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Report on *Res Judicata* in International Arbitration

IBA Arbitration Committee Task Force on *Res Judicata* in International Arbitration

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I. Preface

In February 2024, the IBA Arbitration Committee launched a Task Force to determine whether it would be possible to develop an autonomous standard on *res judicata*, and if so, whether it is desirable for the Arbitration Committee to do so.

This report concludes that it is possible to develop guidelines on autonomous *res judicata* standards, and that it is desirable for the Arbitration Committee to do so, but recommends that the guidelines should be limited to the *res judicata* effects of a commercial arbitration award on subsequent commercial arbitration proceedings and, at least not initially, address the 'identity of parties' requirement.

The question of whether a prior arbitration award has *res judicata* effects in a subsequent arbitration arises with some frequency in commercial arbitration proceedings. But the available arbitral jurisprudence has not developed a consistent approach.

On the one hand, a majority of international commercial arbitration tribunals determine that question by applying domestic law on the basis of a conflict-of-laws analysis. However, this approach by no means provides consistency or predictability in how this question is resolved, for the following reasons:

- *First*, there is great divergence and inconsistency in the application of the choice-of-law criteria, and tribunals often fail to properly reason their decisions;
- *Second*, different jurisdictions have different approaches regarding the scope of *res judicata,* which inevitably leads to divergent outcomes depending on the chosen applicable domestic law; and
- *Third*, domestic law criteria for *res judicata* have been developed in the context of domestic court judgments and are not always properly suited for international arbitration proceedings.

On the other hand, some tribunals have started to veer away from a pure domestic law approach to *res judicata* and have also applied transnational or autonomous *res judicata* standards that are more tailored to the specific needs of international arbitration.

In sum, there is a high degree of uncertainty and unpredictability regarding the application of *res judicata* to commercial arbitration awards.

In the early 2000s, the International Law Association ('ILA') set up a Committee to study the issue of *lis pendens* and *res judicata* in international arbitral proceedings. In 2004, the Committee issued an Interim Report on *Res Judicata* and Arbitration and, in 2006, a final Report and Recommendations on *Res Judicata.* As the ILA Final Report points out, the Recommendations did not intend to be comprehensive but only covered certain aspects of *res judicata*. Specifically, the ILA Committee drafting the Recommendations concluded that there were some issues of *res judicata* where transnational rules could be developed and other issues

where doing so would still be 'premature' and that accordingly such issues should be decided under the applicable domestic law.[1]

The ILA Recommendations apply to the effects of an international commercial arbitration award upon further or subsequent commercial arbitration proceedings between the same parties. The ILA Recommendations adopt the traditional triple identity test. They provide for a more extensive notion of *res judicata* than used in some civil law jurisdictions by covering not only the dispositive part of an arbitral award but also the underlying reasoning; by adopting a form of issue estoppel; and by including a standard of abuse of process and procedural unfairness.

Almost twenty years have passed since the ILA Recommendations were published. The number of arbitration proceedings has since increased significantly as arbitration has become an accepted and increasingly prevalent means of settling disputes in most regions of the world. As a result, the issue of the *res judicata* effects of prior awards arises with more frequency in arbitration proceedings. Some tribunals have considered the ILA Recommendations in determining the applicable *res judicata* standard. Moreover, the *res judicata* effects of arbitration awards have been the subject of discussion at an increasing number of arbitration conferences and in publications. A growing number of commentators have voiced support for an autonomous approach to *res judicata* in international arbitration or at least for some guidance regarding the applicable standard.

In light of these developments, this Task Force has analysed whether the development of an autonomous standard for *res judicata* is possible and whether it is desirable for the IBA Arbitration Committee to develop guidance on such a standard.

This report will use the term *res judicata* broadly to encompass any preclusive effects of a prior decision (ie,, barring the re-litigation of matters finally decided in prior proceedings) or its conclusive effects (ie,, allowing a party to invoke the final and binding character of the decision in further proceedings), even though different jurisdictions may use different terminology or might use the term *res judicata* more narrowly.

Instead of referring to a 'transnational' approach to *res judicata* — a term frequently used by commentators — the report uses the term 'autonomous' approach as, in the view of the Task Force, the term 'autonomous' better reflects standards that are tailored to the specific needs of arbitration.

Considering the breadth of potential issues that the application of *res judicata* might encompass, the Task Force has sought to narrowly focus on the *res judicata* effects of commercial arbitration awards on commercial arbitration proceedings between the same parties; and in particular on the objective scope of *res judicata*. That objective scope encompasses doctrines such as 'identity of claims and of cause of action' in many civil law systems, and cause-of-action estoppel, issue estoppel, and claim preclusion or abuse of process in many common law systems.

[1] ILA Final Report on *Res Judicata* and Arbitration (2006), para 5.

The Task Force has not examined the *res judicata* effects of an investment arbitration award on a subsequent investment arbitration proceeding, or the effects of a commercial arbitration award on investment arbitration proceedings and vice versa. The Task Force also has not focused on the effects of a domestic judgment on an international arbitration proceeding.

The report has three parts. Section II provides an overview of the current *res judicata* landscape, summarising (i) the *res judicata* standards in selected common law and civil jurisdictions; (ii) whether selected jurisdictions regard *res judicata* as part of public policy; and (iii) the available arbitral case law regarding the *res judicata* effects of prior commercial arbitration awards. Section III provides an evaluative analysis, focusing on (i) the challenges with the prevailing choice-of-law method; (ii) the legal bases for an autonomous approach; and (iii) potential obstacles to developing guidance on an autonomous approach to *res judicata*. Section IV provides the Task Force's recommendations on next steps for the IBA Arbitration Committee to take.[2]

[2] The Task Force members are very grateful for the help they received from IBA Arbitration Committee officers María Inés Corrá (Argentina) of Bomchil and Anke Meier (Germany) of Noerr; from Yoko Maeda and Kaoru Vaheisvaran (Japan) of City Yuwa; Caroline Devès and Thomas de Bekker (Netherlands) of Houthoff; Heleen Van Cauwenberge (Belgium) of Ubelius; Mohamed Bouzagou Ouali (France) of Wordstone; Marius G Gass (England), Rotimi Adeniyi-Akintola and Opeyemi Longe (Nigeria), Clemency Wang (Singapore), Emma Dann (Australia), Cynthia Chen (Canada), Chloe Gomez de Orozco and Kimiya Haghighi-Sprengart (United States) and Cameron Jeffrey (South Africa) of White & Case; Julianne Marley, Chris Bello, Andrew van Duyn and Marta Canneri (United States) of Debevoise & Plimpton.

II. Current Status of *Res Judicata*

1. Introduction to *Res Judicata*

The principle of *res judicata* is recognised in every domestic legal system and is considered to be a general principle of international law. The principle has been accepted since ancient times, including by ancient Greek custom, Roman jurists and Hindi texts.[3] The principle ensures that a judgment of a court that is no longer subject to appeal or an arbitration award is binding and final.

Res judicata is generally understood to have both a preclusive (or negative) effect that bars the re-litigation of matters finally decided in prior proceedings, and a conclusive (or positive) effect, which allows a party to invoke the final and binding character of the decision in further proceedings. *Res judicata* therefore can be considered to have both procedural and substantive aspects. It is procedural because it precludes the adjudicator in new proceedings from deciding a matter that was already determined in a prior proceeding. It is often also qualified as substantive because a decision that is *res judicata* determines once and for all the parties' substantive rights and obligations.

Res judicata therefore protects a party against the risk of repeated litigation and potential harassment, creates finality and legal certainty, and ensures the efficient function of the judicial system, conserving judicial resources. In the words of the US Supreme Court, '[t]he idea is straightforward: Once a court has decided an issue, it is forever settled between the parties, thereby protecting against the expense and vexation attending multiple lawsuits, conserving judicial resources, and fostering reliance on judicial action by minimizing the possibility of inconsistent verdicts. In short, a losing litigant deserves no rematch after a defeat fairly suffered.'[4]

While the principle of *res judicata* exists in all legal systems, the way the principle operates varies significantly. Different legal systems have different names and terminology to describe the various effects of *res judicata*. Moreover, the scope of *res judicata* differs between legal systems. On the one end of the spectrum are jurisdictions that adopt a very narrow and technical approach to *res judicata*, and on the other, jurisdictions that take a broader and flexible approach based, among others, on concepts of good faith or abuse of process. In some jurisdictions, the principle of *res judicata* is exclusively based on case law and in others, it is grounded in the constitution or in procedural law but has been further developed by courts.

The difference between the scope of *res judicata* is most pronounced between civil law and common law jurisdictions. But, as Section II.2 will show, the differences are not always as vast as is often assumed. In particular, the jurisprudence of a number of important civil law jurisdictions has recently moved towards a broader notion of *res judicata* that, at least in

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[3] P. Barnett, *Res Judicata, Estoppel and Foreign Judgments* (Oxford University Press, 2001), para 1.12. *See,* eg Sophocles, Ajax (1239-49); Justinian, Institutes, Book IV, Sections 6-7; Sir Lawrence Jenkins in *Sheoparsan Singh v Ramnandan Singh*, AIR 1916 PC 78 at 80-81 (for Hindi roots of *res judicata*).

[4] *B&B Hardware, Inc. v Hargis Indus.*, 575 US 138, 147 (2015) (citations omitted).

some respects, is not dissimilar from the scope of *res judicata* in many common law jurisdictions.

In a limited number of jurisdictions, *res judicata* is deemed to form part of public policy. As Section II.3 will show, courts in these jurisdictions might set aside or refuse to recognise and enforce an arbitration award that does not apply the *res judicata* standard of that jurisdiction. In the great majority of jurisdictions, however, courts will not — or are at least unlikely to — set aside or refuse recognition and enforcement of awards that do not apply that jurisdiction's specific *res judicata* standard.

In international commercial arbitration, the issue of the *res judicata* effects of a prior award on a subsequent arbitration arises with some frequency. As Section II.4 will show, international arbitration tribunals have not developed a coherent jurisprudence on the *res judicata* effects of prior awards. In most cases, tribunals apply a domestic law *res judicata* standard identified through not clearly defined choice-of-law criteria. Some tribunals, in turn, have sought to apply a more autonomous arbitration-specific *res judicata* standard or a hybrid approach that considers both domestic law and an autonomous standard. The result is a great degree of uncertainty and unpredictability with regard to the scope of an arbitration award's finality that adversely impacts the reliability and efficiency of the arbitration process.

2. Case Law of Domestic Courts Applying *Res Judicata* to Domestic Judgments

In this Section, the Task Force first provides an overview of the current landscape of *res judicata* in selected common law and civil law jurisdictions, focusing on the basic principles of how *res judicata* applies to domestic judgments.[5] This foundational analysis lays the groundwork for subsequent sections, which will analyse how these principles apply in the context of international arbitration.

a. Common law jurisdictions

Common law jurisdictions widely apply the doctrine of *res judicata*, although the origin, terminology, approach and scope differ among jurisdictions. The Task Force has summarised the approach to *res judicata* in Australia, common law Canada, England & Wales, Nigeria, Singapore, South Africa and the United States of America, aiming to be representative of various regions of the world.

i. Australia

Australian common law recognises three forms of estoppel: (i) cause of action estoppel (*res judicata*), (ii) issue estoppel and (iii) Anshun estoppel.[6]

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[5] The following section provides a summary of the current state of *res judicata* standards as they are applied in various jurisdictions. This summary is only intended to inform the discussion and does not necessarily reflect the views or opinions of the individual members of the Task Force. While every effort has been made to ensure accuracy, this description is not exhaustive and should not be interpreted as an endorsement of the legal positions or practices outlined herein.

[6] See *Tyne (as Trustee of the Argot Trust) and Anor v UBS AG (No 3)* (2016) 110 ACSR 492 at [330]-[341] citing *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 323 ALR 1; *Blair & Perpetual Trustee Co Ltd v Curran*

Under the Australian common law, *res judicata* and issue estoppel are distinct forms of estoppel. The doctrine of *res judicata* exists to bar further claims by parties (or their privies)[7] in circumstances where the merits of the claim have already been the subject of final judgment.[8] Issue estoppel in turn prevents the re-litigation of specific factual or legal issues which have been the subject of final judgment in other claims.

Despite being distinct forms of estoppel, the relevant elements of a *res judicata* estoppel and issue estoppel under Australian common law are the same.[9] They require the following factors: (i) the same question has been decided; (ii) the 'judicial decision' which is said to create the estoppel is 'final and conclusive'; and (iii) the parties to the judicial decision (or their privies) were the same persons as the parties to the proceedings in which the estoppel is raised.

Anshun estoppel precludes a party from raising an issue that could have been, but was not, raised in earlier proceedings between the same parties (and their privies) and was so relevant to the subject matter of the first proceeding that it would have been unreasonable not for it to have been relied upon in the first proceeding. Anshun estoppel was adopted by the High Court in Australia in the decision of *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, which is the Australian application of the English law principle in *Henderson v Henderson* (1843) 3 Hare 100.[10]

A 'judicial decision' has been interpreted in the Australian common law as encompassing judgments, orders, declarations, or awards, so long as they are grants of final remedy or relief and must be handed down by a court of competent jurisdiction.[11] Judicial decisions which are interlocutory in nature cannot give rise to *res judicata* or issue estoppel because they are not 'final and conclusive'.[12] However, judicial decisions which are subject to a pending appeal are considered 'final and conclusive'.[13]

(Adam's Will) (1939) 62 CLR 464; *Jackson v Goldsmith* (1950) 81 CLR 446; *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537; *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589; *Henderson v Henderson* (1843) 3 Hare 100; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853.

7 At common law, a privy is someone who claims a right through or on behalf of a party bound by a decision can include persons with an interest (legal or beneficial) in the previous litigation or its subject matter. See, eg, *Ramsay v Pigram* (1968) 118 CLR 271 at 279: 'The basic requirement of a privy in interest is that the privy must claim under or through the person of whom he is said to be a privy'.

8 *Jackson v Goldsmith* (1950) 81 CLR 446 at 466; *Administration of the Territory of Papua New Guinea v Guba* (1973) 130 CLR 353 at 453-5.

9 This test was originally formulated in *Carl Zeiss Stiftung v Rayner and Keeler (No 2)* [1967] 1 AC 853 at 935. This test was later unanimously adopted by the High Court of Australia in *Kuligowski v Metrobus* (2004) 220 CLR 363 at 373.

10 *Port of Melbourne Authority v Anshun* (1981) 147 CLR 589.

11 *Hill End Gold Ltd v First Tiffany Resource Corp* [2010] NSWSC 375; *Maganja v Arthur* [1984] 3 NSWLR 561 AT 566.

12 However, it is important to note that orders obtained by consent between the parties can be *res judicata*, as can orders for default judgment (See, eg, *R v Rogers (No 2)* (1992) 29 NSWLR 179 at 182 per Gleeson CJ; *BDQ16 v Minister for Immigration & Border Protection* [2017] FCCA 703 at [39]).

13 See, eg, *Taylor v Ansett Transport Industries Ltd* (1987) 18 FCR; *Denham Constructions Project Co 810 Pty Ltd v Smithies (No 2)* [2015] ACTSC 30 at [45]; *Administration of the Territory of Papua and New Guinea v Guba* (1973) 130 CLR 353 at 454.

ii. Canada

In common law Canada, the doctrine of *res judicata* is based on case law and contains two aspects: cause of action estoppel and issue estoppel.[14]

In *Grandview v Doering*, the Supreme Court of Canada set out the principles for the application of cause of action estoppel.[15] As summarised by Hewak C.J.Q.B. in *Bjarnarson v Manitoba*,[16] four elements must be present: (i) a final decision of a court of competent jurisdiction in the prior action; (ii) the parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action; (iii) the cause of action in the prior action must not be separate and distinct; and (iv) the basis of the cause of action in the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.

In the leading case *Danyluk v Ainsworth Technologies Inc.*,[17] the Supreme Court of Canada set out the principles governing issue estoppel. The preconditions for issue estoppel to apply are:[18] (i) the same issue of fact or law has been decided; (ii) the judicial decision which is said to create the estoppel was final; and (iii) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies. As a second step, the court must still determine whether, as a matter of discretion, issue estoppel ought to be applied. As articulated in *Danyluk*, '[t]*he underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case.*'[19]

Finally, in circumstances where the requirements for *res judicata* are not met, it is also possible to preclude re-litigation by the application of the doctrine of abuse of process.[20]

iii. England & Wales

In England and Wales, *res judicata* is used as an umbrella term containing distinct legal principles with distinct origins. In *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly known as Contour Aerospace Ltd)*, the Supreme Court of the United Kingdom referred to the following six principles as forming part of the *res judicata* doctrine:[21]

(1) A judgment holding that a particular cause of action does (or does not) exist will be conclusive such that the same cause of action cannot be challenged in subsequent proceedings (against the same parties or their privies) (known as 'cause of action estoppel').

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14 See, eg, 2013 BCCA 76, para 12.
15 [1976] 2 SCR 621.
16 *Bjarnarson v Manitoba* (1987), 1987 CanLII 993 (MB KB), para 6.
17 *Danyluk v Ainsworth Technologies Inc.,* 2001 SCC 44.
18 2001 SCC 44, para 25.
19 2001 SCC 44, para 33.
20 2003 SCC 63, para 37.
21 *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly known as Contour Aerospace Ltd)* [2013] UKSC 46, at [17].

(2) Where a claimant succeeds in initial proceedings and does not challenge the outcome, it cannot subsequently bring a second action on the same cause of action.

(3) Once a judgment has been given in favor of a claimant, the cause of action is extinguished following which the claimant's sole right is upon the judgment (known as the 'doctrine of merger').

(4) A decision on a particular issue, which is a necessary ingredient that must be decided in the initial proceedings, will be binding as to that issue in subsequent proceedings (against the same parties or their privies) (known as 'issue estoppel').

(5) An estoppel will extend to matters which might have been — but were not — raised in the initial proceedings, unless there are special circumstances which justify otherwise. This is also known as the rule in *Henderson v Henderson*.[22]

(6) It may be an abuse of process to duplicate proceedings.

The legal principles set out in (1) and (4) form the core of the *res judicata* doctrine in England and Wales; the principle in (5) is frequently referred to as *res judicata* in its 'wider' or 'extended' sense but can also be viewed as part of the law relating to abuse of process, as is (6). The principles in (2) and (3) produce the same effects, but (3) is a substantive rule specifically about the effects of English court judgments.

The *res judicata* doctrine will not apply if the initial judgment was (i) not final, (ii) not on the merits (a decision will be on the merits if it finds certain facts, deals with the law applicable thereto, and applies that law to the facts), (iii) not given by a court of competent jurisdiction, or (iv) obtained by fraud or collusion.[23] Lastly, an estoppel will also not arise where there is a lack of identity between the parties or where the issue raised is not identical.

iv. Nigeria

In Nigeria, the principle of *res judicata* is based on case law. The Nigerian courts have determined that, where a court or tribunal of competent jurisdiction has pronounced a final decision settling matters in dispute between certain parties, none of the parties or their representatives may relitigate the same issues in dispute, as the matter is said to be *res judicata*.[24]

To successfully raise the plea of *res judicata* (also described as 'cause of action estoppel'),[25] the following conditions must be satisfied: (i) the same parties or their representatives must be involved in both cases; (ii) the issues and subject matter must be identical in both cases; (iii) the prior judgment must be from a court with competent jurisdiction; and (iv) the prior

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[22] *Henderson v Henderson* 67 E.R. 313.

[23] See, for example, *DSV Silo-und Verwaltungsgesellschaft mbH v Sennar (Owners), The Sennar* (No.2) [1985] 1 WLR 490; *DPP v Humphrys* [1977] A.C. 1; *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly known as Contour Aerospace Ltd)* [2013] UKSC 46.

[24] *Aro v Fabolude* (1983) LPELR-558 (SC); *S.O. Ntuks & Others v Nigerian Ports Authority* (S.C. 190/2003) [2007] NGSC 173.

[25] *Ebba & Ors v Ogodo & Ors* (2000) LPELR-983(SC); *Adone & Ors v Ikebudu & Ors* (2001) LPELR-191(SC).

judgment must have conclusively resolved the disputes and be final with no pending appeals.[26]

Additionally, Nigerian courts apply issue estoppel, preventing parties from relitigating specific issues that have already been distinctly determined within a single cause of action.[27] The conditions for a successful plea of issue estoppel are that: (i) the same issue was resolved in a past decision; (ii) the decision alleged to establish the estoppel is final, and not interlocutory; and (iii) the parties involved in the court decision or their representatives were the same as the parties or representatives in the case where the issue estoppel is invoked.[28]

Nigerian law also recognises abuse of process, which has been described as an instance where one party improperly uses judicial processes to irritate another party or interfere with the proper administration of justice. It can be evidenced by: (i) instituting multiple actions on the same subject matter and same issues against the same opponent; (ii) instituting multiple actions on the same issue between the same parties; (iii) simultaneously instituting multiple actions on different grounds between the same parties in different courts; (iv) the action being frivolous or reckless, and unsupported by law; or (v) using two similar judicial processes to exercise the same right.[29]

v. Singapore

In Singapore, *res judicata* can refer to any one of three legal concepts: (i) cause of action estoppel; (ii) issue estoppel; and (iii) the 'extended doctrine' of *res judicata*, which refers to the procedural issue of abuse of process.

Both cause of action estoppel and issue estoppel require three elements to be met, which were elucidated by the Singapore High Court in *Zhang Run Zi v Koh Kim Seng and another*:[30]

(1) There must be a final and conclusive judgment on the merits. The judgment with estoppel effects cannot be an interim judgment and subject to change, as explained by the Singapore High Court (Family Division) in *VIK v VIL and others*.[31] It must fully dispose of the issues before it.

(2) The judgment must be of a court of competent jurisdiction.

(3) There must be 'identity of the parties'. As explained by the Singapore High Court in *Goh Nellie v Goh Lian Teck and others*,[32] this requirement is met if the principal

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[26] *S.O. Ntuks & Others v Nigerian Ports Authority* (S.C. 190/2003) [2007] NGSC 173 citing *Afolabi v Gov. Of Osun State* (2003) 13 N.W.L.R (Part 836) 119 and 130-132; *Nkanu Onun* (1977) 5 SC 13; *Udo v Obot* (1989) 1 N.W.L.R. (Part 95) 59.

[27] *Lawal v Dawodu & Anor* (1972) LPELR-1761(SC); *Ajiboye v Ishola* (2006) LPELR-301(SC); *Bamgbegbin & Ors v Oriare & Ors* (2009) LPELR-733(SC).

[28] *Lawal v Dawodu & Anor* (1972) LPELR-1761(SC); *Ajiboye v Ishola* (2006) LPELR-301(SC); *Bamgbegbin & Ors v Oriare & Ors* (2009) LPELR-733(SC).

[29] *Saraki vs. Kotoye* (1992) LPELR-3016(SC); *Ladoja v Ajimobi & Ors* (2016) LPELR-40658(SC); *Agwasim & Anor v Ojichie & Anor* (2004) LPELR-256(SC).

[30] [2015] SGHC 175.

[31] [2020] SGHCF 12.

[32] [2007] 1 SLR(R) 453.

players in both actions are 'effectively identical'. They do not have to be exactly the same.

Cause of action estoppel requires an additional fourth element to be met, as held by the Singapore High Court in *Zhang Run Zi v Koh Kim Seng and another*:[33] that the identity of the causes of action must be the same in substance.

Issue estoppel requires a different fourth element to be met: the identity of issues or subject-matter, as held by the Singapore Court of Appeal in *Lee Tat Development Pte Ltd v Management Corporation of Strata Title Plan No 301*.[34] This requirement of identity of issues or subject-matter, in turn, contains three sub-elements, as explained in *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal and other matters*:[35] (i) the prior decision must 'traverse the same ground as the subsequent proceedings,' and the facts and circumstances giving rise to the earlier decision 'must not have changed or should be incapable of change;' (ii) the issue determined must have been 'fundamental and not merely collateral' to the ruling; (iii) the issue must in fact have been raised and argued.

vi. South Africa

South Africa is a mixed common law and civil law jurisdiction. The principle of *res judicata* is based on the term's definition in the texts of Roman-Dutch jurists such as Voet and Grotius. The English law concept of issue estoppel, in turn, has been accepted into South African law as an offshoot of *res judicata*, permitting a relaxation of the strict requirements a pleader must show to sustain a defence of *res judicata*.

South Africa's Constitutional Court remarked that the '*underlying rationale for [the] principle is to ensure certainty on matters that have already been decided, promote finality and prevent the abuse of court processes.*' The Court summarised the requirements as: '*(i) there must be a previous judgment by a competent court (ii) between the same parties (iii) based on the same cause of action, and (iv) with respect to the same subject-matter, or thing.*'

The Constitutional Court has acknowledged that the strict requirements of *res judicata* can be relaxed, such as where issue estoppel may be present. In *Hyprop Investments Ltd and Others v NSC Carriers and Forwarding CC and Others*,[36] the Supreme Court of Appeal (SCA) acknowledged that issue estoppel is '*firmly embedded in* [South African] *law, and that the court apprised of it has a discretion whether to allow the plea to preclude the later claim.*' In *Kommissaris van Binnelandse Inkomste v Absa C Bank Bpk*, the then Appellate Division (now SCA), stressed that, for issue estoppel to apply, relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others. [37] As such, constitutional considerations of justice and fairness are valid exceptions to a defence of *res judicata* in South African law.

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[33] [2015] SGHC 175.
[34] [2005] 3 SLR(R) 157.
[35] [2017] 2 SLR 12.
[36] 2014 (5) SA 406 (SCA).
[37] 1995 (1) SA 653 (A).

vii. United States

Although US federal statutory law establishes the preclusive effects of judgments from domestic courts, such as through Article IV, Section 1 of the US Constitution mandating full faith and credit to state judicial proceedings,[38] and Title 28, Section 1738 of the US Code,[39] the rules of preclusion in the United States have largely been developed by the judiciary.

Under United States common law, there are two distinct doctrines of preclusion— issue preclusion and claim preclusion— which are collectively referred to as *res judicata*.[40]

The US Supreme Court in *Montana v United States* underscored the primary objective of the principle of *res judicata*: to conserve judicial resources and shield parties from the burden and cost of re-litigating claims and issues that have already been resolved.[41] The Restatement of the Law (Second) of Judgments affirms the widely recognised principle of *res judicata*.[42]

As elucidated by the US Supreme Court in *New Hampshire v Maine*, claim preclusion generally bars successive litigation of the same claim.[43] In *Capitol Hill Group v Pillsbury*, the US Court of Appeals for the District of Columbia Circuit explained that claim preclusion is applicable when three conditions are met: (i) the prior judgment is a final judgment on the merits issued by a court of competent jurisdiction; (ii) both suits involve the same parties or their privies; and (iii) both suits are based on the same cause of action.[44]

As the US Supreme Court outlined in *Lucky Brand v Marcel*, the concept of the 'same cause of action' hinges on whether the two suits stem from a common transaction or occurrence or share a nexus of operative facts.[45] The Court further explained that claim preclusion also prevents parties from raising issues that could have been adjudicated in the previous action, even if they were not actually litigated.[46]

In *New Hampshire v Maine*, the US Supreme Court stated that issue preclusion, also known as collateral estoppel, bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim.[47] As detailed by the US Court of Appeals for the

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38 US Constitution, Article IV § 1 ('Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.').

39 28 USC § 1738 ('The records and judicial proceedings of any court of any such State, Territory or Possession . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.').

40 Courts in the United States also sometimes refer to the doctrine of claim preclusion individually as *res judicata*. *See Brownback v King*, 592 US 209, 215 n.3 (2021) ('The terms res judicata and claim preclusion often are used interchangeably. But res judicata 'comprises two distinct doctrines.' The first is issue preclusion, also known as collateral estoppel. . . . The second doctrine is claim preclusion, sometimes itself called res judicata.' (internal citations omitted)).

41 *Montana v United States*, 440 US 147, 153–54 (1979).

42 Restatement (Second) of Judgments §§ 18, 19 (1982) (defining claim preclusion, also known as merger and bar); Restatement (Second) of Judgments § 27 (1982) (defining issue preclusion).

43 *New Hampshire v Maine*, 532 US 742, 748 (2001).

44 *Capitol Hill Group v Pillsbury, Winthrop, Shaw, Pittman, LLC*, 569 F.3d 485, 490 (D.C. Cir. 2009*); see Duhaney v Att'y Gen. of US*, 621 F.3d 340, 347 (3d Cir. 2010).

45 *Lucky Brand Dungarees, Inc. v Marcel Fashions Grp., Inc.*, 590 US 405, 412 (2020).

46 *See id.*

47 *New Hampshire v Maine*, 532 US 742, 748–749 (2001).

Federal Circuit in *Levi Strauss v Abercrombie*, to assert issue preclusion, four prerequisites must be met: (i) the issues in both suits must be same; (ii) the issues must have been actually litigated in the prior proceeding; (iii) the determination of the issues was necessary to the resulting judgment in the prior proceeding; and (iv) the party defending against issue preclusion had a full and fair opportunity to litigate the issues in the prior proceeding.[48]

b. Civil law jurisdictions

In civil law jurisdictions, the doctrine of *res judicata* is also widely recognised and codified. The Task Force has summarised the approach to *res judicata* in Argentina, Belgium, Brazil, France, Germany, Italy, Japan, Poland, Romania, Spain, Sweden and Switzerland, also aiming to be representative of various regions of the world.

i. Argentina

In Argentina, the principle of *res judicata* is covered by Sections 17 and 18 of the National Constitution[49] and regulated in Section 832 of the Argentine National Civil and Commercial Code ('ANCCC') and Section 347 §6 of the Argentine National Civil and Commercial Procedural Code ('ANCCPC'),[50] as well as other related and complementary provisions of the ANCCPC.

Further, the National Supreme Court of Justice ('CSJN') has clarified that *res judicata* requires, as a prerequisite, the comprehensive examination of both disputes to determine if the final judgment has already resolved what constitutes the claim raised in the new case.[51] If the answer is affirmative, the new claim shall be rejected.

Argentine law requires a triple identity test to determine whether *res judicata* exists: (i) the parties and — in some cases — third parties (subjective element); (ii) the object of the decision (claim), ie, the dispute actually submitted for adjudication (objective element); and (iii) the cause of action, ie, the facts or factual situation invoked as the basis of the claim, which support the claim directly or indirectly (causal element).[52]

Regarding the third element, cause of action, Argentine law requires the existence of a final decision that must be compared to the issues being raised in the second proceeding to determine if they coincide. This test must be made using logic and common sense, supported by the general rules of interpretation. The test must determine whether there

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48 *Levi Strauss & Co. v Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 1371 (Fed. Cir. 2013); *see Tyus v Schoemehl*, 93 F.3d 449, 453 (8th Cir. 1996).

49 Section 17 of the Argentine National Constitution guarantees the right to property, whereas the National Supreme Court of Justice considers that the rights acknowledged by a resolution passed as *res judicata* integrate the patrimony of the rights' beneficiary and are therefore protected by the Constitution (Palacio, Lino E., *Derecho Procesal Civil*, v. III, 4th edition, Abeledo Perrot, Buenos Aires, 2017, p. 2326). Section 18 of the Argentine National Constitution sets forth the principles of due process and defense in court.

50 Section 347 §6 of the ACPCCN regulates the exception of *res judicata*.

51 CSJN, 'Recurso de hecho deducido por la actora en la causa Agnese, Miguel Angel c/ The First National Bank of Boston (Banco de Boston)', December 16, 1993.

52 Falcón, Enrique M., Código Procesal Civil y Comercial de la Nación. Comentado — concordado — anotado, v IV, 1st edition, Abeledo Perrot, Buenos Aires, 2009, pp. 584/586; and Tratado de Derecho Procesal Civil, Comercial y de Familia, v III, 1st edition, Rubinzal Culzoni, Santa Fe, 2006, p. 685.

exists a real risk of contradictory rulings by judges with the same or equal competence, albeit from different jurisdictions.[53]

When determining the scope of *res judicata*, a minority position is that only the operative part of the judgment is relevant. But the prevailing position is that, while the focus should be on the operative part, the reasoning should not be excluded from the analysis.[54] This position has been confirmed by Argentine case law, which has extended the *res judicata* effects to the reasoning when the operative part contains an express reference to the former,[55] when the reasoning constitutes a unity with the operative part and becomes an indispensable element of the ruling,[56] or when the reasoning is invoked to interpret the dispositive part and to clarify its scope.[57]

In Argentina, *res judicata* applies to final judgments and to final interlocutory judgments.[58] The ANCCPC provides that the existence of *res judicata* may be declared *ex officio* at any stage of the proceedings.[59]

ii. Belgium

The guiding principles on *res judicata* under Belgian law are set out in Articles 23 to 28 of the Belgian Judicial Code ('BJC').[60] Belgian law recognises two types of preclusion: claim preclusion and issue preclusion.

Claim preclusion prevents parties from reintroducing issues that have already been decided in the previous decision rendered between the same parties; which cover the same object (ie, social or economic result sought by the parties); based on the same cause (ie, the factual

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53 Falcón, Enrique M., *Tratado de Derecho Procesal Civil, Comercial y de Familia*, v III, 1st edition, Rubinzal Culzoni, Santa Fe, 2006, p. 673; Colombo, Carlos J. & Kiper, Claudio M., *Código Procesal Civil y Comercial de la Nación. Anotado y comentado*, v II, 2nd edition, La Ley, Buenos Aires, 2006, p. 264. In other words, the existence of *res judicata* is subject to demonstrating that it concerns the same issue subjected to judicial decision or that, due to continuity, relatedness, accessory status, or subsidiarity, the judgment has already resolved what constitutes the subject matter or claim of the litigation (Kielmanovich, Jorge L. *Código Procesal Civil y Comercial de la Nación. Comentado y anotado*, v III, 1st edition, Albremática, Buenos Aires, 2022, p. 109)

54 Colombo, Carlos J. & Kiper, Claudio M., *Código Procesal Civil y Comercial de la Nación. Anotado y comentado*, v II, 2nd edition, La Ley, Buenos Aires, 2006, pp. 215, 248 to 249.

55 CSJN, 'Giménez Zapiola Viviendas S.A. c/ Buenos Aires, Provincia de s/ daños y perjuicios', August 13, 1998.

56 National Commercial Appeals Court ('NCAC'), La Ley, 18-846.

57 NCAC, Chamber I, 'Litroup SA v Laboudigue, Juan D. y otro', March 7, 1997.

58 Such as ordering rulings that transcend the procedural scope by resolving a substantial issue, concluding the process, ordering precautionary measures, etc. (Palacio, Lino E., *Derecho Procesal Civil*, v III, 4th edition, Abeledo Perrot, Buenos Aires, 2017, p. 2324). It also applies to disputes over the same subject matter, even if formulated differently, not only to the issues that were decided but also those that could have been raised but were not, as well as those that were the subject of explicit debate, even if they were resolved only implicitly as a logical precedent to the decision (Falcón, Enrique M., *Código Procesal Civil y Comercial de la Nación. Comentado – concordado – anotado, v* IV, 1st edition, Abeledo Perrot, Buenos Aires, 2009, p. 589).

59 See Section 347 of the ANCCPC, ('(...) *The existence of res judicata or lis pendens may be declared ex officio at any stage of the proceedings.*'). See also NCAC, Chamber I, '*Chiappetta, Lorenzo v Obra Social del Personal de la Industria Metalúrgica*', July 13, 1999.

60 M . DRAYE, 'No Do-Overs, No Take-Backs? A Belgian Perspective on Res Judicata and Arbitration' in D . DE MEULEMEESTER, M . BERLINGIN, B . KOHL (*eds.*), Liber Amicorum Cepani 1969-2019, Wolters Kluwer, 2019, 111.

basis).[61] Article 23 BJC further specifies that a party is precluded from bringing the same claim on a different legal basis in subsequent proceedings, except for legal grounds which could not have been brought in the first proceeding.[62]

Issue preclusion requires a compatibility test under which a legal claim will be dismissed for lack of merit if, by upholding the claim, an award or court decision would be rendered that is incompatible with a previous award or judicial decision between the same parties.[63]

According to the well-established case law of the Belgian Court of Cassation: 'Res judicata applies to what the judge has decided on a point in dispute and to what, by reason of the dispute brought before it and submitted to the contradiction of the parties, constitutes, be it implicitly, the necessary foundation of its decision.'[64]

The *res judicata* effects of a judgment therefore extends to:

(1) The operative part of the judgment ('*dispositif*'): any decision relating to an issue in dispute between the parties is considered to be an 'operative' decision.[65] Under Belgian law, since the operative part of a decision does not have to comply with any requirement of form, the operative part may be found in the reasoning of the decision ('*motif décisoire*');[66]

(2) The reasons which necessarily support the operative part of the decision and are therefore indissociable from it;[67] and

(3) The findings implicitly contained in a decision, which necessarily support the operative part of the decision.[68]

By contrast, the *res judicata* effects do not extend to the *obiter dicta*.[69]

Pursuant to Article 27 BJC, *res judicata* must be raised by the parties and cannot be raised *ex officio* by a court or arbitral tribunal.

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61 Article 23 BJC: "L'autorité de la chose jugée n'a lieu qu'à l'égard de ce qui a fait l'objet de la décision. Il faut que la chose demandée soit la même; que la demande repose sur la même cause, quel que soit le fondement juridique invoqué; que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité. L'autorité de la chose jugée ne s'étend toutefois pas à la demande qui repose sur la même cause mais dont le juge ne pouvait pas connaître eu égard au fondement juridique sur lequel elle s'appuie."

62 Article 23 BJC was modified by Law of 19 October 2015 no 1, to specify that the same cause (of a claim) exists regardless of the legal basis invoked.

63 See Judgment of the Court of Cassation of 4 December 2008, J.T. 2009, p. 303.

64 Judgment of the Court of Cassation of 4 December 2008, *J.T.* 2009, p. 303.

65 G. De Leval, *Droit judiciaire – Manuel de procédure civile*, t.II, Larcier, 2015, p. 644, no 7.17.

66 Judgment of the Court of Cassation of 28 April 1994, no C.93.0245.F, *Pas.* 1994, I, p. 418.

67 G. DE LEVAL, *Droit judiciaire – Manuel de procédure civile*, t.II, Larcier, 2015, p. 644, no 7.17.

68 J. VAN COMPERNOLLE, 'Considérations sur la nature et l'étendue de l'autorité de la chose jugée en matière civile', *R.C.J.B.*, 1984, p. 265, no 34.

69 H. DE PAGE, *Traité élémentaire de droit civil belge*, t. III, p. 994, no 947.

iii. Brazil

In Brazil, the principle of *res judicata* is grounded in the Federal Constitution (Article 5, item XXXVI)[70] and in the Code of Civil Procedure ('BCCP').[71] As a rule, '*no judge shall decide again issues that have already been decided in relation to the same dispute*' (Article 505 of the BCCP).[72]

Res judicata applies to judgments that are final and no longer subject to appeal (Article 502 of the BCCP).[73] *Res judicata* is subject to a triple identity test: the dispute cannot be relitigated if it involves the same parties, claim and cause of action (Articles 337, §§ 1º, 2º, and 4º of the BCCP).[74] However, a new decision on an issue related to the same dispute is possible (i) if the dispute concerns an ongoing legal relationship, and there is a change in the state of fact or law, and (ii) in exceptional cases provided for by law (Article 505, I and II, of the BCCP).[75]

Res judicata generally applies to the dispositive portion of the decision on the merits, that is, to the main issue expressly decided in the decision (Article 503 of the BCCP).[76] However, *res judicata* may also extend to a preliminary issue if (i) the judgment on the merits depends on the resolution of the preliminary issue, (ii) both parties were heard on the preliminary issue, and (iii) the court has full jurisdiction to decide the preliminary issue as if it were the main issue (Article 503, §1º, of the BCCP). *Res judicata* does not extend to *obiter dicta*, the reasons or the facts of a judgment (Article 504 of the BCCP).[77]

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[70] Article 5, item XXXVI of the Brazilian Constitution: 'All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: [...] XXXVI: the law shall not injure the vested right, the perfect juridical act and the res judicata [...]' (Translation available at: https://www2.senado.leg.br/bdsf/bitstream/handle/id/243334/Constitution_2013.pdf).

[71] Article 502 of the BCCP: 'Substantive res judicata is the authority that renders immutable and indisputable the judgment on the merits which is no longer appealable.' (ALVIM, Teresa Arruda & DIDIER JR., Fredie (Coord.) CPC Brasileiro Traduzido para a Língua Inglesa: Brazilian Code of Civil Procedure, Salvador: Editora JusPodivm. 2017 at 207).

[72] Article 505 of the BCCP: 'No judge shall decide again issues that have already been decided in relation to the same dispute, except: I – in the case of a legal relationship with an ongoing agreement, if there was an alteration in the state of fact or law, in which case the party can apply for the review of what was determined in the judgment; II – in the other cases provided for by law.' (ALVIM, Teresa Arruda & DIDIER JR., Fredie (Coord.) CPC Brasileiro Traduzido para a Língua Inglesa: Brazilian Code of Civil Procedure, Salvador: Editora JusPodivm. 2017 at 207).

[73] Article 502 of the BCCP: 'Substantive res judicata is the authority that renders immutable and indisputable the judgment on the merits which is no longer appealable.' (ALVIM, Teresa Arruda & DIDIER JR., Fredie (Coord.) CPC Brasileiro Traduzido para a Língua Inglesa: Brazilian Code of Civil Procedure, Salvador: Editora JusPodivm. 2017 at 207).

[74] Article 337 of the BCCP: '§ 1 *Lis alibi pendens* or *res judicata* occur when a previously filed action is reproduced. § 2 An action is identical to another when it has the same parties, the same cause of action and the same claim. [...] § 4 *Res judicata* occurs when an action that has been settled by final judgment is repeated.' (ALVIM, Teresa Arruda & DIDIER JR., Fredie (Coord.) CPC Brasileiro Traduzido para a Língua Inglesa: Brazilian Code of Civil Procedure, Salvador: Editora JusPodivm. 2017 at 153).

[75] See STJ, REsp 594.238/RJ, Rapporteur Luis Felipe Salomão, 4 April 2009; and STJ, REsp 472.728/MG, Rapporteur Sálvio de Figueiredo, 20 March 2003.

[76] STJ, REsp 909.157/PR, Rapporteur Humberto Gobes de Barro, 19 December 2007.

[77] Article 504 of the BCCP: 'The following do not give rise to res judicata: I – the ratio decidendi, even if important to determine the scope of the conclusion of the judgment; II – the truth of the facts, established as the grounds of the judgment.' (ALVIM, Teresa Arruda & DIDIER JR., Fredie (Coord.) CPC Brasileiro Traduzido para a Língua Inglesa: Brazilian Code of Civil Procedure, Salvador: Editora JusPodivm. 2017 at

Because of the preclusive effect of *res judicata*, once the judgment on the merits becomes final and unappealable, no party may file a new action making the same claim based on any arguments or defenses that could have been, but were not, argued in the earlier action (Article 508 of the BCCP).[78] The preclusive effect does not mean that *res judicata* extends to the reasons of the judgment, but only that a party cannot bring new (or old) reasons to relitigate the same claim already decided.

Res judicata may be raised by defendants as a preliminary argument in their answer to the complaint (Article 337, VII, of the BCCP),[79] but may also be recognised by the judge *ex officio*, who will then terminate the proceeding (see Article 337, §5 and Article 485, V, and §3 of the BCCP).[80]

iv. France

In France the principle of *res judicata* is referred to as '*autorité de la chose jugée*' and is codified in the French code of civil procedure ('FCCP')[81] and the French civil code ('FCC').[82]

Article 1355 of the FCC provides that *res judicata* applies only if a triple identity test between the claim submitted to the judge and that which has already been decided is met: '*The claim sought must be the same; the claim must be based on the same cause; the claim must be between the same parties, and made by and against them in the same capacity.*'

French courts have developed the concept of *identity of cause* by introducing a principle of concentration of pleas, whereby the plaintiff must present, at the outset of the initial proceedings, all the pleas it considers likely to justify the claim.[83] If the plaintiff fails to do so, any new claim based on different arguments will be dismissed on the grounds of *res*

207). See STJ, REsp 1.878.043/SP, Rapporteur Nancy Andrighi, 8 September 2020; STJ, AgRg nos EDcl no REsp 1.399.152/RS, Rapporteur Luis Felipe Salomão, 8 April 2014; STJ, AgRg no REsp 109.1875/PR, Rapporteur Antonio Carlos Ferreira, 17 December 2013; and STJ, EDcl no REsp 633.105/MG, Rapporteur Humberto Gomes de Barros, 14 November 2007.

78 Article 508 of the BCCP: 'When the decision on the merits becomes res judicata, it shall be deemed that all the arguments and defences that the party could assert against both the acceptance and the denial of the claim have been removed and repudiated.' (ALVIM, Teresa Arruda & DIDIER JR., Fredie (Coord.) CPC Brasileiro Traduzido para a Língua Inglesa: Brazilian Code of Civil Procedure, Salvador: Editora JusPodivm. 2017 at 208); see also STJ, AgInt no REsp n. 1.997.955/SP, Rapporteur Min. Regina Helena Costa, 5 September 2022; STJ, REsp n. 1.516.158/MG, Rapporteur Gurgel de Faria, 11 June 2019; and STJ, AgInt no REsp n. 1.676.855/PE, Rapporteur Francisco Falcão, 19 November 2019.

79 Article 337, VII, of the BCCP: 'Art. 337. Before discussing the merits, it is up to the defendant to allege: [...] VII – res judicata;' (ALVIM, Teresa Arruda & DIDIER JR., Fredie (Coord.) CPC Brasileiro Traduzido para a Língua Inglesa: Brazilian Code of Civil Procedure, Salvador: Editora JusPodivm. 2017 at 152).

80 Article 337, §5º, of the BCCP: '§ 5 Except in the cases of an arbitration agreement and lack of relative jurisdiction, the judge shall take cognizance of the matters listed in this article ex officio.'; Article 485, V and §3º, of the BCCP: 'A judge shall not rule on the merits when: [...] – V - the judge acknowledges the existence of a perempção26, lis alibi pendens or res judicata; [...] § 3 The judge shall take cognizance, ex officio, of the matters contained in items IV, V, VI and IX, at any moment and any instance of jurisdiction, while there is no res judicata decision.' (ALVIM, Teresa Arruda & DIDIER JR., Fredie (Coord.) CPC Brasileiro Traduzido para a Língua Inglesa: Brazilian Code of Civil Procedure, Salvador: Editora JusPodivm. 2017 at 152, 198 and 199).

81 Articles 480 to 488 of the FCCP.

82 Article 1355 of the FCC states that: 'The authority of res judicata applies only to what is the subject of the judgment. The claim sought must be the same; the claim must be based on the same cause; the claim must be between the same parties, and made by and against them in the same capacity.'

83 Cass., Ass. Plén., 7 July 2006, Cesareo, no. 04-10.672; Cass, Civ 3e., 13 February 2008, no. 06-22.093.

judicata.[84] This principle was then extended to the defendant, who is obliged to present all the defences likely to lead to the rejection of the claims made against it.[85]

French courts have also clarified that only the operative part of the judgment has *res judicata* effects.[86]

The judge *may* raise the issue of *res judicata ex officio*,[87] but *must* do so only when a decision was previously handed down in the same proceedings.[88]

v. Germany

In Germany, the principle of *res judicata* is referred to as '*materielle Rechtskraft.*' It is codified in Sec. 322 of the German Code of Civil Procedure (*Zivilprozessordnung*, 'ZPO').

The ZPO does not specifically define the principle of *res judicata*, but explicitly mentions it as one of the principles inherent to German civil procedure.[89] At its core, the principle of *res judicata* under German law stipulates that a subject matter which has already been finally decided in a court judgment cannot be subject to another court proceeding between the same parties.[90]

German courts determine the identity of subject matter using a triple identity test: (i) identity of parties;[91] (ii) identity of the underlying operative facts; and (iii) identity of the legal remedy sought in the prayers for relief.[92] The relevant operative facts include all circumstances which, from the view point of the parties, form part of the set of facts which the claimant must submit to the court in support of its prayers for relief.[93] Consequently, there may be 'identity of the subject matter' both when the same action is brought a second time by the same claimant, as well as when either party in a second action requests the determination of the exact opposite of the issue decided in the first action. In both cases, the *res judicata* effects of the first judgment preclude a new action and decision.[94]

The German Federal Court of Justice (*Bundesgerichtshof*) has clarified that not all parts of a judgment are subject to the protection of *res judicata* but only the core of the court's decision on the legal claim advanced by the lawsuit — ie, the operative part of the decision

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84 Article 122 of the FCCP.
85 Cass., Com. 20 February 2007, no. 05-18.322 ; Cass., Civ. 2e, 27 February 2020, nos 18-23.972, 18-23.370.
86 Cass., Ass. Plén. 13 March 2009, no. 08-16.033; Cass., Civ 2e, 21 mars 2019, no. 17-23.640.
87 Article 125 of the FCCP.
88 Cass., Civ. 2e, 14 January 2021, no. 19-17.758.
89 Sec. 322 (1) ZPO.
90 *Gottwald*, in: Münchener Kommentar zur ZPO, 6th ed. 2020, § 322, recital 4.
91 While *res judicata* in principle only applies between the parties of the original action, pursuant to Sec. 325 ZPO, *res judicata* can also apply to the parties' legal successors.
92 *Gruber*, in: BeckOK ZPO, 53rd ed. 2024, § 322, recital 20.
93 German Federal Court of Justice, decision dated 15 December 2020 — II ZR 108/19; *Gehle*, in: Anders/Gehle (eds.), Zivilprozessordnung, 81st ed. 2023, § 2, recital 4; *Gruber*, in: BeckOK ZPO, 53rd ed. 2024, § 322, recital 20.
94 *Gehle*, in: Anders/Gehle (eds.), Zivilprozessordnung, 81st ed. 2023, Preliminary remark to § 322, recital 17; *Gottwald*, in: Münchener Kommentar zur ZPO, 6th ed. 2020, § 322, recital 11.

(*Entscheidungs-tenor*) — becomes legally binding.[95] The factual determinations and the legal reasoning underlying the court's decision (*Entscheidungsgründe*) are not subject to *res judicata*.

The principle of *res judicata* will be applied by the German court *ex officio*.

vi. Italy

In Italy, only judgments that are no longer subject to review through 'ordinary means' of challenge — including appeal and recourse to the Corte di Cassazione (ie, the Italian Supreme Court) — are granted *res judicata* effects (Article 324 of the Italian Code of Civil Procedure, addressing 'formal' *res judicata*). 'Substantive' *res judicata* is addressed by Article 2909 of the Civil Code ('ICC'), which provides that 'the decision [*accertamento*] set out in a judgment that has acquired the authority of *res judicata* is binding in all respects on the parties, their heirs and assignees.'

Res judicata pursuant to Article 2909 of the ICC is held to preclude the re-litigation of claims already determined. Claim preclusion turns on the identity of claims assessed according to the 'triple identity' test, which requires comparing the elements of the claim already decided with those of the claim brought in new proceedings. Its scope is therefore determined by the elements that identify a claim: parties, object (*petitum*) and cause (*causa petendi*).

Italian courts have repeatedly held that *res judicata* covers '*il dedotto e il deducibile*', literally 'what was raised and what could have been raised.' This holding has been interpreted as indicating that the *causa petendi* encompasses all legal grounds and facts, albeit not invoked, giving rise to the same right or legal effects.[96]

The traditional position in Italy has long been that *res judicata* covers only the dispositive part of the judgment ('*dispositivo*'), ie, the operative part that formally sets out the decision on the claims.[97] Yet, the case law now acknowledges that *res judicata* also covers the reasons that constitute the '*necessary logical premise*' of a decision, as well as the points of fact or law that constitute its '*logical antecedent.*'[98] The evolution of Italian law towards a broader

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[95] German Federal Court of Justice, decision dated 24 June 2014 — I ZR 27/13; German Federal Court of Justice, decision dated 13 May 1997 — VI ZR 181/96; Musielak/Wolff, in: Musielak/Voit (eds.), Kommentar zur ZPO, 21st ed. 2024, § 322, recital 16.

[96] See, eg, Corte di Cassazione, Sez Lav, 30 October 2017, No 25745, para 6; Corte di Cassazione, Sez Lav, 23 February 2016, No 3488; and Corte di Cassazione, Sez Un, 19 October 1990, No 10178).

[97] Article 34 ICPC, dealing with the competence of Italian courts, has been held to support this view. It provides that, if a preliminary issue ('*questione pregiudiziale*') is to be decided with *res judicata* effects, either because the law so requires or a party so requests, and such issue falls within the competence of a higher court, the court seized shall remit the entire dispute to the higher court. So, Article 34 seems to assume that, except where provided by the law or requested by a party, preliminary issues — dealt with in the judgment's reasons — are addressed and resolved *incidenter tantum*, ie, with no *res judicata* effects.

[98] See, eg, Corte di Cassazione, Sez I, 12 May 2021, No 12671, para 3.7; Corte di Cassazione, Sez III, 20 April 2017, No 9954, para 2; Corte di Cassazione, Sez III, 22 October 2013, No 23921, para 2.3; Corte di Cassazione, Sez I, 5 July 2013, No 16824, 2-3. Certain judgments and scholars distinguish between preliminary issues in a 'logical sense' and in a 'technical sense' pursuant to Article 34 ICPC, depending on whether the issues fall within the 'constitutive fact' of the right invoked. As preliminary issues in a 'logical sense', contrary to those in a 'technical sense', could not give rise to autonomous disputes, they would fall within the purview of *res judicata*. According to C. Cavallini, E. Ariano, *Issue Preclusion out of the US (?) - The Evolution of The Italian Doctrine of Res Judicata in Comparative Context*, in *Indiana International & Comparative Law Review*,

concept of *res judicata* emerges from two important 2014 *en banc* judgments of the Corte di Cassazione[99] which held that an express finding of nullity of a contract is always *res judicata*, even if it is only set out in the reasoning. The Court also held that decisions on claims for termination, annulment, or rescission of a contract are apt to produce an implied *res judicata* on the validity of the contract: this is always the case if the claims are upheld, and in principle also if they are not.[100]

The plenary session of the Corte di Cassazione held that the *res judicata* of judgments can be considered *ex officio* at any stage and instance of the process.[101] It underscored that there is a public interest—associated with legal certainty brought by the stability of judicial decisions—in respecting a judgment's *res judicata*. Subsequent case law conformed to this view.[102]

vii. Japan

Article 114(1) of the Japanese Code of Civil Procedure ('JCCP') stipulates that '*res judicata applies only with regard to the contents of a final and binding judgment that are included in the main text.*' [103]

The article is widely considered to indicate that *res judicata* can only apply to the subject matter of the judgment, that is, the plaintiff's remedy claimed on the same legal basis and facts. Therefore, a party can still file a lawsuit against the same opponent regarding the same facts if the legal basis is different from that of the previous lawsuit.

Although the scope of *res judicata* is quite narrow under Japanese law, in practice, courts often take a flexible approach. For example, courts may prevent a party from unfairly bringing up an argument that was made in a previous lawsuit or an argument that a party could have made in a previous lawsuit against the same opponent, if they contradict the previous judgment. Courts do so by admitting the defence of breach of good faith. In deciding whether the defence should be admitted, courts tend to consider: (i) the similarities of claims in both lawsuits, (ii) to what extent the argument was discussed in the previous lawsuit or whether the plaintiff could have raised the new argument in the previous lawsuit, and (iii) the legal certainty of the defendant's status.[104]

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vol. 31, no. 1, 2021, p. 1, the case law recalled above '*ha[s] prompted a reconceptualization of res judicata, pointing out a potential rapprochement between the Italian and American solutions.*'

99 Corte di Cassazione, Sez Un, 12 December 2014, Nos 26242 and 26243, paras 4.2.1, 4.4.1, 4.7.1., 4.7.2, 4.8, 5.16, 7.3.B.1-2.

100 Precisely, in all cases except where the dismissal is founded on a reason more readily ascertainable ('*liquida*') than nullity (such as expiry of the limitation period, fulfillment of the contract, non-material breach or automatic set-off).

101 Corte di Cassazione, Sez Un, 25 May 2001, No 226.

102 See: Corte di Cassazione, Sez Lav, 26 June 2018, No16847; Corte di Cassazione, Sez III, 31 January 2017, No 2322; Corte di Cassazione, Sez Un,16 June 2006, N. 13916.

103 A Japanese judgment usually consists of two parts, the 'main text' and the reason for the decision. The 'main text' only includes whether the court upheld or dismissed the plaintiff's claim, the scope of the upheld claim and which party or in what ratio each party bears the cost of the lawsuit. For example, when the court upholds a plaintiff's monetary claim, the main text would be a monetary payment order, such as '*1) the defendant must pay one hundred million yen to the plaintiff. 2) the defendant must bear the cost of the lawsuit.*'

104 There are two representative judgments by the Supreme Court that accepted the defendant's defense of a breach of good faith. The first judgment was rendered on April 26, 1974 (Case No. 1971(o)411) and the second on September 30, 1976 (Case No. 1974(o)331).

A Japanese judgment usually consists of two parts, the 'main text' and the reason for the decision. Article 114(1) sets forth that *res judicata* applies only to the main text. The 'main text' only includes (i) whether the court upheld or dismissed the plaintiff's claim, (ii) the scope of the claim upheld and (iii) which party or in what ratio each party bears the cost of the lawsuit.

The court can invoke *res judicata* without a party raising it as an argument. In practice, however, a party usually raises the argument and then the court examines whether the filing of the lawsuit violated the principle of *res judicata*.

viii. Poland

Article 366 of the Polish Code of Civil Procedure ('PCCP') provides that '*The judgment of the Court of Law has the dignity of judgment only as to what has been the subject of the dispute and, moreover, only between the same parties.*'

The phrase '*between the same parties*' refers to the subjective premise of *res judicata,* which refers to a proceeding between the same plaintiff(s) on the one hand and the same defendant(s) on the other hand.[105] The identity of the subject matter is met when there is an identical factual and legal basis for the ruling and the plaintiff's renewed claim. These prerequisites must occur cumulatively. Whether a new lawsuit involves the same or a different factual basis for the dispute is determined by the state of facts existing at the time of the conclusion of the first proceeding.[106]

As a general rule, *res judicata* covers the decision contained in the operative part of the judgment, not its reasoning.[107] However, the reasons for the judgment may constitute a vital supplement to the ruling, necessary to clarify its scope. However, this applies only to the elements of the statement of reasons relating to the decision on the merits, in which the court makes a firm, authoritative statement about the claim.[108]

If there is a previously initiated case for the same claim between the same parties, or if such a case has already been finally adjudicated, this is classified by the legislator as one of the causes of nullity of the proceeding (Article 379(3) of the PCCP). The courts must examine these circumstances *ex officio* at every stage of the proceedings.

ix. Romania

Article 430(1) of the Romanian Civil Procedure Code ('the Romanian Code') provides that court judgments are *res judicata* (or have '*autoritate de lucru judecat*') with respect to matters settled in the judgment. Article 431 of the Romanian Code provides that *res judicata* has two distinct effects: (i) no person may be tried twice where there is identity of parties, claims and cause of action; and (ii) any party may invoke *res judicata* of a prior judgment in

[105] *Wyrok Sądu Apelacyjnego w Warszawie* z 8.05.2019 r., I ACa 229/18, LEX nr 2689778.
[106] *Wyrok Sądu Apelacyjnego w Katowicach* z 18.04.2018 r., I ACa 1078/17, LEX nr 2488165.
[107] *Wyrok Sądu Apelacyjnego w Gdańsku* z 26.07.2021 r., V AGa 58/21, LEX nr 3282470.
[108] *Wyrok Sądu Apelacyjnego w Łodzi* z 13.06.2019 r., III AUa 317/19, LEX nr 2713551.

other proceedings if the prior judgment is relevant. Article 431 in essence distinguishes between positive and negative *res judicata* effects where there is identity of parties.

In the *positive* sense, a matter, once finally settled by a court, may be invoked as *res judicata* in subsequent proceedings (ie, it has conclusive effects). Article 431(1) thus requires identity of parties and either claims or grounds (but not both). In the *negative* sense, *res judicata* operates as a bar to re-litigation only where the triple identity test is met (ie, the judgment has preclusive effects).[109] The High Court of Cassation and Justice held that where neither facts nor law have changed, there exists an *absolute presumption* of *res judicata* as between the parties in the proceedings.[110] Third parties are also bound by court judgments, but they may overcome the presumption of *res judicata*.

Pursuant to Article 430(2) of the Romanian Code, both the dispositive part and the grounds on which it is based produce *res judicata* effects (Article 430(2)). The Romanian High Court held that matters which are necessarily implied (but not expressly mentioned) within the dispositive part are also *res judicata* if they cannot be removed from the judgment without fundamentally altering it.[111]

Res judicata may be invoked as an exception in subsequent proceedings at any point, either by the parties or by the courts, including during appeal (Article 432). The Romanian High Court has interpreted this as an *ex officio* obligation on the part of the courts to verify *res judicata*, even where the parties have not raised the issue.[112]

x. Spain

In Spain, the principle of *res judicata* is known as '*cosa juzgada*' and is codified in the Spanish Act on Civil Procedure (*Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil*).

Spanish law characterizes *res judicata* as an 'institution fundamentally procedural in nature,'[113] and distinguishes between formal *res judicata* ('*cosa juzgada formal*')[114] and material *res judicata* ('*cosa juzgada material*').[115] Formal *res judicata* refers to the effects that render a decision final and binding, meaning that no further appeal is possible within the same proceeding in which it was issued.[116] This may occur either because (i) the procedural law does not provide for any appeal against the decision in question, or (ii) the legally established deadline has lapsed without any party having filed the appeal.[117]

Material *res judicata* refers to the effects produced by a final and binding decision in a subsequent proceeding,[118] which are twofold: the positive effect means that the court of a subsequent proceeding is bound by matters that have already been decided in a final and binding decision from a previous proceeding provided (i) they 'appear as a logical precedent

[109] Decision 602 of 24 March 2021, Romanian High Court of Cassation and Justice.
[110] Decision 916 of 21 April 2021, Romanian High Court of Cassation and Justice.
[111] Decision 1262 of 9 June 2021, Romanian High Court of Cassation and Justice.
[112] Decision 1325 of 26 June 2019, High Court of Cassation and Justice.
[113] Spanish Act on Civil Procedure (*Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil*), Preamble IX.
[114] Spanish Act on Civil Procedure, art. 207.
[115] Spanish Act on Civil Procedure, art. 222.
[116] Spanish Act on Civil Procedure, art. 207.3.
[117] Spanish Act on Civil Procedure, art. 207.2.
[118] Spanish Act on Civil Procedure, art. 222.

of the matter at issue' and (ii) the parties are the same (or considered as such by law);[119] and the negative effect bars a subsequent proceeding whose subject matter is identical to that of a previous proceeding resolved by a final and binding decision.[120]

For a decision to have negative *res judicata* effects, a triple identity test (ie, identity of parties, claims, and cause of action) between the previous and subsequent proceedings must be met.[121] Regarding the identity of parties, the general rule is that *res judicata* effects only apply to the parties of the proceeding in which the decision was issued, as well as to certain individuals and entities connected to them.[122] Regarding the claims ('*pretensiones*' or '*petitum*'), *res judicata* extends to both the statement of claim ('*demanda*') and the counterclaim ('*reconvención*').[123] Regarding the cause of action ('*causa de pedir*' or '*fundamentos o títulos jurídicos*'), any facts and legal grounds presented in a subsequent proceeding are treated as identical to those in the previous proceeding if they could or should have been raised earlier.[124] This is in line with the obligation that, if a claim can be based on several facts and different legal grounds, the claim must include all those which are known or may be invoked when the claim is filed.[125]

Spanish case law has stated that *res judicata* derives from the declarations contained in the operative part ('*parte dispositiva*') of the judgment that grants or denies the specific claims sought; 'although recently res judicata has been extended to the reasoning contained in the body of the judgment.'[126]

Finally, the Spanish Supreme Court ('*Tribunal Supremo*') has held that tribunals may consider material *res judicata ex officio* 'when its existence is clearly evident; this extends beyond the mere private interest of the parties, firmly aligning with public interest and embodying the fundamental right to effective judicial protection.'[127]

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[119] Spanish Act on Civil Procedure, art. 222.4.

[120] Spanish Act on Civil Procedure, art. 222.1.

[121] Superior Tribunal of Justice ('*Tribunal Superior de Justicia*') of Basque Country Judgment, No. 696/2017, of March 21, 2017 ('Lo primero que debemos aclarar es que, en relación a las identidades señaladas para que opere la cosa juzgada, las mismas solo son exigidas en lo que hace a su función de efecto negativo, bastando en cuanto al efecto positivo previsto en el art. 222.4 de la LEC con que, sin necesidad de que se dé una identidad absoluta de todos los componentes, lo resuelto en un proceso por sentencia firme actúe en otro posterior como antecedente lógico de lo que sea su objeto.').

[122] Spanish Act on Civil Procedure, art. 222.3.

[123] Spanish Act on Civil Procedure, art. 222.2.

[124] Spanish Act on Civil Procedure, art. 400.

[125] Spanish Act on Civil Procedure, art. 400.1.

[126] Provincial Court ('*Audiencia Provincial*') of Cáceres Judgment, No. 495/2017, of October 11, 2017 (unofficial translation) ('la cosa juzgada deriva de la declaración contenida en la parte dispositiva de la sentencia al resolver (para conceder o denegar) la concreta tutela jurídica pedida, aunque modernamente se ha permitido la extensión de la cosa juzgada respecto de la razón decisoria contenida en el cuerpo de la sentencia.') *See also*, among others, Spanish Supreme Court Judgment, No. 1013/2017, of December 15, 2017 ('En interpretación del citado precepto [222.4 de la Ley de Enjuiciamiento Civil] se ha indicado por la Sala que: [...] c) que el elemento prejudicial de conexión lógica -la vinculación- puede producirse no sólo respecto a lo que se ha incorporado formalmente en la parte dispositiva de la sentencia, sino también respecto de los elementos de decisión que siendo condicionantes del fallo no se incorporan a éste de forma específica» [SSTS ... 13/06/06 (RJ 2006, 8441) -rcud 2507/04 -; ... ; 26/11/09 (RJ 2009, 8025) -rcud 1061/08 -; 19/01/10 -rco 50/09 (RJ 2010, 3104); y 12/07/13 (RJ 2013, 6578) -rcud 2294/12 -].').

[127] Spanish Supreme Court Judgment, No. 422/2010, of July 5, 2010 (unofficial translation) (original: 'Aunque cabe la apreciación de oficio de la cosa juzgada cuando es evidente su existencia, toda vez que trasciende del mero interés particular de las partes, para situarse decididamente en la esfera del interés público y constituir una manifestación el derecho fundamental a la tutela judicial efectiva (entre otras muchas, sentencias número

xi. Sweden

The Swedish Code of Judicial Procedure ('Swedish Code') provides in Chapter 17, Section 11 that '*upon the expiration of the time of appeal, a judgment acquires legal force [rättskraft] to the extent that it determines the matter at issue in respect of which the action was instituted;*' and '*a question thus determined may not be adjudicated again.*'

For *res judicata* to apply under Swedish law, the 'same matter' must be at issue in the second proceeding as in the first proceeding. The Swedish Supreme Court has held that in determining the 'matter at issue,' the 'remedy' is decisive. This includes 'all circumstances which can be alleged as support for the same remedies regardless of whether they are alleged.'[128]

Res judicata only binds the parties to the litigation and 'third parties who are connected in a legally relevant way to the claimant or defendant.'[129]

Only the dispositive part of a judgment is *res judicata*. The reasoning, however, may be reviewed in order to determine the scope of *res judicata*.[130]

The Code of Judicial Procedure does not contain an express provision through which the court has an *ex officio* duty to raise *res judicata*.

xii. Switzerland

In Switzerland, the principle of *res judicata* ('*autorité de la chose jugée,*' or '*materielle Rechtskraft*') is part of civil procedure. Swiss law recognises both a negative and a positive *res judicata* effect. The negative effect entails that a same claim cannot be brought again in other proceedings. The positive effect entails that, if a court has to decide a preliminary issue that has already been finally decided in the dispositive part of an earlier judgment, that court is bound by the earlier judgment and must implement it in its own judgment.[131]

372/2004, de 13 mayo (RJ 2004, 2741), 277/2007, de 13 de marzo (RJ 2007, 2455), 686/2007, de 14 de junio (RJ 2007, 3572) y 905/2007 de 23 julio (RJ 2007, 5147)), no incurre en incongruencia la sentencia que no se pronuncia sobre ella cuando no ha sido opuesta en tiempo [...].'). *See also, among others*, Spanish Supreme Court Judgements, No. 372/2004, of May 13, 2004; No. 277/2007, of March 13, 2007; No. 686/2007, of June 14; and No. 905/2007, of July 23.

[128] 'Manual for legal practitioners – Sweden', p. 18.

[129] Heuman L et al, 'Sweden' in Sir Francis Jacobs (chair), The Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, Res Judicata and Abuse of Process [2006] British Institute of International and Comparative Law, pp. 31, 35.

[130] 'Manual for legal practitioners – Sweden', pp. 6-7.

[131] Judgment of the Swiss Federal Tribunal 4A_525/2021 of 28 April 2022, para 3.2 ('Diese materielle Rechtskraft hat eine positive und eine negative Wirkung. In positiver Hinsicht bindet sie das Gericht in einem späteren Prozess an alles, was im Urteilsdispositiv des früheren Prozesses entschieden wurde (sogenannte Präjudizialitäts- oder Bindungswirkung). In negativer Hinsicht verbietet sie jedem späteren Gericht, auf eine Klage einzutreten, deren Streitgegenstand mit dem rechtskräftig beurteilten identisch ist, sofern der Kläger nicht ein schutzwürdiges Interesse an der Wiederholung des früheren Entscheids geltend machen kann (sogenannte Ausschlusswirkung).').

Pursuant to Article 59, paragraph 2, letter (e) of the Swiss Civil Procedure Code ('SCPC'),[132] for a Swiss court to consider a case, it must not already be the subject of a legally binding decision. The lack of an earlier legally binding decision accordingly is a procedural requirement for the admissibility of a claim.

The Swiss *res judicata* standard has remained largely uncodified and has been developed mostly in the decisions of the Swiss courts.

According to the jurisprudence of the Swiss Federal Tribunal, the requirements for the application of *res judicata* are assessed using the following cumulative criteria (i) identity of the parties and (ii) identity of the subject-matters in dispute. With respect to the identity of subject-matters in dispute, the Swiss Federal Tribunal has held that this requirement is assessed with regard to the relief sought by the parties and the facts alleged by the parties on which the relief is based ('*Tatsachenfundament*').[133] The identity of subject-matters must not be assessed literally, but in terms of substance. The subsequent claim is not different from the previous claim, despite a different description, if the new claim was contained in the claim already decided or if the new claim is the opposite of the decided claim.[134] The legal grounds invoked by a claimant are not relevant in the assessment of the identity between subject matters.[135]

Only the dispositive part of a judgment ('*dispositif*') has *res judicata* effects.[136] While the reasons underlying a judgment have no *res judicata* effects, they may be considered to interpret the meaning and scope of the *dispositif*.[137]

Pursuant to Article 60 SCPC,[138] the court shall examine *ex officio* whether the procedural requirements are satisfied. The defendant is nevertheless encouraged to raise any *res judicata* defenses.

c. An emerging trend towards convergence in *res judicata* standards

As the above overview of selected jurisdictions shows, recent developments in civil law jurisdictions indicate a trend towards broadening the scope of *res judicata*, thereby narrowing the gap that historically existed between common law and civil law jurisdictions.

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[132] SCPC, status as of 1 September 2023; pursuant to Article 59 SCPC, '(1) The court shall consider an action or application provided the procedural requirements are satisfied. (2) Procedural requirements are in particular the following: [...] (e). the case is not already the subject of a legally-binding decision.'

[133] Judgment of the Swiss Federal Tribunal 4A_525/2021 of 28 April 2022, para 3.3, 'Die Identität von Streitgegenständen beurteilt sich im Hinblick auf die sogenannte negative Wirkung der materiellen Rechtskraft nach zwei Kriterien: den Klageanträgen einerseits und dem behaupteten Lebenssachverhalt andererseits, das heisst dem Tatsachenfundament, auf das sich die Klagebegehren stützen.'

[134] Judgment of the Swiss Federal Tribunal 4A_525/2021 of 28 April 2022, para3.3, 'Dabei ist der Begriff der Anspruchsidentität nicht grammatikalisch, sondern inhaltlich zu verstehen. Der neue prozessuale Anspruch ist deshalb trotz abweichender Umschreibung vom beurteilten nicht verschieden, wenn er in diesem bereits enthalten war oder wenn im neuen Verfahren das kontradiktorische Gegenteil zur Beurteilung gestellt wird.'

[135] Judgment of the Swiss Federal Tribunal 4A_525/2021 of 28 April 2022, para 3.3, 'Auf den 'Rechtsgrund' - verstanden als 'angerufene Rechtsnorm' -, auf den die Klagebegehren gestützt werden, kommt es nicht an.'

[136] Judgment of the Swiss Federal Tribunal 4A_525/2021 of 28 April 2022, para 5.3.2, 'Folgendes ist zu beachten: Einzig das Dispositiv des Ersturteils nimmt an der Rechtskraft teil [...].'

[137] ATF 128 III 191, para 4a.

[138] Pursuant to Article 60 SCPC, 'The court shall examine ex-officio whether the procedural requirements are satisfied.'

This shift is particularly evident with regard to the preclusion of claims raised by the parties in the prior proceedings, issues litigated in the prior proceedings, as well as the preclusion regarding matters that could and should have been raised in the prior proceedings.

i. Preclusion Regarding Claims Raised in the Previous Proceedings

The first aspect of *res judicata* – preclusion regarding claims raised by the parties in the previous proceedings – represents a common core across jurisdictions, although the approaches to implementing it may vary. Common law systems conceptualise claims broadly. For example, English law adopts the doctrine of 'cause of action estoppel' , which precludes a claimant from bringing forward any new claims based on facts already litigated. This extends to situations where the legal grounds or remedies differ, so long as the factual basis remains the same. In the United States, the similar concept of 'claim preclusion' is employed. The Restatement of the Law (Second) of Judgments defines a 'claim' in terms of a 'transaction', pragmatically assessing factors like time, space, and motivation to determine whether claims should be considered part of the same dispute.[139] Australia, Canada, Nigeria, Singapore and South Africa adopt a similar approach.

Several civil law jurisdictions have begun to shift toward a more factual understanding of claims, similar to the broader concept in common law. For example, French law, which traditionally adhered to the strict 'triple identity' test, evolved with the 2006 Cesareo decision by the Cour de cassation.[140] In this case, the court overruled its earlier position, adopting a more fact-based approach when assessing whether there is identity of cause of action. It required claimants to raise all grounds supporting their claim in the initial proceedings, holding that a subsequent claim based on the same facts and different arguments would be dismissed on the grounds of *res judicata*.[141] The decision marked a significant shift toward a factual conception of *res judicata*, where legal grounds are no longer the primary focus, and factual elements take precedence.

Similarly, Belgian law underwent a reform in 2015, amending Article 23 of its Judicial Code to stipulate that the same cause exists regardless of the legal basis invoked (except for legal grounds which could not have been brought in the first proceedings).[142] This mirrors the evolution in French law, with the focus shifting toward ensuring that all relevant factual matters are considered in the initial proceedings. Spanish law also aligns with this trend, mandating that all facts and grounds must be presented at the outset, as reflected in Article 400 of its Civil Procedure Code.[143]

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[139] Restatement (Second) of Judgments §§ 19, 20, 24 (1982) (defining claim preclusion and transaction: '(1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
(2) What factual grouping constitutes a 'transaction', and what groupings constitute a 'series', are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.'

[140] Cour de cassation, Assemblée plénière, 7 July 2006, No 04-10672. See above II.2.b.iv.

[141] Article 122 of the FCCP.

[142] Art 23 BJC (as modified by Law of 19 October 2015 no 1). See above II.2.b.ii.

[143] Spanish Act on Civil Procedure, art. 400; see above Section II.2.b.x.

Other civil law jurisdictions have evolved the scope of claim preclusion in a similar direction. Italian courts, for instance, have held that *res judicata* covers 'what was raised and what could have been raised', implying that the *causa petendi* element of the triple identity test encompasses all legal grounds and facts, albeit not invoked, giving rise to the same right or legal effects. This broad interpretation ensures that claimants generally cannot evade the preclusive effect of *res judicata* by raising new legal bases in subsequent litigation.[144] In Germany, a key factor in determining the identity of the subject-matter are the operative facts ('*Lebenssachverhalt*'), which according to a 2020 decision of the German Federal Court of Justice include all circumstances that, from the view point of the parties, form part of the set of facts which the claimant must submit to the court in support of its prayers for relief — meaning that new claims that arise out of the same operative facts are precluded.[145] In Switzerland, the Swiss Federal Tribunal followed a similar approach holding that the negative effect of *res judicata* is based not only on the relief sought by the claimant but also on the facts alleged by the claimant on which the relief is based and that the identity of claims must not be understood literally but in terms of substance.[146]

ii. Preclusion Regarding Issues

The second aspect of *res judicata* — preclusion regarding issues — has been historically associated with common law jurisdictions. In English law, this is known as 'issue estoppel', which precludes a party from reopening a factual or legal issue already litigated and necessary to a prior decision. For example, in situations where the same parties are involved in subsequent litigation on a different cause of action, any issue previously decided cannot be relitigated. This principle is similarly applied in Australia, common law Canada, Nigeria, Singapore, South Africa and the United States.[147]

Several civil law jurisdictions are increasingly adopting comparable approaches. For instance, Italian courts have broadened the scope of *res judicata* to include not only the decision on claims but also the underlying reasoning and factual or legal points necessary for that decision, including implicit findings.[148] This marks a departure from traditional civil law doctrine, which typically limited the preclusive effect to the operative part of a judgment.

Belgium likewise has moved toward a broader concept of *res judicata*, giving preclusive effect to the 'necessary foundation' of a judgment.[149] Similar approaches have been adopted in Romania.[150] In Japan, courts have broadened the scope of *res judicata* by employing the

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[144] Corte di Cassazione, Sez Lav, 30 October 2017, No 25745, para 6; Corte di Cassazione, Sez Lav, 23 February 2016, No 3488; and Corte di Cassazione, Sez Un, 19 October 1990, No 10178, 4). See above Section II.2.b.vi.

[145] German Federal Court of Justice, decision dated 15 December 2020 – II ZR 108/19. See above Section II.2.b.v.

[146] Judgment of the Swiss Federal Tribunal 4A_525/2021 of 28 April 2022, para3.3 ('Dabei ist der Begriff der Anspruchsidentität nicht grammatikalisch, sondern inhaltlich zu verstehen. Der neue prozessuale Anspruch ist deshalb trotz abweichender Umschreibung vom beurteilten nicht verschieden, wenn er in diesem bereits enthalten war oder wenn im neuen Verfahren das kontradiktorische Gegenteil zur Beurteilung gestellt wird.'). See above Section II.2.b.xii.

[147] See above Section II.2.a.

[148] See, eg, Corte di Cassazione, Sez I, 12 May 2021, No 12671, para 3.7; Corte di Cassazione, Sez III, 20 April 2017, No 9954, para 2; Corte di Cassazione, Sez Un, 12 December 2014, Nos 26242 and 26243, paras 4.2.1, 4.4.1, 4.7.1., 4.7.2, 4.8, 5.16, 7.3.B.1-2; Corte di Cassazione, Sez III, 22 October 2013, No 23921, para 2.3; Corte di Cassazione, Sez I, 5 July 2013, No 16824, 2–3. See above Section II.2.b.vi.

[149] Judgment of the Court of Cassation of 4 December 2008, *J.T.* 2009, p. 303. See above Section II.2.b.ii.

[150] See above Section II.2.b.ix.

principle of good faith to prevent a party from unfairly bringing up a legal argument that was made in a previous lawsuit if it contradicts the previous judgment.[151]

Moreover, the ELI-UNIDROIT Rules provide in Rule 149(2) that *res judicata* 'also covers necessary and incidental legal issues that are explicitly decided in a judgment where parties to subsequent proceedings are the same as those in the proceedings determined by a prior judgment and where the court that gave the judgment could decide those legal issues.'

iii. Preclusion Regarding Matters That Could and Should Have Been Raised

The third aspect of *res judicata* concerns the preclusion of matters that could and should have been raised in earlier proceedings. This doctrine is traditionally characteristic of common law systems. In English law, the 'extended' doctrine of *res judicat*a, also known as the rule in *Henderson v Henderson*,[152] prohibits the reopening of matters that could have been raised in earlier litigation. The House of Lords has repeatedly affirmed this principle, holding that parties are required to present their entire case in the first set of proceedings.[153] Similarly, US law employs 'claim preclusion' to prevent claims arising from the same transaction from being divided into separate actions, and barring any claims not raised in the initial proceedings from future litigation.[154] Australia adopts a comparable approach, while in Nigeria and Singapore, courts rely on the concept of abuse of process to prevent the improper splitting of claims.[155]

Some civil law jurisdictions resort to principles, such as good faith and the prohibition of abuse of right, which might be applied—and to a certain extent have been applied—to achieve similar preclusive effects.[156] For example, Japan utilises the principle of good faith to bar the re-litigation of matters that could have been raised in earlier proceedings.[157]

iv. Conclusion

In summary, although common law and civil law systems have historically differed in their application of *res judicata*, civil law jurisdictions are increasingly expanding the scope of *res judicata*. As a result, the gap between the two systems is narrowing. This convergence reflects a shared recognition of the need to prevent duplicative litigation, promote judicial efficiency, and ensure the comprehensive resolution of matters in the initial proceedings.

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[151] See above Section II.2.b.vii.

[152] *Henderson v Henderson* (1843) 3 Hare 99, 115 (Sir Wigram).

[153] See *Arnold v National Westminster Bank plc* (n 143) 104–07 (HL) (Lord Keith of Kinkel); *Johnson v Gore-Wood & Co* [2002] 2 AC 1, 12 (Lord Bingham); *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited* (n 15) para 25 (Lord Sumption); *Takhar v Gracefield Developments Ltd* [2019] UKSC 13, para 62 (Lord Sumption); *Union of India v (1) Reliance Industries Limited, (2) BG Exploration and Production India Limited* (n 55) paras 54–58.

[154] See above Section II.2.a.vii.

[155] See above Section II.2.a.

[156] See above Section II.2.b.

[157] See above Section II.2.b.vii.

3. Case Law of Domestic Courts Regarding the *Res Judicata* Effects of Arbitration Awards

The Task Force next turns to the question of whether courts would set aside or refuse to recognise and enforce — on public policy or other grounds — an arbitration tribunal's decision on the *res judicata* effects of a prior award if the tribunal failed to apply the *res judicata* standard of the court's domestic law system.[158]

After an arbitration tribunal issues an award in which it decides on the *res judicata* effects of a prior award, an aggrieved party might seek to set aside the award, or oppose recognition and enforcement of the award, arguing that (i) the tribunal applied a *res judicata* standard that was broader or narrower than the *res judicata* standard of the forum; or (ii) the tribunal incorrectly applied the *res judicata* standard of the forum. The party might argue that the domestic *res judicata* standard forms part of the public policy of that jurisdiction (Art. V.2.b New York Convention) or, in some jurisdictions, might try to invoke other grounds, such as manifest disregard of the law (United States) or appealable error of law (s.69 English Arbitration Act).

The Task Force has accordingly reviewed a number of selected common law and civil law jurisdictions to determine whether the set-aside and enforcement courts (i) would refuse to review the arbitration tribunal's determination of the *res judicata* effects of a prior award; or (ii) conversely would review that determination —on public policy or other grounds — applying their own domestic *res judicata* standard.

As was the case with the overview in Section II.2, the sample aims at representing various regions of the world.

a. Common law jurisdictions

i. England & Wales

Where an arbitral tribunal has made a *res judicata* determination, English courts treat it as having decided an ordinary question of law, with which a court will interfere only exceptionally (according to the specific rules on appeals on points of law set out in s.69 of the English Arbitration Act). English courts would not set aside a *res judicata* determination on public policy grounds.

In *Union of India v Reliance Industries Limited*, the High Court refused to review on the merits the tribunal's determination of the *res judicata* effects of a prior award, instead treating it as an ordinary question of law (in respect of which challenges are available only to a limited extent).[159] The Court considered that the tribunal had not made an error of law. Further, the Court rejected India's contention that the award was contrary to public policy.

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[158] The following section provides a summary of the current state of *res judicata* standards as they are applied in various jurisdictions in relation to arbitral awards. This summary is only intended to inform the discussion and does not necessarily reflect the views of or opinions of the individual members of the Task Force. While every effort has been made to ensure accuracy, this description is not exhaustive and should not be interpreted as an endorsement of the legal positions or practices outlined herein.

[159] *Union of India v Reliance Industries Limited* [2022] EWHC 1407 (Comm).

In the eyes of the Court, public policy is 'not an avenue to reargue the merits' of a tribunal's decision, including on *res judicata*.

In *Daewoo Shipbuilding and Marine Engineering Company Limited v Songa Offshore Equinox Ltd*, the High Court agreed with the arbitration tribunal's application of the 'wider' form of cause of action estoppel—which it considered part of the rules on abuse of process, concluding that claimant could—and should—have raised certain reformulated claims before.[160] As in *Union of India v Reliance Industries*, the tribunal's *res judicata* determination was treated as an ordinary decision on a matter of law. Because the tribunal had not made an obvious error of law, the Court did not interfere with that determination.

ii. Singapore

Where an arbitration tribunal has made a *res judicata* determination, Singapore courts consider that to be an ordinary determination of a legal issue and will not raise any public policy concerns. As such, Singapore courts would not set these aside or refuse to enforce the award regardless of whether the tribunal correctly determined the legal issue.

In *BTN and another v BTP and another*, the Singapore Court of Appeal refused to set aside an award on the basis that the tribunal purportedly 'incorrectly' applied the principle of *res judicata*.[161] The Court of Appeal held that, whether or not the *res judicata* applied in the arbitration was a legal issue of substantive merit, errors of law (even if found) are not a valid ground for setting-aside in Singapore. The Court of Appeal also stated that 'there is no good reason why erroneous decisions to ascribe *res judicata* effects to a prior decision should be treated any differently from other errors of law.'

In *Sanum Investments Ltd v Government of the Lao People's Democratic Republic*, the Singapore High Court refused to set aside an award on the basis that the tribunal did not hear the merits of the case because it applied the New York law principle of collateral estoppel (New York law being the applicable substantive law).[162] Similar to the *BTN v BTP* case, the Court held that it would not review the tribunal's determination of *res judicata* on the merits, given that errors of law (even if found) are not a valid ground for setting-aside.

iii. United States

State and federal courts in the United States generally defer to arbitrators in determining the preclusive effect of a prior award on a subsequent arbitration. This is true both when a party seeks to compel an arbitration that would implicate a prior award or when a party seeks to set aside or enforce an award that involved a *res judicata* determination.

In setting-aside and enforcement proceedings, US courts have not accepted arguments that the tribunal's determination on *res judicata* manifestly exceeded the law. As one court explained, '[d]ue to the discretionary nature of the collateral estoppel doctrine, it is extremely difficult for a litigant to show that a tribunal manifestly disregarded the law in its

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[160] *Daewoo Shipbuilding and Marine Engineering Company Limited v Songa Offshore Equinox Ltd* [2020] EWHC 2353 (TCC).

[161] *BTN and another v BTP and another* [2020] SGCA 105.

[162] *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2022] SGHC(I) 9.

application of preclusion doctrines.'[163] Similarly, a tribunal does not exceed its authority by considering the preclusive effect of a prior award, since that is an issue to be determined on the merits.[164] US courts rarely re-examine the merits of an award at the enforcement stage.

b. Civil law jurisdictions

i. Argentina

In Argentina no case law exists in which courts would have addressed applications to set aside or not to recognise and enforce an award determining the *res judicata* effects of a prior award.

However, based on existing case law regarding *res judicata* more broadly, it is reasonable to conclude that it is unlikely that an Argentine court would recognise or enforce an arbitral award governed by Argentine law which would apply a different standard from the Argentine *res judicata* standard and which would reach a decision contrary to what would have been reached by applying the Argentine *res judicata* standard. This is because Argentine courts have recognised *res judicata* as a matter of public order with constitutional hierarchy and as a due process right that forms part of international public order.[165]

If, on the other hand, the award is governed by a foreign law, the CSJN jurisprudence does not necessarily suggest that courts would deny the recognition and enforcement of the foreign award. Instead, the doctrine suggests that it would be necessary to carry out a case-by-case analysis to assess whether the award applying foreign law leads to consequences incompatible with the Argentine principles of public order.[166]

ii. Belgium

Under Belgian law, *res judicata* is not a matter of domestic public policy. Therefore, an award that does not apply the Belgian law *res judicata* standard is not, as such, contrary to international public policy and cannot be set aside on that basis.[167] A failure to recognise the *res judicata* effects of a prior award might however lead to the setting-aside of the award under other grounds of Article 1717 BJC (for example if the second award was rendered while a valid arbitration agreement was no longer in place).

iii. Brazil

Under Brazilian law, the principle of *res judicata* is a matter of public policy, and decisions rendered contrary to *res judicata* may be unenforceable in Brazilian courts on the grounds that the recognition and enforcement of such decisions would violate public policy (BAA, art.

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163 *W.J. Deutsch & Sons Ltd. v Diego Zamora, S.A.*, 2023 WL 5609205, at *12 (S.D.N.Y. Aug. 30, 2023).

164 *Walton Ave. Assocs. LLC v Bragg*, 2020 WL 6807353, at *3 (S.D.N.Y. Nov. 18, 2020).

165 CSJN, 'EN – Procuración del Tesoro Nacional c/ (nulidad del laudo del 20-III-09) s/ recurso directo', November 6, 2018; and Heredia, Pablo D. & Calvo Costa, Carlos A., *Código Civil y Comercial. Comentado y anotado*, v VI, 1st edition, La Ley, Buenos Aires, 2022, p. 688. See also, CSJN, 'Riopar S.R.L. c/ Transportes Fluviales Argenrío S.A. s/ exhorto', October 15, 1996; and 'Aguinda Salazar, María c/ Chevron Corporation s/ medidas precautorias', June 4, 2013; among others.

166 Uzal, María E., *Derecho International Privado*, 1st edition, La Ley, Buenos Aires, 2016, p. 106.

167 B. HANOTIAU, 'Quelques réflexions à propos de l'autorité de chose jugée des sentences arbitrales', in *Liber amicorum Lucien Simont*, Bruylant, 2002, p. 302.

39, II).[168] For the same reasons, domestic arbitration awards that violate *res judicata* would likely be set aside in Brazilian courts, even though the law does not expressly provide for violation of public policy as setting-aside ground for domestic awards, and there are no precedents in which courts would have set aside an award on the basis that the tribunal's *res judicata* determination violated public policy.[169]

In two cases, the Superior Court of Justice ('*Superior Tribunal de Justiça' – STJ)*, Brazil's highest court on non-constitutional matters, refused to recognise foreign arbitration awards that conflicted with prior Brazilian judicial decisions, stressing that the principle of *res judicata* is fundamental to Brazilian public policy.

In a proceeding to recognise a foreign award, the STJ denied recognition of a foreign arbitral award on the grounds that recognition would violate Brazilian sovereignty and public policy because the award conflicted with an earlier Brazilian court ruling.[170] The Court emphasised that the Brazilian court had already ruled on the amount owed, and this decision had *res judicata* effects. The STJ held that the arbitral award would have undermined this final judgment, disregarded the authority of the Brazilian legal system, and violated the principle of *res judicata*.

Similarly, in another proceeding, the STJ partially denied an application to recognise a foreign ICC award, and excluded the portions of the award that contradicted earlier Brazilian court decisions.[171] The STJ reasoned that recognising those parts of the award would violate the principle of *res judicata* because the issues had already been finally resolved by the Brazilian Judiciary.

iv. Canada

In *Holding Tusculum, b.v. c. Louis Dreyfus, s.a.s.* (SA Louis Dreyfus & Cie)[172] a decision based on Quebec civil law, the Quebec Superior Court examined the question of whether *res judicata* constitutes an issue of public policy, under which an arbitral award can be set aside, or the homologation can be refused, in accordance with Article 947.2 and 946.5 of the Quebec Code of Civil Procedure.[173]

In the court proceedings, Holding Tusculum argued that Arbitration Award #2 offended public order because the arbitration award '*disregards the finality of [a certain part of] Arbitration Award #1 (...) and thereby contravenes the fundamental principle of res judicata.*'[174] The Court determined that it was '*unable to conclude, even on the balance of probabilities, that res judicata forms part of international public policy applicable in the context of the present proceedings*' and that the effect of the Arbitration Award #2, '*does not*

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[168] See STJ, AgInt-Edcl-REsp 1.590.360/SP, Rapporteur Maria Isabel Gallotti, 7 June 2018; STJ, AgRg-Edcl-AREsp 637.392/SP, Rapporteur Ricardo Villas Bôas Cueva, 17 August 2015; and STJ, AgRg-AREsp 158.448/RJ, Rapporteur Herman Benjamin, 20 November 2012.

[169] See CARMONA, Arbitragem e Processo: Um comentário à Lei nº 9.307/96, p. 428; BEREZOWSKI, Ação Anulatória de Sentença Arbitral: Pressupostos e Limites, pp. 166/167.

[170] STJ SEC 826/KR, Rapporteur Hamilton Carvalhido, 15 September 2010.

[171] STJ SEC 1/EX, Rapporteur Maria Thereza de Assis Moura, 19 October 2011.

[172] 2008 QCCS 5904.

[173] Now replaced by Articles 646 and 648 of the 2014 version of the Quebec Code of Civil Procedure.

[174] 2008 QCCS 5904, para 149.

... fundamentally offend the most basic and explicit principles of justice and fairness in Québec; and is not ... contrary to the essential morality of Québec.'[175]

v. France

In France, *res judicata* is a rule of private interest and is traditionally not considered to be a matter of domestic[176] or international public policy, except in the same proceedings.[177] Consequently, as such, *res judicata* cannot lead to a violation of international public policy.[178] In addition, French courts do not control arbitrators' enforcement of *res judicata*, as this would raise an issue of admissibility which is not subject to French courts' review.[179]

Violation of *res judicata* may nevertheless be sanctioned based on the irreconcilability of decisions, where two irreconcilable decisions are deemed to be contrary to international public policy. The decisions must have mutually exclusive legal consequences,[180] meaning that the enforcement of the second decision is incompatible with the existing decision.[181] Under these strict conditions, French courts have rarely upheld the plea of irreconcilable decisions.[182]

vi. Germany

The German Federal Court of Justice has explicitly clarified that the principle of *res judicata* and its observance by arbitral tribunals forms part of the German '*ordre public*', since the maintenance of previous decisions on the same subject matter is '*indispensable for ensuring legal peace'* ('*Rechtsfrieden*').[183]

Therefore, if and to the extent that an arbitral tribunal decides in its award that a prior court judgment or prior arbitral award has *res judicata* effects, this decision can be reviewed by the German courts in a potential setting-aside or enforcement proceeding.[184] The German courts will assess if the application of *res judicata* by the arbitral tribunal complies with the German principle of *res judicata* as applied by the German courts.

The German application of the principle of *res judicata* can become relevant in setting-aside or enforcement proceedings in two ways. *First*, the German courts may set aside an arbitral

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[175] 2008 QCCS 5904, paras 152-153.
[176] Cass., Civ. 1e, 25 February 2009, no. 08-11.984.
[177] B. Moreau, Éloïse Glucksmann, Répertoire de procédure civile – Arbitrage international, June 2016 (updated in March 2023) Dalloz, para 265.
[178] Paris Court of Appeal, 12 July 2021, no. 19/11413, *Monsieur Mulcahy et Société Citigroup Global Markets Inc. v Monsieur Fiorilla*. Exceptions may however apply, for instance in cases where two decisions are rendered during the same proceedings (Cass., Civ. 2e, 17 September 2020, no. 19-17.673).
[179] Paris Court of Appeal, 9 September 2010, no. 09/13550, *Mariott v JNAH*.
[180] *See*, *eg*, Paris Court of Appeal, 12 July 2021, no. 19/11413, *Monsieur Mulcahy et Société Citigroup Global Markets Inc. v Monsieur Fiorilla*.
[181] Paris Court of Appeal, 17 January 2012, no. 10/21349, *Planor Afrique SA v* ETISALAT. *See, contra*, Cass., Civ. 2e, 19 March 2015, no. 14-16.275.
[182] *See*, *eg*, Paris Court of Appeal, 10 March 2005, no. 2003/15518; Paris Court of Appeal, 9 September 2010, no. 09/13550, *Mariott v JNAH*; Paris Court of Appeal, 24 February 2015, no. 13/23404; Paris Court of Appeal, 10 September 2019, no. 17/10639; Paris Court of Appeal, 1 February 2022, no. 19/22977. *See*, *contra*, Paris Court of Appeal, 17 January 2012, no. 10/21349, *Planor Afrique SA v* ETISALAT.
[183] German Federal Court of Justice, decision dated 11 October 2018 – I ZB 9/18.
[184] *ibid*.

award on the basis that the arbitral tribunal disregarded the *res judicata* effects of a prior decision, and thus unduly rendered a decision on a subject matter which has already been finally decided by another court or arbitral tribunal.[185] *Second*, the German courts may also set aside an arbitral award on the basis that the arbitral tribunal applied *res judicata* in excess of German *res judicata* principles, eg, because it unduly overestimated the scope of the subject matter of the previous proceeding.[186]

vii. Italy

There is no case law addressing whether Italian courts, in setting-aside or enforcement proceedings, would review an arbitral tribunal's application of *res judicata* and whether, if they were to do so, they would apply Italian rules on *res judicata*.

However, it seems unlikely that this would happen on grounds of public policy. That arbitral *res judicata* does not form part of public policy is supported by the fact that (i) the Supreme Court held that a *res judicata* defence arising from an earlier award cannot be considered *ex officio*;[187] (ii) in the context of assessing the *res judicata* effects of foreign judgments, Italian courts seem to favour the theory of the *extension of the effects*, according to which a judgment is given the effects that it has in the jurisdiction where it was rendered (State of origin) on the basis of local law.[188]

viii. Japan

In Japan, there are no precedents specifically on whether an arbitration award is against public policy when the tribunal applies *res judicata* in breach of Article 114(1) of the JCCP.

There is, however, case law stating more generally that awards rendered through a procedure that is not in accordance with the JCCP would not constitute a breach of public policy stipulated in Article 44(1)(viii) of the Arbitration Act. Specifically, the Tokyo High Court recently reversed a Tokyo District Court decision setting aside an arbitration on the grounds that it violated the JCCP and therefore also violated public policy.[189] The Tokyo High Court clarified that the JCCP does not apply to arbitrations, and therefore an award, which is rendered through a procedure that is not in accordance with the JCCP, would not violate public policy.

In addition, as mentioned in Section II.2.b.vii above, Japanese courts usually take a flexible approach when dealing with *res judicata* and will often admit a defence of a breach of good faith submitted by the defendant in the later lawsuit. As a result, although the Japanese law *res judicata* standard is in principle narrower than that of common law countries, in practice the effects of the prior arbitration award on the subsequent arbitration may not differ drastically between Japan and common law countries. It therefore appears unlikely that courts in Japan would reach the conclusion that an arbitration award should be set aside solely because it was not in accordance with Article 114(1) of the JCCP.

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[185] *ibid*; *Pika*, in: SchiedsVZ 2019, p. 153 et seq.
[186] German Federal Court of Justice, decision dated 11 October 2018 – I ZB 9/18, para. 15.
[187] Cassazione, nos. 15023/2001 and 18041/2012.
[188] Tribunale di Milano, no. 824/2018.
[189] Tokyo High Court judgment rendered on 1 August 2018 (Case No. 2018(ra)817).

ix. Romania

In Romania, there is no case law on whether an arbitration award is against public policy in either setting-aside or *exequatur* proceedings if the award applies *res judicata* differently than under the Romanian law *res judicata* standard.

Under Article 1129 of the Romanian Code, a foreign award which infringes public policy provisions of Romanian international private law is invalid — this is a separate and distinct ground from the grounds for refusal of recognition and enforcement under Article 1125. It is unlikely that a Romanian court would consider the application of different *res judicata* standards than those provided for under Romanian law as a breach of public policy, since courts have deemed this to be under the exclusive competence of arbitral tribunals.[190]

Domestic awards may be set aside for breaching public policy under Article 608(1)(h). If a Romanian-seated arbitral tribunal applied standards for *res judicata* different from those in Romanian law with respect to another prior award also issued in Romania, it is possible that courts might consider this to be a breach of public policy. Romanian courts have held that *res judicata* is an integral aspect of the right to a fair trial, which the public policy exception for setting aside awards is designed to uphold.[191]

x. Spain

An analysis of Spanish case law reveals that Superior Courts of Justice ('*Tribunales Superiores de Justicia*') ('*SCJ*'), which are the competent domestic courts to hear actions to set aside awards,[192] have held that the application of *res judicata* by arbitral tribunals may be reviewed under the public policy ground for annulment (Spanish Arbitration Act, art. 41.1.f).

In Judgment SCJ of Andalusia, No. 13/2022, of July 28, 2022, the SCJ set aside an award on the ground that it violated public policy because it did not give negative *res judicata* effects to a prior award. The arbitrator had adjudicated the merits of the dispute when he should have refrained from doing so, as the matter had already been decided in '*the legal reasoning of the* [first] *award, which undoubtedly must be considered to understand the meaning of its operative part.*'[193] The SCJ found that '[i]*t is a matter that affects public policy. The Constitutional Court's Judgments No. 17/2021 of February 15 and No. 65/2021 of March 15 recognize that violations of public policy, capable of justifying the annulment of an award, include breaches of the principle of the 'intangibility of a prior final decision.*'[194] The SCJ based its reasoning on the principle that an '*award enjoys the same legal standing as a final judgment, with res judicata effects (Article 43 of the Arbitration Act) and is directly enforceable. Thus, the principles upholding the finality of judicial decisions also extend to arbitral awards.*'[195]

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[190] Decision 142 of 2 April 2018, Târgu Mureș Court of Appeal.
[191] Decision 73 of 10 November 2014, Bucharest Court of Appeal.
[192] Spanish Arbitration Act (*Ley 60/2003, de 23 de diciembre, de Arbitraje*), art. 8.5.
[193] Superior Court of Justice of Andalusia Judgment, No. 13/2022, of July 28, 2022 (unofficial translation).
[194] Superior Court of Justice of Andalusia Judgment, No. 13/2022, of July 28, 2022 (unofficial translation).
[195] Superior Court of Justice of Andalusia Judgment, No. 13/2022, of July 28, 2022 (unofficial translation).

In Judgment SCJ of Catalonia, No. 2/2019, of January 14, 2019, the SCJ set aside an award for violating public policy because it incorrectly gave *res judicata* effects to a prior award and declined to adjudicate the merits of a subsequent dispute. In particular, the SCJ found that, while the facts underlying the subsequent claim had been alleged in the prior arbitration, '*albeit from a different angle*' , the claim itself was '*autonomous, [and] had not been formulated in the prior arbitration*', and thus the arbitrator had an obligation to rule on the merits of such claim.[196] This judgment also confirmed that, because the doctrine of *res judicata* must be applied in arbitration proceedings as provided in article 43 of the Spanish Arbitration Act, '*this issue may be reviewed under the annulment ground provided in paragraph f/ of Article 41.1 of the Spanish Arbitration Act* [ie,, public policy]*, which is notably a ground for annulment that can be recognised ex officio (Article 41.2 Spanish Arbitration Act)* [...].'[197]

No case law has been found regarding the *exequatur* of foreign awards that give *res judicata* effects to a prior award.[198]

Based on the existing case law regarding *res judicata* in the set aside context described above, one could reasonably assume that Spanish courts might not be willing to recognise or enforce an arbitral award governed by Spanish law which would (i) apply a different standard from the Spanish *res judicata* standard, or (ii) incorrectly apply the Spanish standard. If the award is governed by a foreign law, a Spanish court might still assess whether the award deciding on the *res judicata* effects of a prior award leads to consequences incompatible with the Spanish principles of public policy.

xi. Sweden

Pursuant to Swedish courts, violations of the principle of *res judicata* do not necessarily amount to a violation of public policy: '*parties are free to raise, or not raise, an objection of lis pendens and res judicata [during the arbitral proceedings], any violation thereof should not violate ordre public. Consequently, a violation based on the aforesaid cannot result in invalidity in accordance with section 33 of the Arbitration Act.*'[199]

The Swedish Supreme Court also held that *ordre public* has a narrow application, and only covers '*highly objectionable cases.*'[200]

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[196] Superior Court of Justice of Catalonia Judgment, No. 2/2019, of January 14, 2019 (unofficial translation). The SCJ clarified that '[t] *he preclusion rule under Article 400.2 of the Civil Procedure Act, as applied by the arbitrator, pertains to the facts or legal grounds of a claim actually made, not to the formulation of the action itself, if it is—as in this case—raised for the first time in the subsequent arbitration proceeding*' (unofficial translation).

[197] Superior Court of Justice of Catalonia Judgment, No. 2/2019, of January 14, 2019 (unofficial translation.) See also Judgment SCJ of Galicia, No. 25/2021, of September 20, 2021 (rejecting the setting-aside of an award on the basis that it did not violate public policy, because the arbitrator had correctly refused to give *res judicata* effects to a previous award.)

[198] The Spanish Supreme Court Order ('*Auto*') of June 17, 2003, is the only identified case granting exequatur to an arbitral award that upheld a *res judicata* objection. However, the Order does not clarify whether the *res judicata* effects upheld by the arbitral award were accorded to a prior arbitral award or to a domestic court judgment.

[199] 2003 Svea Court of Appeal Judgment in *CME v Czech Republic* (Case No T 8735-01).

[200] Swedish Supreme Court, 14 December 2022, *Poland v PL Holdings*, paras 53-54 (Case No. T1569-19).

xii. Switzerland

According to the Swiss Federal Tribunal, international arbitral tribunals seated in Switzerland must apply the same *res judicata* principles that Swiss state courts apply, in particular the narrow approach of limiting the *res judicata* effects to the dispositive part of an award or judgment.

Moreover, an award may be set aside by the Swiss Federal Tribunal for violation of Swiss public policy if the tribunal has disregarded the *res judicata* effects of a prior award or judgment or if it departed in its final award from the opinions expressed in its own previous awards deciding a preliminary question on the merits.[201]

By way of example, the Swiss Federal Tribunal dealt with an application to set aside an award rendered by an arbitral tribunal seated in Zurich, for violation of Swiss public policy on the ground that the arbitral tribunal had disregarded the *res judicata* effects of a prior award. The prior award had been rendered by an arbitral tribunal seated in Germany and dismissed the claim of a former partner of an international law firm for the payment of certain amounts allegedly due by the law firm under a partnership agreement for the business years 2009 and 2010. Subsequently, the former partner initiated the second arbitration and claimed payment for the business years 2011 and 2012. In response, the law firm argued *res judicata*. The arbitral tribunal in the subsequent arbitration dismissed the *res judicata* argument because it did not consider itself bound by the prior award. The law firm then challenged the subsequent award before the Swiss Federal Tribunal claiming that the *res judicata* effects of the prior award extended to questions of law and fact, and that the arbitral tribunal in the subsequent arbitration hence was bound by the findings of the first.

The Swiss Federal Tribunal found that a foreign decision (ie,, the award rendered in Germany) cannot have wider *res judicata* effects than those that would be granted to an equivalent decision of a Swiss court or arbitral tribunal seated in Switzerland. The Swiss Federal Tribunal made clear that the ILA Recommendations and any desire for transnational standards on *res judicata* did not change that conclusion and that there was no legal basis for the application by international arbitral tribunals seated in Switzerland of such transnational standards.[202] As a result, it concluded that the *res judicata* effects applied only to the dispositive part of the first award and did not include its reasoning. The Tribunal held that, since the first award related to different business years, the subject-matter between the awards was different. It accordingly held that the tribunal in the subsequent arbitration did not violate Swiss public policy by considering that it was not bound by the reasoning or factual findings of the prior award. The Swiss Federal Tribunal further suggested (in an *obiter dictum*) that the arbitral tribunal would have violated procedural public policy if it had

[201] Judgment of the Swiss Federal Tribunal 4A_374/2014, para 4.2.1.

[202] Judgment of the Swiss Federal Tribunal 141 III 229, paragraph 3.2.5. ('Weder die von der Beschwerdeführerin ins Feld geführte „besondere Interessenlage der Parteien eines internationalen Schiedsverfahrens' noch die Wünschbarkeit international einheitlicher Standards und transnationaler Konzepte oder die von ihr erwähnten Empfehlungen einer privaten Organisation (ILA Final Report on Res Judicata and Arbitration ...) vermögen an dieser Rechtslage etwas zu ändern. Die Beschwerdeführerin macht denn auch zu Recht nicht etwa geltend, das New Yorker Übereinkommen oder ein anderer anwendbarer Staatsvertrag sehe eine abweichende Regelung der materiellen Rechtskraft vor. Für die Anwendung des von ihr befürworteten weiten Begriffs der Rechtskraft 'nach weltweit verbreitetem Konzept anglo-amerikanischer Herkunft' besteht keine rechtliche Grundlage').

considered itself bound by the preliminary determinations in the prior award's reasoning and factual findings and thereby declined to decide the claim before it, as that claim was different to the one decided in the prior award.[203]

c. Conclusion

As the review of the selected jurisdictions shows, the predominant position is that an arbitration tribunal's determination on the *res judicata* effects of a prior award will not be reviewed by a court on public policy grounds. In the cases discussed, courts in England, Singapore and the United States have declined to set aside or refuse enforcement of an award based on the arbitration tribunal's determination regarding the *res judicata* effects of prior awards. In civil law jurisdictions, Canadian courts (applying civil law) and French courts have taken a similar position holding that *res judicata* does not form part of public policy. While the courts of Belgium, Italy, Japan, Romania and Sweden have not ruled on that precise issue, their jurisprudence on the scope of public policy suggests that, if seized with this issue, they would likely not review a tribunal's decision on the *res judicata* effects of a prior award on public policy grounds applying their own domestic *res judicata* standard.

The courts of Switzerland and Germany, however, have taken the position that a tribunal seated in their respective jurisdictions must apply the domestic law *res judicata* standard when assessing the *res judicata* effects of a prior award. Failure to do so would constitute a violation of public policy and result in the setting-aside of the award. Courts in Spain have taken the same position with respect to domestic awards. While courts in Argentina and Brazil have not had an opportunity to address this issue, the existing case law makes clear that they regard *res judicata* as part of public policy. It is, however, unclear, whether these courts— when reviewing an award— would insist on applying their domestic *res judicata* standards or would conclude that an autonomous *res judicata* standard that differs in some respects from the domestic *res judicata* standard would meet the public policy goal.

4. Case Law of Arbitration Tribunals Regarding the *Res Judicata* Effects of Prior Arbitration Awards

In this section, the Task Force provides an overview of publicly available arbitration awards addressing the *res judicata* effects of a prior award. Because most arbitration awards remain unpublished, the awards discussed in this section represent only a small fraction of the awards addressing the *res judicata* effects of a prior award.

a. Choice of law applicable to *res judicata* effects

The review of the available awards shows that arbitration tribunals have traditionally engaged in a choice-of-law analysis to apply a specific domestic law *res judicata* standard. In the majority of cases, tribunals have selected the law of the seat, as the procedural law of the arbitration. Some tribunals have selected the *res judicata* standard of the substantive law applicable in the arbitration. Others have applied a hybrid approach that considers both domestic and autonomous *res judicata* standards, including the ILA Recommendations. Finally, a limited number of tribunals have emphasised the autonomous character of

[203] Judgment of the Swiss Federal Tribunal 141 III 229, paragraph 3.2.6.

international commercial arbitration when determining an appropriate approach to *res judicata* questions, leading them to apply an approach not strictly tethered to a specific domestic law.

i. Application of the law of the seat (lex arbitri)

Tribunals generally justify the choice of the law of the seat on grounds that *res judicata* is a procedural matter, and the law of the seat typically governs procedural questions as the *lex arbitri*.[204] The prevailing approach is to apply the law of the seat of the second arbitration in which the *res judicata* question arises,[205] although some tribunals have also relied on the law of the seat in which the first award was rendered. Tribunals do not always explain their reasoning for choosing the law of the seat in detail.

For example, in ICC Case 5901 of 1989, seated in France, the tribunal held that French law applied to *res judicata* of a prior Swiss award since French courts would have jurisdiction over any future proceeding to annul the award.[206] The tribunal also noted that French law on *res judicata* was consistent with both Swiss law and international arbitral precedents applying both civil and common law provisions.[207]

Where the seat of both arbitrations is the same, tribunals have not always distinguished which seat is the most relevant for choosing the applicable *res judicata* standard. For example, in ICC Cases 2745 and 2762 of 1977 (joined), the tribunal found that French law governed the question of *res judicata*[208] given that the prior award was rendered in France, and that the second arbitration was seated in Paris and subject to French procedural law.[209] Similarly, in the *Romanian Lake Arbitrations*, the ICC tribunal held that French law applied to the question of *res judicata* since both arbitrations were seated in Paris, and the respondent had failed to establish a sufficient connection to Romanian law (the applicable substantive law) to overcome the general presumption that the *lex arbitri* should govern *res judicata* issues.[210]

In ICC Case 7438 of 1994, which was seated in Zurich, the arbitrator applied Swiss law to evaluate the *res judicata* effects of an earlier Zurich-seated arbitration because of three

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[204] *See, eg,* ICC Case No. 3540, Award dated 3 October 1988, reported in Journal du droit international (Clunet), No. 4 (1981), pp. 9214-21; ICC Case No. 5901, Final Award dated 1989, reported in ICC International Court of Arbitration Bulletin, Vol. 4, No. 1 (1993).

[205] S. Schaffstein, *The Doctrine of* Res Judicata *Before International Commercial Arbitral Tribunals* (Oxford University Press, 2016), p. 153; L. G. Radicati di Brozolo & F. Ponzano, 'How to assess the *res judicata* effects of international arbitral awards: giving concreteness to an autonomous approach,' Arb Int'l (2024) (advance access publication: 18 July 2024), p. 7. *See also Abu Dhabi Investment Authority v Citigroup Inc (II)*, ICDR Case No. 50-2013-000782, Decision on Preliminary Objections dated 2 October 2015, para 236 ('The Tribunal acknowledges that, from the authorities and scholars cited, it appears to be normal arbitral practice to apply the res judicata law of the arbitral seat.').

[206] Radicati di Brozolo & Ponzano, 'How to assess *res judicata*', p. 7.

[207] Schaffstein, *The Doctrine of* Res Judicata, p. 155.

[208] *See further* Schaffstein, *The Doctrine of* Res Judicata, fn 215; R. J. Montero et al, '*Res judicata* and issue preclusion in international arbitration: an ICC case study', Les Cahiers de l'Arbitrage (2016), 19, 32.

[209] ICC Case Nos. 2745 and 2762, Award dated 1977, reported in S. Jarvin & Y. Derains (eds), Collection of ICC Arbitral Awards 1974-1985 (1990), p. 328 ('Mais, s'agissant d'une sentence française et de son incidence sur un autre litige également soumis à un arbitre statuant selon la volonté des parties à Paris et, sous réserve de l'art. 11 du Règlement d'Arbitrage de la C.C.I., à la loi de procédure française, l'arbitre ne peut pas s'écarter de la notion française et belge, quelle que soit d'ailleurs la loi applicable au fond du litige, question examinée ci-dessus.').

[210] As reported in Montero et al., p. 33.

considerations: (i) the arbitration clause provided for arbitration in Zurich; (ii) the agreement concerning the seat was confirmed in the terms of reference; and (iii) the seat of the prior arbitration was also Zurich.[211] Similarly, in ICC Case 13808 of 2008 (unpublished), the tribunal justified its choice of French law to assess the *res judicata* effects on the basis that '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; and the parties had confirmed their agreement to the application of that law.'[212]

By contrast, in ICC Case 23755 of 2023, the tribunal appeared to accept respondent's argument that it should assess the *res judicata* effects of an award rendered in France under French law, even though the second arbitration was seated in New York and governed by New York law.[213]

In some cases, tribunals have explicitly chosen the law of the seat rather than international principles of *res judicata*. For example, in an unpublished 2007 award rendered in a Stockholm-seated UNCITRAL arbitration, the tribunal concluded that it was 'bound to apply Swedish law' — ie,, the law of the seat — 'rather than international principles of *res judicata* applicable in international commercial arbitration.'[214] In that case, Swedish law also governed the merits and the prior arbitration had also been conducted in Sweden.[215] Similarly, in ICC Case 13808 of 2008 (unpublished), discussed above, the tribunal explicitly rejected the application of the ILA Recommendations, holding that they had no legal value and domestic law applied despite the 'imaginative views of certain experts.'[216]

ii. Application of the substantive law

In a minority of cases, tribunals have applied the *res judicata* standard from the domestic law applicable to the *substance* of the dispute.[217] This approach appears to be mostly driven by the agreement or arguments of the parties or the tribunal's views about the expectation of the parties.

For example, in ICC Case 6293 of 1990, the tribunal applied principles of *res judicata* from New York law, which governed the merits, after both parties based their *res judicata* arguments on New York law.[218] In ICC Case 10027 of 2000, the parties likewise agreed that *res judicata* was governed by New York law as the law applicable to the merits, which the

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[211] Schaffstein, *The Doctrine of* Res Judicata, p. 154.

[212] L. G. Radicati di Brozolo, '*Res judicata* and international arbitral awards', ASA Special Series (2011), pp. 12-13.

[213] *iXblue v Safran*, ICC Case No. 23775/DDA/AZO/SP/ETT, Partial Award dated 14 December 2023, para 11.150.

[214] Reported in K. Hobér, 'Res Judicata and Lis Pendens in International Arbitration', The Hague Academy Collected Courses Online, Vol. 366 (2014), pp. 259-62. *See* Schaffstein, *The Doctrine of* Res Judicata, fn 215; Radicati di Brozolo & Ponzano, 'How to assess *res judicata*', pp. 7-8.

[215] B. Hanotiau, 'The Res Judicata Effect of an Award Rendered in Connected Arbitration Arising from the Same Project' in *Complex Arbitrations: Multi-party, Multi-contract, Multi-issue – A Comparative Study (Second Edition)* (Kluwer Law International, 2020), p. 434.

[216] Radicati di Brozolo, '*Res judicata* and international arbitral awards', p. 13; Schaffstein, *The Doctrine of* Res Judicata, fn 223.

[217] *See* ICC Case No. 6293, Final Award dated 1 January 1990, reported in Dominique Hascher, 'L'autorité de la Chose Jugée des Sentences Arbitrales', p. 20, in *Droit international privé: travaux du Comité français de droit international privé*, 2000-2002, (Pedone 2004). *See also* Schaffstein, *The Doctrine of* Res Judicata, p. 155.

[218] ICC Case No. 6293, Final Award dated 1 January 1990; Schaffstein, *The Doctrine of* Res Judicata, fn 221.

tribunal then applied even as it noted that it considered *res judicata* a procedural issue—although in this case, New York law was also the *lex arbitri*, rendering the choice between the two moot.[219]

More recently, in ICC Case 23949 of 2019, the arbitrator applied principles of *res judicata* from English law, the substantive law of the contract, which had been the basis of the arguments of both claimants and respondents, even though Hong Kong law was the *lex arbitri*. The arbitrator noted that '[n]either Party addressed whether Hong Kong rather than English law applied to the determination of [the *res judicata* issue], or if (and if so how) Hong Kong law differed from English law on this issue,' but that in any event he was 'satisfied that the Hong Kong law does not differ from the English law in any relevant or material respect' with regards to the specific *res judicata* question at issue.[220]

By contrast, in the recent *Grupo Unidos (I)* and *(II)* cases (2018 and 2020, respectively),[221] both of which were seated in Miami and applied US federal law as the *lex arbitri*, the ICC tribunals relied on the parties' choice of Panama law as the substantive law of the relevant contracts to reject respondents' arguments to apply principles of collateral estoppel/issue preclusion derived from US law. In *Grupo Unidos (I)* (2018), the tribunal found that 'although the question is not entirely uncontroversial, the Tribunal considers that the preclusive effect of prior awards is governed by the law applicable to the substance of the dispute, which in this case is Panamanian law' and thus rejected the application of issue preclusion. It noted in doing so that this result 'is consistent with the Parties' expectations in this case' given that all parties to both proceedings were from civil law jurisdictions, which typically do not recognise issue preclusion.[222]

The *Grupo Unidos (II)* (2020) tribunal similarly rejected the application of collateral estoppel based on US law as the *lex arbitri*, noting that 'in international arbitration, primary consideration must be given to the parties' procedural autonomy and their expectations.'[223] It concluded that, 'particularly in light of the Parties' choice to have their disputes decided in international arbitration and their choice of Panamanian law as the law applicable to the merits of their disputes, the Parties' could have reasonably expected *res judicata* to apply only in the sense of claim preclusion.'[224]

In some cases, tribunals have applied both the law of the seat and aspects of substantive law based on the particular facts and circumstances of the case. For example, in SIAC Case No. ARB/414/17 of 2021, the tribunal applied the substantive law of the contract (New York law) to assess issue preclusion, and the law of the seat (Singapore law) to claim preclusion. In doing so, the tribunal reasoned that while the parties had agreed that 'under New York law, collateral estoppel is substantive in nature,' the issue of claim preclusion — which it

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[219] Schaffstein, *The Doctrine of* Res Judicata, fn 221.

[220] *Thunderbird Resorts Inc. v Jack Ray Mitchell*, ICC Case No. 23949/PTA, Final Partial Award on Bifurcated Issues dated 24 October 2019, para 124.

[221] *Grupo Unidos por El Canal SA, Sacyr SA, Salini-Impregilo SPA, Jan de Nul NV, Constructora Urbana SA, Sofidra SA v Autoridad del Canal de Panama*, ICC Case No. 22588, Final Award dated 10 December 2018 and ICC Case No. 20910, Partial Award dated 21 September 2020.

[222] *Grupo Unidos (I)*, ICC Case No. 22588/ASM/JPA, Final Award dated 10 December 2018, para 206.

[223] *Grupo Unidos (II)*, ICC Case No. 20910/ASM/JPA, Partial Award dated 21 September 2020, para 492.

[224] *Grupo Unidos (II)*, ICC Case No. 20910/ASM/JPA, Partial Award dated 21 September 2020, para 495.

characterized as fundamentally a question of abuse of process — is 'a procedural matter under Singapore law.'[225]

In cases where the domestic law governing procedure and substance is identical, tribunals have often applied that law to *res judicata* without articulating whether they did so because that law applies to procedure, the merits, or because of the parties' agreement.[226] For example, the Vienna-seated tribunal in ICC Case 17043 of 2010 observed that, while *res judicata* was a procedural rather than substantive matter per the leading view in Austrian law, the distinction was irrelevant because both the procedure and the substance of the arbitration were governed by Austrian law.[227]

iii. No clear choice of law/reference to general principles

Some tribunals have applied *res judicata* principles to prior awards without explicitly stating that a particular law applies.[228] For example, in ICC Case 3267 of 1984, the tribunal was empowered to act as *amiable compositeur* and held, with respect to its own prior partial award, that '[i]rrespective from the academic views that may be entertained on the extent of the principle of *res judicata* on the reasons of a decision, it would be unfair to both parties to depart in a final award from the views held in the previous award, to the extent that they were necessary for the disposition of certain issues.'[229]

The tribunal in ICC Case 13894 of 2009 (*Jnah v Marriott*) also grounded its conclusions in the 'general principle' of law that 'a plea of *res judicata* must show that a final and binding decision was made in previous proceedings where both the parties and the issues were identical.'[230] In doing so, the tribunal noted that the standard it was applying was 'adopted

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[225] *Lao Holdings and Sanum v San Marco Capital, Kelly Gass and the Government of Lao*, SIAC Case No. ARB/414/17/QW, Award dated 11 August 2021, paras 137, 272. *See also ibid.* para 271 (noting that while 'res judicata is a rule of substantive law, ... abuse of process is a concept which informs the exercise of the court's procedural powers').

[226] Schaffstein, *The Doctrine of* Res Judicata, fn 215 (describing, for example, CRCICA Case 67 of 1995, in which Egyptian law governed the procedure in both arbitrations as well as the merits, and was thus held to apply to *res judicata*).

[227] Hanotiau, *Complex Arbitrations*, pp. 435–36.

[228] *See Globe Nuclear Services and Supply GNSS Ltd v AO Techsnabexport* T 5883-07, Svea Court of Appeal, Judgment dated 18 December 2009; *Limited Liability Company Amto v Ukraine*, SCC Case No. 080/2005, Award dated 26 March 2008; ICC Case No. 6363, Final Award dated 1991, reported in Yearbook Commercial Arbitration, Vol. 17 (1992); CRICA Case No. 67/1995, Award dated 11 August 1996. *See also* Schaffstein, *The Doctrine of* Res Judicata, p. 160. *But see* ICC Case No. 4126, Partial Award dated 1984, reported in S. Jarvin & Y. Derains (eds) Collection of ICC Arbitral Awards 1974-1985 (1990), pp. 513-14 (holding that even though there was no identity of parties, procedural rules as recognised by a number of countries are opposed to a party bringing the same claim in distinct jurisdictions where no change of circumstances has occurred).

[229] *Mexican Construction Company v Belgian Company (member of a Consortium)*, ICC Case No. 3267 of 1984, Final Award dated 28 March 1984, reported in Yearbook Commercial Arbitration, Vol. 12 (1987), p. 89. *See also* Radicati di Brozolo, '*Res judicata* and international arbitral awards', p. 18. *See also* recent decisions of arbitral tribunals at the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, where tribunals automatically applied Romanian *res judicata* principles, as reported in Bucharest Court of Appeal Judgment of 29 March 2022, Judgment 90F of 10 June 2021, and Judgment 64 of 25 June 2019. *See also* the approach at the Stockholm Chamber of Commerce, as reported in *Globe Nuclear Services and Supply GNSS Ltd v AO Techsnabexport* T 5883-07, Svea Court of Appeal, Judgment dated 18 December 2009.

[230] *Jnah v Marriott*, ICC Case No. 13894/EBS/VRO, Final Award dated 4 June 2009, para 89.

by most national laws including the laws of France and the US State Maryland'— the domestic laws applicable to procedure and the substantive law of the contract, respectively.[231]

In some cases, tribunals have also applied the rules of a particular domestic law only after first determining that they were not strictly bound by them given the autonomous character of international arbitration. For example, in ICC Case 13509 of 2006, the law applicable to both arbitrations and to the merits was French law. However, the tribunal stated that it was not bound by French rules on *res judicata*, and instead that they were to be used as a 'source of inspiration' if the tribunal found that they 'appear[ed] reasonable.'[232]

iv. Application of a hybrid approach

More recently, some tribunals have also explicitly considered principles of *res judicata* generally accepted in international practice, including by reference to the ILA Recommendations, in combination with the domestic law otherwise applicable.[233]

For example, the ICC tribunal in *Sanum Investments v St Group* (2023/24) adopted an approach to *res judicata* based both on Macau law and the ILA Recommendations. The tribunal determined that Macau law governed the *res judicata* effects of a prior award rendered by a Singapore-seated tribunal but found that no provisions in Macau law directly addressed *res judicata* with regard to awards rendered outside Macau. It therefore derived a legal standard applicable to the preclusive effects of foreign awards from a combination of Macau arbitration law and the ILA Recommendations as a secondary source of guidance, which the tribunal noted were non-binding but 'provide[d] useful guidance on international *res judicata* principles that might appropriately apply in international commercial arbitrations.'[234]

Similarly, in *Rutas de Lima v Municipalidad Metropolitana de Lima (II)* (2022), the tribunal adopted an approach to *res judicata* based on US federal law (the *lex arbitri*), Peruvian law (the substantive law), and the ILA Recommendations. More specifically, it held that *res judicata* is governed by the *lex arbitri*, but that the applicable Peruvian law and 'the recommendations of the International Law Association, which reflect developments from multiple jurisdictions,' were also relevant.[235] It ultimately found that the three sources 'are all in agreement' as to the requirements for the application of *res judicata*.[236]

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[231] *Jnah v Marriott*, ICC Case No. 13894/EBS/VRO, Final Award dated 4 June 2009, para 89.

[232] ICC Case No. 13509, Award dated 2006, reported in Journal du droit international, No. 4 (2008) (unofficial English translation), pp. 1204-05. *See also* Schaffstein, *The Doctrine of* Res Judicata, pp. 155-56; Radicati di Brozolo & Ponzano, 'How to assess *res judicata*', p. 13.

[233] Or what has been described as an 'autonomous' or 'pragmatic' approach. *See* ICC Case No. 13509, Award dated 2006. See also Schaffstein, *The Doctrine of* Res Judicata, p. 159. The term 'pragmatic approach' was reiterated in *Abu Dhabi Investment Authority v Citigroup Inc (II)*, ICDR Case No. 50-2013-000782, Decision on Preliminary Objections dated 2 October 2015.

[234] *Sanum Investments Ltd v St Group Co Ltd and others*, ICC Case No 25100/PTA/XZG, Award and Addendum to Award, dated 16 October 2023 and 25 January 2024, paras 352-54 (explaining its choice on the ground that the respondent had objected to their application).

[235] *Rutas de Lima v Municipalidad Metropolitana de Lima (II)*, UNCITRAL, Award dated 16 December 2022, paras 219-223.

[236] *Rutas de Lima v Municipalidad Metropolitana de Lima (II)*, UNCITRAL, Award dated 16 December 2022, para 224

In *Abu Dhabi Investment Authority v Citigroup* (2015), the tribunal explicitly adopted a hybrid approach that took into account both New York law, as the *lex arbitri*, and international principles to establish the test and scope for *res judicata*. After noting its authority under the ICDR Rules to apply rules of law that the tribunal 'deems 'appropriate'' absent agreement of the parties, the tribunal concluded that a hybrid approach was most appropriate, as it took into account both the prevailing practice of applying the domestic law of the seat, which might have informed the parties' expectations, while also recognizing that the parties had explicitly chosen to submit their dispute to international arbitration.[237] The tribunal also noted that application of international principles could lead to 'consistency and coherency for preclusion rules in international arbitration,' while noting 'still existing uncertainty and disagreement regarding the application of such an international standard.'[238]

v. Application of an autonomous approach to res judicata

At least one published case has exclusively determined *res judicata* effects of a prior award by reference to the ILA Recommendations. In that case, a 2019 Milan Chamber of Arbitration case between two Romanian companies, the sole arbitrator rejected the application of Romanian law, as the applicable substantive law, on the grounds that *res judicata* was not substantive, and rejected Italian law, the law of the seat of both arbitrations, on grounds that the award had a 'weak, if not none, connection with Italy (apart from the seat of arbitration), and that very probably its enforcement, if needed, will be sought in Romania.'[239] Instead, the arbitrator stated that he 'prefer[red] to set aside the domestic rules, and to adopt a transnational approach, based on uniform rules, having regard to the specificity of the arbitration process.'[240] This approach, he noted, was 'suggested by many authoritative legal writers and supported by the [ILA Recommendations],' which he emphasised were 'intended to be a useful guidance for arbitrators.'[241]

b. Application of *res judicata* standards by arbitration tribunals

Given the variety of approaches taken by arbitration tribunals, it is unsurprising that the test and scope of *res judicata* applied by arbitration tribunals in available awards has also varied from case to case with respect to the test applied and the scope of *res judicata,* including the availability of doctrines of claim preclusion, issue preclusion and abuse of process.

i. Preclusion Regarding Claims Raised in the Previous Proceedings

Because many domestic laws use a version of the triple identity test to determine *res judicata* effects, arbitral tribunals applying domestic law have also frequently applied a triple identity test.[242] However, because domestic laws apply different tests to *res judicata*, including

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[237] *Abu Dhabi Investment Authority v Citigroup Inc (II)*, ICDR Case No. 50-2013-000782, Decision on Preliminary Objections dated 2 October 2015, para 228.

[238] *Abu Dhabi Investment Authority v Citigroup Inc (II)*, ICDR Case No. 50-2013-000782, Decision on Preliminary Objections dated 2 October 2015, para 247.

[239] Milan Chamber of Arbitration, 2019 Award, *in Rivista dell'Arbitrato, 2022*, p. 934.

[240] *Ibid.*

[241] *Ibid.*

[242] *See, eg, Grupo Unidos (I)*, ICC Case No. 22588/ASM/JPA, Final Award dated 10 December 2018, para 205; *Grupo Unidos (II)*, ICC Case No. 20910/ASM/JPA, Partial Award dated 21 September 2020, para 492;

different variations on the triple identity test, tribunals applying domestic law have likewise varied in that approach. Tribunals applying a hybrid or autonomous approach have also applied variations on this approach.

For example, as discussed in Section II.2.b.ix above, Romania is among the civil law jurisdictions which permit wider effects of *res judicata*. Tribunals of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, which apply Romanian law, have applied positive *res judicata* effects to prior awards without strict application of the triple identity test, including one award that held that identity of parties and a 'close connection' between the causes of action was sufficient to grant a prior award conclusive effects in the arbitration.[243]

Further, some tribunals, despite holding that a particular domestic law applies to *res judicata*, nevertheless have applied a test which is either stricter or more permissive than that of the applicable law, suggesting that their approach is at least to a certain extent independent of the applicable domestic law. For example, in ICC Case 6293 of 1990, the tribunal held that New York law applied to *res judicata*, but then applied a version of the triple identity test that appeared stricter than the comparatively broader test under New York law. The tribunal specified that, regardless of the requirements under New York law, *res judicata* applies where a claim is essentially identical to a claim previously decided between the same parties.[244]

Tribunals that have adopted a hybrid approach have also applied hybrid versions of the triple identity test. In *Sanum Investments v St Group* (2023/2024), discussed above, the tribunal applied principles it found relevant to *res judicata* based on general Macau arbitration law, the ILA Recommendations, and the specific circumstances of the case, namely: (i) the triple identity test; (ii) that the first award is final and binding in the country of origin; and (iii) that the first award is capable of recognition at the seat of the second arbitration.

In *Abu Dhabi Investment Authority v Citigroup* (2015), where, as discussed above, the tribunal applied a hybrid approach, the tribunal found that *res judicata* required (i) a final judgment on the merits; (ii) the parties are the same or in privity; and (iii) the current claims were brought before the first tribunal, or the current claims could or should have been brought before the first tribunal.

In the 2019 Milan Chamber of Commerce case discussed above, the arbitrator relied on the ILA Recommendations to apply a triple identity test and rejected any *res judicata* effects of a prior award on the ground that the *causa petendi* and the *petitum* were not identical.[245]

CRCICA Case No. 67/1995, Award dated 11 August 1996; ICC Case 6363, Award dated 1991, reported in Yearbook Commercial Arbitration, Vol. 17 (1992); ICC Case No. 7061, Award dated 1997, cited by Hanotiau, *Complex Arbitrations*, para 551; *Romanian Lake Arbitrations*, cited in Montero and Ruiz.

243 Bucharest Court of Appeal, Judgment 64 dated 25 June 2019.

244 Schaffstein, *The Doctrine of* Res Judicata, pp. 160-61.

245 Milan Chamber of Arbitration, 2019 Award, *in Rivista dell'Arbitrato, 2022*, p. 934.

ii. Scope of res judicata effects

The choice of a particular domestic law also affects the scope of *res judicata* effects. As noted above, it is generally agreed that the dispositive part of a prior arbitral award has *res judicata* effects. However, domestic laws differ— sometimes even internally— on the extent to which the reasoning underlying the conclusions constitutes *res judicata*. Arbitral practice likewise reflects this variation.[246]

For example, in *Grupo Unidos (I)* (2018), the tribunal concluded that once the triple identity test was met, only the dispositive part of the relevant arbitral awards could produce preclusive effects, consistent with Panamanian law.[247] The tribunal in *Grupo Unidos (II)* (2020) similarly found that *res judicata* operates only to bind the parties to the dispositive part of prior awards, though it noted that since the prior awards were decided by 'highly experienced and eminent international commercial arbitration experts,' their legal findings 'have some persuasive authority.'[248]

The tribunal in ICC Case 7438 of 1994 similarly held that under Swiss law, only the dispositive part of the award has *res judicata* effects, though it referred to the reasoning to determine the meaning and scope of the dispositive part.[249] The tribunal in ICC Case 13509 of 2006, applying French law 'as a source of inspiration,' also found that *res judicata* exclusively covered the dispositive part of the earlier award.[250]

In a Stockholm-seated UNCITRAL arbitration of 2007, the tribunal observed that in some circumstances, Swedish law does allow for *res judicata* effects with respect to reasonings, but ultimately held that 'the determinations made respecting the advance payments in the reasons of the First Award are incidental and not fundamental' to the dispositive part, and thus not covered by *res judicata*.[251]

However, other tribunals have applied domestic law to find *res judicata* effects not only from the dispositive part of the judgment but also from conclusions made in reasoning. This was the case in the *Romanian Lake Arbitrations*, ICC Cases 2745 and 2762 of 1977 (joined), where the tribunal, applying French law, found that conclusions relating to payment of a performance bond had *res judicata* effects in a subsequent case seeking losses for breach of contract. One arbitrator dissented from this decision in part, finding that the earlier tribunal had only partially decided the relevant issues.[252]

The tribunal in ICC Case 8023 of 1995, also applying French law, similarly found that *res judicata* extended to the reasons that formed the necessary foundation of the dispositive part of the earlier award. The tribunal noted that this applied not only to the necessary reasons

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[246] *See, however,* the approach of Romanian tribunals, where the national *res judicata* law allows for both preclusive and conclusive effects of judgments and awards, with respect to both the dispositive part and the necessary reasonings. *See* the decisions of tribunals as reported in Bucharest Court of Appeal Judgment 90F of 10 June 2021, Judgment 29 March 2022, and Judgment 64 of 25 June 2019.

[247] *Grupo Unidos (I)*, ICC Case No. 22588/ASM/JPA, Final Award dated 10 December 2018, para 205.

[248] *Grupo Unidos (II)*, ICC Case No. 20910/ASM/JPA, Partial Award dated 21 September 2020, paras 498-99.

[249] Schaffstein, *The Doctrine of* Res Judicata, p. 166.

[250] Radicati di Brozolo & Ponzano, 'How to assess *res judicata*', p. 13.

[251] Schaffstein, *The Doctrine of* Res Judicata, p. 167.

[252] *Romanian Lake Arbitrations* (1977), ICC, reported by Montero and Ruiz, 95-100.

pronounced in clear and unambiguous terms, but also to the findings necessarily implied in the award.[253]

iii. Collateral estoppel/issue preclusion

Depending on the applicable law, tribunals have occasionally applied formal doctrines of issue preclusion (collateral estoppel), which provide that under certain circumstances parties are barred from relitigating issues of fact or law that have already been determined in a prior proceeding.

For example, as discussed above, the tribunals in *Grupo Unidos (I)* and *(II)* (2018 and 2020, respectively) explicitly rejected the application of issue preclusion, observing that Panamanian law, like most civil law jurisdictions, 'does not recognize' collateral estoppel.[254] The *Grupo Unidos (II)* (2020) tribunal further noted that 'the much broader doctrine of issue preclusion that applies in US courts does not necessarily form part of the accepted international res judicata norms.'[255]

Some tribunals have applied doctrines of issue preclusion. The Singapore-seated tribunal in *Lao Holdings v Sanum Capital* (2021), applying New York law as the law governing the contract, specifically recognised and applied the doctrine of collateral estoppel to enjoin 're-litigation of an issue of law or fact that was raised, litigated, and actually decided by a judgment in a prior proceeding.'[256] Applying the multi-factor test for issue preclusion under New York law, the tribunal concluded that the claimants were bound by the adverse findings of fact and conclusions of law in the prior award, which were dispositive of nearly all claims in the arbitration.

Other tribunals have recognised the availability of issue preclusion as a doctrine but rejected its application to the facts. This was the case for the New York-seated AAA tribunal in *Smithkline v Biogen* (1995), also applying New York law, which rejected the claimants' plea of collateral estoppel with respect to a prior London-seated UNCITRAL award on the ground that the issues raised were not identical to those already determined.[257] Similarly, the tribunal in ICC Case 7061 of 1997 rejected the application of issue preclusion on the grounds that the parties were not the same, the arbitration in question took place on the basis of a different supply contract, the applicable law was different, and the evidence may not have been equally available to both tribunals.[258]

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[253] Schaffstein, *The Doctrine of* Res Judicata, p. 166.

[254] *Grupo Unidos (I)*, ICC Case No. 22588/ASM/JPA, Final Award dated 10 December 2018, para 206; *Grupo Unidos (II)*, ICC Case No. 20910/ASM/JPA, Partial Award dated 21 September 2020, para 491.

[255] *Grupo Unidos (II)*, ICC Case No. 20910/ASM/JPA, Partial Award dated 21 September 2020, para 493.

[256] *Lao Holdings and Sanum v San Marco Capital, Kelly Gass and the Government of Lao*, SIAC Case No. ARB/414/17/QW, Award dated 11 August 2021, para 137.

[257] See *Matter of Arbitration Between Smithkline Beecham Biologicals, S.A. v Biogen, Inc.*, SDNY (1996), 1996 WL 209897, at *2.

[258] Schaffstein, *The Doctrine of* Res Judicata, p. 163.

iv. Preclusion regarding matters that could or should have been raised in the prior arbitration/Abuse of process

Several arbitration tribunals have also held that, where a claim could or should have been brought in a prior arbitration but was not, the party was then barred from raising it in a subsequent arbitration. There are, however, few publicly available awards where this has been considered.[259]

The ILA Interim Report referenced an unreported ICC case (date unknown) in which a French-seated tribunal, applying New York law, determined that the claimant had a 'full and fair opportunity' to raise the claim in the prior arbitration, and its failure to do so now barred the claim.[260] In *Dexia Bank v Persero* (2001), a SIAC tribunal applied English law and determined that it had no jurisdiction over the dispute, since the claims before it could or should have been brought in the prior arbitration.[261]

In ICC Case 13808 of 2008, where French law applied, the tribunal held the claimant's failure to raise the nullity of a contract which had also been at issue in the prior arbitration barred that claim in the subsequent arbitration, as it would have reversed the effects of the first arbitration.[262] The tribunal also considered claim preclusion in *Lao Holdings v San Marco Capital* (2021), though the tribunal— applying Singapore law as the *lex arbitri*— found that not all elements of the relevant test had been met.[263]

By contrast, the Paris-seated tribunal in *Jnah v Marriott* (2009) refused to apply claim preclusion, noting that it was 'not familiar with any legal theory applicable to international arbitration similar to the English *Henderson v Henderson* theory'— ie,, the doctrine of claim preclusion[264] — 'that would require Jnah to fire all of its shots in one arbitration.'[265]

In *Abu Dhabi Investment Authority v Citigroup* (2015), the tribunal, in considering whether a claim 'could or should have' been brought in the prior arbitration, noted that it would evaluate whether this would constitute procedural unfairness or abuse, a requirement derived from the ILA Recommendations.[266]

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[259] Schaffstein, *The Doctrine of* Res Judicata, p. 166.
[260] ILA Interim Report on *Res Judicata* and Arbitration (2004), p. 63.
[261] *Dexia Bank SA v PT Asuransi Jasa Indonesia (Persero)*, SIAC Case No. 23, Award dated 2001. *See also* Judgment of the High Court of Singapore [2005] SGHC 197, para 26.
[262] Montero et al., p. 39.
[263] *Lao Holdings and Sanum v San Marco Capital, Kelly Gass and the Government of Lao*, SIAC Case No. ARB/414/17/QW, Award dated 11 August 2021, para 290.
[264] *Henderson v Henderson* (3 Hare 100, 67 ER 313); *See* Section II.2.a.iii above.
[265] *Jnah v Marriott*, ICC Case No. 13894/EBS/VRO, Final Award dated 4 June 2009, para 96.
[266] *Abu Dhabi Investment Authority v Citigroup Inc (II)*, ICDR Case No. 50-2013-000782, Decision on Preliminary Objections dated 2 October 2015, paras 277 et seq.

III. Analysis

In this Section, the Task Force provides an analysis of (i) the challenges of the current choice-of-law or hybrid approaches to *res judicata*; (ii) the legal basis for an autonomous approach to *res judicata*; and (iii) the potential obstacles regarding the adoption of guidance on an autonomous approach to *res judicata*.

1. Inconsistencies and Challenges in Current *Res Judicata* Practices

The review of the available arbitral jurisprudence in Section II.4 shows that, when assessing the *res judicata* effects of prior arbitration awards, most tribunals purport to apply, at least as a starting point for their analysis, the *res judicata* standard of a domestic law identified according to a conflict-of-laws approach.

This conflict-of-laws approach has been criticized for its lack of predictability. In particular, (i) tribunals have used different criteria for determining which domestic *res judicata* standard to apply and often fail to properly reason the choice of the domestic law; (ii) the choice-of-law approach creates uncertainty regarding the scope of *res judicata* and (iii) domestic law standards of *res judicata* are not always properly suited for international arbitration.

a. Challenges in identifying the law governing arbitral res judicata

Identifying the law applicable to *res judicata* requires determining first the conflict-of-laws methodology to identify the applicable law. This can be a complex and unpredictable process given the lack of clear conflict rules applicable in arbitration and specifically to *res judicata*. Tribunals generally determine the law whose *res judicata* rules they purport to apply in a pragmatic way, with little, if any, proper choice-of-law analysis.

As Section II.4.a shows, the domestic laws most frequently considered are the law of the seat (*lex arbitri*) of the second arbitration, the law of the seat of the first arbitration and the law governing the substantive rights at issue in the second arbitration.[267]

Sometimes tribunals do not explain the grounds for applying a given law and it is not possible to infer the choice from the award. This is particularly the case where both the first and the second arbitration are seated in the same jurisdiction; or where the substantive law is the same as the law of the seat.

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[267] *See also* Hascher, pp. 18-21; Schaffstein, *The Doctrine of Res Judicata*, p. 183; Silja Schaffstein, 'The Law Governing Res Judicata' in F. Ferrari & S. Kroll (eds), *Conflict of Laws in International Commercial Arbitration* (Juris 2019), p. 287ff; Bernard Hanotiau, 'Res Judicata and the 'Could Have Been Claims'' in Neil Kaplan and Michael Moser (eds), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* (Wolters Kluwer, 2018) 291; ILA Final Report on *Res Judicata* and Arbitration (2006), para 27; Radicati di Brozolo, '*Res judicata* and international arbitral awards', p. 143; G. Born, *International Commercial Arbitration*, (3rd ed., Kluwer Law International, 2020), p. 4140ff; C. Seraglini, 'Le Droit Applicable à l'Autorité de la Chose Jugée Dans l'Arbitrage' Rev Arb 51 (2016), p. 60; G. A. Bermann, 'Res Judicata in International Arbitration' in S. Kröll, A. K. Bjorklund, and F. Ferrari (eds), *Cambridge Compendium of International Commercial and Investment Arbitration* (Cambridge University Press, 2023), p. 1685ff.

i. The law of the seat

Tribunals predominantly decide *res judicata* on the basis of the law of the seat of the second arbitration. Most tribunals appear to base their decision on the characterization of *res judicata* as a matter of procedure; or on a strict territorial conception of arbitration that views awards as the product of the legal system of the seat, in the same way as domestic judgments are the product of that forum.

None of the decisions reviewed have, at least expressly, identified the seat's mandatory laws or public policy as a reason for selecting the law of the seat. None of the decisions reviewed justified the choice of the law of the seat primarily on the grounds that the seat is normally selected by the parties. To do so would be unconvincing as parties typically select the seat based on the confidence that its courts are efficient, unbiased and take a pro-arbitration approach. Save for exceptional circumstances, parties will not select the seat based on its *res judicata* standard.[268]

Additional uncertainty arises where the seats of the first and the second arbitration differ. The situation is similar to that arising in respect of the *res judicata* effects of foreign judgments. In that case, the question arises whether those effects are governed by the law of the jurisdiction that rendered the judgment (according to the theory of the 'extension of the effects'),[269] by the *lex fori*, ie, the law of the place where its recognition is sought (according to the theory of the 'equalization of the effects'),[270] or by a combination of the two, such as under the *Kommulationstheorie* applied by the Swiss Federal Tribunal pursuant to which the law of the State of origin of a foreign judgment determines the scope of its *res judicata* effects but those effects cannot be broader than those of a corresponding local judgment.[271]

ii. The substantive law

A number of tribunals have selected the *res judicata* standard of the applicable substantive law in the second arbitration. To the extent that this choice is based on the characterization of *res judicata* as a substantive matter, it is not based on an agreed view about the character of *res judicata*. There remains significant uncertainty on whether *res judicata* is properly

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[268] L. G. Radicati di Brozolo, 'Emmanuel Gaillard's theory of international arbitration: The basis for a uniform law of international arbitration' in *Liber Amicorum Emmanuel Gaillard* (Brill, 2024) (forthcoming), p. 7. *See also* Bermann, 'Res Judicata in International Arbitration', p. 1687 (noting that '*it would be most peculiar*' for the parties to consult the *res judicata* law of a jurisdiction before selecting it as an arbitral seat).

[269] This seems to be the approach applied to the recognition of EU Member State judgments in civil and commercial matters under the 1968 Brussels Convention and the subsequent Regulations (EC) No 44/2001 and (EU) No 1215/2012. *See* Case 145/86 *Horst Ludwig Martin Hoffmann v Adelheid Krieg* [1988] ECR 1988-00645, paras 10-11; and Case C-567/21 *BNP Paribas SA v TR* (CJEU, 8 June 2023), para 48. The theory of the 'extension of the effects' has also been accepted in Italy in respect of foreign judgments recognised under the general regime of Law 218/1995. *See* Tribunale di Milano, 25 January 2018, No 824, reported in *DeJure* online, pp. 50-51 and Elena D'Alessandro, *Il Riconoscimento delle Sentenze Straniere* (Giappichelli 2007), 54ff.

[270] English courts have applied their own *res judicata* rules to foreign judgments on the ground that *res judicata* is a procedural matter governed by the *lex fori*. However, English courts seem prepared to take into account foreign law in order not to impose finality on a matter not considered as final in the State of origin of the foreign judgment. *See Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 (HL); J. van de Velden, 'The 'Cautious Lex Fori' Approach to Foreign Judgments and Preclusion' 61 ICLQ 519 (2012).

[271] *See, eg,* Tribunal Fédéral, 27 May 2014, 4A_508/2013, para 3.2; 6 March 2008, 4A_231/2007, para 5.1.2. This is the so called *Kumulationstheorie*, which is in essence a limited form of the 'equalization of the effects.'

characterized as a rule of procedure or substance. The characterization varies amongst legal systems, in some of them it is uncertain or controversial,[272] and may even vary depending on the specific preclusive effects at issue. For example, the traditional notion of *res judicata* and abuse of process might be characterized differently, with the consequence that their respective preclusive effects might be subject to different conflict rules. While *res judicata* has a substantive effect since it impacts substantive rights and obligations, it is also procedural because it relates to the power to adjudicate. The purpose of *res judicata* is in fact to determine how adjudicators must deal with prior, final, substantive determinations in new proceedings, and reconcile the interests advanced by *res judicata* with due process considerations.

Moreover, the choice of substantive law raises the question of whether the substantive law of the first arbitration should also be considered. It further requires a determination of whether to apply the substantive law governing the rights at issue or the substantive law of the arbitration agreement. The determination of which law applies to the arbitration agreement, unless expressly provided, might again require a choice-of-law analysis— leading to further uncertainties.

b. Uncertainty regarding the scope of *res judicata*

As the case law reviewed in Section II.4.b above demonstrates, the application of domestic *res judicata* rules leads to divergent and often uncertain and inconsistent solutions regarding the applicable *res judicata* standard. This is so because the scope of the *res judicata* effects of an arbitration award may vary depending on which law the second tribunal will choose for purposes of determining the *res judicata* effects.

Depending on the choice of domestic law, the tribunal might either find that only claims already determined are precluded, as in the most formalistic civil law jurisdictions, or that also issues resolved for the purposes of determining those claims are precluded. Accordingly, the tribunal might either look exclusively at the operative part of the prior award, may look narrowly at the reasoning to the extent that it clarifies the meaning of the operative part, or consider the reasoning more broadly. Moreover, the tribunal might either find that claims that were not but could have been raised are precluded, or it may allow them. The tribunal might either apply a strict identity-of-parties test or might apply a broader privity theory.

As a result, a party receiving an arbitration award will not know to what extent the award is final and to what extent issues or claims relating to the dispute can be relitigated. This creates a significant degree of uncertainty and unpredictability as to the scope of the finality of an arbitration award— which could have a potentially detrimental effect on the choice of international arbitration as a means of dispute settlement.

In addition, the uncertainty regarding the applicable *res judicata* approach also creates inefficiencies. Parties must expend often significant costs and time in making submissions

[272] Bermann, *International Arbitration and Private International Law*, para 416 noting that 'res judicata*, or claim preclusion, def[ies] easy categorization in any system*'; ILA Final Report on *Res Judicata* and Arbitration (2006), para 27 and paras 66-67; Schaffstein, 'The Law Governing Res Judicata', p. 291.

on what *res judicata* standard should apply, and tribunals often dedicate substantial time to decide on the applicable *res judicata* standard.

c. Challenges of applying rules created for domestic litigation

A further potential difficulty with resorting to domestic *res judicata* standards is that domestic laws typically do not offer specific *res judicata* standards for international arbitration.

In most jurisdictions, it is undisputed that arbitration awards have *res judicata* effects. In a number of jurisdictions, the applicable arbitration law specifically provides that awards have *res judicata* effects or the same effects as domestic judgments.[273] In other jurisdictions, the *res judicata* effects of arbitration awards have been established by case law.[274]

None of the jurisdictions surveyed provide for different *res judicata* standards for arbitration awards than for domestic judgments. As a result, resorting to domestic *res judicata* standards means applying rules that have been conceived for domestic court judgments. These *res judicata* standards are the expression of the traditions and peculiarities of the legal system to which they belong and form an intimate part of its civil procedure.

But arbitration proceedings have distinct features from domestic court litigation. Arbitration laws guarantee finality by permitting the review of awards only under strictly limited grounds including in the event of violation of public policy. Commentators have pointed out that in international arbitration, the parties attach particular importance to having an efficient and final resolution of their dispute in a single proceeding.[275] The ILA Final Report states that 'due to the differences between international commercial arbitration and domestic court dispute settlement, as well as the international character of arbitration,' international arbitration awards 'are to be treated differently than judgments.'[276]

Arbitration tribunals generally do not apply other aspects of domestic procedural law absent a choice by the parties to do so. Instead, international arbitration practice has developed its own rules and understandings based on the specific features and needs of international arbitration. For example, arbitration tribunals typically do not apply domestic law due process standards, but would assess due process within the specific framework of international arbitration. Arbitration tribunals also do not apply domestic codes of civil procedure, save for any mandatory provisions applying to international arbitration— because these codes are tailored for domestic court litigation.[277]

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[273] Italian Code of Civil Procedure, art 824-*bis*; German ZPO, s 1055; Belgian Judicial Code, art 1713.9; Austrian ZPO, s 607; French Code of Civil Procedure, art 1484; Dutch Arbitration Act, art 1059; English Arbitration Act 1996, s 58(1); Spanish Arbitration Act No. 60/2003, art 43.

[274] *See, eg, Greenblatt v Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1360 (11th Cir. 1985); US Restatement (Second) of Judgments § 84 (1982) (collecting cases); *Northern Regional Health Authority v Derek Crouch Construction Co Ltd* [1984] 1 QB 644; *Daewoo Shipbuilding & Marine Engineering v Songa Offshore Equinox Ltd* [2020] EWHC 2353.

[275] *See, eg*, N. Blackaby et al., *Redfern and Hunter on International Arbitration* (Oxford University Press, 2023), paras. 1.04–1.05; M. Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, 2008), pp. 1–3.

[276] ILA Final Report on *Res Judicata* and Arbitration (2006), p. 72.

[277] Schaffstein, 'The Law Governing Res Judicata', p. 297.

2. The Autonomous Approach to *Res Judicata*

In light of the difficulties presented by the conflict-of-laws approach, a growing number of commentators have advocated for an alternative approach which dispenses with domestic law.[278] That approach is often referred to as 'transnational' but should more properly be called 'autonomous,' insofar as it relies on *res judicata* rules that do not necessarily reflect a universal consensus but appear tailored to the peculiarities of international arbitration.

As some commentators have recognised, an autonomous approach to *res judicata* has distinct advantages. Once it has gained sufficient acceptance, it would reduce the uncertainty and lack of uniformity inherent to the conflict-of-laws approach. It also avoids the application of domestic rules potentially ill-suited to the specific features of arbitration in favor of a uniform regime tailored to international arbitration, thereby enhancing international arbitration's aim to be a system of transnational commercial dispute resolution.[279]

a. Growing support for an autonomous approach

The need for a more arbitration-specific approach also has been acknowledged by a limited number of tribunals. The overview of arbitral case law in Section II.4 shows that these tribunals have either (i) derived the *res judicata* standard from 'general principles of law' adopted by most national laws (ie, applying a properly termed transnational approach);[280] (ii) recognised that international arbitration has an autonomous character and that tribunals are not strictly bound by domestic law;[281] (iii) recognised that autonomous rules could lead to 'consistency and coherency for preclusion rules in international arbitration'[282] or (iv) used the ILA Recommendations as a second source of guidance that, while not binding 'provides useful guidance on international arbitration principles that might appropriately apply in international arbitration.'[283]

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[278] *See*, albeit with different nuances, Hascher, p. 17; P. Mayer, 'Litispendance, Connexité et Chose Jugée dans l'Arbitrage International' in *Liber Amicorum Claude Reymond – Autour de l'arbitrage* (Litec 2004); A. Stier, 'Arbitral & Judicial Decision: Preclusive Effects of an International Arbitral Award' 15(2) Am Rev Int'l Arb 321 (2004); S. Brekoulakis, 'The Effect of an Arbitral Award and Third Parties in International Arbitration: Res judicata Revisited' 16 Am Rev Int'l Arb 1 (2005); C. Jarrosson, 'L'autorité de la Chose Jugée des Sentences Arbitrales', No 8-9, étude 17 Procédures 27 (August 2007); P. Mayer, 'L'Obligation de Concentrer la Matière Litigieuse s'Impose-t-elle dans Arbitrage International?' Cahiers Arb 413 (2011); Radicati di Brozolo, '*Res judicata* and international arbitral awards'; N. Voser & J. Raneda, 'Recent Developments on the Doctrine of Res Judicata in International Arbitration from a Swiss Perspective: A Call for a Harmonized Solution' 33 ASA Bull 742 (2015); P. Mayer, 'L'Autorité de Chose Jugée des Sentences entre les Parties' Rev Arb 91 (2016); C. Seraglini, 'Le Droit Applicable à l'Autorité de la Chose Jugée Dans l'Arbitrage' Rev Arb 51 (2016); N. D. Yaffe, 'Transnational Arbitral Res Judicata' 34(5) J Int'l Arb 795 (2017); G. A. Bermann, *International Arbitration and Private International Law*, Collected Courses of the Hague Academy of International Law, Vol. 381 (Brill, 2017), pp. 53, 354ff; G. Born et al., 'The Law Governing Res Judicata in International Commercial Arbitration' in N. Kaplan and M. Moser (eds), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* (Wolters Kluwer, 2018); G. Born, *International Commercial Arbitration*, p. 4099ff; Bermann, 'Res Judicata in International Arbitration'; Radicati di Brozolo & Ponzano, 'How to assess *res judicata*.'

[279] *See* Born, *International Commercial Arbitration*, p. 4143.

[280] *Jnah v Marriott*, ICC Case No. 13894/EBS/VRO, Final Award dated 4 June 2009, para 89.

[281] ICC Case No. 13509, Award dated 2006.

[282] *Abu Dhabi Investment Authority v Citigroup Inc (II)*, ICDR Case No. 50-2013-000782, Decision on Preliminary Objections dated 2 October 2015, para 247.

[283] *Sanum Investments Ltd v St Group Co Ltd and others*, ICC Case No 25100/PTA/XZG, Award and Addendum to Award dated 16 October 2023 and 25 January 2024, para 354. *See also Rutas de Lima v Municipalidad*

One arbitrator adopted 'a transnational approach, based on uniform rules, having regard to the specificity of the arbitration process.' This approach, he noted, was 'suggested by many authoritative legal writers and supported by the [ILA Recommendations],' which he emphasised were 'intended to be a useful guidance for arbitrators.'[284]

While it is difficult to draw too many conclusions from the few available cases, it is noteworthy that most awards departing from a purely domestic law approach and espousing at least to some degree an autonomous approach were issued in the past fifteen years, that is after the ILA issued its Recommendations on *Res Judicata*. It is therefore reasonable to infer that, at a minimum, the ILA Recommendations might have had some impact in raising awareness of the autonomous approach to *res judicata* in international arbitration. In fact, several tribunals expressly stated that they were guided by the ILA Recommendations. On the other hand, the ILA Recommendations hardly have caused a seismic shift away from the prevalent domestic law approach: most tribunals continue to apply domestic law *res judicata* standards; and recent court decisions in Switzerland and Germany have imposed their respective domestic *res judicata* standards as public policy to arbitrations seated in their jurisdictions.

While more tribunals have recently steered away from strictly applying domestic *res judicata* standards in favor of a more flexible approach better suited to arbitration awards, there has also been, as mentioned above, a significant increase in commentators who, in articles and speeches, have advocated for an autonomous approach for *res judicata* in international arbitration. There has also been a larger interest in the subject from the arbitration community at large. To mention but one example, the ICC organized a conference on *Res Judicata, Claim Preclusion, Issue Preclusion and Claim Splitting* on 13 November 2024 which included a panel entitled 'towards a uniform and broader approach to *res judicata*.'

b. The legal basis for an autonomous standard

The Task Force believes that the most persuasive legal bases supporting an autonomous approach to *res judicata* are (i) party autonomy and (ii) the inherent powers of arbitrators.

i. Party autonomy

Domestic law is only mandatorily applicable when overriding mandatory rules or public policy applied to arbitration are at stake, and the failure to respect them can jeopardise the award's validity or enforceability. In all other circumstances, the parties may determine the rules for the solution of whatever type of issue arises in arbitral proceedings, including the *res judicata* standard. In practice, parties have seldom, if ever, adopted specific rules on *res judicata*. The parties are free to agree on the application of a domestic law of *res judicata,* in which case the tribunal has to apply the domestic *res judicata* standard chosen by the parties. The parties can also agree on the application of an autonomous *res judicata* standard.

Metropolitana de Lima (II), UNCITRAL, Award dated 16 December 2022, para 223 (relying on the ILA Recommendations as a secondary source of guidance and noting that they 'reflect developments from multiple jurisdictions').

[284] Milan Chamber of Arbitration, 2019 Award, *in Rivista dell'Arbitrato*, 2022, p. 934. *See also* Radicati di Brozolo, '*Res judicata* and international arbitral awards', p. 9.

The parties' agreement on the *res judicata* standard can be contained in the arbitration agreement, in any applicable arbitration rules, or in other instruments such as terms of reference or in the Procedural Order No.1. A rare example of the exercise of party autonomy in the regulation of *res judicata* is Art. 26.8 of the LCIA Rules, incorporated by reference in arbitration agreements providing for LCIA arbitration. Art. 26.8 provides that '*[e]very award (including reasons for such award) shall be final and binding on the parties.*' It has been noted that the phrase in brackets, which has no parallel in the rules of other arbitration institutions, has likely been inspired by the English notion of issue estoppel and thus precludes the application to LCIA awards of the strictest conception of *res judicata*, which limits the effects of the prior award to its *dispositif*.[285]

ii. Inherent powers of arbitrators

Tribunals are not required to apply domestic law *res judicata* standards if the parties have not directed them to do so, or if there are no mandatory norms or public policy considerations that require the application of a specific domestic law standard. Instead, tribunals can use their inherent powers to apply an autonomous *res judicata* standard that addresses the specific needs of arbitration awards. It is generally accepted that, to fulfill their mandate, tribunals enjoy some degree of inherent or implied powers to deal with issues not addressed in the parties' agreement or by the applicable arbitration rules.

As noted by the ILA in its Report on Inherent Powers in International Arbitration, inherent powers can be used to give effect to the parties' agreement when the parties' agreement does not address directly a specific situation. [286] Another well-recognised function of inherent powers of arbitral tribunals is to protect the integrity of the arbitral process.[287] The exercise of these inherent powers allows tribunals to apply autonomous *res judicata* rules that they determine to be best suited to give effect to the finality of arbitration awards. [288]

As noted by the ILA Report on Inherent Powers, many powers that tribunals are now universally recognised to possess, and that have been set forth in rules and guidelines, were initially exercised by arbitration tribunals on the basis that they were powers inherent to the tribunals' mandate. [289]

c. The scope of the autonomous standard

For an autonomous approach not to be merely aspirational, there needs to be a broad acceptance of what the specific *res judicata* standard of an autonomous approach would be. One of the key considerations to have an autonomous standard is to reduce the uncertainty

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[285] *See* M. Scherer, L. Richman and R. Gerbay, *Arbitrating under the 2020 LCIA Rules: A User's Guide* (Wolters Kluwer, 2021), para 51.

[286] ILA Report on the Inherent Powers of Arbitrators in International Commercial Arbitration (2014), Section III.A.

[287] ILA Report on the Inherent Powers of Arbitrators in International Commercial Arbitration (2014), Section III.C.

[288] Contrary to what is sometimes asserted, the power of arbitrators to decide *res judicata* without resorting to domestic law does not derive from the rule that grants arbitrators discretion to settle on procedural rules. This is because *res judicata* is not a matter of mere procedure since it impacts on the arbitrators' power to adjudicate.

[289] ILA Report on the Inherent Powers of Arbitrators in International Commercial Arbitration (2014), Section II.A.

and lack of uniformity inherent to the conflict-of-laws approach. This goal can only be achieved if there is sufficient acceptance of the scope and content of the autonomous *res judicata* standard.

The prevailing view appears to be that an autonomous approach should grant broad *res judicata* effects to an award.

The ILA Recommendations have adopted standards that are broader than the most traditional civil law standards. For example, Recommendation 4 extends the preclusive and conclusive effects of the award to the 'determinations and relief contained in its dispositive part as well as in all reasoning necessary thereto.' It also includes a form of issue estoppel, extending the *res judicata* effects to 'issues of fact or law which have actually been arbitrated and determined by it, provided any such determination was essential or fundamental to the dispositive part of the arbitral award.' As the ILA Final Report notes, 'Recommendation 4.2 endorses common law concepts of issue estoppel.'[290] Recommendation 5 in turn extends the preclusive effect to 'a claim, cause of action or issue of fact or law, which could have been raised, but was not, in the proceedings resulting in that award, provided that the raising of any such new claim, cause of action or new issue of fact or law amounts to procedural unfairness or abuse.' Commentators have noted that Recommendation 5 codifies an approach similar to that taken in English and US law.[291]

Commentators advocating for an autonomous approach likewise often argue for a standard that confers broad *res judicata* effects to awards and that borrows concepts from common law. This broad approach is typically said to meet the nature and objectives of the arbitral process and the parties' expectations that their dispute is decided efficiently and in a single determination precluding any re-litigation.[292] It has been pointed out that a broad conception of *res judicata* also finds support in 'the significant expansion of *res judicata* in certain civil law jurisdictions, with the consequence that the law of these jurisdictions has in practical terms become more similar to the common law than traditional wisdom suggests.'[293] Finally, it has also been argued that a broad approach to *res judicata* gives effect to the principle of finality of awards enshrined in the New York Convention.[294]

d. The development of an autonomous standard

The autonomous standard can be developed, among others, by case law, arbitration institutions and authoritative guidelines or recommendations of professional organizations.

The development of an autonomous *res judicata* standard by arbitral case law would be, at the very least, challenging for at least two reasons. *First*, unlike in investment treaty arbitration, most commercial arbitration awards remain confidential and unpublished. The unavailability of a large part of arbitral case law therefore would hamper, or at least

[290] ILA Final Report on *Res Judicata* and Arbitration (2006), p. 78.
[291] Radicati di Brozolo & Ponzano, 'How to assess *res judicata*', p. 30.
[292] Radicati di Brozolo & Ponzano, 'How to assess *res judicata*', pp. 6, 11 and 21ff. *See also* T. Landau, 'Arbitral Groundhog Day: The Reopening and Re-Arguing of Arbitral Determinations', 2 Singapore Arbitration Journal (2020).
[293] Radicati di Brozolo & Ponzano, 'How to assess *res judicata*', p. 22.
[294] Born, *International Commercial Arbitration*, p. 4113.

significantly delay, the development of an autonomous standard through case law. *Second*, absent any authoritative guidance reflecting a broader consensus, different tribunals might reach different conclusions about the scope of an autonomous standard that best meets the specificities of international arbitration. This would not resolve but instead prolong the lack of consistency and the resulting uncertainty regarding the finality of arbitral awards.

Arbitration institutions in turn could include autonomous *res judicata* standards into arbitration rules or provide guidance to arbitrators in notes or guidelines. A step in this direction is the above-mentioned Art. 26.8 of the LCIA Rules providing that '*[e]very award (including reasons for such award) shall be final and binding on the parties.*' The Task Force is not aware of any other steps taken so far by arbitration institutions to provide rules or guidance on an autonomous standard. In general, arbitration institutions tend to wait until a particular rule or standard has become sufficiently widely accepted before they include them into their rules. For example, a number of arbitration institutions have included several of the standards set forth in the IBA Guidelines on Party Representation several years after the Guidelines were issued.[295]

Several commentators have therefore encouraged broader acceptance of the ILA Recommendations or encouraged professional organizations, such as the IBA Arbitration Committee, to approach the issue proactively and contribute to the development of rules to give guidance to arbitrators, courts and arbitration institutions in determining the proper standards of arbitral *res judicata*.[296]

In this respect, the IBA Arbitration Committee has had a leading role in developing international arbitration practice through rules and guidelines. In many respects, these rules and guidelines were not a codification of already well-established arbitration practice. Instead, they reflected a broad consensus of leading arbitration practitioners from common and civil law traditions on the most appropriate rules to address specific needs of international arbitration proceedings on issues such as evidence, conflict of interest and party representation. The IBA Arbitration Committee's rules and guidelines have therefore

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[295] For instance, provisions similar to Guidelines 7-8 prohibiting *ex parte* communications were incorporated in the rules of several institutions, including LCIA Rules 2020 (Article 13 and Annex to the LCIA Rules, Paragraph 6), SIAC Rules 2016 (Article 13.6), HKIAC Rules 2018 (Article 11.5), BCDR Rules 2020 (Articles 10 and 21), 2021 ICDR International Dispute Resolution Rules (Article 14.6), 2022 AAA Commercial Arbitration Rules and Mediation Procedures (Rule 20), JAMS International Rules 2021 (Article 12) and ACICA Rules 2021 (Article 20.4). Provisions similar to Guidelines 4-6 regarding conflicts of interest between the tribunal and party-appointed representatives were also incorporated in the rules of several institutions, including LCIA Rules 2020 (Article 18), ICC Rules 2021 (Article 17), Swiss Rules 2021 (Article 16.4), Dubai International Arbitration Centre Arbitration Rules 2022 (Article 7.5), Bahrain Chamber for Dispute Resolution Rules 2022 (Article 21), JAMS International Rules 2021 (Article 19.3), ACICA Rules 2021 (Article 20.4) and AMINZ Rules 2021 (Rule 5.1).

[296] Radicati di Brozolo & Ponzano, 'How to assess *res judicata*', p. 33 ('It is therefore highly recommendable that the arbitration community engages proactively in developing rules on arbitral *res judicata*. That role could be taken on by inclusive organizations such as the International Bar Association or the International Council for Commercial Arbitration that are capable of raising overall awareness of the need for an arbitration-specific regulation of the issue and of elaborating norms that can gain broad acceptance over time, as normative instruments and as sources of inspiration for parties as well as arbitral tribunals and institutions'); *see also* Schaffstein, 'The Law Governing Res Judicata', p. 313 ('International arbitrators [] have a number of means by which they can promote the adoption of uniform, transnational principles' including 'through their involvement in . . . the working groups of professional associations, such as the ILA, the International Bar Association (IBA) or UNCITRAL').

also developed and shaped arbitration practice. While not always without criticism, the rules and guidelines have gained wide acceptance, are regularly adopted by parties and arbitration tribunals, and many of them have been considered by domestic courts and reflected in revisions of institutional rules.

3. Obstacles to Issuing Guidance on an Autonomous *Res Judicata* Standard

Providing authoritative guidance on an autonomous *res judicata* standard is not without challenges. While all legal systems recognise *res judicata*, the scope of *res judicata* varies among jurisdictions. A limited number of jurisdictions regard their domestic *res judicata* standard as public policy. In investment treaty arbitration, the scope of *res judicata* has become a key contention between investors and Governments. And entrenched stakeholders might resist the adoption of an autonomous standard. Providing guidance on an autonomous *res judicata* standard accordingly requires careful consideration of the costs and benefits.

a. Divergent domestic laws and traditions

A first potential obstacle to providing guidance on an autonomous *res judicata* standard is the divergence in domestic laws on the specific requirements and scope of *res judicata*. The differences are most pronounced between some civil law jurisdictions applying narrower standards of *res judicata* that cover only the dispositive part of the judgment and common law jurisdictions applying broader *res judicata* standards that also cover the decision's reasoning, recognise issue estoppel and bar, under certain circumstances, claims that were not but could have been raised in the prior proceeding.

However, the Task Force believes that the differences between civil law and common law jurisdictions, while important, are not an insurmountable obstacle to establishing an autonomous *res judicata* standard.

First, as the review of selected civil law jurisdictions in Section II.2.b shows, several important civil law jurisdictions have taken a broader and more flexible approach to *res judicata*. In some of these jurisdictions, courts extend the *res judicata* effects not only to the dispositive part but also include at least part of the reasoning; and/or may prevent parties from re-litigating issues already decided; and/or may preclude claims that could have been raised in prior proceedings against the same party.[297] This growing convergence between civil law and common law standards for *res judicata* may therefore be less of an obstacle, and instead more of an impetus for the development of an autonomous *res judicata* standard.

Second, any guidance would not seek to establish transnational rules that are based on a common denominator of domestic *res judicata* rules. Instead, the guidance would reflect an autonomous standard of *res judicata,* which is best suited to international arbitration, and which accordingly might diverge from some domestic *res judicata* standards that were created for judgments. Other rules and guidelines, such as the IBA Rules on the Taking of

[297] For decisions issued by Italian courts, *see* Corte di Cassazione, Sez. Un, 15 November 2007, No 23726, paras 5.2-5.3 and Corte di Cassazione, Sez. Un, 16 February 2017, No 4090, para 5.

Evidence in International Arbitration and the IBA Guidelines on Party Representation in International Arbitration followed a similar process: they developed rules best suited for international arbitration. While the drafters carefully considered and drew from the practices in domestic systems, they ultimately devised rules that were tailored to the specific features and requirements of international arbitration even if that meant that certain elements were not recognised in the domestic law of key arbitration jurisdictions. The right of counsel to prepare witnesses for testimony,[298] the rules on document discovery,[299] and communications with arbitrators[300] are three salient examples. This did not prevent the rules and guidelines from achieving broad acceptance and they have become well-accepted international arbitration practice.

The principal challenge therefore does not consist in convincing stakeholders to accept a rule that is not common to their own domestic system. Instead, the principal challenge is to obtain sufficiently broad acceptance that the rule is best suited for the specific purposes of international arbitration. Broad acceptance of the autonomous *res judicata* standard can strengthen the legitimacy of international arbitration as a reliable dispute resolution mechanism, mitigate the impact of divergent national laws, and enhance the enforceability and acceptance of arbitral awards addressing the *res judicata* effects of previous awards.

b. Public policy and enforceability considerations

A second potential obstacle to providing guidance on an autonomous *res judicata* standard are public policy and related enforceability concerns.

As the review of sample jurisdictions in Section II.3 shows, the predominant position is that an arbitration tribunal's determination on the *res judicata* effects of a prior award cannot be reviewed by a court on public policy grounds. In a number of jurisdictions, courts have expressly rejected requests to set aside an award, or objections to the recognition and enforcement of an award, that sought to challenge the arbitration tribunal's ruling with regard to the *res judicata* effects of a prior award.[301] In several jurisdictions where courts have not ruled on that precise issue, the existing jurisprudence on the scope of public policy strongly suggests that, if seized with this issue, courts would not set aside, or fail to recognise and enforce an award on public policy grounds because the tribunal applied a *res judicata* standard that was different than that of the forum's domestic law.

Conversely, the courts of Switzerland and Germany have made clear that tribunals sitting in their respective jurisdiction are supposed to apply the domestic *res judicata* standard when assessing the effects of a prior award, since the courts consider that standard to form part of public policy.[302] While courts in Argentina and Brazil have not yet had an opportunity to address this issue, their case law suggests that they regard *res judicata* as part of public

[298] IBA Guidelines on Party Representation in International Arbitration (25 May 2013), Guideline 24 ('A Party Representative may, consistent with the principle that the evidence given should reflect the Witness's own account of relevant facts, events or circumstances, or the Expert's own analysis or opinion, meet or interact with Witnesses and Experts in order to discuss and prepare their prospective testimony.').
[299] IBA Rules on the Taking of Evidence in International Arbitration (17 December 2020), Article 3.
[300] IBA Guidelines on Party Representation in International Arbitration (25 May 2013), Guidelines 7-8.
[301] *See supra* Section II.3.a. and b.iv-v.
[302] *See supra* Section II.3.b.vi, xii.

policy.[303] Accordingly, a tribunal's adoption of an autonomous *res judicata* standard that is divergent from the domestic *res judicata* standard could put the award at risk of being set aside or not enforced.

The Task Force believes that this risk does not pose an insurmountable obstacle to the issuance of guidelines on an autonomous *res judicata* standard. *First*, any guidance on an autonomous *res judicata* standard would not be binding. Parties and tribunals in arbitrations seated in these jurisdictions (or having enforcement exposure in these jurisdictions) can agree to adopt the domestic law *res judicata* standards or adopt only parts of the autonomous standard that are consistent with the domestic *res judicata* standard.

Second, for purposes of *res judicata*, the Swiss and German courts have equated arbitration awards of tribunals seated in their jurisdiction with judgments of courts rendered in their jurisdiction. Spanish courts have done the same with regard to domestic arbitrations. This is not inconsistent with the prevalent practice among arbitration tribunals of applying the law of the seat to determine the *res judicata* standard applicable to a prior award. It is not inconceivable that the development of an autonomous *res judicata* standard that gains sufficiently broad acceptance might contribute to an eventual reassessment of that position and to a broader recognition by domestic courts that tribunals can assess the effects of prior awards in accordance with an autonomous *res judicata* standard. This view would also be consistent with the generally accepted understanding that the New York Convention's public policy exception must be applied from an international standpoint without recourse to the views of the law of the country of enforcement.[304]

Finally, there are other general principles that may fall within a jurisdiction's public policy exception, such as procedural due process or the independence and impartiality of arbitrators. That did not prevent the adoption of guidelines that are both useful and widely accepted such as the IBA Rules on the Taking of Evidence in International Arbitration and the IBA Guidelines on Conflicts of Interest in International Arbitration. There is no evidence that tribunals following these guidelines have led to more awards being set aside, or not enforced, on public policy grounds. Instead, they have resulted in a greater appreciation by domestic courts that arbitration tribunals can address fundamental rules of due process and arbitrator impartiality not by reference to domestic laws but by applying standards that reflect the specific nature and needs of international arbitration proceedings.[305]

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[303] *See supra* Section II.3.b.i, iii.

[304] A. J. van den Berg, *The New York Arbitration Convention of 1958* (Kluwers, 1981), pp. 360-366; P. Sanders, 'A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards', 13 Int'l L. 269 (1979), pp. 270-71.

[305] *See, eg*, *Tampico Beverages Inc. c Productos Naturales de la Sabans S.Z. Alqueria*, Decisión del Corte Suprema de Justicia, Sala de Casación Civil, de la República de Colombia, 12 July 2017, at § 6.5.2 ('Respecto al segundo aspecto, valga decirlo, la internacionalidad de la hermenéutica, existe una tendencia a acudir a las Directrices IBA sobre Conflictos de Interés en Arbitraje Internacional 2014, para definir las situaciones que afectan la objetividad de los árbitros, por corresponder a una compilación realizada por expertos -de diferentes culturas jurídicas- que refleja la práctica actual en una parte significativa de la comunidad arbitral. Por ello, si bien carecen de fuerza de ley, « en la práctica... las instituciones frecuentemente consideran sus previsiones ».'); *Halliburton Company v Chubb Bermuda Insurance Ltd et al.* [2018] ECWA Civ 817, para 88 ('Further, in so far as the IBA Guidelines reflect international commercial arbitration practice, it is to be noted that the present case may be said to fall within the IBA Guideline Orange list 3.1.5 [...].'). *See generally W Limited v M*

c. Investment arbitration

A third potential obstacle to providing guidance on an autonomous *res judicata* standard is that in investment arbitrations, specific aspects of *res judicata* have become fiercely contested between investors and governments.

In investment arbitration, *res judicata* issues arise with some frequency when investors forming part of the same vertical ownership chain avail themselves in separate arbitrations of the same or different treaties to seek relief regarding the same government measures. This has raised questions such as whether claims brought by companies from the same vertical ownership chain meet the identity-of-parties requirement; or whether claims brought under different treaties regarding the same Government measures and seeking the same type of relief meet the identity of cause-of-action requirement.

There is therefore a risk that the IBA Arbitration Committee, in offering guidance on an autonomous *res judicata* standard, might be seen as taking a position in favor of one or the other side of the hotly disputed issues in investment arbitration and that, as a result, the guidance would not achieve sufficiently broad acceptance from all stakeholders.

The Task Force believes that the risk can be reduced, but not entirely eliminated, if any guidance (i) is expressly limited to the autonomous *res judicata* standard as it applies in commercial arbitrations and does not extend to the *res judicata* standard in investment arbitrations; and (ii) does not address, at least initially, the subjective standard of *res judicata* (identity of parties).

First, the Task Force recommends that any guidance should be expressly limited to commercial arbitrations and express no views on *res judicata* in investment treaty arbitrations. *Res judicata* in investment treaty arbitrations has a different legal basis to that in commercial arbitrations. The legal basis for *res judicata* in investment arbitrations is public international law, which recognises *res judicata* as a general principle of law. Moreover, the *res judicata* effects of investment arbitration awards are also sometimes defined by specific treaty language.[306] While the autonomous and the investment arbitration *res judicata* standards are closely related, as they both draw from domestic rules, the former addresses the specific needs and features of commercial arbitrations and the latter those of investment arbitrations. Because the IBA Arbitration Committee's guidance would not address *res judicata* in investment arbitrations, the Committee would not take a position on issues that are specific to investment treaty arbitration.

Second, the Task Force recommends that, at least initially, any guidance be limited to the autonomous standard of objective *res judicata* and not address subjective *res judicata* (ie,

SDN BHD [2016] EWHC 422 (Comm), para 6 ('There is no doubt that the present case falls within the description given in Paragraph 1.4 of the 2014 IBA Guidelines.').

[306] *See eg,* Switzerland-Mexico BIT (1995), art 9(1) ('An award made by a tribunal established under this Schedule shall solely be binding on the disputing parties and only with respect to the case decided.'); Chile-United States FTA (2003), art 10.25(4) ('An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.').

identity of parties). The guidance would therefore not address one of the most contested *res judicata* issues in investment arbitration — the scope of the identity-of-parties' requirement.

d. Acceptance by stakeholders

A fourth potential obstacle to providing guidance on an autonomous *res judicata* standard is the risk that stakeholders will not accept the standard. Since guidelines are non-binding, they derive their legitimacy from both the authority of the body that issues them and the voluntary adoption by stakeholders. While soft law instruments that are perceived as adequate and useful are well-received and widely adopted by the international arbitration community, guidelines that are considered inappropriate or impractical will fail to gain traction.

Guidelines may fail to obtain sufficient acceptance if (i) they provide standards that do not contribute to solving practical problems because they deal with well-settled and commonplace issues; or (ii) try to regulate issues that are either highly controversial within the arbitration community and hence are not perceived as 'ripe' for uniform standards.

The diversity of legal systems, the prevalence of the choice-of-law approach, setting-aside and enforcement concerns and broader policy issues relating to investment treaty arbitration create a risk that an autonomous *res judicata* standard might not receive the necessary acceptance from stakeholders.

The Task Force is of the view, however, that there appears to be a growing appreciation that the prevailing practice of applying domestic law standards is not adequate for the specific needs of international arbitration, and that there is an increasing desire for a greater degree of certainty, predictability and efficiency in the application of *res judicata* in commercial arbitration. An increasing number of tribunals, and commentators from both civil law and common law jurisdictions, have espoused the need for an autonomous *res judicata* standard that is detached from any specific domestic law.

To receive broader acceptance, any guidance would need to preserve the necessary flexibility in the application of the standard to ensure that it meets the parties' expectations, considers the specific circumstances of the case and ensures that the basic principles of fairness and due process are being met. It is also important that the guidance is developed with the participation of stakeholders from civil and common law jurisdictions, counsel, arbitrators, former judges, in-house counsel, third-party funders and academics. This should include stakeholders from key jurisdictions whose courts regard domestic *res judicata* as public policy.

Finally, any guidance on an autonomous standard, once issued, would require a careful and well-planned roll-out strategy that engages with key stakeholders by explaining the purpose of the guidance, demonstrating the benefits of the autonomous standard and addressing potential concerns.

e. Conclusion

While the obstacles to providing guidance on an autonomous *res judicata* standard are significant and complex, they do not appear to be insurmountable. In the view of the Task

Force, the perceived widespread demand for further guidance on an autonomous standard seems to justify undertaking the task of drafting a set of guidelines on *res judicata* in international arbitration.

IV. Recommendation

The Task Force concludes that it is (i) desirable for the IBA Arbitration Committee to develop a soft law instrument with uniform guidelines on *res judicata* and (ii) possible to do so.

1. Whether Guidelines on an Autonomous *Res Judicata* Standard Are Desirable

The development of guidelines on an autonomous *res judicata* standard is desirable because the current practice of determining the *res judicata* standard is unsatisfactory for at least three main reasons.

First, the current approach to *res judicata* lacks clarity, consistency and predictability, which has an adverse impact on a fundamental precept of international arbitration, the finality of arbitration awards. As explained in Section III.1 of this report, the practice of arbitration tribunals in identifying the applicable *res judicata* standard is greatly inconsistent. There is no single methodology, with tribunals using diverging choice-of-law or hybrid approaches often without sufficient reasoning. Depending on the domestic or hybrid *res judicata* standard that the tribunal choses to apply, the *res judicata* effects of a prior award could either be narrow or broad. As a result, when an arbitration award is rendered, the parties do not know to what extent the dispute has been finally settled.

Second, domestic *res judicata* rules are not always suited for the specific needs of international arbitration. Instead, they were created for domestic court judgments and reflect the traditions and peculiarities of the legal system to which they belong. Arbitrations have distinct features from domestic court litigation that have not been accounted for in developing the domestic law standards.

Finally, engaging in a choice-of-law or hybrid approach also renders arbitrations less efficient, as absent an agreement on the applicable *res judicata* standard, parties have to devote significant time to brief and argue the selection of the *res judicata* standard.

As a result of the uncertainty and inefficiency resulting from the use of domestic *res judicata s*tandards, momentum has been building in favour of an autonomous approach to *res judicata*. As explained in Section III.2, the adoption of an autonomous standard was spearheaded by the ILA Recommendations. Since their issuance, an increasing number of arbitration tribunals have started to move away from purely domestic *res judicata* concepts to a hybrid approach that also considers autonomous *res judicata* standards. The LCIA amended its rules to state that '[e]very award (including reasons for such award) shall be final and binding on the parties.' And a growing number of commentators have advocated in favour of an autonomous approach to *res judicata*. Some have even specifically called on the IBA Arbitration Committee to develop such guidance.

The Task Force is therefore of the view that it is desirable for the IBA Arbitration Committee to develop these guidelines. The Committee has been at the forefront of developing uniform rules and guidelines on issues of importance to international arbitration. In doing so it has had an important impact on the development of international arbitration. The Committee

has not shied away from addressing issues that were controversial when it saw a need to provide guidance to arbitrators and courts alike.

2. Whether Guidelines on an Autonomous *Res Judicata* Standard Are Possible

The development of guidelines on an autonomous res judicata standard is possible for at least three main reasons.

First, the *res judicata* standards of major civil law jurisdictions — with some notable exception s— have been converging with those of common law jurisdictions. As Section II.2 shows, an increasing number of civil law jurisdictions apply *res judicata* effects to some extent also to the reasoning of the award and recognise preclusion with regard to claims that should have but were not brought in the prior arbitration. While the autonomous standard is separate from domestic *res judicata* standards, this convergence nevertheless shows that there is growing acceptance for a *res judicata* standard that is broader than the traditional narrow *res judicata* standard under civil law.

Second, there is a sound legal basis for the autonomous approach. As set forth in Section III.2.b, the autonomous approach can be based on (i) party autonomy or (ii) the inherent powers of arbitration tribunals. Where there are no overriding mandatory rules or public policy concerns, the parties can agree to apply an autonomous *res judicata* standard. Tribunals can also apply an autonomous *res judicata* standard in the exercise of their inherent powers to give effect to the parties' agreement or to protect the integrity of the arbitral process.

Finally, it is possible to address and overcome potential obstacles to adopting guidelines on an autonomous *res judicata* standard.

- A first potential obstacle is the divergence in domestic laws on the specific requirements and scope of *res judicata*. However, the guidelines on an autonomous standard would not seek to establish 'transnational' rules that are based on a common denominator of domestic *res judicata* rules, but instead would reflect a *res judicata* standard that is best suited to international arbitration. Moreover, the *res judicata* standards of major civil law jurisdictions have been converging with those of common law jurisdictions, which is likely to increase acceptance for an autonomous *res judicata* standard that is broader than the traditional narrow civil law standard.

- A second potential obstacle is that the courts in a limited number of jurisdictions regard the *res judicata* standard of the forum as public policy and might set aside or refuse enforcement of an award that applies an autonomous *res judicata* standard to the extent that it is broader than the standard recognised in that jurisdiction. That obstacle is not insurmountable either. Guidelines on an autonomous *res judicata* standard would not be binding, and parties and tribunals in arbitrations seated in these jurisdictions (or having enforcement exposure in these jurisdictions) can agree to adopt the domestic law *res judicata* standard or adopt only parts of the autonomous standard that are consistent with the domestic *res judicata* standard. Moreover, it is not inconceivable that the adoption of guidelines on the autonomous *res judicata* standard might eventually lead courts in those jurisdictions to reassess their position

and recognise that arbitration tribunals can assess the *res judicata* effects of prior awards in accordance with an autonomous standard.

- A third potential obstacle is that in investment arbitrations, specific aspects of *res judicata* have become fiercely contested between investors and governments. That risk can be reduced, but not entirely eliminated, if the guidelines (i) are expressly limited to the autonomous *res judicata* standard as it applies in commercial arbitrations, but would not cover the *res judicata* standard in investment arbitrations and not take a position on the *res judicata* issues that are specific to investment arbitrations; and (ii) do not address, at least initially, the subjective standard of *res judicata*, the scope of which is particularly contentious in investment arbitrations.

- A fourth potential obstacle is the risk that stakeholders will not accept an autonomous *res judicata* standard. That risk can be addressed by ensuring that the guidelines (i) preserve the necessary flexibility in the application of the standard to ensure that it meets the parties' expectations; (ii) allow for the consideration of the specific circumstances of the case; and (iii) ensure that the basic principles of fairness and due process are being met. It is also important that the guidelines are developed with the participation of a diverse group of stakeholders.

For the reasons explained above, the Task Force recommends limiting the scope of the guidelines on *res judicata*, at least initially, to objective *res judicata*. Other issues, such as (i) subjective *res judicata* (identity of parties) and (ii) the definition of arbitral awards which qualify for *res judicata* effects, can be left for later development.

The Task Force further recommends that the guidelines be limited to the *res judicata* effects of a commercial arbitration award on a subsequent commercial arbitration. The Guidelines hence would not cover (i) the *res judicata* effects of an investment arbitration award on a subsequent investment arbitration; (ii) the *res judicata* effects of a commercial arbitration award on a subsequent investment arbitration and vice versa; and (iii) the *res judicata* effects of domestic judgments on a commercial arbitration award or an investment arbitration award.

3. Next Steps: Need for the Constitution of an Expanded Task Force

The Task Force suggests that, as the next step, the IBA Arbitration Committee establish an Expanded Task Force to draft the guidelines on an autonomous *res judicata* standard. The Task Force should consist of a diverse group of stakeholders from all major regions including counsel, arbitrators, academics, former judges, third-party funders and in-house counsel.

The Expanded Task Force should also be tasked with further exploring the issue of public policy; and it should be authorised to reconsider this Task Force's recommended scope of the guidelines and to suggest to the IBA Arbitration Committee the inclusion of any additional issues into the Guidelines if it determines that doing so is desirable and possible.

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