

# Binding effect of Prior Court Judgments in International Arbitration

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# Framing the Problem

Arbitral tribunals are:

- ◆ Not subordinate to Courts; and
- ◆ Not embedded in a hierarchical judicial system.

→ Generally accepted position: Arbitration does not recognize binding precedent

→ However, arbitration is not isolated, but indirectly constrained by external legal systems.

Therefore, focus of the analysis is on the issues of *“finality”* and *“legal effect”*.

## §

# Key Considerations

- ◆ **Precedent** → *generally irrelevant in arbitration as a binding concept*
- ◆ **Res judicata** → *potentially binding*
- ◆ **Public policy** → *enforcement constraint*



# The Concept of 'Res Judicata'

- ◆ An internationally accepted and recognised concept
- ◆ Is straightforward to apply in national courts
- ◆ However, national rules governing 'res judicata' vary from one legal system to another

# ✂ 'Res Judicata' in Arbitration and the Conflict of Laws

## ◆ *Genuine conflict-of-laws problem*

Conflicting laws that may apply to *res judicata* of prior court judgments in international arbitration:

- (1) The law of the State in which the prior court judgment was rendered (*deeming res judicata as an inherent characteristic of the judgment*)
- (2) The law of the State of the seat of arbitration (*relevant in respect of annulment considerations*)
- (3) The law of the State in which the award will be executed (*relevant in respect of enforcement considerations*)
- (4) The law which the parties to the dispute have agreed to apply (*may also be applicable*)

# ✘ 'Res Judicata' in Arbitration and the Conflict of Laws

Issue of characterization of res judicata as *substantive* or *procedural* matter.

Common law Jurisdictions → *Generally classified as procedural*

Civil law jurisdictions → *Appears to be treated more as substantive in some jurisdictions*

Example of proposed hybrid approach:

ILA Final Report on Res Judicata and Arbitration' (Toronto: International Law Association, 2006) - Recommendation No. 5 of ILA (based on French Jurisprudence):

→ *recommended that the positive effect is substantive because it pertains more to the merits of the subsequent arbitration proceedings AND that on the contrary, the judgment's negative (preclusive) effect is procedural.*

→ Too unpredictable because the positive effect of res judicata may have a procedural or a substantive nature according to the nature of the content of the judgment in question.



## Unsuitability of Traditional Approaches in dealing with the issue of Res Judicata of prior court judgments in international arbitral proceedings

✂ **Traditional conflict of laws approach:** (substance vs procedure)  
→ *controversial*

🌐 **Comparative approach:** comparing different national laws to determine the generally accepted res judicata principles common to most States

→ *not viable due to the many differences that may exist from one jurisdiction to another (generally has wider scope in common law countries)*

🏛 **Recognition approach:** essentially involves the arbitrator examining whether the prior court judgment is capable of being recognised in the state of the seat of arbitration

→ *(1) not acceptable for an arbitrator to act as judge of the place of the seat, and (2) in most cases determination of such matter will go beyond the scope of the arbitration agreement*



# Adoption of a Transnational conflict of laws rule for Res Judicata - A Solution?

- ◆ Emmanuel Gaillard, *'Transcending National Legal Orders for International Arbitration'*, in *Breakout Session C1 (International Arbitration: The Coming of a New Age, Singapore: International Council For Commercial Arbitration, 2012)*
- ◆ Al-Harb, A., *"Applicability of Res Judicata in International Arbitration: The Case of Prior National Court Judgments"* (2022) *International Review of Procedural Law*).
- ◆ IBA Committee Task Force Report on Res Judicata in International Arbitration (2024)

In particular, Harb recommends the following formulation:

*"The tribunal shall decide a dispute concerning any question that pertains to the authority of res judicata of a prior national court judgment under such rules of law as may be agreed by the parties. In the absence of such agreement, the tribunal shall apply the law of the State where the prior court judgment was made."*

This approach provides:

- ◆ *conceptual coherence*
- ◆ *predictability*
- ◆ *respect for national legal systems*
- ◆ *bypasses the problem of characterization which was mentioned earlier.*



# Adoption of a Transnational conflict of laws rule for Res Judicata - A Solution?

## *However:*

- ◆ requires transcending the national laws of the seat of arbitration regarding recognition of foreign judgments and *res judicata* public policy considerations, especially if the prior court judgment in question is manifestly abusive.
  
- ◆ This approach underestimates:
  - divergence at the enforcement stage
  - the role of public policy
  - the possibility of inconsistent outcomes across jurisdictions



# Practical Considerations and Obstacles

## **Saipem SpA v. Bangladesh (ICSID Case No. ARB/05/07)**

→ ICC tribunal applied a transnational approach to *res judicata* and ignored the prior Bangladeshi judgment revoking the authority of the ICC tribunal, because it was manifestly abusive

→ Bangladeshi Supreme Court, acting as the seat of the arbitration, determined that the award was "non-existent" since the authority of the ICC tribunal had been revoked, and thus could be neither set aside nor enforced.

→ ICSID arbitration was filed against the State of Bangladesh claiming breach by Bangladesh of the BIT.

→ ICSID found that the actions of the courts of Bangladesh constituted an illegal expropriation under the BIT.



# Conclusion and Key takeaways

- No binding precedent
- Conditional binding via res judicata

## However:

- ❖ controversial conflict of laws issues
- ❖ Inconsistency and unpredictability at the enforcement stage

# Thank you for your time

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