RES JUDICATA AND INTERNATIONAL ARBITRAL AWARDS
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1. Introduction

The doctrine of res judicata can come into play in relation to international arbitration in a variety of ways. In the context of a discussion devoted to “Post-award issues”, res judicata is relevant only insofar as it relates to the effects of arbitral awards. In this connection, the issues that arise are whether a given arbitral award has res judicata effect in the same arbitration (in which case the question is that of the effects of partial or interim awards in subsequent phases of the same arbitration), in other arbitrations (whether or not based on the same arbitration agreement) and in proceedings before domestic courts. Other aspects of the doctrine which do not involve the effects of awards, and are therefore beyond the scope of this discussion, are the res judicata effects in arbitral or in domestic court proceedings of judgments of domestic courts which deal with arbitration (for instance a finding of nullity or inapplicability of an arbitration agreement) and the res judicata effects in arbitration proceedings of national judgments on issues of substance.

All these topics, including those addressed here, have important practical implications and arise relatively frequently. They also raise thorny questions that might seem to fall within the purview of hard-nosed specialists of civil procedure, but actually go to the heart of the law and of the system of international arbitration. In the past decade increasing attention has been focused on this topic¹, partly in the wake of a number of well publicized cases². Nevertheless, further reflection is in order.

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In essence the questions at bar relate to what are usually called the negative (or preclusive) and the positive (or conclusive) effects of res judicata of arbitral awards (which could be more appropriately termed res arbitrata). The first have to do with the effect of preventing further litigation on a matter that has formed the subject of a prior arbitral award. The second have to do with the effects of the decisions contained in an award in other proceedings, whether or not between the same parties.

The relevance of these issues is well illustrated by an interesting award where the discussion turned on the preclusive effects of a previous award based on the same arbitration clause. In a first arbitration the arbitral tribunal had awarded very substantial damages for breach of contract, without dealing with arguably applicable European Union competition law, because the parties had failed to raise that issue in the arbitration. The award was challenged before the Paris Court of Appeal on the grounds of violation of public policy due to the arbitral tribunal’s failure to apply competition law. In a very well known judgment, the Court of Appeal rejected the challenge, holding that in the circumstances there was no violation of public policy. Obiter the Court remarked that, since the issue of nullity of the contract for violation of competition law had not been decided by the arbitrators, it was open to the losing party to raise that matter in subsequent proceedings.

Possibly encouraged by this statement, that party began a new arbitration based on the same arbitration agreement seeking a declaration of nullity of the contract for violation of competition law and restitution of the damages paid under the first award. The arbitral tribunal in this second arbitration accepted that the claim for nullity of the contract was not

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3 ICC case n. 13808/2008, unpublished. The author had the opportunity to view the relevant portions of a redacted version thanks to the courtesy of colleagues involved in the arbitration.

barred by the earlier decision but, much more importantly from a practical point of view, it held that *res judicata* precluded the claim for restitution on the grounds that to uphold that claim would have completely overturned the result of the first arbitration.

This case, to which I will revert below\(^5\), is only one of the many in which the doctrine of *res judicata* was decisive for the outcome of the arbitration. The issue is not specific to international commercial arbitration, since it also arises frequently in the context of investment arbitration, although usually in a somewhat different framework\(^6\).

2. **The open issues**

The point of departure of the discussion is the existence of a broad consensus that arbitral awards, like judgments of national courts, have *res judicata* effect. It is often even said that *res judicata* is a “general principle of law recognized by civilized nations” within the meaning of Article 38 of the Statute of the International Court of Justice\(^7\). Important as this finding may be, it is not particularly helpful because the consensus does not go much further. Indeed, most of the crucial issues relevant for the solution of concrete problems remain open.

To list just the main questions that arise in this connection, there is uncertainty even as to the legal basis of *res judicata* in relation to awards in international arbitration. There are then fundamental questions as to the scope of the doctrine, and specifically the reach of the preclusive (negative) and conclusive (positive) effects of an arbitral award, i.e. the extent to which it prevents the relitigation of matters coming within the scope of an arbitration and the extent to which the effects of the award can be relied upon in different contexts.

A further question is whether the *res judicata* effect of an award applies only to the dispositive part of the award or also to the reasoning. Furthermore, does *res judicata* operate only when the “triple identity test” often mentioned in this connection (same parties, cause of

\(^5\) See para. 5.2(i) below.

\(^6\) The point is usually that of the effects of awards across legal orders, the conclusion being that commercial awards (just like the decisions of domestic courts) do not have *res judicata* for an investment tribunal, although they may be relevant as facts: see for instance ICSID Case No. ARB(AF)/00/3 of April 30, 2004, Waste Management v. Mexico, § 38 seq.; ICSID Case No. ARB/03/4 of September 5, 2007, Industria Nacional de Alimentos v. Peru (annulment), § 81 seq.; ICSID Case ARB/No. 05/19 of July 3, 2008, Helnan International Hotels v. Egypt, § 121 seq.; ICSID Case ARB/10/6 of December 10, 2010, Rachel Grynberg and others and RSM Production v. Grenada.
action and subject matter) is satisfied? Does it cover all matters that could or should (by the exercise of due diligence and good faith) have been raised before the court in support of the claims brought in the earlier proceedings (this situation is sometimes referred to as the obligation of concentration)? How does one assess which matters ought to have been pleaded in support of the such claims? Do awards on jurisdiction and interim or partial awards have *res judicata* effects? Who is bound by the *res judicata* effect of an arbitral award? As of when is the award *res judicata*? Is the effect conditional upon the award being, or having been declared, enforceable? Are there situations where *res judicata* does not apply? Does *res judicata* operate across different legal orders (e.g. can a judgment rendered under public international law or in an investment arbitration be *res judicata* in a commercial arbitration or vice versa)? What are the consequences of the failure to attribute the requisite *res judicata* effect to an arbitral award? Must, or can, *res judicata* of an award be raised by arbitrators of their own motion?

The answers to most of these questions are far from settled. Since proposing solutions for each one of them would greatly exceed the scope of this article, here I will concentrate on the overarching methodological issues of the relations between *res judicata* and arbitral awards.

3. **The shortcomings of domestic law**

A possible starting point in the quest for the solutions to the issues pointed to above is obviously domestic law. And indeed, as will be discussed below, domestic courts and arbitral tribunals often do resort to domestic law to deal with the problem. However, national laws are not necessarily helpful nor do they provide the ideal solution.

This is because, firstly, not all national laws deal explicitly with the effect of arbitral awards and, moreover, those that do, do so in fairly general terms. They usually do not go much beyond the proposition that arbitral awards have *res judicata* effects or that arbitral awards have the same effects as court judgments. Similar, but equally rather unhelpful,

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8 For a discussion of several specific problems see the works referred to supra, footnote 1.

statements about the binding effect of awards appear in the rules of certain arbitral institutions\textsuperscript{10}.

Of course most national laws contain fairly elaborate statutory or other rules on this problem. The trouble is that they relate almost exclusively to the effects of the judgments of the courts of the forum, and not of arbitral awards and are therefore not necessarily particularly suitable when it comes to assessing the effect of arbitral awards. This is because an award differs considerably from a judgment, since the authority of the former stems in the first instance from the autonomy of the parties, whilst the latter is determined directly, and exclusively, by the law\textsuperscript{11}.

The complexity increases when it comes to the effects of arbitral awards in international situations, where — to the extent that an analogy can be drawn between arbitration and court judgments — the analogy is with the effects of foreign judgments. Now, the rules governing the \textit{res judicata} effect of foreign judgments are far from well settled\textsuperscript{12}.

To all this must be added that, in any event, the approaches of individual national legal systems differ considerably from one another\textsuperscript{13}. At the risk of serious generalization, continental legal systems tend to adopt a more formalistic approach, which essentially limits \textit{res judicata} to the dispositive part of the decision and sets considerable emphasis on the triple identity test. Common law systems, on the other hand, follow a more open and pragmatic approach which extends the \textit{res judicata} to cover not only claim preclusion (or cause of action estoppel) but also issue preclusion (or issue estoppel). Even legal systems belonging to the same family can provide for significantly divergent results\textsuperscript{14}. As has been noted, the tag \textit{res judicata} «disguise[s] under ancient clothes very different concepts in diverse national legal systems\textsuperscript{15}.

\begin{footnotes}
\item\textsuperscript{10} See for example Article 28(6) of the ICC Rules; Article 26(9) of the LCIA Rules; Article 32(2) of the Swiss Rules.
\item\textsuperscript{11} See in particular P. Mayer, supra, footnote 1.
\item\textsuperscript{12} P.R. Barnett, \textit{Res judicata, estoppel and foreign judgments: the preclusive effect of foreign judgments in private international law}, 2001.
\item\textsuperscript{13} For an overview of the position in the different national legal systems see G. Born, \textit{op. cit.}, p. 2894 seq. and I.L.A, \textit{Interim Report}, supra footnote 1.
\item\textsuperscript{15} See V.V. Veeder, \textit{Issue estoppel}, supra, footnote 1, p. 29.
\end{footnotes}
This poses a dual problem. On the one hand, even were it appropriate to rely on principles governing the *res judicata* effects of court judgments, the diverging approaches of national laws make it difficult to identify significant common principles, beyond very general concepts, and consequently to derive from those systems any meaningful principles having universal validity. Consequently, applying one law rather than another may lead to dissimilar results, which is a questionable outcome when dealing with arbitration and with its effects, that should ideally always be assessed in the same way.

Relying on national law often raises another equally intractable problem, *viz.* identifying appropriate conflict of laws rules to determine which national law governs the *res judicata* effects of an award. There are, in fact, no generally accepted conflict rules on the subject. As recalled above, even in relation to the *res judicata* effect of foreign judgments the conflict principles are not settled. When it comes to determining the *res judicata* effect of an arbitral award, several different laws could conceivably be relevant. Among the ones that spring to mind are: (i) the *lex arbitri* of the award whose effects are invoked; (ii) the *lex arbitri* of the second arbitration or the *lex fori* of the court, depending on whether the award is invoked in another arbitration or before a State court; (iii) the substantive law governing the rights at issue.

None of these solutions unquestionably recommends itself over the others, nor are any particularly satisfactory. Even the one which relies on the *lex arbitri* has significant drawbacks\(^16\). Of course the seat is an important connecting factor in arbitration, principally because its courts have supervisory jurisdiction and jurisdiction on the validity of the award. However, in international arbitration the links to the seat are often rather weak and random, as a result of which the claim of its law to govern matters relating to the arbitration is often fairly arbitrary. In any event, to the extent that it makes sense to refer to it, the law of the seat is more suitable to govern issues concerning the functioning of the arbitration. Notwithstanding that in national legal systems it is often considered an issue of procedure, in the international context the force of *res judicata* of the award is a matter that pertains to the conceptual framework and underpinnings of arbitration and which, as will be mentioned below, is affected by the international obligations of States in relation to the effects of awards. Moreover, relying on the law of the seat of the arbitration may lead to unpredictable results, since the rules applying to the *res judicata* effect of the award are not usually amongst the questions that parties consider.
when choosing the seat. Finally, it is debatable whether, if reference is had to the *lex arbitri*, this should be to the one of the first or of the second arbitration, when the question is whether an award can have *res judicata* effects in another arbitration.

No given law, including the *lex arbitri*, thus has a particularly strong claim to govern the matter. In any event, the trend in international arbitration is in the direction of moving away from too much reliance on a conflicts of laws approach in the identification of the solutions to key problems affecting the the structure\(^{17}\), the nature and the functioning of the arbitration, as is clearly the one of the effects of an award\(^{18}\). In this respect the situation is unlike the one prevailing in relation to the merits of the dispute, for which the tendency is for the most part to apply national law following a conflicts of law approach, albeit not necessarily the same one that would be applied by national courts\(^{19}\).

Of course, the conflict of laws problem does not always have the same relevance from a practical point of view. If the transnational nature of the arbitration is not very pronounced, or simply when the arbitration is closely related to a single legal system or to legal systems which share common approaches and concepts, the need to engage in a sophisticated analysis to identify the law which should govern the issue may be less pressing\(^{20}\). This still leaves open the problem that, not being arbitration-specific, the national rules which are applied are not ideally suited to this institution and that different awards may be treated differently depending on the law applied to assess their effects.

\(^{16}\) P. Mayer, *supra*, footnote 1, p. 186 seq.

\(^{17}\) Although there is no single approach, it is increasingly felt to be better in keeping with international arbitration’s vocation to be a truly international dispute settlement mechanism to rely on more transnational, less parochial rules (see L.G. Radicati di Brozolo, *The impact of national law and courts on international commercial arbitration (Mythology, physiology, pathology, remedies and trends)*, in *Les cahiers de l’arbitrage - Paris journal of international arbitration*, 2011, p. 222 seq.

\(^{18}\) A purely domestic law perspective is inappropriate for two sets of reasons. First, arbitrators do not have a *lex fori* that provides them with an obvious and paramount prism through which to assess the effects of a prior award in their arbitration. Second, international awards are made for international circulation, unlike judgments which are primarily destined to have effect in the forum, and it therefore makes sense to view their effects having regard to this specificity and to the need for a uniform approach in this regard.

\(^{19}\) See L. G. Radicati di Brozolo, *The impact of national law*, *supra*, footnote 17, p. 222 seq.

\(^{20}\) For some interesting considerations on the relations between the degree of transnationality of a dispute and the rules applied to it see V. Heiskanen, *And/or: The problem of qualification in international arbitration*, in *Arbitration International*, 2010, p. 450 seq.
4. The approach of national courts ...

Having seen the drawbacks of the application of national law to govern the res judicata effects of international awards, one can examine more closely the attitude of national courts and of arbitral tribunals. Those attitudes may not necessarily be the same, even though that might be undesirable or not entirely satisfactory. Ideally the effects, in particular from the perspective of res judicata, of an international arbitral award should remain the same, regardless of whether they are considered by a State court or by another arbitral tribunal.

National courts will more often than not be tempted to assess the res judicata effects of awards simply applying rules mirroring those of their own legal system that govern the res judicata of domestic judgments. This approach is probably not justified even for domestic awards, due to the difference between arbitral awards and domestic judgments recalled above.

For the reasons discussed in the previous section, the reference by national courts to concepts of domestic law, including their own, is questionable, and particularly unsatisfactory, when it comes to international arbitration. This solution appears even more questionable if one considers that in this context there is an international source, i.e. the New York Convention, that plays a paramount role. Although the Convention does not address res judicata directly or expressly, the obligation for States to “recognize arbitral awards as binding” laid down by Article III is undoubtedly crucial to this discussion. Article II of the Convention requiring States to give effect to arbitration agreements also has its pertinence in this context. As has been underlined, this provision is a fundamental underpinning of the undertaking of States to further arbitration and spells out the obligation to provide final and binding resolution of disputes submitted to arbitration and, consequently, to avoid multiple proceedings. The fact that Article III is couched in fairly general terms and does not in and of itself provide solutions to the more specific problems relating to the preclusive and conclusive effects of international awards does not give State courts unlimited freedom to fall back on domestic notions in this context.

Since the obligation derives from an international convention, regard must be had in its application to the principles of construction of international treaties laid down by the 1969

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Vienna Convention on the law of treaties which postulates that regard must be had, *inter alia*, to the “object and purpose” of the treaty (Article 31, para. 1). These considerations militate in favor of an autonomous and relatively broad approach to *res judicata* in relation to arbitral awards even before national courts, which would seem to go beyond the narrow and formalistic notions that traditionally apply in continental systems. In other words, the international framework aimed to ensure the effects and the circulation of arbitral awards requires municipal courts to focus on the *effet utile*, and therefore on the proper functioning of the mechanism, primarily having due regard to the underlying assumptions of the parties’ agreement to arbitrate. Admittedly even this only provides general guidance and does not directly resolve the question of how *res judicata* effects are to be gauged in specific situations.

A broad notion of the *res judicata* effects of arbitral awards has been adopted by the French courts, independently of the New York Convention, in a recent case that upheld the “obligation of concentration” holding that the right to a fair trial does not entitle a party to “saisir successivement plusieurs juges de demandes reposant sur une même cause alors qu’il lui était loisible de les grouper.”

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23 *Id.*, at 2894.

24 See G. Born, *International Commercial Arbitration*, op. cit., p. 2891 seq. for references to two national judgments (one from Italy and one from Bermuda) that took a broad view of the effects of awards based on the spirit of the New York Convention.

5. ... and of arbitral tribunals

5.1 The possible approaches

Although not directly bound by the New York Convention\textsuperscript{26}, it would seem natural that arbitral tribunals adopt an approach which is at least in part different from that of domestic courts.

One reason is that it is more in the nature of arbitrators to attribute paramount importance to the will of the parties, given that this is the primary source of arbitration, rather than to abstract rules on the effects of judicial decisions. In so doing they may consider the purported, or even the actual\textsuperscript{27}, intention both of the parties to the first arbitration as to the effects of the outcome of that arbitration, as well as of the parties to the second arbitration as to the effects of the first award within that arbitration.

Another reason for the likely difference in approach of international arbitrators compared to national judges is the fact that, while the latter are immersed in the perspective of their \textit{lex fori}, arbitrators, who have no \textit{lex fori}, may find it appropriate to shy away from a rigid application of national law in matters having to do with the functioning and with the structure and essence of arbitration, as opposed to pure issues of merits. As indicated above, in those matters arbitrators are generally more inclined to apply a flexible and substance-oriented approach which does not give prominent weight to formalities often typical of national law.

There is a further factor that may influence the attitude of arbitrators confronted with \textit{res judicata} issues, allowing them to shift away from a strict application of domestic notions and to develop more pragmatic and issue-oriented solutions. Since the application of the principle is irrefutably a question of law, the scope for court review of the way in which the arbitrators have dealt with the issue in the award at the annulment and enforcement stage is fairly

\begin{itemize}
\item\textsuperscript{26} The obligations to enforce arbitration agreements and awards contained in the Convention are clearly aimed at national courts and have no direct impact on arbitrators (save, for instance, when it comes to assessing the legality of the decisions of a national court enjoining the continuation of the arbitration (see L.G. Radicati di Brozolo and L. Malintoppi, \textit{Unlawful interference with international arbitration by national courts of the seat in the aftermath of Saipem v. Bangladesh}, in \textit{Liber Amicorum B. Cremades}, La Ley, 2010, p. 993 seq.).
\item\textsuperscript{27} Although it is unlikely that the parties will have agreed beforehand on the law governing the issue of \textit{res judicata}, especially in relation to the first arbitration, this is not inconceivable. See for instance ICC award discussed below in Section 5.2(ii) which acknowledges that, for the purposes of assessing the \textit{res judicata} effects of a former award, “[i]f the parties agree that […] the provisions of [the governing] law have to be applied, both by virtue of the choice of such law in the Contract (to the extent the substantive effects of \textit{res judicata} come into consideration) and by virtue of the choice of […] as the place of arbitration”.
\end{itemize}
limited. This does not mean that arbitrators are free to disregard the principle altogether or to apply it arbitrarily. Nevertheless, given that in most legal systems the application of legal principles by the arbitrators is not a ground for review of the award, the application of the principle of *res judicata* can attract the sanction of setting aside or refusal of enforcement only if it falls within one of the few possibly relevant grounds. The most obvious one is public policy. However, even if it is held that *res judicata* is one of the tenets of public policy, as is certainly arguable, it is probably only the unjustified or idiosyncratic disregard of the principle that could fall foul of public policy. The other conceivable grounds to fault the application of *res judicata* are the violation of the arbitrator’s mission and due process, but these too will be available only in exceptional circumstances.

The upshot is that seldom will it be possible to contest a given application of the doctrine, whether broad or restrictive, provided it is reasonably argued. This means that arbitrators in practice have a considerable leeway to apply the principle as they see fit in light of the circumstances, and in keeping with broader principles relevant to the nature of arbitration, and without undue deference to national conceptions. Empirical evidence shows that arbitrators frequently refer to the applicability of *res judicata* axiomatically, without engaging in particularly elaborate discussions on the underpinnings and on the scope of the doctrine.

An authoritative survey of arbitral case-law bears out that such a case-by-case and pragmatic approach is followed also with regard to the *res judicata* effects of previous awards, which, as mentioned above, is precisely a matter that pertains to the conception of arbitration as an international dispute settlement instrument. In many of the awards discussed in the survey, even when arbitrators state their need to rely on principles of national law, this

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28 This is remarked by most of the authors cited supra, footnote 1.


sometimes appears like lip service to a traditional conception. Some arbitral jurisprudence displays a constructive and non-formalistic approach to the issue, placing considerable emphasis on principles such as good faith, party autonomy and the scope and effects of the arbitration agreement, consistency and non-contradiction, estoppel, concentration of issues and claims, expectations of the parties, *effet utile*, efficiency and procedural economy and prohibition of procedural abuse. Thus, even when the issue is debated in a framework of continental legal systems there is a tendency to follow an approach which recognizes a fairly broad scope to the doctrine of *res arbitrate*.

As always with arbitral practice, it is difficult to know exactly how widespread any particular approach is and whether one may be in the presence of a significant uniformity or trend. Also with regard to the present topic one may suspect that there is a considerable variety of solutions. It is for example probably fair to assume that the extent to which arbitrators will be prompted to depart from a strict construction of *res judicata* according to the conceptions of a given national law may also be a function of the degree of “transnationality” of the arbitration and of the underlying dispute. For the reasons outlined above, if the arbitration displays only a limited level of transnationality it is likely that the arbitrators will be more averse to depart from the tenets of the legal system to which the situation is tied\(^{32}\).

### 5.2. Some examples

To gain a sense of the different ways in which international arbitral practice approaches the issue at hand, it is interesting to examine a few recent cases, which complement the Judge Hascher’s survey of some years ago\(^ {33}\), perhaps providing a somewhat different angle.

(1) In ICC case 13808/2008 mentioned above, the arbitrators held French law to be applicable to the issue of *res judicata* because the prior award “was part” of the French legal order (presumably because the seat was in France), Paris was the seat of the second arbitration

\(^{32}\) For some interesting considerations on the relations between the degree of transnationality of a dispute and the rules applied to it see V. Heiskanen, *And/or: The problem of qualification in international arbitration*, in *Arbitration International*, 2010, p. 450 seq.

and the parties confirmed their agreement to the application of that law. Faced with arguments that relied also on alleged solutions “retenu dans le domaine de l’arbitrage international et du commerce international” and on academic writings, the tribunal paid little heed to “les vues imaginatives de certains experts” on the grounds that both the earlier award and the one to be rendered were “integrated” in the French legal order, “aussi attractive que puisse paraître une ‘méthode autonome’ ou autrement ‘transnationale’”. Arguments based on comparative law were likewise dismissed by the Tribunal.

The Tribunal also gave short shrift to the ILA’s Recommendations on res judicata on the ground that they were mere recommendations and that they had not been agreed to by the parties. Somewhat surprisingly on this point the Tribunal added a statement which could be held to imply that the principles of the applicable law on res judicata cannot be displaced by party autonomy: “à supposer que [les Parties] puissent convenir des solutions s’écartant de la notion de l’autorité de la chose jugée attachée aux précédentes sentences en vertu du droit français”. The Tribunal concluded that in any event the solution reached by it under French law was “perfectly compatible” with the rules elaborated in the international context. In a similar vein the Tribunal declined to take into account the ALI/UNIDROIT principles on international civil procedure.

Despite the Tribunal’s rather conservative approach to the question of the underlying principles, the decision on the merits is well balanced and convincing. The award relied on a constructive interpretation of the doctrine of res judicata to dismiss the claim for restitution of the amount payable under the earlier award (but not the claim for nullity of the contract). It held that, since in the first arbitration the claimant had failed to raise nullity to paralyze the claim for damages although it was open to it to do so, it could not invoke nullity in the second arbitration with a view to reversing the result of the first arbitration and to obtaining restitution of the amounts paid, as this would have completely reversed the effects of the first arbitration. Any other result would, indeed, have been completely counter-intuitive. After many years of litigation, presumably involving very considerable amounts of money, during which for whatever reason the claimant has completely omitted to raise the issue of competition law, and once the Court of Appeal had decided that the failure to apply competition law did not entail a violation of public policy, it would have been contrary to all
principles of good faith, legitimate expectations and efficiency of proceedings that a second arbitral award would undo the result of the first arbitration.

On the point of the applicable principles, it is interesting to note that, precisely at the time of the arbitration, the French law on the scope of res judicata was significantly broadened by an important judgment of the Cour de Cassation which opted for a more liberal and less formalistic view that the one previously adhered to by French law. The fact that, as a result of this, the arbitral tribunal was able to reach a satisfactory decision and that, in any event, the dispute seems to have had few international elements, leaves open the speculation as to whether the tribunal would have been equally amenable to rely almost exclusively on French law if that law had remained anchored to a more restrictive and formalistic vision, particularly if the dispute had been more transnational.

(ii) The approach of another ICC award is not dissimilar, although on the facts of the specific case it reached the opposite result in terms of the preclusive effect res judicata. Although it was uncontested that the law of a certain South European country was applicable,37 there was a discussion as to whether, under the applicable law, the rules on the res judicata effects of international awards differed from those governing national judgments and were more flexible, in particular on the alleged “obligation to concentrate the subject matter in dispute”. The Tribunal held that “recognising the difference between arbitration and court proceedings does not imply that legal institutions and principles are necessarily different in the two institutions” and that “considerations relating to the unity of a legal system militate in favour of assuming uniformity in legal concepts”. In spite of the contrary opinion of an expert presented by one of the parties — a well-known and authoritative scholar and author of one of the most frequently cited works on the subject — the Tribunal was unpersuaded that “that there is a clear and binding principle requiring a claimant in arbitration to bring all claims arising from the same factual context in the same proceedings”, although it admitted that “such a principle might be desirable and may be progressively emerging”.

34 A somewhat similar situation was involved in the case decided by the Court of Appeal of Barcelona, (supra, footnote 29). An arbitrator dismissed on grounds of res judicata claims based on violations of competition law, holding that they could and should have been addressed in the litigation before the Spanish courts. The court annulled the award on the reasoning that res judicata extends only to claims actually brought in the earlier dispute resolution process.


36 No. 13254/2011. The point made in footnote 3 above applies.

37 See footnote 27 above.
For the Tribunal the decisive question was therefore whether the “obligation of concentration” was provided for by the arbitration agreement, the arbitration rules or other elements of the procedure, the parties’ agreement or the arbitral tribunal’s directions in the first arbitration. Incidentally, on this point the arbitrators were considerably, and rightly so one would say, more willing to take into account the role of party autonomy in this context than the tribunal in the case discussed above. The tribunal could find no basis for the obligation in those sources. In particular it held that general principles, such as finality, efficiency and economy of the proceedings as they are recognized in the applicable law and the ICC Rules did not have “the effect of expanding or limiting the scope of the res judicata, depriving a party of its right to bring a claim not previously raised”. The tribunal concluded in favor of “a solution which, bearing in mind the principle of unity and completeness of a national legal system, leads to a uniform interpretation of the concept of res judicata and its effect, taking into account the views that have been expressed both by authoritative scholars and by the courts of [the country of the applicable law] regarding specific aspects of this concept”.

(iii) In the arbitration decided by ICC award 13509/2006 the claimant (X) invoked against the defendant (Y) the conclusive effects of the holding of an award rendered between different parties (Y and Z) on the interpretation of a contract between the parties to the first arbitration to which X had become a party as a successor of Z. In addressing the applicable principles to assess the res judicata effect of the previous award the tribunal reasoned that it enjoyed great latitude, at the same time noting that the parties concurred on that point. The arbitrators held that, while it did not bind them, in the instant case French law was “an important source of inspiration” because it was both the law of the seat and the law governing the merits of both arbitrations, and was the framework within which the parties addressed the matter in the proceedings. The arbitrators concluded that they were not bound by “le détail des règles françaises”, but that they would consider French law “pour déterminer les concepts de base qui doivent prévaloir”; elsewhere they stated that they could draw inspiration from the principles of French law when they appeared reasonable. According to the commentator, in so doing the arbitrators applied a “règle matérielle”, as opposed to following a more traditional conflict of laws approach. This may be true, with the caveat that, as is usually the case in similar situations

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38 The existence of an “obligation of concentration” was denied also by the arbitral award challenged (inter alia for this reason) and upheld by Cour d’Appel de Paris, September 9, 2010, Marriot c. Jnah, supra footnote 25.

39 Journal du droit international, 2008, p. 1204, note B.D.

40 Id., p. 1211.
when the concept of *règles matérielles* is used by French authorities, such rules are not necessarily the reflection of generally recognized rules but of the French vision of what such rules are or should be. In their very dense reasoning on the issues of *res judicata*, the arbitrators went on to decide that French law provides no answer as to the positive effects of an award in international arbitration and that even with regard to judgments there are hesitations. They also seemed to consider that the reasoning of an award does not have binding effect, even as between the same parties41. The reason of this holding is that a party satisfied with the dispositive part of the award may choose not to raise a challenge notwithstanding its dissatisfaction with the reasoning, not suspecting that it may subsequently find itself bound by the reasoning. This finding, however, does take sufficiently into account that in arbitration the scope of a challenge is very limited, and would rarely seem to cover the mere reasoning of the award. Finally on the issue of the “*opposabilité aux tiers*”, the tribunal considered, also having regard to the difficulties that the claimant in the second arbitration would have faced, had it sought to intervene in the first arbitration, that such *opposabilité* could not deprive the third party (i.e. X) of its right to invoke its own interpretation of the contract. Otherwise the interpretation of a contract as between two parties would end up binding third parties.

(iii) The effects of awards on jurisdiction was the subject of the unpublished partial award in case 2308/2009 of the Milan Arbitration Chamber. In a first award on an earlier dispute over a sale of shares a tribunal had declined jurisdiction on the strength of a broad (and possibly incorrect) interpretation of the arbitration clause, which reserved certain types of disputes relating to the valuation of the company to an expert. A variation of the same dispute was brought before a second arbitral tribunal which, by a majority, upheld jurisdiction, rejecting the *res judicata* objection in relation to the first award, on the reasoning that the substance of the claims brought in the two arbitrations differed as to *causa petendi* and *petitum*. In his dissent the minority arbitrator argued that the second tribunal was bound by the first award’s decision on the interpretation of the arbitration agreement which excluded certain types of disputes from its scope, including the one at issue42. Neither the majority nor the minority opinions addressed in any detail the issue of applicable rules and principles, presumably because also in that case there was no significant conflict of laws.

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41 For the opposite position see for example ICC Award No. 3267/1984, *Yearbook of Commercial Arbitration*, 1987, p. 87.

The majority’s reasoning and conclusion in that case were in line with an ICC award in which the arbitrators declined jurisdiction, considering themselves not bound by a previous award that had upheld jurisdiction. The second award (which rejected the res judicata of the first award also on the ground that the parties to the two arbitrations were partly different) withstood a challenge before the French courts on grounds of violation of international public policy based on the violation of res judicata.  

6. The way forward

6.1. The need for ad hoc principles for international arbitration

The available decisions of domestic courts and arbitral tribunals provide only a sample of the matters that fall under the heading of res judicata in relation to international arbitration, and, not unsurprisingly, do not yield a consistent picture. The only element of real certainty is that the case-law confirms what was already clear from the start, i.e. that res judicata is a fundamental principle which applies also to arbitral awards.

For the rest, even arbitrators still tend to lean — albeit with a different emphasis — on notions of domestic law, and prevalently on those developed for court judgments. Admittedly, in many cases where this approach has been followed the tribunals’ reluctance to engage in a more elaborate or creative analysis may have been justified by the lack of significant conflict of law issues, at least in terms of the practical solutions. Even in those cases, however, the decisions sometimes reveal an awareness of the need to move away from solutions that mirror national law too closely and often admit that party autonomy may play a role which it would not normally have when dealing with the effect of court judgments. It is reasonable to assume that in less straightforward situations arbitrators might be more prepared to take into account the peculiarities of res judicata in an arbitration context and to adopt an attitude which is more responsive to the peculiarities of international arbitration.

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44 Whilst the award analyzed in Sec. 5.2(i) is particularly loath to admit the relevance of any principles going beyond those of the applicable law, the one analyzed in Sec. 5.2(ii) was in principle amenable to take into account the will of the parties and the one analyzed in Sec. 5.2(iii) was more explicit in holding itself not bound by national law.

45 See for instance the award analysed in Section 5.2(ii) above.

46 See the awards discussed in Section 5.2 (ii) and (iii) above, unlike the one discussed in Section 5.2(i).
Beyond this, the case law does not contribute significantly to the fleshing out of overarching solutions, be they with regard to the nature of the applicable legal principles or to the broad array of specific problems conceivably calling *res judicata* into play. For the time being the response of arbitrators will inevitably continue to be case-by-case and fairly haphazard. This may not be as problematic for arbitrations taking place in a relatively homogeneous legal environment, because, as experience shows, the solutions will tend to be drawn from more consolidated approaches, albeit designed for court judgments and therefore not necessarily fully respectful of the peculiarities of arbitration. It may, however, be less acceptable when the legal environment is diverse, because in such cases the solutions may be very unpredictable.

Such a situation is hardly satisfactory for the parties, who obviously need to rely on uniform and especially predictable solutions. It may also fuel the grievances of opponents of arbitration, who often — and in many cases rather superficially — accuse arbitration of leading to solutions which are not based on hard and fast legal rules and of allowing excessive discretion to arbitrators. There is therefore merit in striving for a more consolidated and arbitration-specific approach to these issues. The way to achieve this has been pointed to by the more authoritative scholars of the subject. It lies in the development of a set of *ad hoc* substantive transnational rules that attempt to bridge the gap between different legal systems and traditions and have due regard for the specificities of arbitration, and in particular the need for ensure the *effet utile* of the arbitration process, and principally its finality, and to give proper effect to the agreement, or at least the expectations, of the parties. The oft-heard objection that moving away from domestic law approaches and towards a transnational solution is a source of uncertainty is no more well founded with reference to *res judicata* than it is to most other questions having to do with the law of international arbitration (as opposed to the merits). As shown above, relying on national law, with all the related conflict of laws problems, is itself a source of significant uncertainty as well as of inadequate outcomes, especially in complex international situations.


48 See Hascher, op. cit, p. 25; P. Mayer, op. cit., p. 190; Ch. Jarrosson, op. cit, § 23; V.V. Veeder, op. cit, p. 78; Ch. Seraglini, op. cit, p. 914

49 The fundamental role of the will of the parties has been underscored by P. Mayer, op. cit., p. 190-191, who, while recognizing that the precise intention of the parties will often be difficult to identify, insists on the need to attempt to ascertain what it would reasonably have been.
The solution cannot simply be to wait for the spontaneous emergence of transnational rules, because that requires a lot of time and also because the confidentiality of awards makes it difficult to monitor developments. The challenge must therefore be met through forms of bottom-up harmonization such as the rules developed by the International Bar Association on the taking of evidence and arbitrator conflicts\(^{50}\), which stand arbitration in very good stead.

6.2. The International Law Association’s Toronto Recommendations

An important move in the suggested direction is of course the International Law Association’s Toronto Recommendations on *res judicata*\(^{51}\), which, together with the accompanying Report, lay the groundwork for concrete reflection on the subject. While this is not the place for an extensive comment of the text, it is sufficient to mention here that the Recommendations lay down a clear statement in favor of the conclusive and preclusive effect of awards in international commercial arbitration (Recommendation No. 1). Even more importantly, they posit that such effects “*need not necessarily be governed by national law and may be governed by transnational rules applicable to international commercial arbitration*” (Recommendation No. 2). This is a forceful endorsement of the position in favor of a transnational approach based on uniform substantive rules that takes stock of the problems inherent in the application of national rules.

The Recommendations then proceed to lay down some concrete principles. Recommendation No. 3 lists the conditions that an award must satisfy to have conclusive and preclusive effects. It must be final and binding and recognizable in the country of the seat of the second arbitration; it must have decided on a claim for relief that is the subject of the second arbitration and must be based upon a cause of action invoked in such arbitration; it must have been rendered between the same parties. Recommendation No. 4 clarifies what is covered by *res judicata*, and specifically refers to the reasoning of the awards and the issues of fact or law that have been arbitrated or determined, provided that the determination was

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\(^{50}\) The trend toward a convergence of solutions is an overall feature of international arbitration. It is visible both in the more or less spontaneous harmonization of national rules on matters which fall to be governed by national law (including the grounds for setting aside which increasingly mirror those of the New York Convention following the prototype of the Model Law) and in the development of uniform rules and practices governing matters which are within the competence of arbitrators, such as those which are the subject of the IBA rules mentioned in the text.

\(^{51}\) *Supra*, footnote 1.
essential to the dispositive part. The last point worth mentioning here is the “obligation of concentration” as to which Recommendation No. 5 puts forward that it applies insofar as raising a claim, cause of action or issue of fact of law that could have been, but was not, raised in an earlier arbitration would amount to procedural unfairness or abuse.

These propositions are intentionally low key, being formulated as they are as mere Recommendations, and what is more directed only to arbitrators and not to national courts. They are only a first shot at elaborating solutions to the problem at issue. One commentator has remarked that the Recommendations “se partagent entre l’audace et la timidité”52. The solutions they put forward may appear progressive insofar as they enunciate principles which are not the product of a consensus of the doctrine or the case law, and in particular go considerably beyond the solutions generally accepted in civil law systems. Their prudence, instead, is evidenced by their shying away from an attempt at comprehensiveness, since many problems remain untouched (for instance that of the effects vis à vis third parties53) and are consequently left to be governed by national law without any attempt being made to elaborate any conflict rule54. Surprisingly the role of party autonomy is not emphasized either.

Despite these possible shortcomings, which may indeed lead some to view them as too conservative and others as too progressive, the options set out in the ILA’s Recommendations are on balance well considered, even if inevitably they do not reflect consolidated solutions, since none are at hand. This is for instance the case of the recommendation on the touchy and still controversial issue of the “obligation of concentration”55. As mentioned, in the Recommendations the preclusion against raising a matter that could have been raised in the earlier arbitration is limited to situations where to do so would amount to procedural unfairness or abuse. This position takes into account the need, on the one hand, to respect the flexibility inherent in arbitration and the parties’ freedom to determine their litigation

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52 Ch. Seraglini, supra, footnote 1, p. 915.
53 On this issue see in particular L. Brekoulakis, supra, footnote 1.
54 Report, § 26-27.
55 The matter was, for instance, the subject of a considerable number of court decisions and arbitral awards discussed in this article and, as is apparent, received divergent solutions. It is arguable that, until the rule of concentration is established sufficiently broadly, its rigid application could lead to unfair results if it takes the parties by surprise. At the same time, considering that, at the outset, it can be in both parties’ interest to avoid successive litigation, the parties may often be well advised to give the matter due consideration when laying down the ground rules of the first arbitration.
strategies, also in the interest of saving costs and efforts. It also avoids the risk of surprise for parties, particularly from a civil law background, unfamiliar with the notion of issue preclusion. At the same time it safeguards the increasingly recognized general interest to avoid abusive tactics and attempts to have an unjustified second bite at the cherry. It is interesting that, in relation to the principle of concentration, one of the awards discussed above reasoned that it “might be desirable and may be progressively emerging”. While that particular tribunal declined to put any store on the ILA Recommendations, it could be that other like-minded tribunals will rely more heavily on Recommendation No. 5 as support for their decisions.

The ILA’s Recommendations therefore provide a useful basis for the solution of the problems that may arise in arbitrations. They are an excellent starting point for any analysis of the res judicata effects of awards and should be referred to by arbitrators (and perhaps to some extent even judges) as a weighty source of guidance. It is particularly important that they can be a source of reassurance to arbitrators as to the feasibility — and actually the advisability — of adopting an approach that is arbitration-specific and detached from the peculiarities of domestic law. At the same time, they can serve to prevent each arbitral tribunal from making the rules as it goes along and thus perpetuating uncertainty and haphazard solutions. Accordingly, the Recommendations seem to deserve more attention than the relatively off-hand treatment accorded to them by some of the awards discussed above. In spite of their being labeled as recommendations, the principles enunciated in the ILA’s instrument lend

56 See ILA, Final Report, § 60.
57 This is emphasized by P. Mayer in his annotation to Cour d’Appel de Paris, September 9, 2010, cited supra, footnote 25.
58 There is a growing consensus towards curtailing the relitigation of issues that should have been pled the first time by parties in good faith: see for instance P. Mayer, supra, footnote 1, p. 196 (for the author this should be derived from an implied will of the parties; see, however, this author’s more cautious and nuanced approach in the annotation Cour d’Appel de Paris, September 9, 2010, cited supra, footnote 25); D. Hascher, supra, footnote 1, p. 26; Ch. Jarrosson, supra, footnote 1, § 40 seq.; G. Born, supra, footnote 1, p. 2893-4; with a somewhat different emphasis, E. Loquin, supra footnote 25; L. Weiller, supra, footnote 25. See also the following holding of Cour d’Appel de Paris, November 18, 2004, supra, footnote 4 in relation to the matter that formed the subject of ICC award 13808/2008 discussed in Sec. 5.2(i) above: “La loyauté et la bonne foi procédurale dans l’arbitrage international imposent bien aux parties de faire connaître leurs demandes le plus tôt possible de manière à éviter qu’une demande qu’aurait pu et dû être soulevée ne le soit par la suite dans un but dilatoire ou par simple négligence”. Eventually the decision of the arbitral tribunal in that case substantially gave effect to that principle. See however the judgment of the Barcelona Court of Appeal, supra footnote 34.
59 See Sec. 5.2(ii).
60 See the awards discussed in Section 5.2 (i) and (ii) above.
themselves to be applied almost as a set of rules, or of guidelines, that, if utilized consistently in arbitral practice, could bring about a good measure of uniformity and predictability in this area. They can be the kernel of what, over time and with appropriate adaptations and complements to take into account developments in the practice and in the thinking about policy implications, could evolve into a set of more consolidated arbitration-specific uniform rules on *res judicata*, such as the IBA’s rules on evidence and on arbitrator conflicts of interest\(^61\).

### 6.3 The role of arbitrators, of party autonomy and of arbitral institutions

Even if the ILA’s Recommendations, or any other principles, develop into a set of generally recognized and adhered to tenets on the scope of *res judicata* in international arbitration, they would by nature remain a non-binding instrument to which arbitrators and the parties can look for guidance. This should be enough to overcome the objections of those who are understandably wary of the trend toward the increase in the number of rules in arbitration\(^62\). It is true that arbitration is and should remain a relatively informal and unproceduralized dispute settlement mechanism. However, the critics overlook the need for a certain measure of predictability, which is increasingly felt as the world of international arbitration becomes ever more diverse and complex and which can only be catered for by means of appropriate instruments to provide guidance to arbitrators and parties. Obviously such rules can never be any more prescriptive than any other similar rule or guideline developed in the world of international arbitration.

Such rules will therefore never be able to thwart the ability, and the duty, of arbitrators to adapt intelligently to the circumstances, adopting the most appropriate solutions also in the light of the plausible expectations of the parties. Moreover, they will never have anything more than a gap-filling role with respect to any rules on the subject matter laid down by the parties themselves, directly or indirectly\(^63\). There is therefore considerable scope for the parties to address the matter in their arbitration agreements or in the terms of reference, as well as for

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\(^61\) As is well known, initially such rules appeared to many as artificial or too slanted in the direction of common law approaches, but they are now generally recognized as the standard for international arbitrations.

arbitrators to do so in their initial procedural orders. Likewise, the matter might warrant greater consideration in the rules of arbitral institutions or in the check-lists of issues to which they draw the arbitrators’ and the parties’ attention. This is particularly true in relation to whether, and the extent to which, the parties undertake to concentrate claims and defenses in the arbitration with a view to foreclosing relitigation of the subject matter of the dispute.

63 There are of course certain matters that cannot be disposed of by the parties, such as the effects vis-à-vis third parties.

64 The anonymous commentator of ICC Award 2745-2762/1977 in Journal du droit international, 1977, p. 989 remarks that, although the ICC Rules do not contain any obligation to respect res judicata, the ICC Court “could not reasonably approve” an award which contradicts a previous ICC award. See also V.V. Veeder, supra, footnote 1, p. 79 suggesting that the ICC Rules be amended to provide that the reasons, as well as the result of the award, are presumed to bind the parties in subsequent proceedings.