

# ILA Final Report on *Res Judicata* and Arbitration\*

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## I. INTRODUCTION

1. This is the Final Report of the ILA International Commercial Arbitration Committee on the topic of *res judicata* and arbitration. This Report should be read together with the Committee's Interim Report presented and adopted at the Berlin Conference in August 2004 ('Interim Report').<sup>1</sup> In this Final Report, references will be made in footnotes to the Interim Report, the content of which is incorporated in this Final Report.

2. The Committee has agreed upon certain Recommendations as to *res judicata* in relation to international commercial arbitration. This Final Report provides a brief commentary on each. This Final Report is followed by a list of relevant literature additional to the literature cited in the Interim Report.

3. These Recommendations are the culmination of a four year study of *res judicata* by the Committee, starting just before the New Delhi Conference in 2002. The Recommendations have been discussed and agreed by the Committee at meetings in Auckland (October 2004), Geneva (March 2005), Paris (May 2005), Prague (September 2005) and Zürich (January 2006) and discussed at the Conference Working Session in Toronto (June 2006). A number of Committee members have made written comments or have sent documentation regarding the project. Also, scholars and practitioners have sent observations regarding the Interim Report. The Chairman and the Rapporteur wish to thank all those who have contributed to this project.

4. In conducting this project, the Committee has noted that there was both academic and practical interest and a need for analysis and recommendations regarding *res judicata* in international commercial arbitration.

5. The Recommendations do not intend to be comprehensive, but only to cover some aspects of *res judicata* in international commercial arbitration. The Committee believed that a compromise was to be struck between those aspects addressed by the Recommendations (where it considered that transnational rules

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could be developed) and other aspects (where it perceived that development of transnational rules was premature and reference to conflict rules was more appropriate).<sup>2</sup>

6. In this respect, the Committee considered that, pursuant to Recommendation 2, transnational rules can be developed regarding the following issues:

- a more extensive notion of *res judicata* than is known in some civil law jurisdictions regarding claim preclusion, which not only covers the dispositive part of an arbitral award but also the underlying reasoning, as in Recommendation 4.1
- a more extensive notion of *res judicata* than is known in civil law jurisdictions in relation to issue estoppel, as in Recommendation 4.2
- the introduction of a standard of abuse of process and procedural unfairness, as in Recommendation 5
- the procedural status of *res judicata*, as in Recommendations 6 and 7.

7. On the other hand, the Committee has refrained from formulating transnational rules in relation to the following issues:

- the definition of arbitral awards which qualify for *res judicata* effects
- *res judicata* effects of decisions of tribunals from different legal orders
- *res judicata* effects on third parties in using a more lenient 'identity of the parties' standard
- *res judicata* effects if the requirement of mutuality was to be abolished as in the United States
- an extension of issue estoppel benefiting third parties as in the United States by application of the doctrine of collateral estoppel.

8. The exclusion of those aspects identified in the preceding paragraph does not imply that further development may not be needed. It only implies that the Committee considered that it should not give guidance at this stage regarding any such development, because of the complexity of those issues and in order not to pre-empt any such development.

9. The Recommendations concern the effect of an international commercial arbitral award upon further or subsequent arbitration proceedings between the same parties.<sup>3</sup> Thus, they concern both distinct arbitration proceedings, where the effects of a prior arbitral award are raised in the subsequent arbitration, as well as the question as to *res judicata* effects within the same arbitration where a

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<sup>2</sup> Interim Report, p. 5 (page reference to the Report on the ILA website).

<sup>3</sup> Interim Report, pp. 3–4. Subsequent arbitration proceedings refer to different arbitration proceedings while further arbitration proceedings refer to both subsequent proceedings and arbitration proceedings which continue within the same arbitration proceedings in which the prior arbitral award was rendered (e.g., after a partial final award).

prior award has been rendered which is invoked at a later stage of the same proceedings (*e.g.*, bifurcation of the arbitration proceedings).

10. These Recommendations are for the benefit of international commercial arbitrators faced with *res judicata* issues. They are not directly addressed to state courts faced with *res judicata* effects of arbitral awards in relation to jurisdiction, setting aside or enforcement questions,<sup>4</sup> but they may constitute persuasive authority for domestic courts when considering *res judicata* effects of international commercial arbitral awards.

11. However, international arbitrators may be faced with *res judicata* problems not only in relation to prior arbitral awards but also in relation to prior state court judgments, specifically regarding the existence of an arbitration agreement. Where a prior state judgment is invoked in arbitral proceedings, arbitrators may have to determine the *res judicata* effects of the prior judgment. Since the Recommendations do not deal with the relationship between state courts and arbitral tribunals, they will equally not apply to the question what the arbitral tribunal is to do when faced with a prior state judgment. Also in this respect, arbitrators may consider that they should not automatically apply the *res judicata* doctrine of the law governing the previous state judgment and/or of the arbitration seat, but take the Recommendations into consideration.

12. Although the Recommendations primarily follow a procedural approach to questions of *res judicata*, they are not intended to bar alternative perspectives, as for instance contractual characterizations such as interpretation of the agreement to arbitrate or waiver, as means to reach results similar to those embedded in the Recommendations.<sup>5</sup>

13. The Committee recognized that confidentiality of awards may have an impact on *res judicata* issues, but that this was less likely in further proceedings between the same parties.

14. Finally, this Report does not separately address the issues identified at the end of the Interim Report. The answers to those questions are incorporated in this Report and in the Recommendations.

## II. AWARDS AND EFFECTS

15. In defining *res judicata* in international commercial arbitration, Recommendation 1 does not refer to domestic law nor does it use *res judicata* terminology. Both domestic law and *res judicata* notions differ significantly as between jurisdictions and, for that reason, Recommendation 1 uses the terminology of 'conclusive and preclusive effects of arbitral awards' to encompass both the positive and negative effects of awards (positive and negative *res judicata*). Regarding the former, *res judicata* may be invoked by a claimant in further proceedings to develop his case (*i.e.*, to rely on previous findings). As to the latter, *res judicata* works as a defense to stop relitigation of subject-matter, which has been disposed of in a

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<sup>4</sup> For a discussion, see Interim Report, pp. 4–5.

<sup>5</sup> See Interim Report, p. 25.

previous decision. The terminology of conclusive and preclusive effects of arbitral awards has the added advantage in that it covers the full scope of application of the doctrine of *res judicata* and similar concepts (see Recommendations 4 and 5: claim estoppel, former recovery, issue estoppel and abuse of process).

16. In this respect, *res judicata* is to be distinguished from:<sup>6</sup>

- invoking previous arbitral awards rendered between different parties as persuasive precedent
- correction of arbitral awards rendered between the same parties in order to have an error in an arbitral award corrected, which in many countries is covered by specific rules in the applicable arbitration law
- interpretation of arbitral awards rendered between the same parties in order to obtain a clarification of the meaning and scope of such arbitral awards, which in many countries is covered by specific rules in the applicable arbitration law
- supplementation of arbitral awards rendered between the same parties in order to obtain an additional award regarding claims formulated during the arbitration proceedings but not dealt with in the arbitral award (*infra petita*), which in many countries is covered by specific provisions in the applicable arbitration law
- revision of arbitral awards rendered between the same parties on the basis of facts discovered after the rendering of the award that were unavailable at the time of rendering of the award and which the party invoking the facts was unaware of and could not reasonably be expected to have been aware of at the time the award was made, which in some countries is covered by specific provisions in the applicable arbitration law
- remission of arbitral awards rendered between the same parties to the arbitral tribunal for reconsideration in order to avoid partial or complete setting aside, which in some countries is covered by specific provisions of the applicable arbitration law.

17. The Committee's 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 and the Recommendations may inform arbitrators in domestic cases as well as domestic courts when seized of a *res judicata* question regarding a domestic award.

18. Because law and practice in different jurisdictions do not have uniform standards for the characterization of different forms of awards and procedural decisions and no international consensus has emerged or is likely to emerge in the near future regarding characterization of awards and procedural orders, the Recommendations refrain from defining such awards or procedural decisions and

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<sup>6</sup> See in relation to public international law, Bowett, D.W., *Res judicata* and the limits of rectification of decisions by international tribunals, *Afr. J Int. Comp. L*, 1996, 577–591.

leave that to the *lex arbitri*. Thus, the law of the place of arbitration of the prior award by and large will govern the question whether determinations in the prior award, in view of the nature of the award, may qualify for conclusive and preclusive effects.

19. Notwithstanding the reservation in the preceding paragraph and in order to give some guidance, it may be added that the Recommendations are intended to apply to partial final awards, final awards (including awards on agreed terms)<sup>7</sup> and awards on jurisdiction. Only these awards seem to qualify for conclusive and preclusive effects, because they contain final determinations. Contrary to §13 *Restatement Second Judgments*, which gives *res judicata* effects to issues of fact and law contained in judgments that are not final, the Recommendations are not intended to cover any such preliminary or provisional determinations since this solution does not correspond to practice and perceptions in international commercial arbitration.

20. As to awards on jurisdiction<sup>8</sup> and subject to the applicable law, the Recommendations do not exclude giving such awards conclusive and preclusive effects.<sup>9</sup> An award declining jurisdiction entails a decision that there is no agreement to arbitrate or that the dispute does not fall within the ambit of the arbitration agreement, and accordingly the general jurisdiction of domestic courts may revive. Positive rulings on jurisdiction in which an arbitral tribunal accepts jurisdiction, may also constitute *res judicata*. Of course, these rulings may be reviewed in setting aside proceedings, but that creates a question of validity and *res judicata* is predicated on the assumption that an award is valid. Either the setting aside court will confirm the arbitrators' decision on jurisdiction or the setting aside court will nullify the award and in that case there is no longer a valid award and no *res judicata* issue. The problem arises, then, primarily if domestic courts in countries in applying Article II of the New York Convention deny arbitral jurisdiction and assume jurisdiction themselves. If a setting aside court accepts arbitral jurisdiction, there will be a situation of conflicting decisions on jurisdiction, but that does not imply that the award has no *res judicata* effect. Under those circumstances, *lis pendens* rules may not have been able to avoid conflicting decisions and a party may invoke *res judicata* of the arbitral decision on jurisdiction, which will be followed in the country of the place of arbitration and probably not in the country where the conflicting judgment denying arbitral jurisdiction was made. In third countries, there will be the question whether under Article V, §1(a) New York Convention the arbitral award on jurisdiction

<sup>7</sup> See G.R. Shell, *Res judicata* and collateral estoppel effects of commercial arbitration, 35 *UCLA L Rev.* 659 (1988) emphasizing the limited issue estoppel effects of consent awards as well as of default awards (at p. 648) and unreasoned awards (at p. 660). Similar observations may apply regarding awards based on 'amiable composition' (compare Shell at p. 659).

<sup>8</sup> In some jurisdictions, an arbitral tribunal may give procedural orders that the arbitration may proceed on the basis that the tribunal has jurisdiction (subject to confirmation in an award on the merits) and these preliminary orders do not constitute *res judicata* in the sense that the tribunal may still dismiss the case for want of jurisdiction, for instance on the basis of new evidence.

<sup>9</sup> For a discussion, see Interim Report, pp. 7 and 18.

can be recognized (see under 3.1 of the Recommendations as to requirements for *res judicata*).

21. Furthermore, the Recommendations have not attempted to deal with any single situation which may arise. Situations such as awards declaring that the request for arbitration is withdrawn (with or without prejudice) or that the request was premature, will have to be dealt with on a case-by-case basis (compare *Restatement Second Judgments* §20 where solutions to these problems are given) and have been left to further development. Similarly, the question whether the granting of a primary claim for relief bars the relitigation of an alternative claim is not resolved by the Recommendations, because it is primarily a question of interpretation of the prior award.

22. The Recommendations generally are not intended to be applicable to provisional awards, awards regarding interim measures or procedural decisions, and the characterization of these awards and decisions is to be governed by the law of the seat of the prior arbitration.

### III. TRANSNATIONAL APPROACH

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

24. The Interim Report had indicated that there were important differences between the various legal systems regarding *res judicata* effects of judgments and arbitral awards. Thus, the Committee was faced with the question whether and to what extent those differences were acceptable in arbitration and were to be coordinated by appropriate conflict rules or whether and to what extent uniform transnational rules should be developed to the benefit of international commercial arbitration.

25. *Res judicata* regarding international arbitral awards should not necessarily be equated to *res judicata* effects of judgments of state courts and, thus, may be treated differently than *res judicata* under domestic law. International arbitral awards in accordance with the Recommendations are to be treated differently than judgments. 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 appropriate in an international context.<sup>10</sup>

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<sup>10</sup> This departs from §84(1) *Restatement Second Judgments* stating that awards should have the same legal effects as judgments. First, the Restatement has not addressed international commercial arbitration and has been written primarily from a US domestic perspective. Further, the Restatement from a comparative law perspective contains the most extensive approach to *res judicata*. This implies, on the one hand, that the US model is interesting for these Recommendations, but, on the other hand, that a proposition that awards are to be equated to judgments may be arguable for a liberal set of rules regarding effects of judgments but are not necessarily suitable on a worldwide level where more restrictive notions of *res judicata* exist.

26. At its meeting in Auckland on October 26, 2004, the Committee opted for a mixed model under which transnational rules on certain aspects of *res judicata* would be adopted and remaining issues were to be referred to domestic law under an acceptable conflict rule.

27. In reaching this conclusion, the Committee took into consideration the following arguments. First, a conflict of laws approach raises difficult characterization issues as to the substantive or procedural nature of conclusive and preclusive effects. Second, a conflict of laws perspective implies a difficult choice between three different legal systems: the law of the place of arbitration of the proceedings leading to the prior award; the law of the place of arbitration of the proceedings where *res judicata* is invoked; and the law governing the contract.<sup>11</sup> Third, the Committee believed that, for some aspects of *res judicata*, a uniform approach was feasible, which would by-pass the difficult conflict of laws issues mentioned above and would also generally provide more satisfactory answers assuring procedural efficiency and finality than answers provided by domestic law.

28. The mixed model can be found in the Committee's Recommendations. Recommendations 3 thru 7 contain the transnational rules, which in the opinion of the Committee may be appropriate and beneficial in international commercial arbitration. Aspects other than those covered by the Recommendations are to be governed by domestic law referred to by a conflict rule but, in view of the complexity of the issue, no specific recommendation is made regarding the characterization of *res judicata* and the choice as between the three competing conflict rules mentioned above.

#### IV. REQUIREMENTS FOR CONCLUSIVE AND PRECLUSIVE EFFECTS

29. The Committee identified five traditional conditions for arbitral awards to have conclusive and preclusive effects:

- the prior award must be final and binding and capable of recognition in the country where the arbitral tribunal of the subsequent arbitration proceedings has its seat
- the arbitration proceedings in which the *res judicata* issue is raised, must pertain to the same legal order as the prior award
- identity of the subject matter
- identity of the cause of action
- identity of the parties.

These conditions are generally thought to be cumulative.

30. As the discussion below will show, the Committee decided to retain four of the five conditions above, but not the requirement as to the 'same legal order'.

<sup>11</sup> See Hascher, D., L'autorité de la chose jugée des sentences arbitrales, *Trav. Com. fr. dr. int. privé*, 2000-2002, Paris, Pedone, 2004, 18-21.

31. The conditions above are not exhaustive. For instance, the Recommendations do not deal with the moment at which arbitral awards constitute *res judicata*.<sup>12</sup> Although arbitral awards may constitute *res judicata* between the parties as of the time the award is rendered, sent to or received by the parties or at such time as means of recourse can no longer be instituted against the award (depending on the applicable law), the Recommendations proceed on the basis that the award can no longer be challenged before domestic courts at the place of arbitration. This implies that the Recommendations apply as of such time as arbitral awards have become final and binding at the place of arbitration (*i.e.*, that no challenge can be brought against any such awards or that a challenge has been denied by a final decision of a domestic court at the place of arbitration).

32. Recommendation 3.1, thus, proceeds on the basis that arbitral awards are valid and have conclusive and preclusive effects in accordance with the *lex arbitri* of the prior arbitral award.

33. In international cases, the prior award will also need to be recognized at the place of arbitration of the further arbitration proceedings, if different from the place of arbitration of the prior award. Recommendation 3.1, thus, also proceeds on the basis that the prior award can be recognized abroad and will have *res judicata* effects until such effects are suspended in recognition proceedings. In this regard, Recommendation 3.1 intends to provide a link with the New York Convention which proceeds on the assumption of a single legal system determining the validity of arbitral awards (*i.e.*, at the place of arbitration) and provides in Article V, §1(e) for a coordination mechanism regarding recognition of arbitral awards which are subject of setting aside proceedings.<sup>13</sup> Recommendation 3.1 suggests following the global standard of the New York Convention, which implies that those validity questions will not come into play if no challenge has been brought or when challenge proceedings have finally been dismissed at the place of arbitration. On the other hand, a prior award which is set aside at the place of arbitration by a final judgment, will no longer be valid, not be capable of recognition and, thus, no longer produce conclusive and preclusive effects.<sup>14</sup>

34. The second requirement ('same legal order') recognizes that arbitral awards rendered between States, which are deemed awards of a public international law character, do not have *res judicata* effects in international

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<sup>12</sup> See Interim Report, p. 6.

<sup>13</sup> Other grounds for refusal of recognition may, of course, be available under Article V of the New York Convention. Also, recognition may be based on the more favourable treatment provision of the New York Convention as well as on other international conventions or domestic recognition rules. In the context of the recognition of the prior award in the subsequent arbitration proceedings, the second arbitral tribunal may, for instance, have to determine whether there was an arbitration agreement regarding the proceedings leading to the prior award, whether due process was observed, whether the subject matter was capable of settlement by means of arbitration or whether there was a violation of public policy.

<sup>14</sup> But see n. 13 for exceptions.



commercial arbitration and vice versa.<sup>15</sup> Generally, this requirement does not create problems in practice because this situation does not occur frequently.

35. The requirement is, however, more relevant in the context of the relationship between state courts and international commercial arbitral tribunals which – the Committee submits – both belong to the same legal order since both are dealing with a relationship between the parties which is governed by private law (and not by public international law). Since the Committee has refrained from expressing recommendations to state courts or to arbitral tribunals faced with a prior state court judgment, this requirement needs no further discussion. However, to the extent that state courts or arbitral tribunals may infer indirect support from these Recommendations (see above), the requirement of the same legal order is to be interpreted as expressing the view that state courts and arbitral tribunals pertain to the same legal order and that this requirement is met.

36. The preceding paragraphs express traditional views which have recently been challenged by the rise of investment arbitrations where foreign investors under Bilateral Investment Treaties ('BITs') have a direct cause of action against States for violation of investment protection by the State giving rise to State responsibility. This has created novel issues regarding conclusive and preclusive effects of arbitral awards. The many BITs and the wide scope of application regarding the notion of 'investor' have created possibilities for treaty shopping and parallel arbitrations, which may raise *res judicata* issues. These issues include the application of the identity of the causes of action and identity of the parties (as in the *Lauder/CME/Czech Republic* arbitrations).<sup>16</sup> The Recommendations do not address these issues, because they pertain more to public international law than to international commercial arbitration or at least to the hybrid legal order of BIT arbitrations.<sup>17</sup> However, the Recommendations may still have some indirect relevance for BIT arbitrations.

37. The Recommendations also do not directly envisage parallel arbitrations between a BIT arbitration and a commercial arbitration. To the extent different parties are involved, there would not be *res judicata* under Recommendation 3.4, but the Recommendations do not exclude further development and refinement regarding these issues.

38. To the extent that a State is also the counterpart to the contractual relationship, there would not be a Recommendation 3.4 problem. However, parallel BIT and commercial arbitrations would still face the traditional same legal order requirement (as well as the same cause of action requirement).

39. Similarly, there may be an impact of European Union law, which may also create a same legal order impediment to *res judicata*.

40. In order not to prejudge further developments on the subjects above, the Committee decided not to include the same legal order as a requirement in its

<sup>15</sup> Interim Report, p. 21.

<sup>16</sup> See Interim Report, pp. 21–24.

<sup>17</sup> The Committee understands that the ILA Committee on Law of Foreign Investment is studying *res judicata* of BIT awards.

Recommendations. That decision was also inspired by the complexity of the issues raised as well as the Committee's impression that a process of permeation and interaction between different legal orders is only beginning and may result in the legal community no longer viewing private law and public law as operating in separate legal orders.

41. The Recommendations maintain the traditional triple identity test (identity of the claims, of the causes of action and of the parties).

42. For an arbitral award to have conclusive and preclusive effects, the same claim or relief must be sought in the further arbitration proceedings. Conversely, *new claims and new prayers for relief in principle will not be barred by a prior award*. Recommendation 3.2 expresses a principle that is accepted both in the civil and common law and does not seem to be controversial. However, under Recommendation 5, a party may still be barred from litigating new claims and relief if any such litigation constitutes procedural unfairness or abuse.

43. For an arbitral award to have conclusive and preclusive effects, the claims or relief sought in further arbitration proceedings must be based on the same cause of action<sup>18</sup> as in the prior arbitration proceedings (Recommendation 3.3). Conversely, *a claim or relief based on a different cause of action is not barred by res judicata*. This rule is also uncontroversial both in civil and common law jurisdictions. Again, Recommendation 3.3 is subject to the procedural unfairness or abuse defense of Recommendation 5.

44. For an arbitral award to have conclusive and preclusive effects in further arbitration proceedings, it must have been rendered between the same parties as the parties in the further arbitration proceedings (Recommendation 3.4). This principle is by and large also generally accepted. Conversely, if there are different parties in the further arbitration proceedings, the prior award will not have conclusive and preclusive effects on a different party.

45. The Recommendations refrain from formulating new rules in relation to the requirement of the identity of the parties.

46. First, they do not formulate a requirement as to mutuality (*i.e.*, that the parties are only identical if they act in the same capacity in the prior and further arbitration proceedings). Although many jurisdictions, except for the United States, require mutuality,<sup>19</sup> this requirement has not been included expressly in order not to block further developments if so required.

47. Second, the Recommendations also refrain from formulating definitions as to the notion of parties. They do not seek to make any comment on the common law concept of 'privies', save to note that this concept is applied far less often than civil lawyers fear. In addition, there are too many different situations in relation to the question whether a party, by virtue of assignment, succession, close relationship or otherwise, is bound to obligations of a predecessor that these issues are left to the applicable law. Moreover, different jurisdictions have sometimes

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<sup>18</sup> Cause of action may be construed broadly as 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 (*see* Interim Report, pp. 7-8).

<sup>19</sup> Interim Report, pp. 9-10 and 13.

very different rules regarding succession of title that it is best that these aspects are left to the applicable law.

48. The Committee notes that, in practice, important and delicate problems arise in relation to the identity of the parties, particularly in relation to groups of companies and BIT arbitrations. These issues are, however, too complex to deal with in a report which is focused on *res judicata*. On the other hand, Recommendation 3.4 is not intended to pre-empt further development and refinement.

49. In relation to the issue discussed in the previous paragraph, the Committee has considered §39 *Restatement Second Judgments*, which provides that a person not a party to an action but controlling or substantially participating in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party. However, the Committee assessed that international acceptance of any such recommendation would be weak and, thus, to be omitted. Moreover, different countries have different methods and theories for identification of third parties to a legal action, which do not necessarily have the same requirements and do not lead to the same conclusion (*e.g.*, alter ego, agency, protection of legitimate expectations). Furthermore, the most important application of identification questions is in the field of piercing the veil of corporations and raises fundamental issues of international corporate law regarding limited liability of subsidiaries in multinational corporate groups, which – the Committee believed – could not be treated within the scope of the *res judicata* project and deserved better and more elaborate treatment elsewhere.

50. Finally, the application of the identity of parties test in recent BIT arbitrations also warrants extensive treatment, but exceeded the scope of the Committee's project on *res judicata*. All this does not, however, exclude that further legal developments can take place in relation to the identity of the parties test, but guidance regarding these developments will not be found in the Recommendations.

## V. SCOPE OF CONCLUSIVE AND PRECLUSIVE EFFECTS

51. Recommendation 4 deals with claim estoppel, former recovery and issue estoppel.

52. As to the first, they endorse a more extensive notion of *res judicata*, which is also followed in public international law,<sup>20</sup> under which *res judicata* not only is to be read from the dispositive part of an award but also from its underlying reasoning.<sup>21</sup> More restrictive notions of the scope of *res judicata*, limiting conclusive and preclusive effects to the dispositive part of awards, have not been followed in the Recommendations, because the Committee considered the latter notion to be overly formalistic and literal. If it is clear from an arbitral tribunal's reasoning that the dispositive part is to be interpreted in a way to bar further or subsequent arbitration proceedings, claim preclusion ought to follow for the sake of arbitral

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<sup>20</sup> Interim Report, p. 24.

<sup>21</sup> However, it will not extend to subsidiary and collateral matters of fact or law and to *obiter dicta* (see Interim Report, p. 8).

efficiency and finality. Claims estopped on the basis of the same cause of action by virtue of the *res judicata* effects of both the dispositive part of the award as well as its underlying reasoning prevent some evidence or legal argument regarding that cause of action being reargued.

53. Rules on claim estoppel apply not only to claims but also to counterclaims. The Recommendations do not expressly reflect this because it seems evident that, since counterclaims are also claims, claim estoppel also applies to them. This rule has also been adopted by §23 of the *Restatement Second Judgments*.

54. The Recommendations also endorse claim estoppel if it relates to former recovery. Further relief than the one formerly recovered or obtained cannot be claimed if it is based on the same cause of action.

55. The Recommendations have not taken a position regarding claim preclusion in relation to claims related to the same transaction or connected transactions. In the United States, such claim preclusion is accepted, but the Committee considered that it could not yet recommend that it be extended to other jurisdictions. In this respect, §24(2) *Restatement Second Judgments* formulates an open-ended standard under which transactions and series of connected transactions are to be determined pragmatically, giving weight to such considerations as whether the facts constituting a transaction or series of connected transactions are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage. The fact that the Recommendations have not adopted a test similar to §24(2) *Restatement Second Judgments* does not, however, imply that the Committee rejected any such standard, but only that the Committee considered it premature to adopt it as a transnational principle in international arbitration.

56. Furthermore, Recommendation 4.2 endorses common law concepts of issue estoppel,<sup>22</sup> which for reasons of procedural efficiency and finality, seem to be acceptable on a worldwide basis, notwithstanding the fact that they are yet unknown in civil law jurisdictions.<sup>23</sup> To accept issue preclusion, it is required that

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<sup>22</sup> Interim Report, pp. 8 and 12–13. These Recommendations follow the approach of R.W. Hulbert (Arbitral procedure and the preclusive effect of awards in international commercial arbitration, 7 *Int. Tax and Bus. L.* 155 ff. (1989)) advocating that arbitration is not to be treated differently from domestic judgments in terms of issue estoppel. In doing so, the contractual model of Shell (*Res judicata* and collateral estoppel effects of commercial arbitration, 35 *UCLA L Rev.* 623 ff. (1988)) and the exclusion model of G. Sanders (Rethinking arbitral preclusion, 24 *L and Pol. Int. Bus.* 101–121 (1992)) are rejected. Shell's model has been considered as being too conjectural as to the parties' intent regarding issue estoppel and Sanders' theory as being contrary to finality of arbitration.

<sup>23</sup> A decision of the Swedish Supreme Court indicates that broader concepts regarding preclusive effects of arbitral awards are also acceptable in a civilian context. In that case, it was accepted that dismissal of a set-off defense did not entitle a party to file fresh arbitration proceedings to have its case retried again. Under traditional civil law notions of *res judicata*, a dismissal of a set-off defense would only constitute *res judicata* as to the amount of the alleged set-off, but would not prevent having new proceedings to the extent that a claim exceeds the amount invoked for set-off purposes. The Swedish Supreme Court went further and accepted that the claim filed in a second arbitration to the extent it exceeded the amount of the set-off claimed in the prior arbitration was also covered by *res judicata* and, thus, accepted in this specific context an application of issue estoppel. For a more extensive discussion of this case, see Söderlund, C., *Lis pendens, res judicata and the issue of parallel judicial proceedings*, 22 *J Int. Arb.*, 2005, 317–318.

a particular issue of fact or law has actually been arbitrated and determined by the award and that the determination of the issue was essential or fundamental to the arbitral award. Conversely, if an issue was not the subject of debate between the parties, determined in the prior award or incidental in the arbitral tribunal's determination, it would not be a bar to further or subsequent arbitration proceedings in relation to that issue.

57. Issue estoppel, under the conditions above, not only applies regarding the same claim but also regarding different claims in further arbitral proceedings.

58. The Committee acknowledges that issue estoppel may be subject to certain exceptions as indicated in §28 *Restatement Second Judgments* (e.g., unrelated claims in both proceedings, changes in the law, different burden of proof regarding different claims, fairness in the proceedings), but has chosen not to take a position as to possible exceptions.

59. However, similar to the requirement of mutuality and the identity of the parties test, the Committee was reluctant to follow United States law in relation to extending issue estoppel to third parties (collateral estoppel) (see §29 *Restatement Second Judgments*), by which a third party in subsequent proceedings may invoke issue preclusion for its benefit against a party to prior proceedings.<sup>24</sup> The Committee considered that there was insufficient worldwide support for any such extension and that third party effects of issue estoppel at this stage is to be left to further legal development.

## VI. PROCEDURAL UNFAIRNESS

60. The Recommendations have also chosen a cautious approach to procedural unfairness or abuse.<sup>25</sup> In arbitration, party autonomy to a large extent reigns and parties and their counsel should be given wide discretion in determining their strategies. Costs, psychological influences, relational elements, cross-cultural considerations, persuasiveness, political constraints and other aspects may be responsible for not instituting certain claims or for not raising certain causes of action or issues of fact or law, and caution is in order to avoid *res judicata* amounting to a patronizing review of what parties and counsel ought to have done in managing their case.

61. On the other hand, policy objectives of efficiency and finality can also be taken into account to protect respondents from being exposed to further arbitration if a claimant fails to raise claims, causes of action or issues of fact or law in prior proceedings.<sup>26</sup> Also, there is a legitimate public interest in having an end to arbitration as well as an end to the supportive and corrective powers of

<sup>24</sup> Interim Report, p. 12.

<sup>25</sup> For a description, see Interim Report, pp. 8–9, 13, 24 and 27.

<sup>26</sup> This situation is to be distinguished from late filing of new claims and late submission of amendments to causes of actions and issues, if the arbitral tribunal were to bar these amendments from being litigated. In exercising their powers, tribunals in further or subsequent proceedings will have to balance claimant's due process rights against respondent's right not to have this relitigated for reasons of procedural unfairness or abuse.

domestic courts supervising and reviewing the arbitral process and assisting at the recognition and enforcement stage.

62. The doctrines of procedural fairness and abuse, in the view of the Committee, provide an acceptable compromise regarding the private and public interests at stake. The open-textured nature of these doctrines give arbitral tribunals wide powers to assess, on the basis of the specific circumstances of the case, whether there is procedural unfairness and/or abuse. Finally, the compromise between a claimant's right to have access to justice and a respondent's right to have a fair trial in conformity with constitutional and human rights standards (as under Article 6 of the European Convention on Human Rights) also seems to be acceptable if arbitral tribunals exercise their powers with wisdom and restraint.

63. Procedural unfairness and abuse equally apply to counterclaims, for instance if the relationship between the counterclaim and the claim is such that successful prosecution of the second action would nullify the initial arbitral award or would impair rights established in the initial action (*see* the wording of §22 *Restatement Second Judgments*). If, however, there are acceptable reasons for late filing of counterclaims, which can no longer be filed in the first proceedings (as was the case with the preclusion of filing new claims after signing of the Terms of Reference under the 1988 ICC Arbitration Rules), a second arbitration may have to be instituted to deal with the counterclaim. The first proceedings would, then, not constitute *res judicata* as to the second proceedings.

64. The limited acceptance of procedural unfairness or abuse regarding *res judicata* does not imply that the Committee endorses a general theory of procedural unfairness or abuse in international commercial arbitration. The broader ramifications of any such theory need further research including its characterization (contractual and/or procedural) and its scope of application which exceeds the ambit of the *res judicata* project.

65. Finally, the Committee accepts that there ought to be exceptions to conclusive and preclusive effects of arbitral awards, for instance if the award was procured by fraud. Other exceptions may be left to the *lex arbitri* (e.g., revision of awards by means of recourse such as the *requête civile* or *tierce opposition* under which in certain circumstances discovery of new documents may provide a way to reopen a case<sup>27</sup> or where a third party who is affected by an award may be entitled to reopen a case) or the *lex causae* which provide the background under which the parties have had their dispute arbitrated.

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<sup>27</sup> In this respect, reference can be made to established practice in the WIPO Domain Name Administrative Panel Decisions which, under common law precedents, accept relitigation of a dispute in cases of serious misconduct, perjured evidence, discovery of credible and material evidence which could not have reasonably been foreseen or known at trial and breach of natural justice or due process (*see* Case No. D2001-1041, *Jones Apparel Group Inc. v. Jones Apparel Group.com* at [www.wipo.int](http://www.wipo.int) which discusses previous cases).

## VII. PROCEDURAL STATUS OF CONCLUSIVE AND PRECLUSIVE EFFECTS

66. The Recommendations suggest that a distinction is to be made between the conclusive and preclusive effects of arbitral awards in relation to their characterization. Their conclusive effects pertain much more to the substance of the dispute on which a successful claimant may build further arbitral proceedings. Thus, it is recommended that a claimant can invoke the conclusive effects of an award in further arbitral proceedings as long as this is permissible under the rules applicable to the arbitration (arbitration rules, applicable law at the seat).

67. The preclusive effects on the other hand pertain more to procedure and, thus should be raised as soon as possible after a party has become aware of or should have been aware of the prior award.<sup>28</sup> Since preclusion is a bar to arbitration, efficiency dictates that this is raised as soon as possible.

68. In this respect, the Committee does not express an opinion as to the question whether preclusive effects of a prior arbitral award go to jurisdiction or to admissibility.<sup>29</sup> Jurisdictions give different answers to this question and the Committee prefers to leave this question to the applicable law. On the other hand, the question is to a large extent moot since under both characterizations a preclusion defense is to be raised early in proceedings.

69. The Committee does not believe that conclusive or preclusive effects of arbitral awards pertain to public policy.<sup>30</sup> These effects primarily relate to the parties' interests in having final, fair and efficient arbitral proceedings. Public interest is limited to the costs and time related to the supportive and reviewing powers of domestic courts. Furthermore, as a consensual and private process, arbitration does seem to be distinguishable from court proceedings, where some jurisdictions consider that *res judicata* belongs to public policy.

70. The conclusion of the preceding paragraph implies that conclusive and preclusive effects of arbitral awards are not to be invoked by arbitrators on their own motion and that their application is to be left to the initiative of the parties.<sup>31</sup> Also, the parties may waive the application of conclusive and preclusive effects of arbitral awards.

71. The Recommendations do not deal with review by domestic courts of the second award in the context of setting aside or enforcement proceedings in circumstances where the second award is said to have violated the preclusive effects of the first award. However, the fact that Recommendation 7 is based on

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<sup>28</sup> Given the identity of party requirement, it is likely that in most cases, a party will know of or be expected to know of the prior award.

<sup>29</sup> Interim Report, p. 28.

<sup>30</sup> See Interim Report, p. 16.

<sup>31</sup> See Interim Report, p. 16 and Söderlund, C., l.c., 304.

the principle that *res judicata* does not pertain to public policy<sup>32</sup> and can be waived by a party, the Recommendations implicitly call for restraint by setting aside and enforcement courts. To the extent that waiver is accepted, the issue would not arise. If a party raises *res judicata* in the further arbitration, but is overruled by the arbitral tribunal, it will be up to the reviewing domestic court to assess whether this amounts to one of the grounds for setting aside or for refusal of enforcement under the rules applicable in that court.<sup>33</sup>

72. Finally, the Committee does not see reasons for having specific recommendations regarding matters of evidence regarding conclusive and preclusive effects of arbitral awards and, thus, recommends that general discretion be given to arbitral tribunals concerning evidence.

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<sup>32</sup> The European Court of Human Rights has held that *res judicata* is a fundamental principle in a democratic society and that disrespect by States may violate Article 6 of the European Convention on Human Rights guaranteeing fair trial (see for instance ECHR, January 12, 2006, *Kehaya and others v. Bulgaria* available at [www.echr.coe.int/echr](http://www.echr.coe.int/echr)). However, the Court's case law relates to court judgments and it may be doubted whether and to what extent this applies to a consensual process such as arbitration.

<sup>33</sup> See Hascher, D., *l.c.*, 28–32 for an analysis under French law.