Arbitration International, 2024, **40**, 409–443
https://doi.org/10.1093/arbint/aiae020
Advance access publication 18 July 2024
Article

OXFORD

How to assess the *res judicata* effects of international arbitral awards: giving concreteness to an autonomous approach

Luca G. Radicati di Brozolo[*] and Flavio Ponzano[†]

ABSTRACT

The article seeks to demonstrate the inadequacy of the 'conflict-of-laws' approach to determine the *res judicata* effects of international arbitral awards. Demystifying the erroneous assumption that the rules on the scope of *res judicata* are *per se* a matter of public policy, the authors defend an 'autonomous' approach, which dispenses with domestic law and confers broad preclusive effects on awards, with a view to avoiding the re-litigation of a dispute that is, in essence, the same as one already decided by a prior award. The legal bases for such an approach are party autonomy and the inherent powers of arbitrators. Building on the ILA Recommendations and recording the evolution of the conception of *res judicata* in certain civil law jurisdictions, the article proposes the elements of an arbitration-specific notion of the subject matter scope of the *res judicata* of awards with respect to issues of substantive law, addressing the situation of the *res judicata* of an award relied upon in further arbitral proceedings. The authors urge soft-law-making bodies and arbitral institutions to tackle arbitral *res judicata* proactively and contribute to the development of rules to give secure guidance to arbitrators and courts in determining its proper contours.

INTRODUCTION

The *res judicata* effects of arbitral awards are the subject of a significant body of case law and doctrinal investigation. Nonetheless, there is still insufficient consensus on the proper approach to establish the extent to which an award is *res judicata* and on the concrete contours of that notion.

As is the case with many issues relating to international arbitration, the authorities on *res judicata* are divided essentially into two camps. The traditional one remains anchored to the belief that all aspects of arbitral *res judicata* must be determined according to a domestic law to

[*] Luca G. Radicati di Brozolo, formerly Tenured Professor of private international law at the Law School of the Catholic University of Milan; Partner, ArbLit—Radicati di Brozolo Sabatini Benedettelli Torsello, Milan; tenant, Fountain Court Chambers, London. Email: luca.radicati@arblit.com. The authors are grateful to Professor Pierre Mayer for his comments on an earlier draft of this article as well as to the anonymous referees for their helpful suggestions.

[†] Flavio Ponzano, PhD in international law, Catholic University of Milan; Partner, ArbLit—Radicati di Brozolo Sabatini Benedettelli Torsello, Milan. Email: flavio.ponzano@arblit.com.

be identified in each case according to a conflict-of-laws methodology. As will be shown, this 'conflict-of-laws approach' is problematic. It relies on unpredictable conflict rules that, in addition to hindering uniformity, may lead to subjecting arbitral awards to restrictive conceptions of *res judicata* that mimic those developed for judgments given in local court proceedings and, as such, may defy the parties' reasonable expectations of finality embedded in their choice of international arbitration and in the way it is normally conducted. The proponents of the conflict-of-laws approach usually do not go beyond the mere enumeration of the potentially applicable laws, without addressing its shortcomings or providing viable practical solutions.[1]

The alternative approach, now prevailing amongst commentators, assumes that the *res judicata* effects of arbitral awards should be determined according to rules tailored to the peculiarities of international arbitration. However, not even this approach, usually referred to as 'transnational', is of sufficient practical assistance because, with few exceptions,[2] the position of its advocates remains largely aspirational, for the most part failing to address the problem of its legal basis and to elaborate sufficiently precise indications for the solution of concrete issues.[3]

The consequence is that adjudicators are left without clear bearings on how to address the conclusive and preclusive value of arbitral awards. This, coupled with the almost automatic, albeit unjustified, reflex to address *res judicata* through the prism of domestic law, has the effect that arbitral and judicial case law on this matter varies widely and unpredictably. In essence, arbitral *res judicata* still remains '*in a no man's land*'.[4]

Given the practical importance of arbitral *res judicata* and the frequency with which it arises, this situation is highly unsatisfactory and should be addressed proactively. In the authors' view, this endeavour must concentrate on the so-called transnational approach, which ought more properly to be termed 'autonomous', insofar as it relies on *res judicata* rules that do not necessarily reflect a universal consensus but appear particularly suited to international arbitration.

A commendable step in this direction was taken two decades ago by the International Law Association, which devoted two Reports and a set of Recommendations to *res judicata*

[1] See, eg Kaj Hobér, *Res Judicata and Lis Pendens in International Arbitration*, Collected Courses of the Hague Academy of International Law (Vol 366, Brill 2014) 109, 258ff; Niklaus Zaugg, 'Objective Scope of Res Judicata of Arbitral Awards—Is There Room for Discretion?' (2017) 35 ASA Bull 319. An attempt to determine appropriate conflict rules is made by Michele Grassi, *Il Riconoscimento degli Effetti del Giudicato nell'Arbitrato Commerciale Internazionale* (Giappichelli 2022) (see n 34). See also Céline Deborah Kellmann, 'Choice-of-Law Rules Governing Preclusive Effects: On Transcending Res Judicata's State of Ambiguity in International Commercial Arbitration' (2022) 40 ASA Bull 27.

[2] See the Reports and Recommendations of the International Law Association discussed below (n 5); Silja Schaffstein, *The Doctrine of Res Judicata Before International Commercial Arbitral Tribunals* (OUP 2016); Silja Schaffstein, 'The Law Governing Res Judicata' in Franco Ferrari and Stefan Kröll (eds), *Conflict of Laws in International Arbitration* (2nd edn, Juris 2019) 287ff.

[3] See, albeit with different nuances, Dominique Hascher, 'L'autorité de la Chose Jugée des Sentences Arbitrales' in *Droit international privé: travaux du Comité français de droit international privé*, 2000-2002 (Pedone 2004) 17; Pierre Mayer, 'Litispendance, Connexité et Chose Jugée dans l'Arbitrage International' in *Liber Amicorum Claude Reymond—Autour de l'arbitrage* (Litec 2004); Andreas Stier, 'Arbitral & Judicial Decision: Preclusive Effects of an International Arbitral Award' (2004) 15(2) Am Rev Int'l Arb 321; Stavros Brekoulakis, 'The Effect of an Arbitral Award and Third Parties in International Arbitration: Res judicata Revisited' (2005) 16 Am Rev Int'l Arb 1; Charles Jarrosson, 'L'autorité de la Chose Jugée des Sentences Arbitrales' [August 2007] No 8–9, étude 17 Procédures 27; Pierre Mayer, 'L'Obligation de Concentrer la Matière Litigieuse s'Impose-t-elle dans Arbitrage International?' [2011] Cahiers Arb 413; Luca G Radicati di Brozolo, 'Res Judicata and International Arbitration Awards' in Pierre Tercier (ed), *Post Award Issues: ASA Special Series No. 38* (Juris 2011); Nathalie Voser and Julie Raneda, 'Recent Developments on the Doctrine of Res Judicata in International Arbitration from a Swiss Perspective: A Call for a Harmonized Solution' (2015) 33 ASA Bull 742; Pierre Mayer, 'L'Autorité de Chose Jugée des Sentences entre les Parties' [2016] Rev Arb 91; Christophe Seraglini, 'Le Droit Applicable à l'Autorité de la Chose Jugée Dans l'Arbitrage' [2016] Rev Arb 51; Nathan D Yaffe, 'Transnational Arbitral Res Judicata' (2017) 34(5) J Int'l Arb 795; George A Bermann, *International Arbitration and Private International Law*, Collected Courses of the Hague Academy of International Law (Vol 381, Brill 2017) 53, 354ff; Gary B Born and others, 'The Law Governing Res Judicata in International Commercial Arbitration' in Neil Kaplan and Michael Moser (eds), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* (Wolters Kluwer 2018); Gary B Born, *International Commercial Arbitration*, vol 3 (3rd edn, Wolters Kluwer 2021) 4099ff; George A Bermann, 'Res Judicata in International Arbitration' in Stefan Kröll and others (eds), *Cambridge Compendium of International Commercial and Investment Arbitration* (CUP 2023).

[4] Audley Sheppard, 'The Scope and Res Judicata Effect of Arbitral Awards' in Stephen R Bond and others (eds), *Arbitral Procedure at the Dawn of the New Millennium: Reports of the International Colloquium of CEPANI* (Bruylant 2005) 265.

in international commercial arbitration.[5] Notwithstanding its undoubted praiseworthiness, that project has not had the influence and success it deserved. One reason is that the ILA Recommendations were probably ahead of their time, having been elaborated when the perception of the peculiarities of arbitration and of the need to wean it from the dependence on domestic law—and particularly the fallback on the law of the seat—was still insufficient.

The present article considers arbitral *res judicata* against this backdrop.[6] Given the topic's complexity, it only addresses the case of arbitral awards invoked in subsequent arbitral proceedings between the same parties, focusing on the subject matter (or 'objective') scope of *res judicata*—broadly understood to include potential preclusion arising from the doctrine of abuse of process—in relation to issues of substance. Accordingly, it does not address the personal (or 'subjective') scope of *res judicata*, or the requirements for an award to qualify as *res judicata*, including the jurisdiction of the tribunal that issued it and the validity and recognisability of the award.[7]

The authors challenge the frequent (and erroneous) assumption that the rules on the subject matter scope of *res judicata* are *per se* a matter of public policy and argue in favour of an autonomous approach that confers broad *res judicata* effects on arbitral awards, with a view to avoiding the re-litigation of a dispute that is, in essence, the same as one already decided by a prior award. The proposed approach builds on the ILA Recommendations and borrows from the solutions prevailing in common law, towards which, significantly, certain civil law systems are also moving. In the authors' view, this approach is particularly well suited—but not necessarily limited—to arbitrations involving parties from different legal backgrounds and that invest considerable money and efforts in an elaborate process conducted differently from local litigation and with no appeal on the merits, thereby presumably expecting to settle their dispute once and for all.

Depending on the circumstances, this approach may even entail the preclusion in a subsequent arbitration (on grounds of abuse of process) of claims not raised in an earlier one. Such an expansive conception of finality may be appropriate to protect the respondent from attempts by the claimant to frustrate the results of an arbitration in which it was unsuccessful by subsequent costly and time-consuming arbitration. The fact that this type of preclusion is known in common law systems, albeit applied with circumspection, seems sufficient to dispel the preoccupations of an inherent incompatibility with the right to be heard and the *principe dispositif*, voiced particularly in civil law systems. After all, if international arbitration aspires to be a transnational system of justice, it cannot reasonably be expected to deliver justice on the basis of a rigid application of conceptions elaborated by individual domestic systems.

As will be discussed, the legal underpinnings for the proposed approach are party autonomy and the inherent powers of arbitrators, which can be employed in a broad range of matters,

[5] The International Commercial Arbitration Committee of the International Law Association, presided over by Filip De Ly with Audley Sheppard as rapporteur, issued an '*Interim Report on* Res Judicata *and Arbitration*' ('**ILA Interim Report**'), presented at the 2004 ILA Conference on International Commercial Arbitration in Berlin, and a '*Final Report on* Res Judicata *and Arbitration*' ('**ILA Final Report**') accompanied by '*Recommendations on* Lis Pendens *and* Res Judicata *and Arbitration*' ('**ILA Recommendations**') presented at the 2006 ILA Conference on International Commercial Arbitration in Toronto. The Reports and Recommendations are published in (2009) 25 Arb Intl 35ff.

[6] The need for a revised relationship between arbitration and domestic law in the interest of increasing the responsiveness of international arbitration to the needs of its users as a proper transnational system of justice has been analysed by the authors in particular in the following publications: Luca G Radicati di Brozolo, 'What Rules Must International Arbitrators Apply to Decide According to the Law?' (2023) 39 Arb Intl 298; Luca G Radicati di Brozolo, 'Uniform Arbitration-Specific Rules v. Domestic Law and Conflict of Laws in International Commercial Arbitration' in *The Hague Academy's Lectures on Emmanuel Gaillard's Legacy* (Brill 2023); Luca G Radicati di Brozolo, 'Emmanuel Gaillard's Theory of International Arbitration: The Basis for a Uniform Law of International Arbitration', forthcoming in *Liber Amicorum Emmanuel Gaillard* (Brill 2024); Luca G Radicati di Brozolo and Flavio Ponzano, 'The Need for Arbitration-Specific Rules on Ethics: A Plea for a Collective Effort' in Mohamed S Abdel Wahab and others (eds), *Leadership, Legitimacy, Legacy: A Tribute to Alexis Mourre* (ICC 2022); Diego P Fernández Arroyo and Luca G Radicati di Brozolo, 'The Proper Role of the Seat in International Commercial Arbitration: A Minimalist Perspective' forthcoming in *Essays in Memory of Piero Bernardini* (Brill 2024).

[7] These requirements may be assessed differently depending on whether a territorial or autonomous conception of arbitration is adopted.

including the protection of the integrity of the arbitral process and the implementation of the parties' agreement. The authors firmly believe that there is a need for the arbitration community, and primarily arbitral institutions, to engage in the development of specific default rules on arbitral *res judicata*. However, even before that result is achieved, the autonomous approach should not be foregone. Rather, arbitrators should try to address the issue with the parties, and strive to give effect to their presumable expectations by a constructive interpretation of the provisions on the finality of the award present in most arbitration rules and agreements.

Although the study is limited to the *res judicata* of an award relied upon in further arbitral proceedings, the autonomous approach it recommends is equally appropriate to assess the *res judicata* effects of awards in subsequent domestic court proceedings.[8]

RES JUDICATA AND INTERNATIONAL ARBITRATION

The principle of res judicata

The principle of *res judicata* dictates that the disposition of a dispute stemming from a decision of a competent adjudicator (which satisfies the relevant requirements to be considered *res judicata*) is final and conclusive. This principle, recognized in every domestic legal system, is held to reflect a '*wisdom that is for all time*'[9] and to be '*one of the basic elements of a modern civil lawsuit*'.[10] It is also established in public international law, where it is considered customary law[11] or a '*general principle of law recognized by civilized nations*' within the meaning of article 38(1)(c) of the Statute of the International Court of Justice.[12]

Res judicata is commonly understood to have both a preclusive (or negative) effect, as a bar to the re-litigation of matters finally decided in prior proceedings, and a conclusive (or positive) effect, which consists of the final and binding character of the findings of a decision that may be invoked in further proceedings.[13] This distinction illustrates the dual dimension of *res judicata*. It is a matter of 'procedure', in the sense that it pertains to the power to adjudicate, since it precludes parties and adjudicators from addressing in new proceedings a matter already determined. At the same time, it has substantive effects because a decision qualifying as *res judicata* determines once and for all the parties' substantive rights and obligations, by acknowledging, modifying, or creating them.

Res judicata is viewed as instrumental to the protection of a public as well as of a private interest, which are respectively ending litigation in order to ensure legal security and the efficient and cost-effective functioning of the judicial system and safeguarding the parties from the risk of repeated litigation of the same matter.[14] Indeed, to the extent it prevents the co-existence

[8] The autonomous approach is not appropriate in the opposite situation, to assess the *res judicata* effects of court judgments on substantive matters invoked in further arbitral proceedings, since the effects of domestic judgments should in principle fall to be determined by the law of the relevant State, which seems in line with the expectations of the parties.

[9] Peter R Barnett, *Res Judicata, Estoppel, and Foreign Judgements* (OUP 2001) para 1.12.

[10] Albrecht Zeuner and Harald Koch, 'Effects of Judgments (Res Judicata)', *International Encyclopedia of Comparative Law*, vol XVI (J.C.B. Mohr 2012) 4.

[11] Born, *International Commercial Arbitration* (n 3) 4107; Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (OUP 2003) 245.

[12] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens 1953) 336; Permanent Court of International Justice (PCIJ), *Interpretation of Judgments Nos 7 & 8 Concerning the Case of the Factory at Chorzow*, Dissenting Opinion of Judge Anzilotti, 16 December 1927, Publications of the Permanent Court of International Justice Series A—No 13 (Sijthoff 1927) 27; International Court of Justice (ICJ), *The Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, 13 July 1954, ICJ Rep 1954, 53, defining *res judicata* as a '*well-established and generally recognized principle of law*'; ICSID Tribunal, *Amco Asia Corporation and others v Republic of Indonesia*, Decision on Jurisdiction, 10 May 1998, ICSID Case No ARB/81/1, Resubmitted Case, para 26.

[13] See, eg Schaffstein, *The Doctrine of Res Judicata* (n 2) para PI.03; Brekoulakis (n 3) 7.

[14] See, eg Schaffstein, *The Doctrine of Res Judicata* (n 2) para PI.05; Hobér (n 1) 127; Born, *International Commercial Arbitration* (n 3) 4101; Kevin M Clermont, 'Res Judicata as Requisite for Justice' (2016) 68 Rutgers Un L Rev 1067, 1090; Frédérique Ferrand, 'Res judicata: From National Law to a Possible European Harmonisation?' in Jens Adolphsen and others, *Festschrift für Peter Gottwald* (Beck 2014) 143–45.

of conflicting decisions within a given legal system, *res judicata* ensures the coherence and credibility of that system and legal security for the parties in dispute, in the form of finality of adjudication.

While it exists in all legal systems, the way the principle of *res judicata* is formulated and operates varies from one to the other. The complexity of the matter is compounded by the fact that different systems use different terms and concepts—having essentially the same general objective—and that terminology is often ambiguous even within the same system. In the words of the United Kingdom Supreme Court, '*Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle*'.[15]

Broadly speaking, at least as far as State court judgments are concerned, the scope of their *res judicata* effects varies amongst jurisdictions depending on how each of them strikes a balance between the interests pursued by *res judicata* and the way 'due process' (in the sense of adversarial process or 'right to be heard') is understood within judicial proceedings. In several jurisdictions, the law of *res judicata* is a highly technical and constantly evolving judge-made law as a result of factors that change over time, ranging from the conception of how justice should be delivered to more pragmatic considerations, such as the costs of access to justice, the need to protect litigants from harassment and the judicial caseload.[16]

The specificity of international arbitration and its relevance for the assessment of the res judicata effects of international arbitral awards

It is generally accepted that the principle of *res judicata* applies not only to the judgments of domestic courts and of international courts and tribunals but also to international commercial arbitral awards.[17] Yet, there is little agreement as to how the principle applies to these. In essence, there are two competing approaches that reflect the dichotomy of approach to most issues that arise in relation to international arbitration.[18] The traditional one relies on domestic *res judicata* rules developed (at least primarily) for State court judgments to be identified through a conflict-of-laws analysis. The alternative approach is an autonomous one which resorts to arbitration-specific solutions that dispense with national law and, as argued in this article, is the appropriate one.

The search for the preferable approach and for the criteria to apply *res judicata* in respect of international arbitral awards can usefully begin by recalling the principal features of international arbitration and the reasons why it is resorted to.

Arbitration is the primary mechanism for the settlement of international commercial disputes and can be considered a transnational system of commercial justice, in contrast to the fragmented dispute settlement offer of local courts. There are multiple reasons why in international business relationships these courts tend to be shunned in favour of arbitration. These include the fact that arbitration is a mechanism designed exclusively for commercial disputes that does not replicate domestic litigation and is generally viewed as more neutral and less influenced by the peculiarities of domestic law. As such it is capable of delivering more uniformity and predictability, which are crucial for business, as well as business-oriented rather than formalistic solutions. Thanks to the role party autonomy is allowed to play in it, arbitration can much better be tailored to the specific needs of the users. In particular, it is capable of offering a process that

[15] *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited* [2013] UKSC 46, para 17.

[16] Cécile Chainais, 'L'autorité de la Chose Jugée en Procédure Civile: Perspectives de Droit Comparé' [2016] Rev Arb 3, para 12.

[17] Born, *International Commercial Arbitration* (n 3) 4107; Schaffstein, *The Doctrine of Res Judicata* (n 2) para 4.15; ILA Interim Report (n 5) 37.

[18] Radicati di Brozolo, 'What Rules Must International Arbitrators Apply' (n 6).

allows the parties to fully deploy their factual (technical, economic, and so on) and legal arguments and to have them analysed in the desired detail, which is usually not possible before the courts. At the same time, arbitration is recognized as ensuring the same, if not a higher, level of due process compared to domestic courts.

Another distinguishing feature of arbitration, particularly relevant for the purposes of the present discussion, is the finality of the process, which the relevant rules guarantee by permitting the review of awards only in pathological cases, in the event of violation of public policy, unlike court judgments that are subject to multiple levels of review. This is consistent with the expectations of commercial users who are generally interested in a one-shot process yielding a final resolution of their dispute and avoiding the prospect of protracted re-litigation which interferes with the conduct of business. The expectation of finality is likely to be all the stronger since arbitration tends to be an elaborate process in which, even in low-value cases, the parties invest significant amounts of money and efforts, resorting to the entire gamut of plausible, and sometimes even not so plausible, legal and factual arguments on all the issues that conceivably impact on the outcome of the dispute.

There is a further aspect, often overlooked, which is essential to understanding how arbitration can cater to the needs and expectations of the parties summarized above. This has to do with the role of domestic law. Domestic legal systems adopt a largely *laissez-faire* attitude towards arbitration and in particular, do not insist on their laws being applied within arbitration. Indeed, as elaborated elsewhere,[19] neither in domestic arbitral laws nor in arbitral rules is there any rule requiring the application of domestic law within arbitration. Domestic law is only mandatorily applicable when public policy or overriding mandatory rules claiming application to arbitration are at stake and the failure to respect them can jeopardize the award's validity or enforceability. This means that, in all other circumstances, the rules for the solution of whatever type of issue arises in arbitral proceedings may be determined by the parties, which of course remain free to stipulate the application of domestic law. It also means that, in those circumstances, arbitrators only have the duty to apply domestic law if the parties agree or expect them to do so, but otherwise enjoy a broad latitude in determining the rules to apply.

It is in light of these features of international arbitration that we turn to discuss why we consider the autonomous approach to arbitral *res judicata* to be both desirable and possible.

THE AUTONOMOUS APPROACH TO THE *RES JUDICATA* EFFECTS OF INTERNATIONAL ARBITRAL AWARDS

The desirability of the autonomous approach

The desirability of the autonomous approach largely depends on the assessment of its advantages compared to the conflict-of-laws approach.

The inadequacy of the conflict-of-laws approach

The conflict-of-laws approach involves, as a first step, identifying the domestic law to be applied and then applying that law's rules on *res judicata*. Depending on the specific situation at issue, and notably the degree of 'transnationality' of the dispute, both steps may give rise to difficulties and uncertainties.

Although arbitral practice on *res judicata* is difficult to appraise given the relative scarcity of publicly available awards, the traditional approach still seems to prevail. The known decisions appear to indicate that, when assessing the *res judicata* effects of arbitral awards, arbitrators tend to rely—albeit not always strictly—on domestic rules designed (primarily) for local judgments.

[19] ibid 299ff.

The difficulties of identifying the applicable law

Recourse to domestic law to establish the *res judicata* effects of an award requires identifying which one(s) of the domestic laws having some connection with the dispute should be applied. When the matter arises before an arbitral tribunal, this involves a two-step process.

The first step is determining the conflict-of-laws system, or methodology, to identify the governing law. This depends on the relevant framework, which varies from one arbitration to the other and is usually determined by the arbitration rules. The second step is finding, within that system, the appropriate conflict rule to establish the law governing the *res judicata* of awards.

This can be a complex and unpredictable process. As noted by Gary Born, '*[a]uthority on the choice of law for* res judicata [in arbitration] *is fragmented, and courts and tribunals have failed to develop a uniform approach to the issues*'.[20] The lack of clear conflict rules leaves arbitral tribunals with even more discretion in identifying the applicable law than domestic courts. Their discretion is possibly still greater when the applicable law falls to be identified through the *voie directe*.[21] Arbitrators generally determine the law whose rules they purport to apply in a pragmatic way, with little, if any, proper choice-of-law analysis.[22]

With respect to *res judicata*, the laws most frequently considered are the one of the seat of the arbitration within which the *res judicata* effects of the award are invoked, the one of the seat of the arbitration within which that award was issued, the one governing the substantive rights at issue (which could be different in the first and in the second arbitration), and the one governing the arbitration agreement (which itself is not always easy to determine).[23] In many cases, none of these has an objective claim or interest in being applied.

This was held to be the case in a recent Milan-seated arbitration between two Romanian companies in which the sole arbitrator decided on the *res judicata* effects of an award issued between the same parties in an earlier arbitration with the same seat. The arbitrator relied on the ILA Recommendations and refused to apply Romanian law, the *lex causae*, reasoning that *res judicata* is not a matter of substance. The arbitrator also refused to apply Italian law, despite finding that, as the *lex arbitri* of both arbitrations, it had a strong claim to govern the issue, noting that the award to be rendered had at best a weak connection with Italy.[24]

Arbitrators predominantly decide *res judicata* on the basis of the law of the seat of the second arbitration.[25] This occurred in two ICC arbitrations seated in France which applied French law. In ICC Case No 5901 of 1989,[26] the tribunal held that the *res judicata* effects of a prior Swiss award were a question of procedure subject to the *lex fori* and that, although arbitrators lack a *lex fori*, the law of the seat was also applicable because the award might be challenged before French courts. In the other case,[27] the tribunal applied the law of the seat to assess the *res judicata* of an award issued in an earlier Paris-seated arbitration, refusing to apply the law governing the contract at issue on the ground that it had no claim to be applied to procedural matters not governed by the ICC Rules. Similarly, an unpublished 2007 award issued in a Stockholm-seated

[20] Born and others, 'The Law Governing Res Judicata' (n 3) 9.

[21] See, eg ICC Arbitration Rules 2021, art 21.1; LCIA Arbitration Rules 2020, art 22.3; SIAC Arbitration Rules 2016, art 31.1.

[22] Schaffstein, *The Doctrine of Res Judicata* (n 2) para 4.126; Mayer, 'Litispendance, Connexité et Chose Jugée' (n 3) 188.

[23] See Hascher (n 3) 18–21; Schaffstein, *The Doctrine of Res Judicata* (n 2) para 5.21; Schaffstein, 'The Law Governing Res Judicata' (n 2) 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 (n 5) para 27; Radicati di Brozolo, 'Res Judicata' (n 3) 143; Born, *International Commercial Arbitration* (n 3) 4140ff; Seraglini, 'Le Droit Applicable' (n 3) 60; Bermann, 'Res Judicata in International Arbitration' (n 3) 1685ff.

[24] Final Award, March 2019, Milan Chamber of Arbitration [2022] Riv Arb 933–34.

[25] See Hascher (n 3) 18; Schaffstein, *The Doctrine of Res Judicata* (n 2) para 4.127, with references to arbitral case law in no 215; Sheppard, 'The Scope and Res Judicata Effect of Arbitral Awards' (n 4) 231.

[26] Reported by Hascher (n 3) 19.

[27] Unpublished ICC award discussed in Félix Montero and Laura Ruiz, 'Res Judicata and Issue Preclusion in International Arbitration: An ICC Case Study' [2016] Cahiers Arb 19, paras 35–37 and 79–80.

UNCITRAL arbitration discussed the applicable law at length and ultimately applied the law of the seat rather than international principles on *res judicata*.[28]

Sometimes the grounds for applying a given law are not explained and cannot be understood, particularly when that law is at the same time, for instance, the one of the seat both of the arbitration in which the award was rendered and of the one in which it is invoked or also the *lex causae* or the law on which the parties focused their submissions.[29]

Even when not made explicit, the basis for recourse to the law of one of the seats often seems to be either the characterization of *res judicata* as a matter of procedure or, instead, a strict 'territorialist' conception of arbitration, which views awards as the product of the legal system of the seat, in the same way as domestic judgments are the product of that of the forum. The justification for applying the law of the seat based on the fact that the seat is normally selected by the parties is unconvincing. In fact, save perhaps in the rarest of cases, the choice of the seat is driven essentially by confidence in the experience of its courts in dealing with arbitration in an efficient, unbiased, and pro-arbitration manner. It is extremely unlikely that any thought will have been given to how the law of the seat as a whole deals with the countless issues, including *res judicata*, not addressed in detail by the seat's arbitration legislation.[30]

Also if, on whatever ground, *res judicata* is assumed to be governed by the law of the seat, the uncertainty as to its governing law persists where the seats of the two arbitrations differ. The situation is similar to the one that arises in respect of the *res judicata* effects of foreign judgments. In that case, the dilemma is 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')[31] or 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')[32] or by a combination of the two.[33] For this reason, the attempts to conceive conflict rules for arbitral *res judicata* modelled on those for the *res judicata* of foreign judgments are unconvincing.[34]

[28] Reported by Hobér (n 1) 259–60.

[29] See, for instance, Award in ICC Cases (joined) Nos 2745 and 2762 of 1977, in Sigvard Jarvin and Yves Derains (eds), *Collection of ICC Arbitral Awards (1974-1985)* (Kluwer 1990) 328 (discussed in ILA Interim Report (n 5) 62); Awards in ICC Cases Nos 6293 of 1990, 7438 of 1994, 8023 of 1995, 10027 of 2000, reported by Hascher (n 3) 19ff; Award in CRCICA Case No 67 of 1995, in Mohie-Eldin Alam-Eldin (ed), *Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration* (Kluwer 2000) 153ff. See also unpublished Award in ICC Case No 13808 of 2008 (also known as the second *Thalès v Euromissile* arbitration), discussed in Mayer, 'L'Obligation de Concentrer la Matière Litigieuse' (n 3) 417–19 and Radicati di Brozolo, 'Res Judicata' (n 3) 139–40. In that case, the tribunal engaged in a detailed analysis of French law, including the *Cour de cassation's Cesareo* decision establishing the obligation of '*concentration des moyens*' (see section '*Preclusion regarding claims*' below) and held that, since in the first arbitration the claimant had failed to raise nullity of the contract for violation of competition law as a defence to the respondent's contractual claim for damages, it was not permitted to invoke it in the second arbitration to obtain the restitution of the damages paid in compliance with the first award.

[30] Radicati di Brozolo, 'Emmanuel Gaillard's Theory of International Arbitration' (n 6) para 4. In the same vein Bermann, 'Res Judicata in International Arbitration' (n 3) 1687 notes 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.

[31] 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 recognized under the general regime of Law 218/1995. See Tribunale di Milano, 25 January 2018, No 824, in *DeJure* online, 50–51, and Elena D'Alessandro, *Il Riconoscimento delle Sentenze Straniere* (Giappichelli 2007) 54ff.

[32] 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); Jacob van de Velden, 'The "Cautious Lex Fori" Approach to Foreign Judgments and Preclusion' (2012) 61 ICLQ 519.

[33] The Swiss Federal Tribunal has held that, while the law of the State of origin of a foreign judgment determines the scope of its *res judicata* effects, those effects cannot be broader than those of a corresponding local judgment. See, for instance, 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'.

[34] Grassi (n 1) 286ff suggests assessing the *res judicata* effects of arbitral awards invoked in arbitral proceedings on the basis of different conflict rules depending on the degree of transnationality of the dispute. In particular, if the dispute is strictly connected to the jurisdiction of the seat of the arbitration where the *res judicata* issue arises, the arbitrators should apply the law which, in

A few publicly available awards assessed the *res judicata* effects of earlier awards according to the *lex causae*, rather than under the (different) law of the seat of the two arbitrations. This is the case of two of the multiple awards issued between the same parties in the 'Panama Canal' arbitrations,[35] where the Miami-seated tribunals applied Panamanian law as the *lex causae* and, based on that law, took a restrictive position excluding any form of 'issue preclusion' arising from the earlier awards. The conflict-of-laws analysis of both tribunals is unsatisfactory insofar as it relies on the characterization of *res judicata* as a substantive matter under the *lex causae*.[36] This is because, while *res judicata* has a substantive effect since it impacts substantive rights and obligations, it is nonetheless inherently procedural because it relates to the power to adjudicate. As mentioned earlier, 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. Precisely because of this, *res judicata* does not fall amongst the issues typically governed by the *lex causae*.[37] In our view, this finds support in the circumstance that foreign judgments are generally given *res judicata* effects according to the law of their State of origin or of the law of the State where they are invoked (or based on a combination of both laws), with no regard for the *lex causae*.

In any event, it is arbitrary to rely on the characterization of *res judicata* as a substantive or procedural issue for the selection of the law governing the *res judicata* effects of awards principally because that characterization varies amongst legal systems, in some of them is uncertain,[38] and may even vary depending on the specific preclusive effects at issue.[39]

Given this uncertainty due to the absence of accepted conflict rules, as well as for the reasons discussed below, conflict of laws fails to fulfil one of its primary goals, which is to implement '*the reasonable and legitimate expectations of the parties to a transaction or an occurrence*'.[40]

The downsides of applying domestic *res judicata* rules to arbitral awards

The second potential difficulty with resorting to domestic law is that it may not contain specific rules on the scope of arbitral *res judicata*. The provisions on the binding force of awards usually do not go beyond the general proposition that they have *res judicata* effects[41] or have the same effects as court judgments.[42] The consequence is that resorting to domestic *res judicata* rules means resorting to rules conceived for domestic court judgments, with no consideration for arbitral awards and the nature and objectives of the arbitral process.[43]

---

that jurisdiction's perspective, governs the effects of foreign judgments. If, instead, the seat has no clear conflict rule or the dispute is truly transnational, arbitrators should give the earlier award the *res judicata* effects it has in the jurisdiction where it was rendered, subject to the seat's public policy. This approach does nothing to eliminate the uncertainty inherent in the conflict-of-law approach, and the assessment of the 'transnationality' of the dispute adds an additional layer of uncertainty. Moreover, it is subject to the downsides of applying domestic *res judicata* rules to arbitral awards, as discussed in the following section.

[35] Final Award, 10 December 2018, ICC Case No 22588/ASM/JPA, and Partial Award, 21 September 2020, ICC Case No 20910/ASM/JPA.

[36] Final Award, ICC Case No 22588/ASM/JPA (n 35) para 205; Partial Award, ICC Case No 20910/ASM/JPA (n 35) paras 490–92.

[37] See Bermann, 'Res Judicata in International Arbitration' (n 3) 1685–86.

[38] Bermann, *International Arbitration and Private International Law* (n 3) para 416 noting that 'res judicata, *or claim preclusion, def[ies] easy categorization in any system*'; ILA Final Report (n 5) para 27 and paras 66–67; Born and others, 'The Law Governing Res Judicata' (n 3) 10.

[39] In particular, the traditional notion of *res judicata* (as matter actually *adjudicated*) and abuse of process might be characterized differently, with the consequence that their respective preclusive effects might be subject to different conflict rules. See, for instance, CJEU, *BNP Paribas SA v TR* (n 31) where the CJEU, in essence, found that the *res judicata* effects of foreign judgments recognized under Regulation (EC) No 44/2001 are to be assessed according to the law of the State where they are rendered, whereas the rule on the 'centralization of claims' (abuse of process) is procedural in nature and consequently subject to the *lex fori*, ie the one of the places where recognition is sought.

[40] Lawrence Collins and others, *Dicey, Morris and Collins on The Conflict of Laws* (Sweet & Maxwell 2023) para 1-005.

[41] French Code of Civil Procedure, art 1484; Dutch Arbitration Act, art 1059; English Arbitration Act 1996, s 58(1).

[42] Italian Code of Civil Procedure, art 824-*bis*; German ZPO, s 1055; Belgian Judicial Code, art 1713.9; Austrian ZPO, s 607.

[43] See, eg Born, *International Commercial Arbitration* (n 3) 4149; Hobér (n 1) 404.

Because domestic *res judicata* rules are conceived for local court proceedings and judgments, they are the expression of the traditions and peculiarities of the legal system to which they belong, are an intimate part of its civil procedure, and are moreover usually applicable to all types of judgments, not only those in commercial matters. For this reason, they first of all lead to divergent solutions, in contrast with the expectation of a uniform *res judicata* regime for all awards which is consistent with the features of international arbitration. Moreover, they are not necessarily suitable to assess the effects of awards that are the product of a process with distinctive features. This is especially the case for the rules that adopt narrow or formalistic conceptions of the subject matter scope of *res judicata* which are more liable to frustrate the parties' expectations as to the finality and uniform effect of the culmination of the process.

The idea that national *res judicata* rules are not necessarily suited to international arbitral awards is supported by the ILA Final Report which underlines the need to treat these differently than judgments, due to the differences between international commercial arbitration and domestic court dispute settlement.[44] It has also been noted that determining an award's *res judicata* effects based on narrow rules out of step with the parties' expectations of finality can undermine the objectives of the New York Convention.[45] Although the Convention is only directly binding on domestic courts, its spirit should also inform the decisions of arbitrators.

With notable exceptions,[46] when applying national *res judicata* rules to international arbitral awards, arbitrators usually neither reflect on their suitability to international arbitration nor strive to take the specificities of the latter into consideration.

In ICC Case No 13254 of 2011, which was unusual because the parties had agreed on the (national) law governing the *res judicata* of a prior award,[47] the tribunal considered whether, under that law, the preclusive effects of international awards differed from those of national judgments and were more flexible, in particular as to the alleged '*obligation to concentrate the subject matter in dispute*'. The tribunal held that '*recognising the difference between arbitration and court proceedings does not imply that legal institutions and principles are necessarily different in the two institutions*' and that '*considerations relating to the unity of a legal system militate in favour of assuming uniformity in legal concepts*'. Contrary to the opinion of an authoritative expert of one of the parties, the tribunal was unpersuaded that '*that there is a clear and binding principle requiring a claimant in arbitration to bring all claims arising from the same factual context in the same proceedings*', although it admitted that '*such a principle might be desirable and may be progressively emerging*'. For the tribunal, the decisive question was whether the '*obligation of concentration*' could be held to derive from the arbitration agreement, the arbitration rules or other elements of the procedure, the parties' agreement or the arbitral tribunal's directions in the first arbitration. It is noteworthy that, while finding that in the case at hand such an obligation did not flow from any of those sources, the tribunal impliedly but clearly acknowledged the role of party autonomy with respect to the scope of arbitral *res judicata*.

In the 'Panama Canal' arbitrations mentioned above,[48] the finding that the earlier awards could not give rise to any form of 'issue preclusion' was clearly influenced by the tribunals' assessment of the parties' purported expectations. The tribunals held that the parties in those cases did not expect the application of broad preclusion rules akin to 'issue estoppel', as they all came from civil law jurisdictions (specifically, Spain, Italy, Belgium, Luxembourg, and Panama).[49] While the arbitrators were correct in giving relevance to the parties' expectations, the assessment of

[44] ILA Final Report (n 5) para 25.
[45] Born and others, 'The Law Governing Res Judicata' (n 3) 11.
[46] See section '*The potential of an autonomous approach*' below.
[47] Unpublished Award, ICC Case No 13254 of 2011 discussed in Radicati di Brozolo, 'Res Judicata' (n 3) 140–41.
[48] See section 'The difficulties of identifying the applicable law' above.
[49] Final Award, ICC Case No 22588/ASM/JPA (n 35) para 206; Partial Award, ICC Case No 20910/ASM/JPA (n 35) paras 490–93, 495.

these was questionable insofar as it was made without elaborating on the actual scope of *res judicata* in the relevant jurisdictions, and therefore without considering that at least in one of them (Italy) the case law has moved beyond the traditional formalistic conception. But even leaving this aside, the tribunals gave no weight to the fact that the parties were extremely sophisticated and repeat users of arbitration—the Panama Canal Authority on one side and a consortium of major international contractors on the other—and that the two arbitrations were part of a string of enormous, complex, and extremely costly arbitrations arising from the same project and spanning many years. It is naïve to believe that those parties would have organized their strategy in such disputes relying on restrictive conceptions of *res judicata*.[50]

An ICC award referred to in the ILA Interim Report is illustrative of the fact that arbitrators are prepared to give broad *res judicata* effects to awards when the domestic rules they hold to be applicable lead to such a result. In that case, a tribunal sitting in France but applying New York law found that the claimant should have asserted its present claim by way of counterclaim or defence in earlier ICC proceedings and that having had the opportunity to do so but not having done so, was now barred from bringing a second action seeking relief inconsistent with the earlier award.[51]

Domestic courts faced with the question of the preclusive effects of arbitral awards have for the most part applied the *res judicata* rules of their *lex fori* both to awards rendered in arbitrations seated in the forum and to those seated abroad.[52] Based on a review of a substantial body of case law, it has been observed that the application of domestic rules '*is often carried out without examining whether, and to what extent, the analogy between litigation and arbitration is appropriate*'.[53]

For example, in England, it is well established that domestic arbitral awards, unless set aside, have the same *res judicata* effects as English judgments. Accordingly, they can give rise to the pleas of cause-of-action and issue estoppel[54] and of abuse of process (also known as the *Henderson v Henderson* rule).[55] Conversely, in Switzerland arbitral awards are given narrow *res judicata* effects in accordance with the Swiss *res judicata* rules for local judgments. It is settled that those rules apply to awards rendered by Swiss-seated tribunals[56] which cannot attribute to

[50] One may wonder how the tribunals' reasoning on expectations would have been impacted if one of the members of the consortium had been from a common law jurisdiction.

[51] ILA Interim Report (n 5) 63.

[52] Born, *International Commercial Arbitration* (n 3) 4109: '*In most jurisdictions, awards are accorded the same preclusive effects that national court judgments receive under national law*'; Born and others, 'The Law Governing Res Judicata' (n 3) 6: '*Where national courts have considered the preclusive effects of prior awards, they have often applied their own* res judicata *rules, at times without much choice-of-law analysis or reasoning*'; Brekoulakis (n 3) 180–81; Radicati di Brozolo, 'Res Judicata' (n 3) 134; Schaffstein, *The Doctrine of Res Judicata* (n 2) paras 4.116–17.

[53] Schaffstein, *The Doctrine of Res Judicata* (n 2) para 4.117.

[54] See, eg *Fidelitas Shipping Co. Ltd v V/O Exportchleb* [1996] QB 630, 643 (CA): '*Issue estoppel applies to arbitration as it does to litigation. The parties having chosen the tribunal to determine the disputes between them as to their legal rights and duties are bound by the determination by that tribunal of any issue which is relevant to the decision of any dispute referred to that tribunal*'; Lawrence Collins and others (n 40) para 16-108; David St John Sutton and others, *Russell on Arbitration* (24th edn, Sweet & Maxwell 2015) para 6-176.

[55] ibid, and the authorities mentioned in n 637 therein. In *Injazat Technology Capital Ltd v Najafi* [2012] EWHC 4171 (Comm), the High Court granted an anti-arbitration injunction to prevent the pursuit of two arbitrations deemed a '*blatant attempt*' to avoid the enforcement in the United States of a prior English ICC award by re-arbitrating issues already determined in the award or raising matters which could and should have been raised as a defence and counterclaim in the first arbitration (ibid para 22). More recently, in *Union of India v (1) Reliance Industries Limited, (2) BG Exploration and Production India Limited* [2022] EWHC 1407, the High Court did not allow an appeal under s 69 of the English Arbitration Act 1996 against an award of a London-seated tribunal that had applied the *Henderson v Henderson* principle to bar certain '*threshold matters/objections*' that it held could have been raised prior to the issuance of a partial award. The High Court found that the tribunal correctly assessed the issue under English law, as law of the seat of arbitration (as opposed to Indian law, the applicable *lex causae*), reasoning that the *Henderson v Henderson* principle is a procedural power, rather than a matter of substantive law (ibid paras 58–59). The High Court found the source of such procedural power in the duty of a tribunal under s 33(1)(a) of the English Arbitration Act 1996 to act fairly by giving the parties a 'reasonable' opportunity to put their case and to deal with that of their opponent, and s 33(1)(b) to adopt procedures avoiding unnecessary delay or expense (ibid para 61). For a critical assessment of the High Court's judgment, see Myron Phua and Serena Seo Yeon Lee, 'The applicability of Henderson v Henderson in an Arbitration Seated in England' (2022) 38 Arb Intl 278.

[56] Schaffstein, *The Doctrine of Res Judicata* (n 2) para 4.73.

a foreign award (capable of recognition in Switzerland) broader *res judicata* effects than those of a corresponding Swiss judgment.[57]

The potential of an autonomous approach

The unsuitability of the conflict-of-laws approach to determine the *res judicata* effects of arbitral awards and the need for an autonomous approach is acknowledged by the majority of authoritative commentators.[58] The ILA Final Report notes that:

> Some aspects of *res judicata* as set forth in the Recommendations are to be characterized autonomously and are to be governed by transnational substantive or procedural rules and not by domestic or transnational conflict rules.[59]

Recommendation No 2 of the ILA Recommendations reads as follows:

> The conclusive and preclusive effects of arbitral awards in further arbitral proceedings [...] need not necessarily be governed by national law and may be governed by transnational rules applicable to international commercial arbitration.[60]

And indeed, it seems difficult to deny that, at least in principle, an approach that dispenses with domestic law has distinct advantages. Once it has gained sufficient acceptance, it reduces the discretion of the arbitrators and the uncertainty and lack of uniformity inherent to the conflicts-of-law approach. More importantly, it avoids the application of domestic rules potentially ill-suited to the specificities of arbitration in favour of a uniform regime tailored to it, thereby enhancing international arbitration's claim to be a system of transnational commercial dispute resolution.[61]

An autonomous approach to arbitral *res judicata* has the potential to implement the parties' presumably strong interest to have their dispute settled once and for all, in a way that does not permit re-litigation of a dispute that is in essence the same as one already decided by a prior award. As discussed in section 'The specificity of international arbitration' above, this expectation of finality—with its positive implications for time and costs—can be inferred from the lack of appeal against awards, the commercial nature of the disputes in question and the fact that, regardless of the amount in dispute, arbitration is an elaborate process in which the parties invest considerable resources. In this type of proceeding, it seems natural that the party that has obtained a favourable award should be entitled to particular protection against attempts by its opponent to frustrate the results of the first arbitration, by having a second bite at the apple to correct the potential flaws of its strategy that led to its unsuccess. Indeed, the litigation strategy, and specifically the way a claim is brought, is exclusively in the hands of the claimant, while the consequences of a re-litigation if the claim is rejected fall solely on the respondent.[62] After all, it is unlikely that, if asked beforehand (rather than after receiving an unfavourable award), the

[57] This is essentially the same approach that Swiss law adopts with respect to foreign court judgments. See, eg Tribunal Fédéral, 26 February 2015, 4A_374/2014, consid 4.2.2.

[58] See, for instance, Born, *International Commercial Arbitration* (n 3) 4149; Schaffstein, *The Doctrine of Res Judicata* (n 2) paras 5.14ff; Brekoulakis (n 3) 205ff; Hascher (n 3) 25–26; Jarrosson (n 3) paras 19ff; Mayer, 'Litispendance, Connexité et Chose Jugée' (n 3) 186ff; Sheppard, 'The Scope and *Res Judicata* Effect of Arbitral Awards' (n 4) 265ff; Voser and Raneda (n 3) 762ff; Born and others, 'The Law Governing Res Judicata' (n 3) 1; Emmanuel Gaillard, 'The Myth of Harmony in International Arbitration' (2018) 36 ASA Bull 763ff; Yaffe (n 3) 795ff.

[59] ILA Final Report (n 5) para 23.

[60] ILA Recommendations (n 5) Section II, point 2.

[61] cf Born, *International Commercial Arbitration* (n 3) 4143.

[62] This point is highlighted by Pierre Mayer, 'Réflexions sur l'Autorité Négative de Chose Jugée' in *Mélanges Dédiées à la Mémoire du Doyen Jacques Héron* (LGDJ 2008) 343.

users would concur that the outcome of a future award could be subverted on restrictive *res judicata* grounds and would be prepared to accept what, from a layman's perspective, will often appear as an abuse of process.

The need for a more arbitration-specific approach also seems to be acknowledged by certain arbitral awards and State court decisions which, while not openly adhering to an autonomous approach, depart from a strict application of domestic *res judicata* rules.

In fact, awards that apply such rules often do not do so mechanically. Especially more recently, various tribunals have avoided the strict application of those rules in favour of a more flexible, intuitive, and pragmatic approach.[63] This is more likely to occur in cases with a significant degree of 'transnationality', and less likely when this is limited.[64]

Consistent with this approach, in ICC Case No 13509 of 2006,[65] the arbitrators held they enjoyed broad freedom to determine the principles for assessing an earlier award's *res judicata* effects and that they were not bound by '*the details of French rules*', although they found that French law—which was the law of the seat of the arbitration and of the earlier arbitration, as well as the one applicable to the merits of both arbitrations and the law relied upon by the parties—was an '*important source of inspiration*' and that it served '*to determine the basic concepts that must prevail*'.[66]

Authoritative surveys of arbitral case law confirm the 'flexible' and pragmatic application of domestic *res judicata* rules by arbitrators to establish claim preclusion in respect of the 'triple identity' test[67] used in several jurisdictions, albeit with differences in the interpretation of the requirements.[68] By way of example, in ICC Case No 6293 of 1990, the sole arbitrator applied New York law without considering that law's specific requirements for *res judicata*. He was satisfied to recognize *res judicata*'s basic objective to prevent re-litigation between the same parties of matters already determined by a final and binding judgment or arbitral award, which entails verifying if the 'essential elements' of the new claim are identical to those of the claim already determined.[69] In ICC Case No 8023 of 1995, where French law was deemed applicable to *res judicata*, the requirement of the identity of the parties was considered met even if the parties in the two proceedings were not strictly identical.[70] More generally, the requirements of identity of object and cause are normally not discussed in arbitral awards.[71]

In sum, even the arbitral jurisprudence that purports to rely on national law often seems to do so as a mere lip service to a traditional conception, displaying a constructive and non-formalistic approach.[72] Some tribunals even appear to have decided *res judicata* issues without relying on any specific national law rule. For example, the sole arbitrator in the Milan-seated arbitration recalled above purported to apply the 'triple identity' test as set forth in the ILA Recommendations.[73]

[63] Schaffstein, *The Doctrine of Res Judicata* (n 2) paras 4.131, 4.139–41, 4.180.

[64] Radicati di Brozolo, 'Res Judicata' (n 3) 138.

[65] Award, ICC Case No 13509 of 2006 (2008) *J du droit intl* 1204 (summary), discussed in Radicati di Brozolo, 'Res Judicata' (n 3) 141–42.

[66] Award, ICC Case No 13509 of 2006 (n 65) 1205.

[67] See section '*Preclusion regarding claims*' below.

[68] Schaffstein, *The Doctrine of Res Judicata* (n 2) para 4.146. See also Hascher (n 3) 24.

[69] Reported by Hascher (n 3) 20. See also ICC Case No 4126 of 1984 in Sigvard Jarvin and Yves Derains (eds), *Collection of ICC Arbitral Awards (1974-1985)* (Kluwer 1990) 511ff (discussed in Schaffstein, *The Doctrine of Res Judicata* (n 2) paras 4.135–36), where the tribunal refused to grant an interim measure essentially identical to an earlier one which had been denied by a state court, despite the fact that the parties to the arbitration and the court proceedings were not exactly the same.

[70] Reported by Hascher (n 3) 21–22, who notes that '*La solution est ainsi fondée sur un raisonnement propre au droit de l'arbitrage sur l'extension des effets obligatories de la clause compromissoire*'.

[71] ibid 24.

[72] Radicati di Brozolo, 'Res Judicata' (n 3) 138.

[73] Final Award, Milan Chamber of Arbitration (n 24) 934.

In ICC Case No 6363 of 1991,[74] the tribunal applied the 'triple identity' test without reference to any rule. In ICC Case No 3383 of 1979,[75] an earlier award's finding of the validity of an arbitration agreement for *ad hoc* arbitration was considered *res judicata* on the basis that prior awards are final and binding unless successfully challenged, without relying on any specific *res judicata* rules. In ICC Case No 3267 of 1984, here too without any reference to applicable rules, the tribunal found that *res judicata* covered the legal reasons constituting the necessary foundation of the *dispositif* (ie the operative part) of the tribunal's prior partial award, holding that '*it would be unfair to both parties to depart in a final award from the views held in the previous award, to the extent they were necessary for the disposition of certain issues*'.[76]

Certain State courts too seem amenable to applying domestic *res judicata* rules taking into account to a certain extent the peculiarities of arbitration. This is the case of French courts, which, despite stating that the *res judicata* effect of awards proclaimed by article 1484(1) of the French Code of Civil Procedure is essentially the same as that of French judgments, apply the concept more expansively to awards.[77] By way of example, given that French law does not require arbitrators to set out their decision in the *dispositif*, the *Cour de cassation* has held that *res judicata* covers the arbitrators' findings irrespective of where they are enunciated.[78] In this respect, the *Cour d'appel de Pau* underscored that a broad conception of *res judicata* should be followed in arbitration.[79]

Another example of a 'flexible approach' is provided by certain decisions discussing whether arbitral *res judicata* extends to legal grounds and claims not raised in the arbitration but that could and should have been raised there. In *SA Thalès Air Défense B.V. v GIE Euromissile, EADS France and EADS Deutschland GmbH*,[80] the *Cour d'appel de Paris* refused to set aside an award on the ground of public policy for alleged violation of EU competition law rules not raised during the arbitration. It reasoned that considerations of honesty ('*loyauté*') and procedural good faith ('*bonne foi procédurale*') may bar a party from raising subsequent arbitration claims ('*demandes*') that could and should have been advanced in the first arbitration.[81] It is noteworthy that the *Thalès* judgment pre-dates the *Cour de cassation*'s *Cesareo* judgment, which for the first time established the duty of 'concentration of grounds' ('*concentration des moyens*') in domestic litigation.[82] In the subsequent *Société G et A Distribution v société Prodim*, the *Cour de cassation* extended the *Cesareo* holding to domestic arbitration, upholding a broader obligation of

[74] Final Award, ICC Case No 6363 of 1991, in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration*, vol XVII (Wolters Kluwer 1992) 186ff. At para 35 of the award, the tribunal stated that '*Where there is, cumulatively, identity as regards parties, subject matter of the dispute* petitum*, and* causa petendi*, between a prior judgment and a new claim, the new claim is barred by the principle of* res judicata'. See also the CAS award cited by Schaffstein, *The Doctrine of Res Judicata* (n 2) para 4.137, n 231.

[75] Award, ICC Case No 3383 of 1979, in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration*, vol VII (Wolters Kluwer 1982) 119ff; discussed in Schaffstein, *The Doctrine of Res Judicata* (n 2) paras 4.132–34.

[76] Final Award, ICC Case No 3267 of 1984, in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration*, vol XII (Wolters Kluwer 1987) 89. See also the Award in ICC Case No 8023 of 1995 reported by Hascher (n 3) 23, where the tribunal, applying French law, concluded that *res judicata* also covers the explicit and implicit reasons which constitute the necessary foundation of the *dispositif*; the same conclusion under French law was reached in the Award issued in ICC Cases (joined) Nos 2745 and 2762 of 1977, 328 (discussed also in the ILA Interim Report (n 5) 62); see also the unpublished 2007 UNCITRAL award reported by Hobér (n 1) 278–79, where the tribunal recognized that in certain cases Swedish law gives *res judicata* effects to reasons. Conversely, applying Swiss law, the tribunal in ICC Case No 7438 of 1994 (discussed in Schaffstein, *The Doctrine of Res Judicata* (n 2) para 4.166) held that *res judicata* covers exclusively an award's *dispositif*. The same conclusion was reached, applying French law, in the Award in ICC Case No 13509 of 2006 discussed above.

[77] Jarrosson (n 3) para 12; Born, *International Commercial Arbitration* (n 3) 4137; Schaffstein, *The Doctrine of Res Judicata* (n 2) para 4.56.

[78] Cour de cassation, 25 March 1999, *Acquier v Faure* [1999] Rev Arb 311.

[79] Cour d'appel de Pau, 22 February 2011, *Société Carrefour proximité France v SARL Falco et fils* [2011] Rev Arb 287 (summary). See also, eg Cour d'appel de Paris, 3 March 2020, *SAS Ekyog et société Francis Alexander Investments Inc. v SCI Elo* [2020] Rev Arb 667: '*L'autorité de chose jugée s'attache à toutes les décisions prises par la sentence arbitrale et qui en font partie sans qu'il soit nécessaire que la décision soit énoncée sous forme de dispositif*'.

[80] Cour d'appel de Paris, 18 November 2004, *SA Thalès Air Défense B.V. v GIE Euromissile, EADS France and EADS Deutschland GmbH* [2005] Rev Arb 751–53 (summary).

[81] ibid 756.

[82] See section '*Preclusion regarding claims*' below.

concentration including not only grounds ('*moyens*') but also claims ('*demandes*').[83] While the *Cour de cassation* reached essentially the same conclusion as the *Cour d'appel de Paris* in *Thalès*, it reasoned in terms of *res judicata*, not good faith. In more recent decisions, likewise involving arbitration, the *Cour de cassation*, however, clarified that the obligation of concentration applies exclusively to the grounds not raised, and not to the claims,[84] on the ground that the *principe dispositif* entails that litigants be free to determine the subject matter of the dispute by the claims they raise.[85] In a 2011 decision, the *Cour d'appel de Paris* explicitly rejected the existence of the duty to concentrate claims in international arbitration.[86]

The legal bases for the autonomous approach

Having concluded that an autonomous approach is potentially the most suitable for arbitration, we address the legal bases that support the recourse to it, which are party autonomy and the inherent powers of arbitrators.[87] Before coming to this, it is necessary to dispose of a potential hurdle to the autonomous approach, which is the argument that the application of domestic *res judicata* rules to arbitral awards would be mandated by public policy considerations.

The application of domestic res judicata rules to arbitral awards is not mandated by public policy considerations

It is sometimes said that granting awards *res judicata* beyond the strict limits set by some jurisdictions, in particular civil law ones, could offend public policy. This is in particular the Swiss and German position.

In the *Fomento* case, the Swiss Federal Tribunal held that *res judicata* is a matter of procedural public policy within the meaning of article 190.2(e) Private International Law Act because it prevents the co-existence of contradictory decisions on the same matter in the same legal order.[88] In that decision, the Federal Tribunal considered whether a Swiss-seated tribunal should apply *res judicata* rules different from those applicable before a Swiss court. While acknowledging that the private nature of arbitration makes it difficult to equate arbitral tribunals with domestic courts, it noted that arbitral awards are enforceable in the same way as judgments. From this, it was inferred that there exists the same incentive to prevent contradictory decisions. The Federal Tribunal added that an arbitral tribunal cannot, relying on the private nature of arbitration, circumvent the *res judicata* principle.[89]

The position that *res judicata* is a matter of procedural public policy was confirmed by two decisions of the Federal Tribunal in 2015,[90] one of which[91] is representative of the Swiss

[83] Cour de cassation, 28 May 2008, *Société G et A Distribution v société Prodim* [2008] Rev Arb 461–62. See also Cour d'appel de Paris, 18 March 2010, *Société Prodim S.A.S. v société G et A Distribution* [2010] Rev Arb 347–48 (summary), 351; Cour d'appel de Pau, 22 February 2011 (n 78). See Eric Loquin, 'Autorité de la Chose Jugée et Concentration des Moyens' [2016] Rev Arb 107, 108–09.

[84] See, eg Cour de cassation, 16 March 2017, No 16-15426, 2; Cour de cassation, 12 May 2016, No 15-16743, 15-18595, Bull inf 2016, No 850, I, 1278; Cour de cassation, 12 April 2012, No 11-14123 (dealing with the *res judicata* of an arbitral award invoked in domestic court proceedings), Bull civ, I, No 89, 3; Cour de cassation, 26 May 2011, No 10-16735, Bull civ, II, No 117, 2.

[85] See French Code of Civil Procedure, art 4.

[86] Cour d'appel de Paris, 5 May 2011, *SARL Somercom v SARL TND Gida Ve Temizlik Mad Dagtim A.S.*, No 10-5314 [2011] Rev Arb 1093. The principle of concentration was also rejected in an international arbitration seated in France, ie the second *Marriot* arbitration (unpublished ICC award of 4 June 2009 in *Marriott v Jnah*, reported by Loquin (n 83) 117, where the arbitral tribunal held that '*il n'existe pas de théorie juridique applicable en matière d'arbitrage international qui soit similaire à la théorie juridique Henderson c/ Henderson, laquelle imposerait aux parties de brûler toutes leur munitions dans une même procédure d'arbitrage*').

[87] For the sake of clarity, it is worth underscoring that, 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, as also noted by Grassi (n 1) 258–59, *res judicata* is not a matter of mere procedure, since it impacts the arbitrators' power to adjudicate.

[88] Tribunal Fédéral, 14 May 2001, *Fomento* case, 127 ATF III 279, consid 2bb.

[89] ibid consid 2c.

[90] Both judgments dismissed annulment actions against Swiss awards predicated on the alleged failure to consider the *res judicata* of an earlier foreign award: Tribunal Fédéral, 26 February 2015, 4A _374/2014, consid 4.2.1; Tribunal Fédéral, 29 May 2015, 141 III 229 (4A_633/2014) consid 3.2.1.

[91] Tribunal Fédéral, 29 May 2015, 141 III 229 (4A_633/2014).

approach that also applies the domestic notion of *res judicata* to foreign awards. After the rejection by an award in a German-seated arbitration of a lawyer's claims against the US law firm of which he was a partner for payments allegedly owed to him in 2009 and 2010 under certain remuneration arrangements, an award in a second, Swiss-seated, arbitration granted the lawyer's claims for payments for 2011 and 2012 based on a different interpretation of the same contractual arrangements. The Federal Tribunal dismissed a challenge against the second award based on the disregard of the *res judicata* effect of the prior award as a result of a different interpretation of the relevant contractual provisions on the ground that, under Swiss law, *res judicata* only attaches to a decision's operative portion, and not to its reasoning, so that the second tribunal was not bound by the first tribunal's interpretation of the contractual arrangements. The Federal Tribunal went as far as to state that public policy would have been violated had the second tribunal given *res judicata* effect to the first award's reasoning.[92]

In the same vein, the German Federal Supreme Court held that an arbitral tribunal breached public policy by wrongly considering itself bound by an earlier award, ie by attributing broader *res judicata* authority than provided by German rules on *res judicata*. It reasoned that only in that way could a party bound by an arbitration agreement be prevented from being denied access to justice to obtain a substantive assessment of a claim erroneously rejected on the grounds that it had already been finally decided.[93]

With the utmost respect, we consider these decisions to be wrong, insofar as they mean that the *res judicata* effects of arbitral awards must be assessed according to local *res judicata* rules held to reflect public policy.[94] This is because of the profound differences between international arbitration and court litigation, for which domestic *res judicata* rules are conceived.

Because of these differences, there is no reason why national legal systems should, like those of Switzerland and Germany, seek to elevate their respective conceptions about the finality of their judgments to the level of public policy and thereby also insist on their application for the assessment of arbitral awards. Domestic *res judicata* rules are tailored to the exercise of the State's judicial function in relation to all types of disputes, and not just commercial ones, and reflect an individual legal system's conceptions of the process, which is the product of how they achieve balance between different values, including the use of public resources, access to justice, and due process. Those conceptions are not necessarily suitable for international arbitration, particularly if they embody a restrictive approach to *res judicata*, because, as highlighted earlier,[95] arbitration is a private and consensual dispute settlement mechanism, typically conducted differently from local litigation and used by parties which tend to expend considerable resources and have high expectations of finality. In such a system, *res judicata* does not rise to the level of public policy even if it has to do with the exercise of the power to adjudicate. Indeed, in arbitration, this power falls within the scope of party autonomy, as demonstrated by the fact that States accept that arbitral jurisdiction is determined by the will of the parties, albeit with certain limitations.

It is universally accepted that, with respect to international arbitration, public policy must be interpreted restrictively, in particular because not doing so may frustrate the obligation to respect arbitration agreements and awards arising from the New York Convention.[96] This is notoriously the case in relation to arbitral procedure, with respect to which due process and the

[92] ibid consid 3.2.6.

[93] Bundesgerichtshof, 11 October 2018, I ZB 9/18—OLG Köln, para 15.

[94] This view is shared by Voser and Raneda (n 3) 776, who criticize the Swiss Federal Tribunal's approach for disregarding the peculiarities of arbitration and considering the detailed provisions of Swiss law on *res judicata* as applied by the Swiss courts to be part of procedural public policy.

[95] See section 'The specificity of international arbitration' above.

[96] Born, *International Commercial Arbitration* (n 3) 3611, with references in n 1035. See also, George A Bermann, 'Navigating EU Law and the Law of International Arbitration' (2012) 28 Arb Intl 408; Bernard Hanotiau and Olivier Caprasse, 'Arbitrability, Due Process, and Public Policy Under Article V of the New York Convention' (2008) 25 J Intl Arb 730; Julian DM Lew and others, *Comparative International Commercial Arbitration* (Kluwer 2003) paras 26–66ff.

right to be heard—which also in arbitration are fundamental—are appraised by reference to an autonomous notion proper to arbitration, not necessarily reflecting the specific incarnations of those principles prevailing in domestic litigation. For instance, certain practices relating to the conduct of international arbitral proceedings, such as those regarding evidence, are not permissible under many domestic procedural laws but are nonetheless held not to breach public policy when awards rendered in conformity with such practices are subject to court scrutiny.

This interpretation of public policy should equally apply in respect of *res judicata*. The interests supposedly protected by restrictive *res judicata* rules are no more fundamental for due process and the right to be heard than those protected by rules of domestic civil procedure, the non-application of which in arbitration does not breach public policy. Nor are the differences amongst domestic conceptions of *res judicata* a greater bar to the compatibility with public policy of an arbitration-specific notion of *res judicata* than the differences amongst national procedural law principles are to the compatibility with public policy of arbitral procedural practices. Indeed, finality does not *per se* entail sacrificing access to justice, due process, and the right to be heard, as all these notions must be assessed by reference to the specific context of international arbitration.

We therefore think the correct position is the one expressed in the following passage of the ILA Final Report:

> The Committee does not believe that conclusive or preclusive effects of arbitral awards pertain to public policy. These effects primarily relate to the parties' interests in having final, fair and efficient arbitral proceedings. Public interest is limited to the costs and time related to the supportive and reviewing powers of domestic courts. Furthermore, as a consensual and private process, arbitration does seem to be distinguishable from court proceedings, where some jurisdictions consider that res judicata belongs to public policy.[97,98]

This approach is in substance shared by the holding of the Singapore Court of Appeal that a supposedly erroneous attribution of *res judicata* effect to an award is not reviewable on grounds of public policy.[99] Likewise, French courts do not consider *res judicata per se* a matter of public policy, so this is not breached by the attribution of preclusive effect to a prior award beyond what would be required under French rules. Public policy is only breached if the failure to consider *res judicata* renders an award irreconcilable with a prior French award or judgment.[100]

Properly understood, as regards *res judicata* public policy therefore does not encompass detailed prescriptions on the subject matter scope of *res judicata*, but merely prevents the coexistence of conflicting decisions. Accordingly, public policy can only be a ground to challenge

[97] ILA Final Report (n 5) para 69.

[98] The conclusion that national notions of *res judicata* are not expressions of public policy is reinforced by the fact that such notions are not even set in stone with respect to judgments, since in some cases they evolve in order to ensure a more substantive protection of the finality of the judgment (see sections '*Preclusion regarding claims*' and '*Preclusion regarding issues*' below).

[99] See *BTN and another v BTP and another* [2020] SGCA 105, paras 72–73: '*there is no basis on which to challenge an award involving an erroneous ruling in respect of an admissibility issue (such as a* res judicata *issue) that would result in the tribunal considering that it is not able to determine the merits of either party's position on that issue, on the basis of it being contrary to public policy. […] there is no good reason why erroneous decisions to ascribe* res judicata *effect to a prior decision should be treated any differently from other errors of law*'. See also *Sanum Investments Ltd and another v Government of the Lao People's Democratic Republic and others* [2022] SGHC(I) 9, where the High Court of Singapore refused to set aside an award for breach of natural justice and public policy allegedly arising from the tribunal's failure to hear the merits of certain claims that it dismissed under the doctrine of collateral estoppel under New York law. The High Court, at para 39, held that '*Whether the Tribunal made an error of law or fact in its decision that the doctrine of collateral estoppel applied goes only to the merits, and cannot found a challenge to the Award*'.

[100] See, eg Cour d'appel de Paris, 11 May 2006, *Société Groupe Antoine Tabet v République de Congo* [2007] Rev Arb 101; Cour d'appel de Paris, 9 September 2010, *Société Marriott International Hotels Inc v société Jnah Development SA* [2011] Rev Arb 976; Cour d'appel de Paris, 12 July 2021, *Monsieur El Mulcahy et Société Citigroup Global Markets Inc. (GGMI) v Monsieur Fiorilla* [2021] Rev Arb 969. See also Mayer, 'L'Obligation de Concentrer la Matière Litigieuse' (n 3) 416.

an award insofar as the award is not reconcilable with an earlier decision (an award or a judgment) having *res judicata* effects.

To conclude, there is no convincing ground for arguing that domestic *res judicata* conceptions—as opposed to the general principle of *res judicata*—form part of public policy. Accordingly, public policy should not constitute a bar to the resort by arbitrators to more expansive conceptions of *res judicata* than those of certain domestic laws.

The contractual basis for the autonomous approach to arbitral res judicata

Because the *res judicata* effects of awards are not a matter of public policy, there is no impediment to the exercise of party autonomy on this point.[101] The parties are therefore free to lay down rules on the *res judicata* effects they wish their award to have. Such rules can be contained in the arbitration agreement, in any applicable arbitration rules or in other instrument. In practice, parties seldom if ever adopt specific rules to this effect.

An example of the exercise of party autonomy in the regulation of *res judicata* is article 26.8 of the Arbitration Rules of the London Court of International Arbitration, incorporated by reference in arbitration agreements providing for LCIA arbitration, according to which '*[e]very award (including reasons for such award) shall be final and binding on the parties*'. The phrase in brackets, which has no parallel in the rules of other arbitral institutions, is probably inspired by the English notion of issue estoppel and thereby precludes the application to LCIA awards of the strictest conception of *res judicata*, which limits its effects to the dispositive.[102]

The rarity of explicit contractual provisions on the *res judicata* of awards does not mean that, absent such provisions, arbitrators cannot rely on a contractual basis for their decisions on this point. Such a basis can be found in the provisions on the finality of the award contained in all arbitration rules and in most arbitration agreements.[103] Although these provisions do not explicitly refer to *res judicata* or to the scope of the preclusive effects of the award, they must be interpreted with specific reference to the arbitral context. Bearing in mind that the review of awards is practically always excluded by national rules, according to the *effet utile* principle their reference to the 'finality' of the award cannot reasonably be understood as a mere redundant prohibition of appeal against the award. Rather, in keeping with the practical approach of participants in commercial relations, the most convincing interpretation of that reference seems to be as an expression of the parties' intent that the product of the arbitration must constitute a definitive adjudication of the dispute.

Put differently, provisions on the finality of awards can be viewed as a manifestation of a term arguably implied in every agreement to arbitrate. As observed by Toby Landau, it should be uncontroversial that, in agreeing to international arbitration, parties commit not only to a final and binding determination but only to a single determination, rather than multiple or repeat determinations, of the given dispute.[104]

Such an understanding of the finality provisions in arbitration agreements and rules is consistent with the above-mentioned presumable interests and expectations of parties resorting

[101] This is recognized, for instance, in ICC Case No 13254 of 2011 discussed in section 'The downsides of applying domestic *res judicata* rules' above.

[102] cf Maxi Scherer and others, *Arbitrating under the 2020 LCIA Rules: A User's Guide* (Wolters Kluwer 2021) 411, para 51.

[103] See, eg ICC Arbitration Rules 2021, art 35.6: '*Every award shall be binding on the parties […]*'. This suggested interpretation of the provisions on finality is particularly apposite where, in addition to generally providing for finality, arbitration rules also explicitly exclude appeals and recourse against the award. See SIAC Arbitration Rules 2016, art 32.11: '*Subject to Rule 33 and Schedule 1, by agreeing to arbitration under these Rules, the parties agree that any Award shall be final and binding on the parties from the date it is made, and undertake to carry out the Award immediately and without delay. The parties also irrevocably waive their rights to any form of appeal, review or recourse to any State court or other judicial authority with respect to such Award insofar as such waiver may be validly made*'.

[104] Toby Landau, 'Arbitral Groundhog Day: The Reopening and Re-Arguing of Arbitral Determinations' (2020) 2 SIArb J 1, para 111. For these purposes the term 'dispute' must also be understood in its broadest and pragmatic sense.

to international arbitration that arbitrators are bound to respect.[105] As discussed, the parties' most likely intent is to forestall their opponent, after a potential, presumably costly and lengthy, arbitration, from beginning litigation from scratch relying on narrow conceptions of *res judicata*, such as those espoused by certain domestic legal systems.[106]

There are therefore strong arguments for interpreting finality clauses in arbitration agreements and rules as expressing an agreement of the parties that they will not attempt to re-litigate their dispute once it has been resolved by an award. It is on the basis of such an agreement that arbitrators can safely consider themselves to have authority to decide issues of *res judicata* according to a broad conception of this notion. The view that clauses of this type cannot provide the basis for an autonomous notion of *res judicata*[107] is misguided and presumably influenced by an unjustified assumption that the *res judicata* effects of arbitral awards are not subject to party autonomy.

The application of the autonomous approach to res judicata as an exercise of the inherent powers of arbitrators

The same result of granting broad *res judicata* effects to arbitral awards can be achieved by the exercise of the implied powers of arbitral tribunals.

It is acknowledged that, in order to fulfil their adjudicative mandate, arbitrators enjoy some measure of inherent or implied powers to deal with situations not caught by the parties' agreement or by rules specifically designed for arbitration applicable to the proceedings at issue. As indicated, *res judicata*, for which there are no rules specifically tailored to arbitration, is one such situation.

In the event that arbitrators are not persuaded that the preclusive effects to be accorded to a prior award are directly addressed by the parties' agreement on the finality of that award, they must find the appropriate solution to the issue by resorting to their inherent powers. It is useful to recall that by no means are arbitrators required to apply domestic law if the parties have not directed them to do so, at least by implication.[108] As noted in the ILA's Report on inherent powers in international arbitration,[109] the first situation in which such powers can be used is to '*effectuate the parties' agreement*' when the parties' agreement does not speak directly on a specific situation. On this basis, arbitrators can feel empowered to give contextual substance to the language of finality provisions they may view as insufficiently precise, by applying it to the determination of the conclusive and preclusive effects of prior awards.

Another category of inherent powers of arbitral tribunals is those instrumental to the protection of the integrity of the arbitral process.[110] In our opinion, depending on the circumstances, an exercise of those powers in such a way as to grant broad preclusive effects to the prior award—including in relation to matters that could and should have been raised in the prior arbitration—may be necessary to achieve that goal. In fact, save perhaps in exceptional circumstances, the bringing by the unsuccessful party in a prior arbitration of a second arbitration that in practical terms aims to invalidate the substantive result of the prior one favourable to the other party should be characterized as abusive for misuse of the arbitral process. The purpose of arbitration is to put an end to litigation. This goal would be frustrated were the losing party permitted

[105] Mayer notes that the intentions of the parties are the source and the limits of the powers of arbitrators to decide, amongst other issues, on *res judicata* and that, since those intentions are rarely expressed, arbitrators enjoy a certain freedom but must strive to identify the parties' reasonable intentions (Mayer, 'Litispendance, Connexité et Chose Jugée' (n 3) 190).

[106] See Brekoulakis (n 3) 3–4.

[107] This view seems implied in the decisions that apply domestic *res judicata* rules to international arbitral awards without considering the provisions on the finality of the award contained in the applicable arbitration rules and in the arbitration agreement.

[108] See section 'The specificity of international arbitration' above.

[109] International Law Association, *ILA Report on the Inherent Powers of Arbitrators in International Commercial Arbitration*, Report for the Biennial Conference in Washington D.C. April 2014 ('**ILA Inherent Powers Report**'), Section III.A, 14.

[110] ILA Inherent Powers Report (n 109) Section III.C, 17ff.

to circumvent the result of the award to overcome negligent or deliberate shortcomings of its initial litigation strategy. The prevention of such an outcome certainly falls within the inherent powers of arbitrators to ensure the integrity of the arbitral process and a just and fair result.[111]

Of course, in deciding whether to exercise those powers, and especially in cases of abuse of process, arbitrators must carefully appraise all the circumstances of the case, all the more so because one of the functions of inherent powers is to protect due process and the right to be heard.

Support for this exercise of the arbitrators' inherent powers may be found in the New York Convention. Although, as mentioned earlier, not directly applicable to arbitrators, the Convention is the cornerstone of international arbitration, and its underlying principles are central to the determination of a broad range of issues. Reasoning on the basis of the principle of finality of awards enshrined in the Convention, it has been noted that it should only permit 'one bite at the cherry' as required in developed common law preclusion systems. That outcome is appropriate in light of the New York Convention's terms and purposes and the objectives of the arbitral process, even if it may not be aligned with the traditional views on *res judicata* in some civil law jurisdictions.[112]

To sum up, the absence of clear rules on the *res judicata* of arbitral awards should not deter arbitrators from resorting to their implied powers to decide on the preclusive effect of awards in harmony with the specific needs of arbitration and without reference to domestic law. As noted by the ILA,[113] many powers that arbitrators are now universally recognized to possess and have thereby become explicit, and are governed by explicit rules (such as the power to decide on their jurisdiction, to grant of interim measures or exclude of counsel), were initially exercised on the basis that they were inherent to the arbitrators' mandate. It is probable that the same will happen for *res judicata*, but in the meantime, arbitrators should consider it part of their mandate to decide this issue as discussed above.

GIVING CONCRETENESS TO THE AUTONOMOUS APPROACH

A rebuttal of the critique of the viability of the autonomous approach

Having established the desirability of the autonomous approach and its legal bases, the question that arises at this point is whether this approach lends itself to being satisfactorily applied in practice, contrary to the view of its critics.

The opponents of the autonomous approach, and even some supporters who hesitate to apply it concretely, argue that this approach is unworkable. The principal reasons are stated to be the lack of generally agreed rules, which depends at least in part on the absence of a shared conception of *res judicata* across the various legal systems, as well as on an alleged difficulty in determining the expectations of the parties. This would entail that arbitrators intending to forego domestic law in favour of an autonomous approach to deciding on *res judicata* are left to their own devices. The result would be an excess of discretion, with arbitrators deciding more or less arbitrarily according to their personal policy preferences as well as their subjective assessment of the nature of arbitration and of the intentions of the parties. This would lead to lack of predictability as to the outcome of their decisions.

[111] ibid 18: '*While international commercial arbitration is a service-oriented process that seeks to satisfy the party-consumers, it is also a legal process that results in an internationally enforceable award and should provide a just and fair result. […] In deciding to arbitrate, parties consent to a legal process involving certain minimum standards of due process and fairness upon which they should not be able, consistent with that agreement, to renege. Arbitrators should be seen as having the authority to enforce these standards*'. Fairness considerations were critical, for instance, in the award issued in ICC Case No 3267 of 1984 and in the *Thalès* judgment of the *Cour d'appel de Paris* discussed in section '*The potential of an autonomous approach*' above.

[112] Born, *International Commercial Arbitration* (n 3) 4113.

[113] ILA Inherent Powers Report (n 109) Section II.A.

This criticism, which is in part responsible for the insufficient consideration given to the ILA Recommendations,[114] is misconceived and defeatist. First, it overlooks the degree of uncertainty highlighted above that is inherent in the application of domestic law to arbitral *res judicata*, coupled with the unsuitability to arbitration of the solutions of some domestic systems. It is therefore disingenuous to suggest that the autonomous approach grants arbitrators more discretion and that the results are less predictable and appropriate than those based on domestic law. The uncertainty is enhanced by the fact that, as also mentioned, domestic *res judicata* law is highly technical and subject to evolution, and is therefore difficult to be applied competently (and therefore predictably) by non-specialists in the relevant law.

Second, the absence of universal consensus on the solutions in domestic law cannot be a bar to the quest for the most appropriate solutions. The goal of identifying standards for arbitration-related problems, including *res judicata*, is not to seek solutions accepted by all legal systems, which would be impossible or lead to outcomes not responsive to the needs of arbitration, but rather to find solutions specifically suited to those needs. Sticking to ossified solutions resulting from a patchwork of different domestic laws simply due to the absence of widely shared rules is contrary to the spirit of arbitration and the expectations of users analysed above and leads to a chicken and egg loop in which new rules cannot emerge. In other areas of arbitration, in particular with respect to procedural matters, the differences in domestic legal traditions have not prevented the development of arbitration-specific rules, which, depending on the specific issue, lean more towards the approach of certain jurisdictions than others. In any case, the resistance to the autonomous approach based on the lack of shared conceptions fails to consider the extent to which there has occurred a convergence between the different notions, which is highlighted below.

In our opinion, there is no reason of principle why arbitrators should not decide on the *res judicata* effects of prior awards according to an autonomous approach. The task that must be undertaken is therefore to identify the criteria for implementing this approach. As suggested by Pierre Mayer, this consists essentially of putting forward interpretations of the parties' intentions and of the reasonable exercise by the arbitrators of their powers.[115]

The criteria to determine the res judicata of awards

With this in mind, the proper formulation of the criteria for the determination of *res judicata* effects of awards that are respectful of the parties' expectations of finality, as well as of the nature and objectives of the arbitral process, requires ensuring that a dispute submitted to arbitration is subject to a single determination and precluding re-litigation of a dispute which, in substance, is the same as one already submitted to and decided by arbitration. To achieve that goal, a broad conception of the subject matter scope of *res judicata* is required. This should encompass the three progressively broader notions that emerge from a comparative law analysis and that can be

[114] The Recommendations have been regarded with scepticism by some tribunals. An unpublished 2007 award issued in a Stockholm-seated UNCITRAL arbitration (see section 'The difficulties of identifying the applicable law' above) labelled them a '*forward-looking document aiming to introduce changes in international law and practice*', and declined to apply them on the basis that they were not part of Swedish law, which was applied to assess *res judicata*. Similarly, in Case No 13808 of 2008 (n 29), the tribunal underscored that the ILA Recommendations were merely recommendations with no legal value and held that despite '*les vues imaginatives de certains experts*', the earlier awards (the *res judicata* effects of which were at issue) and the one to be rendered were 'integrated' in the French legal order and it was therefore bound to apply French law, '*aussi attractive que puisse paraître une "méthode autonome" ou autrement "transnationale"*' (quoted in Radicati di Brozolo, 'Res Judicata' (n 3) 139). See also Ritunjay Gupta, 'Res Judicata in International Arbitration: Choice of Law, Competence & Jurisdictional Court Decisions' (2020) 16 Asian Intl Arb J, 193, 204: '*The ILA Recommendations […] seem unworkable in civil law jurisdictions who do not afford such as expansive* res judicata *effect to their prior adjudications*'; Christophe Seraglini, 'Brèves Remarques sur les Recommandations de l'Association de Droit International sur la Litispendance et l'Autorité de la Chose Jugée en Arbitrage' [2006] Rev Arb 909 para 10; William W Park, 'Soft Law and Transnational Standards in Arbitration: The Challenge of *Res Judicata*' in Arthur Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Brill 2017) 71.

[115] Mayer, 'Litispendance, Connexité et Chose Jugée' (n 3) 191.

seen to form concentric circles.[116] The *first circle* is the prohibition against re-litigating a dispute already decided, as identified by the parties' claims. The *second, broader, circle* is the prohibition against reconsidering any issue (of law or fact) resolved for the purpose of deciding an earlier dispute. The *third, broadest, circle* is the prohibition against litigating matters that the parties arguably could and should have raised in earlier proceedings but did not. Where utlised, this prohibition is referred to in terms of abuse of process.

According to this approach, an award should be given *res judicata* effects in respect of the claims and issues that it determines, as well as of the matters that could and should have been raised in the proceedings that culminated in the award. This is in substance the approach of common law jurisdictions which the authors consider particularly well suited to arbitration.

Support for a broad conception of *res judicata* can be found in the arbitral and domestic jurisprudence that values the specificities of *res judicata* in international arbitration. It can also be found in the jurisprudence of international courts and tribunals, which are in a position similar to international commercial tribunals because they lack hard and fast rules on this matter and operate on the basis of a consensual process governed by party autonomy. Further support is provided by 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.[117] The ILA Recommendations provide a very good starting point for the elaboration of criteria for arbitral *res judicata*,[118] even if they may not go far enough.

Preclusion regarding claims

The first facet of *res judicata*—preclusion regarding claims—is the 'common core' of this concept accepted in virtually all jurisdictions, although by different techniques. It is addressed by ILA Recommendations No 3 and No 4.

ILA Recommendation No 3 provides that '*An arbitral award has conclusive and preclusive effects in further arbitral proceedings if: […] • it has decided on or disposed of a claim for relief which is sought or is* being *reargued in the further arbitration proceedings; • it is based upon a cause of action which is invoked in the further arbitration proceedings or which forms the basis for the subsequent arbitral proceedings; • it has been rendered between the same parties*'.

ILA Recommendation No 4 further provides that '*[a]n arbitral award has conclusive and preclusive effects in the further arbitral proceedings as to: […] determinations and relief contained in its dispositive part […]*'.

These provisions state the basic principle that an award precludes re-litigation of the claims determined by it, and in Recommendation No 3 set out the requirements to establish the *res judicata* effects of an arbitral award. However, they do not elaborate on the notions of '*claim for relief*', '*cause of action*', and '*determinations and relief*' used in Recommendations 3 and 4, and accordingly provide no guidance as to how to determine when claims are the same for *res judicata* purposes. In order to determine when this is the case, it is necessary to bear in mind the need to prevent the resubmission to a different tribunal of what is essentially the same dispute, relying on technical variations of the elements of the claims brought in the first arbitration. Accordingly, the identity of claims in different arbitrations should be assessed having regard to

[116] This useful approach is proposed by Chainais (n 16) paras 11–16.

[117] Cesare Cavallini and Emanuele Ariano, 'Issue Preclusion out of the U.S. (?)—The Evolution of The Italian Doctrine of *Res Judicata* in Comparative Context' 2021 (31 1) Indiana Intl & Comp L Rev 6: '*a recent tendency to broaden the scope of* res judicata *beyond its traditional boundaries for the sake of a more efficient administration of justice is visible in the civil law world*'. See also Born, *International Commercial Arbitration* (n 3) 4106.

[118] This view is shared by Born and others, 'The Law Governing Res Judicata' (n 3) 16.

the object of the claims and to the facts on which they are based, irrespective of the specific legal grounds invoked.

This approach is in line with the flexible, intuitive, and pragmatic manner in which commercial arbitral tribunals have often applied the 'triple identity' test (typical of civil law jurisdictions) for *res judicata* purposes, which requires the identity of parties, object ('*petitum*'), and cause ('*causa petendi*') in the proceedings at issue.[119]

A pragmatic *conception* of the 'triple identity' test is also in line with how *res judicata* is understood in international law by international courts and tribunals. Referring to that test, the ICSID tribunal in *Apotex Holdings Inc. and Apotex Inc. v United States of America*[120] noted that '*certain international tribunals and scholars have questioned its division between* petitum *and* causa petendi; *and many cases have used a simpler analysis*'.[121] The *Apotex* tribunal cited to earlier decisions[122] where the 'triple identity' test was reduced to the identity of parties and questions/subject matters, as well as to the views of Professor Bin Cheng[123] and to the legal opinion of Professors Schreuer and Reinisch in *CME Czech Republic B.V. v Czech Republic*,[124]which noted that

> [i]nternational tribunals have […] been aware of the risk that if they use too restrictive criteria of 'object' and 'grounds', the doctrine of *res judicata* would rarely apply: if only an exactly identical relief sought (object) based on exactly the same legal arguments (grounds) in a second case would be precluded as a result of *res judicata*, then litigants could easily evade this by slightly modifying either the relief requested or the grounds relied upon.[125]

This rationale is perfectly transposable to commercial arbitration for the reasons alluded to above.

The proposed approach can also be found in national law. In fact, it seems consistent with the conception of 'cause of action' and 'claim' adopted in common law jurisdictions. It also seems consistent with the progressive shift toward a factual conception of the requirement of (the identity of) 'cause' in certain civil law jurisdictions that adopt the 'triple identity' test, which implies that *res judicata* preclusion may also operate as a bar to actions based on legal arguments not actually determined in earlier proceedings.

English law is representative of the approach of common law jurisdictions. Under that law, the typical preclusive effect of *res judicata* is secured by the plea of 'cause of action estoppel', which prevents a 'cause of action' finally determined by a decision qualifying as *res judicata* from being contradicted in further proceedings between the same parties or their privies. In English law 'cause of action' is conceived as the factual matrix that entitles a claimant to seek a remedy from the court against a defendant,[126] from which it follows that, to establish an identity of 'causes of

[119] See section '*The potential of an autonomous approach*' above.

[120] ICSID Tribunal, *Apotex Holdings Inc. and Apotex Inc. v United States of America*, Award, 25 August 2014, ICSID Case No ARB(AF)/12/1.

[121] ibid para 7.15.

[122] Specifically, the British–US Claims Arbitration (1910) cited in Cheng (n 12) 339–40: 'res judicata *applies only where there is identity of the parties and of the question at issue*' and PCA, 'The Pious Fund of the Californias' *(United States of America v Mexico)*, Award, 14 October 1902, in *The Hague Court Rep*, 3ff, where the tribunal required only identity of parties and '*subject-matter*'.

[123] Cheng (n 12) 343.

[124] Christoph Schreuer and August Reinisch, Legal Opinion, 20 June 2002, submitted in *CME Czech Republic B.V. v Czech Republic*, UNCITRAL Arbitration, Quantum Proceedings.

[125] ibid para 45.

[126] See *Letang v Cooper* [1964] EWCA, 5, defining 'cause of action' as '*a factual situation the existence of which entitles one person to obtain from the court a remedy against another person*'; Neil Andrews, *English Civil Procedure: Fundamentals of the New Civil Justice System* (OUP 2003) para 40.12, defining cause of action as '*[…] the set of material facts, or core factual matrix, which supports a recognized legal ground of claim*'. See also ILA Interim Report (n 5) 42 stating that (at English common law) '*a "cause of action" comprises all the facts and circumstances necessary to give rise to a right to relief*', and noting that '*generally, all claims arising from a single event and relying on the same evidence will be treated as the same cause of action*'.

action' in different proceedings, it is in principle irrelevant that the subsequent action is brought on new legal bases or seeks different remedies.[127] A similar approach is followed in Singapore.[128]

US law seems to take a similar stance, resorting to the notion of 'claim preclusion' (sometimes simply referred to as *res judicata*). The Restatement of the Law (Second) of Judgments, which codified the modern US approach to the subject, defines 'claim' in terms of 'transaction'[129] and recommends a pragmatic approach to identify a 'transaction':

> What factual grouping constitutes a 'transaction', and what grouping constitute a 'series' [of connected transactions], 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 unit conforms to the parties' expectations or business understanding or usage.[130]

Certain civil law jurisdictions, traditionally more attached to a formalistic understanding of the 'triple identity' test, have evolved in the same direction. This is the case of France, which resorts to that test for *res judicata* purposes.[131] Specifically, the notion of *cause* ('*causa petendi*') used in that test has evolved over the past decades. In the 2006 *en banc* judgment in the *Cesareo* case,[132] the *Cour de cassation* overruled its earlier position according to which there is identity of *cause* only if, in addition to the facts relied upon in the different proceedings, there is also identity between the specific legal grounds underlying the claims in those proceedings. Specifically, it held that a plaintiff has the duty to raise in court proceedings all grounds ('*moyens*') sustaining its claim.[133] As noted by Professor Chainais, in this way the *Cour de Cassation* adopted a 'purely factual' conception of *cause*,[134] with the consequence that:

> La conception de la cause est si étendue que l'identité d'objet prend le pas, en pratique, sur l'identité de cause: pour mettre en œuvre la fin de non-recevoir tirée de l'autorité de la chose jugée, l'opération intellectuelle à mener consiste en une comparaison entre la chose demandée lors d'un second procès avec la chose demandée—et non avec la chose jugée—lors du premier procès.[135]

[127] See, for instance, *Republic of India v India Steamship Co Ltd; The Indian Endurance and The Indian Grace* [1993] AC 410 (HL), known as the *Indian Grace* case, where the House of Lords held that a claim for damages to part of a ship's cargo arising from a fire incident involved the same 'cause of action' as a claim for short delivery regarding another part of that cargo jettisoned during the same incident. The House of Lords reasoned that both actions concerned the same contract and sought to draw the legal consequences of a single event. It found that the incident at issue gave rise to distinct breaches of contract which in reality constituted a single relevant breach (corresponding to a single claim).

[128] See *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd and others* [2020] SGHC 133, para 70, holding that '*in ascertaining the identity of causes of action, reference should be had to the* substance *of the claims and the facts relied upon, and not the* form *of the cause of action invoked. […] this means that the task of the Court is to examine the matrix of factual allegations that the plaintiff is relying on to support its claim to relief, and to determine whether the same set of factual allegations was raised and adjudicated upon in the previous proceedings. The Court does not simply accept the labels applied by the parties to the claims in the later legal proceedings*'; *Zhang Run Zi v Koh Kim Seng and another* [2015] SGHC 175, paras 49–50.

[129] American Law Institute (ALI), Restatement of the Law (Second), Judgments, para 24(1): '*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*'.

[130] ibid para 24(2). See also Clermont (n 14) 1109.

[131] See French Civil Code, art 1355.

[132] Cour de cassation, Assemblée plénière, 7 July 2006, No 04-10672.

[133] In subsequent judgments, the *Cour de cassation* held that the same principle applies to a defendant, which is therefore under a duty to raise all defences in the first proceedings in order to avoid the preclusion arising from *res judicata*. See, for instance, Cour de cassation, 20 February 2007, No 05-18322, 1; Cour de cassation, 13 February 2008, No 06-22093, 2; Cour de cassation, 6 July 2010, No 09-15671, 2. More recently, see Cour de cassation, 17 November 2021, No 19-23.298, para 7 summarizing its position in the context of a request to the CJEU for preliminary ruling on the *res judicata* effects of judgments recognized pursuant to Regulation (EC) No 44/2001.

[134] Chainais (n 16) para 46.

[135] ibid. See also Mayer, 'Réflexions sur l'Autorité Négative' (n 62) 332.

Belgian law evolved in the same direction in 2015 as a result of an amendment of article 23 of the Judicial Code, whereby the 'triple identity' test was modified so as to specify that the same *cause* (of a claim) exists regardless of the legal basis invoked.[136]

The obligation to put forward all grounds (and facts) underlying a claim also exists in Spanish law by virtue of article 400 of the Civil Code of Procedure.

In Italy, which likewise resorts to the 'triple identity' test, the case law has 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 effect.[137]

Under German law, the subject matter of the dispute ('*Streitgegenstand*')—the identity of which in different proceedings triggers the preclusive effect of *res judicata*—is identified by the parties' prayers for relief ('*Antrag*') and the main facts underlying them ('*Lebenssachverhalt*'). Thus, under German law the subject matter requirement is also understood essentially in its factual dimension,[138] so that the preclusive effect of *res judicata* is not avoided by raising in further proceedings a new legal basis for a claim already dismissed.[139]

The same approach is now established in Switzerland after the Federal Tribunal's holding that the subject matter identity of different disputes is to be determined by reference to the parties' claims or counterclaims and to the underlying facts.[140] Accordingly, as noted by one commentor, under Swiss law '*[t]he legal arguments that a party may have invoked in support of its claim or counterclaim are not relevant for determining the* res judicata *of a prior decision and, in particular, whether there is identity of subject matter between two sets of proceedings*' and a party cannot bring an action based on facts it could and should have invoked in earlier proceedings on the same subject matter.[141]

The 2021 'Model European Rules of Civil Procedure' developed by the European Law Institute and the International Institute for the Unification of Private Law, an authoritative 'soft law' instrument *intended* to promote common rules of civil procedure at the European level, are also particularly relevant to this discussion. Rule 149(1) provides that '*The material scope of* res judicata *is determined by reference to the claims for relief in the parties' pleadings, including amendments, as decided by the court's judgment*'. Significantly, this provision is complemented by Rule 22(1), according to which '*Parties must bring all the legal and factual elements in support of, or in objection to, a claim for relief that arise out of the same cause of action in one single proceeding*'.[142] Pursuant to Rule 22(2), failure to comply with Rule 22(1) '*renders proceedings on the same claim for relief arising out of the same cause of action inadmissible*'.

[136] Belgian Judicial Code, art 23 (as modified by Law of 19 October 2015 no 1).

[137] See 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.

[138] Chainais (n 16) para 34.

[139] See, eg Bundesgerichtshof, 26 September 2000, VI ZR 279/99; Bundesgerichtshof, 8 May 2007, XI ZR 278/06.

[140] See Tribunal Fédéral, 25 February 2013, ATF 139 III 126 (4A_496/2012) para 3 and 15 July 2008, 5A_337/2008, para 4.1 holding that, for the purposes of determining the identity of subject matter, claims need not be formulated exactly in the same way, the focus being instead on their substance.

[141] Schaffstein, *The Doctrine of Res Judicata* (n 2) paras 1.155–56.

[142] The Commentary on the ELI-UNIDROIT Rules explains, at p 86, that: '*Rule 22 strikes a compromise between the very broad common law conception of claim preclusion and the more restricted conception of some countries of Romance tradition, which limits claim preclusion to supporting legal and factual elements actually subject to dispute in the first proceeding. Both solutions aim at preventing abuse of process and at concentrating litigation, although they differ in scope and measure. Rule 22 does not exclude a partial claim. However, only explicit partial claims should be admissible. It should be stressed that in this respect, there are important differences in the procedural cultures of the European Union member States and, more broadly, European jurisdictions. Some do take a more liberal approach to admitting partial claims placing significant weight on the effect that the value at stake in the proceedings has on the costs to be paid by parties*'.

Preclusion regarding issues

The second facet of *res judicata*—preclusion regarding issues—is traditionally associated with common law jurisdictions, where *res judicata* covers any issue of fact or law resolved for the purpose of deciding a dispute. By way of example, under English law, this form of *res judicata* is referred to as the plea of 'issue estoppel', which is available

> where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue.[143]

This form of *res judicata* is addressed in ILA Recommendation No 4, which states that an arbitral award has conclusive and preclusive effects in respect of '*determinations and relief* set out not only in its dispositive but also in '*all reasoning necessary thereto*'.[144] It adds that those effects also attach to '*issues of fact or law which have actually been arbitrated and determined by [the award], provided that any such determination was essential or fundamental to the dispositive part of the arbitral award*'.[145] This is a clear endorsement of a broad notion of *res judicata*, that rejects the more restrictive ones as '*overly formalistic and literal*'.[146] The ILA Committee deemed that the common law concepts of issue estoppel are '*acceptable on a worldwide basis*' for '*reasons of procedural efficiency and finality*', '*notwithstanding the fact that they are yet unknown in civil law jurisdictions*'.[147] The solution of ILA Recommendation No 4 is all the more appropriate considering the jurisprudence of certain tribunals established under international law and the fact that, actually, in certain civil law jurisdictions there is also a clear trend to give *res judicata* effect to the findings that, explicitly or impliedly, constitute the necessary premise of a judgment.

As noted in *Apotex*,[148] '*forms of issue estoppel*' have been applied by international tribunals, such as in the *Orinoco Case*,[149] *Amco v Indonesia*,[150] and *RSM v Grenada*.[151] *Apotex* noted that

[143] See *Arnold v National Westminster Bank plc* [1991] HL, 104, which also held, at paras 109–11, that, unlike cause of action estoppel, issue estoppel suffers exceptions when further factual material relevant to determine the issue was not available in earlier proceedings or could not have been adduced by exercising reasonable diligence, and when there has been a material change in the law since the earlier decision (so-called '*Arnold* exception'). Also, Singapore law recognizes issue estoppel: see *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453, setting out the requirements for determining the identity of issues at paras 34–39; *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] 5 SLR 1104, para 100, and para 190 adopting a narrow perspective of the '*Arnold* exception' in the context of domestic issue estoppel. In US law, the equivalent of issue estoppel is 'issue preclusion' (or 'collateral estoppel') which 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 (*Taylor v Sturgell*, 553 US 880 (2008) 893, relying on *New Hampshire v Maine*, 532 US 742 paras 748–49). The identity of issues in different proceedings is assessed based on pragmatic considerations and turns on factors such as the extent of the overlap between factual evidence and legal arguments put forward (see ALI, Restatement of the Law (Second), Judgments, para 27 comment (c)). Under US law issue preclusion suffers several exceptions including legal impossibility to challenge the first judgment, intervening change in the applicable legal context, differences in the procedures followed in the two proceedings and in the burden of proof, non-predictability at the time of the initial action that the issue would arise in the context of a subsequent action, and lack of adequate opportunity or incentive for the party against whom issue preclusion is invoked to obtain a full and fair adjudication in the initial action because of special circumstances (see ibid para 28 and Clermont (n 14) 1115).

[144] ILA Recommendations (n 5) No 4, first bullet point.

[145] ibid second bullet point.

[146] ILA Final Report (n 5) para 52.

[147] ibid para 56. The ILA Recommendations do not take a position on possible exceptions to issue preclusion, including, for instance, change in law, different burden of proof in relation to different claims and fairness considerations (ibid para 58).

[148] *Apotex* Award (n 120) para 7.18.

[149] Mixed Claims Commission (France-Venezuela), *Claim of Company General of the Orinoco Case*, 1902, Report of French-Venezuelan Mixed Claims Commission of 1902, US Government Printing Office, Washington 1906, 186: '*every matter and point distinctly in issue [...] and which was directly passed upon and determined in said decree, and which was its ground and basis, is confirmed by said judgment, and the claimants [...] are forever estopped from asserting any right or claim based in any part upon any fact actually and directly involved in the said decree*'.

[150] *Amco* Decision on jurisdiction (n 12) para 30.

[151] ICSID Tribunal, *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v Grenada*, Award, 10 December 2010, ICSID Case No ARB/10/6, para 7.1.1: '*a finding concerning a right, question or fact may not be relitigated (and, thus, is binding on a subsequent tribunal), if, in a prior proceeding: (a) it was distinctly put in issue; (b) the court or tribunal actually decided it; and (c) the resolution of the question was necessary to resolving the claims before that court or tribunal*'.

'*courts and tribunals have regularly examined* under *international law a prior tribunal's reasoning, and the arguments it considered, in determining the scope, and thus the preclusive effect, of the prior award's operative part*',[152] referring, *inter alia*, to the jurisprudence of the International Court of Justice (ICJ)[153] and the European Court of Justice.[154] Following that approach, the *Apotex* tribunal read the dispositive of an earlier North American Free Trade Agreement award invoked by the respondent together with the reasons set out in the award, and by a majority deemed those reasons to be *res judicata*, leading to the dismissal of the claims.[155]

Although the ILA Recommendations do not consider that *res judicata* also covers issues determined impliedly, that approach is followed by the jurisprudence of the ICJ[156] and more recently also by investment tribunals,[157] according to which *res judicata* covers all issues decided, either expressly or '*by necessary implication*'. That approach is consistent with a functional conception of *res judicata* in line with the needs of commercial arbitration and there is no reason not to apply it in that context as well.

That approach is also in line with the evolution of the case law of certain civil law jurisdictions. Contrary to traditional wisdom,[158] not all civil law jurisdictions subscribe to the view that issues determined in order to rule on claims are not *res judicata*, as this is limited to the judgment's operative (or dispositive) part, which sets out the decision on claims.

In Italy, for example, 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

[152] *Apotex* Award (n 120) para 7.23.

[153] ICJ, *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia v Peru)*, Judgment, 27 November 1950, ICJ Rep 1950, 395ff; *The Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v Albania)*, Judgment, 9 April 1949, ICJ Rep 1949, 4ff.

[154] Joined Cases 97, 193, 99, and 215/86 *Asteris AE & Others & Greek Republic v Commission of the European Communities* [1988] ECR 1988-02181, para 27; Case C-137/92 P *Commission of the European Communities v BASF AG & Others* [1994] ECR 1994 I-02555, para 67; Case C-355/95 P *Textilwerke Deggendorf GmbH (TWD) v Commission of the European Communities and Federal Republic of Germany* [1997] ECR 1997 I-02549, para 21.

[155] *Apotex* Award (n 120) paras 7.41ff, holding (by majority) at para 7.58 that '*The purpose of the* res judicata *doctrine under international law is to put an end to litigation; and it would thwart that purpose if a party could so easily escape the doctrine by "claim-splitting" in successive proceedings*', and at para 7.59 that '*[…]. The costs and time required for investor-state arbitrations, already not inconsiderable, would be multiplied several times over if unsuccessful claimants could persuade later tribunals to restrict the effect of earlier awards by simply reformulating their claims and arguments. […], there is a strong interest, both public and private, in bringing an end to a dispute by one final and binding arbitration award*'.

[156] ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Rep 2007, para 126; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia)*, Judgment—Preliminary Objections, 17 March 2016, ICJ Rep 2016, para 60; *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v Nicaragua)*, Judgment, 2 February 2018, ICJ Rep 2018, para 68; *Arbitral Award of 3 October 1899 (Guyana v Venezuela)*, Judgment—Preliminary Objection, 6 April 2023, para 67.

[157] UNCITRAL Tribunal, *Iberdrola Energía, S.A. v The Republic of Guatemala*, Final Award, 24 August 2020, PCA Case No 2017-41, para 288: '*The Claimant is correct in pointing out that under international law* res judicata *will only bar a second adjudication if the claims before the second court or tribunal have been "definitively settled" in the first proceedings. The ICJ has recalled this requirement in two recent decisions,* Nicaragua v Colombia *and* Costa Rica v Nicaragua*, in the following terms: […] [F]or* res judicata *to apply in a given case, the Court "must determine whether and to what extent the first claim has already been definitively settled" […] for "[i]f a matter has not in fact been determined, expressly or by necessary implication, then no force of* res judicata *attaches to it"*'. See also SCC Tribunal, *GPF GP Sàrl v The Republic of Poland*, Final Award, 29 April 2020, SCC Arbitration V 2014/168, para 287.

[158] French law is representative of the traditional approach of civil law jurisdictions. Art 480 of the French Code of Civil Procedure provides that a judgment has *autorité de chose jugée* in relation to the '*objet du litige*' decided in the *dispositif*. Thus, as confirmed by the *Cour de cassation*, the reasoning of a judgment—setting out the *motifs*—does not carry *res judicata* effect (see, eg Cour de cassation, 22 November 2012, No 11-24493, Chainais (n 16) para 61). In Germany, s 322.1 of the ZPO provides that judgments have legal force only to the extent they decide on the parties' claims and counterclaims ('*Anspruch*'). Accordingly, *res judicata* is held to attach exclusively to the judgment's operative part setting out its decisions ('*Tenor*' or '*Urteilsformel*'). The judgment's reasoning ('*Entscheidungsgründe*') does not have *res judicata* effects but can be resorted to for the interpretation of its operative part. This approach has been criticized by scholars on grounds that it may lead to inconsistent decisions on the same legal relationship, causing them to advocate a broader interpretation of the notion of *res judicata* (see Albrecht Zeuner, *Die objektiven Grenzen der Rechtskraft im Rahmen rechtlicher Sinnzussammenhänge: zur Lehre über das Verhältnis von Rechtskraft und Entscheidungsgründen im Zivilprozess*, 1959). Similarly, under Swiss law *res judicata* attaches to the judgment's *dispositif*, and *not to its reasons, irrespective of whether* they constitute the necessary foundation of the *dispositif* (see, for instance, Schaffstein, *The Doctrine of Res Judicata* (n 2) paras 1.143ff, with further references). The determinations of preliminary issues are therefore not binding in further proceedings.

that constitute its 'logical antecedent'.[159] It has been observed that this case law '*ha[s] prompted a reconceptualization of* res judicata*, pointing out a potential rapprochement between the Italian and American solutions*'.[160]

The evolution of Italian law towards a broader concept of *res judicata* emerges clearly from two important 2014 *en banc* judgments of the *Corte di Cassazione*,[161] 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. Interestingly, the Court justified this expansive approach relying on a broad notion of the 'object of the proceedings'—which it identified by assessing the entire substantive legal relationship at issue—which directly serves to determine the scope of *res judicata*. The Court also held that decisions on claims for contractual termination, annulment, or rescission 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.[162]

Belgian law too adopts an expansive notion of *res judicata* that accords *res judicata* effect to the explicit or implicit 'necessary foundation' of the decision.[163]

Finally, it is significant that the ELI-UNIDROIT Rules referred to above in essence codify the common law notion of 'issue estoppel', thereby departing from the narrow approach of certain civil law countries such as France, Germany, and Switzerland. In particular, Rule 149(2) provides 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 the prior judgment and where the court that gave that judgment could decide those legal issues*'.

The application of issue preclusion in international arbitration has been criticized on the basis that the parties expect the arbitrators selected by them to make their own independent determinations based only on the evidence before them.[164] This is unconvincing. When an issue already decided is raised again in subsequent proceedings between the same parties, it is unlikely that *both of them* (rather than only the losing party) want that issue to be considered anew. In fact, for the reasons discussed above, it is to be presumed that, when committing to international arbitration, the common expectation of the parties is that there will be a single final determination of any material issue submitted to arbitration.

The criticism of issue preclusion is possibly driven by a concern that it may bar consideration of issues that were peripheral or not sufficiently addressed in the first arbitration but might arise as central in a second arbitration. That concern, however, is unjustified to the extent that issue preclusion only applies in respect of issues of fact or law the determination of which was—in the words of the ILA Recommendations—'*essential or fundamental to the dispositive part of the arbitral award*'. In other words, it is only issues resolved in the first arbitration that were material in order to rule on the parties' claims that are capable of giving rise to issue preclusion. Such issues would normally have been extensively addressed by the parties in the course of the proceedings and would have received utmost consideration by the arbitrators, including by inviting focused submissions if necessary, which should clearly emerge in the reasoning of the award.

In our view, issue preclusion should apply not only to issues expressly addressed and determined in the prior arbitration but also to those resolved impliedly, provided they constitute a necessary premise of the arbitrators' findings. In practice, this would often be the case of points of fact or law that are assumed by implication in the arbitrators' reasoning either because they

[159] 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.

[160] Cavallini and Ariano (n 117) 1.

[161] 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.

[162] 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, fulfilment of the contract, non-material breach or automatic set-off).

[163] Cour de Cassation de Belgique, Arrêt No C.07.0412.F, 4 December 2008, 6.

[164] Mayer, 'L'Autorité de Chose Jugée' (n 3) 105.

are uncontroversial or were not raised by the party that would have had an interest in doing so. Admittedly, in the latter case, it may be difficult to draw the boundary between issue preclusion and preclusion by reason of 'abuse of process' discussed below.

One of the most frequent situations calling for the application of issue preclusion is that of disputes arising from long-term contracts where, from time to time, the parties make claims which turn on the interpretation of the same contractual provisions. A typical example is the situation discussed in section '*The application of domestic res judicata rules*' above, regarding a law firm partner who commenced two arbitrations against his firm for payments allegedly due to him in different years, in which the same contractual provisions were interpreted differently by the two tribunals and the second one held itself not bound by the former's interpretation. Although the Swiss Federal Tribunal condoned it reasoning that at Swiss law *res judicata* attaches only to the *dispositif*, that outcome was clearly unsatisfactory since it allowed the co-existence of two basically inconsistent awards, which would not be permitted by the autonomous approach advocated here.

Another common situation is that of contractual disputes in which the invalidity of the contract is raised only in the second arbitration. In such cases, the fact that the first award decided on the contractual claims should in principle produce implied *res judicata* on the validity of the contract. That is because the validity of the contract is a necessary premise of any decision on contractual claims, such as for those for payment or termination. Significantly, the same conclusion in terms of preclusion might be reached reasoning on the basis of abuse of process, where the party who had an interest in raising the invalidity of the contract in the first proceeding failed to do so.

Preclusion regarding matters that could and should have been raised in earlier proceedings

The third and final facet of *res judicata*—preclusion regarding matters that could and should have been raised in earlier proceedings—is typical of common law jurisdictions insofar as it concerns claims.

Under English law, the relevant prohibition turns on the plea of abuse of process, also known as the 'extended' doctrine of *res judicata* or the rule in *Henderson v Henderson*, after the Court of Chancery's 1843 landmark decision in which this plea was first formulated (as an equity remedy relating to *res judicata*). In *Henderson v Henderson*, the Court of Chancery held that

> [it] requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case.[165]

In *Arnold v National Westminster Bank plc*, the House of Lords held that the rule applies to both cause of action and issue estoppel, expanding their preclusive reach.[166] In *Johnson v Gore-Wood & Co*, the House of Lords classified the *Henderson v Henderson* rule as pertaining to the doctrine of abuse of process and underscored the need to avoid a dogmatic approach in this matter, in favour of a merits-based assessment to decide on the existence of a procedurally abusive conduct.[167] In *Virgin Atlantic v Zodiac*, the Supreme Court, per Lord Sumption, held that '[r]es judicata *is a rule of substantive law, while abuse of process is a concept which informs the exercise of the*

[165] *Henderson v Henderson* (1843) 3 Hare 99, 115 (Sir Wigram).
[166] *Arnold v National Westminster Bank plc* (n 143) 104–07 (HL) (Lord Keith of Kinkel).
[167] *Johnson v Gore-Wood & Co* [2002] 2 AC 1, 12 (Lord Bingham).

court's procedural powers', adding that '*they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation*'.[168] In the more recent *Takhar v Gracefield Developments Ltd*, Lord Sumption confirmed that the *Henderson v Henderson* rule is a procedural power.[169] Singapore law is essentially the same as English law.[170]

The US equivalent of the rule is covered by the plea of 'claim preclusion', also known as 'the rule against splitting a single cause of action',[171] which prevents fresh proceedings on claims that were not raised in first proceedings but could and should have been raised, insofar as they originate from the same transaction.[172]

A similar approach is codified in ILA Recommendation No 5, which provides for preclusion in respect of '*a claim, cause of action or issue of fact or law*' that could have been raised in an earlier arbitration but was not, provided that its raising in the subsequent arbitration '*amounts to procedural unfairness or abuse*'.[173] This solution responds to the need to take into account '*policy objectives of efficiency and finality*' to protect the prevailing party in arbitration, also considering that '*there is a legitimate public interest in having an end to arbitration*'.[174] There is in fact an emerging consensus as to its desirability because it is aligned with the expectations of the parties to an international arbitration, including that the arbitration be conducted in good faith.[175]

There is little merit in the criticism sometimes voiced against this solution and addressed by the ILA Final Report,[176] on the grounds that it could curtail party autonomy and the discretion of parties and counsel in determining their litigation strategy and even result in a denial of access to justice. This overlooks the fundamental point emphasized above[177] that the litigation strategy, and specifically the way a claim is brought, is in the hands of the claimant which is in a win-win position. If successful in the first arbitration, it achieves its goal. If it loses, it can have a second go. It is therefore the respondent, and not the claimant, that needs to be protected.

In any case, any concerns about the potential perverse effects of this conception of *res judicata* are assuaged by the fact that the preclusion of claims, causes of action, or factual or legal issues that could have been brought in the first arbitration only operates when raising them in further arbitral proceedings amounts to procedural unfairness and abuse. As noted in the ILA Final Report, this provides '*an acceptable compromise regarding the private and public interests at stake*'[178] as it confers on arbitrators a wide discretion to take into account all the specific circumstances of the case. In carrying out this assessment, arbitrators must consider that the preclusion cannot extend to every matter that could have been brought under the relevant arbitration

[168] *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited* (n 15) para 25 (Lord Sumption).

[169] *Takhar v Gracefield Developments Ltd* [2019] UKSC 13, para 62 (Lord Sumption). See also *Union of India v (1) Reliance Industries Limited, (2) BG Exploration and Production India Limited* (n 55) paras 54–58.

[170] See *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd and others* (n 128) para 48 and *Beyonics Asia Pacific Ltd and others v Goh Chan Peng and others* [2021] SGCA(I) 2, para 52.

[171] Yuval Sinai, 'Reconsidering Res Judicata: A Comparative Perspective' (2011) 21 Duke J Comp and Intl L 359.

[172] See, eg *Citigroup, Inc. v Abu Dhabi Inv. Auth*, 776 2d Cir (2015) 128 n 1. A notable difference with English law seems to be the absence of a prohibition in respect of issues not raised in earlier proceedings: see ALI, Restatement of the Law (Second), Judgments, para 256.

[173] ILA Recommendations (n 5) No 5.

[174] ILA Final Report (n 5) para 61.

[175] See Hanotiau (n 23) 302, recognizing an emerging consensus on 'could have been claims', and 300, holding that this is in line with the expectations of the parties to an international arbitration; Born, *International Commercial Arbitration* (n 3) 4113; David AR Williams and Mark Tushingham, 'The Application of the Henderson v Henderson Rule in International Arbitration' (2014) 26 Singapore Academy of Law Journal (SAcLJ) 1036, 1041; Mayer, 'Litispendance, Connexité et Chose Jugée' (n 3) 196; Hascher (n 3) 26; Schaffstein, *The Doctrine of Res Judicata* (n 2) paras 6.206–07; Loquin (n 83) 109 (the author submits that such an obligation should be grounded on the notion of good faith rather than *res judicata*); Emmanuel Gaillard, 'Abuse of Process in International Arbitration', 2017 (32) ICSID Rev 16, arguing that 'the duty to concentrate a dispute' is a tool to redress abuse of process in international arbitration. See also Landau (n 104) para 109, submitting that that rule in question arises in most cases by virtue of an implied term of the arbitration agreement.

[176] ILA Final Report (n 5) para 60. See also Anne-Marie Lacoste, 'The Duty to Raise all Arguments Related to the Same Facts in a Single Proceeding: Can We Avoid a Second Bite at the Cherry in International Arbitration?' [2013] Cahiers Arb 349.

[177] See section '*The potential of an autonomous approach*' above.

[178] ILA Final Report (n 5) para 62.

agreement, but only to those that were part of the dispute that was the subject of the individual 'arbitral reference' giving rise to the first arbitration.[179] An initial test to verify that the second claim concerns the same dispute already decided is whether that claim would have not been brought had the first claim been successful.[180]

Investor-State case law confirms that the theory of abuse of process is a viable tool to counter attempts to litigate essentially the same dispute in circumstances where the traditional doctrine of *res judicata* cannot apply. In *RSM v Grenada*, the tribunal found in a section on 'Abuse of Process' that

> [i]t is true that Claimants style the present arbitration as Treaty claim based. But the difficulty with this is that, as pleaded and argued, the present case is no more than an attempt to re-litigate and overturn the findings of another ICSID tribunal, based on allegations of corruption that were either known at the time or which ought to have been raised by way of a revision application and over which the Prior Tribunal had jurisdiction. […] Claimants' present case is thus no more than a contractual claim (previously decided by an ICSID tribunal which had the jurisdiction to deal with Treaty and contractual issues), dressed up as a Treaty case. Having regard to all that has gone before, the Tribunal finds that the initiation of the present arbitration is thus an improper attempt to circumvent the basic principles set out in Convention Article 53 and the procedures available for revision and rectification of awards provided for in Article 51.[181]

In *Orascom v Algeria*, another ICSID tribunal relied on the theory of abuse of process to prevent multiple and successive arbitrations against the same State brought by different entities in the same group, on the basis of different investment treaties, in respect of the same investment, the same State measures and the same losses.[182] The tribunal reasoned that the 'object and purpose' of investment treaties would not be served if proceedings of that kind were allowed. The tribunal noted that '*[a]s is evident from the content of the three notices excerpted above, the three companies complain of the same measures taken by Algeria*' and that '*while the parties to the dispute and the legal bases for the claims (the BITs) are different, the dispute being notified in the three notices is effectively one and the same*'.[183] It also cited the *RSM v Grenada* case, noting that it '*essentially relies on the same rationale of avoiding that claims involving the same economic damage be adjudged twice*'.[184] The tribunal concluded that multiple proceedings '*in relation to the same investment, the same measures and the same harm*' are inadmissible in investment arbitration as an abuse of rights.[185]

In our view, in the admittedly different context of international commercial arbitration, applying the *Orascom* 'object-and-purpose' analysis to the provisions on the finality of an award contained in arbitration rules and arbitration agreements should lead to dismiss as abusive any

[179] Landau (n 104) paras 121–31.
[180] Mayer, 'Réflexions sur l'Autorité Négative' (n 62) 345.
[181] *RSM* award (n 151) paras 7.3.6–7.
[182] ICSID Tribunal, *Orascom TMT Investments S.à r.l. v People's Democratic Republic of Algeria*, Award, 31 May 2017, ICSID Case No ARB/12/35, para 543. The tribunal dismissed as abusive the treaty claims brought by an Orascom company against Algeria on the basis of the Belgium–Luxembourg–Algeria investment treaty, in respect of the same investment and losses already subject to a prior arbitration commenced by another Orascom entity under the Egypt–Algeria investment treaty, which was settled and culminated in a consent award. As noted by John David Branson, 'The Abuse of Process Doctrine Extended: A Tool for Right Thinking People in International Arbitration', 2021 (38) J Int'l Arb 210: '*This scenario created a procedurally complex problem that was outside the scope of even the most flexible approaches to* res judicata *or collateral estoppel.* Res judicata *could not apply because there was no reasoned final award. Moreover, even if the Consent Award could arguably suffice as a final award, a strict application of the triple identity test would fail because the claimants were different and the treaties were different—thus the legal causes of action were not identical*', 212: '*the controlling rationale in* Orascom *is clearly intended to address similar concerns as those which* res judicata *and collateral estoppel are intended to bar*'.
[183] *Orascom* award (n 182) para 488.
[184] ibid para 542, n 835.
[185] ibid para 542.

attempt to re-submit to arbitration a dispute which in essence is the same as one already decided in a prior arbitration. As a corollary, the abuse of process theory should bar the raising in a second arbitration of claims and arguments that, having regard to all relevant circumstances, could and should have been made in the first arbitration over the same dispute.

It seems to us that the approach endorsed by the ILA Recommendations, which mirrors the common law doctrine of abuse of process, can also be accommodated in civil law jurisdictions, where there is no explicit equivalent of the *Henderson v Henderson* rule in respect of claims.[186]

For a start, it is significant that, as illustrated above,[187] certain civil law jurisdictions accept in principle that *res judicata* may cover matters actually not determined, which a party could and should have raised in earlier proceedings.[188] This is in particular the case of those jurisdictions that now adopt a broad, factual, conception of 'cause' of a claim for the purposes of establishing the identity of claims under the 'triple identity' test. That conception implies that *res judicata* may preclude the bringing in subsequent proceedings of a claim decided in earlier proceedings, even relying on different legal grounds.

Moreover, virtually all civil law jurisdictions, albeit with certain differences, recognize the notion of 'abuse of right', which is fact-sensitive and apt to be applied to avoid abusive duplicative litigation, in line with the very purpose of the doctrine of *res judicata*.[189] Indeed, the prohibition of abuse of right encompasses procedural rights and can be relied upon to prevent fresh proceedings which, albeit brought on technically different claims, concern essentially the same dispute as the one already decided in earlier proceedings.[190]

This development has been embraced, for example, by two *en banc* decisions of the Italian *Corte di Cassazione*. In 2007, the Court relied on the concepts of 'good faith' and 'abuse of process' to prevent the bringing of multiple actions, each for a fraction of the same claim ('*frazionamento giudiziale*').[191] In 2017,[192] it held that claims arising from different and distinct rights to payment, albeit stemming from the same relationship, may be brought in separate proceedings. However, it added that if a decision on one of the claims would bar the hearing of the other claims on grounds of *res judicata* or if the claims are based on the same facts—so that hearing them separately would lead to a duplication of the taking of evidence and to a piecemeal assessment of the same substantive situation—the claims may only be split into different proceedings if the creditor has an objective interest to obtain separate remedies.

Japanese courts likewise appear to have resorted to the principle of good faith to expand the subject matter scope of *res* judicata, so as to include claims not raised in prior proceedings but which, under a good faith analysis, should have been raised in those proceedings.[193]

Thus, the autonomous approach to arbitral *res judicata* should embrace the broadest preclusive effects, which go beyond the traditional conception of *res judicata* in its literal meaning of 'matter that has been adjudicated'. To be clear, this does not mean that such preclusion would be triggered whenever a claim *could* conceivably have been brought in earlier proceedings.

[186] As explained by Chainais (n 16) para 76: '*Dans les pays de tradition civiliste, le principe dispositif ou principe de la libre disposition implique qu'il incombe aux parties et à elles seules de définir librement la matière litigieuse—les faits et l'objet du litige*'.

[187] See section '*Preclusion regarding claims*' above.

[188] Schaffstein, *The Doctrine of Res Judicata* (n 2) para 1.162.

[189] See, eg Spanish Civil Code, art 7; German Civil Code, s 226; Portuguese Civil Code, art 334; Greek Civil Code, art 281; Luxembourg Civil Code, art 6-1.

[190] cf Jacob van de Velden, *Finality in Litigation: The Law and Practice of Preclusion*—Res Judicata *(Merger and Estoppel), Abuse of Process and Recognition of Foreign Judgments* (Wolters Kluwer 2017) 106 and 193ff.

[191] Corte di Cassazione, Sez. Un, 15 November 2007, No 23726, paras 5.2–5.3.

[192] Corte di Cassazione, Sez. Un, 16 February 2017, No 4090, para 5.

[193] See Yasuhei Taniguchi, 'Good Faith and Abuse of Procedural Rights in Japanese Civil Procedure' 2000 (8) Tulane J Int'l & Comp L 181ff addressing 'abuse of right of action' and discussing a 1976 judgment of the Japanese Supreme Court that expanded the scope of *res judicata* relying on the principle of good faith to declare inadmissible an action brought on a cause of action different from the one adjudicated in earlier proceedings. That judgment has been followed by many lower court decisions which barred a second action on a technically different cause of action (see, eg Tokyo District Court, 9 September 2013, 4).

Indeed, as discussed, the standard requires that the claim in question not only *could* have been brought but also *should* have been brought in the specific circumstances of the case. The assessment of whether a given claim 'should' have been brought in a given case depends on a broad, merits-based analysis requiring careful scrutiny of all relevant circumstances, above all of the conduct of the parties in earlier proceedings and the reasons why a claim that could have been brought was not.

Summary of the criteria to determine the res judicata effects of awards

From all the foregoing it follows that the *res judicata* effects of international arbitral awards should be determined so as to preclude re-litigation of a dispute which is in essence the same as the one already decided. This means recognizing broad preclusive effects to those awards, in accordance with common-law-styled notions of claim preclusion, issue preclusion, and abuse of process.

The proper conception of arbitral *res judicata* should therefore prevent (i) the re-litigation of an identical claim already decided in a prior arbitral award between the same parties, with the identity of claims turning only on the object of the claims in the two arbitrations and the facts on which they are based, irrespective of the specific legal grounds invoked; (ii) the re-litigation of issues determined expressly or impliedly in an earlier award for the purpose of deciding a dispute, possibly subject to the exceptions as developed by the case law of common law jurisdictions; and (iii) the litigation of claims and issues that could and should have been brought in an earlier arbitration, if that proves to be an abuse of process in light of a broad, merits-based, assessment of all relevant circumstances.

THE NEED FOR ENGAGEMENT BY THE ARBITRAL COMMUNITY IN THE DEVELOPMENT OF ARBITRATION-SPECIFIC RULES ON *RES JUDICATA*

The upshot of the foregoing analysis is that an autonomous approach to arbitral *res judicata* is possible and desirable and that, even in the absence of widely recognized criteria, arbitrators ought to strive to apply it, shunning domestic law, relying on their assessment of the presumable intentions of the parties and on their inherent powers. Judges too might better reflect on the specificities of arbitration when deciding on the *res judicata* effects of awards, so as to avoid assessing these as they do those of domestic judgments. And of course, counsel should not hesitate to prod arbitrators and courts before whom they appear to identify and apply the most appropriate solutions for the arbitration-related issues they are confronted with, starting with *res judicata*. In principle, over time this should lead to the emergence of a body of accepted rules.

That said, it is undeniable that, until this occurs, hesitation to follow the proper course will persist. 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. As experience shows, the instruments of these organizations are also pedagogically important for national courts, for whom they can provide guidance on the (non-) application of their own rules to arbitration.

However, it is arbitral institutions that are best placed to tackle *res judicata* effectively. The inclusion of specific default rules on the *res judicata* effects of awards issued under their rules would give teeth to the provisions on finality already contained in them and hopefully eliminate

misplaced hesitation about the legal basis for an arbitration-specific conception of *res judicata*, potential due process concerns and temptations to resort to domestic law. By adopting such rules, institutions could provide their users with greater assurance of protection from attempts to call into question the award. At the same time, by highlighting the issue of *res judicata*, those rules—which could always be opted out of—would induce the parties to focus on the degree of finality they seek and, in the event, allow them to agree on the rule most aligned to their needs.

The LCIA has taken a very timid first step in the proposed direction in article 26(8) of its Rules,[194] but more specific provisions are needed. These could initially address the basic situation of awards relied upon in further arbitral proceedings, focusing exclusively—as this article does—on the subject matter scope of *res judicata* with respect to issues of substantive law. The fact that rule-making by arbitral institutions could produce divergent rules is immaterial. It would give the parties the ability to choose the solution they prefer and lead to healthy competition and cross-fertilization.

In the meantime, arbitrators themselves could deal with the issue well in the course of the proceedings. For example, they could address it in the terms of reference or the procedural rules. They could even ask the parties whether they wish to assert claims for declaratory relief in respect of preliminary issues relevant for the decision of the case (such as the interpretation of contractual provisions), so that the determinations of those issues can be included in the dispositive and acquire *res judicata* effects even if the award is subsequently assessed under the most restrictive approach.

As discussed elsewhere, the elaboration and codification in soft-law instruments of clear rules and practices governing international arbitration are indispensable for the proper functioning and legitimacy of the latter.[195] Today there is no place for opposition to this approach based on tropes such as the fact that it stifles party autonomy, independent thinking, and the flexibility of arbitration or that it fails to respect the diversity of legal cultures and backgrounds. Arbitration is no longer a quaint and elitist endeavour of a small circle of counsel and arbitrators. It is now the primary dispute settlement mechanism for international business transactions, involving parties and counsel from all parts of the world and the most diverse backgrounds. In this context, *ad hoc* rules tailored to arbitration ensure efficiency, predictability, and uniformity, and in this way make arbitration accessible and understandable beyond a closed circle of practitioners. They also avoid excessive discretion on the part of arbitrators, which in turn is key to the perception of arbitration as a legitimate and trusted system.

CONCLUSION

This article has sought to demonstrate that determining the *res judicata* effects of international arbitral awards by reference to domestic law is highly unsatisfactory insofar as it may lead to outcomes incompatible with the nature and objectives of international arbitration, as well as with the parties' presumed expectations of finality embodied in most arbitration agreements and rules. The correct approach is an autonomous one that, in keeping with such expectations and borrowing from the solutions developed in common law, confers broad *res judicata* effects to awards, with a view to preventing re-litigation of disputes that in substance replicate ones resolved by prior awards. This approach is possible because public policy does not encompass detailed prescriptions on the subject matter scope of *res judicata*, which can be the subject of

[194] See section '*The contractual basis for the autonomous approach*' above.

[195] Radicati di Brozolo, 'Uniform Arbitration-Specific Rules' (n 6) 75–79; Radicati di Brozolo and Ponzano, 'The Need for Arbitration-Specific Rules on Ethics' (n 6) 105–07.

party autonomy and can be addressed by arbitrators in the exercise of their inherent powers to effectuate the parties' agreement and protect the integrity of the arbitral process.

Even before broadly recognized rules on arbitral *res judicata* emerge, adjudicators should address the subject with an arbitration-specific mindset, shedding unnecessary domestic law baggage. In so doing they can find useful guidance in the ILA Recommendations, bearing in mind that in some respects it would be appropriate to go a step further. The arbitration community, and primarily the soft-law-making bodies and arbitral institutions, should feel encouraged to approach this issue proactively and to contribute to the development of rules to give secure guidance to arbitrators and courts alike in determining the proper contours of arbitral *res judicata.*