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Res Judicata in International Arbitration

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54

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54.1 Introduction

Res judicata is a legal principle applicable in international arbitration, just as it is in domestic courts. It essentially precludes reconsideration of claims that were placed in issue and conclusively determined in an earlier proceeding.[1] *Res judicata* is generally regarded as serving two complementary interests: a public interest in achieving an end to litigation and a private interest in protecting a party from repetitious suits.[2] It has been suggested that the public interest rationale applies with greater force in national litigation than it does in international arbitration due to the greater claim that the former makes on public resources. By contrast, the private interest in protection from the expense and potential for harassment that inheres in the repeated assertion of a claim is, in principle, no less in an arbitral than in a litigation forum.

Res judicata is commonly viewed as having both a 'positive' and a 'negative' aspect. The positive aspect consists in according the party that prevailed in a judicial or arbitral adjudication the right to have that adjudication treated as binding and enforceable.[3] The negative aspect, which is the one most commonly attributed to *res judicata*,[4] entitles that same party to defeat attempts by the losing party to relitigate the claim in the hope of a better outcome, whether in the same or a different forum. The latter, as expressed through the maxim *ne bis in idem*,[5] essentially operates defensively. *Res judicata* stands to perform in international arbitration as valuable a function as in other adjudicatory

[1] V. Lowe, '*Res Judicata* and the Rule of Law in International Arbitration', *African Journal of International and Comparative Law*, 8 (1996), 38.

[2] Expressed in the Latin maxims '*interest reipublicae ut sit finis litium*' and '*nemo debet bis vexari pro una et eadem causa*', respectively, K. Hobér, '*Res Judicata* and *Lis Pendens* in International Arbitration', in Académie de Droit International de La Haye (ed.), *Recueil des Cours*, vol. 366 (Brill Nijhoff, 2014), 99, 120.

[3] W. S. Dodge, '*Res Judicata*', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Max Planck Institute for Comparative Public Law and International Law, 2006), para. 1.

[4] Hobér, '*Res Judicata* and *Lis Pendens*' (2014), 121.

[5] International Law Association Committee on International Commercial Arbitration, 'Interim Report: "*Res Judicata*" and Arbitration', in International Law Association, *Report of the Seventy-First Conference* (International Law Association, 2004) (ILA Interim Report (2004)), 828.

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settings.[6] Disregarding it would so considerably disadvantage international arbitration as an attractive international dispute resolution alternative that it is not even considered.[7]

This chapter does not deal with all scenarios relating to international arbitration in which a question of *res judicata* might arise. It addresses the scenario in which a prior judgment or prior award is invoked as preclusive of a claim before an arbitral tribunal. It does not deal with other and narrower questions of *res judicata* in the international arbitration setting, such as the binding effect of one national court's decision to annul (or not) or to grant or deny enforcement of an award on a later court's determination of the same question. Within a purely arbitral setting, a partial award may arguably generate *res judicata* effect over a subsequent award in the very same arbitral proceeding. A partial award on arbitral jurisdiction may thus be viewed as

[6] S. Brekoulakis, 'The Effect of an Arbitral Award and Third Parties in International Arbitration: *Res Judicata* Revisited', *American Review of International Arbitration*, 16 (2005), 179–80 (noting that the conclusive effect of a decision serves both 'public and private' interests: '[w]hile public concerns, such as the preservation of legal resources, are less relevant in the context of international arbitration than they are in national litigation, private considerations such as the need for commercial security resulting from the finality and repose of the dispute are critical for the interests and the expectations of the parties in international arbitration. Parties resort to arbitration to have their disputes finally resolved by the award. If the issues determined in the first award were open to a fresh determination, parties' expectations of finality and repose of their dispute would be thwarted and the effectiveness of arbitration would be compromised.'). *See also* Hobér, '*Res Judicata* and *Lis Pendens*' (2014), 257 (noting that 'in international arbitration *res judicata* is not a matter of public policy. It is up to the Parties to determine whether or not they wish to raise objections based on *res judicata*.').

[7] This point obtains, even though a tribunal's failure to apply *res judicata* as a legal principle may not be a ground for denying recognition or enforcement of awards under the New York Convention: L. G. Radicati di Brozolo, '*Res Judicata*', in P. D. Tercier (ed.), *Post Award Issues* (ASA, 2011), 11 ('it is probably only the unjustified or idiosyncratic disregard of the [*res judicata*] principle that could fall foul of public policy. The other conceivable grounds to fault the application of *res judicata* are violation of the arbitrator's mission and due process, but these too will be available only in exceptional circumstances.'). That said, some jurisdictions do consider that *res judicata* forms part of public policy principles. For example, Switzerland considers *res judicata* part of procedural public policy under Art. 190(2)(e) of the Swiss Private International Law Act (PILA), provided the previous award or judgment is entitled to recognition in Switzerland: C. A. Kunz, 'Enforcement of Arbitral Awards under the New York Convention in Switzerland – an Overview of the Current Practice and Case Law of the Swiss Supreme Court', *ASA Bulletin*, 34(4) (2016), 862; B. Berger, 'No Force of *Res Judicata* for an Award's Underlying Reasoning, Note on 4A_633/2014 of 29 May 2015', *ASA Bulletin*, 33(3) (2015), 642. Cf. in France, in which *res judicata* is not understood to be part of international public policy and is thereby not a ground for annulment or non-recognition of an international foreign award, E. Gaillard and J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer, 1999), 962.

The question of whether the standards for applying *res judicata* should be the same regardless of whether the prior adjudication is based on a court judgment or an arbitral award has been subject to academic debate. Cf. G. R. Shell, '*Res Judicata* and Collateral Estoppel Effects of Commercial Arbitration', *UCLA Law Review*, 35 (1988), 639–57, and R. W. Hulbert, 'Arbitral Procedure and the Preclusive Effect of Awards in International Commercial Arbitration', *International Tax & Business Lawyer*, 7 (1989), 194–5.

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producing a preclusive effect at a later stage of the proceeding.[8] These too are important *res judicata* aspects of international arbitration. But, again, this chapter is concerned only with the situation arbitral tribunals face when confronted with an application to dismiss the claim before it on account of a prior determination of what is arguably the same claim.

54.2 *Res Judicata* in National Courts and Arbitral Tribunals

The magnitude of the challenge *res judicata* presents to international arbitral tribunals can best be seen by contrasting *res judicata* in arbitration with *res judicata* in litigation. Obviously, the defendant in a national court proceeding may seek to have an action dismissed due to its advancing a claim that arguably has already been finally adjudicated. (Of course, a national legal system may choose to treat the preclusive effect of a prior international arbitral award differently than it treats the preclusive effect of a prior foreign judgment, but this will ultimately be a matter of forum law.) But determining the *res judicata* effect of a prior judgment or award in national court is vastly simplified by the fact that (a) those courts generally regard the *res judicata* effect of a prior judgment or award as a matter of forum law and (b) the forum law on the *res judicata* effect of a prior judgment or award is ordinarily well-settled. Thus, national courts typically come to the task of determining claim preclusion already equipped with the relevant principles, without need, or even warrant, to invent rules for the individual cases that come before them.

The same may not be said of international arbitral tribunals. Not belonging to any national legal system (and indeed not itself even pre-existing), an arbitral tribunal has no pre-established forum law of *res judicata* upon which to draw. It is certainly not bound, *a priori*, by any single jurisdiction's principles on the matter. In sum, an international arbitrator is very much more at sea than a national court judge when confronted with a *res judicata* defence.

Also, in determining the preclusive effect of a prior arbitral award, a national court must never lose sight of relevant international treaties, notably the New York Convention. After all, a national court of a signatory state is bound to 'recognize' a Convention award, absent one of the grounds that the Convention specifically provides for refusing to do so. Recognition of a foreign award entails precisely treating it as binding, and doing so is an international obligation. A court shows respect for an arbitral award in part by disallowing its impeachment by any means, including relitigation.

The Convention, however, does not itself address more particular matters upon which claim preclusion depends. For example, it does not address the question of the

[8] International Law Association Committee on International Commercial Arbitration, 'Final Report on *Res Judicata* and Arbitration', *Arbitration International*, 25(1) (2009), 71 (ILA Final Report (2009)), noting that '[a]s to awards on jurisdiction and subject to the applicable law, the Recommendations do not exclude giving such awards conclusive and preclusive effects' (footnotes omitted). Whether other kinds of orders in arbitration qualify as 'awards' that generate preclusive effect over subsequent chapters of an arbitration is a separate matter best addressed by the *lex arbitri* (at 72).

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range of subsequent claims against which a *res judicata* defence may be raised. Put differently, the Convention does not prescribe the universe of claims that *res judicata* will, in fact, foreclose. Nor does the recognition of a given award owed under the Convention tell us exactly what is the universe of persons against whom the prior award may be invoked as preclusive. Recognition of an award is accordingly a necessary but not a sufficient predicate for claim preclusion based on that award. Thus, even awards entitled to recognition under the New York Convention may receive differential *res judicata* effect depending on the national court in which they are invoked. In making these additional determinations, national courts must ask a series of more precise questions, thus adding a national law layer onto an international treaty obligation. But here, national courts have pre-established rules on these matters at their disposal. The value of having such rules is considerable.

Here again, international tribunals are situated very differently. Their approach to *res judicata* is not in principle governed by the New York Convention and its rules governing the recognition of awards, as the Convention addresses courts, not arbitral tribunals. Tribunals must find their way on their own.

Mention must be made in passing of a few further complications that accompany *res judicata* in the international arbitral setting, but not ordinarily in the litigation context.

First, in order to exert a positive claim preclusive effect – whether in arbitration or national court – the judgment or award upon which the assertion of *res judicata* is based must be final and binding. While the criteria of the finality of judgments within national law are ordinarily well-settled, the finality of arbitral awards is determined in accordance with the *lex arbitri,* which may not have a settled rule on the matter and as to which different jurisdictions, in any event, have different rules.[9] Moreover, as noted, an arbitral award subject to the New York Convention must meet certain requirements and avoid certain defects in order to achieve recognition, i.e., eligibility to exert claim preclusive effect; without recognition, an award cannot enjoy the preclusive effect.[10] Also, ICSID awards are in principle immune from non-recognition in the courts of the signatory states.[11]

Second, according to the prevailing view, for *res judicata* to apply, the first and second awards must belong to the same legal order. This is not ordinarily a problem in the litigation setting, since national courts from different countries are considered, for these purposes, to be of the same (i.e., national level) legal order.[12] Matters are more complicated at the international level,[13] and more

[9] Hobér, '*Res Judicata* and *Lis Pendens*' (2014), 258–69.

[10] *See* Arts. III to V of the New York Convention. *See also* ILA Final Report (2009), 71–2; Hobér, *Res Judicata and Lis Pendens* (2014), 268.

[11] Article 54(1) of the ICSID Convention. *See also* C. N. Brower and P. F. Henin, '*Res Judicata*', in M. N. Kinnear *et al.* (eds.), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer, 2015), 55.

[12] Hobér, '*Res Judicata* and *Lis Pendens*' (2014), 295.

[13] According to Hobér, court and arbitration proceedings should in principle be seen as belonging to the same legal order, *see* Hobér, '*Res Judicata* and *Lis Pendens*' (2014), 264. The *res judicata* effect of decisions by municipal courts in international arbitration is a question outside the scope of this chapter.

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particularly in connection with investment treaty arbitration. While international investment treaties are all deemed to be part of the same legal order,[14] and international commercial arbitrations likewise, the same cannot be said of the combination of an investment treaty arbitration and a commercial arbitration.[15] Under this view, as between awards resulting from these two species of arbitration there can be no *res judicata* effect.

There is then the question of confidentiality of awards. If an award is genuinely determined to be confidential, the party wishing to rely on it for preclusion purposes may not be permitted to bring it to a tribunal's attention.[16]

54.3 The Contribution of Arbitral Laws and Rules

There is no reason, *a priori*, why parties could not include in their contractual arbitration clause a provision addressing the effect within an eventual arbitration between them of prior adjudication, whether judicial or arbitral. But this is simply not done, nor is it something to which drafters of arbitration clauses will, in fact, give any attention. Slightly more plausible – but only slightly so – is the prospect that the *lex arbitri* of a jurisdiction (i.e., the law of a particular jurisdiction relating directly to arbitration and mostly addressed to arbitration conducted locally) might contain a *res judicata* provision. This, too, is not a prospect to be taken seriously. There are a host of matters related to the fairness, integrity, predictability, and efficiency of arbitration that the *lex arbitri* of a jurisdiction will need to address. It will want to provide a procedural framework for the conduct of arbitration on the territory, some provisions of which will operate as 'default' rules and others of which will be considered mandatory. The *lex arbitri* is certainly likely to address the role of that jurisdiction's own national courts in relation to arbitral proceedings conducted locally and, in some instances, abroad – thus, enforcement of agreements to arbitrate, the grant of interim relief, the annulment of local awards, and the recognition or enforcement of foreign awards. It is a small wonder that working definitions of *res judicata* have, as far as can be told, not made their way into the *lex arbitri* of any jurisdiction worldwide.[17] Notably, the UNCITRAL Model Law on International Commercial Arbitration, widely viewed as 'state of the art', has no provision

[14] *See* Arbitral Tribunal established under NAFTA Chapter 11/ICSID Additional Facility Rules, *Waste Management* v. *United Mexican States*, Decision Concerning Mexico's Preliminary Objection Concerning Previous Proceedings, 26 June 2002, ICSID Case no. ARB(AF)/00/3.

[15] Hobér, '*Res Judicata* and *Lis Pendens*' (2014), 263; W. S. Dodge, 'National Courts and International Arbitration: Exhaustion of Remedies and *Res Judicata* under Chapter Eleven of NAFTA', *Hastings International & Comparative Law Review*, 23 (2000), 367.

[16] Lowe, '*Res Judicata* and the Rule of Law' (1996), 43–4.

[17] Although, as noted above (*see* above, note 7), the Swiss Federal Tribunal has held that failure to give *res judicata* effect to a previous arbitration award or judgment constituted a violation of the procedural public policy provision contained in Art. 190(2)(e) Swiss PILA, namely Swiss *lex arbitri*; the legislation does not furnish a definition of *res judicata*.

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addressed to *res judicata* in arbitral proceedings, and no consideration was apparently given to including one. None of this should come as a great surprise.

Much the same can be said of institutional rules of arbitral procedure. Such rules perform functions analogous to the codes of civil procedure in national courts. They are accordingly called upon to address an exceptionally large number of procedural issues, covering the entire life cycle of an arbitral proceeding from start to finish and even beyond. Whether and how arbitral tribunals should address a *res judicata* defence is a matter wholly absent from all the major institutional rules. If the drafters thought of *res judicata* at all, which is not likely, they almost certainly considered it best to leave arbitral tribunals to their own devices.

Res judicata is by no means the only issue of this sort, i.e., that is regularly left unaddressed by the parties' contract, the law of the place of arbitration, and the institutional rules adopted by the parties. But it is among the most important and outcome-determinative of these issues. For guidance, arbitral tribunals and arbitration counsel simply must look elsewhere.

54.4 *Res Judicata* in Arbitral Practice

In practice, two distinct approaches to *res judicata* have emerged in international arbitration. One may be called a 'choice of law' approach, where a tribunal turns to a specific body of national law to determine whether a given claim is subject to claim preclusion. Contrary to what might ordinarily be supposed, national laws adopt significantly different *res judicata* standards from each other, which is, of course, why a 'choice of law' method might commend itself. The choice of law made may well be outcome-determinative. If *res judicata* applies, the arbitral proceeding will presumably come to an end; if it does not, the proceeding will presumably go forward (unless, of course, there is some other reason for it to be dismissed).

The other approach to *res judicata* in international arbitration consists of applying what may be called an 'international standard', which means a standard derived not from any single national legal system but rather from a norm (if one exists) prevailing in international practice. By reference to that norm, an arbitral tribunal would decide whether or not to attribute the preclusive effect to a prior judgment or award.

Each approach has its advantages and disadvantages. There may be doubt in applying a choice-of-law methodology as to which jurisdiction's law should govern *res judicata* in the arbitral proceeding because, as will be seen, there is no consensus in international arbitration as to the proper choice-of-law rule.[18] It would then remain to ascertain the content of the national *res judicata* norm. By contrast, an international standard would, in principle, be a common one. However, while national law, once chosen on a choice-of-law basis, may supply a clear doctrinal

[18] Radicati di Brozolo, '*Res Judicata*' (2011), 11; ILA Final Report (2009), 73.

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answer, international law may not. And, of course, there may be doubt whether an international standard even exists and, if it does, doubt over its content.

This chapter makes the reasonable assumption that arbitrators will find no guidance on claim preclusion from the contract between the parties, the *lex arbitri*, or the institutional rules chosen and takes up the challenge of identifying the avenues though which an arbitral tribunal may travel in search of such guidance. This chapter seeks to contribute to the discussion surrounding the question of *res judicata* before international arbitral tribunals and, more particularly, concerns the relative merits of a 'choice of law' or international standard approach. In doing so, it deliberately does not distinguish among arbitration cases according to whether the prior adjudication is a national court judgment or an international arbitral award. It is highly likely that, whatever the particular version of *res judicata* a tribunal ultimately favours, it will apply it the same way, regardless of the form – national court judgment or arbitral award – taken by the prior adjudication.[19]

54.5 *Res Judicata* Issues: The 'Triple Identities'

In focusing on *res judicata* in international arbitral proceedings, three questions come to the fore. The first entails determining the degree of identity that two successive claims must have in order for the first to enjoy the *res judicata* effect over the second. The second question entails determining whether it is only the outcome of the first proceeding (its *dispositif*) that has a preclusive effect or whether the findings and reasoning on which it is based have a preclusive effect as well. The third question entails determining not the matters subject to preclusion but rather the persons against whom *res judicata* may be invoked. Most often, this last question is framed in terms of whether and, if so, under what circumstances, a non-party to the first proceeding can be subject to the *res judicata* effect of that proceeding in a subsequent arbitration.

If a tribunal decides to follow a 'choice of law' methodology and identify the national law to be applied, it must face the fact, already mentioned, that r*es judicata* standards differ from one national body of law to another,[20] and that they do so for all three sets of issues just identified. Thus they differ, first, in regard to the degree of identity or similarity between claims that must be shown in order for the earlier adjudication to exert a conclusive effect on the latter. They differ, second, in the scope of the conclusiveness that *res judicata* produces. A notion of *res judicata* confined to the *dispositif* of a judgment or award exerts much less, by way of a preclusive effect, than one that extends to the findings and reasons upon which the *dispositif* was based. Finally, national laws differ with respect to their willingness to apply *res judicata* to persons who were not parties to the first proceeding.

[19] ILA Interim Report (2004), 13, 16.

[20] G. Walters, 'Fitting a Square Peg into a Round Hole: Do *Res Judicata* Challenges in International Arbitration Constitute Jurisdictional or Admissibility Problems?', *Kluwer Law International*, 29 (6) (2012), 653.

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National differences are somewhat obscured by the fact that the term commonly used to describe national *res judicata* rules across legal systems – the so-called 'triple identities' test – is not quite the same everywhere. Jurisdictions subscribing to that test typically require that both the claims and the parties in the two proceedings at issue be identical. However, the 'third' identity appears to vary from country to country. The third required identity may, depending on the country, be characterized as an identity of 'object' or identity of 'cause' or even an identity of 'legal ground or foundation'. The import of these terms can be quite elusive.

Even 'identity of claim', a requirement to which the vast majority of jurisdictions subscribe, does not mean the same everywhere. In most civil law jurisdictions, unless the cause of action advanced in the second proceeding is the same cause of action as was advanced and decided in the first proceeding, the first judgment or award will be denied preclusive effect in the second. To that extent, the 'identity of claim' requirement is understood strictly. In other jurisdictions – including most common law jurisdictions and even a minority of civil law ones – the second claim may be dismissed on *res judicata* grounds not only when it is identical to the claim first adjudicated, but also when it is sufficiently similar and could have been, but was not, advanced in the first proceeding. In these jurisdictions, *res judicata* thus attaches both to causes of action actually previously brought and adjudicated and related causes of action that 'could and should' have been brought and adjudicated the first time around. Clearly, *res judicata* is more potent in the latter jurisdictions than in the former.

Similarly, a subsequent claim may be viewed as the same as a prior claim, however denominated, as long as it seeks the same remedy.[21] If so, *res judicata* once again has a broader reach. It all depends essentially on what is meant by a 'new' claim. Advocates of the 'could and should' view or of the 'same remedy' view typically describe the more conservative understandings of 'same claim' pejoratively as formalistic.[22] They reject 'claim splitting', in whatever form it takes.[23]

Some common law jurisdictions practically dispense with the 'same claim' requirement and allow a prior judgment to have a preclusive effect on a later one even if the claims in the two actions are decidedly not the same. It may be enough that the claims in the two proceedings, though different from one another, share a common key issue. A finding on that issue in the first case may bar its reconsideration in the second, provided it was necessary to support or justify the final conclusion,[24] and the other required identities are met, the unrelatedness of the claims notwithstanding. Since preclusive effect here attaches to a finding rather than a claim, this practice is known as 'issue preclusion' (as distinct from 'claim preclusion'). In the USA, it also commonly goes by the name of 'collateral estoppel', and in the UK, as 'issue

[21] Hobér, '*Res Judicata* and *Lis Pendens*' (2014), 272.
[22] Hobér, '*Res Judicata* and *Lis Pendens*' (2014), 273.
[23] Hobér, '*Res Judicata* and *Lis Pendens*' (2014), 276.
[24] B. Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions* (Kluwer, 2006), 243. Hobér, '*Res Judicata* and *Lis Pendens*' (2014), 277.

estoppel'.[25] Collateral estoppel is by no means widely accepted around the world but is confined to an extremely small number of jurisdictions.[26]

Legal systems also divide sharply over what exactly, in the prior judgment or award, enjoys preclusive effect. Many civil law jurisdictions attach *res judicata* effect only to the *dispositif* of a judgment or award, and not to the reasoning on which the judgment or award was based,[27] while others treat the *ratio decidendi* as preclusive.[28] Here, too, jurisdictions that follow the latter approach greatly expand *res judicata*'s scope of application. These jurisdictions should not, however, be viewed as embracing the common law notion of issue estoppel or collateral estoppel, as defined above. In order for one adjudication to bind a later one, the two claims must be the same. Issue estoppel, as understood in common law countries, is not limited in that way.[29]

Finally, some jurisdictions do not even purport to require an 'identity of parties' in all cases. For example, in the USA, in exceptional circumstances, *res judicata* may even apply to third parties (i.e., non-parties in the first proceeding), provided the claims are at least the same.[30] Thus *res judicata* may be invoked by or against a contracting party's successors in interest.[31] English law recognizes that *res judicata* applies not only to persons but also to their 'privies'.[32] The preclusive effect of a judgment or award is manifestly greater if the non-parties to the first proceeding may conceivably find themselves bound by that judgment or award. (However, subject to that exception, English law requires for *res judicata* 'mutuality', i.e., that *all* the parties to the second proceeding have also been parties to the first proceeding.[33] This may be thought of as a requirement of 'complete' identity.)

[25] Lowe, '*Res Judicata* and the Rule of Law' (1996), 41.

[26] For a sharp critique of giving collateral estoppel effect to international arbitral awards, *see* G. J. Sanders, 'Rethinking Arbitral Preclusion', *Law & Policy in International Business*, 24 (1992–3), 101.

[27] *See*, for example, France and Belgium. *See* generally Hobér, '*Res Judicata* and *Lis Pendens*' (2014), 278; Hanotiau, *Complex Arbitrations* (2006), 245.

[28] The concept of *res judicata* found in common law jurisdictions covers not only the ultimate determination of a claim but also the reasoning of an award or judgment.

[29] Issue estoppel, or issue preclusion, bars a party from contesting a factual or legal issue that the first arbitration had already determined and which was necessarily found to support or justify the conclusion. The causes of action need not be the same.

[30] ILA Interim Report (2004), 3. *See* S. Günes, '*Res Judicata* in International Arbitration: To What Extent Does an Arbitral Award Prevent the Re-Litigation of Issues?', *Transnational Dispute Management*, 12(5) (2015), 10 ('Additionally, the classification of *res judicata* as a part of procedural or substantive law is far from being settled among scholars and different national laws.'). However, the International Law Association has treated the concept as procedural in its interim report (ILA Interim Report (2004), 26, '[b]ecause *res judicata* is a rule of evidence in Common Law jurisdictions, and is codified in procedural codes in Civil Law jurisdictions, the Committee is of the view that it is part of procedural law').

[31] Günes, '*Res Judicata* in International Arbitration' (2015), 5.

[32] Hobér, '*Res Judicata* and *Lis Pendens*' (2014), 156, 270 ('[a]ccording to the doctrine of privity, a privy is a person to whom the rights and obligations of a legal entity devolves'). *See also* UK House of Lords, *Carl-Zeiss Stiftung* v. *Rayner & Keeler Ltd (No 2)*, Decision, 1996, [1996] 2 All ER 536, 910, 936.

[33] Mutuality is not a requirement in the USA, *see*, for example, US Supreme Court, *Parklane Hosiery Co* v. *Shore*, Decision, 9 January 1979, 439 U.S. 322.

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Generally, a jurisdiction's responses to these three questions directly – and importantly – influence *res judicata*'s force and effect. This reality underscores the intuition that a choice-of-law methodology can produce markedly different *res judicata* results, depending on the body of national law to which use of that methodology points.

This complexity is compounded by the fact that international arbitral tribunals may not be assumed to employ the same choice-of-law rule in identifying the national jurisdiction whose law is to be adopted and applied. There is simply no consensus within the international arbitration community regarding the choice-of-law rule that should be used for these purposes. Tribunals may disagree even over the more basic question of whether *res judicata* is to be considered as a procedural or substantive issue.[34] How a tribunal characterizes an issue in terms of this dichotomy, if it does, has obvious choice-of-law implications.

In other words, there is a plurality not only among *res judicata* conceptions across jurisdictions but also a plurality of rules for determining which state's *res judicata* law, whatever it may be, should be applied.

54.6 The Arbitrator's Choice-of-Law Options

The fact that notions of *res judicata* at the national level can differ so much means that an international arbitral tribunal's choice of law to govern *res judicata* can make a significant difference. Both practice and logic tell us that tribunals themselves have a choice among choice-of-law rules.

Assuming again that neither the contract, nor the *lex arbitri*, nor institutional rules address the matter, a tribunal might look to a variety of different national laws for *res judicata* guidance: the law of the contract, the law of the place of arbitration of either the first or second proceeding, the law of the place of probable enforcement, or the law to which the tribunal's own choice-of-law rules (whatever they may be) happen to point.[35] Each of these alternatives are considered in turn.

54.6.1 Law of the Contract

Among available alternatives that come to mind as the national law governing *res judicata* in arbitration is the *lex contractus*.[36] *Res judicata* is an issue that may arise in the very arbitral proceeding that the contract itself contemplated by virtue of its own arbitration clause. But let us assume a contractual choice-of-law clause and ask ourselves whether, in inserting that clause in their contract, the parties envisaged that an arbitral tribunal resolving an eventual dispute between them would adopt the *res judicata* principles of the chosen jurisdiction. In including a choice-of-law provision in their contract, it is almost certain that the parties intended the chosen law to govern the substantive aspects of their dispute, i.e., its merits. They are no more likely to expect the chosen law to govern *res judicata* in an eventual

[34] ILA Final Report (2009), 73. [35] ILA Final Report (2009), para. 27.
[36] Hobér, '*Res Judicata* and *Lis Pendens*' (2014), 258.

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arbitration than expect the chosen law to govern issues of arbitral procedure in that proceeding. To reach this conclusion, one does not need to formally characterize *res judicata* as a procedural issue; it is enough to acknowledge that *res judicata* is *not* a substantive one. Admittedly, subjecting *res judicata* to the law of the contract would have the advantage of simplicity and predictability. It would also, in some sense, appear to effectuate party choice since the parties, after all, made their choice of law.[37] But ultimately, it makes little sense. Not only does *res judicata* not address the merits of a dispute, but it actually operates, if successfully invoked, to prevent any consideration of the merits.

The case for applying the law of the contract becomes somewhat stronger if the arbitration clause within the contract itself designates a choice of law of its own, as is possible.[38] In this event, one can fairly say that the parties intended their arbitration to be governed by the law designated in that provision. But, again, does that mean that they intended the designated law to determine the *res judicata* effect on an arbitration of a prior judgment or award? This, too, is doubtful. What the choice of a law to govern an arbitration clause means is that the chosen law will govern the interpretation of the clause and, most likely, also its validity. But *res judicata* has nothing to do with either the arbitration clause's meaning or validity. If the arbitration clause is to be consulted in determining the law governing *res judicata*, the more appropriate place to look within that clause is the choice of arbitral situs. In choosing the arbitral situs, the parties impliedly chose the arbitration law – the *lex arbitri* – of the arbitral situs, and it is that law that governs how the arbitral procedure is to unfold. That is why it would be perfectly legitimate for the *lex arbitri* of a jurisdiction to prescribe a *res judicata* rule for all arbitral proceedings subject to that *lex arbitri*, which is, as noted, not to be expected.

54.6.2 Law of the Arbitral Seat

Absent a *res judicata* provision in the *lex arbitri* (or in the contract or procedural rules), an arbitral tribunal may well be tempted to do what may look like the next best thing, *viz.* apply the *res judicata* rules that the courts of the place of arbitration apply.[39] To fully appreciate the move that this entails, one must recognize the difference between applying the *lex arbitri*, on the one hand, and applying the 'law of the place of arbitration', on the other. The former is nothing more and nothing less than the law of arbitration of the place of arbitration, governing arbitrations conducted locally. The latter is not arbitration law at all. It is the law, on any issue, that the courts that happen to sit in the arbitral situs happen to apply in the cases that happen to come before them. Applying the *lex arbitri* and applying the 'law of the place of arbitration' are two entirely different things,[40] unless, of course,

[37] As opposed to, for example, applying the *lex arbitri* of the previous arbitration award, which was a product of past choice.
[38] Hobér, '*Res Judicata* and *Lis Pendens*' (2014), 258.
[39] Hobér, '*Res Judicata* and *Lis Pendens*' (2014), 258.
[40] *See*, generally, G. A. Bermann, 'Ascertaining the Parties' Intentions in Arbitral Design', *Penn State Law Review*, 133 (2009), 1017–9.

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a jurisdiction posits that certain aspects of its internal law are incorporated in that jurisdiction's *lex arbitri*.[41]

Upon reflection, there is little justification for arbitral tribunals to borrow the *res judicata* rules of the courts of the place of arbitration. Parties do not select an arbitral seat on the basis of any part of that jurisdiction's law other than its *lex arbitri*. It is idle enough to suppose that parties examine, for example, the law of contract of a jurisdiction before selecting it as the arbitral seat and then select the arbitral seat on that basis. However, it is even less probable that the parties examined the *res judicata* law of a jurisdiction before selecting it as the arbitral seat and then selected it on that basis.

In fact, it would be most peculiar for them to consult the *res judicata* law of a jurisdiction at all before selecting it as an arbitral seat. After all, one of the prime objectives of those who opt for arbitration over litigation as their dispute resolution mechanism is to escape the rules governing litigation in national courts. Why, then, should international arbitrators borrow them from any jurisdiction, including the seat?[42] If the procedural autonomy of arbitral tribunals, a hallmark of arbitration, means anything, it means that how arbitral tribunals handle the cases before them is not determined by the way in which courts of law handle the cases that come before them.[43]

Nor is there any justification to distinguish between the law of the place of arbitration governing the *first* proceeding and the law of the place of arbitration governing the *second* proceeding. Neither should have any bearing on how arbitral tribunals behave when confronted with a *res judicata* defence.

54.6.3 Law of the Place of Probable Enforcement

The notion that a tribunal should derive its *res judicata* principles from the law of the place of probable enforcement of the resulting award need not detain us long. Doing so is as contrary to the procedural autonomy of arbitral tribunals as is borrowing the *res judicata* principles of the place of arbitration. Moreover, the circumstances in which tribunals consult the law of the place of enforcement are generally circumstances capable of affecting the enforceability of an award, and only that. The application or non-application of *res judicata* is simply not a consideration on which a court's willingness to enforce a foreign award ordinarily depends. And of course, it is not often, to begin with, that a tribunal will know in advance with sufficient certainty where an unpaid award is most likely to be brought for enforcement.

[41] Note that the Swiss Federal Tribunal has read into its *lex arbitri* the Swiss law principle that violation of *res judicata* constitutes a violation of public policy. *See* Berger, 'No Force of *Res Judicata* for an Award's Underlying Reasoning' (2015), 645–51; N. Zaugg, 'Objective Scope of *Res Judicata* of Arbitral Awards – Is There Room for Discretion?', *ASA Bulletin*, 35(2) (2017), 319.

[42] *See* C. Seraglini, 'Le droit applicable à l'autorité de la chose jugée dans l'arbitrage', *Revue de l'arbitrage* (2016), 65.

[43] G. B. Born, *International Commercial Arbitration*, 2nd ed. (Kluwer, 2014), 1624 ('By selecting a particular national law to govern the arbitral proceedings [designated seat], parties should not be assumed, absent express contrary provision, to have intended to turn an arbitration into a replica of national court litigation; rather . . . the parties should be understood to refer to the arbitration legislation of [the designated seat].').

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54.6.4 Law Chosen by the Tribunal

A final possibility for arbitrators in choosing a law of *res judicata* would be simply to apply the law they deem most appropriate for resolving that issue. That is the standard that most arbitration laws and rules provide to tribunals when selecting a law in the absence of any designation by the parties. They typically provide for a tribunal, absent a choice of law by the parties, to apply the law that it deems most 'appropriate' or the choice-of-law rule that it deems most 'appropriate'. But these provisions have in mind the tribunal's choice of law to govern the merits of the dispute, not matters such as *res judicata*, which do not in the least implicate the merits. Moreover, even if a tribunal were minded to conduct its own independent choice-of-law inquiry for *res judicata* purposes, it is almost certain that it would select one of the bodies of law just discussed: the law of the contract, the law of the place of arbitration, or the law of the place of probable enforcement. Each of these has been debated above and found wanting.

54.7 An International Standard Alternative

Given its definitionally international character, international arbitration lends itself to a consciously more cosmopolitan approach to *res judicata*. Unsurprisingly, however, while there exist international treaties and conventions in international arbitration, they do not come close to addressing a matter such as *res judicata*.[44] The supposition, if any, would be that whether and how to apply principles of claim preclusion are to be determined by an arbitral tribunal according to whatever set of principles it deems most appropriate to apply.

The obvious alternative by way of international law would be an unwritten international norm; the challenge, of course, is to know whether one exists or can reasonably come into existence.[45] Commentators have mostly been sympathetic to the emergence of an international *res judicata* standard.[46] Some consider it simply

[44] Hobér, '*Res Judicata* and *Lis Pendens*' (2014), 287.

[45] *See* Günes, '*Res Judicata* in International Arbitration' (2015), 12; Radicati di Brozolo, '*Res Judicata*' (2011), 21 (noting that '[a]nother 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 *lex fori*, arbitrators, who have no *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 . . . [I]n 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.'); Born, *International Commercial Arbitration* (2014), 3733, 3768–9 ('the proper choice-of-law analysis with regard to the preclusive effects of an international arbitral award in national courts (and arbitration) should not be to apply the preclusion rules of any particular legal system. Rather, the proper analysis is to apply international preclusion standards derived from the New York Convention (which, in Article II, gives effect to the arbitration agreement) and the objectives of the international arbitral process').

[46] Dominique Hascher's survey of ICC awards addressing *res judicata* for the French Committee of Private International Law demonstrates that tribunals have searched for a transnational standard to establish *res judicata* instead of applying the law of the arbitral seat. *See* D. Hascher, 'L'autorité

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more appropriate that claim preclusion in *international* arbitration be determined in accordance with an *international* rather than a national standard.[47] Others identify predictability and certainty as a justification.

Article 38 of the Statute of the International Court of Justice (ICJ) recognizes 'general principles of law' as a proper source of international law.[48] To employ this source, one must examine a vast number of national laws with a view to detecting important commonalities. Perhaps because of its evident utility, for the reasons set out earlier, the general notion of *res judicata* is widely embraced among legal systems worldwide. It is safe to say that an international consensus has emerged that *res judicata* constitutes a general principle of law within the meaning of Article 38 of the ICJ Statute and merits status as an international legal norm.[49] Arguably, it also forms part of customary international law.[50] Under a general principle of *res judicata*, there should be no reconsideration of 'a right, question or fact distinctly put in issue and distinctly determined by a court of competent jurisdiction as a ground for recovery'.[51] Under national law, international *res judicata* has both positive and negative aspects.[52]

It is possible, however, to posit a general international law norm without finding a consensus as to its precise content.[53] Such appears to be the case with *res judicata*, given the relatively wide range of views among national legal systems canvassed

de la chose jugée des sentences arbitrales', in *Droit international privé: Travaux du comité français de droit international privé, 2000–2002*, vol. XV (Pedone, 2004).

[47] Günes, '*Res Judicata* in International Arbitration' (2015), 6–7.

[48] B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens, 1953), 336 ('There seems little, if indeed any question as *to res judicata* being a general principle of law or as to its applicability in international judicial proceedings.'); Permanent Court of International Justice (PCIJ), *Case Concerning the Factory at Chorzów* (*Germany* v. *Poland*), Judgment, 13 September 1928, *Publications of the Permanent Court of International Justice Series A – No. 17* (Sijthoff, 1928), 27 (Judge Anzilotti, dissenting). *See also* Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press, 2003), 27–8, 164–73, 245–55; Lowe, '*Res Judicata* and the Rule of Law (1996), 38; Hanotiau, *Complex Arbitrations* (2006), 239–40. *See also* Hobér, '*Res Judicata* and *Lis Pendens*' (2014), 262, 294.

[49] I. Scobbie, '*Res Judicata*: Precedent and the International Court: A Preliminary Sketch', in *Australian Yearbook of International Law*, vol. XX (Australian National University, 1999), 299.

[50] Dodge, 'National Courts and International Arbitration' (2000), 365.

[51] ICSID Tribunal, *Amco Asia Corp.* v. *Republic of Indonesia*, Decision on Jurisdiction, 10 May 1998, ICSID Case no. ARB/81/1, Resubmitted Case, para. 30. *Amco* gave effect to the international standard as articulated in the 1905 *Orinoco Steamship* case. A later application of *Amco* can be found in the Arbitral Tribunal established under NAFTA Chapter 11/ICSID Additional Facility Rules, *Waste Management* v. *Mexico*, ICSID Case no. ARB(AF)/00/3; Arbitral Tribunal established under NAFTA Chapter 11/ICSID Additional Facility Rules, *Apotex Holdings, Inc.* v. *United States of America*, Award, 25 August 2014, ICSID Case no. ARB(AF)/12/1.

[52] Cheng, *General Principles of Law* (1953), 337–8.

[53] Scobbie, '*Res Judicata*: Precedent and the International Court' (1999), 301. On this point, Shell has suggested that the role should fall to the parties in arbitration to determine whether an award should have preclusive effects: Shell, '*Res Judicata* and Collateral Estoppel Effects' (1987–8), 662 ('Parties who have bargained for arbitration have agreed to a complex set of benefits and costs that attend this alternative form of dispute resolution. One element of this bargain is the possibility of later preclusion based on an arbitral award. The parties' expectations regarding preclusion are thus an integral part of the arbitration agreement and should be the primary focus of any

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earlier. In ascertaining an international standard, such disparity cannot be ignored. One practical result of these national law divergences could be that international arbitral tribunals derive a general principle of *res judicata* from international law but, when looking for rules to govern the particulars of *res judicata*, turn to national law, employing a choice-of-law methodology as described earlier. From the point of view of certainty and predictability, such an approach is not ideal for reasons already stated.

The question then arises whether an international standard may emerge not only on the existence of a general principle of *res judicata* but also on its particulars. The breadth of acceptance across legal systems of the 'triple identities' idea, notwithstanding the modest differences in its understanding, justifies a belief that it constitutes a common core of understanding and merits recognition as an international standard.[54] It is at the very least a common denominator.[55]

In fact, international courts and tribunals have operated on that assumption, applying some version of a triple identities test for over a century. Its use is commonly dated back to an early pronouncement by Judge Anzilotti in his dissenting opinion in *Chorzów Factory* (1927),[56] in which he wrote: 'we have here the three elements for identification, *persona, petitum, causa petendi*, for it is clear that "the particular case" (*le cas qui a été decidé*) covers both the object and the grounds of the claim. It is within these limits that the Court's judgment is binding'.[57] Anzilotti's opinion was later cited in the *Trail Smelter* arbitration (1941) between the USA and Canada, in which the tribunal ruled that '[t]here is no doubt that in the present case, there is *res judicata* [because the] three traditional elements for identification, Parties, object and cause ... are the same'.[58] More recently, the Iran-US Claims Tribunal held:

> The Doctrine of *res judicata* is applicable only where (1) the parties and (2) the question at issue (or the matter in dispute) are the same. This second element may be subdivided into the object (*petitum*) and the grounds of the case (*causa*

preclusion analysis ... [P]arties should be free to place explicit limits on the preclusive effects of an arbitration, subject only to the normal rules of contract.').

[54] *See*, for example, B. M. Cremades and I. Madalena, 'Parallel Proceedings in International Arbitration', *Arbitration International*, 24 (2008), 521; Lowe, '*Res Judicata* and the Rule of Law' (1996), 40; N. Gallagher, 'Parallel Proceedings, *Res Judicata* and *Lis Pendens*: Problems and Possible Solutions', in L. A. Mistelis and J. D. M. Lew (eds.), *Pervasive Problems in International Arbitration* (Kluwer, 2006), 355.

[55] A. Reinisch, 'The Use and Limits of *Res Judicata* and *Lis Pendens* as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes', *Law & Practice of International Courts and Tribunals*, 3 (2004), 50–1; Hobér, '*Res Judicata* and *Lis Pendens*' (2014), 295. *See also* Brekoulakis, '*Res Judicata* Revisited' (2005), 182.

[56] PCIJ, *Interpretation of Judgments Nos. 7 and 8 (The Chorzów Factory)*, Dissenting Opinion of Judge Anzilotti, 16 December 1927, *Publications of the Permanent Court of International Justice Series A – No. 13* (Sijthoff, 1927).

[57] PCIJ, *Interpretation of Judgments Nos. 7 and 8, Publications of the Permanent Court of International Justice Series A – No. 13* (Sijthoff, 1927), 23.

[58] Arbitral Tribunal, *Trail Smelter (USA* v. *Canada)*, Award, 16 April 1938, 11 March 1941, UN, *Reports of International Arbitral Awards*, vol. III (UN, 2006), 1905.

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> *petendi*). The three traditional elements for identification are thus identity of parties, object, and cause.[59]

As an international principle, *res judicata*, so understood, has an obvious place in investor-state arbitration where international law plays a central normative role. One context in which it has arisen is in the question of whether an investor and the company of which the investor is a shareholder meet *res judicata*'s identity of party requirement.[60] In the *CME* and *Lauder* cases,[61] two claimants had brought similar claims against the Czech Republic under different BITs. The *CME* arbitration initiated after *Lauder*, dismissed the preclusion argument on two grounds: (a) that the two claimants lacked an identity of parties and (b) that the two arbitrations, based as they were on two different BITs, lacked an identity of claims. The two proceedings ended up yielding contradictory awards.[62] These cases not only illustrate the employment of an international *res judicata* standard but also demonstrate that the outcome of a *res judicata* defence can, as suspected, prove outcome-determinative.[63] In its challenge to the award in the Stockholm Court of Appeal, the Czech Republic invoked as a ground for an annulment the doctrine of *res judicata*.[64] It lost on the ground that identity of the parties was lacking.[65]

Commentators widely urge that the identity of claims requirement, in particular, should not be interpreted and applied formalistically. According to Hobér, insistence on absolute identity incentivizes 'claim-splitting'.[66] Hobér even questions the aptness altogether of the third requirement of identity under the triple identities test, namely, an identity of legal grounds. That too, he maintains, contributes to claim-splitting and is, in any event, largely duplicative of the identity of claim requirement.[67] In much the same vein, Michael Waibel calls for a more liberal

[59] Iran-US Claims Tribunal, *The Islamic Republic of Iran* v. *The United States of America*, Partial Award, 17 July 2009, IUSCT Case nos. A3, A8, A9, A14, and B61, para. 114.
[60] Dodge, 'National Courts and International Arbitration' (2000), 357.
[61] Arbitral Tribunal established under Art. VI of the Treaty between the USA and the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment/UNCITRAL Rules, *Lauder* v. *Czech Republic*, Final Award, 3 September 2001, and Arbitral Tribunal established under Art. 8 of the Agreement on Encouragement and Reciprocal Protection of Investments between the Netherlands and the Czech and Slovak Federal Republic/UNCITRAL Rules, *CME Czech Republic BV* v. *Czech Republic*, Final Award, 14 March 2003. *See also*, ILA Final Report (2009), 75.
[62] Arbitral Tribunal established under Art. 8 of the Agreement on Encouragement and Reciprocal Protection of Investments between the Netherlands and the Czech and Slovak Federal Republic/UNCITRAL Rules, *CME* v. *Czech Republic*, Final Award, 14 March 2003, para. 432.
[63] The result is all the more striking in that the Czech Republic had explicitly waived recourse to *res judicata*. Arbitral Tribunal established under Art. 8 of the Agreement on Encouragement and Reciprocal Protection of Investments between the Netherlands and the Czech and Slovak Federal Republic/UNCITRAL Rules, *CME* v. *Czech Republic*, Final Award, 14 March 2003, para. 431.
[64] Arbitral Tribunal established under Art. 8 of the Agreement on Encouragement and Reciprocal Protection of Investments between the Netherlands and the Czech and Slovak Federal Republic/UNCITRAL Rules, *CME* v. *Czech Republic*, Partial Award, 13 September 2001.
[65] *Stockholm Arbitration Report*, 2 (2003), para. 189.
[66] Hobér, '*Res Judicata* and *Lis Pendens*' (2014), 303.
[67] Hobér, '*Res Judicata* and *Lis Pendens*' (2014), 304–5.

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approach to *res judicata* in international investment law in particular, so as to 'take due account of the economic realities of cross-border investment'.[68] Waibel suggests, among other means, adapting the 'identity of parties' requirement to encompass a notion closer to the European Court of Justice's 'single economic entity' doctrine or adapting the 'identity of claims' requirement so that 'substantially similar legal bases' could meet it.[69]

54.8 Uncertainties in the International Standard

The real debate surrounding *res judicata* as an international law norm concerns two issues previously discussed in this chapter. One is whether preclusive effect attaches to the *dispositif* of an award only or also attaches to the findings and reasoning on which the award is based. The other is whether it applies only to the re-adjudication of an identical claim or also to the adjudication of related claims that 'could and should' have been brought at the time the earlier one was brought.

The international law position on the first question seems reasonably settled. *Res judicata* appears to be largely viewed in international law as attaching principally, indeed exclusively, to the *dispositif* of an arbitral award. Although the International Law Association (ILA) Recommendations on *Res Judicata*, to be discussed below, have injected some doubt, this is sufficiently predominant a view across jurisdictions that it can be considered an element of the international standard.[70] In *Polish Postal Service in Danzig*, the Permanent Court of International Justice announced it to be 'certain that the reasons contained in a decision, at least in so far as they go beyond the operative part, have no binding force as between the parties concerned'.[71] Judge Anzilotti in *Chorzów Factory* expressed the same view.[72]

This does not mean that the findings and reasoning upon which an award is based are of no consequence. They may be consulted, if necessary, to interpret or inform the operative part of an award.[73] In the *Genocide* case, the ICJ held that the reasons for a decision provide 'the context' of a judgment or award.[74] Similarly, the tribunal in the *Continental Shelf* arbitration acknowledged 'the close links that exist between the reasoning of a decision and the provisions of its *dispositif*', thus ruling that 'recourse may in principle be had to the reasoning in order to elucidate the meaning

[68] M. Waibel, 'Coordinating Adjudication Processes', in Z. Douglas *et al.* (eds.), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press, 2014), 524.
[69] Waibel, 'Coordinating Adjudication Processes' (2014), 524–5.
[70] Hanotiau, *Complex Arbitrations* (2006), 251.
[71] PCIJ, *Polish Postal Service in Danzig*, Advisory Opinion, 16 May 1925, *Publications of the Permanent Court of International Justice Series B – No. 11* (Sijthoff, 1925), 28.
[72] PCIJ, *Interpretation of Judgments Nos. 7 and 8 (The Chorzów Factory)*, Dissenting Opinion of Judge Anzilotti, 16 December 1927, *Publications of the Permanent Court of International Justice Series A – No. 13* (Sijthoff, 1927), 24.
[73] Arbitral Tribunal, *Pious Fund of the Californias (Mex.* v. *USA*), Award, 14 October 1902, UN, *Reports of International Arbitral Awards*, vol. IX (UN, 2006), 1, 5.
[74] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro*), Judgment, 26 February 2007, ICJ Reports 2007, para. 125.

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and scope of the *dispositif*'.[75] In fact, the ICJ in *Genocide* allowed a finding (the Federal Republic of Yugoslavia being party to the ICJ Statute) not addressed in judgment (neither in the operative part nor in the reasoning) to be *res judicata* by 'necessary implication'.[76]

Less settled is the important question of whether the international *res judicata* standard covers not only a claim that is identical to a previously adjudicated claim but also a related claim that 'could and should' have been brought in the first instance. The uncertainty associated with this proposition is well illustrated by the ILA's 2006 Final Report on *Res Judicata* and Arbitration.[77]

The ILA had little difficulty ascertaining a 'global' subscription to *res judicata*.[78] In its first recommendation, the ILA posits the basic principle that 'arbitral awards should have conclusive[79] and preclusive[80] effects in further arbitral proceedings' thus giving them *res judicata* effect in subsequent international arbitral proceedings.[81] According to the second recommendation, *res judicata* at the international level 'may be governed by transnational rules applicable to international commercial arbitration'.[82]

However, the ILA recommendations are not comprehensive; they address certain particular issues in *res judicata* only, leaving others untouched.[83] On these issues, arbitrators are presumably to perform some gap-filling by reference to the national law indicated by the tribunal's choice of law.[84] But even the particular issues addressed are expressly addressed *de lege ferenda* (i.e., not as the law is but as it should be).[85]

According to recommendation 3, *res judicata* entails an unremarkable first condition, namely that the award upon which claim preclusion is based must be final and binding and entitled to recognition in the country of the second arbitration. Whether the award is, in fact, final and binding is most likely determined in accordance with the *lex arbitri* governing the earlier arbitral proceeding, while the award merits recognition is determined in accordance with the *lex arbitri* governing

[75] UN, Reports of International Arbitral Awards, Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (UK, France) (30 June 1977–14 March 1978), vol. XVIII, 3, 295.

[76] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, *ICJ Reports* (2007), 43, para. 132. *See also* Hobér, '*Res Judicata* and *Lis Pendens*' (2014), 323–4.

[77] The ILA Final Report on *Res Judicata* and Arbitration forms part of the ILA's International Commercial Arbitration Committee Reports on *Lis Pendens* and *Res Judicata*. F. de Ly and A. Sheppard, 'The International Law Association (ILA) International Commercial Arbitration Committee Reports on *Lis Pendens* and *Res Judicata*', *Arbitration International*, 25(1) (2009), 1. It should be read together with the ILA's Interim Report presented and adopted at the Berlin Conference in 2004.

[78] Hobér, '*Res Judicata* and *Lis Pendens*' (2014), 99, 259. *See also* Radicati di Brozolo, '*Res Judicata*' (2011), 19.

[79] That is, positive *res judicata* effects. [80] That is, negative *res judicata* effects.

[81] The recommendations only regard final awards in international commercial arbitration. ILA Final Report (2009), 70–1.

[82] ILA Final Report (2009), 68. [83] Radicati di Brozolo, '*Res Judicata*' (2011), 20.

[84] ILA Final Report (2009), paras. 27–8.

[85] The Recommendations on *Res Judicata* and Arbitration can be found in Annex 2 of the Toronto 2006 Conference Resolution no. 1/2006. *See also* Hobér, '*Res Judicata* and *Lis Pendens*' (2014), 259.

the later arbitral proceeding.[86] Importantly, the ILA endorses the presumption that foreign awards are valid and entitled to recognition.[87]

The further conditions purport to reflect a traditional triple identities test,[88] albeit a somewhat liberal one. As concerns the 'identity of parties' requirement, the ILA does not break new ground. It takes no particular position on whether 'successors' under US law or 'privies' under English law are affected. The matter is left to the applicable law,[89] as are the issues raised by the *CME/Lauder* cases.[90] The Committee also refrained from addressing the issue of mutuality or the question of whether the two adjudications must have emanated from the same legal order.[91]

However, recommendation 4 would extend *res judicata* to 'determinations and relief contained in its dispositive part as well as in all reasoning necessary thereto', and in addition, to 'issues of fact or law which have actually been arbitrated and determined by [the award], provided any such determination was essential or fundamental to the dispositive part of the arbitral award'. Limitation of claim preclusion to an award's *dispositif* is thus squarely rejected. However, subsidiary and collateral matters of a factual and legal character, as well as *obiter dicta*, are not covered.[92] The ILA position on this matter finds some support in the case law. In *Compagnie Générale de L'Orénoque*, it was held that 'a right, question, or fact *distinctly put in issue and directly determined* . . . cannot be disputed' (emphasis in original).[93] However, Hobér points out that the narrower approach to the scope of preclusion is still very widely followed and supported by a number of more recent cases.[94] As already noted, the *Continental Shelf* and *Genocide* cases are illustrative. Pierre Mayer largely shares this view, noting that treating the reasoning behind an award as conclusive will inevitably lead to long and complicated discussions of whether a particular determination was truly essential in reaching the dispositive part of an award and it was sufficiently debated in the first proceeding. He also questions whether treating the reasoning behind an award as conclusive is consistent with the notion that, in arbitration, the parties select their own arbitrators and expect them to make their determinations on the basis of the evidence before them.[95]

Most interesting is the ILA's treatment of the 'could and should' matter. Recommendation 5 takes the position that *res judicata* should cover not only identical claims but also claims that 'could and should' have been brought in the first instance. However, this extension is expressly made a conditional one. The recommendation thus states that claim preclusion applies to 'a claim, cause of action or issue of fact or law, which could have been raised, but was not, in the proceedings

[86] ILA Final Report (2009), 74.
[87] ILA Final Report (2009), 74.
[88] ILA Final Report (2009), 76.
[89] ILA Final Report (2009), 76.
[90] ILA Final Report (2009), 77.
[91] ILA Final Report (2009), 68.
[92] ILA Final Report (2009), 77, referring to ILA Interim Report (2004), 8.
[93] French-Venezuelan Commission, *Company General of the Orinoco Case*, Award, 31 July 1905, in UN, *Reports of International Arbitral Awards*, vol. X (UN, 2006), 184, 276.
[94] Hobér, '*Res Judicata* and *Lis Pendens*' (2014), 322–4. *See also* Seraglini, 'Le droit applicable à l'autorité de la chose' (2016), 51, 70.
[95] P. Mayer, 'L'autorité de chose jugée des sentences entre les parties', *Revue de l'arbitrage* (2016), 105.

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resulting in that award', though only if 'the raising of any such new claim, cause of action or new issue of fact or law amounts to procedural unfairness or abuse'. Assessment of whether entertainment of the second claim would produce 'procedural unfairness or abuse' is left to the discretion of the tribunal.[96] It would appear that asserting in a second proceeding a claim that could have been brought in the first proceeding may, in some instances, be procedurally unfair and abusive and in other circumstances not. In the former situation, *res judicata* would operate; in the latter, not.

Due to the conditionality of the 'could or should' requirement and the fact that the ILA recommendations are, by their own terms, *de lege ferenda* only, the status of the 'could and should' requirement remains uncertain. On the one hand, in two quite old cases – the *Delgado* case[97] and the *Machado* case[98] – the Spain-US Claims Commission refused to consider claims on the ground that they could and presumably should have been brought in a previous proceeding.[99] These two decisions have led commentators to treat the 'could and should' corollary as part of the international *res judicata* standard.[100] It is, however, questionable whether this pair of early cases that have actually been ignored in subsequent awards and decisions are sufficient to import the 'could and should' corollary into the international standard, especially since the corollary has been adopted by extremely few jurisdictions, all of them common law. This is not to say that abuse of process is not a principle of international law. However, it is independent of the principle of *res judicata* and is not established merely by virtue of the advancement of a similar claim that could and should have been brought earlier.[101]

54.9 Conclusion

The principle of r*es judicata* is solidly established in both international litigation and international arbitration. However, much depends on its doctrinal particularities, particularly those that differ in several important respects across national legal systems. In litigation, the operation of *res judicata* is largely unproblematic. While differences among national courts persist, at least within any given legal system, the applicable standard will ordinarily be well-established due to the tradition of subjecting *res judicata* to forum law.

[96] ILA Final Report (2009), 80; the abuse of process standard also applies to counterclaims.

[97] Spain-US Claims Commission 1881, *The Delgado Case*, Award, in J. B. Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, vol. III (Government Printing Office, 1898), 2196.

[98] Spain-US Claims Commission 1881, *The Machado Case*, Award, in Moore, *International Arbitrations to Which the United States Has Been a Party* (1898), 2193.

[99] However, in neither of these cases was reference made to *res judicata* or any international standard on the subject.

[100] *See* Reinisch, 'The Use and Limits of *Res Judicata* and *Lis Pendens*' (2004), 63; Dodge, 'National Courts and International Arbitration' (2000), 366. *See also* Hobér, '*Res Judicata* and *Lis Pendens*' (2014), 303.

[101] It has been argued that the corollary should not be applied to counterclaims. Cheng, *General Principles of Law* (1953), 347; Hobér, '*Res Judicata* and *Lis Pendens*' (2014), 304.

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The operation of *res judicata* in international arbitration is, however, more complex, largely because international arbitral tribunals have no forum law of their own and thus no authoritative rendition of *res judicata*. A traditional response has been to conduct a choice-of-law analysis so as to identify a national legal system whose *res judicata* principles can then be borrowed. Tribunals have done this largely because they could find no guidance either in the parties' contract, the *lex arbitri*, or the institutional rules the parties may have adopted.

Reliance by tribunals on national law for these purposes is highly questionable. *Res judicata* has too distant a relationship with the merits of a case to justify applying the *lex contractus*. Nor can it seriously be maintained that, in selecting an arbitral situs, the parties manifested an attention to copy what the local courts of that locale happen to do. The place of eventual enforcement of the resulting award has no real interest in having its *res judicata* principles applied in the arbitration and is, in any event, mostly unknown at the time a tribunal must entertain and rule on a *res judicata* defence. Finally, inviting a tribunal freely to identify the jurisdiction whose *res judicata* principles are most appropriately applied would almost certainly result in the application of one of the bodies of law just identified: the *lex contractus*, the law of the place of arbitration, or the law of the place of probable enforcement, each of them with the shortcomings just identified. In any case, and above all, by opting for arbitration rather than litigation, the parties manifested no intention for the arbitral tribunal to conduct itself in the way a national court – a national court of any jurisdiction – would.

All these considerations point to an international standard as the most appropriate alternative as a source of *res judicata* principles.[102] On a general level, this is unproblematic. There exists a clear consensus that *res judicata* constitutes an international law norm. However, defining the precise contours of the doctrine remains a work in progress, even in the wake of the ILA's contribution to the task. Numerous particularities – among them whether *res judicata* applies to the findings in an award as well as its *dispositif* and whether non-parties to the first proceeding are implicated by *res judicata* in the second – remain in doubt. But perhaps the most contentious matter is whether 'identity of claim' means not only identical claims but also related claims that the claimant could and should have advanced in the first proceeding. Currently, the corollary lacks sufficient adherence in jurisdictions around the world to justify its inclusion in any international standard, and even the ILA stopped well short of making it an independent requirement, preferring to adopt a more general abuse of process approach instead. But it is in the nature of international standards that the situation may well someday evolve so that the international *res judicata* standard, assuming one to exist, remains a work in progress.

[102] That is to say, it is inappropriate to apply a 'conflict of laws' approach to *res judicata*, a concept not easily characterized as either 'substantive' or 'procedural': ILA Final Report (2009), 73.

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