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Mr Audley Sheppard (UK): *Co-Rapporteur*

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<i>Alternate:</i> Professor Young-Gil Park	Professor Dragica Wedam-Lukic (Slovenia)
Mr Barry Leon (Canada)	Mr David Williams QC (New Zealand)

Interim Report: "*Res judicata*" and Arbitration

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I. INTRODUCTION

The Committee was mandated to study and report on *lis pendens* and *res judicata* in arbitration. This report is the Committee's first under that mandate, and it is an interim report on *res judicata*.¹

This project was commenced under the Chairmanship of Professor Pierre Mayer in 2002, and it has been continued under the Chairmanship of Professor Filip De Ly. The application of *res judicata*, and various drafts of this report, have been discussed at meetings of the Committee in Paris (January 2002), New Delhi (April 2002), Paris (May 2003), San Francisco (September 2003), London (December 2003) and Paris (March 2004).²

After a conceptual introduction, this report will attempt to give an overview of *res judicata* from the perspective of comparative domestic law and public international law. Thereafter, the doctrine of *res judicata* will be discussed and analysed from an international commercial arbitration focus. The application of *res judicata* in international arbitration gives rise to a number of complex and apparently unresolved issues, which are identified in Part VII and which need further analysis and discussion. The Committee's conclusions will be included in a subsequent final report.

A. The doctrine of *res judicata*

The term *res judicata* refers to the general doctrine that an earlier and final adjudication by a court or arbitration tribunal is conclusive in subsequent proceedings involving the same subject matter or relief, the same legal grounds and the same parties (the so-called "triple-identity" criteria). Although terminology may differ as between jurisdictions, this report will use the expression *res judicata* in a wide sense, subject to further definitional clarification in the Committee's final report.

The *res judicata* doctrine has existed for many centuries and in different legal cultures. It was amongst the principles of the Roman jurists,³ and it was also recognised in ancient Hindu texts.⁴ It is said to be a clear example of a general principle of law recognised by civilised nations.⁵

Res judicata is said to have: a positive effect (namely, that a judgment or award is final and binding between the parties and should be implemented, subject to any available appeal or challenge); and, a negative effect (namely, that the subject matter of the judgment or award cannot be re-litigated a second time, also referred to as *ne bis in idem*). The positive effect is largely uncontroversial. This report is concerned primarily with the negative effect of *res judicata*.

The rationale for the *res judicata* doctrine finds expression in two Latin maxims:

¹ It was originally intended that the Committee's report for the 2004 ILA Conference would address the doctrines of both *lis pendens* and *res judicata*. In September 2003, it was decided to split the project into separate reports on *res judicata* and on *lis pendens*. A final report on *res judicata* and an interim/final report on *lis pendens* will be prepared for the 2006 Toronto Conference.

² In addition, the following Committee members have contributed written memoranda: Damien Sturzager, assisted by Ben Tannous (Australia); Bernard Hanotiau (Belgium); Hans van Houtte (Belgium); Fernando Mantilla Serrano (HQ/Colombia); Ole Spiermann (Denmark); Hilmar Raeschke-Kessler (Germany); M.I.M. Aboul-Enein, assisted by Dr M. Alameldin (Egypt); S.K. Dholakia (India); Klaus Reichert (Ireland); Jacomijn van Haersolte-van Hof (The Netherlands); José Luis Siqueiros (Mexico); David Williams QC (New Zealand); Dragica Wedam-Lukic (Slovenia); Bernardo Cremades (Spain); Teresa Giovannini (Switzerland); Johnny Veeder QC (UK); Philip O'Neill Jr, assisted by Tania Garcia (USA); and the Committee's previous chairman, Pierre Mayer (France). We are also grateful to Janet Walker (York University) for a contribution on Canada, August Reinisch (University of Vienna) concerning international law, and Nola Donachie and colleagues at Clifford Chance LLP. This report incorporates some of the information contained in those contributions.

³ See The Digest, Book 50, ch 17; and Justinian, Institutes, IV 13.5; referred to in Barnett, *infra* fn 16, at 8.

⁴ See *Sheoparson Singh v Ramnandan Singh* (1916) LR 43 Ind App 91 at 98 (PC), where the principle of *res judicata* was recognised in the Hindu text of Katyayana; referred to in Barnett, *infra* fn 16, at 8.

⁵ See e.g. Bin Cheng and other authorities cited, *infra* fn 105.

- *Interest reipublicae ut sit finis litium* ("it is in the public interest that there should be an end of litigation")
- *Nemo debet bis vexari pro una et eadem causa* ("no one should be proceeded against twice for the same cause")

The former is a matter of public policy, and the latter is a matter of private justice.

There are material differences in the scope and application of *res judicata* between different legal systems.

The doctrine undoubtedly applies in all principal legal systems to prevent the same claimant bringing the same claim against the exact same respondent. In mainly Common Law jurisdictions, the doctrine also applies to prevent the same parties rearguing an issue that has been determined in earlier proceedings between them. The doctrine has been further extended in a limited number of those Common Law jurisdictions to prevent a party raising issues in subsequent proceedings, between the same parties, that could have been raised in the earlier proceedings but were not raised.

When the doctrine is described, it is generally stated that the parties must be the same in the two sets of proceedings for the doctrine to apply (or, at least, legally deemed to be the same, which the Common Law refers to as "privies", e.g. trustee and beneficiary). However, the strictness of this requirement varies between legal systems. In addition, this requirement has been relaxed somewhat in the United States, where third parties may rely on the doctrine in some circumstances.

Res judicata is generally applied defensively, to stop a claimant bringing the same claim or seeking further relief. At least in the United States, it may also be applied offensively to prevent a respondent from denying rulings made against it in earlier proceedings.

It is generally accepted that the *res judicata* doctrine applies in the context of international arbitration, such that a final award has *res judicata* effect (both positive and negative).

B. Situations where *res judicata* might arise

Issues of *res judicata* might arise in international commercial arbitration in a myriad of different situations,⁶ including between:

- a partial award and a final award;
- two arbitral tribunals;
- a state court and an arbitral tribunal; and
- a supra-national court or tribunal and an arbitral tribunal.

Between a partial award and a final award: within arbitral proceedings, an arbitral tribunal may be faced with *res judicata* problems after rendering a partial final award. Certainly, with increasing bifurcation of arbitral proceedings, arbitral tribunals may struggle with the problem that they are bound by their partial awards where, for instance, during the quantum stage of the proceedings new evidence comes to light that questions the correctness of certain aspects of the decisions contained in the partial award.

Between two arbitral tribunals: *res judicata* may arise because the parties institute arbitration based on different agreements to arbitrate arising under the same legal relationship. The battle of forms is a typical example of such a situation.⁷ A similar situation exists between identical parties in relation to

⁶ See e.g. Pierre Mayer, "Litispendance, connexité et chose jugée dans l'arbitrage international", in Liber amicorum Claude Reymond (Litec, Paris, 2004) at 195-203.

⁷ See e.g. ICC Case No. 3383 (1979), Collection of ICC Arbitral Awards 1974-1985 (ICC Publishing, Paris, 1990) at 100 and 394, case note by Yves Derains, in which an ICC arbitral clause was substituted for *ad hoc* arbitration; under the applicable law, the *ad hoc* arbitrators declined jurisdiction whereupon the claimant instituted ICC arbitration; the sole arbitrator felt bound by the previous *ad hoc* award deciding that both the ICC and the *ad hoc* agreements to arbitrate had terminated.

related legal relationships (such as distribution contracts and ensuing sales relationships and other forms of “group of contracts”). If disputes are brought before different arbitral tribunals, *res judicata* issues may arise.⁸

Res judicata may also arise if one party argues in subsequent proceedings that a prior award did not exhaust the differences existing between the parties.

Another possible scenario is that an amendment to a claim or a counterclaim cannot be instituted before the constituted arbitral tribunal for whatever reason (e.g. late filing) and the claimant (or the respondent) is forced to institute parallel arbitration proceedings.

Res judicata is also encountered when a claimant brings claims against the same respondent arising out of the same factual situation before different arbitral tribunals. Claimants generally will refrain for cost reasons from bringing such parallel arbitrations before different tribunals. However, sometimes such proceedings are necessary, such as under some insurance policies where claims against the same insurance company under different policies are brought before different arbitral tribunals.⁹

Res judicata also arises in multi-party disputes leading to different arbitrations, such as in chain sales contracts.¹⁰

Between state courts and arbitral tribunals: *res judicata* questions seem to appear much more frequently between courts and tribunals than between different arbitral tribunals. Instituting parallel proceedings before state courts may be inspired by legitimate reasons if a party considers that: (i) there is no agreement to arbitrate; (ii) the arbitration agreement is invalid or unenforceable;¹¹ (iii) the arbitration agreement has expired or otherwise has terminated; (iv) the dispute is not arbitrable; or (v) the dispute does not fall within the scope of the agreement to arbitrate. State courts may also have jurisdiction if the respondent does not raise lack of jurisdiction based on an agreement to arbitrate or does raise any such defence too late in the state proceedings. Instituting state court proceedings on the merits in a favourable jurisdiction may be less legitimate if a party files such proceedings in order to frustrate the arbitration by, amongst other things, obtaining an anti-suit injunction preventing the arbitration from continuing and/or thereby attempting to ensure that any arbitral award will not be enforced in that jurisdiction. In such circumstances, the arbitral tribunal may have to consider the *res judicata* effect of the state court's decision on jurisdiction as well as any decision on the merits.

Between a supra-national court or tribunal and an arbitral tribunal: increasingly, arbitral tribunals may have to have regard to the effects of decisions of supra-national courts or tribunals. The Committee will further have to consider whether or not these instances constitute *res judicata* in relation to related arbitral proceedings.

In all of these situations save the first (i.e. partial and final awards), even where the parties in the different proceedings are not identical, *res judicata* issues may arise if it can be said that two of the parties are so closely related that they are privies. A typical example is where two companies in the same group are parties to the separate proceedings (the group of companies phenomenon), especially where it is a parent company and its controlling shareholder.

⁸ See F-X Train, Les contrats liés devant l'arbitre du commerce international (LGDJ, Paris, 2003) at 458-460 and 470.

⁹ See e.g. *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Company of Zurich* [2003] UKPC 1129, [2003] 1 WLR 1041, see also *infra* fn 52.

¹⁰ See e.g. ICC Cases Nos 2745 and 2762 (1977), found in Collection of ICC Arbitral Awards 1974-1985 (ICC Publishing, Paris, 1990) at 326; described *infra* text page 26. For a more extensive analysis, see Bernard Hanotiau, "Problèmes raised by complex arbitrations involving multiple contracts – parties – issues", [2001] J Int Arb 356-360; and Bernard Hanotiau, "Quelques réflexions à propos de l'autorité de chose jugée des sentences arbitrales", in Liber amicorum Lucien Simont (Bruylant, Brussels, 2002) at 301-309.

¹¹ See e.g. *Deutsche Schachtbau- und Tiefbohrgesellschaft v R'As Al Khaimah National Oil Co* [1987] 2 Lloyd's Rep 246, where conflicting decisions ensued from a Geneva ICC award and a court decision in R'As Al-Khaimah. See also David Scott, "Commentary: practical options when faced with an injunction against arbitration", (2002) 18 *Arbitration International* 333-334.

C. The Committee's objectives

State courts apply the established rules of *res judicata* applicable in their jurisdiction to determine the effect of a prior award, but the *res judicata* doctrine varies between legal systems as briefly indicated above. Arbitral tribunals are increasingly faced with issues of *res judicata*. The approach that arbitral tribunals do, and should, take concerning *res judicata* is far from consistent and settled.

Whilst a global harmonised approach to *res judicata* by state courts would be admirable, this Committee is not seeking to give guidance on how state courts should act in applying their domestic laws.¹² The Committee, instead, in its final report will seek to give guidance to arbitrators, when faced with a prior judgment or award which is argued to be *res judicata*. Arbitral tribunals are not necessarily required to apply the same procedural rules as domestic courts and have greater freedom to apply procedural rules that are appropriate for international arbitration. For international arbitration, where arbitrations are often conducted under institutional international rules and increasingly uniform laws, a global harmonised approach to *res judicata* would be commendable and the final report will have to elaborate on any such approach.

D. Limitations on the scope of the Committee's work

The Committee has considered only the *res judicata* effect of a prior final (or partial final) award or of a state court judgment on jurisdiction or on the merits. Other awards or judgments (such as interlocutory decisions regarding evidence), procedural orders or interim awards that do not contain final decisions on the merits have been kept outside the scope of the Committee's recent work and of this report. The final report may have to address whether awards or judgments other than those covered in this interim report may qualify for *res judicata* effect.

In addition, parallel proceedings concerning interim measures have not yet been addressed, because, although they are binding on the parties and may have *res judicata* effect, they do not prejudice upon a decision on the merits. The final report, however, may come back to this issue.

In this respect, the question arose within the Committee whether anti-suit injunctions should be addressed. Anti-suit injunctions clearly are at the heart of any debate as to the relationship between state courts and arbitral tribunals. However, the Committee limited its consideration to the *res judicata* effect of a prior decision on jurisdiction by a court/tribunal and did not address the additional impact that an injunction might have.¹³

Res judicata issues may arise where an award has been set aside at the place of arbitration, but attempts are made to enforce that award in another jurisdiction. If setting aside has been refused, the losing party may raise the same issues in seeking to resist enforcement. The enforcement court must have regard to the grounds prescribed in its law for refusing enforcement (i.e. most probably Article V(2) of the New York Convention), but it may be influenced by the earlier decision.¹⁴ Even where when an award has been set aside at the place of arbitration, some foreign courts have not considered themselves bound by such decision and have enforced that award. The second scenario (i.e. prior annulment) has been addressed at length by commentators and has been excluded from the scope of the Committee's present work.¹⁵

¹² The Committee hopes, nevertheless, that this report will be of interest to state courts that apply an internationally harmonised arbitration law and to state courts that are open to comparative arguments in developing their laws. Cf. Joint American Law Institute / UNIDROIT Working Group, Principles and Rules of Transnational Civil Procedure (UNIDROIT, Rome, 2004), Article 28 concerning *res judicata* (available at www.unidroit.org).

¹³ On this topic, see e.g. the conference papers presented at the Conference on Anti-Suit Injunctions organised in Paris on 21 November 2003 by the Institut d'Arbitrage International (as yet unpublished); and D Scott, "Commentary: practical options when faced with an injunction against arbitration", *supra* fn 11.

¹⁴ For the weight to be given to the decision of the courts at the place of arbitration which refused to set aside the award, see e.g. *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315, Colman J.

¹⁵ See the well-known cases of *Hilmarton*, and *Chromalloy*, discussed in e.g. Lew, Mistelis and Kroll, Comparative International Commercial Arbitration (Kluwer, The Hague, 2003) at paras 26-107 to 26-110, and the articles cited.

The time at which judgments and arbitral awards become *res judicata* may vary from country to country. For example, while some legal systems give *res judicata* effect as of the rendering of the judgment, others do so only at the end of any appeal process (or the end of the period in which an appeal may be lodged). Likewise, the time at which an award becomes *res judicata* may be upon its issue to the parties, but some jurisdictions have different requirements, such as registration. In addition, the commencement of setting aside proceedings may suspend the *res judicata* status of the arbitral award. For the purposes of this report, it is assumed that an award, under the applicable law, has become final and binding.

Administrative and criminal decisions made by state courts and posing *res judicata* questions in relation to international commercial arbitrations are not considered. The effect of such proceedings merit separate treatment and would take the Committee's report beyond acceptable limits.

II. ENGLISH COMMON LAW

A. Introduction

The doctrine of *res judicata* is well established in the Common Law jurisdictions of England,¹⁶ Ireland,¹⁷ Canada,¹⁸ India,¹⁹ Australia²⁰ and New Zealand.²¹

In order for a decision to qualify as a *res judicata*, it must be pronounced by a judicial tribunal of competent jurisdiction, and the decision itself must be a judicial decision that is final and conclusive and on the merits.²²

The effect of a *res judicata* decision is that it disposes finally and conclusively of the matters in controversy, such that - other than on appeal - that subject matter cannot be re-litigated between the same parties (or their privies).²³

The *res judicata* effect of an earlier decision is raised by a party in subsequent proceedings by pleading: cause of action estoppel; or issue estoppel. If accepted, the plea will have the effect of precluding the other party from contradicting the earlier determination in the later proceedings. The rules of estoppel by *res judicata* are rules of evidence.²⁴

English law recognises two further pleas of preclusion: merger/former recovery; and abuse of process. Although the fourth, abuse of process, has its own rules, some authors have posited that all four

¹⁶ See Halsbury's Laws of England, 4th edn (Reissue), (Butterworths, London, 2003) vol 16(2) under "Estoppel", paras 977-993; Peter Barnett, Res Judicata, Estoppel and Foreign Judgments (Oxford University Press, 2001); Keith Handley, Spencer Bower, Turner & Handley on the Doctrine of Res Judicata, 3rd edn (Butterworths, London, 1996).

¹⁷ See P.A. McDermott, Res Judicata and Double Jeopardy (Butterworths, Dublin, 1999).

¹⁸ See Donald Lange, The Doctrine of Res Judicata in Canada (Butterworths, Markham, Ontario, 2000).

¹⁹ Indian law on *res judicata* follows English law in essential respects, but it is not identical; see e.g. *Hope Plantation Ltd v Taluk Land Board* (1999) 5 SCC 590 (Sup Ct).

²⁰ Australian law is also similar but not identical to English law; see e.g. Keith Handley, "Res judicata: general principles and recent developments", (1999) 18 Aust Bar Rev 214, and E Campbell, "Res judicata and decisions of foreign tribunals", (1994) 16 Sydney Law Rev 311.

²¹ Likewise, NZ law is similar but not identical to English law; see e.g. *NZ Building Trades Union v NZ Federated Furniture* [1991] 1 ERNZ 331, and *Langland v Stevenson* [1995] 2 NZLR 474.

²² See Barnett, supra fn 16, at 11, para 1.18.

²³ See Barnett, supra fn 16, at 8, para 1.11.

²⁴ *Carl-Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1966] 2 All ER 536 at 564 (HL), per Lord Guest.

doctrines have as their objective prevention of abuse of the courts' process, and that the term "abuse of process" can be used to describe all four.²⁵

Foreign judgments can have *res judicata* effect similar to domestic judgments.²⁶ However, the foreign judgment must have *res judicata* effect at the place it was made; and, the judgment must first be recognised within the forum for it to have any preclusive effect there.²⁷ Any defences to recognition would stymie the *res judicata* effect of the foreign judgment. Peter Barnett notes that the courts observe special caution when asked to accord preclusive effect to foreign judgments.²⁸

Public policy may be a bar to giving *res judicata* effect to a prior judgment.²⁹

B. Cause of action estoppel

A "cause of action" comprises all the facts and circumstances necessary to give rise to a right to relief. Generally, all claims arising from a single event and relying on the same evidence will be treated as the same cause of action.³⁰

Cause of action estoppel prevents a party asserting or denying the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties (or their privies).³¹

The cause of action must be identical to that in the earlier proceedings.

A plea of cause of action estoppel will often necessitate a review of the reasoning of the earlier judgment, and not just of the formal order granting or denying relief.

C. Issue estoppel

Issue estoppel prevents a party in subsequent proceedings from contradicting an issue of fact or law that has already been distinctly raised and finally decided in earlier proceedings between the same parties (or their privies).³²

The "issue", being an assertion, whether of fact or of the legal consequences of facts, must be an essential element in the cause of action or defence.³³

As in cause of action estoppel, elements of the reasoning and not just the formal order may give rise to *res judicata*. Matters of fact or law, which are subsidiary or collateral, are not covered by issue estoppel. A distinction is drawn between the *ratio decidendi* and what is merely *obiter dictum*.

It has traditionally been accepted that procedural decisions cannot give rise to a plea of issue estoppel.

²⁵ See e.g. Lord Keith in *Arnold v National Westminster Bank plc* [1991] 2 AC 93 at 111 (HL).

²⁶ See Barnett, supra fn 16, starting at 24, para 1.49.

²⁷ In England, for example, a foreign judgment might be recognised according to the rules of: the Common Law; Administration of Justice Act 1920; Foreign Judgments (Reciprocal Enforcement) Act 1933; or the Brussels or Lugano Conventions or the European Council Regulation No 44/2001.

²⁸ See Barnett, supra fn 16, at 26, para 1.54.

²⁹ See e.g. Indian Supreme Court decision in *Isabella v Susai* (1991) 1 SCC 494, where it was held that a prior decision cannot sanction that which is illegal.

³⁰ Even if different contractual provisions are alleged to have been breached, it will constitute a single cause of action.

³¹ See Barnett, supra fn 16, at 87-97.

³² See Barnett, supra fn 16, at 134-182.

³³ See *Mills v Cooper* [1967] 2 QB 49 at 468-469, per Diplock LJ; approved by the House of Lords in *Arnold v National Westminster plc* [1991] 2 AC 93. This requirement exists in the other Commonwealth jurisdictions, with slight variations in wording (e.g. India - "matters directly and substantially in issue" - see *Amalgamated Coal Fields Ltd v Janapada Sabha* AIR 1964 SC 1013).

The plea of issue estoppel may not be accepted if the party against whom it is pleaded can show that further material, which is relevant to the correctness or incorrectness of the assertion, which could not by reasonable diligence have been adduced by that party in the previous proceedings, has since become available to it.

D. Former recovery

The doctrine of former recovery precludes a party in whose favour relief has been granted from reasserting the same claim in order to obtain further relief, based on the same cause of action. It is said that the cause of action has been extinguished by the earlier judgment, by merging into that judgment.

Once a judgment has been paid or otherwise honoured, the paying party can rely on the equitable principle of double satisfaction to prevent further enforcement proceedings.

E. Abuse of process

Cause of action estoppel and issue estoppel concern a cause of action or issue that has been considered by a court and finally determined. The courts have further extended the doctrine to preclude a party in subsequent litigation from raising subject matter (a claim or an issue) which the party, by the exercise of due diligence, could and should have brought before the court in the earlier proceedings. This is referred to as the "rule in *Henderson v Henderson*".³⁴

After the decision of the House of Lords in *Johnson v Gore Wood & Co*,³⁵ this doctrine is considered as a category of the "abuse of process" doctrine, rather than an extension of the principles of estoppel.

In its most general sense, the doctrine of abuse of process prescribes that subsequent proceedings should be precluded if it is necessary for a court to prevent a misuse of its procedure in the face of unfairness to another party, or to avoid the risk that the administration of justice might be brought into disrepute among right-thinking people.³⁶ The doctrine rests upon the inherent power of the court to prevent a misuse of its procedures even though a party's conduct may not be inconsistent with the literal application of the procedural rules (e.g. if the subsequent proceedings were thought to be unjustifiably vexatious and oppressive).³⁷ Its application is wholly discretionary.

F. Same parties

The preclusive effect of a judgment *in personam* in subsequent proceedings in English Common Law jurisdictions is limited according to the rules of privity and mutuality.³⁸

The rule of privity prescribes that the only persons that are bound by a judgment, and hence can take advantage of its preclusive effects, are the parties to the proceedings from which the judgment derived, or their "privies". No third persons can take advantage of it or be bound by it.

The rule of mutuality requires that the estoppel must be mutual, which means that each party (or their privies) to the subsequent proceedings must have been a party to the earlier proceedings, and must

³⁴ (1844) 6 QB 288. In Australia, the abuse of process doctrine is referred to as "*Anshun* estoppel" after the case that affirmed the *Henderson* rule. In Canada, the Supreme Court has recently applied the doctrine of abuse of process to bar a collateral challenge of an earlier decision where the facts did not permit application of the doctrine of issue estoppel (because there was no mutuality): *Toronto (City) v Canadian Union of Public Employees* [2003] SCJ No 64 (Sup Ct).

³⁵ [2000] 2 AC 1. See also *Baker v McCall International Ltd* [2000] CLC 189 per Toulson J; and *Desert Sun Loan Corp v Hill* [1996] 2 All ER 847 per Evans LJ and Stuart-Smith LJ; but contrast Barnett, supra fn 16, at 24 and 186-187.

³⁶ See *Hunter v Chief Constable of the West Midlands* [1982] AC 529 at 536 (HL) per Lord Diplock; *House of Spring Gardens Ltd v Waite* [1990] 3 WLR 347 at 358 (CA); *Talbot v Berkshire County Council* [1993] 3 WLR 798 (CA); *Bim Kemi AB v Blackburn Chemicals Ltd* [2004] EWHC 166 (Comm), Cooke J; and *Toronto (City) v Canadian Union of Public Employee*, supra fn 34.

³⁷ E.g. *Walton v Gardiner* (1993) 177 CLR 378 at 395 (HCA).

³⁸ See Barnett, supra fn 16, at 62-65.

claim or defend in the subsequent proceedings in the same right as they claimed or defended in the earlier.³⁹

So, for example, a judgment obtained by A against B will not be conclusive in an action by B against C, unless C is a privy of A and the same rights are at issue in both proceedings.⁴⁰

The "parties" to English court proceedings are the specific individuals or entities appearing on the record of those proceedings as litigants in those proceedings. In limited circumstances, individuals or entities who do not appear on the record of the proceedings as litigants will be treated as parties. For example, a joint tortfeasor who stands by and allows litigation to be conducted by other joint tortfeasors may be treated as a party notwithstanding that he does not appear on the record of the proceedings.⁴¹ Likewise, those that intervene and take part in proceedings may be deemed a party.

Res judicata may also be claimed by "privies". In English law, a "privy" is a person or entity upon whom all the rights and obligations of any legal entity devolve, including the right to the benefit of, or the obligation to be bound by, a prior judgment. There are three categories of "privy" in English law:⁴²

- (i) Privies in blood (such as ancestors or heirs);
- (ii) Privies in title (such as a person who succeeds to the rights or liabilities of a party upon insolvency); and
- (iii) Privies in interest (such as a trustee who sues on behalf of a beneficiary).

The most difficult category to define is "privy in interest". As regards the practical approach to be taken in determining whether a person or entity is a "privy in interest" at English law, the position is succinctly summarised by Peter Barnett:⁴³

"There must be an examination of the parties' interests, as well as the existence of a sufficient degree of identification between the parties, before it is just to hold that a decision in respect of one party should be binding in proceedings to which another is party. Moreover, the interest in the previous litigation or its subject-matter must be legal or beneficial: a mere curiosity or concern in the litigation or some interest in the outcome is not sufficient."

For example, a trade relationship between two companies does not make one a privy in interest of the other; and an agreement to indemnify does not make the two parties privies of each other;⁴⁴ but a partner could be a privy with a co-partner, and a trustee with a beneficiary. The English courts have held that a licensee and a licensor of intellectual property rights are not to be regarded as the same party

³⁹ Whilst the rule of privity probably applies to all four categories of preclusion described in the text above, the rule of mutuality probably only applies to cause of action and issue estoppel. The rule of mutuality has been rejected in the United States (see below), but the House of Lords has considered and not been persuaded to adopt the United States approach: *Hunter v Chief Constable of the West Midlands*, supra fn 36; and *Carl-Zeiss Stiftung v Rayner & Keeler Ltd*, supra fn 24. Mutuality is also required in Australia: *Ramsay v Pigram* (1968) 118 CLR 271 at 282 (HCA), per McTiernan J; and in Canada: *Toronto (City) v Canadian Union of Public Employee*, supra fn 34; but not in Ireland: see McDermott, supra fn 17, at 89-97.

⁴⁰ However, contrast *Lincoln National Sun Life Insurance Co v Sun Life Assurance Co of Canada* [2004] 1 Lloyd's Rep 737, Toulson J, in which the court held that a claimant in an arbitration against a reinsurer was bound by findings of fact made against it in a prior arbitration brought against another reinsurer. The Judge noted that the modern tendency when tackling the problems of serial litigation involving a common issue had been to move away from technical rules towards a broader consideration of what was fair.

⁴¹ See *House of Spring Gardens Ltd v Waite*, supra fn 36.

⁴² See *Carl-Zeiss Stiftung v Rayner & Keeler Ltd*, supra fn 39, at 910 and 936.

⁴³ See Barnett, supra fn 16, at 69.

⁴⁴ See *Gleeson v J Wippell & Co* [1977] 1 WLR 510 at 515.

if sued in separate proceedings by a single claimant.⁴⁵ Companies and their shareholders (even controlling shareholders) are generally considered not to be privies of one another.⁴⁶

Some cases suggest a willingness by some judges to extend the category of privity of interest. For example, Stuart-Smith LJ in *House of Spring Gardens Ltd v Waite*⁴⁷ was prepared to invoke "justice and common sense", rather than technical principles of estoppel, to preclude the third defendant (not a party to an earlier fraud charge) from alleging the judgment was obtained by fraud. However, such willingness does not appear to be the norm.⁴⁸

The rules described above apply to decisions *in personam* and do not apply to decisions *in rem*. A judgment *in rem* has for its primary object the determination of the title to property or status of a person, property or thing. Provided that the court has jurisdiction over the *res*, the judgment *in rem* will be conclusive against all the world in respect of the questions of title or status so determined.⁴⁹

G. Application to arbitral awards

It has been held since at least 1783 that an arbitral award can justify a plea of cause of action and issue estoppel.⁵⁰ More recently (1966), Diplock LJ said:⁵¹

"Issue estoppel applies to arbitration as it does to litigation. The parties, having chosen the tribunal to determine the disputes between them as to their legal rights and duties, are bound by the determination of that tribunal on any issue which is relevant to the decision of any dispute referred to that tribunal."

The same requirements apply to arbitral awards as to judgments: there must be a final award on the merits pronounced by a tribunal of competent jurisdiction; and the award must be recognised in England.

In a recent Privy Council case, the court considered issue estoppel as amounting to a species of enforcement of the rights created by the award.⁵²

In another case, the English High Court was asked to refuse enforcement of an English arbitral award and, instead, recognise the judgment of a Chinese court on the same matter.⁵³ The Court held that the

⁴⁵ See *Mecklermedia Corp v DC Congress GmbH* [1998] Ch 40.

⁴⁶ See e.g. *Baratok Ltd v Epiette Ltd* [1998] 1 BCLC 283 (CA), where a company and its sole beneficial shareholder were held not to be privies; but contrast *Berkeley Administration Inc v McLelland* [1995] ILPr 210 (CA) at 211, in which Dillon LJ thought it wholly unreal in the context of that case to separate a parent company and its wholly owned subsidiary.

⁴⁷ Supra fn 36. See also the test articulated by the NZ court in *Langland v Stevenson*, supra fn 21, at 474.

⁴⁸ The Federal Court of Australia has suggested strongly that there is no basis for extending privity of interest to include cases where the interest is merely a financial right or interest in the previous action: *Effem Foods Pty Ltd v Trawl Industries of Australia Pty Ltd* (1993) 43 FCR 510.

⁴⁹ See Barnett, supra fn 16, at 75-85. Contrast *Powell v Wiltshire* [2004] EWCA Civ 534 (CA), concerning ownership of an aeroplane.

⁵⁰ *Doe d Davy v Haddon* (1783) 3 Doug KB 310. See also *Cummings v Heard* (1869) LR 4 QB 669 at 672. See Mustill & Boyd, *Commercial Arbitration*, 2nd edn (Butterworths, London, 1989 and 2001 Companion) at 409-415; and Merkin, *Arbitration Law* (LLP, London, looseleaf) at para 16.116.

⁵¹ *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1965] 1 Lloyd's Rep 13 (CA).

⁵² *Associated Electric and Gas Insurance Services Ltd (Aegis) v European Reinsurance Co. of Zurich (European Re)* [2002] UKPC 1129, [2003] 1 WLR 1041 (on appeal from the Court of Bermuda). Two different claims by the same insurer against the same reinsurer, under the same insurance contract, arising out of the same underlying facts, were submitted to two different arbitral tribunals. European Re won the first arbitration, and sought to rely on the award in the second arbitration, and raise a plea of issue estoppel. Aegis obtained an injunction, based upon a confidentiality clause in the contract, prohibiting European Re from submitting the award in the second arbitration. The Privy Council held that any obligation of confidentiality does not apply as between the same parties and the arbitrators in the second arbitration.

arbitration award was the first in time and had not been challenged, and that the issues between the parties were *res judicata* and could not be re-litigated. Accordingly, the award was enforced and recognition of the judgment was refused.

The courts in India, Australia and New Zealand have confirmed that valid arbitral awards give rise to *res judicata*.

We are not aware of any case in which an arbitral tribunal has applied, or a court has approved the application of, the abuse of process doctrine in arbitration.⁵⁴

It has been confirmed conclusively that a valid partial final award is *res judicata* and gives rise to issue estoppel, and the tribunal becomes *functus officio* in respect of the issues decided in the partial award.⁵⁵

III. UNITED STATES COMMON LAW

A. Introduction

The doctrine of *res judicata* in the United States is generally similar to that in England and other Commonwealth countries, but in some circumstances it also extends to third parties.⁵⁶

A party to the prior judgment (or its privies) may raise the pleas of claim preclusion (i.e. cause of action estoppel) or issue preclusion (i.e. issue estoppel).⁵⁷ Issue preclusion may also be pleaded by a third party.

B. Claim Preclusion

Claim preclusion forbids a party from relitigating a claim that had been determined by a competent court in a final and valid judgment on the merits.⁵⁸

A "claim" comprises all rights of the claimant to remedies against the respondent with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

C. Issue Preclusion

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination of that issue is conclusive in a subsequent action, whether on the same or a different claim.⁵⁹

For issue preclusion to apply, the determination of the issue must be "essential to the judgment". Some courts have stated that only the determination of an "ultimate" fact or issue of law will give rise to issue preclusion, but that even a necessary "evidentiary fact" might not. The Restatement takes the view that

⁵³ *Peoples Insurance Company of China v The Vysanthy Shipping Company Ltd* [2003] 2 Lloyd's Rep 617.

⁵⁴ Mustill & Boyd doubt whether the rule in *Henderson v Henderson* applies in arbitration, supra fn 50 at 413. The issue was raised in *Aegis* but the Privy Council held that it was irrelevant, supra fn 52, para 16.

⁵⁵ *Fidelitas Shipping Co Ltd v V/O Exportchleb*, supra fn 51, per Diplock LJ. See also Sutton & Gill, Russell on Arbitration, 22nd edn (Sweet & Maxwell, London, 2003) at 285.

⁵⁶ See American Law Institute (ed.), Restatement: Second: Judgments, Ch. 3, § 13-33 ("Restatement").

⁵⁷ "*Res judicata*" is often used to refer to the entire topic of former adjudication, including both claim and issue preclusion. Some cases and commentators refer to claim preclusion as *res judicata*, and issue preclusion as collateral estoppel.

⁵⁸ Restatement, § 19.

⁵⁹ Restatement, § 27.

the appropriate inquiry is whether the issue was actually recognized by the parties as important and by the court as necessary to the first judgment.⁶⁰

A number of exceptions exist to the general rule of issue preclusion, which have regard to the qualitative nature and circumstances of the two proceedings.⁶¹

D. Abuse of process

Save for in very limited circumstances, a judgment is not generally conclusive in a subsequent action as to issues which might have been but were not litigated and determined in the prior action. There is no general "abuse of process" doctrine in the United States akin to that in England. The Restatement explains that there are many reasons why a party might have chosen not to raise an issue: the interests of conserving judicial resources, of maintaining consistency, and of avoiding oppression or harassment of the adverse party are less compelling when the issue on which preclusion is sought has not actually been litigated before.⁶²

E. Same Parties

Usually claim preclusion will operate only between those who were parties both to the first and second lawsuit. This general rule, however, has some exceptions. For instance, a successor in interest might be bound by a previous judgment. Similarly, where a person is so closely connected to a suit that he will be considered "in privity" with the party to the first suit, he will be bound by the previous judgment.

A concept of "virtual representation" is sometimes invoked to extend claim preclusion to those who were not parties to previous litigation, but were "virtually represented" by such parties.⁶³ Also, a person who is not a party to an action, but who controls or substantially participates in the control of the litigation, is bound by the determination of the issues as though he were a party.⁶⁴

Mutuality is no longer a requirement for issue preclusion, as courts have held that it can apply in subsequent litigation with others.⁶⁵ Thus, a party who is precluded from relitigating an issue with an opposing party is also precluded from doing so with another person, unless he lacked a full and fair opportunity to litigate the issue in the first action or there are other circumstances that justify affording him an opportunity to relitigate the issue.⁶⁶ Application of this doctrine may be used offensively, to allow a claimant that was not party to earlier proceedings to bring a claim based on findings in those proceedings, with the same respondent prevented from relitigating such findings.

F. Application to arbitral awards

In general, a valid and final award by a competent arbitral tribunal has the same effect under the rules of *res judicata*, subject to the same exceptions and qualifications, as a judgment of a court.⁶⁷

Thus, claim preclusion and issue preclusion apply in general with respect to prior arbitral awards.⁶⁸

⁶⁰ Restatement, § 27, comment j.

⁶¹ Restatement, § 28.

⁶² Restatement, § 27, comment e. New York law may be less tolerant, see e.g. *Henry Modell & Co Inc v Reformed Protestant Dutch Church of City of New York*, 68 NY.2d 456 at 464 (1986), and ICC Case, *infra* fn 155.

⁶³ See Yeazell, Civil Procedure (Aspen Law & Business, 1996) at 811 (citing *Southwest Airlines Co v Texas Int'l Airlines*, 546 F.2d 84 (5th Cir. 1977)).

⁶⁴ Restatement, § 39.

⁶⁵ E.g. *Parklane Hosiery Co v Shore*, 439 US 322 (1979), where "offensive non-mutual issue estoppel" was raised. However, the court held that the claimant was not permitted to rely on previous determinations if he could easily have joined the earlier actions but did not.

⁶⁶ Restatement, § 29.

⁶⁷ Restatement, § 84(1), and exceptions to the general rule at § 84(2)-(4) See e.g. Gary Born, International Commercial Arbitration in the United States, 2nd edn (Kluwer, The Hague, 2001) at 914.

⁶⁸ See e.g. Andreas Lowenfeld, "Arbitration and Issue Preclusion: a view from America", Arbitral Tribunals or State Courts: Who must defer to whom?, ASA Special Series No 15, 2001; and Richard Shell, "*Res judicata* and

An interesting aspect of US law on *res judicata* of arbitral awards relates to jurisdiction, i.e. whether US courts or arbitral tribunals have competence to deal with *res judicata* arguments. In this respect, the Federal Circuit Courts of Appeal have taken somewhat different approaches in determining when *res judicata* can be asserted as a valid jurisdictional defence against relitigation in domestic courts. Some circuit courts have focused on the language of the arbitration clause to determine whether *res judicata* is within the scope of the arbitration clause; others have focused on the finality of the award and applied a traditional transactional analysis to the claims being raised; and others have pursued a hybrid approach between the two.⁶⁹ The standards applied, while different, are well defined and offer some predictability, although a decision of the US Supreme Court or Congress to create a uniform standard would be welcome.

IV. EUROPEAN CIVIL LAW

A. Introduction

Civil Law countries have a well-established doctrine of *res judicata*. In many countries, the principle of *res judicata*, as it applies in domestic legal proceedings, is codified,⁷⁰ but notably in Switzerland it is not.⁷¹ (Although not covered in this interim report, the position is similar in Civil Law countries in the Middle East⁷² and Latin America.⁷³)

collateral estoppel: effects of commercial arbitration", (1988) 35 UCLA Law Rev 623. Offensive non-mutual collateral estoppel applies in arbitration in some circumstances, e.g. against an indemnifier who was invited to join prior arbitral proceedings but declined - referred to as "vouching-in", see e.g. *SCAC Transp (USA) Inc v S.S. Danaos*, 845 F.2d 1157 (2nd Cir. 1988), and *Duferco Int'l Steel Trading v T Klaveness Shipping A/S*, 333 F.2d 383 (2nd Cir. 2003).

⁶⁹ Compare, e.g. *Chiron Corp v Ortho Diagnostic Sys*, 207 F.3d 1126, 1130-1131 (9th Cir. 2000); *John Hancock Mutual Life Insurance Co v Thomas W Olick*, 151 F.3d 132, 136-137 (3rd Cir. 1998); *Apparel Art International, Inc v Amertex Enterprises Ltd*, 48 F.3d 576, 583 (1st Cir. 1995); and *Hugo Marom Aviation Consultants Ltd v Recon/Optical Inc*, 1991 US Dist LEXIS 6877 (7th Cir. 1991). See also Born, supra fn 67, at 683.

⁷⁰ In France, New Code of Civil Procedure Article 480; in Belgium, Code of Civil Procedure Articles 23-27; in The Netherlands, Code of Civil Procedure Article 236; in Germany, Code of Civil Procedure Articles 322-327; in Italy, Code of Civil Procedure Article 324; in Sweden, Code of Judicial Procedure Articles 17:11 and 30:1.

For France, see generally, Vincent & Guinchard, *Procédure civile*, 26th edn (Dalloz, 2001), ch. 3; Cadiet & Jeuland, *Droit judiciaire privé*, 5th edn (Litec, 2004), ch 2; Guinchard, *Droit et pratique de la procédure civile* (Dalloz, 2002/2003), Titre 2, ch 1; and Perrot & Fricéro, "Autorité de la chose jugée", in *Jurisclasseur Procédure Civile*, Fascicule 554 (1998 and updates).

For Belgium, see Albert Fettweis, *Manuel de Procédure Civile*, 2nd edn (Liege, 1987) at 267; and Georges de Leval, *Elements de Procédure Civile* (Brussels, 2003) at 234.

For The Netherlands, see generally, Van Nispen, Van Mierlo & Polak, *Tekst en Commentaar Burgerlijke Rechtsvordering* (Kluwer, Deventer, 2002) at 367, commentary by C.J.J. van Maanen.

For Germany, see generally, Koch & Diedrich, *Civil Procedure in Germany* (C.H. Beck, Munich, 1998); Baumbach & Lauterbach, *Zivilprozeßordnung*, 62nd edn (C.H. Beck, Munich, 2004); Einführung vor §§ 322 - 327; Thomas & Putzo, *Zivilprozeßordnung*, 25th edn (C.H. Beck, Munich, 2003), § 322.

For Italy, see generally F Carpi, *Commentario Breve al Codice di Procedura Civile*, 3rd edn (2001); C. Mandrioli, *Diritto Processuale Civile. Il processo di cognizione* (Torino, 2002) vol II at 367; and Cass. 87/5813; 87/8787; 92/7697; and 93/1997.

See also Jan Kropholler, *Europäisches Zivilprozeßrecht*, 7th edn (Recht und Wirtschaft, Heidelberg, 2002).

⁷¹ See generally, Fabienne Hohl, *Procédure civile* (Bern, 2001), Tome I, Introduction et théorie générale, at 244.

⁷² Middle Eastern laws inspired by the French model have similar provisions, e.g. in Egypt, Civil Code Article 405.

⁷³ E.g. Mexico, Código Federal de Procedimientos Civiles, Articles 354-357; and Argentina, Código Procesal Civil y Comercial de la Nación, Articles 347(6) and 517.

Judgments are binding upon the parties when rendered (subject to any appeal) and constitute a bar to re-litigating the same dispute. Thus, Civil Law jurisdictions in this respect have a broader notion of *res judicata*, which expresses both the binding nature of a judgment or award on the parties (positive *res judicata*) and the mirror image of the prohibition upon re-litigating claims which have been decided (negative *res judicata*).

On the other hand, the Civil Law doctrine, by and large, is more restricted than the Common Law perspective on *res judicata*. There is no notion of issue estoppel or preclusion (as in the Common Law). This is because, generally, a more formalistic approach is taken and it is only the operative order of the court (the "*dispositif*") that has *res judicata* effect, and therefore the doctrine applies only to claims.

Likewise, there is no principle of abuse of process (although civil procedural law may subscribe to a doctrine of "abuse of rights"⁷⁴).

The triple identity test of same matter/relief, same issues and same parties is generally applied strictly.

B. General principles

In France, the principle is referred to as "*autorité de la chose jugée*",⁷⁵ and it is confirmed in the Code of Procedure.

Article 480 of the French *Nouveau Code de Procédure Civile* ("NCPC") states (in translation⁷⁶):

"The judgment which decides in its holdings all or part of the main issue, or one which rules upon the procedural plea, a plea seeking a peremptory declaration of inadmissibility or any other incidental application, shall from the time of its pronouncement, become *res judicata* with regard to the dispute which it determines."

Thus, judgments on jurisdiction and judgments on the merits have *res judicata* effect. Generally, procedural orders and judgments dealing only with the administration of the case do not have *autorité de la chose jugée*.⁷⁷ Orders regarding interim measures may well have *autorité de la chose jugée* although they do not prejudice the merits. Partial and final judgments on the merits are, without doubt, *chose jugée*.

Judgments are binding upon the parties (and constitute *res judicata*) as of the time they have been rendered without further formal requirements. However, when a party institutes a means of recourse against a judgment, the judgment being attacked still has *autorité de la chose jugée* but its recognition and enforcement is generally suspended until the appeal has been determined.⁷⁸

The defence of *res judicata* is generally characterized as procedural and belonging to the *lex fori*, and is thus not to be determined in accordance with the law applicable to the merits.

In international cases, only final decisions will qualify for recognition and enforcement.

The *res judicata* effect of a foreign judgment is generally conditional upon recognition of that judgment in the *lex fori*. When a judgment qualifies for recognition, its *res judicata* effect seems to be governed by the procedural law of the country in which it was rendered.

However, in some Civil Law countries, foreign judgments do not qualify for *res judicata* in the absence of an international convention or EU regulation providing for recognition of foreign judgments. This is the case in Denmark and Sweden.

⁷⁴ See e.g. Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press, 2003) at 255-260.

⁷⁵ To be distinguished from a final decision ("*autorité de la force jugée*"), which means that no ordinary means of recourse with suspensive effect, such as appeal proceedings, can be brought against a judgment.

⁷⁶ Taken from www.legifrance.gouv.fr.

⁷⁷ See NCPC Articles 481 and 488.

⁷⁸ See NCPC Articles 500 and 501.

In Italy, the Civil Code expressly prescribes that a judgment may be revoked if it is contrary to another decision having *res judicata* effect between the parties, provided that the second decision has not decided upon such objection.⁷⁹

In France, Belgium and The Netherlands, a defence based on *autorité de la chose jugée* is to be raised by a party and not by a court on its own motion. Such a defence is also deemed to be waived if a party fails to raise it. Accordingly, in France, *res judicata* is not considered part of public policy.⁸⁰ However, in Germany and Switzerland, the court may raise *res judicata* ex officio.⁸¹ In Switzerland, *res judicata* may be part of procedural public policy.⁸²

C. *Res judicata* extending beyond *dispositif*

Article 1351 of the French Civil Code states that: "The force of *res judicata* takes place only with respect to what was the subject matter of a judgment". However, in practice, not only the *dispositif* is to be looked at but also the necessary underlying motivation. A similar position applies in Belgium.

Also in The Netherlands, those elements of the motivation which have not been repeated in the *dispositif* but nonetheless are intended to contain final decisions on specific points are deemed to constitute *res judicata*.⁸³

In Germany, arbitral awards are viewed similarly to state court judgments.⁸⁴ Pursuant to Articles 322 and 325 of the German Civil Procedure Code, only the *dispositif* or relief granted (or denied) has *res judicata* effect. Only where the *dispositif* of the judgment is not self-explanatory can the underlying key reasons be looked at.⁸⁵ The reasoning and the findings may only help to determine the scope of *res judicata*.

In Switzerland, the Federal Supreme Court has held that: "*Res judicata* only relates to the *dispositif* of the decision or the award. It does not cover the reasoning. However, one sometimes needs to look at the reasoning of the decision to know the exact meaning and extent of the *dispositif*".⁸⁶

In Italy, while the legal doctrine holds that *res judicata* effect is limited to the operative part of the judgment, Italian case law has admitted that the *res judicata* effect may include the entire reasoning,⁸⁷ and in almost all cases that *res judicata* includes the grounds that constitute the logical and necessary assumptions for the decision itself (the so-called "*giudicat implicito*").⁸⁸

D. Triple identity test

Article 1351 of the French Civil Code also states (in translation) that: "It is necessary that the thing claimed be the same; that the claim be based on the same grounds; that the claim be between the same parties and brought by them and against them in the same capacity." This triple identity test also applies in Belgium and The Netherlands.

⁷⁹ See Code of Civil Procedure Article 395(5).

⁸⁰ See e.g. *Sulzer v Somagec, Saers et al*, Paris CA, 27 November 1987, (1989) Rev Arb 62; Cadiet & Jeuland, supra fn 70 at 942; but also see Guinchard, supra fn 70 at 4999-5000, listing exceptional circumstances where *res judicata* is considered part of public policy ("*ordre public*") and may be raised by the court.

⁸¹ For Germany, see Koch and Diedrich, supra fn 70, at 70.

⁸² See e.g. Swiss Federal Supreme Court, 3 April 2002, ATF 128 III 191, see also infra fn 97. This may be limited, however, to requiring that arbitral tribunals act consistently with their own prior decisions.

⁸³ See e.g. Hoge Raad, 20 January 1984, NJ 1987, 295; and Hoge Raad, 21 March 1997, NJ 1998, 207 (*Eco Swiss v Benetton*).

⁸⁴ See Zöller, *Zivilprozeßordnung*, 24th edn (Otto Schmidt, Cologne, 2004), § 1055, no 7.

⁸⁵ See Zöller, supra fn 84, § 322, no 31.

⁸⁶ ATF 128 III 191, infra fn 97; see also Hohl, supra fn 71, at 246.

⁸⁷ E.g. Cass 94/8865.

⁸⁸ E.g. Cass 86/4137; 89/1892; 94/7890; and 95/1460.

Identity of the "thing claimed" is to be interpreted and applied narrowly. As such, *res judicata* will only vest in judgments provided the relief sought in a party's "*petitum*" in parallel or subsequent proceedings is identical.

Identity of the "same grounds" or "*causa petendi*" also requires that the legal basis for the claim should be identical in both proceedings. Consequently, later proceedings may be brought and the case can be relitigated if a party chooses to take a second shot and attempts to bring its case based on a different cause of action.

Under the French model, identity of the parties is to be construed strictly. First, they must be the same, or their universal successors (such as in the case of a legal merger) or successors having a specific title (such as an assignee). Generally, parties having an interest in the outcome of litigation or arbitration will not qualify as parties for *res judicata* purposes.⁸⁹ Secondly, a judgment or award will only constitute *res judicata* if a party in parallel or subsequent proceedings acts in the same capacity.⁹⁰ For example, it will act in a different capacity if it acts as a principal in the first proceedings and as an agent in the second proceedings.

Italian law also requires absolute identity of parties.⁹¹

E. Application to arbitral awards

Many Civil Law countries have also codified *res judicata* provisions regarding arbitral awards.

Article 1476 of the French NCPC states (in translation): "The arbitral award, from the moment that it has been given, shall carry the authority of *res judicata* in relation to the dispute which it has determined".⁹² This provision also applies to "awards made abroad or made in international arbitration" (per Article 1500).⁹³

Article 1703 of the Belgian Judicial Code provides that the arbitral award has *autorité de la chose jugée* if it has been notified to the parties and provided it does not violate public policy and that the subject-matter of the dispute was capable of settlement by means of arbitration.

In The Netherlands, only final or partial final awards may constitute *res judicata* and do so from the date of the making of the award (Article 1059(1) of the Code of Civil Procedure).⁹⁴ Depositing the award with the District Court is not a requirement for the award to obtain *res judicata* status. A statutory provision regarding *res judicata* was deemed necessary to establish that the award has become binding under the applicable law at the place of arbitration in relation to enforcement proceedings of such an award abroad under the 1958 New York Convention (Article V(1)(e)).

⁸⁹ See Couchez, Procédure civile, 12th edn (Armand Colin, 2002) at 213.

⁹⁰ In relation to French law, see Cadiet and Jeuland, supra fn 70 at 945; for Belgian law, see Article 23, *in fine* Belgian Code of Civil Procedure.

⁹¹ See Code of Civil Procedure Article 39; and Cass 85/811.

⁹² Taken from www.legifrance.gouv.fr.

⁹³ See e.g. Matthieu de Boissésou, Le Droit Français de l'Arbitrage: Interne et International (Joly, 1990) at 811; Fouchard, Gaillard & Goldman on International Commercial Arbitration (Kluwer, The Hague, 1999) at paras 12, 24, 1419, and 1567; and Delvolvé, Rouche & Pointon, French Arbitration Law and Practice (Kluwer, The Hague, 2004) at 194-196. However, the French judgment granting recognition to a foreign arbitral award will have *autorité de la chose jugée*; see, Pierre Mayer and Vincent Heuzé, Droit international privé, 7th edn (Montchrestien, 2001) at 408 and 427.

⁹⁴ See e.g. Snijders, Nederlands Arbitragerecht, 2nd edn (Kluwer, Deventer, 2003) at 252; and Tekst en Commentaar Burgerlijke Rechtsvordering (Kluwer, Deventer, 2002) at 1196, commentary by G. Meijer; and Lazic & Meijer, "The Netherlands Country Report", in Weigand (ed), Practitioners' Handbook on International Arbitration (Beck, 2002) at 934.

Article 1055 of the German Code of Civil Procedure provides that an arbitral award has the same effect between the parties as a final and binding court judgment.⁹⁵ See also Article 190 of the Swiss Act on Private International Law, and Article 823(6) of the Italian Code of Civil Procedure.

Swiss law also accepts the application of *res judicata* to awards on jurisdiction,⁹⁶ and partial final awards on substantive issues. Awards that deal with substantive preliminary issues are deemed not to constitute *res judicata*, but if the arbitral tribunal were to depart from its own decision, that may constitute a violation of procedural public policy entailing the setting aside of a subsequent award.⁹⁷

The Italian Code of Civil Procedure also states that an award may be annulled if it is contrary to a preceding court decision entered into force amongst the parties, provided that such objection has been raised in the arbitral proceedings (Article 829(8)). It is understood that the Italian courts and arbitral tribunals must recognise the *res judicata* effect of a foreign arbitral award if such award is recognised in Italy under the New York Convention.

In Sweden and Denmark, similar principles regarding *res judicata* apply to arbitral awards.⁹⁸ It is not clear whether their laws are more open than other Civil Law jurisdictions to accept some sort of issue preclusion. The Svea Court of Appeal recently held that one of the fundamental conditions for *res judicata* in Sweden is that the same parties are involved in both cases, and also that *res judicata* is not part of public policy and may be waived by a party.⁹⁹

In Spain, Article 43 of the new Arbitration Act provides that: "The final award has the effects of *res judicata* and shall only be subject to an application for revision in accordance with the procedure established in the Civil Procedure Act for final judgments".¹⁰⁰

Several Middle Eastern jurisdictions have followed the French model.¹⁰¹

F. European Council Regulation No. 44/2001

European Council Regulation No. 44/2001 on jurisdiction and the recognition of judgments in civil and commercial matters (and its predecessors, the 1968 Brussels Convention¹⁰² and the related Lugano Convention¹⁰³) prescribes which Contracting State has jurisdiction over a particular matter. The Regulation (and its predecessors) also contains specific rules dealing with the problems of actions pending in different Contracting States, and the enforcement of conflicting awards. In this context, the

⁹⁵ See e.g. Zöllner, *supra* fn 86, § 1055, no. 1; and Lörcher & Lörcher, Das Schiedsverfahren - national/international - nach Deutschem Recht (C.F. Müller, Heidelberg, 2001) at 87.

⁹⁶ Swiss Federal Supreme Court, ATF 127 III 279, and ATF 121 III 495. See also Honsell, Vogt, Schnyder & Berti, International Arbitration in Switzerland (Kluwer, 2000) at 572; and Francois Perret, "Parallel actions pending before an arbitral tribunal and a state court: the solution under Swiss law", ASA Special Series No 15, 2001, at 65, discussing *Compania Minera Condesa SA v BRGN-Perou SAS*, ATF 124 III 83; and Lalive, Poudret & Reymond, Le droit de l'arbitrage interne et international en Suisse (Lausanne, 1989) at 421.

⁹⁷ Swiss Federal Supreme Court, 3 April 2002, ATF 128 III 191, and see e.g. Bernard Corboz, "Le recours au Tribunal fédéral en matière d'arbitrage international", in Semaine Judiciaire (2002), Part II (Doctrine), vol 1, at 19.

⁹⁸ In Sweden, see e.g. *Esselte AB v Allmanna Pensionsfonden*, NJA 1998.189.

⁹⁹ *The Czech Republic v CME Czech Republic BV*, decision of the Svea Court of Appeal, 15 May 2003. An English translation appears in Mealey's International Arbitration Report, vol 18, issue #6, A1 - 37. For the underlying decision of the arbitral tribunal, which was being challenged, see *infra* fn 129.

¹⁰⁰ This is similar to Article 37 in the previous Act. See e.g. Sentencia Tribunal Constitution no 288/1993.

¹⁰¹ See e.g. Article 55 of the Egyptian Arbitration Act No. 27/1994, which provides that arbitral awards have the authority of *res judicata*.

¹⁰² Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, done at Brussels on 27 September 1968, 29 ILM 1413 (1990).

¹⁰³ Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, done at Lugano on 16 September 1988, 28 ILM 620 (1989).

European Court of Justice has opined on what is meant by "same cause of action" and "same parties" and "related actions", which may inform the debate on how these concepts should be applied when determining issues of *res judicata* in arbitration.¹⁰⁴ These decisions will be considered in the Committee's final report.

V. INTERNATIONAL LAW

A. General principle

It is widely accepted that *res judicata* is also a rule of international law.¹⁰⁵

In his famous dissenting opinion in the *Chorzow Factory Case* (1927) before the Permanent Court of International Justice ("PCIJ"), Judge Anzilotti referred to *res judicata* as one of the "general principles of law recognised by civilised nations"¹⁰⁶ (in the sense of Article 38(1)(3) of the PCIJ Statute,¹⁰⁷ now Article 38(1)(c) of the Statute of the International Court of Justice ("ICJ")¹⁰⁸).

Bin Cheng noted in 1953 that: "There seems little, if indeed any question as to *res judicata* being a general principle of law or as to its applicability in international judicial proceedings."¹⁰⁹

The ICJ has repeatedly recognized the principle of *res judicata*; for instance, in the *UN Administrative Tribunal Case*¹¹⁰ (1954), *Arbitral Award Case*¹¹¹ (1960), *South West Africa Case*¹¹² (1966), *Cameroon and Nigeria*¹¹³ (1998), and in the *Boundary Dispute between Qatar and Bahrain Case*¹¹⁴ (2001).

¹⁰⁴ See e.g. Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments* (Professional Books Ltd, Abingdon, 1987); Kaye, *Law of the European Judgments Convention* (Barry Rose Publishers Ltd, Chichester, 1999) vols 4 and 5; Keith Handley, "Res judicata in the European court", (2000) 116 LQR 191; and Helène Gaudemet-Tallon, *Compétence et exécution des jugements en Europe, Règlement n°44/2001 et Conventions de Bruxelles et de Lugano*, 3rd edn (LGDJ, 2002), at 325.

¹⁰⁵ See Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, 1953); Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996* (Kluwer, The Hague, 1997), vol III, at 1655-1661; Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press, 2003) at 27-28, 164-173 and 245-255; Vaughan Lowe, "Res judicata and the rule of law in international arbitration", (1996) 8 African Journal of International and Comparative Law 38; and August Reinisch, "The use and limits of *res judicata* and *lis pendens* as procedural tools to avoid conflicting dispute settlement outcomes", (2004) 3 The Law and Practice of International Courts and Tribunals 37.

¹⁰⁶ *Interpretation of Judgments Nos 7 & 8 Concerning the Case of the Factory at Chorzow*, 1927 PCIJ (Ser A) No 11, at 27. See also the advisory opinion of the PCIJ rendered two years earlier in *Polish Postal Service in Danzig*, 1925 PCIJ (Ser B) No 11, at 30.

¹⁰⁷ See also the comments of the Advisory Committee of Jurists appointed to draft the PCIJ Statute, in particular those of Mr Arturo Ricci-Busatti and Lord Phillimore, who recognised *res judicata* as a general principle accepted by all nations, *Procès-verbaux of the Proceedings of the Committee*, 16 June-24 July 1920, with Annexes (1920) at 315 and 335. See also Iain Scobbie, "Res judicata, Precedent and the International Court: A Preliminary Sketch", (1999) 20 *Australian Yearbook of International Law* 299; and Ole Spiermann, "'Who attempts too much does nothing well': the 1920 Advisory Committee of Jurists and the Statute of the Permanent Court of International Justice", (2002) 73 *British Yearbook of International Law* 187 at 216-7.

¹⁰⁸ Cf. Article 59 of the ICJ Statute, which provides that: "The decision of the Court has no binding force except between the parties and in respect of that particular matter".

¹⁰⁹ Bin Cheng, *supra* fn 105, at 336.

¹¹⁰ *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (1954) ICJ Rep 47 at 53.

¹¹¹ *Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v Nicaragua)*, 1960 ICJ Rep 192.

¹¹² *South West Africa Case* (1966) ICJ Rep 4 at 240.

The European Court of Justice ("ECJ") has also relied upon *res judicata* in declaring actions inadmissible in cases that have already been decided by previous judgments although the Court's Rules of Procedure do not expressly refer to *res judicata*.¹¹⁵

Arbitral tribunals applying international law have confirmed the doctrine of *res judicata*, including the *Pious Fund Arbitration*¹¹⁶ (1902), and the *Trail Smelter Case*¹¹⁷ (1935). The distinguished tribunal in *Amco v Indonesia (Resubmission: Jurisdiction)*¹¹⁸ (1988), after an extensive enquiry into the principle, stated:

"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 for recovery, cannot be disputed."

And the tribunal in *Waste Management v Mexico*¹¹⁹ (2002) stated:

"There is no doubt that *res judicata* is a principle of international law, and even a general principle of law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice."

Broadly speaking, there are four preconditions for the doctrine of *res judicata* to apply in international law, namely proceedings must: (i) have been conducted before courts or tribunals in the international legal order; (ii) involve the same relief; (iii) involve the same grounds; and (iv) be between the same parties.¹²⁰

B. Same legal order

Res judicata in international law relates only to the effect of a decision of one international tribunal on a subsequent international tribunal. International dispute settlement organs are not considered to be bound by decisions of national courts or tribunals.¹²¹

Included in the same legal order are tribunals established under treaties and mixed arbitration tribunals (between private investors and host States).¹²²

¹¹³ *Request for Interpretation of the Judgment of 11 June 1998 in the Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)*, 1999 ICJ Rep 31 at 39.

¹¹⁴ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, 2001 ICJ Rep para 303.

¹¹⁵ Case 14/64, *Mrs Emilia Gualco v High Authority of the European Coal and Steel Community* [1965] ECR 51; Cases 172, 226/83, *Hoogovens Groep v Commission* [1985] ECR 2831; Cases 358/85, 51/86, *France v. Parliament* [1988] ECR 4846 at 4849-50. See also Lasok, The European Court of Justice: Practice and Procedure, 2nd edn (Butterworths, London, 1994) at 219.

¹¹⁶ *Pious Fund of the Californias (US v Mexico)*, Hague Ct Rep (Scott) 1 at 5.

¹¹⁷ *Trail Smelter (US v Canada)*, 3 RIAA 1905 at 1950.

¹¹⁸ *Amco Asia Corp v Indonesia (Resubmission: Jurisdiction)*, ICSID, 89 ILR 552 at 560. The tribunal comprised Rosalyn Higgins (UK - President), Marc Lalonde (Canada) and Per Magid (Denmark).

¹¹⁹ *Waste Management Inc v Mexico (Mexico's Preliminary Objection)*, ICSID, decision dated 26 June 2003, (2002) 41 ILM 1315. The tribunal comprised James Crawford (Australia - President), Eduardo Gomez (Mexico), and Benjamin Civiletti (USA).

¹²⁰ The requirement that items (ii) to (iv) must exist was confirmed by the tribunal in *CME Czech Republic BV v The Czech Republic* (comprising Wolfgang Kuhn (Germany - Chairman), Stephen Schwebel (USA) and Ian Brownlie (UK)), in Final Award, dated 14 March 2003, *infra* fn 129, para 435; also see Lowe, *supra* fn 105.

¹²¹ See e.g. Brownlie, Principles of Public International Law, 6th edn (Clarendon Press, Oxford, 2003) at 50, where he states that "There is no effect of *res judicata* from the decision of a municipal court so far as an international jurisdiction is concerned ...".

¹²² E.g. *Boundary Dispute between Qatar and Bahrain*, *supra* fn 114.

C. Identity of relief

Res judicata applies only if the "object" or "*petitum*" of two claims are the same.¹²³

Whilst this requirement is said to apply strictly, "claim splitting" will not always be accepted (for example, by first seeking *restitutio in integrum*, and later in separate proceedings seeking monetary compensation).¹²⁴

D. Identity of grounds

For *res judicata* to apply, the "cause" or "grounds" or "*causa petendi*" of the two claims must also be the same.¹²⁵

It is not uncommon that acts and omissions of States (or other international actors) are subject to more than one treaty instrument, and therefore more than one dispute settlement mechanism. In theory, actions brought under different instruments constitute different "causes". In some cases, however, this might be an artificial distinction, for example if the legal obligation (e.g. not to expropriate an investment) is the same.

In the *Southern Bluefin Tuna Case*¹²⁶ (2000), an arbitral tribunal under the 1982 UN Convention on the Law of the Sea ("UNCLOS") had to determine whether a dispute about Japanese fishing practices was to be settled under the Convention for the Conservation of Southern Bluefin Tuna 1993 ("CCSBT") or (also) under UNCLOS. In the course of assessing the character of the legal dispute at issue, the UNCLOS tribunal stated:

"[T]he Parties to this dispute ... are the same Parties grappling not with two separate disputes but with what in fact is a single dispute arising under both Conventions. To find that, in this case, there is a dispute actually arising under UNCLOS which is distinct from the dispute that arose under the CCSBT would be artificial."¹²⁷

A number of commentators favour an approach that looks at the underlying nature of a dispute and not at its formal classification.¹²⁸

However, the authorities seem to be divided on this issue. For instance, the tribunal in *CME Czech Republic BV v The Czech Republic*¹²⁹ (2003) indicated that claims brought under separate bilateral investment treaties by an investor and its controlling shareholder, concerning the exact same alleged acts of expropriation, constituted separate causes.

¹²³ See *Bin Cheng*, supra fn 105, at 340.

¹²⁴ See *Bin Cheng*, supra fn 105, at 344.

¹²⁵ See e.g. *Bin Cheng*, supra fn 105, at 345; and *Waste Management*, supra fn 119, at para 43, where the tribunal stated that "a judicial decision is only *res judicata* if it ... concerns the same question as that previously decided".

¹²⁶ *Southern Bluefin Tuna Case (Australia and New Zealand v Japan)*, Award on Jurisdiction and Admissibility, 4 August 2000, 39 ILM 1359.

¹²⁷ Supra fn 126, at 1388, para 54.

¹²⁸ See e.g. Reinisch, supra fn 105.

¹²⁹ Final Award, dated 14 March 2003, para 433. Mr Lauder had made an investment in the Czech Republic through a Dutch intermediary holding company that he controlled, CME Czech Republic BV. It was alleged that the investment had been expropriated. Two arbitrations were commenced: one under the US - Czech Republic BIT by Mr Lauder; the other under the Netherlands - Czech Republic BIT, by CME CR BV. For the purposes of the expropriation claims, the facts were the same in each arbitration. The Lauder tribunal issued its Final Award on 3 September 2001 finding the Czech Republic not liable. The CME Tribunal issued a Partial Award on Liability on 13 September 2001 finding against the Czech Republic and holding it liable to pay damages. In the second (quantum) phase of the CME arbitration, the Czech Republic argued that the Lauder Final Award had a *res judicata* effect on questions of liability. The three awards can be found at <http://ita.law.uvic.ca>

The *CME* tribunal quoted the tribunal in *The Mox Plant Case*¹³⁰ (2001), which stated that: "the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, inter alia, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*".

The *CME* tribunal also noted that: "Moreover, the fact that one tribunal is competent to resolve the dispute brought before it does not necessarily affect the authority of another tribunal, constituted under a different agreement, to resolve a dispute - even if it were the "same" dispute."¹³¹

In contrast to the possibility of multiple claims brought under the same or various investment treaties in respect of the same investment, Article 1121 of NAFTA precludes an investor from bringing a NAFTA claim against one of the NAFTA parties while he (or an enterprise that he "owns or controls") simultaneously brings another claim arising out of the same governmental measure.¹³²

E. Identity of Parties

"Identity of the parties" is unequivocally stated as a requirement for the application of *res judicata* in almost all of the international precedents (e.g. the recent decision in *Waste Management*¹³³). International tribunals have not always taken a very strict approach, however.

Arbitral tribunals operating under the auspices of ICSID have on occasions followed an "economic approach" with regard to jurisdiction.¹³⁴ It may be argued that if such an "economic approach" is accepted for jurisdictional purposes, the same standard should also be applied for purposes of *res judicata*: otherwise individual companies of a corporate group (constituting a single economic entity) might avail themselves of the possibility to endlessly re-litigate the same dispute under the disguise of formally separate legal identities.

Other fields of modern international economic law have adopted a similar "economic or realistic approach" vis-à-vis corporate entities by focusing on the underlying economic realities instead of the formal legal structure of corporate groupings, for example in EC competition law.¹³⁵

However, the tribunal in *CME Czech Republic BV v The Czech Republic*, applying international law, held that *res judicata* did not apply to the earlier award made by the tribunal in *Lauder v The Czech Republic* because, inter alia, the claimants in each arbitration were different (albeit that Mr Lauder was the controlling shareholder of CME).¹³⁶

¹³⁰ *The Mox Plant Case (Ireland v UK)*, Request for Provisional Measures, ITLOS, Case No. 10, 3 December 2001, para 51.

¹³¹ Final Award, dated 14 March 2003, para 435. The tribunal cited as authority: *Certain German Interests in Polish Upper Silesia, Jurisdiction* (1925) PCIJ, Series A, No. 6, at 20 (PCIJ jurisdiction not barred by the existence of separate proceeding); *American Bottle Company (US v Mexico)*, (1929) 4 RIAA 435 at 437 (submission to another tribunal of identical dispute between same parties has no effect on tribunals jurisdiction); and *SSP (ME) Ltd v Egypt* (First Decision on Jurisdiction, 27 November 1985), 106 ILR 502 at 529.

¹³² See e.g. William Dodge, "National courts and international arbitration: exhaustion of remedies and *res judicata* under Chapter Eleven of NAFTA", (2000) 23 *Hastings Int'l & Comp Law Rev* 357 at 366; Charles Brower and Jeremy Sharpe, "Multiple and conflicting international awards", (2003) 4 *Journal of World Investment* 211; and Charles Brower, Charles Brower II and Jeremy Sharpe, "The coming crisis in the global adjudication system", (2003) 19 *Arbitration International* 415.

¹³³ *Supra* fn 119, at para 39. See also Bin Cheng, *supra* fn 105, at 340.

¹³⁴ See Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001), Article 25, para 216.

¹³⁵ See e.g. Case 48/69 *ICI v Commission (Dyestuffs Case)* [1972] ECR 619, para 133; Case 52/69 *Geigy v Commission* [1972] ECR 787, para 44; and Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215, para 15.

¹³⁶ Final Award, dated 14 March 2003, *supra* fn 129, para 432.

The tribunal stated that: "Only in exceptional cases, in particular in competition law, have tribunals or law courts accepted a concept of a 'single economic entity', which allows discounting of the separate legal existences of the shareholder and the company, mostly, to allow the joining of a parent of a subsidiary to an arbitration. Also a 'company group' theory is not generally accepted in international arbitration (although promoted by prominent authorities) and there are no precedents of which this Tribunal is aware for its general acceptance. In this arbitration the situation is even less compelling. Mr Lauder, although apparently controlling CME Media Ltd, the Claimant's ultimate parent company, is not the majority shareholder of the company and the cause of action in each proceeding was based on different bilateral investment treaties. This conclusion accords with established international law."¹³⁷

F. *Res judicata* extending beyond *dispositif*

The debate whether *res judicata* attaches to the entire decision including its reasoning or to the ruling or *dispositif* only also occurs in respect of international law decisions.¹³⁸

The authorities appear to be in favour of the extended civil law approach described above.¹³⁹ For example, in the *Channel Arbitration*¹⁴⁰ (1978), the tribunal stated that although *res judicata* "attaches in principle only to the provisions of [the decision's] *dispositif* and not to its reasoning", it was equally clear that "having regard to the close links that exist between the reasoning of a decision and the provisions of its *dispositif*, recourse may in principle be had to the reasoning in order to elucidate the meaning and scope of the *dispositif*." Professor Vaughan Lowe notes that to have *res judicata* effect, it is not necessary that a particular finding be "executed" by the ordering of action in implementation in the *dispositif*, and that it is enough that the finding be clearly a determination by the tribunal.¹⁴¹

Concerning the ECJ, it has been said that the "extent of the effect of *res judicata* is defined by reference to the operative part of the judgment and to the reasoning in the judgment which supports it. The effect covers only those questions of fact and law actually or necessarily decided in the judgment."¹⁴²

G. Abuse of process

International law recognises a doctrine of abuse of process, but it is extremely rarely applied.¹⁴³

VI. INTERNATIONAL ARBITRATION

A. Arbitration Rules

The binding effect of arbitral awards is prescribed by many institutional rules. For example, Article 28(6) of the ICC Rules provides: "Each Award shall be binding on the parties. By submitting the dispute to arbitration under these rules, the parties undertake to carry out any Award without delay ...". The LCIA Rules, Article 26.9, and the UNCITRAL Rules, Article 32(2), provide that the award shall be "final" and "binding".

¹³⁷ Final Award, dated 14 March 2003, supra fn 129, para 436. The tribunal cited as authority: *Barcelona Traction Case (Belgium v Spain)* Second Phase, ICJ Rep 1970, 3, 48-50; *Holiday Inns SA v Morocco*, in Pierre Lalive, "The First World Bank Arbitration - Some Legal Problems", (1993) I ICSID Reports 645 at 664. A similar conclusion was reached by the Svea Court of Appeal, applying Swedish law, in challenge proceedings brought by the Czech Republic, see decision dated 15 May 2003, an English translation appears in Mealey's International Arbitration Report, vol 18, issue #6, A1 - 37.

¹³⁸ See Scobbie, supra fn 107, at 303.

¹³⁹ See e.g. the *Pious Fund Arbitration* (1902), supra fn 116; the majority opinion in the *Chorzow Factory Case* (1927), supra fn 106, at 14; and *Amco v Asia (Resubmitted: Jurisdiction)*, supra fn 118, at 551.

¹⁴⁰ *Delimitation of the Continental Shelf (UK v France)*, 18 RIAA 271 at 295 (1978).

¹⁴¹ Lowe, supra fn 105, at 40.

¹⁴² Lasok, supra fn 115, at 220.

¹⁴³ See e.g. Shany, supra fn 74; and *Waste Management*, supra fn 119, at paras 48-50.

Such provisions confirm the positive *res judicata* effect of an award. It might also be said that by agreeing to arbitration pursuant to such rules, the parties accept the negative *res judicata* effect of any valid arbitral award.

Moreover, the ICC Rules prescribe, in Article 25(2), that an award shall "state the reasons upon which it is based". Other institutional rules have similar provisions (e.g. LCIA Article 26.1, UNCITRAL Article 32(3)). V.V. Veeder QC has argued that the upshot of ICC Articles 25(2) and 28(6), and similar provisions in the other rules, is that the an "award" includes "the reasons", and that therefore the reasons are also final and binding, and that this effectively implements issue estoppel.¹⁴⁴

We are not aware of any arbitration rules that give guidance as to how a tribunal should deal with issues of *res judicata* (either raised by the parties or ex officio), save for the general provisions that prescribe that the tribunal must act within its jurisdiction and apply the applicable law.

B. UNCITRAL Model Law

Article 35(1) of the UNCITRAL Model Law on International Commercial Arbitration states that an arbitral award, irrespective of the country in which it was made, shall be recognised as binding. Thus, the *res judicata* effect of arbitral awards is recognised. The legislative history of the Model Law indicates that it was debated whether the binding effect of awards should be clarified as to mean only between the parties to the award; however, this was considered not to be necessary and the effort was abandoned.¹⁴⁵

The Model Law does not expressly address whether an award can be set aside, or its enforcement refused, if it is inconsistent with an earlier decision in the forum that is *res judicata*.¹⁴⁶

C. National laws

As noted above, a number of Civil Law jurisdictions expressly recognise in legislation that arbitral awards have *res judicata* effect.

Professor Schlosser has observed that: "Nowhere in a statute of a common law country is it stated that an arbitral award has *res judicata* effect like a judgment".¹⁴⁷ Nevertheless, the *res judicata* effect of an award is well established by case law in Common Law jurisdictions, as described above.

D. New York Convention

Article III of the 1958 New York Convention states that: "Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon under the conditions laid down in the following articles." This provision recognises that an arbitral award has *res judicata* effect, but the Convention does not expressly address what an enforcement court should do if faced with more than one decision concerning the same dispute.

E. Arbitral practice

Arbitral awards are generally regarded as having *res judicata* effect, to a greater or lesser extent.¹⁴⁸

¹⁴⁴ See V.V. Veeder QC, "Issue Estoppel, Reasons for Awards and Transnational Arbitration", in Complex Arbitrations: Perspectives on their Procedural Implications, (Special Supplement - ICC International Court of Arbitration Bulletin, 2003) at 73.

¹⁴⁵ See Holtzmann. & Neuhaus, A Guide to the UNCITRAL Model Law on International Commercial Arbitration, (Kluwer, Deventer, 1989) at 1010-1011.

¹⁴⁶ Cf. express provisions to this effect in some national legislation (e.g. Italy, see text supra page 16 and fn 79).

¹⁴⁷ Peter Schlosser, "Arbitral Tribunals or State Courts: Who must defer to whom?", ASA Special Series No 15, 2001, at 21.

¹⁴⁸ See e.g. Redfern & Hunter, Law and Practice of International Commercial Arbitration (Sweet & Maxwell, London, 1999) at 395; Fouchard, Gaillard & Goldman on International Commercial Arbitration (Kluwer, The Hague, 1999) at para 1419; and Mauro Rubino-Sammartano, International Arbitration Law and Practice, 2nd edn, (Kluwer, The Hague, 2001) at 787-797.

There are many reported cases where commercial arbitral tribunals have applied *res judicata* principles.¹⁴⁹

To take just one example, a recent Swiss award (2002) held that "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*".¹⁵⁰

The final report will further address instances where arbitral tribunals have been faced with *res judicata* issues, including the scope of *res judicata* in international commercial arbitration and the triple identity test. For present purposes, we briefly mention three relevant issues.

F. *Res judicata* extending beyond *dispositif*

ICC Cases Nos 2745 and 2762 (1977) may be cited as examples of application of the extended doctrine.¹⁵¹ These cases involved chain sales contracts. In ICC Case No. 1762 (1970), the first buyer in the chain was held to be liable to the subsequent party in the chain. In the motivation (but not in the *dictum*) of the award, it was held that the first buyer could not invoke *force majeure* or breach by further companies in the chain to escape from liability. When the subsequent party was sued in ICC Case No. 2745 by the following party in the chain, it brought Case No. 2762 against the first buyer seeking to be held harmless if it were to be found liable. The cases being joined, the arbitral tribunal held that it was bound by the prior ICC award in Case No. 1762 disposing of the relationship between the same parties as in Case No. 2762. In the opinion of the tribunal, it would be paradoxical not to be bound by another prior ICC award. Also, the tribunal sitting in Paris held that *res judicata* was to be determined in accordance with French concepts, being the law of the place of the arbitration chosen by the parties. German law as the law of the sales contract was not to be applied. The larger French notion of *res judicata* extending to the elements of the reasoning which form the necessary support for the holding was followed rather than the stricter German concept of the *dictum* only.

A similar conclusion was reached in ICC Case No. 3267 (1984). A tribunal chaired by Professor Reymond, applying Swiss law, when asked to consider the *res judicata* effect of its earlier partial award, held that "the binding effect of its first award is not limited to the content of the order thereof adjudicating or dismissing certain claims, but that it extends to the legal reasons that were necessary for such order, i.e. to the *ratio decidendi* of such award."

G. Partial awards

Partial final awards are generally recognised as being *res judicata* (e.g. ICC Case No. 3267 (1984) referred to in the previous paragraph) and any attempt at revision must be made to the supervisory national court.

One authoritative tribunal in an *ad hoc* arbitration under the UNCITRAL Rules has indicated that exceptions exist in the case of fraud:¹⁵²

"... a court or Tribunal, including this international arbitral Tribunal, has an inherent power to take cognisance of credible evidence, timely placed before it, that its previous determinations were the product of false testimony, forged documents or other

¹⁴⁹See e.g. Bernard Hanotiau, "The *Res Judicata* Effect of Arbitral Awards", published in Complex Arbitrations: Perspectives on their Procedural Implications, (Special Supplement - ICC International Court of Arbitration Bulletin, 2003) at 43; Dominique Hascher, "L'autorité de la chose jugée des sentences arbitrales", in Travaux du Comité Français de DIP, (Pédone, 2004); the cases published in the four volumes of Collection of ICC Arbitral Awards (ICC Publishing, Paris), the Yearbook of Commercial Arbitration (Kluwer, The Hague), and the Kluwer Arbitration website "www.arbitration.com" and arbitration CD-Rom.

¹⁵⁰ *A v Z*, Order no 5 of 2 May 2002, ASA Bulletin, vol 21 no 4 (2003) at 810. The tribunal comprised Marcus Wirth (Chairman), Gabrielle Kaufmann-Kohler, and Franz Kellerhans.

¹⁵¹ Collection of ICC Arbitral Awards 1974-1985 (ICC Publishing, Paris, 1990), at 326.

¹⁵² *Antoine Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, Awards of 27 October 1989 and 30 June 1990, reprinted in (1994) XIX Yearbook Commercial Arbitration 11 at 22-23. The tribunal comprised Stephen Schwebel (Chairman - USA), Don Wallace (USA), and Monroe Leigh (USA).

egregious 'fraud on the tribunal'... Certainly if such corruption or fraud in the evidence would justify an international or a national court in voiding or refusing to enforce the award, the Tribunal also, so long as it still has jurisdiction over the dispute, can take necessary corrective action. ...".

In addition, the French Cour de Cassation has held that the arbitral tribunal could itself, if it remains constituted after making if the award (or can be reconstituted), revise its earlier award in the case of fraud.¹⁵³

F. Issue estoppel / abuse of process

There is a debate as to whether arbitral tribunals can and should apply issue or collateral estoppel, and it is generally assumed that arbitral tribunals do not apply any principle akin to abuse of process.¹⁵⁴ The answer may depend on the applicable law. In a recent ICC award,¹⁵⁵ a tribunal sitting in France but applying New York law found that the claimant should have asserted its present claim by way of counterclaim or defence in earlier ICC proceedings and that having had a full and fair opportunity to do so and, not having done so, was now barred from bringing a second action seeking relief inconsistent with the earlier award. Whilst this was an application of the US principle of claim preclusion, it is akin to the English concept of abuse of process.

VII. KEY ISSUES

The most relevant questions concerning the application of *res judicata* in arbitration, which occur to the Committee and will be addressed in its final report, are set out below.

A. What are the policy considerations underpinning *res judicata*?

In order to determine how *res judicata* should apply in international arbitration, it is necessary first to consider what are the policy reasons underpinning *res judicata*, and whether they are the same for international arbitration as for domestic litigation, having regard to the mixed nature of the doctrine of *res judicata*, which pertains both to public policy and to private justice. For example, how should the fact that an arbitral tribunal determines its own procedure, and that in many cases arbitral procedures are more informal than court procedures, affect the *res judicata* of arbitral awards? Likewise, how should the fact that arbitral proceedings are often confidential affect the scope and application of the doctrine in subsequent proceedings? The Committee's final report will seek to address these issues, and will consider whether the doctrine should apply, without discrimination, to both judgments and arbitral awards.

B. Is *res judicata* based on normative law?

Res judicata is a well-established principle of normative law in most legal systems, although the scope of the doctrine varies. In many legal systems, *res judicata* is confirmed in legislation (in particular, codes of civil procedure). However, *res judicata* as applied to arbitral awards could also be analysed in terms of contractual obligations (e.g. on the basis of *pacta sunt servanda*), and in particular the effect of parties agreeing to institutional arbitration rules that provide that any award shall be final and binding. On that basis, a party may be estopped by contract law principles such as renunciation or waiver from having its case tried anew in subsequent proceedings. Alternatively, it might be argued that the agreement to arbitrate is rendered inoperable in the event that a party seeks to re-arbitrate the same dispute. The final report will contemplate these issues at greater length and detail.

C. What is the applicable law for determining the *res judicata* effect of a prior award?

In determining the *res judicata* effect of a prior award, there are three relevant legal systems to consider: (i) the emitting legal system, where the first decision was made; (ii) the *lex fori*; and (iii) the *lex arbitralis*. The governing law of the parties' relationship appears not to be relevant. The final report will address the question of whether international arbitration warrants a more autonomous approach,

¹⁵³ *Fougerolles v Procofrance*, Cass Civ 1er, 25 May 1992, reprinted in (1994) XIX Yearbook Commercial Arbitration 205. See also Fouchard et al, supra fn 93, para 1599.

¹⁵⁴ See e.g. comments of the Svea Court of Appeal in the *CME* challenge case, supra fn 99.

¹⁵⁵ Provided in a sanitised version, with names and dates deleted, by one of the Committee members.

under which the *res judicata* rules that apply to arbitral awards may be different from those rules of national law that apply to judgments, having regard to the distinguishing features of international arbitration such as its contractual foundation, party autonomy and internationalised procedures.

Assuming a more autonomous or harmonised approach is desirable, the following questions arise.

D. Can the divide between Common Law jurisdictions with broader notions of *res judicata* (not only cause of action estoppel but also issue estoppel, former recovery and/or abuse of process) and Civil Law jurisdictions be bridged in international commercial arbitration?

Is there a need and possibility to overcome this divide or must differences be accepted as a fact of legal life to be coordinated by conflict rules?

E. Is the principle of *res judicata* part of procedural or substantive law?

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.

F. Does *res judicata* go to jurisdiction or admissibility?

On one analysis, a claim that is finally determined by a court or tribunal is extinguished and no subsequent tribunal has jurisdiction to determine that claim. On another analysis, a subsequent tribunal has jurisdiction so long as it is properly constituted but it should not admit evidence that contradicts a prior determination of the same claim. The Committee did not reach a conclusion whether the *res judicata* doctrine goes to jurisdiction or admissibility, or even possibly to the merits. The final report will address these issues.

G. Is it just the *dispositif* that has *res judicata* effect?

In Switzerland, Germany and Sweden, it is said that just the *dispositif* has *res judicata* effect. In France, Belgium and the Netherlands, it may be possible to look at the reasoning. In England and the US, the essential elements of the reasoning give rise to issue estoppel.

H. If more than the *dispositif*, what documents may be produced to justify *res judicata*?

The Committee will further consider whether, in order to establish *res judicata*, an applicant should only be entitled to rely on the prior award and its reasoning, or also on the parties' pleadings, and on evidence submitted to the tribunal. There may be issues relating to the confidentiality of the prior arbitral proceedings.

I. How strict should be the requirements of identity of parties, cause of action and subject matter?

"Triple identity" is often said to be a strict requirement, although a number of judges and commentators advocate a more liberal approach based on economic reality. Is there a need and are there possibilities to extend *res judicata* effects to "privies in interest", such as in relation to groups of companies and what requirements, if any, should apply? Similar questions arise as to mutuality and third party effects of previous judgments and arbitral awards.

J. Does an award on jurisdiction have *res judicata* effect?

The Common Law answer seems to be negative, while the answer is more qualified in Civil Law jurisdictions. Further analysis and discussion in the final report will be needed.

K. For *res judicata* to apply, must the respective tribunals be of the same legal order?

Is the traditional line between national courts and arbitral tribunals, on the one hand, and supranational courts and public international law tribunals, on the other hand, to be maintained for purposes of application of *res judicata*, or should qualifications be made to that principle? Do domestic courts and arbitral tribunals belong to separate legal orders, and if so, what is the consequence with regard to *res judicata*? How should *res judicata* apply in investment treaty cases, where there might be prior and/or concurrent court and/or other treaty proceedings?

L. Before a foreign judgment/award is given *res judicata* effect, must it be capable of recognition at the place of arbitration?

This question goes to whether only judgments/awards that can be, or have been, formally recognised at the place of arbitration should be given *res judicata* effect? And can and should the arbitral tribunal itself determine whether such judgment/award would be prime facie recognised and/or enforced pursuant to the applicable law, or must this be left to the domestic courts to determine?

M. Is a partial final award *res judicata* on the tribunal that issued it?

Subject to confirmation in the final report, the answer seems to be positive, save in exceptional circumstances such as fraud on the tribunal.

N. Are there circumstances when *res judicata* should not be applied where it would otherwise be applicable?

Are public policy and non-arbitrability of the subject matter of the dispute grounds to refuse application of the doctrine of *res judicata*? Are there other exceptions such as fraud or new evidence available after the closure of the arbitral proceedings? Is inconsistency with an existing enforceable judgment sufficient reason?

O. Is *res judicata* a principle of public policy?

In some jurisdictions, *res judicata* is not considered to be a principle of public policy, and it must be raised by the parties, and therefore it can be waived by the parties. In others, it may be raised ex officio. In some jurisdictions, some aspects of *res judicata* may be part of procedural public policy. This issue is related to the next question.

P. Is failure to apply *res judicata* a ground for setting aside or refusal to enforce an award?

If *res judicata* is part of procedural public policy, failure by an arbitral tribunal to apply the doctrine could prove fatal for any award. However, like other types of procedural public policy, application of the *res judicata* doctrine may be capable of being waived. The final report will consider this question further.

Professor Filip De Ly
Chairman
and
Audley Sheppard
Rapporteur