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RES JUDICATA "BEYOND BORDERS": FINALITY AND CONCLUSIVENESS OF PRIOR DECISIONS IN INTERNATIONAL ARBITRATION

MASTER OF TRANSNATIONAL LAW

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1. Introduction

The essence of arbitration lies in the settlement of disputes outside of a state's judicial system. Parties to cross border commercial transactions refer to arbitration with the expectation that, unless a settlement is reached along the way, the arbitration process will lead to an award that is both final and binding upon them[1].

Notwithstanding, international arbitration is becoming increasingly challenging and sophisticated, due to the emergence of disputes involving multiple parties, contracts or issues. Albeit it is universally acknowledged that every award shall be binding upon the parties and that they shall undertake to carry out the same without delay, arbitral tribunals are constantly faced with questions regarding the finality and conclusiveness of prior decisions: should arbitral tribunals be bound by a prior decision on the merits of the same dispute and, if so, on what grounds and to what extent? Does the *res judicata* effect of an award apply only to the operative part of the award or does it extend to the reasoning as well? To what extent is a subsequent arbitral tribunal or a national court bound by the findings of an award previously rendered? International arbitration practitioners' aim at an efficient, predictable and cost-saving dispute resolution process and parties to arbitration proceedings expect to be treated fairly and equally, especially considering that at the end of the arbitration there will be a final and binding award defining their legal rights. Bearing this in mind, and in spite of contrasting differences in domestic laws, the principle that a valid determination, either judgment or award, entails a conclusive effect regarding the subject matter and the parties of the dispute represents a basic legal principle anchored in every legal system[2].

In the field of international arbitration, the final and binding effect of an arbitral award is intrinsically linked with its jurisdictional nature. Although the arbitration process has a contractual origin, the same develops into a phenomenon with jurisdictional dimensions. The outcome of the arbitral proceeding is a final award which disposes of all issues submitted to the arbitral tribunal and any other decision of the arbitral tribunal which finally determines any question of substance. It can also pertain to the question of jurisdiction or

[1] ALAN REDFERN/MARTIN HUNTER/NIGEL BLACKABY/CONSTATINE PARTASIDES, "*Law and Practice of International Arbitration*", Sixth Edition, Kluwer Law International, 2015, p. 501, available at www.kluwerarbitration.com

[2] GRETTA WALTERS, "*Fitting a Square Peg into a Round Hole: Do Res Judicata challenges in international arbitration constitute jurisdictional or admissibility problems?*", in Journal of International Arbitration, Kluwer Law International 2012, Volume 29 (Issue 6), p. 652, available at www.kluwerarbitration.com.

any other issue of procedure but, in the latter case, only if the arbitral tribunal terms its decision an award.

Consequently, there are important practical implications concerning the scope and extent of the arbitral award. If the final and binding determination set forth in the first award was subject to a new reassessment by a different adjudicator, the parties' expectations pertaining to the definitive resolution of their dispute would be compromised and the effectiveness of the arbitration process would be endangered.

Nonetheless, the current legal framework of reference for *res judicata* issues in international arbitration is fragmentary and misleading. Indeed, most arbitral rules simply state that the award shall be binding on the parties. Additionally, there are significant differences between common and civil law countries regarding the basic features, scope and limits of the doctrine of *res judicata*. While it is certainly true that most domestic *res judicata* rules prevent the same claimant from bringing identical claims against the exact same respondent in successive proceedings, after this benchmark there are various disparities between legal systems.

In light of the finalities of fairness, efficiency, certainty and predictability in the arbitration process, we will argue that it is of the utmost importance to develop a transnational doctrine *res judicata* that surpass the existing differences among domestic laws regarding the nature and scope of *res judicata*, as well as the obstacles concerning the elaboration of an adequate framework of conflict-of-laws rules.

Bearing in mind the core purposes of this dissertation, the same is divided in 3 (three) parts: part 1 (one) outlines the diverging concepts of *res judicata* in national laws – both from a civil a common law perspectives – and examines the underlying legal and cultural diversity between systems; part 2 (two) addresses the "*inside-out*" movement of the doctrine of *res judicata,* as a matter of transnational law, as well as the contrasting approaches to the same outside of the state context; finally, part 3 (three) aims to identify transnational principles and rules of *res judicata*, specifically in what concerns its scope and limits, in light of the specific nature, features and purpose of international arbitration.

2. The doctrine of *res judicata* in domestic laws

2.1. Overall assessment

The doctrine of *res judicata* reflects the principle by virtue of which an earlier and final adjudication rendered by a court or arbitral tribunal is conclusive in subsequent proceedings referring to the same subject matter or relief, the same legal grounds and the same parties[3]. It is one of the legal concepts regularly encountered in international arbitration, for which civil and common law traditions provide contrasting approaches. Furthermore, it is generally accepted 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[4].

The doctrine of *res judicata* aims to avoid legal uncertainty and contradictory decisions. Therefore, it is commonly considered to be inspired by both public and private interests. Public interest demands that litigation operates in an efficient and economic manner, in terms of ensuring legal certainty and a correct allocation of resources. Moreover, the doctrine of *res judicata* intends to avoid the issuance of incongruent and conflicting decisions, considering that it may impair the credibility and public perception of the judicial system. In this view, *res judicata* rests upon the public interest relating to the finality of litigation rather than the attainment of justice on the merits of a specific case.

Notwithstanding, it is also argued that *res judicata* is based on a private interest pertaining to the protection of the individual, in terms of ensuring that no person shall be confronted by more than one litigation on the same subject matter. Finally, the doctrine of *res judicata* is also perceived as a tool available to tribunals to ensure that there is no abuse of process, in such a way that subsequent proceedings should be precluded if a tribunal

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[3] International Law Association, International Commercial Arbitration Committee, Interim Report on Res Judicata in Arbitration, 2005, p. 2.

[4] SILJA SCHAFFSTEIN, "*The doctrine of res Judicata before international arbitral tribunals*", 2012, p. 73, para. 276, available at https://qmro.qmul.ac.uk/xmlui/bitstream/handle/123456789/8665/Schaffstein_S_PhD_Final.pdf?sequence=1

views that it is necessary to prevent any kind of abuse of procedure to the unfair detriment of the other party[5].

Before addressing the contrasting perspectives on the doctrine of *res judicata* in different legal systems, it is importance to make a brief reference about its effects. In general terms, *res judicata* has two effects: it is final and binding upon the parties, i.e., once a case has been decided by a valid decision, the same issue may not be disputed again between the same parties, provided that said binding decision remains intact (*non bis in idem*)[6]. Therefore, *res judicata* entails both conclusive and preclusive effects in subsequent proceedings: it is conclusive insofar as it encompasses a final and binding effect upon the parties; and preclusive, because once a certain dispute is decided by a valid and final judgment, the same may not revisited again between the same parties.

It is also questionable as to what is exactly the scope of *res judicata,* with each jurisdiction having its own view on this issue: whereas some legal systems set out that only the operative part of the decision acquires the force of *res judicata,* others advocate that said effect also covers the underlying reasoning of the decision. As it will be shown *infra*, the scope of *res judicata* can vary tremendously depending on the applicable law, in relation to which there are also significant ambiguities.

Consequently, in despite of being generally accepted, in domestic laws, that *res judicata* embodies the principle that a claimant is prevented from initiating or bringing the same claims against the exact same respondent in successive proceedings, there are significant differences as to what are the precise boundaries and effects of *res judicata*[7]. These differences are not only evident while comparing common and civil law countries, but similarly while comparing the different national laws comprised within said legal systems.

Further to the above, this part of the dissertation purports to introduce the different concepts and views on the doctrine of *res judicata* through a comparative analysis, with the aim of assessing whether there is a consistent doctrine of *res judicata* among national legal systems.

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[5] PINSOLLE PHILIPPE/SUHAIB AL-ALI, "*How Arbitrators should treat prior awards rendered on the same contract*", in Indian Journal of Arbitration Law, Vol. V, Issue 2, p. 49, available at www.kluwerarbitration.com.

[6] BERNARD HANOTIAU, "*Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions",* Chapter VIII, 2006, p. 241, available at www.kluwerarbitration.com.

[7] SILJA SCHAFFSTEIN, *supra*, p. 14, para. 32.

2.2. *Res judicata* in civil law countries

2.2.1. France

In France, there is an extensive and comprehensive legal framework governing the issues relating to the doctrine of *res judicata* before domestic courts. As a general principle, *res judicata* refers to a judgment that determines a legal dispute between parties in a way that it is final and conclusive, in terms of terminating the court's jurisdiction over the dispute. In light of French law, a judgment acquires force of *res judicata* upon being rendered, even if it may be subject to appeal (*autorité de chose jugéé*). Therefore, *res judicata* exists irrespectively of any right to appeal, albeit provisionally, given that the judgment may be called into question by virtue of the appeal[8]. In case the appeal is dismissed, the judgment acquires *force de chose jugéé*, insofar as no ordinary means of recourse with suspensive effect can be brought against it.

As for the requirements relating to *res judicata*, Article 1351 of the French Civil Code provides that a judgment qualifies as such where the parties (in capacity), cause of action and claim are identical in both proceedings (triple identity test). In case this triple identity test is fulfilled, a judgment employs negative *res judicata* effects, which means that either party is precluded from re-litigating an issue decided in the operative part of the first decision. This negative effect of *res judicata* reflects the principle that the subject matter of the dispute, which has finally been resolved in a judgment or award, cannot be reassessed in a subsequent forum, thus avoiding an unnecessary and wasteful duplication of proceedings pertaining to the same parties and subject matter[9].

With respect to the identity of parties requirement, the negative effect of *res judicata* applies only if the parties are the same and act in the same legal capacity in both proceedings[10]. As regards the same cause of action plea, most French scholars tend to argue that the same refers to the framework of facts specifically alleged by the parties as the basis of their claims, and not necessarily to an abstract category to be completed in light of the concrete content of the parties' claims. Moreover, French case-law states that a claimant

[8] BERNARD HANOTIAU, *supra,* p. 244.

[9] GRETTA WALTERS, *supra*, p. 653, available at www.kluwerarbitration.com.

[10] This effect extends to a party's universal successors, such as in case of legal merger or even assignment of rights and/or debts. Moreover, any legal or natural person who was validly represented in the first proceedings is subject to the binding nature of the decision.

must raise all possible legal grounds of his/her claim when initiating the first action, or otherwise said claimant will be precluded from raising another legal grounds which could have relied upon in the first proceedings (but chose not to). Finally, with regards to the identity of claim requirement, it is generally argued that the claim comprises only the final outcome reached by the court in the operative part of a decision, excluding the preliminary issues.

As for the scope of *res judicata*, French law adopts a restrictive approach further to which only the operative part of the judgment is recognized as having such effect. Therefore, the judgment's underlying reasons, or reasoning, do not constitute *res judicata*. Furthermore, *res judicata* is confined to those issues that have been the subject of the parties' discussions and on which the court has actually ruled, which entails that the matters which were not raised during the proceedings have no *res judicata* effect.

More specifically, it is understood that the reasons underlying the judgment, at the very most, may be used to interpret the operative part of the judgment and to clarify the meaning and extent of what was decided. In this path, a distinction has been made between *motifs décisoires* and *motifis décisifs*: whereas the former refer to reasons which decide parts of the dispute, albeit not contained in the operative part, the latter represent the necessary cornerstone of the operative part. Until very recently, French courts had acknowledged that said *motifs décisifs* benefited from the *res judicata* effects granted to the operative part, considering that said reasons constituted a nuclear foundation of the decision. However, during the last decade this approach has been abandoned, with courts adopting narrower view, further to which anything that does not formally appear in the operative part of the decision is deprived of any *res judicata* effects[11].

On another level, it is controversial whether a prior and final resolution on a specific matter positively imposes itself in further proceedings, although pertaining to a new claim (positive *res judicata* effects). This positive effect of *res judicata* entails that courts in subsequent proceedings, when asked to decide on an issue already resolved in a prior judgment, are bound by said prior resolution and must abstain from deciding against it. However, considering that Article 1351 of the French Civil Code expressly requires the so-called triple identity test, as well as the fact that no other provision refers to the positive *res judicata* effect of judgments, most legal commentators tend to argue that this effect is

[11] ROGER PERROT / NATALIE FRICERO, "*Authorité de la chose jugée*", *Jurisclasseur - Procédure civile*, fasc. 554, 2008.

nothing more than a consequence of the negative *res judicata* effects, in terms of simply entailing the right to invoke a prior decision in subsequent proceedings[12].

2.2.2. Portugal

In Portugal, it is generally understood that the doctrine of *res judicata* is based on public policy reasons, *inter alia* legal safety and certainty, as well as on the necessity to preserve the courts' prestige. The underlying rationale of *res judicata* is to prevent the practical contradiction between decisions, i.e., it aims to avoid that courts decide differently on questions of fact and law that were previously resolved by a final and binding decision.

The doctrine of *res judicata* has both a negative and positive function[13]. The negative function (or effect) of *res judicata* is set out in Articles 580 and 581 of the Portuguese Civil Procedure Code ("PCPC"), which govern the procedural objection of *res judicata*. According to these provisions, a judgment may generate an objection of *res judicata* whenever there is an identity of parties, cause of action and claim in both proceedings (triple identity test). Similarly to French law, in case this triple identity test is met, the prior decision will have negative *res judicata* effects in subsequent proceedings and, as a result, the subsequent adjudicator is not entitled to decide on the merits of the new claim.

In light of Article 581, (2) of the PCPC, there is identity of parties whenever they bear the same substantive interest in successive proceedings. Therefore, it is not required that the parties are physically coinciding in both proceedings, and neither is necessary that they maintain the same procedural position (claimant/respondent) in both actions. With regards to the identity of claims requirement, Article 581, (3) of the PCPC clarifies that it aims to comprise the cases where the parties in both proceedings aim to attain the same binding legal effect, which means that they must ask the court to recognize the same rights in both proceedings. Finally, according to Article 581, (4), the identity of cause of action requirement entails that the concrete set of facts invoked by the parties – and further to

[12] Although Article 95 of the New Code of Civil Procedure states that *"[w]here the judge, while deciding on the issue of jurisdiction, resolves the merits at issue on which depends the jurisdiction, his decision will become res judicata in relation to the merits at issue"*, French case-law remains contrary to a general recognition of the positive *res judicata* effect of judgments.

[13] José Lebre de Freitas / António Montalvão Machado / Rui Pinto, "*Código de Processo Civil Anotado*", Vol. 2, 2.ª Edição, Coimbra Editora, p. 234, 2008.

which their claims are based – is the same in both proceedings. Moreover, together with the allegation of the facts, the claimant must identity the legal grounds that represent the basis of the claim.

In contrast to French law, the vast majority of Portuguese case-law and legal scholarship accept the positive *res judicata* effects of prior decisions. The legal basis of this understanding rests on the wording of Article 619 PCPC[14], further to which "*the decision on the merits is mandatory both inside and outside of the proceeding*". Therefore, a final decision rendered within a prior proceeding is regarded as creating a new substantive legal relationship between the parties that positively imposes itself in subsequent proceedings before a different adjudicator. The prevailing opinion advocates that this positive effect is triggered regardless of the fulfillment of the triple identity test. In sum, the positive *res judicata* effect implies the compliance with a decision rendered in a prior proceeding whose subject matter overlaps, as a necessary precondition, in the object of a subsequent proceeding, meaning that the substantive legal relationship, as initially defined, must remain intact and undisputed.

According to Article 628 PCPC[15], a decision acquires the force of *res judicata* when no ordinary means of recourse – such as appeal proceedings – can be brought against it (and not upon the moment is rendered).

Finally, in what concerns the scope of *res judicata*, while is generally accepted that the *res judicata* effects of a prior decision are confined to the issues of fact and law specifically addressed in its operative part ("*dispositivo*"), it has been asserted that said effect also covers its underlying reasons, insofar as they are a logical and a necessary prerequisite of the decision's operative part[16].

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[14] Which reads: *"(1) Transitada em julgado a sentença ou o despacho saneador que decida do mérito da causa, a decisão sobre a relação material controvertida fica a ter força obrigatória dentro do processo e fora dele nos limites fixados pelos artigos 580º e 581º, sem prejuízo do disposto nos artigos 696º a 702º".*

[15] Which reads: *"A decisão considera-se transitada em julgado logo que não seja susceptível de recurso ordinário ou de reclamação."*

[16] MIGUEL TEIXEIRA DE SOUSA, "*Estudos sobre o Novo Processo Civil*", Lex, 1997, p. 578-579, states the following: *"It is not the decision, as the conclusion of the judicial syllogism, that acquires the force of res judicata, but the judicial syllogism as a whole: the force of res judicata covers the decision as the outcome of certain reasons and also includes the latter as necessary prerequisites of said decision".*

2.3. *Res judicata* in common law countries

2.3.1. England

In England, a decision attains the force of *res judicata* inasmuch as it is judicial in nature and rendered by a judicial tribunal with jurisdiction over the parties and the subject matter of the dispute, entailing a final and conclusive determination on the merits of the case. Consequently, the doctrine of *res judicata* is perceived as an umbrella doctrine that comprises "*broad rules of public policy that try to ensure finality in litigation and that parties are not «twice vexed in the same matter*"[17].

The preclusive *res judicata* effects may give rise to a plea of cause of action estoppel, issue estoppel, former recovery or abuse of process. Whereas the first three effects can be associated with the traditional concept of the negative *res judicata* effects of civil law countries, the abuse of process requirement applies exclusively in situations where the subject matter of the case in the subsequent proceedings is not covered by the *res judicata* effect of the prior decision.

The plea of cause of action estoppel aims to prevent a party from asserting a cause of action or defense that has previously been resolved in proceedings between the same parties. A cause of action consists on the facts that lead to the right or relief, the legal rights asserted, and the substance of the proceedings. It comprises the set of facts and circumstances based on which a right to a relief arises, and therefore all claims which arise from the same event and rely on the same evidence make up one cause of action[18]. In light of the above, cause of action estoppel acts as an absolute bar on the subsequent proceedings, which means that errors of law, discovery of new factual matters, or even subsequent changes in law are insufficient to overcome the estoppel[19]. Only alleged fraud or collusion can prevent the application of a cause of action estoppel once it has arisen, albeit instances of these are rare.

As for the plea of issue estoppel, the same prevents parties from seeking to re-assess an issue of fact or law that was an essential step or cornerstone in the reasoning of a

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[17] VARUN N. GHOSH, "*An uncertain shield: res judicata in arbitration*", Arbitration International, 31, Oxford, 2015, p. 661.

[18] ILA, "*Interim Report on Res Judicata and Arbitration",* Berlin Conference, p. 7, available at www.ila-hq.com.

[19] VARUN N. GHOSH, *supra*, p. 663.

previous decision, even where the subsequent cause of action is different. Hence, a matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision, cannot be re-opened. Nonetheless, issue estoppel only applies to matters which were legally indispensable and necessary to the outcome of the prior decision, thus excluding mere collateral and subsidiary issues[20]. Finally, it also extends to issues that should have been, but were not actually, raised in the earlier proceedings[21].

In what concerns the plea of former recovery, it purports to prevent a party in whose favor a final decision has been issued from recovering a second decision against the same party on the basis of an identical cause of action[22]. Similarly to cause of action estoppel, the plea of former recovery is based on a final and conclusive decision regarding a certain cause of action, although it only may be triggered against the party in whose favor a relief has been granted by virtue of a previous decision.

Finally, the doctrine of abuse of process applies to cases where the subject matter at stake in the subsequent proceedings is not covered by the *res judicata* effects of a prior decision. In order for this doctrine to be properly applied, it has to be demonstrated that said subject matter could and should have been rendered *res judicata* by the prior decision had the parties brought the issue before the court. Hence, the court can discretionarily assess, in light of the circumstances of the case, whether the process was misused by virtue of a dishonest behavior of one of the parties[23]. Although it is impossible to rigidly set out *a priori* what constitutes an abuse of process or not, there are certain signs that suggest that a proceeding is abusive, such as when the proceeding is oppressive or unjustly harasses a defendant, or when it could produce inconsistent or mutually exclusive verdicts[24].

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[20] SILJA SCHAFFSTEIN, *supra*, p. 21, para. 55.

[21] VARUN N. GHOSH, *supra*, p. 663.

[22] SILJA SCHAFFSTEIN, *supra*, p. 22, para. 58.

[23] In *Henderson v Henderson*, it was stated that *"[t]he court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest (...). The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time".*

[24] VARUN N. GHOSH, *supra*, p. 666. Albeit the doctrine of abuse of process has a potentially expansive scope, courts have repeatedly stressed the 'need for caution' in its application, suggesting that close attention should be paid to the pleadings and true substance of the dispute.

Additionally, the *res judicata* effects of a judgment are also limited by the doctrines of privity and mutuality. According to the doctrine of privity, only the parties or privies to the proceedings in which a decision with the force of *res judicata* arose can be bound by the same in subsequent proceedings. There are three categories of privy: privies in blood (e.g., ancestors or heirs); privies in title (e.g., a person who succeeds to the rights or liabilities of a party upon insolvency); and privies in interest (e.g., a trustee who sues on behalf of a beneficiary and a partner and his co-partner). However, companies and their shareholders are generally considered not to be privies[25]. Lastly, the principle of mutuality states that the parties (or their privies) to the subsequent proceedings must have been a party to the earlier proceedings and must claim or defend in the subsequent proceedings the same right or interest.

2.3.2. United States

The doctrine of *res judicata* in the United States ("US") is largely similar to that in England (although it may vary amongst States). As a result, a party to the prior proceedings (or its privies) may raise the pleas of claim preclusion or issue preclusion. Contrary to English law, the US approach towards *res judicata* does not acknowledge an autonomous plea of abuse of process. Nevertheless, US law seems to attain a similar result to that of the plea of abuse of process in English law, since the concept of claim preclusion is broadly interpreted and applied, comprising "*all the 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*"[26]. In order to determine the existence of a claim for preclusion purposes, courts assess: (i) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (ii) whether substantially the same evidence is presented in the two actions; (iii) whether both proceedings relate to the alleged violation of the same rights; and (iv) whether the two proceedings arise from the same core of facts.

[25] AUDLEY SHEPPARD, "*Parallel State and Arbitral Procedures in International Arbitration*", Chapter 8: *Res judicata* and Estoppel, Dossiers of the ICC Institute of World Business Law, Volume 3, p. 226, available at www.kluwerarbitration.com.

[26] SILJA SCHAFFSTEIN, supra, p. 33, para. 92.

Albeit similar rules and principles of privity apply, the doctrine of *res judicata* in the US differs from the English model since the principle of mutuality is no longer a requirement for issue preclusion[27]. This entails that a party is prevented from re-litigating an issue in subsequent proceedings with another person, even if that person/entity was a third party to the prior proceedings.

Overall, a valid and final award rendered by an arbitral tribunal has the same effects under the rules of *res judicata.*

2.4. Irreconcilable differences?

Following the comparison between the legal systems set out above, we believe that there are significant differences and divergence among domestic laws in what concerns the scope and extent of the doctrine of *res judicata*.

In civil law systems, the codified notion of *res judicata* is rather confined to the claims raised in the proceedings than to the issues determined in the decisions. In this sense, the approach to *res judicata* is generally narrower, as demonstrated by the importance of the triple identity test. However, even in France - which is an emblematic example of the classic triple identity test - we are witnessing the adoption of a broader approach to the scope of the doctrine of *res judicata*, comprising all claims that could have been addressed in prior proceedings. Nevertheless, the same of cause action test of civil law countries demonstrates that *res judicata* is generally detached from any fact-finding power, which entails that a judicial decision can only determine the legal consequences of "what seems to have happened" rather than determine "what really happened"[28]. Hence, the importance of a certain proceeding and a specific issue arising in said proceeding could differ widely in relation to another legal proceeding. Accordingly, since a particular issue might be of relative insignificance in the first litigation, it is feasible that a party does not invest so much in addressing the same; as a result, one could argue that it would be unwise to grant the force of *res judicata* to said issue. Nonetheless, this narrower approach concerning the relevance of the issues raised in prior proceedings is surpassed through the adoption of a

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[27] SILJA SCHAFFSTEIN, supra, p. 38, para. 111.

[28] STRAVOS BREKOULAKIS, "*The effect of an arbitral award and third parties in International Arbitration: Res Judicata revisited*", The American Review of International Arbitration, Vol. 16, 2005, p. 7.

broader approach to *res judicata* – as exemplified by Portugal – that acknowledges both the positive effect and the extension of the force of *res judicata* not only to the operative part of the decision *per se,* but also to its underlying reasons, insofar as they represent a necessary and indispensable precondition for the decision on the merits.

Conversely, common law jurisdictions seem to have developed a broader approach in relation to doctrine of *res judicata*, encompassing the prevention of re-assessment of both facts and issues (factual and legal) adjudicated in the decision. Therefore, *res judicata* entails a fact-finding value and reflects and authoritative determination of the whole narrative of the dispute[29]. This kind of "*expansive approach furthers the policy of finality that res judicata seeks to accomplish by virtue of focusing on the actual substantive and transactional configuration of the proceedings instead of relying on the narrow and formalistic mechanisms that undermine the doctrine*"[30].

This analysis demonstrates that the doctrine of *res judicata* is not applied uniformly in domestic laws. Although it is commonly required that there must be identity of the parties, facts and claims at issue, there is no consensus as to the exact features and extent of these concepts, as well as their practical consequences. In light of the irreconcilable differences between legal systems, we believe that the application of domestic *res judicata* principles and rules in international commercial arbitration is not feasible and should be considered as undesirable, on the basis of the cornerstone principles and specific nature of international arbitration.

3. "*Inside-out*" movement: *res judicata* as a matter of transnational law

3.1. A fragmentary legal framework

As previously stated, similarly to judgements rendered by national courts, arbitral awards have *res judicata* effects. This is quite understandable since *"[o]ne of the fundamental objectives of international arbitration is to provide a final, binding resolution of the parties' dispute. Essential to achieving this objective is the preclusive effect of*

[29] STRAVOS BREKOULAKIS, *supra*, p.6.

[30] MARTINEZ-FRAGA & H.J. SAMRA, "*The role of precedent in defining res judicata in Investor-State Arbitration", Northwestern Journal of International Law & Business*", No. 3, 2012, p. 421.

arbitral awards: if parties are not bound by the awards made against them – either dismissing or upholding their claims or declaring their conduct wrongful or lawful – then those awards do not achieve their intended purpose and are of limited value"[31].

Consequently, most conventions, treaties, laws and rules that govern international arbitration embrace the concept of *res judicata*. For instance, Article III of the 1958 New York Convention on the Recognition and Enforcement of Foreign Awards ("NY Convention") sets forth that *"[e]ach Contracting State shall recognize arbitral awards as binding [...]"*. Similarly, Article 34 (2) of the UNCITRAL Arbitration Rules provides that *"[a]ll awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delays"*. Finally, Article 28 (6) of the International Chamber of Commerce ("ICC") Rules of Arbitration sets out that "*[e]ach award shall be binding on the parties*". However, the scope and limits of the *res judicata* effects of awards rendered pursuant to said rules is not clear.

According to GARY BORN[32], the NY Convention shall be understood as prescribing international mandatory standards that ensure the binding nature of arbitral awards and prevent national courts from denying preclusive effects to said awards. In particular, Article III shall be read as requiring not only that Contracting States enforce arbitral awards, but also that they recognize such awards as binding. This encompasses not merely the duty to give formal recognition to awards, but also to give recognition of a nature that makes an award truly binding on the parties, and this type of recognition would not exist if awards did not have preclusive effects in national courts, in such a way as to the parties from re-litigating issues that had already been decided in prior proceedings. Therefore, "*Article III of the Convention should not be interpreted to prescribe particular rules of preclusion, but instead to provide a constitutional statement of principle – mandating recognition of the "binding" effects of awards – that must be elaborated over time by national courts and arbitral awards"*[33].

In the opposite direction, some scholars and legal commentators argue that the doctrine of *res judicata* might compromise some of the most basic features of arbitration, such as party autonomy[34]. In this sense, the recognition of *res judicata* principles would impair the

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[31] GARY BORN, "*International Commercial Arbitration"*, Volume II, Wolters Kluwer, 2014, p. 3734, available at www.kluwerarbitration.com.

[32] GARY BORN, *supra*, p. 3741-3745.

[33] GARY BORN, *supra*, p. 3744.

[34] SILJA SCHAFFSTEIN, *supra*, p. 164-165, para. 506-507.

flexibility and malleability of the arbitral process, in a way that it would look more similar to traditional litigation - which is precisely what the parties wanted to avoid by entering into an arbitration agreement and referring their disputes to arbitration. Moreover, it has also been stated that the adoption of strict *res judicata* rules would conflict with the current path of exempting international arbitral tribunals from traditional procedural formalities. Hence, on the grounds of procedural economy and simplicity, arbitral tribunals would be entitled to decide, on a discretionary manner, on the scope and terms based on which they are bound by prior rulings, depending on the circumstances of the case. This would truly accommodate the legitimate interest of many parties to have their dispute arbitrated in a comprehensive manner[35]. As for the possible risk of having contradictory decisions regarding the same issue and/or subject matter, this inconsistency would be dealt with through annulment or recognition and enforcement proceedings. Additionally, this deviation from *res judicata* also reflects a certain skepticism regarding the absence of mechanisms to avoid parallel proceedings between arbitral tribunals and state courts, as well as between different arbitral tribunals.

However, we are of the opinion that this case-by-case approach, detached from any basic framework of reference, generates a fatal uncertainty and unpredictability for arbitration. The purpose and key feature of arbitration is to resolve, on a final and conclusive manner, the parties' disputes, while avoiding the costs and delays of different litigations in national courts. Hence, entitling arbitral tribunals to discretionarily extend the scope of *res judicata* would most likely endanger the parties' need for legal certainty and their interests regarding the finality and conclusiveness of prior adjudications. Moreover, this discretionary approach also undermines the fact that the core concept of *res judicata* is a procedural foundation of all jurisdictions and acknowledged as a rule of customary international law or a general principle of law, on the grounds of which both the parties and the arbitral tribunal base their actions and expectations.

In light of the above, we believe that we have reached a dead end: none of the relevant provisions set forth in domestic laws, institutional rules and international conventions seem to go beyond highlighting the general principle that arbitral awards are binding upon the

[35] NIKLAUS ZAUGG, *"Objective scope of res judicata of arbitral awards – Is there room for discretion?",* Association Suisse de l'Arbitrage, Kluwer Law International 2017, Volume 35, pp. 332, available at www.kluwerarbitration.com. According to this scholar, there is indeed room for discretion regarding the definition of the objective scope of *res judicata* of arbitral awards, but it should be left entirely in the hands of the parties, with the purpose of reinforcing two of the most important features of international arbitration: flexibility and party disposition.

parties. Although the arguments presented by GARY BORN regarding the interpretation of Article III of the NY Convention are indeed impressive, the wording of said provision does not encompass any substantive criteria concerning standards of preclusion and conclusiveness for arbitral awards. In fact, one may even argue that the approach suggested by GARY BORN is somewhat contradictory, since it relies on domestic laws to refine towards a coherent standard[36].

Considering these uncertainties, arbitral tribunals must avoid an "*unduly mechanical application of technical domestic rules of preclusion with regard to arbitral awards (or national court judgments)*"[37]. Hence, a recent trend asserts the need for *res judicata* guidelines – instead of strict and black letter rules - to be elaborated for international arbitral tribunals, with the purpose of setting out a basic framework of reference for arbitral tribunals, thus ensuring the envisioned certainty and predictability in arbitration[38].

As it will be argued below, arbitral tribunals shall endorse the adoption of transnational *res judicata* principles that find their *raison d'être* in the specific nature, features and cornerstones of international arbitration, such as parties' expectations and procedural efficiency, particularly vis-à-vis the resolution of a dispute in a comprehensive and conclusive manner.

3.2. Applicable law and *res judicata*: the "*elephant in the room*"

International arbitration practice has devoted little attention to the issue regarding the applicable law for determining questions of *res judicata*. By default, the preclusive effects of a prior decision are assessed through the lens of a subsequent adjudicator that looks back to what was decided in the first proceeding. While performing this exercise, it is widely assumed that most arbitral tribunals refer to the domestic *res judicata* rules and concepts in order to ascertain the preclusive effect of a prior decision. This enables arbitrators to motivate and justify their decisions in more traditional terms, thus increasing the likelihood of the award's enforceability. Nevertheless, a question arises: which law should set out the

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[36] NATHAN YAFFE, "*Transnational Arbitral Res Judicata*", Journal of International Arbitration, Kluwer Law International 2017, Volume 34, Issue 5, p. 815, available at www.kluwerarbitration.com.

[37] GARY BORN, *supra*, p. 3776.

[38] SILJA SCHAFFSTEIN, *supra,* p. 173-174, para. 529-530.

requirements in order to assess whether a prior decision qualifies as *res judicata*, therefore defining the effects of said prior decision in the subsequent arbitration proceedings?

Considering that *res judicata* is often perceived as a procedural rule, it might be thought that the arbitral tribunal shall only look to the law of the place where the first award was rendered (or rendering forum)[39]. Nevertheless, the blind application of the rules of the rendering forum seems to undermine the general rule that international arbitral tribunals lack a true seat and also that an *"(...) international arbitration and resulting arbitral award do not bear the same relation to the arbitral seat, as its legal system, as a national court and a judgement do to the local legal system*"[40]. Notwithstanding, and still within this procedural scope, others suggest that the law governing *res judicata* should be the law of the country where the new claim is re-litigated, that is, the law of the place of arbitration of the tribunal before whom the question of *res judicata* arises. The reasoning behind this position is closely intertwined with the notion that it is the forum of re-litigation that bears the inefficiencies and the costs pertaining to the reassessment of certain claims and/or issues[41].

Another approach places a greater emphasis on the contractual nature of international arbitration. While some vehemently advocate in favor of the application of the law governing the contract *(lex contractus)*[42], others tend to highlight that the *res judicata* effects of a decision should be understood as a question of what were the effects that the parties aimed to attain by resorting to arbitration[43]. Therefore, the adequate definition of the parties' expectations can only be determined through the interpretation of the arbitration agreement, which means that the law governing the arbitration agreement will provide clarification to the arbitral tribunal regarding the parties' concerns of finality, efficiency and preclusion of their disputes.

Further to the above, one may conclude that there is indeed a significant discord as to which law(s) should govern *res judicata*. In view of this uncertainty, some of authors

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[39] AUDLEY SHEPPARD, *supra*, p. 229.

[40] GARY BORN, *supra*, p. 3768-3769.

[41] GARY BORN, *supra*, p. 3768.

[42] AUDLEY SHEPPARD, *supra*, p. 230.

[43] JAN KLEINHEISTERKAMP, "*O Caso Julgado na Arbitragem Internacional: Entre conceitos transnacionais e contratuais",* VI Congresso do Centro de Arbitragem da Câmara de Comércio e Indústria, (Centro de Arbitragem Comercial): Intervenções, Coord: António Vieira da Silva, Almedina, 2013, p. 191.

advocate that none of the laws referred to above have a clear and undisputed[44] interest in being applied, and therefore the application of the same is still connected with the distorted view of implementing domestic *res judicata* rules, designed for litigation, in international arbitration. In our opinion, this implementation does seem inadequate, considering that domestic *res judicata* rules do not take into consideration the specific nature and features of international arbitration.

Moreover, this conflict-of-laws method – which implies the *ad hoc* determination of a specific applicable law to *res judicata* issues – raises difficult questions pertaining to the characterization of *res judicata* as a procedural or substantive matter. While it appears that under the English and US legal systems the preclusive and conclusive effects of a prior decision are anchored in substantive law – particularly considering the notions of cause of action estoppel and issue estoppel -, it is argued that in civil law systems the preclusive (or negative) *res judicata* effects relate to procedure, but the conclusive (positive) *res judicata* effects are part of substantive law. Consequently, it is understood that "*the scope of res judicata can vary tremendously depending on the applicable law, and there is some degree of uncertainty in the determination of the applicable law. As a result, the effects of res judicata can be tailored to some degree. It follows that although res judicata can be a very powerful tool in domestic context, it is less so in an international context"*[45].

In our opinion, the discussion around the characterization of *res judicata* in light of the different national laws is not essential to determine how and when international arbitral tribunals should deal with the finality and conclusiveness of prior decisions. As previously stated, the development of a transnational doctrine of *res judicata* surpasses the boundaries of the domestic context with the aim of devising uniform rules and principles to be applied by international arbitral tribunals in case a *res judicata* controversy arises in the context of a subsequent proceeding.

However, we believe that, in case the prior decision is an arbitral award rendered between the same parties, the determination of its final and binding effects shall take into account – and be intrinsically limited by – the parties' arbitration agreement. As it is well know, it is the parties' arbitration agreement that provides the adequate frame of reference for consideration of the inefficiencies and injustices of multiple proceedings. By entering into an arbitration agreement, the parties have conferred upon the arbitral tribunal the power

[44] SILJA SCHAFFSTEIN, *supra,* p. 170, para. 521.

[45] PINSOLLE PHILIPPE/SUHAIB AL-ALI, *supra*, p. 51.

to decide their dispute(s), and said mandate shall be exercised in conformity with the arbitration agreement. Furthermore, one must look, in the context of arbitral proceedings, to the (possible) violation of the parties' arbitration agreement, considering that the latter usually entails significant expectations of finality and efficiency, which must be regarded while applying rules of preclusion[46]. This means that the law governing the arbitration agreement plays an important role in the interpretation of the same and, consequently, in determining the parties' legitimate expectations concerning the fairness, finality and conclusiveness of their dispute. Therefore, it is the parties' expectations – and not the law governing the arbitration agreement where said expectations are contained – that shall enlighten the arbitral tribunal in the subsequent proceedings as to the negative and positive effects of the prior award.

In this sense, even if, for instance, the law of the rendering forum does not acknowledge positive *res judicata* effects of a decision (e.g., France), this does not mean that a subsequent arbitral tribunal is prevented from recognizing such positive effect to this decision, on the grounds that the parties' expectations regarding the conclusiveness of their dispute require such effect. The view that *res judicata* effects of prior decisions should necessarily be determined in light of a specific (albeit unspecified) domestic law – the "elephant in the room" - must be abandoned in favor of an approach that focuses on the specific features of international arbitration and on the parties' expectations.

3.3. *Res judicata* in the transnational world

3.3.1. Introduction

Bearing in mind the contrasting views and diverging domestic concepts as to the objective and subjective limits of the doctrine of *res judicata*, some authors asserted the need to elaborate transnational *res judicata* rules on the basis of the arbitrating parties' expectations[47]. Thus, another possibility of approaching the doctrine of *res judicata* in international arbitration consists on devising autonomous principles and rules that are better suited to embrace the special features and characteristics of international arbitration, by

[46] GARY BORN, *supra*, p. 3769.

[47] SILJA SCHAFFSTEIN, *supra,* p. 173, para. 529.

focusing on principles such as good faith, party autonomy, procedural efficiency, as well as the scope and effects of the arbitration agreement. The purpose of this method is to provide a set of *res judicata* principles unplugged from any domestic law system, which would go beyond the more strict and formalistic views that traditionally apply in national systems.

On paper, this approach seems to prevent the inconsistencies of all the previous alternatives. In particular, this transnational method avoids the application of a certain national law that might be unfamiliar to the parties and averts inappropriate analogies between international arbitration and litigation. Furthermore, it also presents several advantages of its own, such as the respect for the nature and goals of international arbitration and the promotion of more consistent solutions to *res judicata,* in view of ensuring a greater degree of efficiency, fairness, certainty and predictability of the arbitration process.

Nonetheless, even if international arbitral tribunals should not apply any particular domestic *res judicata* rules aimed at domestic judgements, this does not entail that transnational *res judicata* rules for international arbitration should not be influenced upon said set of rules. As previously stated, one shall not disregard the similarities and shared interests between arbitration and litigation with regards to *res judicata*. The specific aims of efficiency, legal certainty and integrity of the decision-making process are equally important in both domestic and international dispute resolution mechanisms. Moreover, the practice of international arbitration has not emerged *ex nuovo*, but instead through the adaption – or even mutation – of traditional frameworks to new situations.

In conclusion, we are of the opinion that domestic laws can provide a basic framework of reference in terms of identifying the key issues, topics and concepts that fall within the umbrella of the doctrine of *res judicata*. Once this core framework of reference is identified, international arbitral tribunals should discover new transnational rules and principles that take into account the parties' expectations and presumptive desire to resolve all of their disputes in a single, centralized proceeding[48].

[48] GARY BORN, *supra*, p. 3745.

3.3.2. ILA Final Report and Recommendations on *Res Judicata* and Arbitration

With the view of promoting a codification of transnational *res judicata* principles and rules, the International Law Association's ("ILA") Committee on International Commercial Arbitral (the "Committee") released, between 2002 and 2006, a set of reports – and later Recommendations[49] – on *res judicata* in international commercial arbitration[50]. The purpose of this work was to discuss and identify certain points of reference and intersection on the doctrine of *res judicata* outside of the domestic context. Ultimately, the underlying objective was to implement certain rules that, on a transnational level, adequately reflect the concern of the parties of having their disputes litigated in an efficient and comprehensive manner.

One of the studies that influenced the Committee was one arising from an extensive analysis of all ICC awards that had to deal with the doctrine of *res judicata*, carried out by DOMINIQUE HASCHER[51]. In light of this analysis, the Committee concluded that international arbitration is witnessing a broader and more malleable approach to *res judicata*, on the basis of a more pragmatic understanding of this doctrine. According to the Committee, since arbitral tribunals are not obliged to apply the same procedural rules as domestic courts and have greater discretion to apply procedural rules that are appropriate for international arbitration, a "*more extensive notion of* <u>*res judicata*</u>*"* should be adopted[52]. Although the Recommendations do not deal with the relationship between state courts and arbitral tribunals, it should be noted that arbitrators, when faced with a prior judgement, may consider that they should not automatically a specific domestic law, but to take the Recommendations into consideration[53].

In a nutshell, the Committee concluded that some issues pertaining to *res judicata* should be governed by transnational rules. According to Recommendation No. 2, *"[t]he conclusive and preclusive effects of arbitral awards in further arbitral proceedings set out*

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[49] Resolution No. 1/2006, International Commercial Arbitration, 72nd Conference of the International Law Association (Toronto, June 2006).

[50] The ILA Report and Recommendations comprise the findings of a four-year project headlined by Professor Pierre Mayer and Professor Filip De Ly, in which over 50 (fifty) members, from all over the world, have cooperated.

[51] Former General Counsel of the ICC Court of Arbitration and current judge of the French "*Cour de Cassation*".

[52] ILA, *Final Report on Res Judicata and Arbitration*, p. 27, para. 6.

[53] ILA, *Final Report on Res Judicata and Arbitration*, p. 28, para. 11.

below need not necessarily be governed by national law and may be governed by transnational rules applicable to international commercial arbitration". Hence, the Final Report is very clear in terms of stating that some aspects of *res judicata* are to be characterized autonomously and to be governed by transnational substantive or procedural rules.

Accordingly, the ILA Committee opted for a mixed model, further to which transnational rules on certain aspects of *res judicata* would be adopted, whereas the remaining issues were to be referred to domestic law under an acceptable conflict rule[54]. The last interim report clearly stated said purpose by saying that *"[a]rbitral tribunals are not required to apply the same procedural rules that are appropriate for international arbitration. For international arbitration, where arbitrators are often conducted under international rules and increasingly uniform laws, a globalized harmonized approach to res judicata would be commendable"*[55] [56].

Nonetheless, it is clear that the Committee refrained from formulating transnational rules in relation to some divisive issues, such as: the definition of awards which qualify for *res judicata* effects and the moment in which said effects arise; *res judicata* effects of decisions of tribunals from different legal orders; and *res judicata* effects on third parties in using a more lenient identity of the parties standard. This mixed model can be found in the Committee's Recommendations, and particularly in the transnational rules are set forth in Recommendations No. 3 through No. 7. For pragmatic reasons, we will focus our assessment on Recommendations No. 3 and 4, which set out the requirements for conclusive and preclusive effects of a previous decision and their scope, respectively.

3.3.2.1. Requirements for conclusive and preclusive effects of a prior decision

[54] ILA, *Final Report on Res Judicata and Arbitration*, p. 26, para. 5.

[55] ILA, *Interim Report on Res Judicata and Arbitration*, p. 35, para. 39.

[56] The Committee stated that the adopted of this 'mixed model' would avoid "*a difficult choice between three different legal systems*": (i) the law of the place of the arbitration of the proceedings leading to the prior award; (ii) the law of the place of the arbitration of the proceedings where res judicata is invoked; and (iii) the law governing the contract (para. 27).

The Commitee identified five traditional conditions for arbitral awards to have conclusive and preclusive effects: (i) the prior award must be final and binding and capable of recognition in the country where the arbitral tribunal of the subsequent arbitration proceedings has its seat; (ii) the arbitration proceedings in which the *res judicata* issue is raised, must pertain to the same legal order as the prior award; (iii) identity of the subject matter; (iv) identity of the cause of action; and (v) identity of the parties. Of all the conditions described above, the Committee decided to set aside the requirement pertaining to the same legal order and maintain the others. As a result, the Recommendations maintain the so-called triple identity test, that is, identity of the claims, of the causes of action and of the parties[57].

Firstly, the Committee highlights that for an award to employ conclusive and preclusive effects, the same claim or relief must be sought in the further arbitration proceedings. Therefore, new claims and new requests for relief will not be barred by the *res judicata* effect of a prior award, with the exception of new claims that constitute procedural unfairness or abuse. Secondly, for an arbitral award to have conclusive and preclusive effects, the claims or relief sought in further arbitration proceedings must be based on the same cause of action as in the prior arbitration. By contrast, if a claim or relief is based on a different cause of action, then it is not barred by *res judicata*. Finally, it is said that the conclusive and preclusive effects of a prior arbitral award are also based on the assumption that the award was rendered between the same parties as the parties in the subsequent arbitration[58]. In this regard, the Committee highlighted that complex issues relating to the identity of the parties may arise, namely in the field of groups of companies and Bilateral Investment Treaties ("BIT's"), but acknowledges that this analysis goes beyond the scope of the report[59]. This increased complexity also arises given that national laws have different methods and theories for identifying third parties to a legal proceeding, which entail different requirements, scope and conclusions (e.g., alter ego, agency, piercing of the corporate veil, protection of legitimate expectations).

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[57] ILA, *Final Report on Res Judicata and Arbitration*, p. 34, para. 41.

[58] The Recommendations purportedly refrained from devising new rules regarding the "identity of the parties" test. Thus, there is no 'mutuality' requirement – i.e., the parties are only identical if they act in the same capacity in the prior and further arbitration proceedings – nor a notion of parties.

[59] ILA, *Final Report on Res Judicata and Arbitration*, p. 34, para. 48.

3.3.2.2. The scope of conclusive and preclusive effects

Concerning the scope of conclusive and preclusive effects under the ILA Final Report and Recommendations, Recommendation No. 4 states that an arbitral award has conclusive and preclusive effects in the subsequent proceedings not only as to the determinations and relief contained in its operative part, but also in relation to all reasoning necessary thereto, and to issues of fact or law which have actually been arbitrated and determined by it, provided any such determination was essential or fundamental to the dispositive part of the arbitral award.

In light of the above, it is indeed true that the Recommendations adopt a broader approach to *res judicata*, further to which the latter covers not only the operative part of the award, but also to its underlying reasoning. By doing so, the Committee acknowledged that more restrictive views regarding the scope of *res judicata* – where the conclusive and preclusive effects of prior decisions are limited to their operative part – were overly formalistic and literal. Hence, if it is clear from an arbitral tribunal's reasoning that the dispositive part is to be interpreted in such a way as to prevent further or subsequent arbitration proceedings, then the former is also *res judicata* in the sense that it cannot be reargued. In this sense, claims barred on the grounds of the same cause of action by virtue of the *res judicata* effects of both the operative part and its underlying reasons prevent the reassessment of evidence and legal arguments previously addressed with regards to said cause of action[60].

3.3.2.3. Did the ILA Report and Recommendations fall short of initial expectations?

The Final Report and Recommendations of the ILA International Commercial Arbitration Committee on the topic of *res judicata* and arbitration reflected a certain tension on the possible development of transnational principles of *res judicata*. Although the Recommendations comprise a core of issues where it was considered that transnational rules could be developed, there were other issues where it was deemed premature to devise

[60] ILA, *Final Report on Res Judicata and Arbitration*, p. 35, para. 52.

said rules.[61] At the time, the development of uniform transnational *res judicata* rules was considered a positive trend towards the attainment of a basic framework of reference capable of providing more satisfactory answers to the specific nature and international facet of arbitration.

While the Final Report and Recommendations constitute an influential guide as to the international perception of the doctrine of *res judicata* and a valuable contribution towards a coordinated answer in the field of international arbitration, some of the proposed solutions have shown to be either unsatisfactory or incomplete, in terms of leaving too many questions unanswered[62]. For instance, one may argue that the triple identity test set forth by the Recommendations can dangerously put form over substance and undermine the specific circumstances of a certain case, as well as being inconsistent with the core policy grounds that gave rise and prominence to the doctrine of *res judicata* (e.g., this test does not prevent, in itself, the rendering of contradictory decisions regarding the same issue). In this path, by applying a very narrow test, where there is little or even no opportunity to join a third party, or have another tribunal stay its proceedings to await the outcome of another arbitration, an arbitral tribunal may, in fact, render unjust solutions.

In addition, by failing to address key issues that may arise when an arbitral tribunal considers a prior award and/or decision, the Committee did not provide a solution for many of the issues that are most likely to encompass significant practical problems. This is particularly evident when assessing the same parties' standard, considering that there is no substantive criteria that would apply in borderline situations. Similarly, some scholars argue that ILA should have taken a firm view on the nature (substantive or procedural) of *res judicata* and on the question of which law shall govern the issue of preclusion[63].

Moreover, one may even argue that the outcome is contradictory in itself, given that the Recommendations state that unresolved questions are to be referred to domestic law. As previously stated, it was the collapse of the conflict-of-laws approach that ultimately generated an international effort to develop a transnational doctrine of *res judicata*. In spite of most jurisdictions treating *res judicata* as a procedural issue, and despite the fact that international arbitration has emancipated from the procedural rules of *lex fori*, there is a

[61] ILA, *Final Report on Res Judicata and Arbitration*, p. 27, para. 5.

[62] NATHAN YAFFE, *supra,* p. 809.

[63] NATHAN YAFFE, *supra,* p. 810.

significant risk that state courts may aggressively scrutinize the award with the purpose of imposing a particular national standard on arbitrators.

On another level, it is argued that the principles and/or guidelines elaborated by private bodies, such as the ILA, do not have any immediate binding authority on arbitral tribunals, unless said transnational rules on procedural matters reflect a broadly – or even universally - acknowledged best practice[64]. Consequently, one may argue that the Recommendations' lack of applicability reflects the prematurity of a soft law/codification approach to *res judicata* in arbitration. Although *soft law* has been very important in the field of international arbitration[65], the conditions for codification were not right with respect to *res judicata*, in light of the diverging domestic solutions.

Does this mean that a transnational approach regarding *res judicata* should be ruled out? We believe exactly the opposite: in fact, the development of *res judicata* principles that respect the nature and objectives of international arbitration should be carried out and adopted. These transnational *res judicata* rules and principles to be applied by arbitral tribunals must be elaborated through a variety of sources, such as common international arbitration law and practice, international arbitration instruments, guidelines drafted by professional organizations – such as the ILA -, and also in light of dominant tendencies emerging from international arbitration practice. Although the ILA Report and Recommendations constitute a solid starting point regarding the codification of generally accepted principles - such as the triple identity test -, it should be noted that, in our opinion, a transnational approach to *res judicata* shall cover a broader scope of cases and issues. Nevertheless, the development of this transnational doctrine of *res judicata* must not forget that there is always 'a light at the end of the tunnel': the particularities and specific objectives of international arbitration, namely the parties' expectations regarding a final and efficient outcome of their dispute.

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[64] NATHAN YAFFE, *supra,* p. 811-812.

[65] For instance, the International Bar Association (IBA) Rules on the Taking of Evidence and the United Nations Commission on International Trade Law (UNCITRAL) Model Law.

4. Transnational *res judicata* principles

4.1. Constituent elements of a decision with the force of *res judicata*

As mentioned above, while it appears that there is not a unanimous definition of *res judicata*, the same usually pertains (or is associated with) a judicial decision rendered by a judicial court or tribunal that, on a final and decisive manner, resolves a legal dispute arising between the parties.

In international arbitration, the requirement pertaining to the finality and conclusiveness of a foreign judgment should be assessed in light of the law of the country where said judgment was rendered[66]. Therefore, the national laws of the state in whose territory the judgment was issued shall determine the exact moment in which a judgment attains its final and conclusive nature for the parties and for the court that pronounced it. This solution is mostly justified due to practical concerns, namely because it would not be efficient for arbitral tribunals to grant preclusive effects to a prior judgment that can still be modified or revoked. Hence, arbitral tribunals must wait until the judgment cannot be altered, thus avoiding the issuance of an incongruent decision[67]. In addition, in order to qualify as a *res judicata* in subsequent proceedings, the prior judgment shall dispose on the merits of the dispute arising between the parties. The cases where a prior judgment finally resolves on the merits of a dispute in both identical and different (i.e., that overlaps to a certain degree with the prior judgment) cases fall into this category. As we will try to explain below, this question is inexorably linked with the issue of whether a judgement should have positive *res judicata* effects on subsequent proceedings or should give rise to issue estoppel or abuse of process[68]. However, in our opinion, the requirements set forth by the law of rendering forum regarding the scope of *res judicata* should not apply. Instead, the arbitral tribunal in the subsequent proceedings, when faced with the question of the *res judicata* effects of a foreign judgment, should adopt a transnational approach based on the protection of the parties' legitimate expectations concerning the finality, efficiency and conclusiveness of their disputes.

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[66] SILJA SCHAFFSTEIN, *supra,* p. 243, para. 727.

[67] For this very same reason, if any appeal proceedings have been brought against the prior judgment, it may be preferable for an arbitral tribunal to wait for the result of the appeal in order to avoid any subsequent implications.

[68] For synthesis purposes, the question of whether prior judgments on jurisdiction qualify as decisions "*on the merits*" will not be covered in this work.

4.2. The scope and limits of *res judicata* effects granted to prior decisions in subsequent arbitral proceedings

In light of the category of decisions that may constitute a *res judicata* for the purposes of this analysis – i.e., a decision that finally resolves a substantive legal relationship concerning the rights and obligations of the parties -, one shall now assess the scope and limits of said *res judicata* effects. Following the transnational approach to *res judicata* adopted in this dissertation, the question pertaining to the preclusive effects of a prior decision shall be answered on the basis of the nature and objective of international arbitration.

Hence, it is our understanding that the adoption of a broader notion of *res judicata*, especially in what concerns claim preclusion and issue preclusion, shall encompass the extension of the preclusive effects of a decision not only to its operative part, but also to its underlying reasons.

For instance, in proceeding No. 1, an arbitral tribunal ruled that A was entitled to claim damages from B by virtue of a breach of contract. As a preliminary (but necessary) issue, the tribunal ruled in favor of the validity of the contract entered into between A and B. Subsequently, B initiates an arbitration proceeding (No. 2) against A arguing that the contract executed between both parties is null and void. However, since the question pertaining to the validity of the contract was essential to the decision on the claim for damages in proceeding No. 1 – therefore, an underlying reason of the first decision – the arbitral tribunal in proceeding No. 2 should not reconsider the validity of the contract. As a result, if it is clear from a prior adjudicator's reasoning that the operative part of the decision is to be interpreted in such a way as to prevent further or subsequent arbitration proceedings, then giving *res judicata* effects to a prior decision, as well as to its underlying reasons, would avoid the reassessment of the evidence and legal arguments already used in relation to the same cause of action. Furthermore, from a procedural efficiency and finality points of view, this line of thought provides greater consistency and harmony to international arbitration's decision-making process, therefore ensuring the protection of the parties' legitimate expectations and legal certainty.

We are aware that this understanding is not universally accepted. In this path, some authors argue that the force of *res judicata* granted to prior decisions should not extent to its underlying reasons because of the lack of interchangeability between arbitral tribunals

and national courts, and even among arbitral tribunals themselves[69] [70]. Following this line of thought, and unless the parties agree otherwise, arbitral tribunals are not obliged to decide according to a prior judgment's underlying reasons, which entails that the subsequent arbitral tribunal is empowered to reach its own conclusions based on the parties' submissions, regardless of any previous reasoning.

However, it is worth noting that international arbitration practice has demonstrated a favorable position concerning the adoption of an broader doctrine of *res judicata*. This issue was addressed in ICC cases No. 2745 and 2762 in 1977, which involved chain sales contracts. In ICC Case No. 1762 (1970), the first purchaser in the chain was considered liable for damages in relation to the subsequent party in the chain. In the motivation of the award (but not on its operative part), the arbitral tribunal stated that the first purchaser could not invoke *force majeure* or breach by further companies in the chain to avoid liability. While 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. After Cases No. 2745 and 2762 were joined, the arbitral tribunal ruled that it was bound by the prior ICC award in Case No.1762 regarding the resolution of the legal relationship between the same parties as in Case No. 2762. Moreover, the arbitral tribunal even stated: "*It would be paradoxical to contend that an arbitrator ruling under the auspices of the ICC would not be bound by an award previously rendered between the same parties on the same issues by another arbitrator also ruling under the auspices of the ICC*"[71]. Hence, even if the ICC Rules of Arbitration do not contain any provisions concerning *res judicata*, it would be highly unlikely to see the ICC International Court of Arbitration approving a second arbitral award between the same parties on the same subject matter that contradicts a prior award already approved by the Court[72] [73].

This broader notion was later adopted in ICC Case No. 3267 (1984), where the arbitral tribunal found that *"(...) the binding effect of its first award is not limited to the contents*

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[69] SILJA SCHAFFSTEIN, *supra,* p. 259, para. 777-782.

[70] MAYER, "*Litispendence, connexité et chose jugée dans l'arbitrage international* », in Liber Amicorum Claude Reymond, Autour d' Arbitrage, Paris, 2004 pp. 197.

[71] ICC Cases No. 2745 & 2762, 1977, Collection of ICC Arbitral Awards (1974 – 1985), Siegvard Jarvin, Yves Derain (eds.), Paris, New York, Deventer, Boston, 1990.

[72] AUDLEY SHEPPARD, *supra*, p. 234.

[73] BERNARD HANOTIAU, *supra*, p. 250.

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. By contrast, the arbitral tribunal made clear in other parts of its first award that the views expressed therein on certain other aspects of the case were of a preliminary nature only and without prejudice to its final decision. On such aspects, the arbitral tribunal holds itself entirely free to adopt other views with the benefit of further evidence and investigations."[74]

In our opinion, this line of argument perfectly illustrates the reasons why the *res judicata* effects of a prior award shall extend not only to its operative part, but also to its underlying reasons. Thus, we believe that the *res judicata* effects of prior decisions in international arbitration shall give rise to a plea of issue estoppel, meaning that the parties are prevented from submitting the reassessment of an issue of fact or law that was an essential (albeit preliminary) cornerstone in the reasoning of a previous determination[75].

Identically, we consider that the argument pertaining to the presumed intentions of the parties is not decisive as to exclude the extension of the *res judicata* effects of a prior decision to its reasons. In fact, we believe that it is exactly the opposite: the presumed intention of the parties reinforces the need to adopt a broader approach to *res judicata*. Arbitral awards are not mere recommendations: they are final and binding determinations, entailing immediate legal effects and creating immediate rights and obligations for the parties[76]. Moreover, an arbitral award shall dispose of all the issues submitted to the arbitral tribunal by the parties, which means that the operative part of the decision is the logical and necessary consequence of certain issues that were raised by the parties and later addressed by the arbitral tribunal as a precondition for the ruling on the merits.

When referring a certain dispute to arbitration, the parties envisaged a final and binding resolution on all the issues raised therein, in terms of the same becoming definitive and undisputed. In the example we gave, we understand that A's major purpose is to obtain an

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[74] ICC Case No. 3267, 1984, Yearbook Commercial Arbitration, A J Van den Berg ed., Vol. XII, 1987.

[75] As previously explained, the ILA Report and Recommendations already provide for extensive *res judicata* effects of prior awards, stating that the preclusive and conclusive effects extend to the determinations and/or reliefs contained in the operative part of the award, as well as all reasoning necessary thereto (Recommendation 4.1.).

[76] GARY BORN, *supra*, p. 2894.

arbitral award that, on a final and conclusive manner, sentences B to pay a compensation for damages arising from a breach of contract. In our opinion, however, the determination regarding the validity of the contract entered into between both parties is no less important. Considering that the determination on the validity was a necessary and essential precondition for the decision on the claim for damages, once the decision becomes final and binding upon the parties, the protection of their legitimate expectations shall encompass that the prohibition of re-assessment extends not only to the claim for damages in itself, but also to the issue concerning the validity of the contract.

In light of the above, we are of the opinion that it is advisable to implement claim and issue preclusion pleas in international arbitration, which embodies the adoption of a wider approach to the doctrine of *res judicata*, in terms of granting preclusive and conclusive effects not only to the decision's operative part, but also to its underlying reasons. Consequently, in order to prevent the rendering of contradictory decisions, the arbitral tribunal in the subsequent proceedings is not entitled to set aside the findings of the prior adjudicator regarding essential (albeit preliminary) issues as a precondition for the determination on the merits. Although it might be viewed as a restriction on the authority of the arbitration tribunal in the subsequent proceedings to decide the matters at stake, we believe that this solution is justified on grounds of procedural fairness and efficiency, legal certainty and judicial integrity.

4.3. The case for positive *res judicata* effects of prior decisions

Pursuant to the conclusion that the *res judicata* effects of a prior decision on the merits shall extend to its underlying reasons, we will now assess whether it is plausible to argue that said prior decision employs positive *res judicata* effects.

As mentioned above in connection with the analysis of the civil law system, the positive effect of *res judicata* entails that a prior determination of a particular matter positively imposes itself in subsequent proceedings, albeit pertaining to a new claim. The first decision is perceived as a presumption of the truth concerning the merits of the case to be assessed in the subsequent proceedings. Also, this positive effect does not require the fulfillment of the triple identity test and is based on the grounds of legal certainty in legal relationships. Furthermore, these positive *res judicata* effects are not set aside, or even

called into question, when the decision failed to correctly decide on the facts of the case and/or misinterpreted the law applicable to the merits.

In our opinion, the adoption of claim and issue preclusion principles in international arbitration necessarily implies the acknowledgment of the positive *res judicata* effects of prior decisions. Therefore, if the arbitral tribunal in subsequent proceedings has to render a decision on an issue previously addressed by an arbitral tribunal or national court as a matter that served as a legal foundation or justification for its conclusion, then the arbitral tribunal is obliged to comply with the previous resolution and must implement it in its award. Following this line of thought, the recognition of the positive *res judicata* effects means that the reasons for the judgment serve a greater purpose than the simple assistance on the interpretation of the operative part and the clarification of the meaning and scope of what has been decided. In fact, the reasons of the prior decision positively impose themselves on future determinations, in terms of constituting an undisputed precondition of any future decisions on the merits.

This question acquires particular significance in the context of the possible rendering of multiple arbitral awards on the same contract. As it is well known, arbitral awards often refer to disputes relating to the interpretation and application of contracts without necessarily terminating the relationship between the parties[77]. Therefore, in the aftermath of a first dispute, where the first tribunal addressed some aspects pertaining to the interpretation of the contract, there will be a final and binding decision with both a legal and practical effect. Let us consider the following example: A (grantor) and B (concessionaire) entered into a freeway concession agreement for a period of 30 (thirty) years. Afterwards, due to an alleged sudden decrease in revenues, the grantor unilaterally determines that the concessionaire shall comply with new pecuniary obligations. Further to the arbitration agreement set forth in the concession agreement, B initiates an arbitration against A asking for the restoration of the financial balance of the concession. In its defense, A counters this assertion by stating that there was a change of circumstances further to clause X of the agreement that justified this unilateral imposition. However, the court dismisses A's argument, stating that there wasn't any change of circumstances and, as a result, deems B's pleading as well-founded. Subsequently, A initiates an arbitration proceeding against B, before a different arbitral tribunal, seeking the termination of the

[77] PINSOLLE PHILIPPE/SUHAIB AL-ALI, *supra*, p. 43.

concession agreement on the grounds that there was a fundamental change of circumstances pursuant to clause X of the contract.

In light of the above, we are of the opinion that the authority of the first decision, concerning the restoration of the financial balance and the interpretation of clause X of the agreement, determines that the arbitral tribunal in the subsequent proceeding shall comply with the former's conclusion, inasmuch as it definitely decides an issue raised in the first arbitration that ultimately influenced the decision on the merits. In other words, the positive *res judicata* effect of the first decision prevents the reassessment of an issue in a subsequent arbitration involving a new claim. As a result, the interpretation that the first arbitral tribunal made of clause X, as an underlying precondition for the decision on the merits of the case, constitutes a final and binding determination that shall be complied with in subsequent proceedings. Since the rendering of a second decision in favor of A's claim would be contradictory and inconsistent with the decision rendered in the first arbitration – i.e., that ordered the restoration of the financial balance of the concession – the second arbitral tribunal shall refrain for rendering a decision in such terms.

The recognition of positive *res judicata* effects of the prior award is essential to justify that the same is meant to provide judicial certainty to the parties, because once the arbitral tribunal interprets a clause of a long-term contract, it provides clarity to the contracting parties as to the exact meaning and consequences of said provision. Therefore, the parties are legitimately expected to rely on the manner in which said clause has been interpreted, therefore adjusting their behavior accordingly[78]. In addition, on practical terms, the reassessment of issues would mostly likely cause confusion and waste of resources, which would comprise the economic certainty pursued by the arbitral award[79]. The rendering of an arbitral award enables the parties to project the economic consequences of their contractual relationships by settling a dispute relating to an interpretative issue of the contract. Consequently, provided an arbitral award is rendered and that the same establishes the interpretation of a particular clause of the contract, the parties can plan how and when to use their resources throughout the performance of the same, with the certainty that the same issue will not be re-litigated[80].

On this basis, and taking into account the arguments set out above, the acknowledgment of positive *res judicata* effects of prior decisions in international arbitration, particularly in

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[78] PINSOLLE PHILIPPE/SUHAIB AL-ALI, *supra*, p. 48.

[79] PINSOLLE PHILIPPE/SUHAIB AL-ALI, *supra*, p. 48.

[80] PINSOLLE PHILIPPE/SUHAIB AL-ALI, *supra*, p. 49.

relation to arbitral awards rendered on the same contract – and concerning the same interpretative issue -, presents several advantages, namely at the level of legal certainty, the parties' legitimate expectations and procedural efficiency.

Furthermore, the doctrine of positive *res judicata* effects not only applies (or potentially applies) across a much wider field of cases that those highlighted by the traditional negative *res judicata* effects (triple identity test), but also provides greater clarity when compared, for instance, to the doctrine of abuse of process adopted by English law. Although the doctrine of abuse of process may also apply in cases where the positive *res judicata* effects are triggered – namely, if the new proceeding entails a collateral attack on an earlier finding or is capable of producing contradictory decisions – the former is much less clear, as well as being discretionarily implemented by courts and/or arbitral tribunals.

Since the arbitral award aims to settle specific issues of interpretation of the contract, said award is meant to be regarded in the later stages of the performance of the contract by the parties and future tribunals as an authority, should the same or other conflicting issues arise afterwards. Consequently, the recognition of the positive *res judicata* effects of prior decisions in subsequent arbitration proceeding entails an objective and clear criteria that simultaneously prevents the rendering of inconsistent decisions regarding the same and/or contrasting issues and precludes a party from adopting contradictory behaviors to the detriment of the other party, in terms of undermining the latter's understanding of the relationship on which it relied.

5. Conclusion

The traditional notion of *res judicata* consists on a decision that entails an earlier and final adjudication rendered by a court or arbitral tribunal that is conclusive in subsequent proceedings referring to the same subject matter or relief, the same legal grounds and the same parties. Although it is generally accepted as one of the nuclear principles in both domestic ligation and international arbitration, and inspired by public and private interests, there are contrasting approaches among domestic laws regarding the scope and extent of the doctrine of *res judicata*.

On the first part of our dissertation, we aimed to identify the core differences between civil and common law systems regarding the doctrine of *res judicata*. Here, we showed that in civil law systems the approach to *res judicata* is generally stricter, as evidenced by the emphasis placed on triple identity test, particularly in France. Moreover, in civil law systems, *res judicata* is generally detached from any fact-finding power. However, we noted that in Portugal the approach to *res judicata* is more flexible, especially through the recognition of the positive effects of *res judicata* and its extension to the decision's underlying reasons, provided that some requirements are met. Contrastingly, we highlighted that the common law system developed a broader approach in relation to *res judicata*, encompassing the prevention of re-assessment of both facts and issues (factual and legal) adjudicated in the decision. In this sense, we argued that *res judicata* entails a fact-finding value, mirroring the authoritative determination of the whole narrative of the dispute.

On the second part of this dissertation, we explored the phenomenon of *res judicata* as a matter of transnational law. Firstly, we saw that the treaties, laws and rules that govern international arbitration embrace, albeit fragmentarily, the concept of *res judicata*. In particular, we noted that some argue that Article III of the NY Convention requires not only the enforcement of arbitral awards, but also the duty to recognize such awards as binding, in order to prevent the re-litigation of issues that had already been decided in prior binding proceedings. However, we also emphasized that the relevant provisions set forth in domestic laws, institutional rules and international conventions are very vague and incipient regarding the scope and limits of *res judicata*. In connection with this, we noted that the discussion regarding the characterization and applicable law to *res judicata* is not essential to determine how and when international arbitral tribunals should deal with the

finality and conclusiveness of prior decisions. Therefore, we argued that arbitral tribunals should adopt transnational *res judicata* principles based on the specific nature, features and cornerstones of international arbitration, such as parties' expectations and procedural efficiency.

In the context of this transnational approach to *res judicata*, we then addressed the ILA Final Report and Recommendations on *Res Judicata* and Arbitration. Firstly, we highlighted that, under the mixed model implemented by the Recommendations, transnational rules on certain aspects of *res judicata* would be adopted, whereas the remaining issues were to be referred to domestic law under an acceptable conflict rule. We noted that the Recommendations maintain the triple identity test and also that the preclusive and conclusive effects of a prior decision also extend to its underlying reasons. However, we also argued that, in a way, the ILA Final Report and Recommendation fell short of initial expectations. In our opinion, this should not hinder the necessity to develop a transnational doctrine of *res judicata*.

On the third part of this dissertation, we proposed to identify and discuss the key features of a transnational doctrine of *res judicata* in international arbitration. Concerning the scope and limits of *res judicata* effects granted to prior decisions in subsequent arbitral proceedings, we argued that a broader notion of *res judicata* – covering both claim preclusion and, most importantly, issue preclusion -, shall encompass the extension of the preclusive effects of a decision not only to its operative part, but also to its underlying reasons. In our opinion, this would avoid the reassessment of evidence and/or legal arguments used in the first proceeding and, from a procedural efficiency and finality points of view, would foster a greater consistency and harmony to international arbitration's decision-making process (thus protecting the parties' legitimate expectations). We also tried to advocate that international arbitration practice demonstrates an increasing propensity towards the adoption of a broader doctrine of *res judicata*. As a result, we proposed the development of an international *res judicata* principle consisting on the implementation of an issue preclusion plea in international arbitration. Finally, and pursuant to the conclusion that the *res judicata* effects on the merits shall extend to its underlying reasons, we also argued that said prior decision employs positive *res judicata* effects. In this context, we stated that this question is very important considering the possible rendering of multiple arbitral awards on the same contract. The acknowledgment of positive *res judicata* effects of a prior award ensures the protection of the parties' legitimate expectations, since it provides clarity and legal certainty concerning the exact

meaning and consequences of specific provisions of the contract. Within the framework of long-term contracts, parties are legitimately expected to rely on the manner in which a certain clause was interpreted, therefore adjusting their behavior accordingly.

On the one hand, the purpose of this dissertation was to highlight both the importance and the uncertainty surrounding the doctrine of *res judicata* in the field of international arbitration. We believe that this objective was attained through the demonstration of the diverging concepts among the different domestic laws and the insufficiencies of the traditional frameworks of analysis – e.g., conflict of laws approach – in the resolution of *res judicata* issues that arise in international arbitration.

On the other hand, and taking into account the above, we aimed to demonstrate that *res judicata* is, indeed, a matter of transnational of law and that the specific features and characteristics of international arbitration are the foundational elements of a transnational doctrine of *res judicata.* In this regard, we tried to argue in favor of a broader understanding of *res judicata*, in terms of acknowledging both an extended scope (i.e., underlying reasons) and (positive) effects. Considering the increasing complexity of cross-border commercial transactions and disputes, we are of the opinion that international arbitral tribunals will increasingly face disputes where *res judicata* issues will arise. Therefore, we believe that *res judicata* is - and will remain – an important mechanism to demonstrate the autonomy and innovation of arbitration in comparison to domestic litigation, particularly in what concerns the development of transnational principles and standards that account for the specific nature and features of international arbitration.

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