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TOO MUCH DOMESTIC LAW IN INTERNATIONAL ARBITRATION: THE CASE OF ARBITRAL *RES JUDICATA*

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I. INTRODUCTION

The topic I have chosen for today's lecture, the *res judicata* effect of international commercial awards, is in my view interesting from two perspectives.

First of all, it is of great practical significance because disputes on whether, and under what circumstances, the outcome of an arbitral award can be called into question in other arbitral or judicial proceedings between the same parties arise with increasing frequency. Secondly, arbitral *res judicata* also has broader relevance because it raises the issue of what rules must be applied to resolve arbitration-related issues, and specifically the extent to which solutions must be sought in domestic law. The title I have chosen for my lecture is a bit of a give-away as to my take on this.

In the majority of cases, the question whether a previous award precludes the adjudication of a dispute tends to be resolved by arbitrators — and even more so domestic courts — on the basis of a domestic law. I will try to show that, for several reasons, this is neither practically nor dogmatically satisfactory.[1]

I will only consider this issue from the perspective of arbitrators, but much of what I will say should, in my view, also apply when the issue arises before domestic courts.

II. THE RELATIONSHIP BETWEEN ARBITRATION AND DOMESTIC LAW

To identify the rules that arbitrators must apply to establish whether a prior award issued by a different tribunal has a preclusive effect, it is useful to start with a few considerations on the relationship of arbitration with domestic law.

Arbitration, of course, depends on State law and can only exist and function within the limits permitted by domestic law. Today, however, States adopt a *laissez faire* attitude towards arbitration and there is broad

1. Some of the issues discussed in this lecture are addressed more comprehensively in other publications of mine, *see, e.g.*, Luca G. Radicati di Brozolo, *What Rules Must International Arbitrators Apply to Decide According to the Law?*, ARB. INT'L, 298, 298–309 (2023); Luca G. Radicati di Brozolo, *Uniform Arbitration-Specific Rules v. Domestic Law and Conflict of Laws In International Commercial Arbitration, in* MÉLANGES EN MÉMOIRE D'EMMANUEL GAILLARD 49, 49–82 (2023); Luca G. Radicati di Brozolo, *Domestic Law and Conflict of Laws: What Should Their Role be in International Arbitration?*, *in* APPLICABLE LAW ISSUES IN INTERNATIONAL ARBITRATION, 539 (G. Cordero Moss & D. Fernández Arroyo eds., 2023); Luca G. Radicati di Brozolo & Flavio Ponzano, *The Need for Arbitration-Specific Rules on Ethics: A Plea for a Collective Effort*, in LEADERSHIP, LEGITIMACY, LEGACY: A TRIBUTE TO ALEXIS MOURRE 105, 110–12 (Mohamed S. Abdel Wahab et al., eds., 2022).

convergence between the more relevant domestic laws not to interfere too much with it, except to preserve the integrity of the process. The key principle is party autonomy. It is important to bear in mind that there are no mandatory domestic rules dictating what rules the arbitrators must apply. Especially, there is no obligation for arbitrators to apply State law, unless of course the parties want them to do so (as is usually the case with the merits). States have no particular interest in the application of their laws by arbitrators, with the exception of mandatory rules. This is demonstrated particularly by the fact that there is no review of the legal principles applied by the arbitrators.

The result is that international arbitration has been allowed to develop into a fairly homogenous system based to a considerable extent on shared approaches. This is true both as regards to the internal functioning of the arbitral process and, albeit to a lesser extent, as regards to how arbitration is treated by the courts. This is in line with the expectations of the parties that tend to favor a uniform and predictable and flexible system, as opposed to the fragmented and parochial alternative of domestic litigation.

III. THE DIFFERENT CONCEPTIONS OF *RES JUDICATA*

With this in mind, let me turn to *res judicata*.[2]

The principle of *res judicata* is recognized in all domestic legal systems and public international law and dictates that the decision of a dispute by a competent adjudicator is final and conclusive. This is crucial for the efficient functioning of judicial systems because it ensures legal security and avoids repeat litigation of the same matter.

The notion of *res judicata* varies between legal systems, and in these

2. *Res judicata* in commercial arbitration is the subject of increasing interest, *see* GRASSI MICHELE, IL RICONOSCIMENTO DEGLI EFFETTI DEL GIUDICATO NELL'ARBITRATO COMMERCIALE INTERNAZIONALE, 2022; Toby Landau, *Arbitral Groundhog Day: The Reopening and Re-Arguing of Arbitral Determinations*, 2 SING. ARB. J. 1 (2020); Gary B. Born et al., *The Law Governing Res Judicata in International Commercial Arbitration*, *in* JURISDICTION, ADMISSIBILITY AND CHOICE OF LAW IN INTERNATIONAL ARBITRATION 1–18 (Neil Kaplan & Michael J. Moser, eds. 2018); SILJA SCHAFFSTEIN, THE DOCTRINE OF RES JUDICATA BEFORE INTERNATIONAL COMMERCIAL ARBITRAL TRIBUNALS (2016); Luca G. Radicati di Brozolo, *Res Judicata*, *in* POST AWARD ISSUES: ASA SPECIAL SERIES 127–50 (38th ed., 2012); M. Dominique Hascher, *L'autorité de la Chose Jugée des Sentences Arbitrales*, *in* DROIT INTERNATIONAL PRIVÉ: TRAVAUX DU COMITÉ FRANÇAIS DE DROIT INTERNATIONAL PRIVÉ 17–46 (2004); Pierre Mayer, *Litispendance, Connexité et Chose Jugée dans l'Aritrage International*, *in* LIBER AMICORUM CLAUDE REYMOND: AUTOR DE L'ARBITRAGE 185–203 (2004).

systems its scope is not always precisely identifiable because the rules are highly technical and usually elaborated by the courts and subject to evolution. The different conceptions of *res judicata* can be seen as forming three concentric circles:

(i) The first one is the prohibition against relitigating a dispute already decided, as identified by the parties' *claims*. This conception of *res judicata* exists in all systems.

(ii) The second, broader, circle is the prohibition against reconsidering any issue (of law or fact) that has been resolved for the purpose of deciding an earlier dispute.

(iii) 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. This prohibition is referred to in terms of abuse of process and is not universally shared.

IV. THE APPROACHES TO DETERMINING THE *RES JUDICATA* EFFECTS OF INTERNATIONAL ARBITRAL AWARDS

Although it is accepted that *res judicata* also applies to international commercial awards, there is a discussion as to its legal basis and scope. In essence, there are two competing approaches. The traditional, almost default, approach is to resort to domestic law. This is still the most common approach to the majority of arbitration-related problems. The second approach is a "transnational" one, which dispenses with national law.

In my opinion the first approach, that I will call the conflict of laws approach, is ill-suited to deal with *res judicata* in arbitration. Actually, in my view, it is ill-suited to deal with the majority of problems that arise in connection with arbitration, other than the merits.

V. THE DRAWBACKS OF THE CONFLICT OF LAWS APPROACH

The reason for this is that recourse to domestic law is complex, breeds uncertainty, and does not ensure appropriate results for arbitration.

The first drawback is the identification of the applicable domestic law, which is obviously the first step of the process for applying domestic law. Before the arbitrators, this involves a two-step process. The initial step is determining the conflict of laws system, or methodology, for identifying the governing law. As we know, this process is fraught with uncertainty because there is no uniform approach to identifying the applicable law in arbitration. This is a first source of unpredictability and uncertainty. Once this hurdle is in some way overcome, the next step is identifying the appropriate conflict rule to establish the law governing the *res judicata* of

awards. This exercise is equally uncertain and unpredictable because most systems do not have a clear conflict rule on the subject (as a matter of fact, not even for foreign judgments) and the solutions adopted in practice vary considerably. Arbitrators, therefore, have wide discretion to identify the domestic law they will apply.

The laws usually considered by arbitral jurisprudence are:

(i) the one of the seat of the second arbitration, in other words the arbitral proceedings in which the *res judicata* effects of the award are invoked, which is the law most often resorted to;
(ii) the one of the seat of the first arbitration;
(iii) the one governing the substantive rights at issue (which could be different in the first and in the second arbitration); and
(iv) the one governing the arbitration agreement, which itself is notoriously difficult to determine given the variety of approaches in different domestic systems.

Often, the application of one law rather than the other is not the result of a proper conflict of laws analysis and it is unclear why one law rather than another law is ultimately applied. Sometimes the choice is made based on the characterization of *res judicata* as a matter of procedure (which is held to lead to the application of the law of the seat — but which seat?) or a matter of substance, leading to the *lex causae*. One problem here is that the characterization of *res judicata* as substantive or procedural varies from one system to another and is not always straightforward.

The second drawback of resorting to domestic law is that the law considered applicable usually will not contain specific rules on the scope of *res judicata* of awards. As a result, resorting to domestic *res judicata* rules means resorting to rules conceived for domestic court judgments, with no consideration for arbitral awards. And because those rules are conceived for local judgments, they are the expression of the traditions and peculiarities of their respective legal system, and are an intimate part of its civil procedure, and are moreover usually applicable to all types of judgments, not only those in commercial matters. They are therefore not necessarily suitable to assess the effects of arbitral awards, especially international ones, that deal only with commercial matters and are the outcome of a process which States leave to the autonomy of the parties and is conducted differently than local court proceedings. In arbitration, the needs and expectations of the parties are paramount. A particularly important expectation is undoubtedly the one as to the finality and uniform effect of the culmination of the arbitral process. Both these expectations may be frustrated by national rules based on narrow and formalistic notions of *res judicata* that vary from one legal system to the other.

Often, when applying national *res judicata* rules to awards, arbitrators do

not pause to reflect on whether those rules are suited to international arbitration, nor do they make an effort to take the specificities of arbitration into consideration.

The flaws of the conflict of laws approach to *res judicata* are evident in the recent awards in two of the multiple arbitrations relating to the works on the Panama Canal, on which I can only dwell briefly.[3] As you certainly know, these are a cluster of gigantic multibillion-dollar arbitrations between enormous, sophisticated and well-resourced players, with recurrent issues. In both awards, the Miami-seated tribunals denied preclusive effects to a prior award, on the basis of an extremely restrictive domestic law conception of *res judicata* which excluded issue preclusion. The first set of flaws concerned the conflict of laws analysis. This was a little different in the two cases, but in both it was largely incomprehensible and in one case circular — I unfortunately don't have time to go into the details. Both tribunals ended up applying Panamanian law, which was the law governing the merits. This is a fairly unusual and rather unconvincing solution.

This unsatisfactory conflict of laws and substantive conclusion was assertedly buttressed by a consideration of the parties' expectations. In essence, the tribunals reasoned that the parties did not expect the application of broad preclusion rules akin to "issue estoppel," because all of them were from civil law jurisdictions. Neither tribunal made the slightest effort to investigate the reasonable expectations of arbitration users, or for that matter even of those specific parties. While, as I will say later, the arbitrators were correct in giving relevance to the parties' expectations, the assessment of these was at best questionable and purely theoretical. The arbitrators bluntly assumed that, because the parties were from civil law systems, they expected a formalistic interpretation of *res judicata* excluding issue estoppel. They did not even pause to consider that, at least in the laws of some of the parties, the case law has moved beyond that very formalistic restrictive conception of *res judicata*. Of course, if even one of the parties (say a member of the consortium) had been from a common law country, the Tribunal's entire reasoning would have unraveled.

More fundamentally, both tribunals completely disregarded the context

3. *See generally* Grupo Unidos por el Canal, S.A. v. Autoridad del Canal de Panama (Lux., Belg., It., Spain v. Pan.), Int'l Comm. Arb. Case No. 22588/ASM/JPA, Final Award, ¶ 205 (ICC Int'l Ct. Arb. 2018); Grupo Unidos por el Canal, S.A. v. Autoridad del Canal de Panamá, Int'l Comm. Arb. Case No. 20910/ASM/JPA, ¶ 490–92 (2020).

of the arbitrations — the nature of the parties, the complexity and cost of the project and arbitrations themselves, and the sheer number of proceedings. Is it not naïve to believe that those parties (which, by the way, were represented by highly reputed international law firms, not all from civil law jurisdictions) organized their strategy in the arbitrations relying on parochial conceptions of *res judicata* and for this reason were justified in seeking to overturn the outcome of earlier awards?

VI. THE ADVANTAGES OF A TRANSNATIONAL APPROACH

The view that national *res judicata* rules are not well suited to govern the effects of arbitral awards — as eloquently demonstrated by the two awards I just referred to — is supported by many commentators, as well as by the *Report and Recommendations on Res Judicata* of the International Law Association,[4] which are a very useful basis to address our subject and that I will refer to as we go on.

There is a growing consensus that the better solution is a "transnational" approach that dispenses with domestic law in favor of uniform arbitration-specific rules. This has several advantages, which are the flip side of the drawbacks of the conflict of laws approach. It reduces the discretion of the arbitrators, and therefore the uncertainty regarding the outcome, that as mentioned above is *inherent* in the conflicts of law process in arbitration as well as the lack of uniformity deriving from the differences in domestic regimes. Moreover, it avoids the application of domestic rules potentially ill-suited to the specificities of arbitration in favor of a uniform regime tailored to arbitration. Basically, the transnational approach is in keeping with the spirit of international arbitration as a system of transnational dispute resolution, one of the goals of which is to ensure that matters pertaining to the functioning of the dispute settlement mechanism are settled in a manner that is relatively uniform and suitable to the peculiarities of arbitration.

Although not explicitly, a transnational approach is followed in certain arbitral awards and even State court decisions, which — while professing to apply domestic law — avoid the strict application of State *res judicata* rules in favor of a more flexible, intuitive, and pragmatic approach.

4. *See generally* Filip De Ly & Audley Sheppard, *ILA Interim Report on* Res Judicata *and Arbitration*, 25 ARB. INT'L 35 (2009) [hereinafter *ILA Interim Report*]; Filip De Ly & Audley Sheppard, *ILA Final Report on* Res Judicata *and Arbitration*, 25 ARB. INT'L 67 (2009) [hereinafter *ILA Final Report*]; Filip De Ly & Audley Sheppard, *ILA Recommendations on* Lis Pendens *and* Res Judicata *and Arbitration*, 25 ARB. INT'L 83 (2009) [hereinafter *ILA Recommendations*].

Emphasis is placed on principles such as good faith, party autonomy and the scope and effects of the arbitration agreement, consistency and non-contradiction, estoppel, concentration of issues and claims, expectations of the parties, *effet utile*, efficiency and procedural economy, and prohibition of procedural abuse.

In fact, often even when arbitrators refer to a domestic law, they seem to be paying lip service to a traditional conception and at times they do not even refer to a specific national law. The case law is now relatively abundant, but unfortunately cannot be examined in this lecture.

VII. THE LEGAL BASIS FOR THE TRANSNATIONAL APPROACH

So, if the consensus is that a transnational approach is in principle preferable, why do arbitrators still tend to rely on domestic law, or at least purport to do so?

I think this is due in part to a form of intellectual laziness that leads arbitrators to stick to habit and to the apparently safer and less controversial course and to overlook the specificity of arbitration and the powers they have to identify appropriate solutions for the problems that come before them.

It is useful to recall that, except in the presence of mandatory rules, arbitrators must always abide by the will of the parties when deciding whatever matter submitted to them. Absent party agreement on how to decide a given issue, arbitrators must rely on any relevant arbitration-specific rules in the sources that govern their powers in the proceedings at hand, which — depending on the circumstances — are domestic law, arbitration rules, soft law, and arbitral practice. When no such rules are available, as with *res judicata*, arbitrators must exercise their inherent authority in such a way as to decide the dispute within the applicable parameters and to protect the integrity, fairness, and efficiency of the proceedings. Under no circumstances are arbitrators under an obligation to apply domestic law when no arbitration-specific rules are available, and the parties do not require them to do so.

Since with respect to *res judicata*, there are no arbitration-specific rules, their authority to adopt a transnational solution must be found in contractual provisions or in their inherent powers.

VIII. THE APPLICATION OF DOMESTIC *RES JUDICATA* RULES TO ARBITRAL AWARDS IS NOT MANDATED BY PUBLIC POLICY CONSIDERATIONS

Before coming to this, let me dispel the preoccupation, which is sometimes voiced, that granting *res judicata* to awards beyond the strict

limits set by some national jurisdictions could offend public policy.

I think there is absolutely no merit in this, precisely because of the fundamental differences between international arbitration and court litigation and because domestic *res judicata* rules are conceived for domestic litigation. It is because those rules have been developed for disputes involving a variety of categories of litigants, including non-sophisticated ones and ones without the means to engage in complex proceedings addressing all potential issues, that some systems (but not all) may consider a restrictive conception of *res judicata* as mandatory.

As I said earlier, international arbitration is instead concerned exclusively with disputes between commercial parties, often high-stake ones. The parties and their lawyers are normally better equipped than other types of litigants to assess their litigation strategy and they tend to maximize their chances of success, devoting large resources to the proceedings by resorting to the entire gamut of arguments potentially impacting the outcome of the dispute. Holding back potentially relevant arguments, speculating on the possibility of raising them in subsequent litigation, could well be considered a breach of the obligation to arbitrate in good faith. Due to the commercial nature of the disputes, in arbitration there is also greater interest in the finality of decisions, so much so that (as I recalled at the beginning) there is no recourse against the decisions of arbitrators.

In light of this, there is, in my opinion, little or no basis to suggest that applying an expansive conception of *res judicata* to arbitration might impact due process and the parties' right to be heard and to plead their case as they choose.

As we all know, when it comes to arbitration, public policy must be interpreted restrictively, to avoid frustrating the New York Convention's obligations. This is uncontroversial with respect to arbitral procedure, in relation to which the fundamental notions of due process and the right to be heard are interpreted autonomously, without reference to their specific incarnations in domestic civil procedure. I submit to you that 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 other domestic civil procedure rules not viewed as forming part of public policy. There is consequently no reason why an autonomous and restrictive assessment of public policy tailored to the specificities of arbitration should not also apply for *res judicata*.

The conclusion should therefore be that domestic rules on the preclusive effect of *res judicata* (unlike those on the positive effect of *res judicata*, which forbids disregarding the decision of an award) do not form part of public policy and therefore do not constitute a bar to the resort, by

arbitrators, to more expansive conceptions of *res judicata*. This position is shared by the ILA's Report and Recommendations.

A principled consideration of the concept of public policy as applicable in set aside and in recognition and enforcement proceedings should therefore give ample reassurance to arbitrators that they do not have to remain prisoners of stereotypical restrictive notions of *res judicata* when they are called to establish the preclusive effect of prior awards, just as they do not have to abide by domestic civil procedure. For their part, domestic courts should likewise realize that in determining the validity of an award at the annulment stage and in recognition or enforcement proceedings they must apply a different standard compared to the one they are used to applying when assessing the preclusive effects of prior court judgments.

IX. THE CONTRACTUAL BASIS FOR A TRANSNATIONAL APPROACH TO ARBITRAL *RES JUDICATA*

From the conclusion that arbitral *res judicata* is not constrained by narrow domestic law constructs and mandatory law, it follows that the contours of the preclusive effect of awards may freely be fashioned by party autonomy.

In practice, parties very seldom address the *res judicata* of the award in their arbitration agreement or in arbitration rules. But, even absent specific provisions, arbitrators can rely on a contractual basis for their decisions on this point.

That contractual basis can, in my view, be found in the provisions on the finality of the award contained in all arbitration rules and in most arbitration agreements. Although they do not explicitly refer to the preclusive effect of the award, those provisions must be interpreted with specific reference to the arbitral context. Since the review of awards is practically always excluded by national rules, according to the *effet utile* principle, the reference to the "finality" of the award in those contractual provisions cannot reasonably be understood as a mere redundant prohibition of appeal against the award. Rather, in line with the practical approach of participants in commercial relations and their interest in finality, 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.

The provisions on the finality of awards may thus be viewed as a manifestation of a term that would seem to be implied in every agreement to arbitrate.

This interpretation of finality clauses is consistent with the parties' presumable interests and expectations. Recourse to arbitration, which

nowadays is in practice the default dispute resolution mechanism for international disputes, is largely determined precisely by the fact that it has its own features and does not replicate domestic litigation. Users therefore neither expect nor desire a pure and simple transposition to arbitration of rules applied in domestic courts. This is so for the conduct of the proceedings, but it is only natural that users would likewise not wish the *res judicata* effects of their award to be determined by a pedantic application of domestic rules dependent on the vagaries of conflict of laws that is capable of opening the doors to re-litigation. Rather, their most likely intent is to prevent their opponent, after a potential, presumably costly and lengthy arbitration, from beginning litigation from scratch relying on narrow domestic conceptions of *res judicata*.

There are therefore strong arguments for a constructive and context-based interpretation of finality clauses in arbitration agreements and rules as covenants not to relitigate the dispute resolved by a prior award. On that basis alone, I believe that arbitrators can safely consider that they have authority to assess *res judicata* according to a broad conception.

X. THE APPLICATION OF A TRANSNATIONAL APPROACH TO *RES JUDICATA* AS AN EXERCISE OF THE INHERENT POWERS OF ARBITRATORS

If arbitrators feel that the preclusive effect of a prior award is not addressed, directly or with sufficient precision, by the parties' agreement on the finality of that award, they must find the appropriate solution by resorting to their inherent powers.

It is recognized that arbitrators enjoy inherent or implied powers to deal with situations not caught by the parties' agreement or by rules specifically designed for arbitration.[5] Inherent powers can firstly be used to give effect to the parties' agreement when this does not speak directly on a specific situation. They can therefore constitute an additional basis to establish with greater precision the scope of finality provisions with respect to the conclusive effect of prior awards.

Inherent powers can also be used to protect the integrity of the arbitral process and to ensure a fair and just result. In exercising their powers to this end, arbitrators must appraise all the relevant circumstances, including particularly the expectations of commercial litigants which, as I said, favor

5. *See* INT'L L. ASS'N, REPORT FOR THE BIENNIAL CONFERENCE IN WASHINGTON D.C. APRIL 2014 6 (2014).

pragmatic solutions and eschew byzantine conceptions capable of compromising a final solution of the dispute. Against this background, particularly in complex high-stake arbitrations with sophisticated parties, it is difficult to maintain that the losing party can in good faith hold the expectation that it is permitted to bring a second arbitration to subvert the outcome of the first one. This is all the more so if the parties are from different backgrounds and the alleged expectation on the permissibility of re-litigation rests on parochial approaches to *res judicata* not tailored to arbitration.

Accordingly, since re-litigation in these circumstances would in most cases be a misuse of the arbitral process, arbitrators can confidently use their implied powers to apply a functional approach to *res judicata* in harmony with the needs of arbitration and having regard to the specific factual scenario, without reference to domestic law.

XI. THE CRITERIA TO DETERMINE THE *RES JUDICATA* EFFECTS OF AWARDS

So, if it is clear that arbitrators have the power to adopt a transnational approach, the crucial question is what standards should arbitrators apply to determine the preclusive effects of prior awards?

From what I have said on the expectations of efficiency and finality and the nature and objectives of the arbitral process, it is obvious that these standards must ensure that a dispute submitted to arbitration is subject to a single determination and must therefore preclude re-litigation of a dispute which, *in substance*, is the same as one decided by a prior arbitration.

The standard must therefore encompass the three facets of *res judicata* I identified at the start. Specifically, it should recognize preclusive effect to an award 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.

I believe that support for this broad conception can be found in the arbitral and domestic jurisprudence that appreciates the specificities of *res judicata* in international arbitration, as well as in the significant expansion of *res judicata* in certain civil law jurisdictions. As a result, the law of these jurisdictions has, in practical terms, become more similar to the common law than traditional wisdom suggests. Also, the jurisprudence of international courts and tribunals is relevant because they are in a position similar to international commercial tribunals, in the sense that they too lack hard and fast rules on this matter and operate on the basis of a consensual process governed by party autonomy.

The ILA Recommendations provide a very good starting point for the

elaboration of criteria for arbitral *res judicata*, although in my view even they may not go far enough.

A. Preclusion Regarding Claims

The first facet of *res judicata* is the preclusion regarding claims for relief and causes of action submitted and decided in the prior arbitration. It is addressed by ILA Recommendations no. 3 and no. 4,[6] which however do not elaborate on the notions of "claim for relief," "cause of action," and "determinations and relief," and provide no guidance as to how to determine the identity of claims.

In line with the more modern approach (even in civil law jurisdictions), it seems to me that the conception of identity of claims should be flexible, pragmatic, and intuitive, having regard to the object of the claims and to the facts on which they are based, irrespective of the specific legal grounds invoked. The aim is to prevent the resubmission to a different tribunal of what is essentially the same dispute, simply relying on technical variations of the elements of the claims brought in the first arbitration**.**

B. Preclusion Regarding Issues

The second facet of *res judicata* is the preclusion regarding issues of fact or law resolved to decide the dispute in the prior arbitration. This is essentially issue estoppel of common law jurisdictions that was rejected by the Panama Canal arbitrations I criticized earlier. This 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 in its dispositive and also in the reasoning.

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6. ILA Recommendation no. 3 provides as follows:

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 Recommendations, *supra* note 4, at 85 (emphasis added).

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 . . . ," *id.*

This broad notion rejects the more restrictive and overly formalistic and literal conception of *res judicata*, which the ILA Committee rightly deems to be "acceptable on a worldwide basis" for "reasons of procedural efficiency and finality." It is in line with the jurisprudence of certain tribunals established under international law, and with the trend in certain civil law jurisdictions, to give *res judicata* effect to the findings constituting the premise of an award.

Although the ILA Recommendations do not say so, in my view there is good reason to consider that *res judicata* also covers issues determined impliedly, or "by necessary implication," according to the approach followed by the ICJ and more recently by certain investment tribunals, which is consistent with the functional conception of *res judicata* in line with the needs of commercial arbitration.

C. Preclusion Regarding Matters that Could and Should Have Been Raised in Earlier Proceedings

The third and final facet, which is more controversial, is the "extended" notion of preclusion applied in common law jurisdictions, which aims at preventing abuse of process.

This 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."[7]

This approach also responds to the objectives of efficiency and finality typical of arbitration and of protection of the prevailing party, as well as the obligation to conduct arbitration in good faith.

This solution is sometimes criticized on the grounds that it may curtail the parties' discretion in determining their litigation strategy and even result in a denial of access to justice. This, however, overlooks a fundamental point. Litigation strategy, including the way a claim is brought, is in the hands of the claimant which is in a win-win position. If it is successful in the first arbitration, it achieves its goal. If it loses, it can have a second bite at the cherry. The consequences of a re-litigation fall solely on the respondent, who is therefore the one that deserves protection against attempts to frustrate the results of the first arbitration and to remedy the defects of the strategy of that arbitration.

In any case, and this is a very important qualification, this type of

7. Id.

preclusion only operates when raising the claims in question amounts to procedural unfairness and abuse. Arbitrators must assess this preclusion in light of all the circumstances and of what a reasonable and diligent claimant should be expected to do in the first arbitration. This assessment is obviously very fact-specific, and this criterion cannot be interpreted as precluding whichever claim could conceivably have been brought. A simple 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.

Although this conception of claim preclusion is not traditionally known in civil law jurisdictions, even in some of those it is increasingly accepted that *res judicata* may cover matters that could and should have been raised in earlier proceedings. This is especially the case of systems that adhere to a broad, factual, conception of "cause" of a claim. Moreover, virtually all civil law jurisdictions, albeit with differences, recognize the notion of "abuse of right," which is fact-sensitive and apt to avoid abusive duplicative litigation.

XII. CONCLUSION ON THE TRANSNATIONAL APPROACH TO DETERMINING THE *RES JUDICATA* EFFECT OF AWARDS

To conclude, I am convinced that an autonomous approach to *res judicata* that grants broad preclusive effects to arbitral awards is both permissible and consistent with the nature and objectives of international arbitration and the expectations of users.

Arbitrators should wean themselves off their default approach to look to domestic law and take stock of their power — and I would say obligation — to adopt the appropriate solutions to ensure the stability of awards and avoid the re-litigation of disputes substantially already decided by prior awards.

If they are in need of reassurance, they can rely on the more modern, innovative, and thoughtful jurisprudence and academic writings, in particular on the ILA Recommendations which reflect the correct approach adopted by the most persuasive sources.

The criticism of these Recommendations, and more generally of the transnational approach, is out of place.

First, it is irrelevant that the Recommendations are not the expression of a universally shared approach to *res judicata* in domestic law or that they are too inspired by the common law. This underestimates the extent to which, in substance, if not explicitly, even some traditionally restrictive domestic systems are moving towards more pragmatic and less formalistic conceptions of *res judicata,* not dissimilar to those of the common law.

Second, it disregards that the goal of identifying standards for arbitration-related problems, including *res judicata*, is not to seek solutions accepted by all legal systems, but to find solutions specifically suited to arbitration. This is, for instance, what happened to arbitral procedure with the adoption of the IBA Rules on Evidence.

Third, it is irrelevant that the Recommendations do not embody a recognized transnational rule. The absence of consolidated rules is not a reason to fall back on unsuitable domestic law, instead a reason to elaborate solutions suitable for arbitration.

Fourth, it is disingenuous to say that the transnational approach breeds uncertainty and leaves free rein to the discretion of arbitrators. I alluded earlier to the great uncertainty inherent in the application of domestic law in this context and the unsuitability to arbitration of the solutions of certain domestic systems. The Panama Canal arbitrations I mentioned are paradigms of the unsuitability of recourse to domestic law. It is simply not credible that decisions based on the transnational approach predicated here would be surprising to good faith litigants, or less predictable and appropriate than those assertedly based on domestic law. The intricacies and uncertainties of domestic *res judicata* rules cannot be overestimated and render the application of those rules by arbitrators extremely unpredictable. Arbitrators, especially experienced ones, should be trusted to apply transnational criteria in a fair and reasonable manner.

I therefore firmly believe arbitrators should explicitly recognize that a transnational approach is required and should consistently apply *res judicata* having regard to the specificities of arbitration, perhaps along the lines I have just discussed, including by attributing greater weight to the ILA Recommendations, instead of dismissing these on false pretenses. Over time, this should lead to the emergence of a consolidated transnational approach to *res judicata* that ensures uniformity, which I think is essential, just as has happened for other issues, like evidence.

In this context, like in many others, I think it would be important for arbitral institutions to adopt a more proactive and creative approach by specifically addressing the effects of their awards in their rules, which would overcome the hesitations on the appropriate legal basis for an arbitration-specific conception of the preclusive effect of awards. The LCIA Rules have taken a very timid first step in this direction in their Section 26(8), but much more is needed.

On a final and more general note, my point is that — for no good reason — domestic law still plays an excessive role in arbitration (and again, I am not speaking of the merits), and stifles the full potential of this dispute settlement mechanism. Therefore, in their decisions and in the selection of the rules they apply to issues relating to the functioning of the

arbitral process, arbitrators should be more aware of their powers and duties, and both they and judges should be more courageous and creative and cognizant of the specificities of arbitration. As I mentioned, this is what has permitted the abandonment of domestic procedural rules that has spurred the emergence of uniform and uncontested procedural rules.

By the same token, counsel should not remain mired in domestic law conceptions detrimental to the uniform and efficient functioning of arbitration and should not hesitate to prod the 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*.