

# Recent Developments on the Doctrine of *Res Judicata* in International Arbitration from a Swiss Perspective: A Call for a Harmonized Solution

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## 1. Introduction

The principle of *res judicata* (*autorité de chose jugée*) is a general legal principle applicable in domestic and international legal proceedings alike.<sup>2</sup> Generally speaking, the doctrine of *res judicata* addresses the effect of a previous decision on subsequent court or arbitration proceedings (irrespective of whether the previous decision was rendered by a domestic or foreign court or arbitral tribunal).

In Swiss civil procedural law, the goal of the doctrine of *res judicata* is threefold. First, *res judicata* creates legal security (*Rechtssicherheit*) by minimizing the risk of contradictory and irreconcilable decisions or awards.<sup>3</sup> Second, by avoiding the multiplication of proceedings on the same matter, the doctrine promotes procedural efficiency. Finally, since a party aiming at re-litigating an issue already conclusively decided by a court or arbitral tribunal is

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<sup>2</sup> With regard to state court proceedings, see e.g. F. Bohnet, in: F. Bohnet / J. Haldy / N. Jeandin / P. Schweizer / D. Tappy, *Code de procédure civile commenté*, 2011, Ad Article 59 ZPO, at 104 *et seq.*; N. Jeandin / A. Peyrot, *Précis de procédure civile*, 2015, at 775 *et seq.*; J. Haldy, *Procédure civile suisse*, 2014, at 257 *et seq.*; with regard to arbitration proceedings, see e.g. ILA Interim Report on *Res Judicata* and Arbitration, pp. 2-3, 18, <http://www.ila-hq.org/en/committees/index.cfm/cid/19>; L. G. Radicati di Brozolo, *Res judicata and international arbitral awards*, ASA Special Series 2011, p. 129; G. Born, *International Commercial Arbitration*, 2014, at §27, p. 3732 *et seq.*; N. Erk, *Parallel Proceedings in International Arbitration: A Comparative European Perspective*, Kluwer Law International, 2014, p. 257. For a general discussion on the doctrine of *res judicata* in international law, see ICSID Case No. ARB(AF)/12/1, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, Award of 25 August 2014, Part VII, pp. 3-13.

<sup>3</sup> The same goal is also pursued by the closely related principle of *lis pendens*, which addresses the issue of parallel proceedings pending between the same parties on the same subject matter.

deemed to lack a legitimate and legally protected interest to have the dispute reassessed, the doctrine of *res judicata* protects the integrity of judgments.<sup>4</sup>

The purpose of the present article is to describe the impact of a recent decision of the Swiss Federal Tribunal concerning the effect of a foreign state court judgment in subsequent arbitration proceedings seated in Switzerland (Decision of the Swiss Federal Tribunal 140 III 278 [4A\_508/2013] dated 27 May 2014; the “**South-Western Railways decision**”).<sup>5</sup> The *South-Western Railways* decision raises fundamental questions concerning *res judicata*. In addition, while not diverging from its previous decisions on the topic, the Swiss Federal Tribunal opens the door to a possible development of its case law on *res judicata* in international arbitration.

The factual configuration of this decision was special since, unlike what is generally the case in practice, it concerned a state court that did not defer the matter before it to arbitration when faced with a plea of lack of jurisdiction as a result of an arbitration agreement (*exceptio arbitri*).<sup>6</sup> The more typical situation, where an arbitral tribunal is confronted with the findings of a previous foreign arbitral award, was at the core of two subsequent decisions of the Swiss Federal Tribunal rendered since the *South-Western Railways* decision. The first decision rendered in February 2015<sup>7</sup> concerned the challenge of an award issued by a panel of the Court of Arbitration for Sport (the “CAS”). It addressed questions of *res judicata* concerning a previous arbitral award rendered by the dispute resolution commission of the Mexican Football Federation (the “**Mexican football club decision**”). The second decision, rendered in May 2015, also dealt with the *res judicata* effect of a

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<sup>4</sup> Decision of the Swiss Federal Tribunal 4A\_568/2013 of 16 April 2014, consid. 2.2; Decision of the Swiss Federal Tribunal 112 II 268 of 6 May 1986, consid. I.1.a); S. Zingg, in: H. Hausheer / H. P. Walter (ed.), *Berner Kommentar ZPO*, BK-ZPO I, 2012, ad Article 59, at 64; F. Bohnet, *op. cit.*, Ad Article 59, at 104.

<sup>5</sup> Decision of the Swiss Federal Tribunal 4A\_508/2013 of 27 May 2014, ASA Bull. 4/2015, p. 865. Although this decision was published in the official court reporter as Decision of the Swiss Federal Tribunal 140 III 278, only a portion of the decision was selected for publication in the official digest. As such, in the following, reference will be made to the full original text of the decision, *i.e.* 4A\_508/2013.

<sup>6</sup> If a previous court decision is at stake, the question of the effect of such previous court decision occurs more frequently where not the whole dispute, but one of the issues decided by the foreign court becomes relevant in a subsequent arbitral proceeding and thus, may have *res judicata* effect in relation to one specific issue to be decided in the subsequent proceedings; G. Born, *op. cit.*, at §27.02[A][1], p. 3775; N. Erk, *op. cit.*, pp. 230-231.

<sup>7</sup> Decision of the Swiss Federal Tribunal 4A\_374/2014 of 26 February 2015.

previous arbitral award issued by an arbitral tribunal in Germany (the “**American law firm decision**”).<sup>8</sup>

The present article takes as a starting point for discussion the *South-Western Railways* decision and addresses the challenges posed by the doctrine of *res judicata* in international arbitration from the point of view of an arbitral tribunal seated in Switzerland.<sup>9</sup> Section 2 below first analyzes in detail the *South-Western Railways* decision and is followed in Section 3 by a summary of the subsequent cases of the Swiss Federal Tribunal briefly mentioned above.

Section 4 goes on elaborating on the issue of *res judicata* and the relevant points raised in the *South-Western Railways* decision. In particular, Sub-section 4.1 explains the now well-established case law of the Swiss Federal Tribunal according to which *res judicata* is treated as a principle of Swiss procedural public policy. Sub-section 4.2 then takes up the issue raised by the Swiss Federal Tribunal in its *South-Western Railways* decision but purposefully left open, *i.e.* the “prerequisite of recognition” of the foreign court judgment. Next, Sub-section 4.3 discusses the legal framework governing the principle of *res judicata* in international arbitration, where the authors submit that arbitral tribunals should address the issue of *res judicata* as a matter of procedure and apply its procedural discretion to resolving this issue. Lastly, in Sub-section 4.4 the necessity of harmonization of the principle of *res judicata* in international arbitration is discussed in the context of the International Law Association (“**ILA**”), International Commercial Arbitration Committee Reports on *Res Judicata*.

Section 5 concludes with a summary and closing remarks of the authors.

## 2. The *South-Western Railways* decision

### 2.1 The factual background<sup>10</sup>

On 14 November 2004, the Ukrainian state company South-Western Railways contracted with the Turkish construction company Dogus Insaat Ve

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<sup>8</sup> Decision of the Swiss Federal Tribunal 141 III 229 of 29 May 2015.

<sup>9</sup> The present article does not address the issue of *res judicata* in a domestic setting (Swiss-Swiss relationship), nor does it address the issue of *lis pendens* arising out of parallel proceedings. On this aspect, please see Article 186(1) bis PILA, which was enacted following the much controversial *Fomento* decision in order to avoid the situation where foreign state court proceedings are initiated to stifle arbitration proceedings; for more details, see the message of the Federal Council for the enactment of Article 186(1) bis PILA in: FF 2006 4469.

<sup>10</sup> The names of the parties in the arbitration have been made public. See “*Swiss court rules on res judicata*”, in *Global Arbitration Review*, 14 August 2014, <http://globalarbitrationreview.com/news/article/32890/swiss-court-rules-res-judicata/>. The

Icaret to be the general contractor for the construction of a highway and railway bridge over the Dnieper river in Kiev, Ukraine (the “**contract**”). The price for the work according to the contract was USD 100 million. The contract provided for arbitration with a seat in Zurich under the rules of the International Chamber of Commerce (the “**ICC**”).

On 15 May 2007, South-Western Railways and Dogus Insaat Ve Icaret amended the contract with an addendum no. 1 increasing the contractual price for the work to USD 110 million.

In 2008, the attorney general for transportation in Ukraine (“**Kiev attorney general**”) initiated state proceedings in Ukraine against South-Western Railways and Dogus Insaat Ve Icaret before the Commercial Court, requesting the invalidation of the addendum no. 1 on the grounds that the representative of South-Western Railways no longer had signing authority at the time he executed the addendum.

On 15 November 2011, the Commercial Court rejected the application of the Kiev attorney general. On 6 December 2011, the Commercial Court dismissed Dogus Insaat Ve Icaret’s plea of lack of jurisdiction raised on the basis of the arbitration clause contained in the contract. In its decision, the Commercial Court also confirmed its 15 November 2011 ruling that the addendum no. 1 was valid. The Court of Appeal confirmed the lower court’s judgment on appeal on 13 March 2012.

Thereafter, on further appeal, South-Western Railways brought the case before the High Commercial Court, which, by judgment of 11 April 2012, overturned the lower court’s decisions and found the addendum no. 1 to be invalid.

In parallel to the aforementioned state proceedings and relying on an arbitration clause provided in the contract, on 15 June 2010 Dogus Insaat Ve Icaret filed a notice of arbitration with the ICC.<sup>11</sup> Dogus Insaat Ve Icaret requested the arbitral tribunal to consider the addendum no. 1 valid and enforceable and to order South-Western Railways to pay for the construction work in the remaining amount of approx. USD 33.5 million. In its last submission before the arbitral tribunal, South-Western Railways objected to the arbitral tribunal’s jurisdiction based on the *res judicata* effect of the decision of

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relevant factual circumstances are summarized for the purpose of illustrating the context in which *res judicata* was raised. A more detailed description of the facts is provided in Decision 4A\_508/2013.

<sup>11</sup> The Zurich-seated arbitral tribunal was composed of Christian Dorda, Pierre Tercier and Irina Nazarova. See Global Arbitration Review, 14 August 2014, <http://globalarbitrationreview.com/news/article/32890/swiss-court-rules-res-judicata/>.

the High Commercial Court and requested that Dogus Insaat Ve Icaret's claims be dismissed.

In its final arbitral award of 6 September 2013, the arbitral tribunal (i) confirmed its jurisdiction, (ii) held the addendum no. 1 to be valid and enforceable, and (iii) ordered South-Western Railways to pay Dogus Insaat Ve Icaret an amount of approximately USD 23.5 million, plus interest.

On 10 October 2013, South-Western Railways filed a petition to set aside the arbitral award before the Swiss Federal Tribunal for violation of procedural public policy pursuant to Article 190(2)(e) of the Private International Law Act (the "PILA"). According to South-Western Railways, the arbitral tribunal disregarded the *res judicata* effect of the decision of the High Commercial Court, which declared the addendum no. 1 to be invalid.

## 2.2 The holding and reasoning of the Swiss Federal Tribunal

The Swiss Federal Tribunal rejected the arguments presented by South-Western Railways and dismissed its petition to set aside the arbitral award based on the considerations set forth below.

### 2.2.1. *Res judicata* as part of procedural public policy

Relying on its previous case law,<sup>12</sup> the Swiss Federal Tribunal confirmed that an award issued by an international arbitral tribunal seated in Switzerland that disregards the preclusive effect of an earlier state court judgment or arbitral award violates the principle of *res judicata*, and breaches procedural public policy within the meaning of Article 190(2)(e) PILA. In such circumstances, an arbitral award would be subject to challenge before – and ultimately annulment by – the Swiss Federal Tribunal.

### 2.2.2. Review of the prerequisite of recognition of a foreign court judgment

In its analysis, the Swiss Federal Tribunal confirmed that the first question that has to be examined by an arbitral tribunal is whether the foreign state court judgment at stake can deploy effect outside the jurisdiction in which it was rendered, *i.e.* whether the foreign state court judgment is entitled to recognition in Switzerland<sup>13</sup> (*i.e.* a prerequisite of recognition). If the foreign

<sup>12</sup> Decision of the Swiss Federal Tribunal 127 III 279 of 14 May 2001, consid. 2b; Decision of the Swiss Federal Tribunal 136 III 345 of 13 April 2010, consid. 2.1. This was again confirmed in Decision of the Swiss Federal Tribunal 4A\_374/2014 of 26 February 2015, consid. 4.2.1 and Decision of the Swiss Federal Tribunal 141 III 229 of 29 May 2015, consid. 3.2.4.

<sup>13</sup> Decision of the Swiss Federal Tribunal 4A\_508/2013 of 27 May 2014, consid. 3.1.

state court judgment is capable of being recognized in Switzerland pursuant to Article 25 PILA, or pursuant to an international treaty as referred to in Article 1(2) PILA, the arbitral tribunal shall then examine whether the conditions for *res judicata* are met.<sup>14</sup>

The prerequisite of recognition is not fulfilled when the decision of the foreign state court was rendered in disregard of a plea of lack of jurisdiction based on a valid arbitration agreement (*exceptio arbitri*).<sup>15</sup> The Swiss Federal Tribunal, referring to previous case law,<sup>16</sup> indicated that the so-called indirect competence of the foreign state court as per Article 25(a) PILA must be examined by reference to Article II(3) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “**New York Convention**”). Pursuant to this provision, a state court seized with an action where the parties have concluded an arbitration agreement, must, upon the request of one of the parties, refer the matter to arbitration unless it finds that the arbitration agreement is “*null and void, inoperative or incapable of being performed*”. Consequently, according to the Swiss Federal Tribunal, if, in violation of Article II(3) New York Convention, the state court enters into the merits of the case, such state court will lack competence within the meaning of Article 25 PILA and its decision will not be entitled to recognition in Switzerland.<sup>17</sup>

However, the Swiss Federal Tribunal challenged its own reasoning. It questioned whether – as suggested by some scholars<sup>18</sup> – it would not be more appropriate to determine the issue in light of Article 7 PILA and Chapter 12 PILA considering that the New York Convention does not deal with the recognition of foreign court judgments. According to those authors, the main issue is not to determine whether the foreign state court is competent with regard to its *lex fori*, which could entail dilatory maneuvers, but rather whether, under Swiss law, there is a valid arbitration agreement (Article 178 PILA) and whether the dispute could be subject to arbitration proceedings in Switzerland (Article 177 PILA). Eventually, the Swiss Federal Tribunal left the question open since at least one of the prerequisites of the *res judicata* principle was in the view of the Swiss Federal Tribunal not fulfilled in the case before it.

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<sup>14</sup> Decision of the Swiss Federal Tribunal 4A\_508/2013 of 27 May 2014, consid. 3.1.

<sup>15</sup> Decision of the Swiss Federal Tribunal 4A\_508/2013 of 27 May 2014, consid. 3.1; Decision of the Swiss Federal Tribunal 124 III 83 of 19 December 1997, consid. 5b.

<sup>16</sup> Decision of the Swiss Federal Tribunal 124 III 83 of 19 December 1997, consid. 5b.

<sup>17</sup> Decision of the Swiss Federal Tribunal 4A\_508/2013 of 27 May 2014, consid. 3.1; Decision of the Swiss Federal Tribunal 124 III 83 of 19 December 1997, consid. 5b.

<sup>18</sup> B. Berger/F. Kellerhals, *International and Domestic Arbitration in Switzerland*, 3rd ed., 2015, at 1662.

### 2.2.3. The scope of the *res judicata* effect

According to the Swiss Federal Tribunal, unless provided by an international treaty, the question of whether the claim raised before a foreign state court is identical to the one brought before a Swiss court must be dealt with in accordance with the *lex fori*, i.e. according to the notions of *res judicata* as understood in Switzerland.<sup>19</sup> This in turn requires references to the principles of *res judicata* as developed by the Swiss Federal Tribunal.

The Swiss Federal Tribunal added that the law of the state where the previous decision was rendered should determine the conditions and limits of *res judicata*. As a consequence, the subjective, objective and temporal scope of *res judicata* may vary depending on the jurisdiction in which the foreign state court judgment was rendered. Where the scope of the *res judicata* principle differs in the jurisdiction where the decision was rendered as compared to the scope of *res judicata* at the seat of the subsequent arbitration, harmonization should be sought. Specifically, a foreign state court judgment recognized in Switzerland may not have greater effect than what it would have had it emanated from a Swiss court. Likewise, the foreign state court judgment may not have broader effect in Switzerland than it would have under the legal system from which it originates.<sup>20</sup>

The Swiss Federal Tribunal held that the determination of the *res judicata* effect of a foreign state court judgment was to be made by reference to the common denominator of both the law of the jurisdiction where the decision was rendered and Swiss law.<sup>21</sup>

In essence, this means the following:

- The *res judicata* effect of a foreign decision is governed by the law of the state in which this decision was rendered;
- Conversely, the foreign decision cannot have a broader effect in Switzerland than an identical Swiss decision would have in Switzerland.

### 2.2.4. The three-prong test applied by the Swiss Federal Tribunal

In Switzerland, *res judicata* may be invoked where the matter in dispute is identical to that which was already the subject of an earlier proceeding and which resulted in an enforceable decision. This is the case if in both proceedings the same parties submitted the same claims based on the same

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<sup>19</sup> Decision of the Swiss Federal Tribunal 4A\_508/2013 of 27 May 2014, consid. 3.2.

<sup>20</sup> Decision of the Swiss Federal Tribunal 4A\_508/2013 of 27 May 2014, consid. 3.2.

<sup>21</sup> Decision of the Swiss Federal Tribunal 4A\_508/2013 of 27 May 2014, consid. 3.2.

facts.<sup>22</sup> The Swiss Federal Tribunal examined these three conditions in turn in the *South-Western Railways* decision.

**a. Identity of parties**

In the arbitration proceedings, Dogus Insaat Ve Icaret argued that the parties were different and had different positions before the High Commercial Court as compared to those in the arbitral proceedings. First, according to Dogus Insaat Ve Icaret, the Kiev attorney general was not bound by the arbitration agreement and thus was not a party to the arbitration proceedings. Second, Dogus Insaat Ve Icaret maintained that it and South-Western Railways were co-defendants facing the Kiev attorney general in the Ukrainian court proceedings leading to the decision of the High Commercial Court, whereas Dogus Insaat Ve Icaret and South-Western Railways were opposing parties in the arbitration proceedings. Based on the foregoing, the arbitral tribunal held that the decision of the High Commercial Court could not have any *res judicata* effect in the arbitration.<sup>23</sup>

After summarizing the reasoning of the arbitral tribunal on this point, the Swiss Federal Tribunal indicated that the test of identity of the parties refers to the subjective scope of the principle of *res judicata*. It extends only to the individuals and legal entities, or their successors in law, that have been parties to the previous proceedings. In this context, it was undisputed that the parties in the state court proceedings and in the arbitration proceedings were different.<sup>24</sup>

However, the Swiss Federal Tribunal expressed some doubt as to whether the sole presence of the Kiev attorney general justified the conclusion that the parties in the proceedings before the High Commercial Court and in the arbitration should *not* be considered as identical. According to its reasoning, even if the roles of the parties may have changed between the first and second proceedings, the identity of the parties might still exist in terms of *res judicata* rendering the procedural position of the parties in the first and second proceedings irrelevant.<sup>25</sup> Incidentally, and in accordance with the Swiss Federal Tribunal's case law, the presence of a third party in the first proceedings (*i.e.* the Kiev attorney general) does not prevent the conclusion,

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<sup>22</sup> The Swiss Federal Tribunal hereby confirmed that the legal basis of the claim(s) advanced by the parties is not decisive with respect to *res judicata* considerations in Switzerland. See Decision of the Swiss Federal Tribunal 4A\_508/2013 of 27 May 2014, consid. 3.3.

<sup>23</sup> Decision of the Swiss Federal Tribunal 4A\_508/2013 of 27 May 2014, consid. 4.1.

<sup>24</sup> Decision of the Swiss Federal Tribunal 4A\_508/2013 of 27 May 2014, consid. 4.2.1.

<sup>25</sup> Decision of the Swiss Federal Tribunal 4A\_508/2013 of 27 May 2014, consid. 4.2.1; B. Berger/F. Kellerhals, *op. cit.*, at 1652.



as a matter of principle, that the subsequent proceedings were between the same parties.<sup>26</sup>

Although it took a formalistic approach to the issue of the identity of parties, the Swiss Federal Tribunal nevertheless asked whether consideration should not be given to the specific circumstances of the case. It considered the importance of also determining the particular role held by the party that may be absent in the subsequent proceedings.<sup>27</sup> The Swiss Federal Tribunal thus appears to be open to reconsider its strict approach to the identity of the parties, and allows consideration for the specific circumstances of the case in order to prevent maneuvers intended to torpedo the arbitration proceedings (“[...] *de faire barrage à d’éventuelles manoeuvres visant à torpiller la procédure arbitrale*”)<sup>28</sup>. However, the Swiss Federal Tribunal did not further develop its analysis of this “delicate question”.

### **b. Identity of claims**

Turning to the question of the identity of claims and referring to its earlier decisions, the Swiss Federal Tribunal confirmed that the subject matter of the new claim must be identical – from an objective point of view – to the one litigated in the previous proceedings. As a consequence, the claim (or counterclaim) put forward must be the same.<sup>29</sup>

The Swiss Federal Tribunal recalled that identity must be understood from a substantive (and not literal) point of view. Consequently, a new claim, regardless of its wording, has an identical subject matter to a claim already decided if it appears as its opposite or as part of the claim in the first proceedings.<sup>30</sup>

In the case before it, the Swiss Federal Tribunal agreed with South-Western Railways’ argument that the prayers for relief in the arbitration proceedings and those raised in the Ukrainian proceedings were partially similar. That said, the Swiss Federal Tribunal understood the subject matter of the arbitration to be broader than that of the Ukrainian proceedings. In the arbitration, Dogus Insaat Ve Icaret sought payment of the work performed on the basis of the contract and the addendum no. 1, whereas in the Ukrainian proceedings the Kiev attorney general only aimed at invalidating the

<sup>26</sup> Decision of the Swiss Federal Tribunal 4A\_508/2013 of 27 May 2014, consid. 4.2.1.

<sup>27</sup> Decision of the Swiss Federal Tribunal 4A\_508/2013 of 27 May 2014, consid. 4.2.1.

<sup>28</sup> Decision of the Swiss Federal Tribunal 4A\_508/2013 of 27 May 2014, consid. 4.2.1.

<sup>29</sup> Decision of the Swiss Federal Tribunal 121 III 474 of 3 November 1995, consid. 4a.

<sup>30</sup> Decision of the Swiss Federal Tribunal 4A\_508/2013 of 27 May 2014, consid. 3.3. In the present case, the Kiev attorney general’s main claim before the High Commercial Court was to declare the addendum no. 1 invalid. Correspondingly, Dogus Insaat Ve Icaret’s claim before the arbitral tribunal was to declare the addendum no. 1 valid.

addendum no. 1. In fact, the only issue that the courts in the Ukrainian proceedings had to decide was whether the addendum no. 1 was valid although the signatory authority of the representative of South-Western Railways had expired. Nevertheless, Dogus Insaat Ve Icaret included as one of its prayers for relief in the arbitration that the arbitral tribunal rule that the addendum no. 1 was valid and enforceable, which was the exact reflection of what was decided by the High Commercial Court.<sup>31</sup>

As a result, the Swiss Federal Tribunal considered that identity of claims existed, at least in relation to the question of the validity of addendum no. 1.

### **c. Identity of facts**

According to the Swiss Federal Tribunal's case law, the identity of facts is defined by the set of facts on which the prayers for relief rest.<sup>32</sup> The test requires a comparison of the set of facts submitted in the first proceedings as compared to those submitted in the subsequent proceedings. This condition is fulfilled when the facts submitted in the subsequent proceedings are the same as the facts which existed at the time of the decision in the first proceedings. Whether the parties were aware of those facts or put them forward is not relevant. Neither is relevant whether the judge or arbitrator considered them as proven.<sup>33</sup>

The Swiss Federal Tribunal confirmed that there is no *res judicata* effect where a new claim is based on modified circumstances that occurred after the parties were precluded from submitting new facts and adducing new evidence in the first proceedings. These circumstances must be considered as new facts (*vrais nova*; *echte Noven*) as opposed to facts that already existed but could not be invoked in the first proceedings (*faux nova*; *unechte Noven*).<sup>34</sup>

In accordance with the reasoning of the arbitral tribunal, the Swiss Federal Tribunal considered that the scope of review of the High Commercial Court was limited to the signatory authority of the representative of South-Western Railways while the arbitral tribunal's scope of review included new facts (*vrais nova*).<sup>35</sup> In particular, the arbitral tribunal had considered whether

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<sup>31</sup> Decision of the Swiss Federal Tribunal 4A\_508/2013 of 27 May 2014, consid. 4.2.2.1.

<sup>32</sup> This approach is consistent with the principle *jura novit curia* applicable before both Swiss state courts and arbitral tribunals seated in Switzerland. See B. Berger/F. Kellerhals, *op. cit.*, at 1650.

<sup>33</sup> Decision of the Swiss Federal Tribunal 115 II 187 of 2 March 1989, consid. 3b; Decision of the Swiss Federal Tribunal 139 III 126 of 25 February 2013, consid. 3.1; Decision of the Swiss Federal Tribunal 4A\_508/2013 of 27 May 2014, consid. 3.3.

<sup>34</sup> Decision of the Swiss Federal Tribunal 4A\_508/2013 of 27 May 2014, consid. 3.3. *Faux nova* opens way for revision of the decision.

<sup>35</sup> Decision of the Swiss Federal Tribunal 4A\_508/2013 of 27 May 2014, consid. 4.2.2.2.

the conduct of South-Western Railways over a period of about four and a half years after the conclusion of the addendum no. 1 had implied acceptance of the terms of said addendum by South-Western Railways. Importantly, the arbitral tribunal had found that after the judgment of the High Commercial Court was rendered, South-Western Railways had acted in a manner that implied that they considered themselves bound by the addendum. These new facts, which could not have been taken into account by the High Commercial Court at the time of its decision, were to be considered as an implicit ratification of the addendum no. 1 by South-Western Railways.<sup>36</sup>

As a result, the Swiss Federal Tribunal held that the condition of identity of facts was missing.

### 2.3 Conclusions of the Swiss Federal Tribunal

After carefully examining the arguments raised by both parties, the Swiss Federal Tribunal concluded that there was no identity of facts in the first proceedings as compared to those in the arbitration proceedings. As a consequence, the Swiss Federal Tribunal held that the arbitral tribunal did not disregard the *res judicata* effect of the decision of the High Commercial Court when rendering its arbitral award.<sup>37</sup>

As will be explained hereafter, the Swiss Federal Tribunal devoted considerable effort to analyzing the principle of *res judicata*, leading the path to what may be a more practical approach to this concept in order to, among others things, “prevent potential ambush tactics from jeopardizing the arbitral proceedings”.<sup>38</sup>

## 3. Subsequent decisions from the Swiss Federal Tribunal on the doctrine of *res judicata* following the *South-Western Railways* decision

Following the *South-Western Railways* decision, the Swiss Federal Tribunal rejected two additional petitions to set aside awards for violation of the principle of *res judicata*. In these two cases, the Swiss Federal Tribunal addresses for the first time objections raised in subsequent arbitration proceedings in Switzerland as to the *res judicata* effect of foreign arbitral awards. The facts and reasoning of the Swiss Federal Tribunal in these cases are briefly described below.

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<sup>36</sup> Decision of the Swiss Federal Tribunal 4A\_508/2013 of 27 May 2014, consid. 4.2.2.2.

<sup>37</sup> Decision of the Swiss Federal Tribunal 4A\_508/2013 of 27 May 2014, consid. 4.3.

<sup>38</sup> Decision of the Swiss Federal Tribunal 4A\_508/2013 of 27 May 2014, consid. 4.2.1.

### 3.1 The Mexican football club decision

#### 3.1.1. Factual background

Decision of the Swiss Federal Tribunal 4A\_374/2014 rendered in February 2015 concerned employment agreements between two professional coaches from Argentina (the “**coaches**”) and a first-division Mexican football club affiliated to the Mexican Football Federation and the International Federation of Association Football (“**FIFA**”) (the “**Mexican football club**”).

Pursuant to the parties’ employment agreement, the coaches were to assume the technical management of the club until the end of the “*2009 closing tournament*”. In 2009, at the end of the contract term, the Mexican football club replaced the coaches. The coaches claimed, however, to have entered into a second contract with the Mexican football club for the period between 1 July 2009 and 20 June 2011 that was conditioned on the club remaining in first division (which was the case). The coaches argued that by hiring a replacement coach the Mexican football club was in breach of their amended agreement. As a result, the coaches filed a monetary claim against the Mexican football club before the Mexican Football Federation’s Conciliation and Dispute Resolution Commission (“**CDRC**”) alleging that the Mexican football club had unlawfully put an end to their working relationships.<sup>39</sup>

In 2009, the CDRC suspended the proceedings following the filing of a criminal complaint by the Mexican football club. In 2011, the CDRC rendered a second decision, whereby it terminated the proceedings pending before it. In essence, the CDRC considered that since the proceedings had been suspended for more than six months, the coaches had abandoned their claims.<sup>40</sup>

In parallel, the coaches seized the FIFA’s Players’ Status Committee (“**PSC**”) with the exact same claims as those originally brought before the CDRC. The single judge of the PSC dismissed the claims of the coaches, finding that the disputed employment contracts had not been signed by the Mexican football club but by its agent, which was not affiliated to FIFA.<sup>41</sup>

On appeal of the PSC’s decision, the CAS rendered an award, annulling the PSC’s decision and ordering the club to indemnify the coaches. Thereafter, the Mexican football club filed a petition before the Swiss Federal Tribunal to set aside the CAS award for violation of procedural public policy. The Mexican

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<sup>39</sup> Decision of the Swiss Federal Tribunal 4A\_374/2014 of 26 February 2015, consid. A.a and A.b.

<sup>40</sup> Decision of the Swiss Federal Tribunal 4A\_374/2014 of 26 February 2015, consid. A.b.

<sup>41</sup> Decision of the Swiss Federal Tribunal 4A\_374/2014 of 26 February 2015, consid. A.c.

football club argued that the CAS had disregarded the *res judicata* effect of the CDRC's decision of 2011.<sup>42</sup>

### 3.1.2. The holding and reasoning of the Swiss Federal Tribunal

The Swiss Federal Tribunal confirmed that an arbitral tribunal seated in Switzerland violates procedural public policy if it disregards the *res judicata* effect of an earlier foreign arbitral award, provided that the award is capable of recognition in Switzerland pursuant to Article 194 PILA (*i.e.* a prerequisite of recognition).<sup>43</sup> The Swiss Federal Tribunal confirmed that the prerequisite of recognition is assessed according to Article V New York Convention, which exhaustively sets out the grounds for refusing the recognition and enforcement of a foreign arbitral award.<sup>44</sup>

In the Swiss Federal Tribunal's opinion, the CDRC's 2011 decision that was subject to appeal to the CAS, constituted by its nature an enforceable arbitral award in accordance with Article I(2) New York Convention.<sup>45</sup> In addition, according to Mexican labor law, the CDRC's 2011 decision was considered to be a waiver of claim by the two coaches, which should be given *res judicata* effect. As the claims before the PSC were identical to those brought originally before the CDRC, and the parties were the same in both proceedings, the Swiss Federal Tribunal found that the CDRC's decision had *res judicata* effect and prevented the coaches from bringing their claims before the PSC.<sup>46</sup>

However, when considering whether the prerequisite of recognition had been met, the Swiss Federal Tribunal eventually considered that the CDRC's 2011 decision had been rendered in gross violation of the coaches' right to be heard. The CDRC's decision was taken on the basis of a report drafted by the secretary of the President of the Mexican Football Federation. Prior to the CDRC's decision, neither of the two coaches had an opportunity to comment on such report. Yet, under Mexican law, a waiver of a claim can only take place at the request of a party and only with preliminary notice of the consequences of such waiver to the concerned party. In the case before the CDRC, the two coaches had not been given the opportunity to be heard on the issue as they only learned about the CDRC's decision after the decision was rendered. The Swiss Federal Tribunal found that the CDRC's gross violation of the coaches'

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<sup>42</sup> Decision of the Swiss Federal Tribunal 4A\_374/2014 of 26 February 2015, consid. B and C.

<sup>43</sup> Decision of the Swiss Federal Tribunal 4A\_374/2014 of 26 February 2015, consid. 4.2.1.

<sup>44</sup> Decision of the Swiss Federal Tribunal 4A\_374/2014 of 26 February 2015, consid. 4.2.2.

<sup>45</sup> Decision of the Swiss Federal Tribunal 4A\_374/2014 of 26 February 2015, consid. 4.3.2.1.

<sup>46</sup> Decision of the Swiss Federal Tribunal 4A\_374/2014 of 26 February 2015, consid. 4.3.2.2.

right to be heard amounted to a ground to refuse the recognition of the CDRC's 2011 decision in accordance with Article V(2)(b) New York Convention. As a consequence, the prerequisite of recognition was lacking and no *res judicata* effect was afforded to the earlier foreign arbitral award.<sup>47</sup>

## 3.2 The American law firm decision

### 3.2.1. Factual background

Decision of the Swiss Federal Tribunal 141 III 229, rendered in May 2015, concerned a dispute arising out of an agreement between an American law firm (the “**American law firm**”) and an attorney domiciled in Germany (“**German attorney**”). A law firm co-founded by the German attorney was to be integrated into the American law firm in return for an annual payment to the German attorney as consideration.<sup>48</sup> In April 2010, the German attorney commenced arbitration proceedings against the American law firm claiming, among other things, the difference between the actual amounts received in 2009 and 2010 and the annual amount said to be owed by the American law firm for this period. The parties agreed to move the seat of the arbitration from Zurich to Frankfurt. On 20 September 2011, the arbitral tribunal rendered an award dismissing the German attorney's claims.<sup>49</sup>

In April 2013, the German attorney initiated a second arbitration against the American law firm in Zurich claiming the difference between the actual amounts received in 2011 and 2012 and the annual amount said to be owed for this period. The arbitral tribunal seized with the matter dismissed the *res judicata* objections raised by the American law firm and held, in particular, that it did not consider itself bound by the reasoning and decision of the earlier arbitral tribunal. The second arbitral tribunal partially granted the German attorney's claims. In return, the American law firm filed a petition to set aside the award before the Swiss Federal Tribunal, arguing that the arbitral tribunal in the second arbitration had violated procedural public policy by disregarding the *res judicata* effect of the award rendered in the earlier arbitration.<sup>50</sup>

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<sup>47</sup> Decision of the Swiss Federal Tribunal 4A\_374/2014 of 26 February 2015, consid. 4.3.2.3.

<sup>48</sup> On this decision, see commentary of B. Berger, *No Force of Res Judicata for an Award's Underlying Reasoning*, Note on 4A\_633/2014 of 29 May 2015, in ASA Bulletin (2015), Vol. 33, no. 3, p. 642 et seq.

<sup>49</sup> Decision of the Swiss Federal Tribunal 141 III 229 of 29 May 2015, consid. A.

<sup>50</sup> Decision of the Swiss Federal Tribunal 141 III 229 of 29 May 2015, consid. B and C.

### 3.2.2. The holding and reasoning of the Swiss Federal Tribunal

The Swiss Federal Tribunal confirmed once more that, unless otherwise provided by an international treaty, the issue of *res judicata* must be assessed with reference to the doctrine as developed under the Swiss *lex fori*. Based on this principle, any potential *res judicata* effect stems from the earlier foreign arbitral award itself and therefore depends on the law of the state where the award originates.<sup>51</sup> Accordingly, the conditions and limits of *res judicata* may vary according to the legal system invoked.

The Swiss Federal Tribunal reconfirmed that no foreign arbitral award that is recognized in Switzerland may have greater effect than an identical decision rendered (hypothetically) by an arbitral tribunal seated in Switzerland. As a result, in Switzerland any *res judicata* effect would be limited to the operative part of the decision, regardless of whether the law of the relevant foreign jurisdiction extends the *res judicata* effect also to the decision's reasoning. Equally, no foreign decision may, in terms of its legal effect, have broader implications than under the legal system it originates from. The Swiss Federal Tribunal added that while in Switzerland the *res judicata* effect of a previous decision is limited to the operative part of a state court judgment or arbitral award, the meaning and scope of a specific operative part can often only be established by examining the reasoning employed.<sup>52</sup>

In its decision, the Swiss Federal Tribunal held that the arbitral tribunal in the second arbitration was correct in its finding that the claim before it was not identical to the claim raised in the earlier arbitration. The second arbitration concerned the amounts allegedly due for the period of 2009-2010, whereas the earlier arbitration dealt with the amounts allegedly due for the period of 2011-2012.<sup>53</sup>

Lastly, the Swiss Federal Tribunal explicitly acknowledged the lack of transnational concepts and consistent international standards regarding *res judicata*. It emphasized that neither the specific interests of the parties in international arbitration nor the recommendations of private organizations (as contained, for instance, in the ILC International Commercial Arbitration Committee Reports on *Res Judicata* and Arbitration) were relevant or capable of influencing the Swiss Federal Tribunal's decision.<sup>54</sup>

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<sup>51</sup> Decision of the Swiss Federal Tribunal 141 III 229 of 29 May 2015, consid. 3.2.3.

<sup>52</sup> Decision of the Swiss Federal Tribunal 141 III 229 of 29 May 2015, consid. 3.2.3.

<sup>53</sup> Decision of the Swiss Federal Tribunal 141 III 229 of 29 May 2015, consid. 3.2.6.

<sup>54</sup> Decision of the Swiss Federal Tribunal 141 III 229 of 29 May 2015, consid. 3.2.5.

## 4. *Res judicata* in international arbitration

### 4.1 *Res judicata* as part of Swiss notion of procedural public policy

The first time the Swiss Federal Tribunal stated that the doctrine of *res judicata* formed part of Swiss procedural public policy within the meaning of Article 190(2)(e) PILA was in the *obiter dictum* of the much disputed 2001 *Fomento* decision. In particular, the Swiss Federal Tribunal stated that,

*“It is contrary to public policy that, in a determined legal order, two contradictory decisions on the same subject matter between the same parties exist, which are equally and simultaneously enforceable [...]. As to the force of res judicata, this principle prohibits the judge from ruling on a claim that has already been finally decided; this mechanism definitely excludes the competence of the second judge.”*<sup>55</sup>

The Swiss Federal Tribunal added that the same principles would be applicable for national and international matters alike.

It took nine years before the Swiss Federal Tribunal was able to set aside its first award on the grounds of a violation of procedural public policy due to the non-adherence to the doctrine of *res judicata*.<sup>56</sup> In *Club Atletico de Madrid SAD v. Sport Lisboa E Benfica – Futebol SAD*, the Swiss Federal Tribunal held that an arbitral tribunal “violates procedural public policy if, in its award, it disregards the force of *res judicata* of an earlier decision, or if its final award deviates from a determination it has made on a preliminary point of substance in an earlier interlocutory award [...]”. The Swiss Federal Tribunal held that the CAS had disregarded the *res judicata* effect of an earlier decision of the Commercial Court of the Canton of Zurich, warranting a set-aside of its award.<sup>57</sup>

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<sup>55</sup> Decision of the Swiss Federal Tribunal 127 III 279 of 14 May 2001, consid. 2b. Except for the reference to *res judicata* in the *obiter dictum*, the *Fomento* decision essentially deals with the issue of *lis pendens* and has eventually been overturned by the introduction of Article 186(1bis) PILA. As stated by the Swiss Federal Tribunal in its Decision 127 III 279 of 14 May 2001 quoting Berger/Kellerhals, *International and Domestic Arbitration in Switzerland*, 2<sup>nd</sup> ed., 2010, at 951d: “Article 186(1bis) only lifts the “barrier effect” of *lis pendens*, but leaves the “barrier effect” of *res judicata* untouched.”

<sup>56</sup> Decision of the Swiss Federal Tribunal 136 III 345 of 13 April 2010, consid. 2.1.

<sup>57</sup> Unlike Decision of the Swiss Federal Tribunal 4A\_508/2013 of 27 May 2014, and unlike most cases related to *res judicata*, the Decision of the Swiss Federal Tribunal 136 III 345 of 13 April 2010 did not involve the same parties in the previous proceedings and in the proceedings where *res judicata* was raised. However, the judgment rendered by the Commercial Court of the Canton of Zurich had *res judicata* effect because the dispute concerned the interpretation of the by-laws of a sport’s association, which had given rise to



In its *South-Western Railways* decision,<sup>58</sup> and more recently in decisions 4A\_374/2014<sup>59</sup> and 141 III 229,<sup>60</sup> the Swiss Federal Tribunal confirmed, albeit in different settings (in the first case, an arbitral tribunal seated in Switzerland faced with a plea of *res judicata* emanating from a foreign court decision; in the latter cases, an arbitral tribunal faced with foreign arbitral awards), the now well-grounded notion that *res judicata* is a principle of procedural public policy within the meaning of Article 190(2)(e) PILA.

In decision 141 III 229, the Swiss Federal Tribunal also held that an arbitral tribunal would violate public policy should it wrongly consider itself bound by the reasoning of the first arbitral tribunal (*i.e.* wrongly attribute *res judicata* force to an earlier decision, thereby refusing to consider the claim brought before it).<sup>61</sup>

## 4.2 Prerequisite of recognition for the application of *res judicata*

One of the questions that an arbitral tribunal must examine when dealing with a plea of *res judicata* arising from a foreign state court judgment or foreign arbitral award is whether the foreign decision is entitled to recognition in Switzerland, *i.e.* whether it can deploy effect outside its original jurisdiction.<sup>62</sup> The rationale behind this is that if the prerequisite of recognition is lacking, the risk that there will be two (potentially conflicting) decisions enforceable simultaneously in Switzerland does not materialize.<sup>63</sup>

The arbitral tribunal seated in Switzerland must thus examine, as an incidental question,<sup>64</sup> whether the foreign state court judgment or foreign arbitral award complies with the conditions of recognition as per Swiss law. The prerequisite of recognition depends on the nature of the foreign decision invoked as having *res judicata* effect in the subsequent arbitration.<sup>65</sup>

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the previous court judgment of the commercial court. Such a judgment is binding on all members of the association (*i.e.* the judgment had so-called *erga omnes* effect).

<sup>58</sup> Decision of the Swiss Federal Tribunal 4A\_508/2013 of 27 May 2014, consid. 3.1.

<sup>59</sup> Decision of the Swiss Federal Tribunal 4A\_374/2014 of 26 February 2015, consid. 4.2.1.

<sup>60</sup> Decision of the Swiss Federal Tribunal 141 III 229 of 29 May 2015, consid. 3.2.1.

<sup>61</sup> On this particular issue, see B. Berger, *op. cit.*, pp. 656-657.

<sup>62</sup> Decision of the Swiss Federal Tribunal 4A\_508/2013 of 27 May 2014, consid. 4.2.1; M. Liatowitsch, *Schweizer Schiedsgerichte und Parallelverfahren vor Staatsgerichten im In- und Ausland*, 2002, p. 75.

<sup>63</sup> B. Berger, *op. cit.*, footnote 51, at p. 647, according to whom “without recognition, there is no way of even considering whether and to what extent the earlier decision might have a preclusive effect.”

<sup>64</sup> Decision of the Swiss Federal Tribunal 4A\_374/2014 of 26 February 2015, consid. 4.2.2.

<sup>65</sup> C. Debourg, *op. cit.*, p. 417, at 504.

#### 4.2.1. *Res judicata* invoked in relation to a foreign arbitral award

In case an arbitral tribunal is faced with a plea of *res judicata* of a foreign arbitral award, Article 194 PILA is used to determine whether said foreign arbitral award can be recognized and enforced in Switzerland.<sup>66</sup> The recognition and enforceability of the foreign arbitral award will be examined against the grounds provided in Article V New York Convention. According to Swiss law, these grounds must be interpreted restrictively.<sup>67</sup> If no ground can successfully oppose recognition of the foreign arbitral award in Switzerland, such award is thus entitled to recognition, *i.e.* the award may be considered equivalent to an arbitral award rendered in Switzerland for the purpose of the analysis of its *res judicata* effect.<sup>68</sup>

Although the grounds provided in Article V New York Convention are interpreted restrictively, the recent decision 4A\_374/2014<sup>69</sup> is an example of a case where an arbitral tribunal can reject the plea of *res judicata* because the prerequisite of recognition of the foreign arbitral award in Switzerland is lacking (see Section 3.1 above).

#### 4.2.2. *Res judicata* of a foreign state court judgment where the *exceptio arbitri* was raised

The potential recognition of a foreign state court judgment must in principle be examined under Articles 25-27 PILA.<sup>70</sup> If the foreign state court judgment has been rendered in a state which is party to the Convention of 16 September 1988 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the “**Lugano Convention**”),<sup>71</sup> Articles 33-37 Lugano Convention apply in order to determine whether the foreign state court judgment should be recognized in Switzerland. Unless one of the grounds for refusing recognition, such as public policy, is found to have been violated, the foreign state court judgment rendered in a contracting state should be recognized in Switzerland *ipso jure* pursuant to Article 33(1) Lugano Convention.<sup>72</sup>

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<sup>66</sup> Decision of the Swiss Federal Tribunal 4A\_508/2010 of 14 February 2011, consid. 3.2; B. Berger/F. Kellerhals, *op. cit.*, at 1664.

<sup>67</sup> Decision of the Swiss Federal Tribunal 4A\_374/2014 of 26 February 2015, consid. 4.2.2.

<sup>68</sup> Decision of the Swiss Federal Tribunal 135 III 136 of 9 December 2008, consid. 2.1; Decision of the Swiss Federal Tribunal 4A\_233/2010 of 28 July 2010, consid. 3.2.1; Decision of the Swiss Federal Tribunal 4A\_508/2010 of 14 February 2011, consid. 3.2.

<sup>69</sup> Decision of the Swiss Federal Tribunal 4A\_508/2013 of 27 May 2014.

<sup>70</sup> Decision of the Swiss Federal Tribunal 4A\_508/2013 of 27 May 2014, consid. 3.1 with reference to Decision of the Swiss Federal Tribunal 124 III 83 of 19 December 1997, consid. 5.

<sup>71</sup> SR 0.275.12.

<sup>72</sup> N. Erk, *op. cit.*, p. 237; B. Berger/F. Kellerhals, *op. cit.*, at 1661.

According to the case law of the Swiss Federal Tribunal, where a plea of lack of jurisdiction (*exceptio arbitri*) in relation to a valid arbitration agreement providing for arbitration in Switzerland was raised in the first proceedings, the examination of the indirect jurisdiction of the first court must be made pursuant to Article 25(a) PILA. This provision sets forth that a foreign state court judgment may be recognized in Switzerland if the foreign state court that rendered said decision had jurisdiction to do so.<sup>73</sup> In this context, the Swiss Federal Tribunal further indicated that the examination of the jurisdiction of the foreign state court must be made on the basis of Article II(3) New York Convention, which deals with the recognition of arbitration agreements (see Section 1.2.2 above). However, in its *South-Western Railways* decision, the Swiss Federal Tribunal raised some doubts as to the appropriateness of this approach.<sup>74</sup>

First, the examination of the jurisdiction of the foreign state court based on Article II(3) New York Convention is questionable on its premise: state court judgments on the validity of an arbitration agreement are not themselves subject to the New York Convention since the New York Convention only deals with the recognition of arbitration agreements and international arbitral awards.

In addition, following the Swiss Federal Tribunal's suggestion to apply Article II(3) New York Convention, an arbitral tribunal seated in Switzerland should put itself in the shoes of the foreign state court that has to respond to a plea of lack of jurisdiction. Assuming that both the jurisdiction where the judgment was rendered and the country of recognition are party to the New York Convention, the arbitral tribunal must decide which law is applicable to determine the validity of the arbitration agreement under Article II(3) New York Convention, *i.e.* the general principles applicable under the New York Convention, the *lex fori* or the conflict-of-law rules of Article V(I)(a) New York Convention.<sup>75</sup> This question left unsettled could lead to different results in

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<sup>73</sup> Decision of the Swiss Federal Tribunal 124 III 83 of 19 December 1997, *consid.* 5b; Decision of the Swiss Federal Tribunal 4A\_508/2013 of 27 May 2014, *consid.* 3.1.

<sup>74</sup> Decision of the Swiss Federal Tribunal 4A\_508/2013 of 27 May 2014, *consid.* 3.1.

<sup>75</sup> N. Erk, *op. cit.*, p. 74. This reasoning of the arbitral tribunal may not only imply to determine whether the arbitration agreement is null and void, inoperative or incapable of being performed pursuant to Article II(3) New York Convention. According to the prevailing view, the conflict-of-law rules of Article V(1)(a) New York Convention also apply by analogy to the determination of the validity of the arbitration agreement in the pre-award stage. The rationale behind this solution is to avoid the situation where an arbitration agreement is first found valid at the pre-award stage and then invalid at the enforcement stage. See Wilske/Fox, *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary*, Wolff (ed.), 2012, ad Article 2, at 227-230; A. J. van den Berg, *The New York Convention of 1958*, 1981, p. 126; G. Born, *op. cit.*, §4.04[A][1][b], p. 493 et seq.

practice. Should the jurisdiction where the award was rendered not be a member of the New York Convention, the determination of the validity of the arbitration agreement must be made by virtue of an analysis of the foreign *lex fori* and foreign *lex arbitri*, respectively, which could entail dilatory maneuvers.<sup>76</sup>

Finally, the application of the foreign *lex fori* or foreign *lex arbitri* could possibly lead to unacceptable results contrary to Swiss public policy. Assuming that the arbitration agreement is not valid according to the law of the jurisdiction where the foreign state court judgment was rendered but is valid under Swiss law, the arbitral tribunal would have to consider that the foreign state court had jurisdiction pursuant to Article 25(a) PILA (and, provided that the other conditions of Article 25 PILA are met, that the decision may be entitled to recognition in Switzerland). Hence, a foreign state court judgment rendered in contradiction with Swiss law could satisfy the prerequisite of recognition for the purpose of analyzing *res judicata*.<sup>77</sup>

As a consequence, the solution advocated in the Swiss Federal Tribunal's case law according to which the validity of the arbitration agreement is to be assessed in light of foreign standards may lead to unacceptable results in practice. The Swiss Federal Tribunal's own doubts as to the application of Article II(3) New York Convention to the recognition of a foreign state court judgment is thus in the view of the authors well-founded. As advocated by some legal scholars,<sup>78</sup> the arbitral tribunal should rather verify whether the plea of lack of jurisdiction (*exceptio arbitri*) raised before the foreign state court was justified based on its own autonomous analysis (*i.e.* not on the basis of the law of the state where the judgment was rendered).<sup>79</sup> Thus, an arbitral tribunal would have to determine whether there is a valid and applicable arbitration agreement providing for arbitration in Switzerland that covers the dispute of the parties. As anticipated by the Swiss Federal Tribunal in its *South-Western Railways* decision, this test requires a determination as to whether a valid arbitration agreement exists under Swiss law (Article 178 PILA) and whether the dispute can be (and should have been) the subject of arbitration proceedings in Switzerland (Article 177 PILA).<sup>80</sup>

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<sup>76</sup> M. Liatowitsch, *op. cit.*, pp. 78-79.

<sup>77</sup> M. Liatowitsch, *op. cit.*, p. 78. The same type of problematic was raised by the Federal Council in the context of the enactment of Article 186 (1) bis PILA. See FF 2006 4469, 4474.

<sup>78</sup> M. Liatowitsch, *op. cit.*, pp. 75-84; B. Berger / F. Kellerhals, *op. cit.*, at 1662; C. Soderlund, *Lis Pendens, Res Judicata and the Issue of Parallel Judicial Proceedings*, in *Journal of International Arbitration*, 2005, Vol. 22, Issue 4, p. 305.

<sup>79</sup> C. Soderlund, *Lis Pendens, Res Judicata and the Issue of Parallel Judicial Proceedings*, in *Journal of International Arbitration*, 2005, Vol. 22, Issue 4, p. 305.

<sup>80</sup> M. Liatowitsch, *op. cit.*, 2002, pp. 82-83.

### 4.3 Applicable law for the determination of *res judicata* in international arbitration

#### 4.3.1. Preliminary remark

Although the doctrine of *res judicata* is recognized as a principle pertaining to Swiss public policy<sup>81</sup> and as such a “*general principle of law recognized by civilized nations*”,<sup>82</sup> the concept of *res judicata* varies considerably from one jurisdiction to another leading to divergent results.<sup>83</sup> It does matter and is often decisive if the principle of *res judicata* applies with regard to a preceding state court judgment or arbitral award. The practice of arbitral tribunals dealing with *res judicata* issues does not permit to distinguish a clear trend or highlight uniform criteria to determine which rules should govern the issue of *res judicata*.<sup>84</sup>

Many questions can be raised in the discussion of the application of *res judicata* in international arbitration. Should the issue be adjudicated according to the law at the seat of the arbitration (the *lex fori* or the *lex arbitri*), or should the arbitral tribunal apply the law of the jurisdiction where the decision was rendered? Alternatively, should the law governing the merits of the previous foreign decision apply, or a combination of all the aforementioned laws? Should the arbitral tribunal consider transnational principles of *res judicata* such as those proposed in the work of the ILA?

The Swiss Federal Tribunal in its recent case law has given its answer: The law of the jurisdiction where the decision was rendered provides the outer limits and the law at the seat of the subsequent arbitration (*i.e.* Swiss *lex fori*) determines the minimal standard. In other words, a foreign state court judgment or foreign arbitral award cannot have a broader effect than that which corresponds to the Swiss principles of *res judicata*.

For the reasons explained in detail below, from the viewpoint of the authors, this is not the approach that should be followed by an international arbitral tribunal seated in Switzerland.

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<sup>81</sup> See *infra*, Section 4.1.

<sup>82</sup> L. G. Radicati di Brozolo, *op. cit.*, p. 129. See also references at footnote 2.

<sup>83</sup> It is for instance widely known that the common law doctrine of “*issue estoppel*” or “*issue preclusion*” has broader effect than the *res judicata* concept under civil law jurisdictions. See ILA Interim Report on *Res Judicata* and Arbitration, pp. 6 et seq. and 14, <http://www.ila-hq.org/en/committees/index.cfm/cid/19>. See also L. G. Radicati di Brozolo, *op. cit.*, p. 131; G. Born, *op. cit.*, §27.01[A][1] and [2], p. 3734 et seq.

<sup>84</sup> G. Born, *op. cit.*, §27.02[A][2], p. 3775, and references; C. Deboung, *op. cit.*, at 505.

### 4.3.2. Procedural discretion of the arbitral tribunal

When an arbitral tribunal is confronted with a legal issue, it first asks itself whether it is dealing with a procedural issue or a substantive issue. This is due to the fact that legal regimes differ depending on the categorization of the issue at stake. However, this general first step is missing in the Swiss Federal Tribunal's discussions of the effect of *res judicata*.

In Switzerland, *res judicata* is treated as a procedural issue.<sup>85</sup> This seems to be the case not only in most civil but also in many common law jurisdictions.<sup>86</sup> Assuming that the rules for determining procedural issues are applicable,<sup>87</sup> and unless the parties have set forth specific provisions on the issue of *res judicata* explicitly, an arbitral tribunal will have to determine itself what the relevant rules in the arbitration are in order to decide on any plea of *res judicata*. This flows from the fact that in general the issue of *res judicata* is not expressly dealt with in the procedural or arbitration rules that govern a given case. Thus, for an international arbitral tribunal seated in Switzerland the basis is Article 182(2) PILA, which provides that the arbitral tribunal will have to determine the procedure, “*either directly or by reference to a statute or to rules of arbitration*”.

It is recognized that an arbitral tribunal seated in Switzerland has broad powers and wide discretion in determining the applicable procedure.<sup>88</sup> An arbitral tribunal's powers in this respect are only limited by the due process

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<sup>85</sup> Article 59(II)(e) of the Swiss Code of Civil Procedure; Decision of the Swiss Federal Tribunal 121 III 474 of 3 November 1995, consid. 2.

<sup>86</sup> In general, see International Law Association Interim Report on *Res Judicata* and Arbitration, p. 26, <http://www.ila-hq.org/en/committees/index.cfm/cid/19>: “*Because res judicata is a rule of evidence in common law jurisdictions, and is codified in procedural codes in civil law jurisdictions, the Committee is of the view that it is part of procedural law.*”

<sup>87</sup> Unlike in other common law countries, in the United States, the issue of claim or issue preclusion is sometimes considered to be a feature of substantive law. As seen in the context of diversity actions before federal courts, some judges have taken the position that claim preclusion and issue preclusion is a question of substantive law requiring application of state substantive law and not federal procedural law. See *Rutherford v. Rutherford*, 552 F. Supp. 2d 980 (D.N.D. 2008); *Feed Management Systems, Inc. v. Brill*, 518 F. Supp. 2d 1094 (D. Minn. 2007); *Butts v. Evangelical Lutheran Good Samaritan Soc.*, 852 F. Supp. 2d 1139 (D.S.D. 2012); *Giles v. General Motors Acceptance Corp.*, 494 F.3d 865 (9th Cir. 2007); and *Nautilus Ins. Co. v. Pro-Set Erectors, Inc.*, 928 F. Supp. 2d 1208 (D. Idaho 2013). As a consequence, the solution adopted by an international arbitral tribunal seated in the United States may be different from the solution retained by an arbitral tribunal seated in Switzerland. The former tribunal may resort to applying the principle of estoppel as defined under the law applicable to the merits of a case, *i.e.* the *lex causae*, whereas the latter should treat the issue as one governed by the applicable procedural law.

<sup>88</sup> E. Geisinger / P. Ducret, *The Arbitral Procedure*, in *International Arbitration in Switzerland*, A Handbook for Practitioners, 2013, p. 78.

principles set forth in Article 182(3) PILA and possibly by its duty to conduct the proceedings efficiently. An arbitral tribunal will thus have to exercise its discretion to determine what rules should govern the issue of *res judicata* in the specific case before it. Whether or not it is bound by the rules of the Swiss *lex fori* will be discussed in the next section but in any event the arbitral tribunal will carefully need to consider the different options available.

**a. The provisions of the *lex fori***

It is the long-standing practice of the Swiss Federal Tribunal that the issue of *res judicata* shall be determined by the *lex fori*.<sup>89</sup> In the *Fomento* decision, the Swiss Federal Tribunal suggested the application of Article 27(2) PILA<sup>90</sup> by analogy to the issue of *res judicata*.<sup>91</sup> The Swiss Federal Tribunal made a similar assumption in its *South-Western Railways* decision<sup>92</sup> – although it at the same time suggested the application of the common denominator of the *res judicata* effect of both the law of the jurisdiction where the decision was rendered and the law at the seat of the subsequent arbitration (*i.e.* the *lex fori*) (see Section 2.2.3 above).

As also seen in decision 141 III 229 of 29 May 2015, the Swiss Federal Tribunal resorted to the *lex fori* without giving any special reason for doing so (see Section 3.2 above). Also in other jurisdictions, like in Switzerland, arbitral tribunals typically resort to the *lex fori* at the place of the arbitration to determine the principles applicable to the issue of *res judicata*.<sup>93</sup>

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<sup>89</sup> Decision of the Swiss Federal Tribunal 4A\_508/2013 of 27 May 2014, consid. 3.2. and references; N. Erk, *op. cit.*, pp. 234, 257 and references; Berger/Kellerhals, *op. cit.*, at 1666.

<sup>90</sup> “Recognition of a decision must also be denied if a party establishes:

- a. that it did not receive proper notice under either the law of its domicile or that of its habitual residence, unless such party proceeded on the merits without reservation;
- b. that the decision was rendered in violation of fundamental principles pertaining to the Swiss conception of procedural law, including the fact that the said party did not have an opportunity to present its defense;
- c. that a dispute between the same parties and with respect to the same subject matter is the subject of a pending proceeding in Switzerland or has already been decided there, or that such dispute has previously been decided in a third state, provided that the latter decision fulfils the prerequisites for its recognition.”

<sup>91</sup> Decision of the Swiss Federal Tribunal 127 III 279 of 14 May 2001, consid. 2b. The same approach has been followed by an ICC arbitral tribunal seated in Switzerland: “[...] it is settled law by now that an arbitral tribunal sitting in an international arbitration in Switzerland must apply the same rules as would a Swiss court in matters of *res judicata*” (ICC Case No. 5 of 2 April 2002 in ASA Bulletin (2003), Vol. 21, no. 4, p. 813).

<sup>92</sup> Decision of the Swiss Federal Tribunal 4A\_508/2013 of 27 May 2014, consid. 3.2.

<sup>93</sup> G. Born, *op. cit.*, §27.02[A][2], p. 3775, and references; L. G. Radicati di Brozolo, *op. cit.*, p. 130.

The Swiss Federal Tribunal appears to base its approach on the premise that an arbitral award should be given the same effect as a court judgment, relying on Article 387 of the Swiss Code of Civil Procedure (“SCCP”)<sup>94</sup> applicable to domestic arbitrations seated in Switzerland. The Swiss Federal Tribunal expressly states that this notion should be equally valid in the context of a decision of an international tribunal.<sup>95</sup> As such, it would appear that the Swiss Federal Tribunal proposes that in order to assess the *res judicata* effect of a foreign arbitral award, courts or arbitral tribunals should apply the same rules as those applicable to foreign state court judgments, *i.e.* the *lex fori*. Yet, the crucial question remains unanswered. That is whether the automatic application of the *lex fori* at the place of the arbitration (including its rules of civil procedure if decisive of the issue) is in fact self-evident or unavoidable, as is suggested by the Swiss Federal Tribunal.

In the view of the authors, the answer is no. The general assumption that international arbitral tribunals should resort to the *lex fori* when dealing with *res judicata* issues is questionable for the following two main reasons:

- First, the *lex fori* at the seat of the arbitration in general has no relevance to the conduct of arbitration proceedings in international arbitration.<sup>96</sup> Furthermore, domestic rules of civil procedure are often considered as being ill-suited to address the atypical nature of international arbitral proceedings, having due regard to the consensual nature of arbitration.<sup>97</sup> The rules automatically applicable to the arbitral tribunal are the rules of the *lex arbitri*. In fact, the *lex fori* is an unknown concept as far as international arbitration is concerned.<sup>98</sup>

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<sup>94</sup> “As of its notification, the award has the same effects as an enforceable decision of a state court that has become a *res judicata*.” Translation taken from S. V. Berti (ed.), *ZPO: Schweizerische Zivilprozessordnung = CPC: Code de procédure civile suisse = CCP: Codice di diritto processuale civile svizzero = Swiss Code of civil procedure*, 2009, p. 622.

<sup>95</sup> “Dass ein Schiedsspruch mit der Eröffnung die Wirkung eines rechtskräftigen gerichtlichen Entscheides hat, ist zudem im Bereich der Binnenschiedsgerichtsbarkeit gesetzlich ausdrücklich vorgesehen (Article 387 ZPO), gilt jedoch auch für Entscheide internationaler Schiedsgerichte.” Decision of the Swiss Federal Tribunal 141 III 229 of 29 May 2015, consid. 3.2.4 (*in fine*). Some *lex arbitri* explicitly provide that arbitral awards should be given the same effect as their domestic court judgments. See *e.g.* § 607 of the Austrian Arbitration Act: “The award has, between the parties, the effect of a final and binding court judgment.”

<sup>96</sup> E. Geisinger / P. Ducret, *op. cit.*, p. 75; B. Berger/F. Kellerhals, *op. cit.*, at 1092.

<sup>97</sup> G. Born, *op. cit.*, §27.02[A][2], p. 3776; L. G. Radicati di Brozolo, *op. cit.*, p. 133, footnote 18.

<sup>98</sup> L. G. Radicati di Brozolo, *op. cit.*, p. 136; G. Kaufmann-Kohler, *Globalization of Arbitral Procedure*, in *Vanderbilt Journal of Transnational Law* 36(2003), p. 1331 *et seq.* See also



- Second, the automatic application of the rules of *res judicata* as defined by the *lex fori* at the place of the arbitration may also not be the correct approach, because “*the parties may have opted for a neutral situs for the arbitration having no connection whatsoever to the matter in dispute nor to the parties*”.<sup>99</sup>

As a consequence, in the view of the authors, arbitral tribunals should not automatically resort to the application of the domestic rules of civil procedure at the place of the arbitration when deciding the *res judicata* effect of a foreign arbitral award.

**b. The provisions of the arbitration law (lex arbitri)**

Although sometimes chosen for neutrality purposes, the parties’ determination of the seat of arbitration is an important decision, mainly because it entails two consequences. First, the courts at the seat of the arbitration have supervisory jurisdiction and have the jurisdiction to set aside the arbitral award once rendered.<sup>100</sup> Second, in general, the seat of the arbitration determines the law applicable to arbitration, *i.e.* the *lex arbitri*, where the role and powers of an arbitral tribunal are generally defined. Thus, it seems appropriate to first look at the issue of *res judicata* within the context of the *lex arbitri* governing the arbitration and apply any rules provided for in the *lex arbitri*. However, as explained above, the concept of *res judicata* is rarely defined in the *lex arbitri*.

Thus, in practice, absent a specific agreement by the parties, the application of the *lex arbitri* to the issue of *res judicata* still requires a determination of which rules to apply to the issue. For this determination, arbitral tribunals seated in Switzerland for international matters will resort to Article 182(2) PILA to determine the applicable rules governing the issue of *res judicata*. As already stated above, Article 182(2) PILA grants vast discretionary power to the arbitral tribunal when determining the procedure of the arbitration. Thus, if an arbitral tribunal seated in Switzerland were to seek guidance on the issue of *res judicata* by relying on the applicable *lex arbitri*, then the principles which would apply to the issue would remain uncertain and be dependent upon the discretionary power of the arbitral tribunal granted under Article 182(2) PILA.

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G. Born, *op. cit.*, §27.01[B], p. 3768-3769; S. Brekoulakis, *The Effect of an Arbitral Award and Third Parties in International Arbitration: Res Judicata Revisited*, in: *The American Review of International Arbitration*, 2005, Vol. 16 No. 1, p. 207.

<sup>99</sup> N. Erk, *op. cit.*, p. 234. See also L. G. Radicati di Brozolo, *op. cit.*, pp. 130-132; G. Born, *op. cit.*, §27.02[A][2], p. 3776. Opposite: R. Goode, *The Role of the Lex Loci Arbitri in International Commercial Arbitration*, in *Arbitration International*, 2001, Vol. 17, p. 31.

<sup>100</sup> L. G. Radicati di Brozolo, *op. cit.*, p. 132.

**c. The law of the jurisdiction where the decision was rendered**

The jurisdiction where the foreign state court judgment or foreign arbitral award was rendered, is another option to consider when determining which law shall govern the issue of *res judicata*.

The *res judicata* effect is but one of many consequences of a decision rendered in a foreign jurisdiction.<sup>101</sup> The question whether the issue should be analyzed in light of the principle of *res judicata* as applied in the jurisdiction where the decision was rendered seems thus relevant in order to determine whether a foreign state court judgment or foreign arbitral award can have *res judicata* effect in a subsequent arbitration. The Swiss Federal Tribunal advertised to some extent this solution in its *South-Western Railways* decision applying the common denominator of the *res judicata* principle as defined in both the jurisdiction where the decision was rendered and the seat of the subsequent arbitration.<sup>102</sup> In practice, this solution should lead to the application of the *lex fori* of the jurisdiction where the foreign state court judgment or foreign arbitral award was rendered or of the *lex arbitri* of the arbitral award whose effects are invoked.<sup>103</sup>

However, in the view of the authors the situation is not as evident in respect of foreign arbitral awards, where the seat of the arbitration has an often remote link with the parties and contractual relationship. This position is supported by other legal scholars.<sup>104</sup> Thus, it is neither required nor necessary to apply the regime that governs the *res judicata* principle of a foreign state court judgment (where the limitation by the foreign law is immanent) to the *res judicata* effect of a foreign arbitral award. This applies independently of whether or not the *lex fori* at the place of the arbitration gives an arbitral award the same effect as a domestic court judgment. In such situations, the effect of this rule should be considered as being limited to domestic awards.<sup>105</sup>

**d. The law governing the merits of the dispute**

One could argue that when parties choose arbitration as a means of dispute resolution, they do not necessarily intend to extend the law governing the merits of their contractual relationship to procedural questions. This is due to the fact

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<sup>101</sup> A. Bucher / A. Bonomi, *Droit international privé*, Helbing Lichtenhahn, 2013, at 254; J. Kren Kostkiewicz, *Grundriss des schweizerischen Internationalen Privatrechts*, Stämpfli, 2012, at 125.

<sup>102</sup> Decision of the Swiss Federal Tribunal 4A\_508/2013 of 27 May 2014, consid. 3.2.

<sup>103</sup> L. G. Radicati di Brozolo, *op. cit.*, p. 132.

<sup>104</sup> N. Erk, *op. cit.*, p. 167; L. G. Radicati di Brozolo, *op. cit.*, p. 132; S. Brekoulakis, *op. cit.*, pp. 206-207.

<sup>105</sup> This is for example the case in Swiss law where there is such a provision for domestic awards in Article 378 SCCP but not for international awards, *i.e.* in Chapter 12 PILA.

that in general parties are aware that procedural rules are distinct from the rules applicable to the merits of the contract and that, failing an agreement by the parties, or specific rules in the *lex arbitri*, the arbitral tribunal will apply its broad discretion to procedural issues.

As a result, the law governing the merits of the dispute is a less instinctive solution for arbitral tribunals dealing with questions of *res judicata*. However, and contrary to the conclusion of the ILA on this point,<sup>106</sup> the law governing the merits of the dispute may in the view of the authors be relevant depending on the specific circumstances of a given case and may therefore be taken into account as an additional criterion when determining the appropriate rules to govern the issue of *res judicata*. This is for example the case if the rules on *res judicata* (including for instance the U.S. versions of *res judicata* which include “*claim preclusion*” and “*issue preclusion*”) form part of the law chosen by the parties to apply to the merits of the case. In such a situation, it would be difficult to argue that these principles as known under the selected law applicable to the merits should not apply even if they may not correspond to the expectations of all parties involved.

#### 4.3.3. Intermediate solution

Not one of the propositions presented above has any more merit than any of the others.<sup>107</sup> While the application of the rules of the *lex fori* at the place of the subsequent arbitration seems to be the most frequently chosen option by arbitral tribunals, the resort to the *lex fori* at the place of the subsequent arbitration is not an adequate solution for international arbitration. The recourse to the *lex arbitri*, although consistent with the treatment of the issue of *res judicata* as one of procedure and not substance, will mostly lead to referring the arbitral tribunal to its procedural discretion but will not provide any further guidance. The law of the jurisdiction where the decision was rendered carries the risk of a different concept of *res judicata*. Finally, the law governing the merits of the dispute has often a remote link to procedural issues although it might correspond to the legitimate expectations of the parties.

The solution advocated by the Swiss Federal Tribunal in its *South-Western Railways* decision and subsequent decisions is that the arbitral tribunal should look for the common denominator of the effects of *res judicata* according to the jurisdiction where the decision was rendered and the *lex fori* at the seat of the subsequent arbitration. This recommendation, although a

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<sup>106</sup> International Law Association Interim Report on *Res Judicata* and Arbitration, p. 25, <http://www.ila-hq.org/en/committees/index.cfm/cid/19>.

<sup>107</sup> Similarly, L. G. Radicati di Brozolo, *op. cit.*, p. 133.

welcomed attempt towards harmonization, runs counter to the nature of arbitration, which prescribes disconnection from a *lex fori*, procedural neutrality and party autonomy.

As put by one author, “*the focus should be on the parties’ agreement and their expectations, rather than – as with court judgments – on national preclusion rules designed for domestic litigations*”.<sup>108</sup> It follows that absent an agreement of the parties on this specific issue, the arbitral tribunal shall use its broad procedural discretion and take into account all the circumstances surrounding the case in order to meet the parties’ expectations as to the *res judicata* effect of any previous decisions.<sup>109</sup> Therefore, an arbitral tribunal seized with the issue should consider if the main points of reference derive from common law rules, civil law principles, or, alternatively, if the arbitral tribunal should search for a compromise.

There are downsides to the approach advocated in this article. First, as already mentioned, it leads to a differentiation between the treatment of domestic arbitral awards versus foreign arbitral awards (at least based on Article 387 SCCP in Switzerland). That said this is not a unique proposition as there is also a distinction made between domestic and foreign awards in terms of recognition and enforcement. Second, the approach leads to a different solution depending on whether a foreign state court judgment is at stake, as compared to a foreign arbitral award. However, these downsides do not seem to hinder the proposed solution. Rather it is quite normal that domestic awards and foreign arbitral awards are dealt with separately, as is the case with foreign state court judgments and foreign arbitral awards.

In the view of the authors, the potential downside worth consideration is the legal uncertainty resulting from the approach advocated. It is true that an arbitral tribunal’s exercise of its wide discretionary power may lead to unpredictable consequences and to dissimilar results in practice. In response to this problem, some authors have suggested an autonomous approach, warranting the application of a transnational principle of *res judicata*.<sup>110</sup>

So far and to the best of the authors’ knowledge, there has been only one attempt to define a universal concept of *res judicata*, that being in the work of the ILA discussed here below.

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<sup>108</sup> N. Erk, *op. cit.*, p. 167.

<sup>109</sup> L. G. Radicati di Brozolo, *op. cit.*, p. 136.

<sup>110</sup> G. Born, *op. cit.*, at §27.01[B][6], in particular p. 3771; L. G. Radicati di Brozolo, *op. cit.*, p. 133; A.-C. Hahn, *op. cit.*, p. 335.

#### 4.4 The International Law Association Reports on *Res Judicata* and Arbitration: Harmonization of the principles to be applied by arbitral tribunals?<sup>111</sup>

##### 4.4.1. Background of the Reports

Acknowledging that the doctrine of *res judicata* in the context of international arbitration gives rise to a number of complex and unresolved issues, in particular due to the fact that the doctrine of *res judicata* varies from one jurisdiction to another, a committee composed of legal scholars and practitioners was mandated by the ILA to give guidance to arbitrators faced with a plea of *res judicata* arising from a prior court judgment or arbitral award (the “Committee”).<sup>112</sup>

The Committee started its work in 2002 and reviewed the various approaches of *res judicata* in civil and common law jurisdictions, and also looked at the corresponding principles as applied in international law. It eventually issued an Interim Report at its 2004 Conference in Berlin (the “**ILA Interim Report**”) and a Final Report (the “**ILA Final Report**”) as well as the Resolution 1/2006 (the “**ILA Recommendations**”) at its 2006 Conference in Toronto (together the “**ILA Reports and Recommendations**”).

The ILA Reports and Recommendations discuss *res judicata* from an international commercial arbitration perspective. Despite its original mandate to cover the *res judicata* effect of prior court judgments and arbitral awards, the scope of the Committee’s work narrowed with time. In the end, the ILA Interim Report and ILA Final Report address the issue from the point of view of an arbitral tribunal faced with a foreign arbitral award only.<sup>113</sup> The ILA Final Report does not directly address the issue of an arbitral tribunal faced with a prior foreign state court judgment, or the issue of a domestic court faced with

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<sup>111</sup> International Law Association, Interim Report and Final Report on *Res Judicata* and Arbitration and Resolution No. 1/2006 (Annex 2). The ILA Reports and Recommendations can be accessed on the ILA website: <http://www.ila-hq.org/en/committees/index.cfm/cid/19>.

<sup>112</sup> ILA Interim Report on *Res Judicata* and Arbitration, p. 5, <http://www.ila-hq.org/en/committees/index.cfm/cid/19>. Like for the issue of *res judicata*, the Committee was entrusted with the same mission in relation to *lis pendens* issues, which gave form to the ILA Interim and Final Reports on *Lis Pendens* as well as to ILA Recommendations on this issue.

<sup>113</sup> ILA Interim Report on *Res Judicata* and Arbitration, p. 5, <http://www.ila-hq.org/en/committees/index.cfm/cid/19>; ILA Final Report on *Res Judicata* and Arbitration, p. 28, at 9, <http://www.ila-hq.org/en/committees/index.cfm/cid/19>.

the question of the *res judicata* effect to be given to a previously rendered foreign arbitral award.<sup>114</sup>

#### 4.4.2. The ILA Reports and Recommendations

The ILA Final Report emphasizes the fact that *res judicata* in international arbitration should not necessarily be treated similarly to *res judicata* under domestic law. The Committee rather suggests the application of uniform transnational rules of *res judicata* in the context of international arbitration: “*This is due to the differences between international commercial arbitration and domestic court dispute settlement, as well as to the international character of arbitration, which should not be reduced to domestic notions regarding res judicata that are valid in a domestic setting but are hardly relevant in an international context.*”<sup>115</sup>

The ILA Final Report also stresses that the ILA Recommendations issued by the Committee are not meant to cover all aspects of the doctrine of *res judicata*. Rather, they only address aspects on which the Committee considered that transnational rules could be developed,<sup>116</sup> while leaving aside some important aspects of the issue where the Committee could not identify uniform trends.

The ILA Recommendations as contained in Annex 2 of the ILA Recommendations are briefly described hereafter.

While Recommendation 1 gives a clear statement in favor of the *res judicata* effect of foreign<sup>117</sup> arbitral awards in international commercial arbitration,<sup>118</sup> Recommendation 2 confirms the position also supported by the authors of this article that the effect “*need not necessarily be governed by*

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<sup>114</sup> The Committee nevertheless suggests that arbitral tribunals should take the ILA Recommendations into consideration when defining the *res judicata* effect of a foreign state court judgment. Likewise, state courts may rely on the ILA work when dealing with the *res judicata* effect of a prior international arbitral award. See ILA Final Report on *Res Judicata* and Arbitration, p. 28, at 10 and 11, <http://www.ila-hq.org/en/committees/index.cfm/cid/19>.

<sup>115</sup> ILA Final Report on *Res Judicata* and Arbitration, p. 31, at 25, <http://www.ila-hq.org/en/committees/index.cfm/cid/19>.

<sup>116</sup> ILA Final Report on *Res Judicata* and Arbitration, p. 27, at 5 and p. 31, at 26, <http://www.ila-hq.org/en/committees/index.cfm/cid/19>.

<sup>117</sup> According to the Committee, “[the] *Recommendations apply only to international commercial arbitration. It is up to domestic courts to determine res judicata effects regarding domestic arbitrations. However, these Recommendations may also be useful in a domestic arbitration context [...].*”

<sup>118</sup> Recommendation 1 reads as follows: “*To promote efficiency and finality of international commercial arbitration, arbitral awards should have conclusive and preclusive effects in further arbitral proceedings.*”

*national law and may be governed by transnational rules applicable to international commercial arbitration.*"<sup>119</sup>

Recommendation 3 sets out a four-prong test to be carried out by the arbitral tribunal to determine whether a foreign arbitral award may entail a *res judicata* effect in further arbitration proceedings (which include (i) prerequisite of recognition, (ii) identity of a claim for relief, (iii) identity of the cause of action and (iv) identity of parties).<sup>120</sup> This four-prong test is deemed to constitute a compromise of the various traditional conditions found in the jurisdictions reviewed by the Committee.<sup>121</sup> As such, the conditions do not necessarily have the exact same meaning as the one ascribed to them for instance under Swiss law. To take an example, "*cause of action*" in Recommendation 3.3 is interpreted as including "*all facts and circumstances arising from a single event and relying on the same evidence which are necessary to give rise to a right to relief*".<sup>122</sup> Under Swiss law, the condition of "*identity of facts*" has a slightly broader meaning as it encompasses all facts and circumstances that exist at the time of the decision in the first proceedings, whether or not the parties put them forward in the first proceedings or were even aware of such facts.

Recommendation 4 sets out the scope of the *res judicata* effect. Pursuant to the ILA Recommendations, the *res judicata* effect of a prior arbitral award extends to the "*(i) determinations and relief contained in its dispositive part as well as in all reasoning necessary thereto, (ii) issues of fact or law which have been arbitrated and determined by it, provided any such determination was essential or fundamental to the dispositive part of the arbitral award*".<sup>123</sup> When setting out Recommendation 4, the Committee was of the view that limiting *res judicata* to the dispositive part of the award was "*overly formalistic and literal*".<sup>124</sup> It thus provided for a more extensive notion of the scope of *res judicata* than the concept developed for example in Switzerland by the Swiss Federal Tribunal. In addition, Recommendation 4.2 endorses the common law concepts of "*issue preclusion*", which is unknown in Switzerland and in most

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<sup>119</sup> Resolution No. 1/2006, Annex 2.

<sup>120</sup> *Ibid.*

<sup>121</sup> ILA Final Report on *Res Judicata* and Arbitration, p. 32, at 30-31, <http://www.ila-hq.org/en/committees/index.cfm/cid/19>.

<sup>122</sup> ILA Final Report on *Res Judicata* and Arbitration, p. 34, at 43 and footnote 109, <http://www.ila-hq.org/en/committees/index.cfm/cid/19>. See also ILA Interim Report on *Res Judicata* and Arbitration, p. 7, <http://www.ila-hq.org/en/committees/index.cfm/cid/19>.

<sup>123</sup> Resolution No. 1/2006, Annex 2.

<sup>124</sup> ILA Final Report on *Res Judicata* and Arbitration, p. 35, at 52, <http://www.ila-hq.org/en/committees/index.cfm/cid/19>.

civil law jurisdictions.<sup>125</sup> Issue preclusion prevents a party from rearguing a factual or legal issue which has been conclusively decided in earlier proceedings, irrespective of the identity of parties.<sup>126</sup> The Committee considered that this addition was justified given the general aim for procedural efficiency and finality of arbitration proceedings.<sup>127</sup>

Pursuant to Recommendation 5, *res judicata* applies to a claim, cause of action or issue of fact or law that could have been raised in the first proceedings, but was not, amounting to what is considered to be “*procedural unfairness or abuse*”.<sup>128</sup> According to the Committee, this is the result of a compromise between the common law notion of issue preclusion and the general interest of avoiding the reintroduction of matters that should have been pled in good faith in the first proceedings.<sup>129</sup>

Recommendation 6 provides that the plea of *res judicata* can be invoked “*at any time permitted under the applicable procedure*”.<sup>130</sup>

Lastly, according to Recommendation 7, the preclusive effect of *res judicata* should be raised on a party’s initiative (and not *ex officio* by the arbitral tribunal) as soon as possible in the proceedings.<sup>131</sup> This recommendation is based on the Committee’s finding that, unlike the well-settled principle under Swiss law, *res judicata* is not a principle of public policy and may thus be waived by a party.<sup>132</sup>

#### 4.4.3. The limits of the ILA Recommendations

When preparing the ILA Recommendations, the Committee opted to develop a set of transnational rules based on a compromise between the various approaches of *res judicata*. However, the Committee acknowledged that it had to leave aside certain issues of *res judicata* “*to be referred to domestic law*”

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<sup>125</sup> ILA Final Report on *Res Judicata* and Arbitration, p. 36, at 56-57, <http://www.ila-hq.org/en/committees/index.cfm/cid/19>.

<sup>126</sup> ILA Interim Report on *Res Judicata* and Arbitration, pp. 7-8, <http://www.ila-hq.org/en/committees/index.cfm/cid/19>.

<sup>127</sup> ILA Final Report on *Res Judicata* and Arbitration, p. 36, at 56, <http://www.ila-hq.org/en/committees/index.cfm/cid/19>.

<sup>128</sup> Resolution No. 1/2006, Annex 2.

<sup>129</sup> ILA Final Report on *Res Judicata* and Arbitration, p. 37, at 62, <http://www.ila-hq.org/en/committees/index.cfm/cid/19>.

<sup>130</sup> Resolution No. 1/2006, Annex 2.

<sup>131</sup> Resolution No. 1/2006, Annex 2.

<sup>132</sup> ILA Final Report on *Res Judicata* and Arbitration, p. 38, at 66-71, <http://www.ila-hq.org/en/committees/index.cfm/cid/19>.



*under an acceptable conflict rule*".<sup>133</sup> In particular, due to the "complexity of the issue",<sup>134</sup> the Committee did not make any choice between the three legal systems which may come into play to govern the issue of *res judicata* (the *lex fori* or the *lex arbitri* of the place of the previous arbitration; the *lex fori* or the *lex arbitri* of the place of the subsequent arbitration; the law governing the merits of the dispute).<sup>135</sup>

As a result, although the ILA Reports and Recommendations provide guidance, they do not reflect a comprehensive solution. In fact, the ILA Reports and Recommendations openly leave a number of issues unresolved.<sup>136</sup> For example, the ILA Reports and Recommendations leave unanswered the definition of parties and the possibility of allowing a *res judicata* effect on third parties in using a more "lenient" approach to determine the identity of parties.<sup>137</sup>

Obviously, the ILA Recommendations merely provide a set of transnational soft law rules, which can be relied upon by analogy but do not have a binding character.<sup>138</sup>

However, it is nevertheless surprising that the ILA Recommendations have, as it seems, not been followed by arbitral tribunals, nor have they been a main source of inspiration for courts faced with the *res judicata* impact of previous arbitral awards. In its most recent decision,<sup>139</sup> the Swiss Federal Tribunal even clearly stated that they have no impact whatsoever (see Section 3.2).

While they constitute a good compromise of the various trends found in civil and common law jurisdictions, the ILA Recommendations seem to suffer from their "mixed" approach and their lack of answers on some key concerns.<sup>140</sup> Indeed, when used in a particular case, the strict requirement of a four-prong test as set out in Recommendation 3 and the broader effects described in Recommendation 4 to "issues of fact or law which have been arbitrated and determined" seem difficult to reconcile.

Nonetheless, the ILA Recommendations remain a good starting point towards the creation of a truly comprehensive set of transnational rules on *res*

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<sup>133</sup> ILA Final Report on *Res Judicata* and Arbitration, p. 31, at 28, <http://www.ila-hq.org/en/committees/index.cfm/cid/19>.

<sup>134</sup> *Ibid.*

<sup>135</sup> ILA Final Report on *Res Judicata* and Arbitration, p. 31, at 27-28, <http://www.ila-hq.org/en/committees/index.cfm/cid/19>.

<sup>136</sup> L. G. Radicati di Brozolo, *op. cit.*, p. 146.

<sup>137</sup> ILA Final Report on *Res Judicata* and Arbitration, pp. 27-28, at 7, and pp. 34-35, at 44-49, <http://www.ila-hq.org/en/committees/index.cfm/cid/19>.

<sup>138</sup> N. Erk, *op. cit.*, pp. 234-235.

<sup>139</sup> Decision of the Swiss Federal Tribunal 141 III 229 of 29 May 2015.

<sup>140</sup> L. G. Radicati di Brozolo, *op. cit.*, p. 146.

*judicata*. Greater reliance on them by arbitral tribunals and courts faced with a previous arbitral award would certainly add some predictability to the practice of *res judicata* in international arbitration.

## 5. Summary and conclusion

*Res judicata* raises thorny questions in international arbitration – many of which remain unanswered. That being said, as seen in the Swiss Federal Tribunal's *South-Western Railways* decision, the underlying goal is to establish principles that protect arbitration agreements and arbitration proceedings from tactics aimed solely at impeding arbitration proceedings on the basis of *res judicata*.

The *South-Western Railways* decision constitutes an attempt to resolve unsettled issues linked to the principle of *res judicata* in international arbitration.

Regarding the requirement of recognition of the foreign state court judgment where an *exceptio arbitri* was raised before the foreign state court, the Swiss Federal Tribunal duly noted the potential problems of its practice on this point but nevertheless left the issue open. This is unfortunate as a closer look at the issues at stake shows that the approach set forth by the Swiss Federal Tribunal may lead to undesirable results. The authors of the present article propose that an arbitral tribunal should merely rule on its own competence based on its own rules according to its *lex arbitri* instead of embarking on a difficult appreciation of foreign standards on the validity of the arbitration agreement. This, in the view of the authors, would seem to give a practical and more consistent approach to this question.

The key holding of the *South-Western Railways* decision, *i.e.* the application of the Swiss *lex fori* to the issue of *res judicata*, has been confirmed in two following decisions that went more to the core of the problem, namely the *res judicata* effect of a foreign arbitral award in subsequent arbitration proceedings. In doing so, the Swiss Federal Tribunal recognizes that when a foreign court judgment is concerned, policy considerations might require (although not strictly speaking necessitate) arbitral tribunals to apply the principle of *res judicata* as applied by Swiss state courts. However, when a previous foreign arbitral award is at issue, the Swiss Federal Tribunal's approach seems to raise more questions than to give answers. The Swiss Federal Tribunal tried to strike the balance between the requirements of its own *lex fori* and the law of the jurisdiction where the decision was rendered. Nevertheless, in its application the approach advocated by the Swiss Federal Tribunal in its recent case law boiled down to the application of the restrictive rules of the Swiss *lex fori*.

The solution of the Swiss Federal Tribunal is in the opinion of the authors methodologically not entirely satisfactory as it disregards the peculiarities of arbitration. In particular, arbitral tribunals are not linked to any *lex fori* and enjoy wide discretion in terms of procedural issues and parties are granted broad autonomy. The solution of the Swiss Federal Tribunal is also questionable as it amounts in its effect to granting the detailed provisions of Swiss law on *res judicata* as applied by the Swiss courts procedural *ordre public* character. While it is correct that the principles of *res judicata* belong to the *ordre public*, it does not necessarily mean that it has to be equated to the domestic Swiss law principles of *res judicata*.

Finally, given the strict Swiss law principles on *res judicata*, it is likely that an arbitral tribunal will very often disregard the *res judicata* effect of a foreign arbitral award. Depending on the circumstances of the particular case, this might lead to a second tribunal being able to conduct, in essence, a “judicial” review of the first award.

Therefore, the authors submit that when it comes to foreign arbitral awards, arbitral tribunals (when determining the *res judicata* effect of a previous foreign arbitral award) and the Swiss Federal Tribunal (when deciding on setting aside proceedings based on the violation of public policy) should abandon the established Swiss principles of *res judicata*. Instead, separate criteria should be developed to determine what amounts to a violation of *international* public policy when a court or arbitral tribunal does not give *res judicata* effect to a previous foreign arbitral award.<sup>141</sup>

The fact that Swiss principles do not lead to an entirely satisfactory result is to some extent already subtly acknowledged by the Swiss Federal Tribunal in its *South-Western Railways* decision. Indeed, the Swiss Federal Tribunal itself “left the door open” to a more pragmatic approach to the issue of the identity of parties. For this question the Swiss Federal Tribunal recognized the need to take into consideration the concrete circumstances of each case in order to avoid attempts to obliterate the parties’ choice to resolve their dispute by way of arbitration.

The solutions proposed by the authors of this article are based on what are currently the principles prevailing in international arbitration. The authors consider that in order to find the most appropriate rules for the issue of *res judicata*, arbitral tribunals, in applying their procedural discretion, should autonomously determine the core content of the principle of *res judicata*. Considering the various, more extensive, approaches on the issue of *res judicata* in other jurisdictions, that undoubtedly form part of the circle of

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<sup>141</sup> The contrary view has been supported by B. Berger, *op. cit.*, pp. 653-654.

“civilized nations”, the rather restrictive Swiss principles of *res judicata* cannot, in the view of the authors, rise to the level of international public policy. Therefore, the authors submit that there is no compulsory reason why an arbitral tribunal cannot be left to determine the proper rules of *res judicata* to govern the case before it.<sup>142</sup>

Developing separate criteria is not a “greenfield” exercise since some opinions have already been formed in international arbitration. Some academics have considered, in the view of the authors with reason, that the *res judicata* effect extends “to the reasons which are a necessary adjunct to the decision”, i.e. the *ratio decidendi* of the award.<sup>143</sup>

Interestingly, the Swiss Federal Tribunal seems to have followed this approach in a decision regarding the *res judicata* effect of an arbitral award rendered shortly after the *South-Western Railways* decision. The Swiss Federal Tribunal considered that an arbitral tribunal would violate procedural public policy not only if it ruled without taking into account the dispositive part of a previous decision, but also if it departed from an opinion expressed in an arbitral award previously rendered in the same arbitration, including the arbitral tribunal’s discussion and decision on the interpretation of some contractual instruments – even though those opinions were not mentioned in the dispositive part of the award.<sup>144</sup>

A possible approach to the issue of *res judicata* in international arbitration could also be to look at the case law of international courts and in particular the European Court of Justice. When the European Court of Justice developed its autonomous interpretation of the identity of the dispute in order to determine whether or not the closely related principle of *lis pendens* applied, the European Court of Justice established what it called a “Kernpunkttheorie”, i.e. that the relevant question for the issue was whether the “heart of the two actions” (*le centre des deux litiges*) is the same. In doing so, the European Court of Justice acknowledged that the rules prevailing in certain jurisdictions on the issue of identity of dispute were not appropriate because they were too strict. Therefore, the European Court of Justice held that the key question was whether at its core a second case concerned the same dispute or not.<sup>145</sup>

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<sup>142</sup> But see for the contrary view B. Berger, *op. cit.*, p. 646.

<sup>143</sup> B. Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions*, Kluwer Law International, 2006, p. 250. See also ICC Case No. 3267 (1984) published in *Yearbook Commercial Arbitration* XII, 1987, pp. 87-96.

<sup>144</sup> Decision of the Swiss Federal Tribunal 4A\_606/2013 of 2 September 2014, consid. 3.

<sup>145</sup> P. F. Schlosser / Burkhard Hess, *EuZPR. EU-Zivilprozessrecht mit EuGVVO, EuVTVO, EuMahnVO, EuBagVO, HZÜ, EuZVO, HBÜ, EuBVO, EuKiPVO Kommentar*, 4th ed., 2015, Ad Article 29, N 4.

Finally, although the ILA Reports and Recommendations do not seem to bear fruits in arbitration practice and literature, and could be considered as falling short of overcoming the barrier of a variety of concepts and practice around the world, they still constitute a useful basis for further consideration and attempts to create a uniform and standardized transnational principle of *res judicata*.

By way of conclusion, the authors of this article question the finding of the Swiss Federal Tribunal in its American law firm decision.<sup>146</sup> In this case, a first arbitral tribunal decided how a particular provision should be interpreted. The subsequent arbitral tribunal, true to the case law of the Swiss Federal Tribunal, applied the Swiss principle of *res judicata* and came to the result that there was a lack of identity of claims due to the fact that different time periods were concerned. But was not the core issue of the dispute, *i.e.* how to interpret the disputed provision, the same? One could say that in these circumstances the claimant had “*two bites at the apple*”, or even that the second arbitral tribunal acted as an appellate instance reviewing and correcting the findings of the first tribunal.<sup>147</sup> One might wonder if such a result would also have occurred if the question of *res judicata* was viewed not from the parochial Swiss law view, but from a broader and international perspective. Thus, in view of the authors, the Swiss Federal Tribunal’s decision is exacerbating, rather than resolving, an important problem of international arbitration – namely that contradictory decisions might be rendered by different bodies.

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<sup>146</sup> Decision of the Swiss Federal Tribunal 141 III 229 of 29 May 2015; see Section 3.2 above.

<sup>147</sup> This happened in essence in the American law firm decision of the Swiss Federal Tribunal 141 III 229 of 29 May 2015, as confirmed by B. Berger, *op. cit.*, p. 655.

Nathalie VOSER, Julie RANEDA, *Recent Developments on the Doctrine of Res Judicata in International Arbitration from a Swiss Perspective: A Call for a Harmonized Solution*

### Summary

The Swiss Federal Tribunal has recently rendered three decisions addressing the issue of *res judicata* in the context of international arbitration, opening the door to possible developments of the doctrine of *res judicata* as applied in international arbitrations seated in Switzerland.

This article elaborates on the Swiss Federal Tribunal's latest decisions on the topic and endeavors to challenge some of the core principles of the doctrine of *res judicata* as developed in the Swiss practice.

The authors propose that arbitral tribunals apply the provisions of the *lex arbitri* (instead of Article II(3) New York Convention) when examining the requirement of recognition of a foreign state court judgment where an *exceptio arbitri* was raised in the first proceedings.

The article also puts in question one of the key holdings of the Swiss Federal Tribunal, *i.e.* the application of the Swiss *lex fori* to the issue of *res judicata* by an arbitral tribunal seated in Switzerland. Rather than the strict principles of *res judicata* as developed by the Swiss Federal Tribunal, the authors suggest that arbitral tribunals seated in Switzerland should use their procedural discretion and develop autonomous rules which are more generally recognized and thereby seek to define the core content of the principle of *res judicata*. In doing so, and in the absence of internationally applicable rules, arbitral tribunals can promote harmonized principles of *res judicata* better designed for international arbitration than particular national rules.