

RES JUDICATA AND THE RULE OF LAW IN INTERNATIONAL ARBITRATION

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I. THE HYPOTHETICAL

Take a hypothetical situation: States A and B arbitrate a dispute concerning the interpretation of technical terms in, say, an air services treaty. A great deal of complex financial evidence is put before the tribunal and painstakingly explained to it. The tribunal gives its award. Shortly afterwards another, slightly different, dispute arises from the same treaty and is submitted to a new and different tribunal for arbitration. The respondent, State A, refuses to accept that the treaty interpretations contained in the award of the first tribunal are binding and insists that State B once more prove the interpretation for which it contends. State B attempts to do so, but the new tribunal decides upon a different interpretation from that decided upon by the first tribunal.

What is wrong?

Most, if not all, lawyers will feel that something is wrong in this case. In this paper I want to try to pin down exactly what it is that is wrong, and to ask what, if anything, should be done to repair the wrong.

It is, I hope, accepted that lawyers will feel it desirable that legal relations should be “homogenous”, or unified, in the sense that they should appear the same no matter how they are looked at, or by whom. In circumstances where that homogeneity breaks down – for instance, in the case of unrecognised marriages or divorces, or in cases where non-contractual liability is governed by incompatible rules in different States – there is generally perceived to be a problem calling for solution, usually by the harmonisation or unification of national laws. And this must apply a fortiori to breakdowns of homogeneity within a single legal system, such as public international law.

II. RES JUDICATA

Homogeneity in this sense is secured in municipal law by the doctrine of *res judicata*. The doctrine of *res judicata* stipulates, in the words of *Jowett*, that “a

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final judgment already decided between the same parties or their privies on the same question by a legally constituted court having jurisdiction is conclusive between the parties, and the issue cannot be raised again”.

International precedents

Res judicata is also a general principle of international law, albeit one which has attracted relatively little attention. The principle was stated in the *Amco v. Indonesia (Resubmission: Jurisdiction)* award, rendered under the auspices of ICSID, as follows:

The general principle announced in numerous cases is that a right, question or fact *distinctly put in issue and distinctly determined* by a court of competent jurisdiction as a ground of recovery, cannot be disputed.¹

The Tribunal was there quoting the *Orinoco Steamship Company* case. In fact, the *Orinoco* decision was itself quoting *Southern Pacific Railway Co. v. U.S.*,² and is framed slightly differently. It reads as follows:

The general principle announced in numerous cases is that a right, question or fact *distinctly put in issue and directly determined* by a court of competent jurisdiction as a ground of recovery, cannot be disputed. [additional emphasis added]³

A rather wider formulation was given in the *Pious Fund* arbitration between Mexico and the USA in 1902:

[A]ll parts of the judgment or the decree concerning the points debated in the litigation enlighten and mutually supplement each other, and ... they all serve to render precise the meaning and the bearing of the *dispositif* (decisory part of the judgment) and to determine the points upon which there is *res judicata* and which thereafter can not be put in question.⁴

The more cautious *Orinoco* formulation is closer to that generally accepted in international tribunals. It confines *res judicata* to points distinctly argued in the proceedings and essential to the decision or, to use the terms of the *Amco* award, “addressed and determined” by the Tribunal. This approach has been taken in a number of international decisions, including the decisions of the Permanent Court of International Justice in *Postal Service in Danzig*⁵ and *Chorzow Factory*,⁶ and

1. 89 *International Law Reports* 552 at 560.

2. 168 Sup. Ct. Rep. 1.

3. 10 *UNRIAA* 184 at 276.

4. J.B. Scott, *Hague Court Reports* (1916), 1 at 5.

5. PCIJ Rep. Ser. B, No. XI, p.30.

6. PCIJ Rep. Ser. A, p.20.

by arbitral tribunals in the *UK-French Continental Shelf (Interpretation)* case⁷ and *Amco v. Indonesia (Jurisdiction; Resubmission)*.⁸

It is not necessary that a particular Finding be “executed” by the ordering of action in implementation in the *dispositif*. It is enough that the Finding be clearly a “determination” by the Tribunal.⁹

The general principle is subject to a number of qualifications, of which the most important is that a decision may be revised if it was based upon a manifest error of law, such as the overlooking of a relevant treaty.¹⁰ But in general the principle holds good.¹¹

Conditions for application

According to one much-quoted authority, there are three conditions for the application of the principle of *res judicata*. They are: identity of parties; identity of cause; and identity of object (or subject matter) in the subsequent proceedings.¹²

Identity of object

I will take them in a slightly different order. The requirement of identity of object (or subject matter) is uncontroversial. It is intended to ensure that it is in fact the very same issue which arises in both cases. This is, of course, implicit in the very essence of *res judicata*.

Identity of cause

The requirement of identity of cause is intended to establish that there is “the same question at issue” in a slightly different sense from that arising in the context of identity of object. The requirement has its roots in the maxim *ne bis in idem*, rather than the principle of good faith to which I shall return later. It seeks to ensure that a party cannot have a claim retried once it has been determined, but without precluding the party from advancing a legally distinct cause of action arising from the same facts. The doctrine applies only where a point falls for decision twice within one and the same legal context. In this sense, it merely serves to clarify the exact nature of the point in respect of which a plea of *res judicata* may be raised.

7. 54 ILR 139 at 170.

8. 89 ILR 552 at 559-563, 566-568.

9. *Cf.*, the Dissenting Opinion of Judge Koretsky in *South West Africa (Second Phase)* (ICJ 1966), 37 ILR 243 at 486, citing, *inter alia*, *Corfu Channel* ICJ Rep. 1949, at 35, and *US Nationals in Morocco* ICJ Rep. 1952 at 213.

10. *Trail Smelter* arbitration, (USA v. Canada) 3 UNRIAA 1938 at 1957.

11. The position which I have stated is consistent with practically all significant international precedents. One exception, where the Arbitral Tribunal adopted a very restrictive view of *res judicata*, is the *Lighthouses Arbitration between France and Greece* (Permanent Court of Arbitration, 1956), 23 ILR 81. That case can be distinguished, and its view in any event can be rejected as contrary to the weight of authority.

12. Judge Anzilotti, *Chorzow Factory* PCIJ Ser. A. No. 13, at 23-27. *Cf.*, Rosenne, *The Law and Practice of the International Court*, (1965), Vol.II, p.624; *Trail Smelter* arbitration, 3 UNRIAA 1905 at 1952.

Many cases apply the principles with the result that a decision on a claim on one legal basis does not preclude the hearing of a claim on a separate legal basis (e.g., claims based upon two distinct statutory provisions -sex discrimination and unfair dismissal would be common instances in English law). But these cases go to the question whether a *claim* has been finally determined, which they answer by saying that a prior decision is to be taken to have determined only any further claim which is not distinct and separate from that advanced in the earlier case.

Overcoming technical limitations

These technical requirements of *res judicata* may be overcome in certain cases. Identity of cause and object are not, in practice, always required. This is because another doctrine comes to the aid of the party seeking to rely upon the findings of the earlier tribunal.

In municipal law we might seek to raise what we might loosely call an estoppel, not as a bar to the hearing of a claim as is commonly the case where *res judicata* is invoked, but for the more limited purpose of precluding the re-opening of certain issues already determined by the earlier tribunal. In English and US law this more limited purpose would call for the application of the doctrines of collateral estoppel or issue estoppel, rather than *res judicata* in the strict sense.

Issue Estoppel

For the purposes of issue estoppel or collateral estoppel, as one US court has put it:

it is immaterial that two actions are different, tried on different grounds, or instituted for different purposes and seek different relief ... [A] legal finding may be successfully utilised as collateral estoppel only when it is evident from the pleadings and the record that the finding was necessary to the final decree and was foreseeably of importance in future litigation.¹³

The requirement that the determination be foreseeably of importance in future litigation is, as I understand it, in practice commonly regarded as satisfied if it is shown that the issue was directly addressed by counsel and distinctly determined by the court.

English law has a similar doctrine, issue estoppel, but has not included in its definition of the concept a requirement that the determination be foreseeably of importance in future litigation. In *Hoystead v. Commissioner of Taxation*¹⁴ it was said that:

13. *Occidental of Umm Al Qaywayn v. Cities Service*, 396 F. Supp. 461 at 467 (US District Ct, 1975).
14. [1926] A.C. 155 at 170 (PC), *Cf. Thoday v. Thoday* [1964] P. 181 at 198 (C.A.); *Fidelitas Shipping Co. Ltd. v. V/O Exportchleb* [1966] 1 Q.B. 631 at 640 (C.A.); *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)* [1967] A.C. 853 at 913-916, 927, 934-938, 946-947, 963-965; *Halsbury's Laws of England*, 4th ed., vol. 16, (1992) paras. 977-982.

if in any Court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding. But the principle also extends to any point, whether of assumption or admission, which was in substance the ratio of and fundamental to the decision.

The English law requirements for issue estoppel have been explained as follows:

(1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.¹⁵

Those requirements for issue estoppel have the same effect as the classical international law requirements for *res judicata*, minus the requirement of identity of cause. The requirement of identity of the parties is common to both; and the requirement that the judicial decision be final is implicit in the international law requirements for *res judicata*.¹⁶

There does not appear to be any explicit decision of a prominent international tribunal on the question of issue estoppel. International tribunals have not distinguished between *res judicata* and related forms of estoppel with either consistency or clarity.¹⁷ However, the Tribunal in the resubmitted *Amco* case clearly applied the principle of issue estoppel to the determination of specific facts and of the legal characterisations of facts by the previous tribunal. Moreover, it did so after an extensive inquiry into the principle of *res judicata* in international law, which resulted in the Tribunal formulating the principle in a manner which made no reference to the need for identity of cause. The fact that the *Amco* tribunal used the terminology of *res judicata* is readily explicable: the Tribunal was there concerned with the rehearing of a case after the annulment of the award of a previous tribunal. But the statement of the law on *res judicata*/estoppel, though technically obiter, is sufficiently clear and well argued, and the Tribunal sufficiently distinguished, for it to be a persuasive authority.¹⁸

There are, then, two doctrines – *res judicata* and issue estoppel – which serve to ensure homogeneity of results. But they have serious shortcomings.

15. *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)* [1967] A.C. 853 at 935 (per Lord Guest).

16. *Société Commercial de Belgique* PCIJ Rep. Ser. A/B, No. 78, p.174.

17. A. Martin, *L'estoppel en droit international public*, 1979, 251.

18. See also *Delgado*, Moore, *International Arbitrations*, Vol.III, p.2196; *Haya de la Torre*, ICJ Rep. 1951, p.71; Bowett, "Estoppel before International Tribunals and its Relation to Acquiescence", 33 *British Yearbook of Int'l Law* 176 at 179-180.

Problems in applying *res judicata*

Identity of parties and a second hypothetical

The first arises from the one requirement for the application of the doctrines of *res judicata* and issue estoppel with which I have not yet dealt: identity of parties.

While this is in many ways the simplest and clearest of the requirements, the underlying policy which it advances is – or should be – far from controversial. Let me take at this point a second hypothetical case.

One arbitration arising from a construction project might reject a defence raised by the main contractor that delays were the result of the failings of the host government, and find the contractor liable for losses resulting from the delays; but a second arbitration on identical facts and raising identical issues, but this time between the main contractor and its sub-contractors, might accept the sub-contractors' defence that the delays resulted from governmental failings.

The main contractor, left with liability for the losses, might be forgiven for feeling that these inconsistent results had not produced a just settlement. The same desire for homogeneity as existed in relation to my first hypothetical suggests the desirability of consistent answers here, although, because the parties to the two arbitrations are not the same, the doctrine of *res judicata* could not be applied.

No third party intervention

This problem is exacerbated by the fact that in arbitrations, unlike judicial proceedings, there is no *right* of third party intervention. Indeed, courts reviewing decisions of arbitral tribunals have shown themselves reluctant to accept the propriety of the brave attempts made by tribunals to overcome the difficulties arising from the potential for discordant awards in multiparty disputes.¹⁹

This, then, is one obstacle, inherent in the arbitral process, to the achievement of homogenous decisions. There are two others even more fundamental and far-reaching.

Confidentiality of award

First, *res judicata* and issue estoppel presuppose that the decision upon which reliance is placed is publicly available. Arbitral awards are not necessarily so available.

One of the leading writers on the subject, Martin Hunter, has written that the parties to an arbitration

... do not accept, either expressly or impliedly, ... that one of them – without the consent of the other – will have the right to make the award public other than for the purpose of challenge or enforcement through an appropriate court.²⁰

19. See Mahir Jalili, "French Setback to Multiparty Arbitration," 7 *International Arbitration Report* 20 (February 1992).

20. (1987) *LMCLQ* 139, at 141.

If one party complies with an award which is not open to challenge, the other appears to have no legal right to produce that award in other proceedings, even if those subsequent proceedings involve a determination of points already argued and determined in the earlier award.

Confidentiality of pleadings

Secondly, even if the award were available, the pleadings in the earlier arbitration remain confidential. Accordingly, not only is it not possible to rely upon concessions made during the earlier hearing, but it may also be impossible to show that a determination in the first award was “distinctly addressed” by counsel in the first arbitration.

There are two features of arbitration which are regarded as almost axiomatic: first, the arbitration proceedings are conducted in private, and the parties are under an obligation to treat pleadings, documents and evidence submitted to the tribunal as confidential; and secondly, the arbitrator has only those powers which are ascribed to him or her by statute or by the common law, or which flow from the agreement between the parties.

The first, the principle that arbitrations are private and confidential proceedings, is asserted by the leading commentators on the subject.²¹ The principle is confirmed by case law,²² and finds application in the rule that strangers may not

21. For example, Kerr J., Chairman of the Law Commission, (as he then was): Businessmen instinctively prefer arbitration because it is private and generally more informal ... [(1980) *Journal of Business Law* 164]; “Arbitration is a private tribunal for the settlement of disputes.” [Russell, *Arbitration*, 20th ed, (1982), p.260; quoted with approval in Bernstein, *Handbook of Arbitration Practice*, (1993), p.144]; “... the arbitration proceedings are a private matter of the parties and the exclusion of public [sic] is not at all strange. Ad hoc arbitrations are held *in camera*. This principle, the principle of confidentiality*, is adopted by many permanent arbitration institutions and associations.” “*fn. P.A. Lalive ... goes very far in emphasising the importance of this feature of arbitration: ‘Parmi ces avantages, le caractère confidentiel de l’arbitrage nous paraît devoir être mis au premier rang.’” [J. Jakubowski, ‘Reflections on the philosophy of international commercial arbitration and conciliation’, in J.C. Schultz and A.J. Van Den Berg, *The Art of Arbitration: Liber Amicorum Pieter Sanders*, (1982), p. 182]; “[It is argued that], in many instances, parties prefer to submit their disputes to arbitration, where the nature of the dispute and the amount in issue are secret, there is no right of access of the public and the press to the hearing before the arbitrators, and the finding of the arbitrators is known only to the arbitrators themselves, the parties and, in institutional arbitration, the senior responsible officials of that institution.” [J.D.M. Lew, in Schultz and Van Den Berg, *supra*, at p.224]; “Arbitration is a *private* process, an advantage in the eyes of those who do not want details of their quarrels (accompanied almost inevitably by attacks on their competence or good faith) to be disclosed in open Court, with the possibility of further publication elsewhere.” [Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, 2nd ed, (1991), p.23]; “It is, however, implicit in the nature of arbitration proceedings that the proceedings are confidential, and that strangers shall be excluded from the hearing. A party’s right to attend the hearing may not be exercised, except with the consent of all other parties so as to allow persons to attend except for the purpose of conducting the proceedings or giving evidence” [Mustill and Boyd, *Commercial Arbitration*, 2nd ed., (1989)].
22. “... What is relied upon [sc., in the claim for non-disclosure of documents previously submitted to an arbitral tribunal] is, in effect, the essentially private nature of an arbitration, coupled with the implied obligation of a party who obtains documents on discovery not to use them for any purpose other than the dispute in which they were obtained.” [per Parker L.J., who approved of this submission, in *Dolling-Baker v. Merrett*, [1990] 1 WLR 1205, at 1213E]. But see *Esso*

be admitted to the arbitration without the consent of the parties.²³ As one commentator observed:

There would be little point in excluding the public from an arbitration hearing if it were open to a party to make public, for example in the press, or on television, an account of what was said or done at the hearing. It is suggested that a party would be entitled to an injunction to restrain the other party from such publication. The same principle must apply to the arbitration as a whole, including the pleadings or Statements of Case, expert reports or witness proofs that have been exchanged, as well as evidence given orally at a hearing.²⁴

The principle also finds application in the rule that arbitrations may not be consolidated without the consent of the parties.²⁵ And the principle is expressed in certain arbitration rules which provide that the award may not be made public without the consent of both parties.²⁶

This fundamental principle of the privacy of arbitration proceedings is based on an implied term in the arbitration agreement, and it applies to impose a duty upon the parties not to disclose to non-parties documents received for the purposes of or in connection with the arbitration. As Parker L.J., put it in *Dolling-Baker v. Merrett*:

As between the parties to an arbitration, although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must, in my judgment, be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and indeed not to disclose in any other way what evidence had been given by the witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court.²⁷

Australia Resources Ltd. & ors v. Plowman, Supreme Court of Victoria, Appeal Division, 17 May 1993. See 11 *Arbitration International* 231-340 (1995).

23. "The concept of private arbitrations derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only between them. It is implicit in this that strangers shall be excluded from the hearing and conduct of the arbitration and that neither the tribunal nor any of the parties can insist that the dispute shall be heard or determined concurrently with or even in consonance with another dispute, however convenient that course may be to the party seeking it and however closely associated with each other the disputes in question may be. The only powers which an arbitrator enjoys relate to the reference in which he has been appointed." [per Leggatt J., *The Eastern Saga*, [1984] 2 Ll.L.R. 373, at 379].
24. Bernstein, *Handbook of Arbitration Practice*, 2nd ed., (1993), para.18.6.3.
25. *The Eastern Saga*, [1984] 2 Ll.L.R. 373. Certain rules of arbitration therefore expressly provide for concurrent hearings of arbitrations where the same tribunal has been appointed in each reference: e.g. LMAA Rules (1987, Revised 1991), First Schedule, para.(C)(1).
26. E.g., UNCITRAL Arbitration Rules, article 32(5).
27. [1990] 1 WLR 1205, at 1213. Cf., Colman J., *Hassneh Insurance Company of Israel v. Mew*, 22 December 1992, [1993] 2 Ll.L.R. 243, RSC O. 24/1/3: "A party who obtains discovery may use

The precise scope of the duty of confidentiality has not been fully worked out by the Courts. There is some suggestion that it covers all documents engendered by an arbitration.²⁸ A later decision at first instance suggests that certain documents, notably the reasoned award, may be disclosed for certain purposes without the consent of the other party or an order or the leave of the Court.²⁹ However, at least pleadings, witness statements, disclosed documents in the arbitration and transcripts are covered by the obligation of confidentiality.³⁰

It follows that parties to an arbitration are not entitled to reveal these documents to third parties. They could not, for example, disclose them to a newspaper. Nor could they reveal them to a conciliator or mediator. Similarly, they could not reveal them to parties to a subsequent, related arbitration.

As an alternative to the implied term basis of confidentiality, it might be argued that the same result – the duty of non-disclosure – might be derived from the status of an the arbitrator. The arbitrator is a private individual who has been appointed by the parties to settle their dispute by private adjudication. On the status (as opposed to the implied contract) approach, the arbitrator is a man of honour and confidence appointed to settle disputes. His position is *sui generis*.³¹

On this approach, it is primarily to the arbitrator rather than to the other party that pleadings, documents and evidence are disclosed in an arbitration reference. They are disclosed to him in order to enable him to settle the dispute. Disclosure to the other party is merely ancillary to this primary purpose. In the circumstances, the information and documents are impressed with confidence deriving from the status of the arbitrator. The arbitrator, and hence the other party, is bound not to use the documents except for the purposes of settlement of the

the documents disclosed to him only for the purposes of conducting his own case, and there is an implied undertaking by him not to use them for any collateral or ulterior purpose ...”

28. Parker L.J., in *Dolling-Baker v. Merrett*, [1990] 1 WLR 1205, at 1213E (CA).

29. Colman J., *Hassneh Insurance Company of Israel v. Mew*, 22 December 1992, transcript, 18E-19B.

30. “I refer to pleadings, witness statements, disclosed documents in the arbitration and transcripts.

It is reasonably clear that, as I have held, such documents are subject to a duty of confidence. They are merely the materials which were used to give rise to the award which defined the rights and obligations of the parties to the arbitration. Accordingly, that qualification to the duty of confidentiality based on the reasonable necessity for the protection of the arbitrating party’s rights against a third party cannot be expected to apply to them. It is the final determination of rights expressed in the award which is pertinent as against third parties, not raw materials for that determination. The relevant exception in the case of such documents is an order or leave of the court. This is the conclusion arrived at by the Court of Appeal in *Dolling-Baker v. Merrett*.” [per Colman J., *Hassneh Insurance Company of Israel v. Mew*, 22 December 1992, transcript, 18E-19B].

31. See generally, Mustill and Boyd, *Commercial Arbitration*, 2nd ed., (1989) pp.220-233. “To proceed by finding a contract and then applying to it the ordinary principles of the law of contract will not produce a reliable answer unless a contract really exists to be found ... [the appointment of an arbitrator] is not like appointing an accountant, architect or lawyer. Indeed, it is not like anything else at all.” [*ibid*, p.223] ... “We hope that the courts will recognise this, and will not try to force the relationship between the arbitrator and party into an uncongenial framework, but will proceed directly to a consideration of what rights and duties ought, in the public interest, to be regarded as attaching to the status of an arbitrator.” [*ibid*, p.233]

dispute in question. And because a party to an arbitration agreement has no general right to reveal the contents of documents forming part of the proceedings of an arbitration, it cannot obtain such a right for itself merely by subsequently concluding a separate arbitration agreement. Equally, because a party has no right to reveal the documents, it cannot by contract bestow upon the arbitrator in a subsequent arbitration the power to demand those documents from it.

Whichever of the foregoing arguments be correct, if the party which submitted the documents to the original arbitration does not consent to their disclosure, those documents can only be disclosed to a subsequent arbitrator by order or with the leave of a Court. And in English law, following the repeal of Section 12(6)(b) of the Arbitration Act 1950 by the Courts and Legal Services Act 1990, it appears that the Court has no power to order discovery in an arbitration.³²

III. THE RULE OF LAW

We have, then, three obstacles to the securing of homogenous awards: the need for identity of the parties; the confidentiality of the award; and the confidentiality of the pleadings.

Of those the first – the need for identity of the parties, which is a technical requirement of *res judicata* and issue estoppel – might be overcome by a liberal use of equitable principle. The same is not true of the obstacles created by the confidentiality of the award and the pleadings. But perhaps we are wrong even to try to circumscribe or circumvent that confidentiality.

Confidentiality of the pleadings and the award is perceived by many to be an essential element of arbitration, and one which lies at the heart of its attractiveness as an alternative to litigation. It is, moreover, widely thought to be a characteristic which principle demands should be upheld.

There is no reason why disputes should not be settled by negotiation between the parties. There is no reason why the parties should not be assisted by their own advisers, or seek the advice of neutral outsiders. Arbitrators are, in essence, neutral advisers. And there is, therefore, nothing wrong in settling disputes by arbitration. The settlements bind the parties. No-one else is affected. So the argument runs. But I do not think that this argument is correct.

My reasons bring me to the question of the Rule of Law.

The desideratum of consistency between judicial or arbitral decisions – what I have called homogeneity – is itself merely one aspect of the elemental principles of justice upon which all legal systems are based. So far, I have mentioned

32. If the arbitrator lacks the power to demand documents covered by the duty of confidentiality, and if the evidence contained in any such documents is necessary for the conduct of the arbitration, the power of the Court to order any form of disclosure must be found elsewhere, e.g. in the power to make an order for the giving of evidence by affidavit or by the attendance of a witness [Arbitration Act 1950, s. 12(6)(c) and (d)]. Any power the Court might have would be discretionary, and the confidentiality a significant reason for not ordering disclosure: *cf.*, *Pharmaceutical Society v. Dickson* [1970] AC 403; *NSPCC v. D* [1978] AC 171; *SRC v. Nassé* [1980] AC 1028; *Dolling-Baker v. Merrett* [1990] 1 WLR 1205.

inconsistency in the context of the interests of the disputing parties: in as much as justice demands that like cases be treated alike, inconsistent decisions violate the parties' rights to justice.

Any legal system which institutionalises the possibility of injustice in this way deserves careful scrutiny, for judicial inconsistency threatens the Rule of Law itself.

This is not the place to enter into a detailed discussion of the notion of the Rule of Law. In broad terms I adopt the approach of Professor Raz³³ and emphasise the "basic idea that the law should be capable of providing effective guidance."³⁴ (*ibid.*, p.218)

The most elementary lessons in our Whiggish legal education stick firmest, and most of us will instinctively think of the Rule of Law as the antithesis of arbitrary action by the Executive. But, as John Wilkes himself would no doubt have been eager to explain, the judiciary is as much a part of the great engine of State as are the Executive and Legislature, and potentially as much as an instrument of arbitrary power as a protection against it.

I do not, of course, suggest that arbitrators act in an arbitrary fashion. What I do suggest is that inconsistent findings by different tribunals on the same facts deprive the law of its predictability and hence of its ability to provide effective guidance; and hence, they threaten to undermine one aspect of the Rule of Law.

There are also interests other than those of the parties to be taken into account. There is an important public interest expressed in the adage that justice must not only be done, but must be seen to be done. Two aspects of that interest might be distinguished.

First, there is a public interest in seeing that the parties have been treated fairly by the tribunal. That interest derives, in part, from the possibility that we, too, may have to appear before the tribunal. To that extent its applicability to the voluntary procedures of arbitration is questionable. But it also derives in part from the public desire to see that the law is indeed applied, so that powerful or fortunate litigants – whether they be the government, multilateral corporations, or States – do not evade or escape their legal obligations.

What, for instance, would we make of a case in which a State, following complaints from the public, claims that a foreign company operating under a concession from the State has abused its position in a manner which violates that State's competition laws? Is that a matter which can properly go to arbitration, with neither the public nor the company's competitors knowing what breaches were alleged by the State, or what defences were raised, or what the final determination by the tribunal was, or what the terms of the settlement were? Does not effective protection against arbitrary power depends upon knowledge of how power is exercised?

To these interests, which I gathered under the broad heading of the Rule of

33. *The Rule of Law and its Virtue*, chapter 11 of *The Authority of Law* (1979).

34. *Ibid.*, p.218.

Law, I would add one more. In municipal systems, where law is found in statute and case law, the public availability of the documentary sources of law is an undisputed and indispensable element of the Rule of Law. In international law, the position is less straightforward.

Judicial decisions are not, strictly, a source of law; and no complaint can be made on this ground concerning the confidentiality of arbitral awards. On the other hand, State practice is a source of law, and it is at least desirable to know, first, what States do by way of settling disputes which are the subject of arbitration, and secondly, what States plead as the law before arbitral tribunals. The awards in the Libyan expropriation cases and in the Iran-US Claims Tribunal have done much to clarify the law on the treatment of alien property, and may serve as an example.

It would be a perplexing paradox if disputes on a certain topic, such as expropriation, were frequently submitted to arbitration with instructions that the arbitrators decide the disputes on the basis of international law, but the awards were never published. I would not wish to press the argument far; but there may be an argument to be made out for the view that the Rule of Law involves not only rights but duties, and that litigants are not only entitled to expect justice but may also be expected to play their part in the development and clarification of the law to which they resort, by having their proceedings reported in an appropriate manner.

IV. WHAT SHOULD BE DONE?

I would certainly not argue that the interests which I have just described should necessarily prevail over the confidentiality of awards and pleadings and over the traditional limitations on *res judicata*. I would, however, argue that, in deciding how the law should develop, it is necessary to balance those traditional rules against the broader interests.

We should, for example, be cautious in defining the concept of arbitrable disputes. There should be no presumption that the expansion of the category of disputes which may be settled out of the public gaze in private arbitrations is necessarily desirable. That addresses my point about the public interest in seeing justice done.

As far as justice between the parties is concerned, it may be thought desirable to secure for both parties the right to use the arbitral awards and pleadings in any subsequent proceedings involving the other party -subject, of course, to appropriate safeguards for keeping truly confidential information from the public eye. That is a matter which might be addressed in the compromise.

On a similar basis, the publication of "sanitised" awards – reports from which the names of the parties and commercially sensitive and other confidential information have been deleted – might be encouraged, as it is to some extent by the ICC. Publication of such reports represents a major contribution to the development of international jurisprudence, for the benefit both of the community of

lawyers and of their clients; and it is better effected through an open, regulated system than through the informal leaking of awards, which is not uncommon today.

Most difficult is the question of the release of awards and pleadings to strangers to the initial arbitration, and the extension of some such principle as issue estoppel to third parties. I doubt whether the legal community would tolerate such a deep entrenchment on the traditional principles of law and on the confidentiality of arbitral proceedings; and it may be more fruitful to concentrate on improving the provisions concerning third party intervention in arbitrations in which they have a direct legal interest.

These modifications could most easily be made by amending the express provisions of arbitration rules; and here the major arbitration institutions are well placed to give a lead.³⁵ But it should not be forgotten that arbitration is permitted by national laws as a derogation from the State's monopoly on the administration of justice, and that what is permitted could be permitted on conditions laid down by law.

To sum up my argument, I think that there are within international arbitration elements which sit awkwardly with the Rule of Law, and in particular with the principles that laws should be, and should be seen to be, applied consistently. That should make us watch the development of international arbitration with some care.

35. See the work of the International Law Association: *Report of the Sixty-Sixth Conference* (Buenos Aires, 1994), pp.689-714.