tribunals. This situation may happen in complex multi-party contracts;
- Disputes arising out of same legal or factual basis when one party alleges that the prior award did not resolve all existing claims;

²⁶ Born (n 3) 3736

²⁷ *ibid* 3738

²⁸ Hanotiau, Complex Arbitrations (n 25) 245, Arbitration Procedural Code of Russia, Article 69 (2), (3)

²⁹ *see, e.g.*, Born (n 3) 3736; van de Velden (n 1) 64

³⁰ *see* ILA Interim Report (n 4) 37

In the context of international arbitration *res judicata* has a number of specific issues, including whether this award has any preclusive effect at all, whether it is a question of substance or procedure and a matter of jurisdiction or admissibility.

a) Source of res judicata effect of arbitral awards

All examined authorities unanimously concur that arbitral awards do have *res judicata* effect.³¹

However, the exact sources of this effect remain unclear. Some authorities refer to international law, while others speak of transnational rules and yet others refer to domestic law. Each of those sources will be discussed in detail in the subsequent Chapters.

b) Legal nature of res judicata

The legal classification of *res judicata* principle affects not only its governing law but also how *res judicata* defense should be raised and countered. The question of governing law depends on whether *res judicata* is a matter of substance or a matter of procedure, while the question of its application – on whether *res judicata* is a question of jurisdiction or admissibility.

Procedure / Substance

As noted by the distinguished English commentators with regard to the legal nature of estoppel, it ‘is an entirely open question’³² whether it belongs in the procedural or substantive field. Dicey and Morris further suggest that the legal nature of estoppel may depend upon its particular type and the nationality of the judicial decision in question. This distinction is equally important regardless of whether *res judicata* is raised before a national court or an arbitral tribunal. Generally, *res*

³¹ see, e.g., Born (n 3) 3739; Hanotiau, *Complex Arbitrations* (n 25) 246; Redfern / Hunter (n 3) para 9.173

³² Lawrence Collins et al (eds), *Dicey and Morris on the Conflict of Laws* (Vol I, Sweet & Maxwell 2000) para 7-030

judicata is treated as a matter of procedure requiring the application of procedural law.³³ At the same time, some argue that *res judicata* has ‘both procedural and substantive dimensions’ being used to enforce substantive rights of the parties³⁴ and question whether the application of procedural rules to *res judicata* matters is justified.

Jurisdiction / Admissibility

This distinction affects the stage of arbitral proceedings at which a *res judicata* objection must be made, the applicable law and the status of the tribunal’s decision on *res judicata* matters. Jurisdictional objections are generally raised in the beginning of the proceedings³⁵, the jurisdiction may be limited by the *lex arbitri*³⁶ and a decision on jurisdiction is subject to the judicial control.³⁷ On the other hand, an admissibility challenge aims at proving that the claim itself is defective and cannot be heard.³⁸ As such, it is raised after the tribunal’s jurisdiction is established and the tribunal’s decision on admissibility *per se* is not subject to the judicial review.³⁹

The ILA abstained from answering the issue leaving the determination to the applicable law.⁴⁰ Other sources suggest that the generally accepted view is that *res judicata* is an admissibility matter.⁴¹

³³ ILA Interim Report (n 4) 65

³⁴ Gary B. Born, Cavinder Bull, et al., 'Chapter 1: The Law Governing Res Judicata in International Commercial Arbitration', in Neil Kaplan and Michael J. Moser (eds), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* (Kluwer Law International 2018) 10

³⁵ Redfern / Hunter (n 3) para 5.118

³⁶ *ibid* para 5.110

³⁷ *ibid* para 5.112

³⁸ Walters (n 10) 661

³⁹ *ibid* 662

⁴⁰ Filip De Ly, Audley Sheppard, 'ILA Final Report on Res Judicata and Arbitration' (2009) 25 (1) *Arbitration International* 67 81

⁴¹ Walters (n 10) 675

c) *Res judicata and party autonomy*

Res judicata may also be affected by the agreement of the parties. Commentators point out that the parties may agree to waive *res judicata* effect of the prior award.⁴² At the same time, party autonomy can hardly be viewed as a significant source of rules governing *res judicata*, considering that in practice parties devote little time and attention to its details. A number of institutional rules contain a provision on the binding force of the arbitration award.⁴³ At the same time, it is unclear whether it may have any impact on the subsequent proceedings. No significant information was found in this regard in legal science and court practice. According to the ILA, no institutional rules contain provisions on *res judicata* issues.⁴⁴

⁴² Born / Bull (n 34) fn 48; Reinmar Wolf (ed), *New York Convention. Commentary* (C. H. Beck 2012) 428

⁴³ HKIAC Administered Arbitration Rules, Article 35.2; LCIA Arbitration Rules, Article 26.7; ICC Rules of Arbitration, Article 35 (6);

⁴⁴ ILA Interim Report (n 4) 60

CHAPTER II

Res Judicata: International and Transnational Sources

One possible solution and arguably the one that comes to mind first when speaking about *res judicata* in the context of international arbitration is to search for preclusion rules contained in various non-national legal sources, independent of domestic law. This approach appears to be especially favored by scholars, offering consistent rules not dependent on varying national laws and their uniform application by arbitral tribunals regardless of their seat, limiting the possibility of setting aside or refusing enforcement and the forum shopping possibilities by parties disappointed with the outcome of the dispute resolution.⁴⁵

This Chapter covers two main types of non-national sources: first, international law sources, which includes case law of public international dispute resolution bodies and international arbitration conventions, and, second, transnational rules not based on particular existing legal sources.

A. International law sources

At least on its face international rules do not suffer from idiosyncrasies of national jurisdictions and offer transparent and consistent framework. Thus, it is only logical to resort to them to resolve a complex problem, which treatment differs from jurisdiction to jurisdiction. This section aims at analyzing international sources of *res judicata*, which are most frequently relied upon in the works of scholars. In the category of international law many authorities distinguish the following types of sources:

⁴⁵ Born / Bull (n 34) 12

1. Public international law rules, which are largely drawn on the basis of the decisions of the International Court of Justice (the “**ICJ**”) and other public international dispute resolution bodies; and
2. International conventions, such as the Convention on the Recognition and Enforcement of Arbitral Awards (the “**New York Convention**”);

Despite the undeniable attractiveness, it will be demonstrated below that international law does not offer a clear and consistent solution. Applicable sources of international law provide rather broad and general rules, leaving gaps to be filled from elsewhere. Thus, on its own international law does not seem to be sufficient to determine the scope and applicability of the *judicata* effect of arbitral awards.

1. Public international case law

In public international law, *res judicata* rules are largely based on the case law of international courts. Public international law as a separate source of preclusion rules is distinguished by Gary Born⁴⁶, Gretta Walters⁴⁷, and others.⁴⁸

a) *The concept of res judicata in public international law*

Res judicata is referred to as a ‘settled rule of international law’⁴⁹ and had been recognized on numerous occasions both by the ICJ and its predecessor, the Permanent Court of International

⁴⁶ *ibid* 13

⁴⁷ Walters (n 10) 652

⁴⁸ E.g. Charles N. Brower and Paula F. Henin, 'Chapter 5: Res Judicata', in Meg Kinnear, Geraldine R. Fischer, et al. (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International 2015) 58

⁴⁹ Born / Bull (n 34) 1

Justice (the “**PCIJ**”). The legal basis for the recognition of *res judicata* as such was provided by the Statute of the PCIJ, the pertinent provisions of which were as follows:

Article 38

The Court shall apply:

1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
2. International custom, as evidence of a general practice accepted as law;
3. The general principles of law recognized by civilized nations;
4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

(...)

Article 59

The decision of the Court has no binding force except between the parties and in respect of that particular case.

Article 60

The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

Identical provisions were incorporated in the Statute of the ICJ.

The first description of *res judicata* as a general principle of law is attributed to the Advisory Committee of Jurists tasked with the preparation of the Statute of the PCIJ.⁵⁰ It was relied upon by Judge M. Anzilotti in his dissenting opinion in the *Chorzow* case of the PCIJ⁵¹, who linked *res judicata* to the general principles of law recognized by the civilized nations in the sense of Article 38 (3) of the Statute. Since then, both the PCIJ and the ICJ created a significant amount of case law supporting this position.⁵²

b) Elements of res judicata in public international law

The ‘traditional elements’ of the triple-identity test were outlined in the same opinion of M. Anzilotti in the *Chorzow* case. As will be further demonstrated in Chapter IV, the very same opinion is frequently cited by international tribunals applying *res judicata*. As M. Anzilotti stated, ‘(...) the three traditional elements for identification [are] *persona, petitum, causa petendi* (...)’.⁵³ In legal science the slightly adjusted criteria of *res judicata* effect are as follows:

- a) identity of relief;
- b) identity of the grounds for the claims;
- c) identity of parties; and
- d) previous decision must be rendered by a court or a tribunal of identical legal order.⁵⁴

⁵⁰ Silja Schaffstein, ‘The Doctrine of Res Judicata before International Arbitral Tribunals’ (PhD thesis, University of London, University of Geneva 2012) 73

⁵¹ Interpretation of Judgements Nos. 7 and 8 (The *Chorzow* Factory Case), Dissenting Opinion by M. Anzilotti (1927) Series A Collection of Judgements of PCIJ 27

⁵² see e.g. Effect of Awards of Compensation Made by the U.N. Administrative Tribunal, Advisory Opinion, 1954 I.C.J. 47 (July 13) 53 (referring to *res judicata* as a well-established and recognized principle of law); ILA Interim Report (n 4) 55

⁵³ Dissenting Opinion, *Chorzow* Factory Case (n 51) 23

⁵⁴ Walters (n 10) 65; ILA Interim Report (n 4) 56

Those requirements are generally similar to the requirements to *res judicata* in national legal systems, however, some criteria have unique specifics in the context of international arbitration.

First, under the identity of grounds requirement the cause of action should be the same. However, on some occasions several claims may be raised on the same matter, but with based on separate legal sources. For example, in the sphere of investment arbitration two claims originating from the same action may be pursued by the investor under the investment contract and the investment treaty. Theoretically, such claims have different legal grounds.⁵⁵

Second, the requirement of identical legal order means that an international dispute settlement body is not bound by domestic courts.⁵⁶ This requirement can be applied relatively straightforward in an international dispute but is less useful in the context of international commercial arbitration. Not only arbitral tribunals belong to the same legal order, but national courts and arbitral tribunals as well (for this reason the identical legal order requirement was omitted from the list of requirements to *res judicata* in ILA Final Report on the matter).⁵⁷ Thus, this requirement is hardly applicable in practice and may be disregarded.

c) Scope of res judicata under international law

It appears that international law does not provide a coherent answer to the question of the scope of *res judicata*: first, to the question of whether its effect extends to the reasoning part or to the dispositive part of the decision and second, whether the parties are precluded from raising in subsequent proceedings claims that were not but could have possibly been raised in the preceding ones.

⁵⁵ ILA Interim Report (n 4) 57

⁵⁶ Walters (n 10) 657

⁵⁷ ILA Final Report (n 40) 73

Regarding the first issue, in his opinion M. Anzilotti stated that *res judicata* is limited only to the dispositive part of the decision:

It appears to me to be clear that a binding interpretation of a judgement can only have reference to the binding portion of the judgment construed. To say that the request for an interpretation can only relate to the binding part of the judgment is equivalent to saying that it can only relate to the meaning and scope of the operative part thereof, as it is certain that the binding effect attaches only to the operative part of the judgment and not to the statement of reasons.⁵⁸

International courts and tribunals appear to lack consensus on this issue. A number of authorities, including the European Court of Justice, apply *res judicata* to the dispositive part and its supporting reasoning, which was necessary to render the judgement.⁵⁹

No consistent approach exists with regard to the second issue of possible claims. In the view of M. Anzilotti stated in the same opinion, *res judicata* extends only to actually decided claims:

It is, moreover, clear that, under a generally accepted rule which is derived from the very conception of *res judicata*, decisions on incidental or preliminary questions which have been rendered with the sole object of adjudicating upon the Parties' claims (*incidenter tantum*) are not binding in another case.⁶⁰

However, in practice there is a contrary position, under which *res judicata* effect precludes the parties from raising claims that could have been raised in the previous proceedings.⁶¹

⁵⁸ Dissenting Opinion, Chorzow Factory Case (n 51) 24

⁵⁹ ILA Interim Report (n 4) 60

⁶⁰ Dissenting Opinion, Chorzow Factory Case (n 51) 24, 26

⁶¹ Born / Bull (n 34) 14

d) Practical application in international commercial arbitration

In public international law *res judicata* is widely recognized as a general principle of law. The same approach has been applied to international arbitral awards.⁶² International law offers the basic framework for *res judicata* and the criteria for its application.

However, the precise rules governing *res judicata* under public international law are unclear. Many issues, such as connected with the scope of *res judicata* discussed above, or the concrete criteria of identity of the parties, are left for individual tribunals to resolve. Therefore, international law, despite its theoretical value, is rarely relied upon in international commercial arbitration.⁶³ Moreover, as will be demonstrated in Chapter IV, interstate and investment tribunals which often resort to public international law did not develop any consistent approaches to the above issues. Therefore, it appears that currently public international law cannot be considered a viable source of rules governing *res judicata* from practical perspective.

2. International conventions

Certain international provisions can be considered from the standpoint of *res judicata* effect of arbitral awards. This subsection largely focuses on the New York Convention due to its significance for international commercial arbitration.

a) The New York Convention

⁶² Born (n 3) 3739

⁶³ *ibid* 3741

Even though the clear text of the Convention contains no direct references to *res judicata* effect of awards, it can be interpreted as providing the basic framework for construction of preclusion rules.

This approach is largely advocated by Gary Born⁶⁴ and supported by other scholars.⁶⁵

Under this approach, the New York Convention is understood as containing fundamental principles of preclusive effect of arbitral awards and can be interpreted as establishing ‘international standards’ of preclusive effect of the latter.⁶⁶ On the basis of such standards arbitral tribunals shall derive uniform rules of preclusion.⁶⁷ The central provision of the New York Convention with regard to the preclusive effect is Article III, which contains the following provisions:

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

The starting point for further interpretation of the Convention is its objective, which is to provide common legislative standards to facilitate recognition and enforcement of arbitral awards.⁶⁸ An

⁶⁴ Born (n 3) 3742; Born / Bull (n 34) 14; Gary B. Born, *International Arbitration: Law and Practice* (2nd edn, Kluwer Law International 2015)

⁶⁵ E.g. Bernard Hanotiau, 'Chapter 17: Res Judicata and the “Could Have Been Claims”', in Neil Kaplan and Michael J. Moser (eds), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* (Kluwer Law International 2018) 301

⁶⁶ Born (n 3) 3743

⁶⁷ *ibid* 3776

⁶⁸ New York Convention, Introduction

integral element in achieving this objective is ensuring that the awards are final and binding for the parties, which is achieved via the Convention containing international preclusive principles.⁶⁹ Therefore, the term “binding” of Article III may reasonably be understood as providing not only for the mandatory compliance of the parties with the award, but as precluding the States from giving the parties an opportunity to re-litigate the subject matter of the award, escaping its binding nature.⁷⁰

Other provisions of the Convention provide an implicit confirmation that the preclusive effect of awards is accepted as a general principle by the Convention. For example, by recognizing an award the court essentially confirms its final status. In turn, a “final” award may be reasonably interpreted only as possessing the preclusive effect.⁷¹

The New York Convention as a source of rules governing *res judicata* effect of arbitral awards suffers from the same issues as public international law sources discussed. It is not disputed that *res judicata* effect is recognized by the New York Convention. Furthermore, in theory there are no compelling legal obstacles to the application of international preclusion principles developed on the basis of the Convention by international tribunals.

However, the practical applicability of the Convention is rather limited. Other than stating the underlying principle of preclusive effect of arbitral awards, the Convention provides no further rules on its scope and application.⁷² As such, the tribunals can hardly rely on the Convention as

⁶⁹ Born (n 3) 3742

⁷⁰ Born (n 3) 3743; Wolf (n 42) 197

⁷¹ Wolf (n 42) 6, 34

⁷² ILA Interim Report (n 4) 61; Wolf (n 42) 197

the sole source of resolution of conflicting situations and may not effectively apply it to find answers to the questions outlined above.

b) Other international conventions in the sphere of international arbitration

Unfortunately, only few international conventions contain provisions related to *res judicata* effect of arbitral awards. As such, those conventions received little attention in legal science and even less in practice. Among such conventions is the one designed to supplement the New York Convention, the European Convention on International Commercial Arbitration of 21 April 1961 (the “**European Convention**”) and the one existing in parallel to the New York Convention, the Inter-American Convention on International Commercial Arbitration of 30 January 1975 (the “**Panama Convention**”).

The European Convention contains no provision directly related to the preclusive effect of arbitral awards. Article IX of the Convention creates limitations for the refusal of enforcement of an award set aside in the country of origin under Article V (e) of the New York Convention, which indicates acceptance of the binding nature of awards under the latter. At the same time, it is noted that the European Convention was adopted to supplement the provisions of the New York Convention⁷³ and is aimed at very specific issues not including the binding force of arbitral awards.

The Panama Convention explicitly grants to an arbitral award that cannot be appealed under the applicable law the force of the final court judgement.⁷⁴ The fact that the Convention does not merely refer to the binding nature of finality of the award itself and instead refers to the force of the ‘final judicial judgement’ may be construed as making a reference to the domestic law of the

⁷³ Schaffstein, Thesis (n 50) 137

⁷⁴ Panama Convention, Article 4

particular State Party to determine the exact scope of such force, and therefore indirectly subjecting *res judicata* of the award to the particular domestic jurisdiction.

Other than the New York Convention, other international conventions do not contain detailed rules applicable to preclusive effect of arbitral awards. That makes their practical applicability very low.

B. Transnational sources

This section is focused on *sui generis* rules governing *res judicata* effect of arbitral awards, which are not associated or related in any way to a particular legal system, whether international or domestic. Rather, such rules represent synthesized rules of international law, domestic jurisdictions and approaches adopted in practice. The first subsection covers the set of transnational rules developed by the ILA. The second explores the approach proposed by N. Yaffe, which centers on arbitral tribunals developing their own body of laws on the issue. The third one covers the possibility of application of the ALI / UNIDROIT Principles of Transnational Civil Procedure to *res judicata* issues in international arbitration.

Transnational rules offer the same benefits as the rules based on international legal sources, namely consistency, transparency and detachment of varying national requirements. At the same time, some of the proposed approaches suffer from lacking precise and detailed rules while others propose a comprehensive solution but wholly depend on arbitral practice to develop. Thus, it appears that currently the practical importance of various transnational rules is regrettably low.

1. The ILA Recommendations

The Recommendations on *Lis Pendens* and *Res Judicata* and Arbitration of the International Law Association⁷⁵ (the “**ILA Recommendations**”) were compiled by the International Law Association on the basis of a lengthy study of *res judicata* principle applied in international arbitration.⁷⁶ The Recommendations are not a binding source; they may be applied as rules or as guidelines at the discretion of international tribunals. In this sense, the Recommendations are not, of course, a source of international law. Still, a number of authorities rely on the transnational approach of the Recommendations to define the rules governing *res judicata* of arbitral awards.⁷⁷

Under the ILA Recommendations *res judicata* effect of arbitral awards can be determined by ‘transnational rules’ applicable to international arbitration.⁷⁸ At the same time the Recommendations do not define or refer to any particular sources of such rules.

The Recommendations define criteria, which an award has to satisfy to obtain the preclusive effect. In addition to the three basic requirements (*i.e.* identical claims, cause of action and parties) for *res judicata* to apply, an award has to become ‘(...) final and binding in the country of origin’ and have no obstacles for its recognition in the country where the seat of subsequent arbitration is located.⁷⁹

The authors favoring the application of the rules provided for by the Recommendations note its contribution towards a harmonized and practically useful set of rules.⁸⁰ At the same time, the

⁷⁵ Filip de Ly, Audley Sheppard, ‘ILA Recommendations on *Lis Pendens* and *Res Judicata* and Arbitration’ (2009) 25 (1) *Arbitration International* 83

⁷⁶ ILA Final Report (n 40) 67

⁷⁷ *E.g.* Redfern / Hunter (n 3) 560; Hanotiau (n 65) 300; Born / Bull (n 34) 16

⁷⁸ ILA Recommendations (n 75) 85

⁷⁹ *ibid*

⁸⁰ Hanotiau (n 65) 295

Recommendations are criticized (sometimes harshly) for the lack of comprehensive approach.⁸¹ In fact, the Recommendations leave a number of important issues unanswered – and apparently leaves them to be decided under applicable national law.

One example of such lack of a comprehensive approach is the finality requirement. On its face, it appears as if the Recommendations took a shot at defining the moment at which an award obtains the preclusive effect. However, the Recommendation gives no guidance on establishing the actual moment at which the award becomes final. As elaborated by Prof. de Ly, the Recommendations merely assumes that under the applicable law (whichever that may be) the award may no longer be challenged and proceeds from there.⁸²

Another example is the question of whether *res judicata* is the issue of jurisdiction or admissibility. Somewhat contrary to the Interim Report's promise to address this question later⁸³, the Final Report leaves the matter to be determined under the applicable law (again, presumably national).⁸⁴ However, this distinction can play an important role in practice.⁸⁵

2. *Sui generis* rules created by tribunals

Another approach to the applicability of transnational standards is actively advocated by Dominique Hascher and Nathan D. Yaffe. However, unlike the ILA Recommendations, the cornerstone of this approach is the New York Convention and the procedural autonomy of arbitral tribunals.

⁸¹ Born / Bull (n 34) 16; Nathan D. Yaffe, 'Transnational Arbitral Res Judicata' (2017) 34 (5) Journal of International Arbitration 795 811

⁸² ILA Final Report (n 40) 74

⁸³ ILA Interim Report (n 4) 65

⁸⁴ ILA Final Report (n 40) 81

⁸⁵ Walters (n 10) 662

On the one hand, it is argued that the New York Convention does not require *res judicata* issue to be governed by national laws or even reserve the areas in which the supervision and control of domestic courts is required.⁸⁶ By comparing different provisions of the Convention, it is revealed that matters of preclusion create much less implications for and are much less sensitive for national jurisdictions, and therefore the Convention leaves no room for national legislation to interfere. On the other hand, Yaffe notes that the tribunals generally enjoy broad discretion with regard to the procedural law applicable to the arbitration. Therefore, nothing precludes the tribunals to apply transnational law governing *res judicata* effect of the awards.⁸⁷

Interestingly, this approach does not clearly define the substance of *res judicata* rules. Instead, international tribunals are encouraged to devise their own case law covering all aspects of *res judicata*.⁸⁸ The author further notes that a certain amount of time is required for this approach to develop a comprehensive legal framework, however, under the proposed framework the tribunals would at the very least be able to apply it.

This approach does not aim at changing the rules governing *res judicata*. Instead, its objective is to provide arbitral tribunals with a legal basis to develop and apply such rules. Compared to the ILA Recommendations, this position creates a solid ground for evolution and application of more detailed and precise rules. The Recommendations' approach, on the other hand, is static.

3. ALI / UNIDROIT Principles of Transnational Civil Procedure

⁸⁶ Dominique Hascher, 'L'autorité de la chose jugée des sentences arbitrales' [2004] *Droit international privé: travaux du Comité français de droit international privé*, 15e année, 2000-2002 18 25; Yaffe (n 72) 815, 816

⁸⁷ Yaffe (n 81) 832

⁸⁸ *ibid* 831

The Principles of Transnational Civil Procedure, adopted by the UNIDROIT and the American Law Institute in 2004 (“**ALI/UNIDROIT Principles**”), were designed as a uniform framework for the resolution of disputes involving parties from different states.⁸⁹ As provided in the Comment P-E, the Principles are equally applicable to arbitration to the extent they are compatible with the its nature.

The ALI/UNIDROIT Principles are described as ‘[b]ridging the gap’ between civil and common law and providing solutions based on the principles contained in both legal systems.⁹⁰ Article 28 of the Principles expressly provides for the rules governing *res judicata* as follows:

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 defenses 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 facts, should be applied only to prevent substantial injustice.

The Principles adopt the approach common to civil law legal systems, under which a party’s claim for relief determines the scope of the subject matter in dispute.⁹¹ Therefore, the Principles provide for the effect of *res judicata* limited to the scope of claims of the parties. In addition, the Principles permit issue preclusion only as an exception. A possible case of such exception is a justified reliance of one of the parties on issues of fact or law determined in prior proceedings.⁹²

⁸⁹ ALI/UNIDROIT Principles, Comment P-C

⁹⁰ Schaffstein, Thesis (n 50) 71

⁹¹ Rolf Stürner, ‘The Principles of Transnational Civil Procedure: An Introduction to Their Basic Conceptions’ (2005) 69 (2) The Rabel Journal of Comparative and International Private Law 201 249

⁹² ALI/UNIDROIT Principles, Comment P-28C

C. Conclusion

International law as the source of rules governing *res judicata* effect of arbitral awards provides answers for a number of important issues. First and foremost, it acknowledges *res judicata* as a fundamental principle of international law and extends it to arbitral awards. Second, the majority of authorities agree that international law provides at least three basic criteria for invocation of *res judicata*, namely (a) identity of the parties; (b) identity of claims; and (c) identity of cause of action.

However, it does not go further than that. On the one hand, the underlying rationale for application of international standards is the promotion of consistency and clarity in arbitration and raises no issues. However, the legal basis for its application is moot. Depending on one's position, *res judicata* issue may be viewed as a substantive issue and in this case is governed by applicable substantive law. In this scenario, rules of international law are hardly applicable absent a specific choice of the parties. If *res judicata* is viewed as a procedural issue, it is subject to the law of the seat.⁹³

Remarkably, even scholars who advocate or mention the possibility to apply international rules of preclusion, provide no *legal* basis for such application. The main justification for the application of international sources is, *inter alia*, consistency, predictability and fairness.⁹⁴ Despite the beneficial nature of those considerations, they do not remove the risk of violation of applicable law of the seat of arbitration, which may negatively affect the award.

On the other hand, even if international rules of preclusion are applicable, they do not resolve all issues (or provide a solid basis for it). First, international rules do not clarify when does an arbitral

⁹³ Born (n 3) 1532

⁹⁴ Born / Bull (n 34) 12; Hanotiau, Complex Arbitrations (n 25) 242 (*quoting Peter Barnett*)

award obtain *res judicata* effect. An attempt to mitigate this issue was made by the ILA, which recommended that *res judicata* arises when ‘no challenge can be brought (...) or (...) has been denied’.⁹⁵ However, this is an escape from solving the problem rather than a solution, because the question of how the moment is determined, remains.

Second, international rules do not determine whether the scope of *res judicata* effect includes only the decision or the reasoning as well. While ILA recommended the broader approach, no legal justification for its selection was provided.⁹⁶ Third, international rules do not define whether *res judicata* is an issue of admissibility or jurisdiction. ILA again tries to mitigate this issue by leaving the answer to the applicable domestic law.⁹⁷ At the same time, it is implied that this distinction is mostly irrelevant. However, this distinction may significantly affect the dispute resolution process, given specific circumstances.

To conclude, practical relevance of international sources of law in their current state is low. Even if a tribunal is willing to apply them, it will nevertheless have to fill out the gaps on its own. International law does provide for certain cornerstone rules and principles. However, as noted before, the general idea of *res judicata* effect is known to the majority of legal systems but the devil is in the details. Those details are not sufficiently regulated by international law.

The actual practical applicability of transnational sources is, unfortunately, hardly higher. The ILA Recommendations suffer from the same disadvantages as the rules based on international sources. The Recommendations provide for general (and widely acknowledged) principles but leave the details to be sorted out with the use of outside sources. This, however, makes them loosely suitable

⁹⁵ ILA Final Report (n 40) 74

⁹⁶ *ibid* 77

⁹⁷ *ibid* 81

for practical application and the resolution of complicated practical issues. Moreover, the Recommendations themselves do not rely on any legal sources. While not a bar for their acceptance (the IBA Guidelines on the Taking of Evidence is a perfect example of widely accepted soft-law instrument) it may become an impediment for the courts and tribunals.

The transnational approach proposed by Yaffe is more beneficial in perspective compared to the ILA Recommendations. It offers a practice-oriented solution with the regulatory framework being designed by the practitioners themselves, and the source of authority for doing so. The obvious disadvantage of this approach is its dependency on arbitral tribunals to develop preclusion rules. As will be demonstrated in Chapter IV below, currently the tribunals devote little to no attention to the issue of *res judicata* of arbitral awards and demonstrate little intention of forming a consistent body of rules. Moreover, a system of transnational rules could still come in conflict with a particular domestic approach of national courts, which can affect the award and even result in it being set aside or refused enforcement.

CHAPTER III

Res Judicata: National Law Sources

This Chapter aims at analyzing rules of a national jurisdiction governing *res judicata*. This approach is commented on in many scholarly works. However, it appears that this approach is favored much less comparing with international law. The reasons are, first, the complexity of choosing the correct applicable law, and, second, inevitable lack of consistency resulting from the applicable law being different from jurisdiction to jurisdiction.

The first section below aims first at analyzing theoretical considerations underlying the choice of a particular national law. The second section's objective is to provide illustrations of how specific jurisdictions approach to the issue and analyze the relevance and applicability of these approaches.

However, even at this point, from the above brief outline of various issues it becomes apparent that determining *res judicata* effect of an award under specific domestic rules is not a straightforward task. However, national rules usually contain a structured and detailed set of rules, unlike international law. Therefore, taking this approach may prove worthy of the tribunal's trouble.

A. Potentially applicable jurisdictions

Res judicata effect of an arbitral award can potentially be governed by *any* of legal systems applicable to the arbitration. The authorities largely consider the following jurisdictions:

- The law of the seat of arbitration;
- The law of the seat of the award which *res judicata* effect is in question was rendered;
- The law governing the arbitration agreement;
- The substantive law applicable to the dispute.

For the sake of practical usefulness, this section will focus on the question which law the tribunal shall apply to determine *res judicata* effect of a previous award rendered by another tribunal.

1. The law of the seat of arbitration

The rationale of this option is rather straightforward. As a rule, procedural aspects of an arbitration are governed by the law of its seat.⁹⁸ The majority of authorities appear to view *res judicata* as a matter of procedure rather than substance.⁹⁹ Consequently, a tribunal sharing the same position would be justified in resorting to the arbitration law of the seat.¹⁰⁰

This approach immediately encounters an issue. In many jurisdictions, especially those that adopted the UNCITRAL Model Law on International Commercial Arbitration (the “**Model Law**”), the *lex arbitri* does not contain any sophisticated rules governing the preclusive effect of an award. Indeed, the preclusive effect of an arbitral award is implicitly addressed only in its Article 35 as follows:

An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36

This provision is similar to Article III of the New York Convention discussed in section A. While it is possible to apply the same interpretative approach as to the Convention, the article nevertheless contains no detailed regulation of *res judicata*. In such circumstances, the tribunal can resort to the law of the forum to discover a suitable framework and apply it by analogy¹⁰¹, which usually results

⁹⁸ Born (n 3) 1531

⁹⁹ ILA Interim Report (n 4) 65; Hanotiau (n 65) 291

¹⁰⁰ Born (n 3) 1602; Born / Bull (n 34); ILA Interim Report (n 4) 50

¹⁰¹ Hascher (n 86) 19

in the application of domestic procedural rules. This, of course, poses additional question of whether arbitral tribunals are permitted to do so, which should largely be answered in affirmative. As noted earlier, most domestic arbitration laws grant arbitral tribunals the right to select the applicable procedural rules at their discretion, which should cover the application of local rules of civil procedure to the issue of *res judicata* of an award without prejudice.

The following disadvantages of this option are evident: first, it may simply happen that the domestic rules of preclusion do not quite fit in the arbitration framework. For example, under Russian law a court decision becomes binding once either the deadline for its appeal has expired, or the appeal was denied, or the appellate court adopted an amended decision.¹⁰² Those provisions can hardly be applied to an arbitral award.

Second, the rules of preclusion of the seat may contradict other relevant rules, especially the rules of the seat of the award which *res judicata* effect is contemplated by the tribunal. Suppose that an award rendered in country A has *res judicata* effect under local laws but is denied this effect by the tribunal seating in country B exclusively on the basis of country B's domestic law. Suppose then a party to this dispute petitions local courts of country B to recognize the former award by issuing an injunction to the second tribunal. What should the courts do, keeping in mind the requirements of the New York Convention? The answer to this question is rather unclear.

2. The law of the seat of the award which *res judicata* effect is in question

The legal rationale of this option is to ensure that an award has *res judicata* effect under the law in accordance with which it was rendered, and that it does not receive more protection than that.¹⁰³

¹⁰² see e.g. Arbitration Procedural Code of Russia, Articles 180 (1), 271 (5)

¹⁰³ Born (n 3) 3768, Audley Sheppard, 'Chapter 8. Res Judicata and Estoppel', in Bernardo M. Cremades Sanz-Pastor and Julian D. M. Lew (eds), *Parallel State and Arbitral Procedures in International Arbitration, Dossiers of the ICC Institute of World Business Law* (Vol 3, ICC 2005) 230

On its face, it is a reasonable approach, because it establishes a connection between the jurisdiction where the award was rendered and with the law it had to comply with, and the seat of subsequent arbitration.

The disadvantages of this option are largely the same that of option 1. The *lex arbitri* of the place where the former award was rendered might not contain required provisions. Moreover, national procedural legislation might be hardly applicable as well. One additional disadvantage of this option is that the jurisdiction where the former award was rendered may contain some very specific condition on effectiveness of *res judicata* or on its scope, which is not reflected in the law of the seat of the subsequent arbitration. Scholars are of the opinion that such restrictions should be respected by the subsequent tribunal, because otherwise the award would receive broader protection than under its seat of origin.¹⁰⁴ However, the reasonableness of respecting manifestly unjustified restrictions was not considered by the scholars.

3. The law governing the arbitration agreement

This option appears to be the least supported; in fact, only two references to it was discovered with no further clarifications as to its rationale.¹⁰⁵ It can be assumed that the connecting factor lies in the issues governed by the law of the arbitration agreement. Among others, the parties' obligation to arbitrate is subject to the law governing substantive validity of their agreement to arbitrate.¹⁰⁶ Furthermore, it is also argued that while an arbitral award is loosely connected to any national

¹⁰⁴ Sheppard (n 103) 230

¹⁰⁵ Born (n 3) 3767; Hanotiau (n 65) 291

¹⁰⁶ Born (n 3) 479, 1270

jurisdiction (including the seat of arbitration) it has the strongest connection with the arbitration agreement, and the rules of preclusive effect of the award shall be fashioned in light of such.¹⁰⁷

The relevance and practical applicability of this option are below average. First, absent the parties' specific choice, an arbitration agreement is governed by the law of the seat or the substantive law of the container contract – depending on the tribunal's views¹⁰⁸, thus removing the need for a separate analysis. Second, even if an award is connected closer to the arbitration agreement rather than to any jurisdiction, it does not directly follow that the governing law of the agreement should apply.

4. The law applicable to the substance of the dispute

Just as the option 3, this one appears to be less favored by scholars. Although commented on, it rarely enjoyed a detailed analysis.¹⁰⁹ It appears that this option is based on specific practice developments rather than theoretical considerations. The possible reason may be that, as stated above, *res judicata* issue is largely perceived as a procedural one, while this option requires the opposite.

This option does not offer any better solution than the options listed above. It leaves open issues associated with the correlations of laws of the place of rendering the former award and the seat of the subsequent tribunal and suffers from all other common illnesses of domestic rules on *res judicata*. Although an arbitral tribunal might select this option, its reasons would probably be very specific to a particular case.

¹⁰⁷ *ibid* 3769

¹⁰⁸ Redfern / Hunter (n 3) paras 3.09 – 3.11

¹⁰⁹ Born / Bull (n 34) 9; Hanotiau (n 65) 291; Sheppard (n 103) 230

B. National approaches to *res judicata*

This subsection deals with national approaches to *res judicata* in arbitration context using Switzerland, France and the United States as examples. The jurisdictions were selected for being known to attract large amount of arbitrations, and for offering interesting approaches to the issue at hand.

1. Swiss law

Swiss *res judicata* rules are based on federal procedural and arbitration laws, however, the *res judicata* doctrine was largely shaped by case law.¹¹⁰ The rules applicable to arbitral awards are the same as applied by national courts to determine *res judicata* of prior decisions.

a) *The statutory basis*

Core provisions regarding *res judicata* are contained in the Swiss Civil Procedure Code (“**ZPO**”). Under Article 59 (2) (e) the claim is inadmissible in court if subject ‘of a legally binding decision’.

No provisions of Swiss law expressly covering *res judicata* effects of arbitral awards were discovered. Indirectly, Article 190 (2) (e) of the Swiss Federal Act on Private International Law (“**PILA**”) provides the grounds for setting an award aside, which includes awards incompatible with Swiss public policy. The Act applies to arbitral tribunals seated in Switzerland pursuant to Article 176 (1). As will be demonstrated in paragraph (d), this provision can be utilized for setting aside the award when the tribunal failed to comply with *res judicata* rules.

b) *Criteria of application*

¹¹⁰ Schaffstein (n 6) 2645, 2647

Under Swiss law *res judicata* applies to the decision on the merits, which provides a final resolution to the dispute of the parties, from the moment when this decision becomes final and binding in the subsequent proceedings involving identical parties and identical subject matter.

A decision on the merits is a decision on whether the claim is ‘well-founded in law’, including judicial approval of settlements and acceptances of claims by the other party.¹¹¹ While decisions on partial claims have *res judicata* effect with regard to the part of claims actually in the scope of the decision, decisions on procedural issues and interim and provisional measures generally do not.¹¹²

The moment on which the decision becomes final for the purposes of *res judicata* is determined by the moment at which no recourse measures may be exercised against the decision, which suspend its enforceability. Essentially, in the context of ZPO this means the impossibility to appeal the decision.¹¹³

The identity test under Swiss law includes identical parties and identical subject matter in dispute. Swiss law has a narrow approach to the identity of parties. Only the parties themselves or their successors are considered identical. Regarding the procedural status, *res judicata* applies not only to claimants and respondents but to other categories of parties under Swiss law (such as third parties).¹¹⁴

The identity of subject matter in dispute is determined by the identity of claims and the identity of the set of facts, which are the basis for the claim. Swiss law contains no requirement of *legal cause*

¹¹¹ *ibid*

¹¹² *ibid* 2648

¹¹³ *ibid* 2649

¹¹⁴ *ibid* 2650

identity (*i.e.* no regard is given to the legal basis of claims).¹¹⁵ The identity of facts criterion is fulfilled when the facts relied upon in the former proceedings are the same as relied upon in subsequent proceedings. As a result, the identity of subject matter occurs when same claims are based on the same facts without regard of the legal arguments invoked by the parties. Consequently, Swiss law does not prevent the parties from bringing new claims on the basis of the facts that were unknown at the time of previous proceedings.¹¹⁶

c) Scope of res judicata

Res judicata effect attaches to the merits of the decision, *i.e.* its dispositive part. The reasons, which are the basis of the judgement, generally do not obtain this effect, although in practice the reasoning can be considered to ascertain the meaning and the scope of the dispositive part. Swiss law also recognizes a limited number of exceptions from this general rule.¹¹⁷

As a consequence, Swiss law does not recognize issue preclusion as a part of *res judicata* doctrine. However, due to the identical cause being determined on the basis of the facts only, Swiss law precludes claims which could have possibly been raised with regard to different legal grounds.

d) Res judicata in international arbitration

The PILA do not directly deal with *res judicata* of arbitral awards. However, it contains important provisions regarding awards rendered in Switzerland: first, that the tribunal may apply the

¹¹⁵ *ibid* 2651

¹¹⁶ Nathalie Voser and Julie Raneda, 'Recent Developments on the Doctrine of Res Judicata in International Arbitration from a Swiss Perspective: A Call for a Harmonized Solution' (2015) 33 (4) ASA Bulletin 742 751

¹¹⁷ Schaffstein, Thesis (n 50) 52, 53

procedural rules of its choice (which is in line with commonly accepted practice) and that the award is final from the moment it is communicated.¹¹⁸

Under the established case law of Swiss Supreme Court, *res judicata* is a part of Swiss public policy.¹¹⁹ Accordingly, the tribunal's failure to adhere to the rules of *res judicata* may constitute a ground for setting the award aside under the PILA.

The Supreme Court expressly denied the existence of transnational preclusion rules or the applicability of the ILA Recommendations and stated that there exists no legal basis for the application of such transnational rules by arbitral tribunals seated in Switzerland.¹²⁰ Under the Supreme Court's position, international tribunals seated in Switzerland must apply Swiss *res judicata* principles in the absence of an international treaty's provisions to the contrary.¹²¹ The Supreme Court established the following general principles of *res judicata* effect of arbitral awards:

- An arbitral award has *res judicata* effect only with regard to its dispositive part and not its reasoning¹²²;
- An arbitral award must obtain *res judicata* effect under the law of the forum where it was rendered¹²³;
- An arbitral award must be enforceable in Switzerland under the New York Convention¹²⁴

¹¹⁸ PILA Article 182 (2), 190 (1)

¹¹⁹ Voser / Raneda (n 116) 757

¹²⁰ Voser / Raneda (n 116) 756; Schaffstein (n 6) 2652

¹²¹ Schaffstein (n 6) 2652

¹²² Daniel Girsberger and Nathalie Voser, *International Arbitration: Comparative and Swiss Perspectives* (3rd edn, Schulthess Juristische Medien AG 2016) 317

¹²³ Schaffstein (n 6) 2652

¹²⁴ Voser / Raneda (n 116) 759

The Swiss Supreme Court approach appears to combine several of the options listed in Section A above. First, arbitral tribunals must select procedural rules of the forum and may not apply other rules to determine effect of *res judicata*.¹²⁵ Second, the tribunals must simultaneously refer to the laws of the seat of the former arbitration to verify whether the award in question obtained *res judicata* effect under such rules. Finally, the treatment of *res judicata* as a matter of public policy effectively precludes approaches incompatible with Swiss rules, as such award may be set aside under Article 190 (2) (e) of Swiss PILA.

Swiss law visibly aims at balancing conflicting interests. On the one hand, the tribunals must ensure that the award in question indeed became binding under the law of the place where it was rendered. On the other, the process of ensuring is strictly subjected to domestic law. Furthermore, the rights of the parties are protected through the public policy clause. This approach provides answers to almost all questions which arise in connection with *res judicata* effect of arbitral awards. However, this approach also places a heavy burden on arbitral tribunals, who are tasked with the verification of the award's compliance to the law of some other jurisdiction.

2. French law

French rules on *res judicata* effect of arbitral awards largely originate from statutory sources, which, notably, contain specific provisions in this regard. French law follows the classic triple-identity test. Certain rules of *res judicata* were developed by court practice.

a) Statutory basis

¹²⁵ *ibid* 764

Article 1351 of the French Civil Code explicitly provides for the triple-identity test with respect of a judgement: identity of claims, identity of parties and identity of grounds for the claims.

Under Article 1476 of the French Code of Civil Procedure an arbitral award obtains *res judicata* effect at the moment it was rendered. However, other aspects of *res judicata* of arbitral awards are not settled by statutes, as confirmed by the Court of Cassation.¹²⁶

b) Criteria of application

Unlike Swiss law, French law awards the *res judicata* effect to a judgement that ‘puts an end’ to the jurisdiction of the court over a dispute from the moment of its pronouncement and regardless of available means of recourse.¹²⁷ Consequently, a decision rendered in the absence of a dispute does not obtain the force of *res judicata*.

French law strictly adheres to the triple identity test as provided by the Civil Code.¹²⁸ The party identity is fulfilled only when the same parties act in the same capacity in the subsequent proceedings, and only the parties themselves, their assignees and successors are considered.¹²⁹ The identity of claim is fulfilled when the party claims ‘substantially the same thing’.¹³⁰

The identity of the grounds for the claim is not further defined in the statutory sources. Therefore, this provision can be interpreted differently, as requiring identical set of facts or identical legal grounds. However, it appears that in court practice this provision is treated as requiring only

¹²⁶ *Distribution v. Prodim* (n 24) 471

¹²⁷ Schaffstein, Thesis (n 50) 41

¹²⁸ Sheppard (n 103) 232

¹²⁹ *ibid* 228

¹³⁰ Schaffstein, Thesis (n 50) 48

identical facts.¹³¹ However, there is a contrary opinion, under which the “grounds” under French law must be interpreted as related only to legal grounds of the claim.¹³²

c) Scope of res judicata

According to Article 1351 of the Civil Code, *res judicata* effect attaches only to the dispositive part of the judgement. The underlying reasons of the judgement have no *res judicata* effect but can be considered for interpreting the dispositive part.¹³³

As stated above, the case law of French courts permits the application of the principle of concertation, which functions in the manner similar to the claim preclusion in the U.S. law.¹³⁴ As a general rule, French law does not recognize issue preclusion due to the narrow *res judicata* effect.

d) Res judicata in international arbitration

With regard to the application of French *res judicata* doctrine to arbitration several important things have to be mentioned. First, as stated above, French law expressly provides for *res judicata* effect of arbitral awards at the moment it was rendered. Similar to the provisions regarding domestic court judgements, courts held that a setting aside claim interdicts the execution of an award but does not deprive it of *res judicata* effect.¹³⁵

Second, it is noted that *res judicata* objection should be raised by parties rather than courts.¹³⁶ To some researchers, this evidences the fact that normally *res judicata* is not a matter of French public

¹³¹ Hanotiau (n 65) 299

¹³² ILA Interim Report (n 4) 52

¹³³ Schaffstein, Thesis (n 50) 43

¹³⁴ Distribution v. Prodim (n 24) 471

¹³⁵ Société Norbert Beyrard France v. République de Côte-d'Ivoire (Court of Appel of Paris) (1994) 1 Revue de l'Arbitrage 134 135

¹³⁶ ILA Interim Report (n 4) 51

policy.¹³⁷ However, there is evidence that in certain situations *res judicata* was treated as a matter of public policy by courts in case of conflicting awards.¹³⁸

Third, French case law is not certain with regard to the applicability of the principle of concentration to arbitration. While some courts extended the principle to international arbitration, others declined to do so.¹³⁹

Scholars mention that French legislature initially contemplated permitting the parties to define the scope of the preclusive effect but ultimately decided against it. Therefore, the parties' agreement inconsistent with French law may possibly be disregarded by the courts.¹⁴⁰

It appears that there is no specific statutory provision nor settled case law with regard to the applicability of French rules by tribunals. Thus, it is in the tribunal's discretion to apply French law. French law offers clear and precise answers to a number of issues such as the moment of obtaining preclusive effect by an award, its scope, consequences of a setting aside claim etc.

3. U.S. law

Typically for a common-law jurisdiction, American preclusion rules have been largely devised by courts and almost not regulated by statutes. One of the leading authorities on the rules of *res judicata* rules is the Restatement (Second) of Judgements, containing an aggregation of the rules of preclusion in civil jurisprudence.

a) Statutory basis

¹³⁷ Sheppard (n 103) 228

¹³⁸ Hanotiau, *Complex Arbitrations* (n 25) 248

¹³⁹ Nadja Erk-Kubat, *Parallel Proceedings in International Arbitration: A Comparative European Perspective* (Kluwer Law International 2014) 169

¹⁴⁰ Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 780

The U.S. federal law established the preclusive effect of judgements of domestic courts. First, Article IV, Section 1 of the U.S. Constitution requires full faith and credit to be given, *inter alia*, to judicial proceedings of states. Under Title 28, Section 1783 of the U.S. Code, ‘full faith and credit in every court within the United States (...)’ is given to national court decisions.

No statutory sources provide for the preclusive effect of arbitral awards. However, under Title 9, Section 207 of the U.S. Code an arbitral award can be ‘confirmed’ by the U.S. court. As a result, the award will get ‘full faith and credit’ as a part of respective “confirming” court decision.¹⁴¹

b) What law applies?

The characteristic features of American common law are contradicting positions regarding preclusive effect of arbitral awards, the lack of unified criteria of application of *res judicata* and difference in approaches between federal and state courts and among different states. This necessarily raises the issue of proper applicable law in different jurisdiction and between courts of different levels.

Federal common law defines the rules of preclusion applied by federal courts to federal cases.¹⁴² However, when a federal court sits in diversity and applies state law, the applicable law is not clear. Pursuant to the Supreme Court decision in *Erie*, federal courts seated in diversity must apply the substantive law of the state and federal procedural law¹⁴³ but researchers state that there is no unified approach to the issue and some courts apply state rules while others apply federal.¹⁴⁴

¹⁴¹ Born (n 3) 3748

¹⁴² Taylor v. Sturgell 553 U.S. 880 (2010) 891

¹⁴³ Erie Railroad v. Tompkins, 304 U.S. 64 (1938)

¹⁴⁴ Mark G. Emerson, ‘Res Judicata in the Federal Courts: Federal or State Law’ (1984) 17 Ind L Rev 523 533

in subsequent proceedings state courts determine the preclusive effect of such federal court ruling using the rules of preclusion available under that state law.¹⁴⁵

Regarding preclusive effects of state court judgements in subsequent federal proceedings and *vice versa* the case law is that under the full faith and credit clause of the U.S. Code mentioned above a federal court must recognize the preclusive effect of the state judgement and apply the rules of preclusion of respective state rather than federal rules.¹⁴⁶

c) *Criteria of application*

Under American law a final judgement on the merits, rendered by a competent court has *res judicata* effect with regard to the same parties and with the same cause of action.¹⁴⁷ The most complicated question appears to be the exact understanding of the “same cause of action” criterion.

According to the Restatement (Second) of Judgments, a final judgement resolves all issues of law or fact related to the claim. If any matters were left for future resolution, such judgement cannot be considered final.¹⁴⁸ Identity requirement is fulfilled if the parties are the same who appeared in previous proceedings, their successors or privies. However, it is noted that issue preclusion can be raised in subsequent proceedings involving third parties.¹⁴⁹

American common law knows two different approaches to the identity of the cause of action similar to English common law as described in Chapter I (A). Under one approach, the cause of action is ‘coterminous with the transaction’, which means that all claims arising out of the same

¹⁴⁵ Dan Ryan Builders, Inc. v. Crystal Ridge Development, Inc. 239 W.Va. 549 (W. Vg. 2017) 559

¹⁴⁶ Kremer v. Chemical Const. Corp. 456 U.S. 461 (1982) 482

¹⁴⁷ Quinn Smith, 'Chapter 27: The Res Judicata Effect of Arbitral Awards', in Laurence Shore, Tai-Heng Cheng, et al. (eds), *International Arbitration in the United States* (Kluwer Law International 2017) 635

¹⁴⁸ Schaffstein, Thesis (n 50) 30

¹⁴⁹ ILA Interim Report (n 4) 48

set of facts which comprise the given transition have the same identical cause of action (the so-called “transactional” approach).¹⁵⁰ Under the other so-called “same evidence” approach cause of action is identical if the evidence to sustain several claims is the same.¹⁵¹ The legal grounds for the particular claim are not considered under both approaches.

In practice, it appears that some courts discard the “same evidence” test in favor of more general and more practice-oriented transactional approach.¹⁵² To the contrary, other jurisdictions appear to apply the “same evidence” test exclusively.¹⁵³ Yet in other jurisdictions the evidence test applies only when evidence required to support different claims ‘varies materially’, while the “transactional approach” applies as a general rule.¹⁵⁴ Federal courts appear to employ both tests.¹⁵⁵

d) Scope of res judicata

First, the fact that the cause of action identity is determined according to the facts only precludes the parties from raising claims which could have been raised in the prior proceedings but were not.¹⁵⁶ Second, American law recognizes issue preclusion (*i.e.* the binding nature of issues of fact and law decided in the previous proceedings), which some researches treat as a broader *res judicata* and some as a separate effect.¹⁵⁷ Unlike claim preclusion, issue preclusion does not extend to issues which could have been but were not actually decided in prior proceedings.¹⁵⁸

¹⁵⁰ Restatement (Second) of Judgements (ALI 1982) para 24, comment a; Born (n 3) 3735; Barnett (n 12) 120

¹⁵¹ *see e.g.* River Park, Inc. v. City of Highland Park 703 N.E.2d 883 (Il. 1998) 891

¹⁵² *ibid*

¹⁵³ White v. SWCC 164 W.Va. 284 (W. Vg. 1980) 289; *Dan Ryan Builders, Inc* (n 145) 560

¹⁵⁴ *see e.g.* Equity Resources Management, Inc. v. Vinson 723 So.2d 634 (Al. 1998) 638

¹⁵⁵ Pike v. Freeman 266 F.3d 78 (2nd Cir. 2001) 91

¹⁵⁶ ILA Interim Report (n 4) 48

¹⁵⁷ *see e.g.* Smith (n 147) 637; Born (n 3) 3736 respectively

¹⁵⁸ Smith (n 147) 637

e) *Res judicata in international arbitration*

First, it is necessary to determine whether under American law an arbitral award has *res judicata* effect at all. The question can be answered in both ways.

Under the negative approach, unconfirmed awards can be denied preclusive effect altogether by courts and subsequent arbitral tribunals.¹⁵⁹ According to the case law of the U.S. Supreme Court, full faith and credit are not extended automatically to unconfirmed awards in the absence of a direct statutory provision, and neither do preclusive effects. In 1984 the Supreme Court once more ruled that a domestic arbitral award (in employment arbitration) does not prevent a subsequent re-litigation of the issue.¹⁶⁰ Interestingly enough, the Court relied not only on the Congress' intention to afford preclusive force to acts of federal and state courts only; it was pointed out that arbitration is not a judicial proceeding being inferior to court proceedings, namely because arbitral tribunals derive their powers from the agreement of the parties and may not enforce them on third parties, that employment arbitration may fail to adequately protect the employee's rights and even that the expertise and fact-finding of arbitrators may be worse than in courts.¹⁶¹

This position can frequently be encountered in the case law. As stated by the 5th Circuit in 1978:

Arbitrators' awards (...) are not accorded the weight of "judicial authority" in determining future controversies, even between the same parties or over the same issues. They are not conclusive or binding upon an arbitrator in subsequent cases. In arbitration, all questions of fact and law are deemed to be referred to the arbitrator for decision. Unless restricted by the contract, or submission agreement, or an applicable state statute,

¹⁵⁹ *ibid* 642

¹⁶⁰ *McDonald v. City of West Branch*, 466 U.S. 284 (1984) 288

¹⁶¹ *ibid* 290, 291

the arbitrator is not bound by the strict rules of law or evidence. As long as the arbitrator keeps within his jurisdiction, he can decide the issues submitted to him, notwithstanding any prior awards between the parties, unless the parties have agreed otherwise.¹⁶²

Similar position was adopted by a number of other courts.¹⁶³ On a number of occasions courts clearly stated that the determination of *res judicata* effect of the prior award is the task for tribunals, not the courts, and refused even to examine such claims.¹⁶⁴ Courts developed no consistent approach to the problem of several conflicting awards, and even in such conditions *res judicata* effect was not always granted to the former.

Under the positive approach, the researchers recognize that there are no compelling grounds for the courts to deny preclusive effect of unconfirmed awards.¹⁶⁵ The majority of cases cited above are comparatively old (the second half of XX century) and might not reflect the existing approach.

Strong case law points that unconfirmed awards do enjoy *res judicata* effect similar to court judgements. Regarding its own decision in *McDonald* case, the Supreme Court later stated that it concerned largely the question of whether statutory claims can be litigated after contractual issues were arbitrated.¹⁶⁶ As provided in the Restatement (Second) of Judgements a final arbitral award has the same effects of *res judicata* as a court judgement.¹⁶⁷ According to Born, a large number of lower courts applied to the unconfirmed domestic arbitral awards the rules derived from preclusion

¹⁶² *Westinghouse Elevators of Puerto Rico, Inc. v. S.I.U. de Puerto Rico* 583 F.2d 1184 (1st Cir.) 1187

¹⁶³ *E.g. Connecticut Light & Power Co. v. Local 420, Intern. Broth. of Elec. Workers, AFL-CIO* 718 F.2d 14 (2nd Ct) 20; *Butler Armco Independent Union v. Armco, Inc.* 701 F.2d 253 (3rd Cir.) 255

¹⁶⁴ *Chiron Corp. v. Ortho Diagnostic Systems, Inc.* 207 F.3d 1126 (9th Cir.) 1132;

¹⁶⁵ Smith (n 147) 643

¹⁶⁶ *Gilmer v. Interstate/Johnson Lane Corp.* 500 U.S. 20 (1991) 35

¹⁶⁷ Schaffstein, Thesis (n 50) 118

standards applicable to the judgements of domestic courts under respective state law.¹⁶⁸ In a recent decision a lower federal court confirmed that ‘federal courts have routinely exercised their discretion’ and afforded preclusive effects to arbitral awards.¹⁶⁹

Second, if the second approach is taken, preclusive effect of arbitral awards is subject to the same principles as preclusive effect of court decisions. For starters, an arbitral award must be final and satisfy requirements for its confirmation (recognition) by courts.¹⁷⁰ Also, the same requirements for the identity of parties and cause of action apply to invoke *res judicata*.¹⁷¹

Third, with regard to the law governing *res judicata* effect of an awards, a small number of courts held that *res judicata* effect of arbitral awards is defined by the law of the place where they were rendered.¹⁷² However, there is no established case law on the matter. However, some courts held *res judicata* objection belongs to the merits of dispute¹⁷³, which suggests that under US law *res judicata* is treated as admissibility issue.¹⁷⁴ With that, it remains unclear which law should the tribunals apply to decide on *res judicata*.

Researchers have conflicting views on whether unconfirmed awards have any preclusive effect whatsoever, with both approaches having support in case law. At least two courts referred to *res judicata* as to the issue of the merits of the dispute, and yet other courts considered that *res judicata* effect is governed by the law of the place where the award was made. What is more, American rules of preclusion vary in different jurisdictions and the federal common law does not bind state

¹⁶⁸ Born (n 3) 3749

¹⁶⁹ In re Johnson 584 B.R. 895 (U.S. Bankr. D. N.D. 2018)

¹⁷⁰ Born (n 3) 3751

¹⁷¹ *ibid*

¹⁷² see Born / Bull (n 34) 8

¹⁷³ *Chiron v. Ortho* (n 164) 1133; *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Belco Petroleum Corp.* 88 F.3d 129 (2nd Cir.) 136;

¹⁷⁴ Walters (n 10) 666

courts. This means that both the parties and the tribunals have to pay great attention to the exact applicable *res judicata* rules.

C. Conclusion

First and foremost, the *res judicata* effect of arbitral awards is recognized in all examined jurisdictions. The U.S. offer more restrictive approach due to the earlier negative treatment of preclusive effects of arbitral awards by the Supreme Court. Nevertheless, currently it appears that even unconfirmed awards are afforded *res judicata* force.

Legal theory can come up with a large number of laws applicable to the issue of *res judicata* of arbitral awards. However, it appears that the most logical solution is to defer to the law of the seat of the subsequent arbitration to determine the status of the prior award. At the very least, it can protect the latter award from being set aside for violating public policy of the seat. In addition, it is also reasonable to take into account the law of the seat of the prior arbitration. However, the legal justification for doing so – not to afford more protection to an award that is afforded in the place of its rendering – is not particularly compelling one.

National approaches to *res judicata* in arbitration vary significantly. Even in the countries which are known destination for arbitrations, the legislature and judiciary did not attempt to come up with a uniform pro-arbitration solution. Among existing approaches, the Swiss way appears to be the most appealing: this conception offers a balanced set of rules which leaves almost no stone unturned. The downside is, however, the complexity and the tribunal's duty to examine two sets of domestic laws under the fear of violating Swiss public policy. France also contains clear and precise and reasonably uncomplicated. The US way is the most confusing among the three jurisdictions. American common law, as noted above, contains a number of specifics which can

make things more complicated and involve additional expenses. Compared to international sources analyzed above, national jurisdictions offer more detailed and more predictable solutions. This conclusion contradicts the findings of researchers advocating international approach but coincides with the approach taken by A. Sheppard in her work on *res judicata* and estoppel in international arbitration.

CHAPTER IV

***Res Judicata* from Practical Perspective – Existing and Desirable?**

The preceding Chapters dealt with existing approaches to the sources of *res judicata* of arbitral awards in legal theory. Overall, neither of the solutions advanced by scholars was perfect. There is no simple and consistent approach that would allow arbitral tribunals around the globe to clearly define all aspects of preclusive effect of a prior award. The approach most favored by scholars is reliance on international law. On its face, it offers clarity, consistency and universally recognized authority. The downsides, however, are so grave that preclude this approach from being applied in practice. Except from the general statement that *res judicata* is internationally accepted and that some kind of identity must be present, international sources provide no further guidance and direct the seeker to the applicable law without even specifying the latter.

Various national jurisdictions offer much more comprehensive and detailed approaches. Apart from doctrinal objections with regard to the international nature of arbitration and the lack of any clear connection with any particular jurisdiction, this approach suffers from inconsistency. The parties would have to study the practice with regard to the preclusive effect of arbitral awards in the country of choice to ensure smooth sailing before actually agreeing on the seat. Which is a highly improbable scenario – at best.

The objective of this Chapter is twofold. First, it will analyze how legal sources of *res judicata* are treated in arbitral practice and to what extent (if at all) this treatment corresponds with approaches advances in legal theory. Second, on the basis of the case study, it will provide recommendations regarding the most beneficial framework for arbitral rules of preclusion and the most suitable sources containing appropriate rules of preclusion.

A. Approaches to the sources of *res judicata* in arbitral practice

This subchapter's aim is to analyze practice with the attention on the legal sources of *res judicata* relied upon by the tribunals and their reasoning and establish whether there is a uniform approach to *res judicata* issues in arbitral practice. The majority of analyzed cases are arbitral awards dealing with preclusive effects of prior awards. At the same, some cases discussed below involve prior decisions of national dispute resolution bodies but allow to see the general position of the tribunals with regard to *res judicata*.

1. International law favored by international tribunals

The majority of awards dealing with *res judicata* issues under international law were rendered by interstate tribunals and investment tribunals. Only a few international commercial tribunals expressly relied on international law or at least referred to the latter to resolve *res judicata* questions.

Interstate and investment tribunals largely take the same approach to *res judicata* issues. First, the tribunals declare *res judicata* as a recognized principle of international law, frequently relying on the Statue of the ICJ or its predecessor, and then referring to arbitral awards or decisions rendered by other international dispute resolution bodies. International commercial tribunals usually refer to *res judicata* as to a recognized principle but are much less precise of its origins and typically do not devote a lot of efforts to justify its application.

On several occasions the Permanent Court of Arbitration dealt with the issue of *res judicata* effect of preceding awards. The *Pious Fund* case concerned a charity founded in the current territory of Mexico. When Mexico obtained independence, the Fund's property was incorporated into the state treasury. To settle the question of compensation, a Mixed Claims Commission was constituted

which found in the US favor. However, Mexico disagreed on the issue of interest payments and the matter was referred to the PCA.

In the Decision of 1902, the Court held that the previous decision of the Mixed Claims Commission between the parties constitutes *res judicata*.¹⁷⁵ The Court reasoned that *res judicata* principle applies to the decision of tribunals and, ‘for an even stronger reason’, applied to international arbitration. Additionally, the Court found that all verdict-related parts of awards ‘enlighten and mutually supplement’ each other. This Award is noted to be the first case of international recognition of *res judicata* effect of arbitral awards.¹⁷⁶

In another Decision of 25 October 1910 in the *Orinoco Steamship* case the Court affirmed the internationally recognized principle of finality of awards.¹⁷⁷ The dispute in question concerned a previous award rendered by Umpire Barge between the same parties regarding claims of U.S. citizens to Venezuela. As it was contended that the umpire had exceeded his jurisdiction, the Parties concluded a new agreement and referred the same dispute to the tribunal. The first question posed before the tribunal was whether the umpire’s award is void.¹⁷⁸ The tribunal did not expressly state whether the umpire’s award had *res judicata* effect. Nevertheless, the tribunal declared that as a general rule, in the interests of peace which is ‘so essential to the well-being of nations’, an award must be final and binding. This rule was derived from Article 81 of the Convention for the Pacific Settlement of International Disputes of 18 October 1907, under which an award of the PCA ‘settles the dispute definitely and without appeal’.

¹⁷⁵ Decision of the PCA between the United States of America and the United Mexican States of 14 October 1902

¹⁷⁶ Manuel Indlekofer, *International Arbitration and the Permanent Court of Arbitration* (Vol 27, Kluwer Law International 2013) 94

¹⁷⁷ Decision of the PCA between the United States of America and the United States of Venezuela of 25 October 1910 (1911) 5 (1) *American Journal of International Law* 230

¹⁷⁸ *ibid* 231

In yet another Decision of 1977 on the case involving the demarcation of the continental shelf line between the U.K. and France, the PCA was requested to interpret its own Decision, and, *inter alia*, its preclusive effects. The PCA held that generally the preclusive effect attached only to the dispositive part of the award and not to its reasoning. At the same time, the Court stated that reasoning may be used to interpret the dispositive part.¹⁷⁹

The PCA case law evidently demonstrates that it accepted the *res judicata* effect of arbitral awards as an international principle of law. The Court, however, did not elaborate much on the choice-of-law process or made references to the specific rules of preclusion.

An Ad Hoc Tribunal for the *Trail Smelter* case held that *res judicata* is a question of international law as well. The dispute arose from the discharging of fumes by a smelter operated in Canada which caused damage to the neighboring Washington state. To settle the dispute, a tribunal was constituted under the Canada – United States Convention for Settlement of Difficulties arising out of Operation of Smelter at Trail B.C., Ottawa, 15 March 1935 (the “**Ottawa Convention**”).

Article III of the convention listed four questions posed by the parties before the tribunal, namely, (1) on the fact of damage to the United States and the amount of compensation, (2) on the possibility of injunctive relief and its scope, (3) on the measures to be taken by the smelter, (4) on the amount of compensation in connection with questions 2 and 30. Under Article IV of the convention the tribunal had to apply U.S. law to the ‘cognate questions’ and international law and practice.

¹⁷⁹ Decision of the PCA between the United Kingdom and France of 14 March 1978 (2006) XVIII Reports of International Arbitral Awards 295

The tribunal rendered its decision on question 1 on 1 October 1937, finding that damage was caused and declaring the amount of compensation. The United States subsequently requested to revise this decision and increase the compensation, claiming that the tribunal had erroneously interpreted the convention. The tribunal contemplated such revision, *inter alia*, from *res judicata* standpoint.¹⁸⁰ The tribunal found that its decision of 1 October 1937 has *res judicata* effect and ultimately denied revision.

The tribunal initially determined that the law applicable to the question whether the decision of 1 October is *res judicata* was international law. The tribunal examined the Ottawa Convention and established that it only provided for the law applicable to the questions listed in Article III. Thus, the tribunal proceeded to resolve the *res judicata* issue on the basis of international law and practice.¹⁸¹

Second, the tribunal declared *res judicata* ‘an essential and settled rule of international law’.¹⁸² In support, the tribunal cited several decisions of the Permanent Court of Arbitration, Permanent Court of Justice and other authorities, which generally held that arbitral decisions resolving a claim are final and cannot be changed or appealed. Based on the dissenting opinion in the *Chorzow* case, the tribunal applied the triple identity test: identity of parties, identity of object of the claim and identity of the cause of action and determined that the decision of 1 October has *res judicata* effect.¹⁸³

¹⁸⁰ Trail Smelter Case (United States, Canada) (2006) III Reports of International Arbitral Awards 1905 1948

¹⁸¹ *ibid* 1950

¹⁸² *ibid*

¹⁸³ *ibid* 1952

At the same time, citing international cases, the tribunal held that since it had not yet decided on all questions referred to it under Article IV of the Ottawa Convention, it had the power to revise the decision of 1 October.¹⁸⁴ However, the tribunal stated that such revision could only be possible in case of ‘manifest’ errors in law and similar errors.¹⁸⁵ The term “manifest error” does not appear in any sources cited by the tribunal and apparently was designed by the tribunal itself on the basis of available authorities.

The Iran – United States Claims Tribunal (“IUSCT”) dealt with the issue of *res judicata* of its on awards on multiple occasions, including the cases No. A3, A8, A9, A14, B61.

In a case dealing with the restrictions imposed by the United States on the transfer of certain Iranian properties to Iran. By its partial award the IUSCT found that under the General Declaration of the Government of Democratic and Popular Republic of Algeria of 19 January 1981 the U.S. had an obligation to compensate Iranian losses accumulated due to such restrictions.¹⁸⁶ In separate proceedings before the IUSCT on the similar matter, but with regard to different properties, the U.S. requested the tribunal to re-examine this issue on the basis that the IUSCT was not bound by its earlier findings of law and a manifest error of law committed by the tribunal in the Partial Award.¹⁸⁷

The IUSCT relied on international sources to determine the scope and elements of *res judicata*. On the basis of international case law, including the *Chorzow* case, the tribunal declared that the

¹⁸⁴ *ibid* 1954

¹⁸⁵ *ibid* 1957

¹⁸⁶ ‘The Islamic Republic of Iran v The United States of America, Partial Award, IUSCT Case Nos. A15 (II:A) and A15(II:B) (529-A15-FT), 6 May 1992’ (1993) 18 Yearbook Commercial Arbitration 246 258 (the “**Partial Award**”)

¹⁸⁷ The Islamic Republic of Iran v The United States of America, Partial Award, IUSCT Case Nos A3, A8, A9, A14 and B61 (601-A3/A8/A9/A14/B61-FT) of 17 July 2009 para 57

triple identity test is the condition of applicability of *res judicata* doctrine.¹⁸⁸ Referencing an ICJ decision, the tribunal also stated that both the reasoning part and the dispositive part of the decision have *res judicata* effect.¹⁸⁹

With respect to the U.S. argument that the partial award was concerned with different properties, the Tribunal noted that the issue of what precisely constitutes the identity of the object of a claim is unclear under international law. However, the tribunal seemingly avoided a direct resolution of this question by establishing that the partial award was rendered with regard to no properties in particular. Therefore, the partial award contained a decision ‘almost in the abstract’ on the interpretation of the General Declaration and had *res judicata* effect under the present case.¹⁹⁰ The IUSCT subsequently applied both dispositive and the reasoning parts of the partial award to the issues in dispute.

Issues of *res judicata* of arbitral awards were also considered by ICSID tribunals.

The *Apotex v. United States* (ICSID Case No. ARB(AF)/12/1) involved Apotex Inc., a Canadian investor, filing a claim under NAFTA against the United States for certain import restrictions that severely affected the manufacturing capability of its American subsidiary. Respondent State raised a *res judicata* objection on the jurisdiction on the tribunal pursuant to an earlier award between Apotex Inc. and the United States rendered under NAFTA and UNCITRAL arbitration rules.¹⁹¹

The tribunal first declared that arbitral awards rendered under NAFTA have *res judicata* effect, because NAFTA contains a provision similar to the one contained in the ICJ Statute. The tribunal

¹⁸⁸ *ibid* para 114

¹⁸⁹ *ibid* para 115

¹⁹⁰ *ibid* paras 118, 119, 124

¹⁹¹ ‘*Apotex v. United States*, ICSID Case No. ARB(AF)/12/1, 25 August 2014’ by Charles H. Brower II para. 2.53

relied on international case law which established *res judicata* effect of ICJ decisions under the Statute.¹⁹² The tribunal further described *res judicata* as a general principle of international law and noted the triple identity test contained in the dissenting opinion in the *Chorzow* case.¹⁹³

The tribunal then proceeded to the scope of *res judicata* effect of the award. Relying heavily on arbitral practice, ICJ and the European Court of Justice case law, the tribunal concluded that *res judicata* has broad effect and extends to the dispositive part and to the reasoning of the award.¹⁹⁴ At the same time, the tribunal did not appear to find a definite answer to this question in practice.¹⁹⁵

In another award in the case *Mobil Investments Canada Inc. v. Government of Canada* (Decision on Jurisdiction and Admissibility, ICSID Case No. Arb/15/6) the tribunal again referred to international law and to the case law of international courts.

Mobil Investments Canada Inc., an American company, brought a claim against Canada for alleged violations arising out of Canadian Guidelines on research expenses and claiming damages for the period from 2012 till 2015. Prior to that, another arbitral award was rendered in a dispute between Mobil, another American company as Claimants and Canada regarding the same Guidelines, where the tribunal awarded damages for the prior period.¹⁹⁶ Canada contended that the present claim was barred due to *res judicata* on the following grounds: first, the prior tribunal denied the

¹⁹² *ibid* para 7.6

¹⁹³ *ibid* paras 7.11, 7.13

¹⁹⁴ *ibid* paras 7.32, 7.42

¹⁹⁵ *ibid* para 7.30

¹⁹⁶ ‘*Mobil Investments Canada Inc. v. Government of Canada* (Decision on Jurisdiction and Admissibility), ICSID Case No. Arb/15/6, 13 July 2018’ by Charles H. Brower II para 89

possibility of any future damages; second, even if it did not, in any event no claims advanced on the same cause of action in the prior arbitration can be advanced in the current.¹⁹⁷

The tribunal first concluded that *res judicata* is a general principle of law and referred to the triple identity test outlined in the dissenting opinion in *Chorzow*.¹⁹⁸ Furthermore, based on international practice, the tribunal noted that to acquire *res judicata* effect a decision must resolve the issue in question and not merely refer to such issue.¹⁹⁹ On this basis the tribunal rejected both lines of arguments of Canada, stating that even an identical claim based on identical cause of action is not precluded, because the prior tribunal did not decide on it. The tribunal's conclusion was based on international case law and arbitral practice.²⁰⁰

In one identified ICC award the tribunal apparently relied on non-national sources to afford preclusive effects to arbitral awards. In the *ICC Case No. 6233 of 1992* (unidentified African country) claimant and defendant engaged in two ICC arbitrations. Subsequently, a separate arbitration tribunal was constituted to interpret one of such awards. The seat of the latter tribunal was the defendant's state located in Africa; it appears, however, that the award which interpretation was in question was rendered in France.²⁰¹ This award is notable for dealing with question of *res judicata* and the law of the place where the preceding award was rendered.

Defendant objected to the tribunal's authority to interpret the preceding award on the grounds that such interpretation by a separate tribunal may involve a revision of such award. Defendant's

¹⁹⁷ *ibid* para 177

¹⁹⁸ *ibid* paras 187, 191

¹⁹⁹ *ibid* para 193

²⁰⁰ *ibid* para 208

²⁰¹ Jean-Jacques Arnaldez, Yves Derains, Dominique Hascher (eds), *Collection of ICC Arbitral Awards 1991-1995* (Vol III, Kluwer Law International 1997) 332

argument was based on French procedural law which did not contain any provisions concerning the interpretation of arbitral awards. The tribunal declined the objection citing the autonomous nature of the arbitration clause and the inapplicability of the French New Code of Civil Procedure to the present arbitration. Nevertheless, the tribunal emphasized its commitment to preserve *res judicata* effect of the prior award.²⁰²

2. Law of the seat – the choice of commercial tribunals

International commercial tribunals often apply domestic law to *res judicata* issues. Frequently the tribunals do not specify the reason for its application or declare that the domestic law has merely a persuasive effect. Nevertheless, it appears that the tribunals favor the law of the seat of the current arbitration over other available options. At the same time, in practice the tribunals applied law governing the merits of the dispute and law of the seat of the preceding arbitration.

In the ICDR Case No. 50 110 T 00118 13 of 2014 the dispute arose out of a contract between two American entities. Certain aspects of claims raised in the present arbitration were allegedly already decided upon by another arbitral tribunal. The tribunal stated that due to the fact that the seat of the previous arbitration was in Puerto Rico and, accordingly, subject to American *lex arbitri*, the present proceedings were seated in Antigua and Barbuda it was unclear which procedural law governed this matter.²⁰³ However, the tribunal did not resolve this question and subsequently dismissed the *res judicata* defense as merely ‘unconvincing’.²⁰⁴

In the ICC Case No. 2475, 2762 of 1977, heard by a tribunal seated in France, the tribunal expressly relied on the law of the seat. The award was rendered with regard to a dispute which arose from

²⁰² *ibid* 334, 335

²⁰³ ‘ICDR Case No. 50 110 T 00118 13, 6 February 2014’ Arbitrator Intelligence Materials 11

²⁰⁴ ‘ICDR Case No. 50 110 T 00118 13, 18 September 2014’, Arbitrator Intelligence Materials 4

a number of steel supply contracts. A, a German entity, concluded a purchase agreement with B of Bulgaria and a supply contract with a Belgian company C, which then concluded a resale contract with D, another Belgium entity, which in turn concluded a resale contract with a French E. As B failed to provide steel, the contracts were defaulted. C initiated an ICC arbitration against A with the seat in Paris and the award was rendered in 1970. At the same time, D was found liable before a state court and initiated an arbitration against C. In turn, C initiated another arbitration against A with the seat in Paris.²⁰⁵

The arbitrator was confronted by the issue if and to what extent the award of 1970 between A and C has *res judicata* effect. A claimed that the award did not deny its right to rely on *force majeure* as a justification for non-performance of its obligations before C. The arbitrator disagreed, stating that while under German law (which was the substantive law of the sales agreement²⁰⁶) an arbitral award would have narrow preclusive effect, in this case French law applied due to the parties' choice of the seat, and the reasoning parts of the award had *res judicata* effect as well.²⁰⁷

The arbitrator's conclusion was based on the fact that the seat of the award of 1970 and the present proceedings were located in Paris. Consequently, he denied connection with the law governing the merits of the dispute and applied French procedural law and determined that the reasoning of the award of 1970 had *res judicata* effect, thereby barring A from relying on *force majeure* defense. Neither the arbitrator nor the parties contemplated the application of any international standards or invoked any authorities in support of their position.

²⁰⁵ Sigvard Jarvin, Yves Derains (eds), *Collection of ICC Arbitral Awards 1974-1985* (Vol I, Kluwer Law and Taxation Publishers 1990) 326

²⁰⁶ Walters (n 10) 234

²⁰⁷ Collection of ICC Arbitral Awards 1974-1985 (n 205) 328

In the ICC Case No. 5901 of 1989 the tribunal seated in France was faced with *res judicata* effect on the award previously rendered by the tribunal seated in Switzerland.²⁰⁸ The tribunal first stated that unlike national courts, arbitral tribunals have no forum and therefore domestic procedural rules are not automatically applicable. Nevertheless, the tribunal resorted to French law, because it was ‘obviously natural’ given the fact that French law contained provisions on *res judicata* effect of arbitral awards and because its award could have been challenged before French courts.²⁰⁹

In the ICC Case No. 8023 of 1995 the tribunal seated in Paris, France was faced with a prior award rendered by a tribunal also seated in Paris. The tribunal applied French law to the issue of *res judicata*, which was the law of the seat and the law on which the parties based their arguments.²¹⁰ Furthermore, the tribunal stated that the reasoning part of the first award which was essential for rendering it had *res judicata* effect as well.²¹¹

In the ICC Case No. 13509 of 2006 the tribunal seated in Paris, France relied on *res judicata* rules in French law as a ‘source of inspiration’. The award concerned a dispute arising out of a contract for establishment of a joint venture, a factory of certain intermediate product. The claimant initiated the arbitration against the defendant for an alleged violation of contractually agreed geographic distribution borders. The governing law of the contract was French.²¹²

The defendant argued that in previous arbitration with the contractual predecessor of the claimant the tribunal stated that the very same contractual provisions presently relied upon by the claimant do not impose any restrictions. Accordingly, the present tribunal should have accepted *res judicata*

²⁰⁸ Hascher (n 86) 19

²⁰⁹ Schaffstein, Thesis (n 50) 141 (footnote 666)

²¹⁰ Hascher (n 86) 21

²¹¹ *ibid* 23

²¹² Jean-Jacques Arnaldez, Yves Derains, Dominique Hascher (eds), *Collection of ICC Arbitral Awards 2008-2011* (Vol VI, Kluwer Law International 2013) 739

effect of the prior award. The tribunal rejected this argument on the basis that the *res judicata* criteria were not met under French law.

The tribunal first noted that it is not bound by French law and repeated this statement several times throughout the award. Nevertheless, it referred to French law as to ‘*une importante source d’inspiration*’ taking into consideration that the present tribunal was seated in France, the award was rendered in France and the disputed contract was governed by French law.²¹³ Eventually, however, the tribunal applied the triple-identity test as contained in the French Civil Code and concluded that in the present proceedings its requirements were not met.²¹⁴

In the ICC Case No. 13808 of 2008 another tribunal seated in Paris was faced with *res judicata* issue with regard to a preceding award rendered also in Paris. The tribunal decided to apply French law to resolve the question of *res judicata*.²¹⁵ No further details with regard to the arbitration are known.

At the same time, the tribunal contemplated the possibility of applying certain transitional rules, including the ones contained in the ILA Recommendations, to the issue. However, the tribunal threatened this approach negatively, stating that transnational rules are a pure theoretical creature. The tribunal declined to follow the ILA Recommendations, noting, *inter alia*, that they had no binding effect nor were chosen by the parties.²¹⁶

In the ICC Case No. 3540 of 1988 the award was rendered by the arbitral tribunal seated in Geneva, Switzerland. No further information with regard to the case was provided. The tribunal applied

²¹³ *ibid*

²¹⁴ *ibid* 740

²¹⁵ Born / Bull (n 34) 9

²¹⁶ Christophe Seraglini, 'Le droit applicable à l'autorité de la chose jugée dans l'arbitrage' (2016) 1 *Revue de l'Arbitrage* 51 73

local civil procedure rules to the issue of *res judicata*. The tribunal first stated that *res judicata* is the matter of procedure. Then, stating that unless the applicable arbitration rules or the *lex arbitri* provide for the contrary, the tribunal concluded that the matter is subject to '*la loi de procedure civile genevoise*'.²¹⁷

In the ICC Case No. 7438 of 1994 the arbitrator seated in Zurich was confronted by a prior award. The arbitrator applied local procedural rules to the issue of *res judicata* on the basis of the following grounds: a contractually determined seat of arbitration in Zurich and the place where the prior award was rendered, which was also Zurich.²¹⁸

In the ICC Case No. 5 of 2002 the tribunal seated in Switzerland predictably applied the approach advanced by the Swiss Supreme Court. Claimant requested a provisional relief from the tribunal and respondent objected, claiming that an earlier state court decision on the matter of interim relief precluded the tribunal from deciding the request. Without delving into the details, the tribunal stated that according to the decision of the Swiss Supreme Court an arbitral tribunal seated in Switzerland must apply the same rules that Swiss courts apply to deal with matters of *res judicata*.²¹⁹

In the NAI Case No. 2212 of 1999 the tribunal applied the rules of civil procedure for national courts of the seat of arbitration. The dispute arose out of a construction contract, which contained an arbitration clause in favor of the Netherlands Arbitration Institute. Replying to the claimant's request for immediate effect of the award, the arbitrator stated that the award will acquire the force of *res judicata* from the date it was rendered. The arbitrator referenced the specific provision of

²¹⁷ Hascher (n 86) 18

²¹⁸ *ibid* 20

²¹⁹ 'A v Z, Order, 2 April 2002' (2003) 21 (4) ASA Bulletin 810 814

the Code of Civil Procedure of the Netherlands, which provided for *res judicata* effect of arbitral awards.²²⁰

3. Other approaches

In practice, arbitral tribunals decided the issue of *res judicata* applying laws not necessarily connected with the seat. Among such jurisdictions is the law of the seat of the previous arbitration, the law governing the merits of the dispute and general principles of law.

a) Substantive law of the dispute

Some tribunals applied the substantive law of the dispute. In the ICC Case No. 10027 of 2000 the tribunal applied the law governing the contract to the issue of *res judicata*. However, the tribunal was bound by the parties' choice of the law applicable to the issue. The tribunal further stated that in its opinion *res judicata* was a matter of procedure.²²¹ In the ICC Case No. 6293 of 1990, the tribunal noted that the principle of finality of an award is contained in the ICC Rules of Arbitration. Nevertheless, the tribunal decided the issue on the basis of New York law, because it was applicable to the dispute and the only law relied upon by the parties.²²²

b) Law of the seat of the previous tribunal

Other tribunals considered, *inter alia*, the law of the seat of the preceding award. For example, the tribunal in the ICC Case No. 2475, 2762 of 1977 took into account not only its seat, but the seat of the former arbitration (which was French law in both instances) and considered itself to be

²²⁰ 'Joint Venture, Engineering Company and others v Chemical Company, Award, NAI Case No. 2212, 28 July 1999' (2001) 26 Yearbook Commercial Arbitration 198 207

²²¹ Hascher (n 86) 20

²²² *ibid*

bound by that law due to the parties' choice of the seat.²²³ Same approach was taken by the arbitrator in the ICC Case No. 7438 discussed above.

In an unidentified ICC case the tribunal seated in France rendered an award, granting damages. The losing party petitioned the national court for setting aside that award due to the tribunal's failure to apply French competition law, which allegedly would have rendered the underlying contract void. The court refused to set aside the award but noted that the losing party may raise the competition law issue in other arbitration proceedings. The losing party filed a request for a new arbitration.²²⁴ The subsequent tribunal refused to grant any remedies which would have reversed the result of the first arbitration due to *res judicata* effect of the prior award, applying French domestic rules on *res judicata*. The tribunal reasoned that the first award became an integral part of the French legal system and explicitly rejected the idea of applying international or transnational preclusion principles.²²⁵

In the ICC Case No. 3267 of 1984 the tribunal seated in Switzerland decided upon *res judicata* effect of its prior partial award on the same case. The exact law applied by the tribunal to this issue cannot be determined from the reported text, although the authorities state that the applied law was Swiss.²²⁶ The tribunal held that the binding effect of the award extends to its reasoning and not only to its dispositive part due to it being 'unfair to both parties to depart' from views expressed in the partial award.²²⁷ If the tribunal indeed applied Swiss law, such conclusion contradicts its

²²³ Collection of ICC Arbitral Awards 1974-1985 (n 205) 328

²²⁴ Yaffe (n 81) 806

²²⁵ *ibid*

²²⁶ Sheppard (n 103) 233

²²⁷ Sigvard Jarvin, Yves Derains, Jean-Jacques Arnaldez (eds), *Collection of ICC Arbitral Awards 1986-1990* (Vol II, Kluwer Law and Taxation Publishers 1994) 45

general provisions with regard to *res judicata* effect extending solely to the dispositive part, as discussed above in section B (1) of Chapter III.

c) General principles

Yet other tribunals appear to apply some transnational principles having no particular connection with any specific jurisdiction, dealing, however, not with arbitral awards but with decisions of domestic institutions. No arbitral awards employing the same approach with respect to preceding awards were discovered. In the ICC Case No. 6363 the tribunal applied general principles of *res judicata* without relying on any particular system of law while examining *res judicata* effect of the prior decision of a state dispute resolution body.²²⁸ In the ICC Case No. 4126 the tribunal seated in France was faced with an interim relief request. However, a national court previously considered and refused a request for the same interim relief but made by a person, which was not a party to the arbitration. Relying on the ‘rules of good procedural order’, the tribunal stated that it is bound by the national court decision, because the request was ‘essentially identical’.²²⁹

4. Summary of arbitral practice

It appears that arbitral tribunals are far from settling on a universally adopted approach to the law governing issues of *res judicata*. The most consistent approach is displayed by interstate and investment tribunals, who not only uniformly rely on international law but arrange their arguments in the similar manner and base their findings on same sources. At the same time, the tribunals appear certain only with regard to the nature of *res judicata* as the generally recognized principle of international law and the triple identity test. To resolve certain issues outside of this established

²²⁸ Schaffstein, Thesis (n 50) 146 (*referring to the ICC Case No. 6363 of 1991*)

²²⁹ A v Z (n 194) 810, 815 (*referring to the ICC Case No. 4126 of 1984*)

framework, such as the scope of *res judicata*, the tribunals provide long lines of arguments and often appear visibly uncertain. Sometimes, like the *Trail Smelter* tribunal, they create new concepts according to their own understanding.

Regrettably, international commercial tribunals demonstrate even less uniformity. The most commonly encountered source is the law of the seat of the arbitral tribunal deciding on *res judicata* effect of the prior arbitral award. At the same time, tribunals reach this point by different rules. At least one tribunal seated in Switzerland based its application of the law of the forum on the case law of the Swiss supreme court, while others seemingly did not provide any elaborated reasoning. Similarly, tribunals seated in France applied French law on the variety of bases, from French law being the most convenient one to French law being applicable due to the fact that the award would be scrutinized by French courts.

Comparably inconsistent reasoning was provided in cases when tribunals resorted to other legal systems. In one case, the tribunal based its conclusion on the finding that the first award became a part of the legal system where it was rendered. In other cases, tribunals merely mentioned that laws of the place where the award was rendered apply. However, often tribunals simply apply *res judicata* rules in the way which evidently appears the most convenient for them. In those cases, the tribunals devote few or no words at all to justify their choice.

Finally, almost in no discovered cases did the tribunal expressly rely on any transnational legal principles governing *res judicata* (although this approach can be implied in some cases). To the contrary, some tribunals outright rejected such idea, stating that such transnational approach is a mere theoretical possibility. In one case the tribunal noted that the ILA Recommendations cannot be applied, because the parties did not agree on their application. This may be interpreted as a hint for the parties.

To conclude, the results of the study of arbitral practice coincide with the study of possible sources of *res judicata*. On its face, international law is consistently applied but to figure out precise details tribunals must venture into an independent analysis, the results of which may vary. On the other hand, domestic law is more frequently applied by arbitral tribunals, presumably because of more clear rules of preclusion available therein. This result somewhat contradicts the findings of Gary Born, who stated in para. 27.02 of his treatise on arbitration that tribunals ‘avoid unduly mechanical application of technical domestic rules’ and develop *sui generis* approach to preclusion rules, and several other authors. At the same time, it coincides with findings of D. Hascher in his book “L’*autorité de la chose jugée des sentences arbitrales*” and with the conclusions of study of arbitral case law by S. Schaffstein in her Thesis. Indeed, as she noted, it is surprising that arbitral tribunals devote relatively little attention to the question of determining the proper law.

B. Suggested framework of *res judicata* for arbitral practice

The survey of arbitral practice demonstrated that there is no uniform approach to the governing law of *res judicata* effect of arbitral awards. Almost all approaches proposed by legal scholars were reflected in arbitral practice, providing arbitral tribunals with a wide selection of options.

In such situation, the appropriate question would be “which source of *res judicata* rules from all available should the tribunal apply?” The answer to this question should be given from the standpoint of the most optimal properties of *res judicata* effect of arbitral awards and practical effectiveness of the application of the selected source of rules.

The optimal attributes of *res judicata* effect of arbitral awards are those that correspond to the intentions of the parties to arbitration. Generally, it is fair to say that the parties seek effective and final resolution of their disputes. Thus, *res judicata* effect should be afforded to arbitral awards in

the way that maximizes the effectiveness of tribunals. This can be achieved by affording the preclusive effect only to arbitral awards which provide final resolution of a given issue (including partial and final awards), which is in line with general approach to *res judicata*, by adopting the narrow approach to parties' identity and restricting the concept of identical parties to the parties themselves and their legal successors to evade unnecessary complications, which would also be strange to civil-law parties and lawyers, by extending the preclusive effect to the reasoning of the award and not only to the dispositive part and by employing the principle of concentration of claims.

1. Conditions of application of *res judicata* effect

a) *Interim, partial or final award*

It is noted that the term “arbitral award” itself is not defined in the majority of legal sources and requires further interpretation.²³⁰ Legal scholars and institutional rules offer different classifications of awards which may contain more than five distinct award types.²³¹ For the question at hand the three distinguished types of award that matter is a “final” award, a “partial” award and an “interim” award. While the authorities generally consider a final award as resolving all outstanding claims and end the jurisdiction of the tribunal²³², other types are used less consistently. Some authorities apply the term “partial award” to awards that deal with preliminary issues such as jurisdiction, applicable law, liability etc.²³³, which effectively removes any distinction between partial and interim awards.

²³⁰ Schaffstein, Thesis (n 50) 245

²³¹ Born (n 3) 3013

²³² *see e.g.* Born (n 3) 3015; Redfern / Hunter (n 3) para 9.18

²³³ *see e.g.* Fouchard / Gaillard / Goldman (n 140) 739; Redfern / Hunter (n 3) para 9.19

For the purposes of affording the preclusive effect the more precise approach is the classification proposed by Gary Born. Thereunder, a final award deals resolves all issues before the tribunal and terminates its jurisdiction, a partial award finally resolves only some of claims before the tribunal, an interim award resolve certain preliminary matters necessary for rendering the award (such as jurisdiction, applicable law, liability etc.) but does not finally resolve a particular claim.²³⁴

Opinions differ regarding the preclusive effect of the above types of awards. Some sources, including the ILA, are of the view that only final and partial awards have *res judicata* effect and it can possibly be extended to awards on jurisdiction, because only these types of awards ‘contain final determinations’ (*i.e.* awards that ‘decided on or disposed of a claim for relief which is sought or is being reargued in the further arbitration proceedings’).²³⁵ This approach is also reflected in domestic court practice in certain jurisdictions.²³⁶ However, other commentators are of the contrary opinion pointing that interim awards also contain final determinations of given issues.²³⁷ Moreover, the former narrow approach would lead to awards on jurisdiction having no preclusive effect, while the ILA in principle acknowledged the preclusive effect of jurisdictional awards but left this issue to be resolved under the applicable law.

It is difficult to say which approach is more beneficial to the parties to an arbitration and the objective of arbitration. On the one hand, affording preclusive effect to all three types of awards will provide additional legal certainty to the parties and enable them to rely on tribunal’s findings immediately (for example, rely on the award on jurisdiction to contest the jurisdiction of another

²³⁴ Born (n 3) 3015 – 3020 (while Born distinguishes awards on jurisdiction as a separate type, such awards may be considered ‘interim’ in the above sense)

²³⁵ ILA Final Report (n 40) 71; ILA Recommendations (n 75) 85; Schaffstein, Thesis (n 50) 247

²³⁶ Hanotiau, Complex Arbitrations (n 25) 244 (with regard to judicial decisions)

²³⁷ Fouchard / Gaillard / Goldman (n 140) 739

tribunal on the same issue). On the other hand, it was noted that the tribunal can still change its position before rendering a final award:

So-called interim awards, which only deal with individual issues such as admissibility of the claim, preliminary substantive issues or the basis of a claim, at least in those cases where an arbitral tribunal still has to decide on the amount due, do not fall within this category. Since the outcome of the dispute is not yet finally determined and the arbitral tribunal may still dismiss the claim in its entirety in spite of its decision on the basis of the claim having a binding effect for the later quantum phase, e.g. when the quantum phase shows that the amount claimed is not founded.²³⁸

The better and more consistent view is to afford preclusive effect to interim awards, which provide a final resolution to issues necessary to render a final decision on the claims at hand. There are no compelling legal grounds against that, and from the perspective of policy and practice the fact that the tribunal may ultimately dismiss the claim in the final or a partial award does not affect the issues of facts and law determined by the tribunal in the preceding interim award. Additionally, the parties would be precluded from contesting the issues determined by the interim award in subsequent proceedings before the same tribunal, which would contribute to timely proceeding and save the resources of the parties.

b) Finality of award

To obtain the preclusive effect an arbitral award must be final, which has to be distinguished from final awards discussed in the subsection above and should be understood as a requirement that the

²³⁸ Judgment of 10 May 2007, 2007 Schieds VZ 278 (Oberlandesgericht Frankfurt) as cited in Born (n 3) 2937

award may no longer be challenged.²³⁹ The requirement itself is hardly questionable, as only an award that is legally “stable” can be relied upon for the purposes of preclusion.

The main question is when an award becomes final and binding. Under the ILA Final Report, this question should be determined under the law of the seat of the prior arbitration. The approaches found in national laws can be very broadly divided into two groups: under Article 34 of the Model Law the general deadline for setting the award aside is three months from the date of its rendering, while some jurisdictions expressly provide for the finality of awards at specific moments (this is the case with French and Swiss law discussed above). As mentioned in Chapter III (B), French courts held that a claim for setting the award aside does not deprive it of the preclusive effect and only bars its enforcement.

Between the two approaches, it is hard to determine whether it is more beneficial for the parties to rely on the award that is certainly can no longer be challenged due to the expiration of respective deadlines or being able to rely on the award from the very moment it was rendered. To resolve the deadlock a resort to domestic legal systems for inspiration is possible. Typically, if a judgement is subject to an appellate review, it acquires binding force and *res judicata* effect once the deadline for such review expires.²⁴⁰ On the contrary, arbitral awards are not subject to anything comparable with “appellate review” and may only be set aside under specific legal grounds. Therefore, a more justified approach would be to afford the preclusive effect to the award from the moment it is rendered. Additionally, the preclusive effect of an award should not be conditioned upon any recognition, confirmation or other act of domestic authorities.

²³⁹ ILA Final Report (n 40) 74

²⁴⁰ Code of Civil Procedure of France, Article 500; Arbitration Procedural Code of Russia Article 180 (1)

c) *Narrow concept of party identity*

With regard to *res judicata* effect of awards and party identity two issues have to be resolved: whether the broad understanding of identical parties, including the concept of privies, is allowed, and whether *res judicata* should be extended to third parties.

It appears that the largest difference between civil and common law countries regarding the party identity criterion is that common law recognizes privies as identical to the actual parties to the dispute. For the purposes of *res judicata* of arbitral awards the more beneficial approach would be the narrower one of civil law countries, which limits identical persons to the parties and their legal successors.

The most compelling reason is the concept of privies itself. Even legal professionals struggle when tasked with describing this concept.²⁴¹ For the parties to a dispute who are non-lawyers grasping the idea of privies might be even harder. This would contradict the whole purpose of *res judicata* doctrine, which is to ensure stability and predictability in dispute settlement, if an apparent third party could claim privity to a party to a dispute and therefore escape or delay an action against itself.

The question of third parties is slightly less obvious. Some argue that *res judicata* effect of an award should extend to third parties, which have ‘a close contractual link to the parties in the prior arbitration’.²⁴² In effect, this approach supports the issue preclusion extending to third parties, a concept which is found in the U.S. law and even in certain civil law countries.²⁴³ *Inter alia*, it allows the tribunals to save time and resources and prevents conflicting findings on the same issue.

²⁴¹ ILA Interim Report (n 4) 44

²⁴² Schaffstein, Thesis (n 50) 264 (citing Stavros Brekoulakis)

²⁴³ Arbitration Procedural Code of Russia, Article 69 (3)

However, there is no legal basis for binding a tribunal hearing disputes between different parties with determinations of another tribunal. In this case the parties would be effectively deprived of resolution of their dispute (at least in part) by “their” tribunal. As noted by the ILA, the application of issue preclusion to third parties is a rather unpopular approach worldwide.²⁴⁴

2. Applicability of the law of the seat of prior and subsequent arbitration

It is unclear whether the validity of the award under the law of the place of its making and the enforceability of the award under the law of the seat of the subsequent arbitration bind the subsequent tribunal. The ILA answered this in positive. The Recommendation 3.1 conditions the preclusive effect of an award on the possibility to enforce the award in the state whether the subsequent arbitration is seated and, according to the Final Report, presumes that the award is valid under the law of the country of origin.²⁴⁵

First, regarding the validity of the award under the law of the country of origin, it appears that arbitral tribunals need not to undertake an independent review of the award’s compliance with it. As noted earlier in Chapter III, the application of the law of the seat of the prior arbitration to *res judicata* effect of an award aims at preventing the more favorable treatment of an award than afforded by its country of origin. By referring to the award’s validity under the law of the country of making, the ILA attempts to create a link with the framework of the New York Convention, where the validity of an award is based on the law of the seat of arbitration.²⁴⁶ This approach is criticized for failing to adhere to the transnational nature of arbitral awards.²⁴⁷ Additionally, it burdens the tribunals with the task of examining the law of a third country with respect to the

²⁴⁴ ILA Final Report (n 40) 79

²⁴⁵ *ibid* 74

²⁴⁶ *ibid*

²⁴⁷ Schaffstein, Thesis (n 50) 248

award's validity, which can affect both the duration and costs of arbitration and contradict the expectations of the parties.

The beneficial approach for the tribunals and parties would be to presume that an award is valid under the law of the place of its making and be bound only by the annulment of the award. It would relieve the tribunals from undertaking a complicated analysis and provide a clear and easily verifiable point of reference in the form of an annulment decisions.

Second, regarding the award being recognizable and enforceable under the law of the country where the subsequent tribunal is seated there are two different opinions as well. The negative opinion is, again, that due to the autonomous nature of arbitration the tribunals need not to verify the award in question against the law of the seat and adhere to the decisions of domestic courts regarding enforcement of such award at their discretion.²⁴⁸

However, at least from purely practical perspectives the tribunals are encouraged to abide by the law of the seat. Considering that certain jurisdictions, such as France and Switzerland, view *res judicata* provisions as matters of public policy, which entails the risk of annulment of a contradicting award. In practice, at least in one ICC case No. 5901 discussed above the tribunal applied the law of the seat to *res judicata* issues on the basis that the award could subsequently be challenged under this law. Given the fact that no discussed jurisdictions accepted transnational rules of *res judicata* (and, as noted in Chapter III, Swiss courts expressly rejected their applicability), a deviation from the law of the seat may endanger the award.

3. Scope of *res judicata*

²⁴⁸ *ibid* 266

a) *Res judicata beyond dispositive part*

The ILA Recommendations favor a broad approach to *res judicata*, including the reasoning part of the award:

An arbitral award has 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;
- issues of fact or law which have actually been arbitrated and determined by it, provided any such determination was essential or fundamental to the dispositive part of the arbitral award.²⁴⁹

Essentially, the ILA approves common-law style scope of the preclusive effect and the issue preclusion doctrine. Some disagree with this position, stating that a determination of factual or legal issue should not bind a subsequent tribunal if such issue is the ‘main issue’ in the subsequent proceedings.²⁵⁰ Other authorities appear to favor an extended application of *res judicata*.²⁵¹

Recognizing the binding force of the reasoning of the award which was necessary for the final decision contributes to legal certainty and stability. In the ICC case No. 2475, 2762 discussed above the tribunal prevent potential inconsistency in findings on essentially the same matter by affording preclusive effect to the reasoning of the prior award. As noted earlier, French law has no provisions compelling the tribunal to apply it to determine *res judicata* effect of an award, so the

²⁴⁹ ILA Recommendations (n 75) 85

²⁵⁰ Schaffstein, Thesis (n 50) 259

²⁵¹ Born / Bull (n 34) 15

tribunal was in principle free to apply other rules (such as German law as the substantive law of the contract in question). The tribunal's choice, therefore, illustrates the preferences of the practitioners.

As noted in the previous subsection, the issue preclusion doctrine has significant positive effects, including saving time and resources by preventing another argument over issues already determined and eliminated the possibility of conflicting findings of fact and law on the same claim. There are no compelling legal arguments to prevent issue preclusion from being applied between the same parties.

b) Res judicata and the principle of concentration of claims

As noted in earlier Chapters, under the principle of concentration the claimant is required to advance all claims arising from the same set of facts in the prior proceedings. Failing that, the claimant is precluded under *res judicata* from raising any such claims in subsequent proceedings. This principle is effectively similar to the common law approach to *res judicata* and is not widely known in civil law countries. At least in France the applicability of the principle of concentration in domestic litigation is recognized under the case law, however, whether this principle can be applied in arbitration is a moot point.

There is no identified arbitral case law dealing with the concentration principle. Similarly, the only national jurisdiction which courts have at least considered this principle in detail is France, but even there its applicability to arbitration is questionable. Therefore, an arbitral tribunal would have little guidance except scholarly opinions on the matter.

The primary basis for criticizing the extension of the principle of concentration to arbitration is the resulting infringement of the party autonomy, inflation of the arbitration subject matter and

increased arbitration costs.²⁵² Undeniably, the principle of concentration limits the parties' freedom, forcing the claimant to file all possible claim in the proceedings. As a consequence, the legal costs increase, as does the burden of the claimant's representatives.

On the other hand, some argue that the principle of concentration or similar doctrines are in line with the expectations of the parties to arbitration. Presuming that the actual intention of the parties is to resolve all existing disputes in an effective manner, permitting a party to divide claims and artificially extend the dispute resolution process in time actually comes contrary to this intention.²⁵³ Some sources suggest employing the principle of concentration in response to blatant intentional claims division, when the party's intent to artificially split the claim is evident.²⁵⁴

4. Implementation

The above sections outlined the preclusion framework that aims to be the most effective in arbitral practice. Given the results of the arbitral case law study outlined in subchapter A above, it appears that the tribunals do not aim at creating a *sui generis* system of preclusion rules – at least, at the moment, and largely favor national legislation as a source of *res judicata* rules. What is more, the examination of international and transnational sources in previous Chapters revealed that those sources do not contain detailed preclusion rules. While they may be appropriate from theoretical perspective, they offer only moderate predictability for the parties. Thus, national legislation appears to be the only practically reliable source.

To ensure that the tribunal would treat the preclusive effect of a prior award as effective as possible and close all loopholes for circumventing such award, the parties are advised to structure the

²⁵² Erk-Kubat (n 139) 170

²⁵³ Born (n 3) 3770

²⁵⁴ Erk-Kubat (n 139) 236

arbitration agreement keeping this aspect in mind. Theoretically, it can be possible to agree on the application of certain transnational rules of preclusion – including the ILA Recommendations. At the same time, as was demonstrated above, similar to international law existing transnational sources do not provide a consistent set of preclusion rules. This leaves the exact details for tribunals’ interpretation and the end result may be unexpected for the parties.

The better approach would be to select the arbitral seat in the jurisdiction where either the applicable law mandates certain rules of preclusion or where sufficient amount of arbitral case law leads to the application of the domestic rules of the seat. The two jurisdictions that correspond to this description examined in this Thesis are France and Switzerland. It is important to draw a line between the two: French law does not obligate the tribunals to apply its domestic rules, but this is the approach taken by a large number of tribunals seated there. French law offers preclusion rules that correspond to the above described framework to a large extent, except for the principle of concentration, which, as was described above, does not apply to arbitral awards under the case law of French courts.

On the other hand, under the case law of the Swiss Supreme Court tribunals seated in Switzerland must apply the rules of preclusion contained in Swiss law. It ensures a predictable outcome for the parties. Swiss law contains rather cumbersome rules, under which, *inter alia*, tribunals must consider the law of the place where the prior award was made. This can simultaneously benefit the parties by negating the risk of setting the award aside (or refusing enforcement) for violation of the rules of public policy, if rules of preclusion are a part of them in the given jurisdiction and cause additional costs and delays due to the amount of information that needs to be considered. Furthermore, the identity test under Swiss law contains criteria largely similar to the principle of concentration, which makes the rules of preclusion more effective.

It is hardly feasible to burden the parties with preclusion issues at the time of conclusion of the arbitration clause. Even the arbitration clause itself often is neglected by the drafters; the solution that requires the parties to consider the preclusive effect of an award in a subsequent arbitration at the point in time when no disputes are even thought of would hardly become popular. Nevertheless, given the lack of reliable *sui generis* or transnational rules of preclusion, it is the parties who have the opportunity to affect those rules. The least that can be done at the drafting stage is consider the law of the potential seat from *res judicata* perspective as well.

CONCLUSION

The objective of this research was to answer the three main questions: whether arbitral awards possess *res judicata* effect in arbitral practice, and, if answered in positive, what are the sources of the rules of preclusive effect of arbitral awards and how do arbitral tribunals approach this issue. However, it became apparent from the very beginning of the research that the preclusive effect *per se* is universally acknowledged. Nevertheless, the most intriguing issues remained: where and why should we look for the proper rules of preclusion?

This Thesis looked separately at the sources of *res judicata* effect of arbitral awards in legal theory and in arbitral practice. It was somewhat expected that the majority of scholars, including prominent researchers in the field of arbitration, would lean towards the rules derived from international sources. Transnational rules, which also have no connection to any specific domestic legal system, were named second best. What was completely surprising was the divergence between theory and practice on this issue. However, the results of this research demonstrate that the divergence – at least at this moment – is justified.

As demonstrated in Chapter II, the rules of preclusion based on the international and transnational sources lack clarity and precision. In the current shape their application in practice “as is” is hardly possible – even the tribunals who rely on such sources still have to figure out the details on their own. To the contrary, domestic preclusion rules offer much more detailed framework, and certain jurisdictions even contain arbitration-specific solutions. Of course, domestic law has its drawbacks. For starters, it poorly corresponds to the international nature of arbitration. Furthermore, as a side effect of offering detailed rules it may have very complicated solutions which can needlessly burden the proceedings.

The disadvantages do not appear to scare the tribunals away. According to the case study of arbitral awards, international commercial tribunals most often apply domestic law, and more specifically, the law of their seat. Accordingly, it appears that the only practical solution which allows for the application of the most beneficial preclusion rules in international commercial arbitration is for the parties to the arbitration agreement to select the proper arbitral seat. If the law of the seat contains arbitration-specific preclusion rules, which at the same time are effective at preventing the circumvention of the arbitral award, it ensures stability and predictability for the parties and arbitrators alike.

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