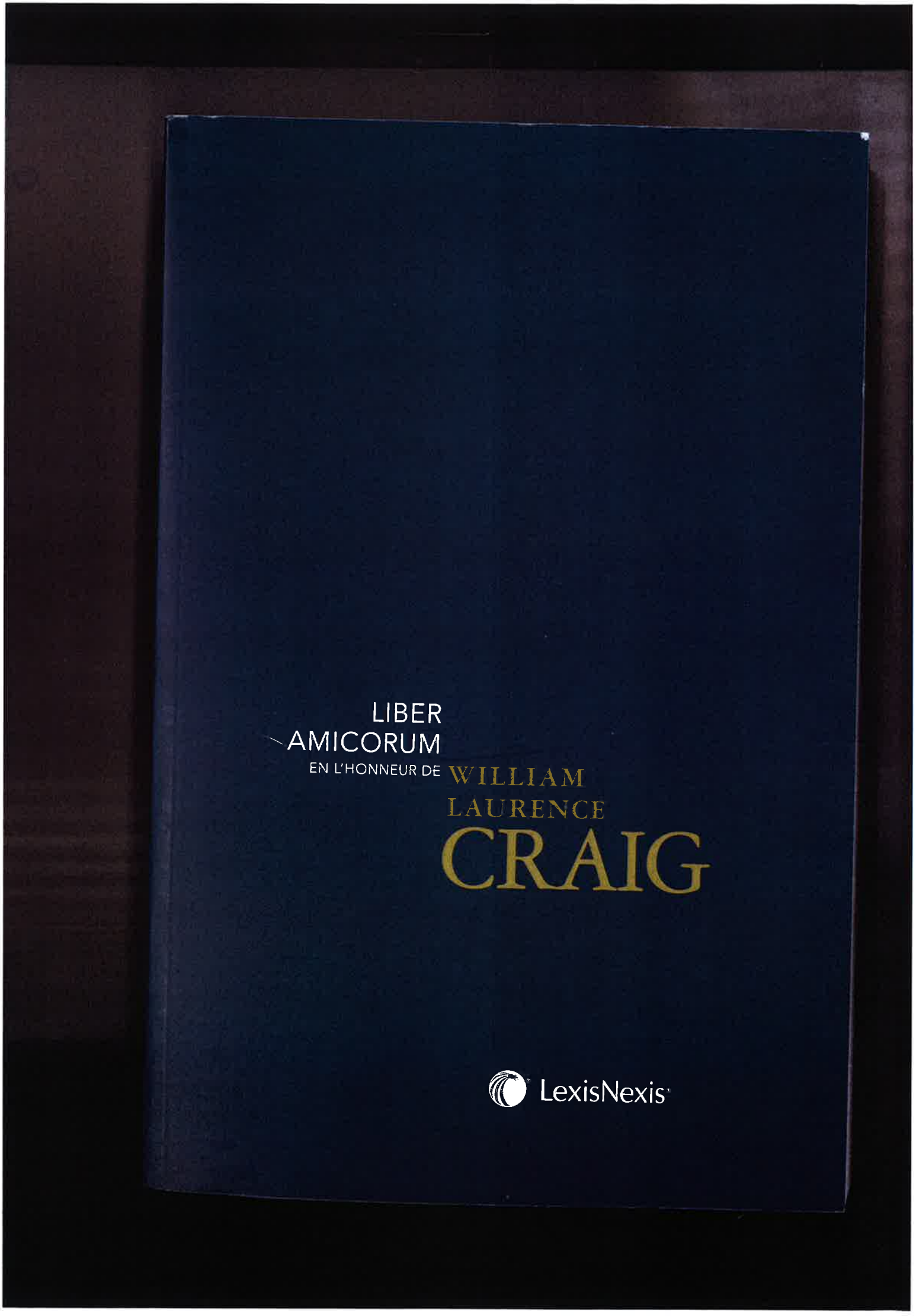
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RES JUDICATA: A CONTRIBUTION TO THE DEBATE ON CLAIM PRECLUSION IN INTERNATIONAL ARBITRATION

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The principle of *res judicata* is reflected almost universally across national legal systems. It is also one of the oldest "general principles of law" incorporated into the international legal order through awards, decisions, and rules of various arbitral bodies and treaties. Starting before the PCIJ and in arbitrations, there is over a hundred years of precedent for its application.

As the proliferation of international dispute settlement continues, so too will recourse to general principles of law. In respect of *res judicata*, and the rise of its close common-law relation, collateral estoppel, we suggest caution in its application. Simply put, where a tribunal has the opportunity to apply *res judicata* in favour of the *reasoning* of a previous tribunal, it steps closer towards imposing a kind of *stare decisis*, or doctrine of precedent.

This article is not comprehensive, but aims to give an overview of the relevant national and international rules and case law. *First*, through a working definition of *res judicata*, and collateral estoppel. *Then*, by way of a short review of the concept of *res judicata* in national civil and common law jurisdictions, addressing the conceptualisation of the principle in some countries in greater depth. *Then again* as to the principle in international law generally and in international arbitration. *Finally*, we venture some comments in conclusion.

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I. – DEFINING *RES JUDICATA*

Res judicata is a Latin term meaning "a matter adjudged." The term is used to describe the concept of claim preclusion, or the notion that a decided dispute is final as between the parties to it and that when such a dispute between the parties has been adjudicated, the same dispute may not be re-adjudicated.

A party to the initial dispute settlement proceeding may thus rely on the final and binding nature of the action. This is the "positive effect" of *res judicata* and is largely uncontroversial. Indeed, the Permanent Court of International Justice ("PICJ") succinctly wrote that, "*{r}ecognition of an award as res judicata means nothing else than recognition of the fact that the terms of that award are definitive and obligatory.*" [1] On the other hand, the "negative effect" of *res judicata* is that the final decision effectively *precludes* any further litigation on the same subject as between the parties to that decision. It is in the application of the negative – or preclusive – effect of *res judicata* that some delicate issues can arise.

For the principle of *res judicata* to operate to preclude an action, courts and tribunals have frequently held that three elements must be present. First, *persona*: the parties to the subsequent action must be the same as in the prior action; second, *petitum*: the subject matter of the subsequent action must be the same as in the prior action; and third, *causa petendi*: there must be a final decision in the prior action.

A concept closely related to claim preclusion is "issue preclusion," a common law concept also referred to as "collateral estoppel." (The terms are used interchangeably hereafter). In some common-law legal systems, issue preclusion operates to bar the re-litigation of an issue or issues decided *within* a previous action between the same parties, on which there has been a final determination. It generally only applies as between the same parties, but in certain cases may apply where the subsequent litigation includes other parties. The concept of issue preclusion is evoked hereafter, as its use in international arbitration has become more frequent (though still remains somewhat unusual).

Res judicata, in the arbitral sense, is most likely implicated in one of three ways: *first*, as between a prior arbitration and a subsequent arbitration, *second*, as between a partial award and a final award, or *third*, as between a court action and an arbitration.

Importantly, *res judicata* must be differentiated from *lis pendens*, which is implicated when the earlier action is ongoing when the subsequent action is initiated.

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1. *Société Commerciale de Belgique* (*Belgium* v. *Greece*), 1939 P.C.I.J. (ser. A/B) n° 78 (June 15), p. 19.

II. – *RES JUDICATA* IN DOMESTIC LEGAL SYSTEMS

The concept of *res judicata* is found across domestic legal systems of almost all countries. However, there is somewhat of a divide between civil and common law jurisdictions. In European civil law jurisdictions, *res judicata* is generally codified in statute, lending itself to a more proscriptive, formal version of the principle,[2] whereas in the common law jurisdictions, being derived at least in part from case law, the notion tends to be a broader, more expansive one and also includes the concept of issue preclusion.

A. – Civil Law Approach

In civil jurisdictions, *res judicata* is usually only applied to the dispositive part of the judgement. This is true of, for example, the Swiss conception of *res judicata*, where the preclusive effect of a previous judgement is confined to the conclusions reached, rather than the reasons upon which such conclusions rest.[3] While the reasons of course provide a valuable tool by which to interpret the judgement and thus may be considered 'prejudicial,' the force of *res judicata* does not attach to them.[4]

In Swiss law, a prerequisite for any application of *res judicata* is that a judgement is final and binding. A judgement is final where it is no longer subject to appeal.[5] The preclusive effects of a judgement in Switzerland are strictly interpreted to attach only to the dispositive part of the decision.[6] The Swiss Federal Tribunal (the supreme court of Switzerland) has stated that findings of fact and determinations in respect of legal relationships do not have a preclusive effect.[7] In fact,

> "[E]ven conclusions which would logically derive from a judgment are not deemed to become legally binding as such. As a consequence, a question which has

2. *See*, for example, Italian Civil Code, Art. 2909 and Art. 324; French Code of Civil Procedure, Art. 1484; However still others are silent, such as the Swiss Civil Code.
3. *See* ATF 4A_508/2013, 3.2. An English translation of this decision is available here: http://www.swissarbitrationdecisions.com/res-judicata-effect-foreign-judgment. *See also* BGE 123 III 16 of Jan. 15, 1997 and *infra* note 4.
4. *See* ATF 4C_314/2004 of Nov. 17, 2004, http://www.polyreg.ch/bgeunpub/Jahr_2004/Entscheide_4C_2004/4C.314__2004.html.
5. If a judgement is subject to appeal, any subsequent action between the same parties on the same subject would not implicate *res judicata* – but it may be subject to *lis pendens*.
6. *See* ATF 4C_314/2004, *supra*, note 4.
7. *See* ATF 4C_130/2003 of Aug. 28, 2003. http://www.polyreg.ch/bgeunpub/Jahr_2003/Entscheide_4C_2003/4C.130__2003.html. A view recently confirmed by the Swiss Federal Tribunal in a judgement of May 29, 2015 refusing to accept the view that *res iudicata* should sometimes extend to the *reasons* of an international arbitral award. The case is 4A_633/2014. It is in German and available on the Court's website www.bger.ch A translation will be available later on www.swissarbitrationdecisions.com.

> only been determined as a preliminary issue (*Vorfrage*) in the judgment (*i.e.*, the finding is only contained in the reasons of the judgment, but not stated upon in the operative part) does not become legally binding. [For example, the] determination of the existence of a loan agreement in a litigation, in which the creditor claims interest, does not preclude the debtor from asserting the invalidity of the agreement in later proceedings regarding the repayment of the loan. Hence, other than the principal issues (*Hauptfrage*) which were subject to the claim – or a counterclaim (*Widerklage*) – and constitute the matter in dispute determined by the judgment (and stated upon in its operative part) are – in principle – not precluded under Swiss law." [8]

In France, the concept is known as *autorité de la chose jugée*, and is formulated as follows:

> "L'autorité de la chose jugée n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement. Il faut que la chose demandée soit la même; que la demande soit fondée sur la même cause; que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité." [9]

In respect of arbitration, however, the French conception is broader. According to Article 1484 of the French Code of Civil Procedure (which is also applicable to international arbitration [10]) *res judicata* attaches to all determinations in the award. *"The arbitration award, once it is made, has the authority of res judicata with respect to the dispute to which it relates.* (...)" [11]

The Paris Court of Appeal, expanding thereon, noted that

> "As no legal provision requires that an award be framed in a dispositive form, an award shall be deemed *res judicata* as a whole with respect to all heads of claim which were disputed between the parties, be they only expressed in the findings (...)." [12]

Thus, it may be said that in respect of French (or French-seated) arbitral awards, the *res judicata* extends to the findings on an issue that was disputed between the parties and upon which a final decision was made, even if it is not necessarily contained in the final *dispositif* of the award. Indeed, as a recent observer has noted,

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8. Report of the BIICL, *The effects in the European Community of Judgments in Civil and Commercial Matters*, Switzerland, (2006), Prof. Paul OBERHAMMER and Urs H. HOFFMANN-NOWOTNY (rapporteurs), p. 28.
9. "Res judicata occurs only with respect to the subject of the judgment. The subject of the claim must be the same. The claim must be based on the same ground and between the same parties. It must be made by them and against each other in the same quality" (free translation provided by the authors). French *Code Civil*, Art. 1351. The *Code Civil* is available online at www.legifrance.gouv.fr.
10. Unofficial (free) translation of the French CPC, Art. 1506. The *Code de Procédure Civile* is available online at www.legifrance.gouv.fr.
11. Unofficial (free) translation of French CPC, Art. 1484.
12. Unofficial (free) translation of S.A. *Cevede et a.* v. *S.A. Coopérative de Commerçants Détaillants "Système U" Centrale Régionale Est*, CA Paris (pôle 1, ch. 1), Judgement of Oct. 2, 2012, n° 10/25301, p. 5 (Summary in *Rev. arb.* 2012, n° 4, p. 868).

> "While in state litigation, "res judicata *extends only to what was the subject matter of the judgment and what was decided in the dispositive section*," it is different in arbitration, where *res judicata* is not limited to the dispositive part of the award because some elements relating to the operative findings of the decision may be disseminated in the reasoning." [13]

Insofar as an "element relating to the operative findings in the decision" is likely to be broader than a simple dispositive section at the end of a judgement, such a conception still appears to remain within the 'sphere' of the restriction of *res judicata* to operative findings.

Italian law is quite similar in form, but it has seen somewhat of an evolution in recent years in respect of *res judicata*. In 1989, Liebman wrote that in Italian law,

> "[T]he reasoning of the decision is outside the scope of res judicata... The parties, with their claims, clearly delimit and define the subject upon which they request a decision. These limits would be infringed if *res judicata* extended to the numerous issues the court must deal with in order to render its judgment." [14]

Since then, however, the Italian *Corte di Cassazione* has issued some decisions which, though still apparently the subject of debate in Italy, appear to have loosened some of the strictures on the principle of *res judicata* in Italian law.

In statute, Italian law provides for a fairly standard definition of *res judicata*, with a distinction between formal and substantive *res judicata* (*cosa giudicata formale* and *cosa giudicata sostanziale*). Substantive *res judicata* is the formulation that is recognised across other jurisdictions. [15]

Article 324 of the Italian Code of Civil Procedure establishes that judgements no longer subject to appeal or revocation have become final. Article 2909 of the Italian Civil Code then provides that the "*assessment contained in the judgement*" is binding on all parties (along with their heirs or assignees). [16] In an interesting decision, the *Corte di Cassazione* affirmed this, stating:

> "Substantive *res judicata* (Article 2909 Italian Civil Code)... is formed on all that represented the subject matter of the decision, including the findings of fact, which represent the necessary premise and logical/legal basis of the ruling, therefore extending its authority not only to the scope of the dispute and the grounds relied upon by the parties (the so-called 'explicit *res judicata*'), but also to the findings that are inseparably linked to the decision, forming its prerequisite, thus covering everything that represents the logical/legal basis of the ruling." [17]

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13. *See* Y. STRICKLER, *Sté Carrefour* v. *Sté Codis Aquitaine et a... : Rev. arb.* 2013, n° 1, p. 126.
14. Unofficial (free) translation of E. TULLIO LIEBMAN, *Giudicato: Diritto Processuale Civile*, in *Enc. Giur.*, Rome (1989), p. 13, part. 6.2.
15. M. CAPPELLETTI and J. M. PERILLO, *Civil Procedure in Italy*, Martinus Nijhoff, 1965, p. 251.
16. Unofficial (free) translation. *Also note* that Article 824 *bis* of the Italian Code of Civil Procedure gives final arbitration awards the same force as judgements, stating that from the date of its last signature, an arbitral award has "the effect of a judgment issued by the judiciary." (Unofficial translation).
17. Unofficial (free) translation of the Decision of the Italian Court of Cassation of September 6, 1999, n° 9401. The Court further noted that this was applicable where the cases share the three elements of the tripartite test.

The Court's conception of *res judicata* in subsequent cases could be considered fairly broad. It could even be stepping closer to issue preclusion, where the Court has found that:

> "If two proceedings between the same parties concern the same legal relationship and one of them was settled by judgment that became final, the assessment performed on the legal situation or the settlement of matters in fact and in law regarding a fundamental point common to both proceedings, being the essential logical introduction to the prescriptions contained in the operative part of the judgment, excludes any reconsideration of the assessed and settled point in law, even if the second proceedings have purposes *other than those* that formed the aim and the subject matter of the first proceedings." [18]

Some caution may be advisable here: these cases may not have broad applicability as most relate to matters which may be considered to have been fixed between the government departments and the individual involved in the case (for example, business classification for the purposes of taxation).

While there has been some movement in other civil law jurisdictions towards collateral estoppel (for example, in Lebanon), the application of issue preclusion tends to be connected to principles such as good faith or abuse of process rather than the common law notion of estoppel. [19]

B. – Common Law Approach

At common law, *res judicata* is generally a principle found in case law, rather than in statute. Common law countries also almost uniformly include issue preclusion.

In the United States, *res judicata* is considered an issue of public policy, and applies to judgements that are final. In *Southern Pacific Railroad Company*, the US Supreme Court observed that

> "[*Res judicata*] is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination.
> (...)
> [*res judicata*] is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if, as between parties and their privies, conclusiveness did not attend the

18. Unofficial (free) translation of the Decision of the Italian Court of Cassation of May 8, 2009, n° 10623. (*Emphasis added.*)
19. M. SAKR, *The Emerging Use of Estoppel by Lebanese and French Courts: Towards a Civil Law Estoppel?*, Lexis Nexis, Emerging Issues Analysis (2009): "In Lebanon, the emerging reference to the concept of estoppel by the courts stems from the application of general legal provisions on good faith and the abuse of rights, as well as a specific text inspired by Sharia law, and by some relevant general principles of law and of lex mercatoria."

judgments of such tribunals concerning all matters properly placed at issue, and actually determined by them." [20]

Southern Pacific Railroad also discussed the concept of issue preclusion, noting that even where the second suit related to a different cause of action, a "right, question or fact, once so determined, must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified." [21] In the US, generally, collateral estoppel may only be invoked where the first case ended in a valid final judgement, in which the issue at hand was both an essential issue to the judgement and upon which a determination was made (*i.e.*, merely raising the issue without a final determination would not be sufficient to create a preclusive effect).

However, tied up with the notion of collateral estoppel, there has been a gradual erosion of the strict requirement of mutuality. In the United States – fairly uniquely – collateral estoppel may be raised by a party to a later action who was not involved in the prior case. In a landmark decision, the California Supreme Court opined that "[t]here is no compelling reason... for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation." [22] Known as 'non-mutual issue preclusion,' its 'offensive' and 'defensive' uses have been affirmed by the United States Supreme Court. [23]

Courts of the United States have explicitly recognised that *res judicata* applies to arbitral awards after they are confirmed (final). [24] Notably, in *Sanders* v. *Washington MTA*, the Court of Appeals (D.C. Cir.) found that "decisions of the arbitrator should be viewed as conclusive as to subsequent proceedings..." [25] Similarly, in *Norris* v. *Grosvenor Marketing Ltd.*, the Court of Appeals (2nd Cir.) wrote that "*Norris was given his opportunity to argue his case to the arbitrator. He should not now be given another bite of the cherry.*" [26] Given the support of the Supreme Court for various liberalisations of the concept of *res judicata*, it seems likely that it would similarly uphold such rulings.

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20. *Southern Pacific Railroad Company* v. *United States*, 168 U.S. 1 (1897). This case has been repeatedly affirmed, such as in *Vicksburg* v. *Henson*, where the Supreme Court stated that "...the rule of res judicata is essential to secure the peace and repose of society..." *Vicksburg* v. *Henson*, 231 U.S. 259 (1913).
21. *Southern Pacific Railroad Company* v. *United States*, 168 U.S. 1 (1897).
22. *Bernhard* v. *Bank of America*, 19 Cal. 2d 807 (1942), 812. *See also* the discussion at 811-813. The Court stated that it found the preclusion of a party not bound by a previous action from asserting *res judicata* against a party who *was* bound "difficult to comprehend." 812-813.
23. Discussion of defensive use: *Blonder-Tongue Laboratories* v. *University of Illinois Foundation* 402 US 313 (1971), *see* 324-326; offensive use: *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979), *see* 329-30.
24. *Tom Trollope et al.* v. *James B. Jeffries*, 55 Cal. App. 3d. 816 (1976) "... an arbitration award is not a judgment having the same force and effect as a judgment in a civil action until it is confirmed." As quoted in *Thibodeau* v. *Crum*, 4 Cal. App. 4th 749 (1992), at 759.
25. *Carl A. Sanders* v. *Washington Metropolitan Area Transit Authority*, 819 F.2d 1151, D.C. Cir. (1987).
26. *Crawford S. and Kathleen Norris* v. *Grosvenor Marketing Ltd. and R. Twinings & Co. Ltd. (U.S.A.) and R. Twining and Company, Ltd.*, 803 F. 2d 1281 (1986), at 1286.

US courts have also recognised collateral estoppel in arbitration. In the *Norris* case, the court rejected the Norrises' arguments, noting that *"the fact that plaintiffs base their claims on new legal theories does not shield them from the doctrine of collateral estoppel as liability is premised on the same issue in both proceedings."* [27]

In a very recent decision, the California Court of Appeals (Div. 4) expressed support for even unconfirmed (domestic) arbitral awards potentially having the effect of *res judicata*, noting that "[s]everal courts have viewed an unconfirmed arbitration award as the equivalent of a final judgment." [28]

III. – *RES JUDICATA* IN APPLICATION OF INTERNATIONAL LAW AND IN INTERNATIONAL ARBITRATION

A. – *Res Judicata* in Application of International law

In international law, *res judicata* is taken to be a general principle of law, and is thus applicable between nations. While the Permanent Court of International Justice (P.C.I.J.) Chorzów Factory case was not the first time the principle was discussed in relation to international law, the dissent of Judge Anzilotti has become the most famous early statement of the principle, where he wrote that

> "[I]t appears to me that if there be a case in which it is legitimate to have recourse, in the absence of conventions and custom, to *"the general principles of law recognized by civilized nations"*... that case is assuredly the present one [of *res judicata*]". [29]

In the same dissent, he also outlined the "triple identity" or "tripartite" test, noting that

> "[W]e have here the three traditional elements for identification: *persona, petitum, causa petendi*, for it is clear that "that particular case" *(le cas qui a été décidé)* covers both the object and the grounds of the claim.
>
> (...)
>
> It appears to me to be clear that a binding interpretation of a judgment can only have reference to the binding portion of the judgment construed." [30]

Since the judgement in this case, Judge Anzilotti's formulation of the test has become standard. However, many years after that decision, Professor Bin Cheng questioned the division between *petitum* and *causa petendi*, noting that in international decisions, it was often disregarded or applied inaccurately. [31]

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27. *Norris, op. cit.*, at 1286. (*Emphasis original*).
28. *North Beach Partners, LLC, et al.* v. *John Sollner*, A139893, 1/4, July 27, 2015 (unpublished).
29. *Case Concerning the Factory at Chorzów* (*Germany* v. *Poland*), P.C.I.J., (1927), dissenting opinion of Judge Anzilotti, p. 27.
30. *Ibid.*, p. 23.
31. B. CHENG, *General Principles of Law as Applied by International Courts and Tribunals*, 1953 (2006), p. 343.

The P.C.I.J. also recognised the application of *res judicata* in respect of arbitration awards, noting in the *Trail Smelter* arbitration that *res judicata* was an "*essential and settled rule of international law.*" [32] This follows the earlier assertion by the Permanent Court of Arbitration (P.C.A.) in the *Pious Fund* case that

> "[A]ll the parts of a judgment or a decree concerning the points debated in the dispute enlighten and mutually supplement each other, and [] they all serve to render precise the meaning and the bearing of the *dispositif* (the decisory part of the judgment), to determine the points upon which there is *res judicata* and which therefore cannot be put in question.
> (...)
> this rule [of *res judicata*] applies not only to the judgments of tribunals created by the State, but equally to arbitral awards rendered within the limits of the jurisdiction established by the *compromis*.
> (...)"

this same principle should, for an even stronger reason, be applied to international arbitration. [33]

B. – *Res Judicata* and the Recognition of Foreign Awards

Res judicata, in an arbitral context, arguably also arises from the recognition of the awards, and their binding nature. Where (perhaps unlike in the ICJ cases or PCA arbitrations above) a party to an arbitration seeks to invoke *res judicata* to bar a successive claim, it is not always the case that it is being asserted within the *same* legal framework as the one in which the award was initially made. In such cases, the award must first pass the test of *recognition*. In other words, the award must be considered enforceable by the legal order in which *res judicata* is requested.

In domestic courts, the recognition of foreign arbitral awards (or the recognition of awards made in a different international legal order) is therefore the logical prerequisite for the application of *res judicata* when dealing with a second legal order. Thereafter, it would be the binding character of the award that becomes controlling.

Gary Born noted that in the context of international arbitral awards, the enforcement of which was subject to the New York Convention, support for the *res judicata* effect of final arbitral awards could be gleaned from the convention itself. The commitment to the enforcement of an arbitral award, he writes,

> "[D]emands not merely that contracting states "enforce" awards, but also that they recognize such awards as "binding." That commitment encompasses not

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32. *Trail Smelter Case* (*U.S.A.* v. *Canada*), Apr. 16, 1938 and Mar. 11, 1941, *Recueil des Sentences Arbitrales*, Vol. III, p. 1905-1982; at p. 1950.
33. *The Pious Fund of the Californias* (*U.S.A.* v. *United Mexican States*), P.C.A., Award of the Tribunal of Oct. 14, 1902, p. 2.

> merely the obligation to give formal recognition to awards, but also to give recognition of a nature that makes an award "binding" on the parties. This type of recognition would not exist if awards did not have preclusive effects in national courts, preventing parties from relitigating matters that had already been decided in "binding" arbitral proceedings."

In the various frameworks of transnational dispute settlement, international tribunals may decide that, by virtue of being made in a different legal framework, the decision cannot be considered *res judicata* if the rights and obligations under separate treaties or frameworks could be considered even marginally different. This may result in what amounts to an excessively formalistic approach to *res judicata* and one, we would suggest, that is somewhat unhelpful in the broader context of the stability and predictability of a party's obligations when construed by tribunals adjudicating in the international sphere.

Indeed, while the principle of *res judicata* can be considered a settled concept in the context of international arbitration, the less firmly settled questions lie in its application. These elements are generally more complex than the acknowledgement of the existence of the doctrine or the bare fact of its general applicability.

C. – Application of *Res Judicata* in International Arbitration

Perhaps the best and most succinct statements of *res judicata* in international arbitration comes from the *Amco II* (ICSID) tribunal, which stated that

> "[A] right, question, or fact distinctly put in issue and distinctly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed." [34]

Indeed, the "positive" effect of *res judicata* is generally uncontroversial in its application; the awards are almost universally considered binding. It is the "negative" or preclusive effect – and at times, the *extent* to which an award may be considered preclusive – where tribunals have engaged with the concept.

As a preliminary matter, there is the question of where to place the authority for the recourse to *res judicata*. There are several possibilities: the *lex fori*, the *lex arbitri*, international law – or even, perhaps, the governing law of the *previous* arbitration.

Where *res judicata* is considered a procedural rule, the most frequent recourse has been to the law governing the *subsequent* action. This seems somewhat at odds with domestic legal systems which – when the law is different on preclusion – generally apply the law applicable in the first action. [35] This is of course in reference to international commercial arbitration; but additionally in investment

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34. *Amco Asia Corporation* v. *Republic of Indonesia* ("*Amco II*"), ICSID Case n° ARB/81/1 (resubmitted), Decision on Jurisdiction of May 10, 1988, § 30.
35. *See*, for example, the United States Federal Courts.

treaty cases, tribunals have also reviewed the governing treaty or law of the initial arbitration.[36]

In the absence of an explicit agreement of the parties, arbitrators are taken to have the authority to decide which law governs the preclusive effect of a previous arbitration. For example, in the ICC rules it is noted that "in the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate."[37] This has been affirmed by domestic courts. For example, in *Citigroup* v. *Abu Dhabi Investment Authority (ADIA)*, the parties had gone to arbitration and a decision in favour of Citigroup was returned. Whilst enforcement proceedings were pending, ADIA initiated a second arbitration under the investment agreement. Citigroup petitioned the courts of the United States – the seat of the arbitration – to enjoin the proceedings based on the doctrine of *res judicata*. However, both the District and the Court of Appeals found in favour of ADIA, holding that the preclusive effect of prior awards was to be decided by the *arbitrators*, not the domestic courts.[38] The Court of Appeals also included the preclusive effect of a federal judgement affirming the enforceability of an arbitral award.[39] This somewhat mirrors a case before the Swiss Federal Tribunal, which noted that an arbitral tribunal would have the power to disregard an earlier award if it were made under circumstances which would render it of such a nature that it could not be recognised by the law of the seat.[40]

Conversely, it may be assumed, however, that should *res judicata* not be properly attributed by the arbitrators and an arbitration nonetheless goes ahead, the enforceability of the award may be affected. Indeed, the Swiss Federal Tribunal has ruled that an arbitration award that fails to take into account the *res judicata* effect of a previous award may be annulled,[41] and the Paris Court of Appeal has noted that awards not giving proper *res judicata* effect are against public policy.[42]

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36. *Apotex Holdings, Inc. and Apotex Inc* v. *The United States of America* ("*Apotex III*"), ICSID Case n° ARB(AF)/12/1, Award of Aug. 25, 2014, § 7.4-7.5; though despite the arbitral forum being different in the *Apotex III* case, NAFTA was still the applicable treaty to the dispute.
37. 2012 ICC Rules, Art. 21.1.
38. *Citigroup, Inc.*, v. *Abu Dhabi Investment Authority*, United States Court of Appeals, (2d Cir.), (Docket n° 13–4825 – cv.), Decision of Jan. 14, 2015. The Court noted its prior ruling to this effect in *National Union Fire Insurance Co. of Pittsburgh, PA* v. *Belco Petroleum Corp.* ("*Belco*"), 88 F.3d 129 (2d Cir.) (1996), which first held that the preclusive effect of a prior arbitration was to be decided by the arbitrators.
39. *Ibid.*
40. *Compañia Minera Condesa SA und Compañía de Minas Buenaventura SA Gegen BRGM-Pérou S.A.S. und Tribunal Arbitral CIA*, ATF 124 III 83 (1997).
41. *Club Atlético de Madrid SAD* v. *Sport Lisboa E Benfica – Futebol SAD and Fédération Internationale de Football Association (FIFA)*, 136 BGE III 345 (2010). An English translation of this decision is available here: http://www.swissarbitrationdecisions.com/setting-aside-of-award-for-violation-of-public-policy-principle.
42. Judgement of Jan. 28, 1979 : *Rev. arb.* 1980, p. 506.

D. – *Res judicata* "stricto sensu" or "grosso modo" or "secundum arbitrum"?

In international arbitration, tribunals tend to take either a strict, formalistic approach to the application of the tripartite test, or a looser, substance-over-form approach.

The *CME* and *Lauder* investment arbitrations are an example of where tribunals have taken a formalistic approach to the application of *res judicata*. Both actions were brought against the Czech government as a result of the nationalisation of a television station. In the *Lauder* arbitration, an action was first brought under the Czech-USA BIT by M. Lauder personally for the loss of his investment. The subsequent CME case was brought under the Czech-Netherlands BIT, by the company CME.

When undertaking a *res judicata* analysis, the later tribunal asserted that whilst Lauder was apparently the controlling shareholder of CME Media Ltd., the Claimant's ultimate parent company, he was *"not the majority shareholder of the company"* [43] and, noting that *"a 'company group' theory is not generally accepted in international arbitration,"* found that the identity of the parties was not established. The tribunal also went on to note that the legal basis for the claim in the *CME* arbitration – the Czech-Netherlands BIT – was sufficiently different from the basis in the *Lauder* arbitration (the Czech-USA BIT). [44] Lauder essentially lost the first arbitration (the Tribunal found a breach of the BIT but did not award damages), [45] but in *CME* – in a conflicting partial award issued merely ten days later – the tribunal found a breach of the Czech-Netherlands BIT and later set the quantum at over 200 million dollars. [46]

This more formalistic approach is also reflected in *SGS* v. *Philippines*, wherein the tribunal viewed contract and treaty claims separately, handling them as though they were non-identical. Following such logic to its conclusion may mean that competing claims invoking different legal bases would not meet the *causa petendi* element, and thus not become subject to the application of *res judicata*. [47]

This certainly seems to be the preference of certain legal orders. Before WTO dispute settlement panels, for example, the issue of *res judicata* has been raised only in theoretical situations. [48] One commentator has observed that apart from

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43. *CME Czech Republic B.V.* v. *Czech Republic*, UNCITRAL Arbitration (Netherlands-Czech Republic BIT), Final Award of Mar. 14, 2003, § 436, also referring (in part) to the Partial Award in the same case of Sept. 13, 2001.
44. *CME Czech Republic B.V.* v. *Czech Republic*, UNCITRAL Arbitration (Netherlands-Czech Republic BIT), Final Award of Mar. 14, 2003, § 433-4.
45. *Ronald S. Lauder* v. *Czech Republic*, UNCITRAL Arbitration (U.S.A.-Czech Republic BIT), Final Award of Sept. 3, 2001, p. 74.
46. *CME Czech Republic B.V.* v. *Czech Republic*, *Op. cit.*, § 648-9.
47. *SGS Société Générale de Surveillance S.A.* v. *Republic of the Philippines*, ICSID Case n° ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, Jan. 29, 2004, § 163.
48. *See*, for example, *Mexico – Taxes on Softdrinks*, WT/DS308/AB/R, Appellate Body Report of Mar. 6, 2006, § 44-57. – *See also* J. PAUWELYN, *Adding Sweeteners to Softwood Lumber: The WTO-NAFTA "Spaghetti Bowl" is Cooking Duke Law School Faculty Scholarship Series*, 2006, Paper 32.

somewhat theoretical musings, the Appellate Body appears "unwilling to refer to FTA jurisprudence, defer to judgements emanating from other dispute settlement fora, suspend proceedings pending the outcome of related proceedings, or otherwise apply comity towards other tribunals." [49] This approach can be contrasted with that of the NAFTA dispute settlement mechanism, which has generally taken a more generous stance towards the work of other dispute settlement systems.

By contrast, in other cases, tribunals have either taken a less formalistic approach to the tripartite test, or not explicitly referred to *res judicata* at all. In still others, tribunals have discussed *res judicata* but have considered substance over form when arriving at their decisions; or have applied as final and binding awards made under other legal frameworks. They have also considered the reasons – or *motifs* – for the determinations made in the previous decisions.

In one such ICC arbitration, the tribunal stated that it was

> "[O]f the opinion that the binding effect of its first award is not limited to the contents 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. Irrespective from the academic views that may be entertained on the extent of the principle of *res judicata* on the reasons of a decision, it would be unfair to both parties to depart in a final award from the views held in the previous award, to the extent they were necessary for the disposition of certain issues." [50]

In *SPP* v. *Egypt*, the ICSID tribunal stayed its own proceedings pending the formal annulment of an earlier ICC award. [51] However, the tribunal did not explicitly refer to *res judicata* when suspending the proceedings, instead noting that the proceedings were "stayed" pending a decision by the French *Cour de cassation* as to whether the parties had validly submitted the earlier dispute to the ICC.

In *Apotex III*, the ICSID tribunal discussed the earlier NAFTA determinations, and ultimately relied upon them. It wrote that while the tribunal viewed the operative part as a "*dispositif*," that it "can and should be read with the relevant 'motifs' or reasons for that operative part." [52] It also noted that "*shorn of all semantic technicalities*," the tribunal could not dismiss the reasons informing the operative part as mere *obiter dictum*, but rather that

> "[T]hose reasons under both NAFTA Articles... were essential to the operative part and thereby distinctly determined matters distinctly in issue in the *Apotex I & II* arbitration
> (...)

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49. C. HENCKELS, *Overcoming Jurisdictional Isolationism at the WTO*, *EJIL* Vol. 19[3] (2008), p. 576.
50. *Mexican Construction Company* v. *Belgian Company (member of a Consortium)*, ICC Case n° 3267, Final Award of Mar. 28, 1984, as found in Albert Jan van den Berg (ed), *Yearbook of Commercial Arbitration 1987* – Vol. XII, p. 88. (*Emphasis added.*)
51. *SPP* v. *Egypt*, Decision on Preliminary Objections to Jurisdiction of Nov. 27, 1985 (*see* the *dispositif*), and Decision on Jurisdiction of April 14, 1988, as quoted in Award on the Merits of May 20, 1992, § 15-24.
52. *Apotex III*, *op. cit.*, § 7.42.

> The purpose of the *res judicata* doctrine under international law is to put an end to litigation; and it would thwart that purpose if a party could so easily escape the doctrine by 'claim-splitting' in successive proceedings."[53]

In the *Helnan* arbitration, the claimant, a Danish company, had been unsuccessful in a previous arbitration against the Egyptian Organization for Tourism and Hotels, which had been conducted pursuant to an arbitration clause in a contract between the claimant and respondent. Helnan attempted to have the award set aside in the Egyptian courts, but was ultimately unsuccessful and the award was enforced.[54] Helnan then brought a claim before an ICSID tribunal against the Republic of Egypt. Helnan had submitted that the claim was admissible, as the *persona* and *causa petendi* elements of the triple-identity test were not met because the Republic of Egypt had not been a party to the previous arbitration, and that in the Cairo Arbitration the claims were filed for breach of the management contract, while in the ICSID case they were filed for the breach of the Denmark-Egypt BIT.

The ICSID tribunal ultimately dismissed the subsequent action. It did so after finding that the Cairo Arbitration was not binding upon it in a manner that would make the subsequent claim inadmissible – essentially upholding the tripartite test insofar as admissibility was concerned. However, when dismissing the case on the merits, it noted that the decisions on municipal law made in that arbitration had essentially been settled, with a force of *res judicata*:

> "The Management Contract was terminated by the Cairo Award on 30 December 2004 pursuant to the arbitration clause included in the Management Contract. This award (...) is final and binding. It has been in force and has res judicata effects in the Egyptian legal order. As Egyptian law was applicable to the Management Contract, the present arbitral tribunal cannot ignore its effect, unless it would be established that rendering of the Award was made in breach of the Treaty, or general international law."

In so doing, it raised the possibility of claims being subject to *res judicata* despite there being no *strict* identity of the parties in the subsequent arbitration.

Perhaps coupled with the more frequent use of partial awards in arbitral proceedings, there appears to be a growing openness towards collateral estoppel in international arbitration.

E. – Issue Estoppel in International Arbitration

Despite the fact that issue preclusion is rarely found in civil jurisdictions, it has been applied by tribunals in several international arbitral proceedings. The tribunal in the *Apotex III* arbitration noted that "it is clear that past international

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53. *Apotex III*, *op. cit.*, § 7.57-58.
54. *Helnan International Hotels A/S* v. *The Arab Republic of Egypt* ("*Helnan*"), ICSID Case n° 05/19, Award of July 3, 2008, § 6-8.

tribunals have applied forms of issue estoppel, without necessarily using the term." [55]

For example, in *Grynberg* v. *Grenada*, [56] the tribunal examined whether collateral estoppel could be used to bar the re-litigation of an issue already decided – the respondent referring to the principle as a "species" of *res judicata*. [57] The claimants in that case had brought a previous action under the name RSM, a corporation wholly owned by the three claimants. The respondent argued that, given RSM's ownership and that the investment at issue was a contract to which RSM was a party (and the individual shareholders were not) there was no burden in holding the claimants in the subsequent arbitration to the findings in the previous award. [58]

The tribunal noted that, "[i]t is also not disputed that the doctrine of collateral estoppel is now well established as a general principle of law applicable in the international courts and tribunals such as this one."

The tribunal referred to the *Amco* case and the *Orinoco* arbitration, noting that in the decision of the United States Supreme Court in *Southern Pacific Railroad* – referred to by the *Orinoco* tribunal – collateral estoppel was construed as applying "between the same parties or their privies." [59]

The tribunal went on to apply collateral estoppel, writing that identity of the parties, whilst not strictly present, was present in *substance*, as

> "[I]t is true that shareholders, under many systems of law, may undertake litigation to pursue or defend rights belonging to the corporation. However, shareholders cannot use such opportunities as both sword and shield. If they wish to claim standing on the basis of their indirect interest in corporate assets, they must be subject to defences that would be available against the corporation – including collateral estoppel." [60]

This decision is clearly distinct from the analysis undertaken by the *CME* tribunal and points towards a less formal approach to *res judicata*.

V. – CONCLUSION

In a way, *res judicata* seems a settled, almost staid point of law. However, upon closer examination its application in international arbitration – particularly the diversity of the manner in which it is applied – makes it a concept worthy of the international practitioner's attention.

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55. *Apotex III*, *op. cit.*, Award of Aug. 25, 2014, § 7.18.
56. *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation* v. *Grenada* ("*Grynberg* v. *Grenada*"), ICSID Case n° ARB/10/6, Award of Dec. 10, 2010.
57. *Grynberg* v. *Grenada*, § 4.6.5.
58. *Grynberg* v. *Grenada*, § 4.6.8.
59. *Grynberg* v. *Grenada*, n° 34.
60. *Grynberg* v. *Grenada*, § 7.1.7.

From the cases briefly discussed, it might be tempting to prefer the less formal approach to *res judicata* in international arbitration, as opposed to the fairly strict and somewhat geometrical view adopted for example by the Swiss Supreme Court, among others. Indeed, a less formal approach may seem somehow more in-step with a form of dispute settlement which, it may be said, rests its very foundation on its capacity to focus on the particularities of the dispute at hand. However, while it may be viewed as supportive of the predictability of international arbitration, the readiness of certain arbitral tribunals to apply *res judicata* to the reasoning of the awards, in addition to the dispositive part, may be a move towards an ultimately more restrictive international legal order.