International In-house Counsel Journal
Vol.12, No. 46, Winter 2019, 1

The Notion of *Res Judicata* in Investor-State Arbitration

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Abstract
The notion of *res judicata* is a general principle of both national and international law. The general ideas of the principle are that, in the public interest, there should be and end of litigation, avoiding damage to the credibility and resources of the legal system, and, as a matter of private justice, no one should be proceeded against twice for the same cause, imposing unnecessary litigation costs and risks. In light of party autonomy, when choosing arbitration, parties deliberately confers jurisdiction on arbitrators, what act must be assumed to mean a determination to exclude in principle a review of an award and to establish a single and fully binding dispute settlement alternative to ordinary courts. The finality and binding effects of arbitral awards are prescribed in many institutional arbitration rules, which confirm its conclusive effect; and by agreeing to arbitration to such rules, the parties are presumed to accept the *res judicata*-effect of any valid award. The scope of *res judicata* differ between legal systems. International law applies a model placed between these legal systems, which approach can be argued to be apposite in investor-State arbitrations in order to balance between justice and efficiency.

Keywords: autonomy, finality, investor-State arbitration, *res judicata*

1. Introduction

Efficiency poses an important advantage of arbitration and is specifically linked to the finality and enforceability of the award; the former saves time and costs and the latter ensures the ultimate effectiveness of the system. For reasons of efficiency, the parties are thus prepared to refrain from the possibility of reviewing a tribunal's reasoning, the substance of an award or the adequacy of the evidence upon which the award was based through an appeal mechanism that is possible in the event of disputes before national court.[1]

However, this objective of efficiency assumes that the national courts recognize a valid arbitration clause as procedural impediment, and, further, that arbitration awards are granted legal force and enforceability by the national legal systems.[2]

Upon the expiration of the time for appeal (if any) a judgment enters into final force and acquires legal force; these are two different legal consequences, which occur at the same

[1] *See* Gabrielle Kaufmann-Kohler and Michele Potestà, 'Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?' (2016) Geneva. CIDS - Geneva Center of International Dispute Settlement, at 15 < http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf > accessed 21 September 2018; Christoph H. Schreuer, 'From ICSID Annulment to Appeal HalfWay Down the Slippery Slope' (2011) 10 The Law and Practice of International Courts and Tribunals 211, at 211.

[2] *See e.g.* Michael Bogdan, *Svensk internationell privat- och processrätt* [Swedish International Civil and Procedural Law] (8th edn), Stockholm: Norstedts Juridik, 2014, at 305.

time and which bring about the final determination of the contested legal situation. If the judgment cannot be appealed it will at once gain legal force.[3]

A judgment that has acquired legal force is in principle unyielding and cannot be reviewed in substance. This means that it cannot be challenged otherwise than through extraordinary judicial remedies, for which normally strictly conditions apply.[4] As a general principle, arbitration awards also acquire legal force.[5, 6]

The concept of legal force is complex. Divergence about its meaning does not primarily concern 'what' legal consequences are related to the judgment, but more about 'how' the rules on these legal consequences are to be formulated. In short, a judgment or an arbitration award can be relevant in a new trial in two ways: Firstly, bringing an action for a new claim must be dismissed if the claim concerns the 'same' claim as previously determined in a legally binding judgment; that is the importance of legal force as a procedural impediment, *res judicata* or negative legal force. Secondly, a final judgment, in which a claim has been determined, has a conclusive effect in another proceeding that concerns a claim that 'relates' to the claim as previously thus determined; that is the positive effect of legal force.[7]

1.1 Purpose, questions and disposition

Even if parties to arbitration assume that the procedure results in a final and biding decision[8] the award may subsequently be proved to contain irregularities attributable to the substance of the case; then, injustice turns into justice, why one might argue that the concept of legal force, contrary to its purpose, contributes to creating uncertainty in both business and social life.[9] Furthermore, the losing party may, after an award has gained legal force, acquire knowledge of circumstances or discover new items of evidence that possibly could have led to a different outcome if presented in the concluded proceeding. Considering the major economic values and fundamental principles that are disputed in investor-State arbitrations, one may argue that it would be motivated that adjudicated cases should be reviewable without prejudice to legal force, having regard to only appropriate balance between finality and flexibility. Against this, one can convey a number of counter-arguments, such as procedural economic reasons, uncertainty in both business and social life if awarded claims would not prevail due to lack of legal force.

In view of the above, this paper aims to examine the validity of the notion of legal force, in the meaning of its negative effect, i.e. *res judicata.* Within the limited scope of this

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[3] *See e.g.* Karl Olivencrona, *Domstolar och Tvistemål* [Courts of Law and Civil Action] (9th edn), Lund: LiberFörlag, 1982, at 85; Per Olof Ekelöf, Torleif Bylund and Henrik Edelstam, *Rättegång, tredje häftet* [Judicial Proceedings, Part III] (7th edn), Stockholm: Norstedts Juridik, 2006, at 175.

[4] *See e.g.* Per Olof Ekelöf, *Rättsmedlen* [The Judicial remedies] (10th edn), Uppsala: Iustus Förlag, 1987, at 115. In Sweden, arbitration awards are considered not to be subject to a relief for a substantive defect or grave procedural errors under the Swedish Code of Judicial Procedure, *see e.g.* the Weekly Law Reports, the Supreme Court of Sweden NJA 1986 p. 620.

[5] *See* Filip De Ly and Audley Sheppard, 'ILA Interim Report on *Res Judicata* and Arbitration' (2009) 25(1) Arbitration International 35, at 45–46, 48, 52–54 and 61–62; Juan Fernández-Armesto, 'Different Systems for the Annulment of Investment Awards' (2010) ICSID Review – Foreign Investment Law Journal 128, at 130.

[6] *See also* Bernard C. Gavit, 'Jurisdiction of the Subject Matter and Res Judicata' (1932) 80(3) University of Pennsylvania Law Review and American Law Register 386, at 390, where the author explains that *res judicata* is not limited to judicial judgments and decrees: It is ancient law that parties could submit their existing disagreements over their legal rights to an impartial person who was not a court and that his finding was conclusive. The decision was called an award and not judgment or decree, but the results were practically identical. In contrast, compare the concept of non-finality of judgments in Jewish law, *see* Yuval Sinai, 'Reconsidering *Res Judicata*: A Comparative Perspective' (2011) 21 Duke J Comp & Int'L 353, at 387–396.

[7] *See e.g.* De Ly and Sheppard, *supra* note 5, at 36; Olivencrona, *supra* note 3, at 86; Ekelöf et al, *supra* note 3, at 171 and 173; Gary B. Born, *International Arbitration: Law and Practice* (2nd edn), Alphen aan den Rijn: Kluwer Law International, 2016, at 357.

[8] *See* Born, *supra* note 7, at 3.

[9] *See e.g.* Ekelöf et al, *supra* note 3, at 177.

paper, I narrow the examination to arbitration awards in investor-State arbitration adjudicated under the rules of the ICSID Convention[10] and the UNCITRAL Rules[11]. Moreover, outside the scope for this paper is an account of the remedies that a party may pursue under the above-mentioned rules on the basis of a final award, for example the annulment institute.[12]

In summary, the objective of this paper is thus to examine the questions to what extent the notion of *res judicata* can be justified and applied in the particular types of disputes arising out of investor-State legal relationships.

In section 1, I have introduced the topic, purpose and the questions of issue of this paper. Then, in section 2, I will describe the legal sources that the paper is based upon. This lead to section 3, where I will give a background and outline some characteristics of investor-State arbitrations, and section 4, where I will more specifically address the objective of this paper. In section 5, I will propose some conclusions for this paper.

2. Legal sources

Since the principle of *res judicata* as examined herein concerns international relations – that involve treaty interpretations and international law, in combination with legal principles both from civil law and common law – the central legal sources for this paper are arbitration case law, that apply within the framework of the above-mentioned institutional rules, and legal literature. In addition, the paper includes references to some national legal systems which can give perspectives on the application of *res judicata*.[13] In view of the limited scope of this paper, the purpose of the comparative references is to contribute only to the general picture, rather than the comparison being the main purpose of the paper.

3. Investor-State arbitration

3.1 Introduction

The majority of international arbitration proceedings concern commercial disputes between private parties. Naturally, in the international business environment, there exist other legal relationships, such as business relations between private investors and States; disputes in these relationships are also frequently subject to international arbitration, so-called investor-State arbitration.[14] This section provides an overview of the characteristics pursuant to investor-State arbitration.

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[10] The Washington Convention on the settlement of investment disputes between States and nationals of other States of 1965 (referred to herein as the "ICSID Convention").

[11] The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules as revised in 2010, with amendments as adopted in 2013 (referred to herein as the "UNCITRAL Rules").

[12] It can be noted that the annulment of an award will result in, in principle, that its legal force discontinues; *see* Fernández-Armesto, *supra* note 5, at 142. For consequences in practice of qualified nullifications, see *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No ARB/81/1, Decision on Jurisdiction in Resubmitted Case (10 May 1988), [27]–[29]. Notwithstanding nullification, in some occasions an arbitration award has been enforced elsewhere than the country where it was annulled, *see* Born, *supra* note 7, at 346–347; Eric A. Posner and Nathalie Voser, 'Should International Arbitration Awards Be Reviewable?' (2000) 94 Proceedings of the Annual Meeting (American Society of International Law) 126, at 131-134.

[13] Since I am a Swedish lawyer, this paper consists of references to Swedish law, although acknowledging that it is a peripheral jurisdiction. Nevertheless, the Swedish legal system is relevant due to the fact that the third most used arbitration rules, with respect to investor-State disputes, are the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC); *see* further the United Nations Conference on Trade and Development, '*UNCTAD IIA Issues Note: International Investment Agreements – Special Update on Investor-State dispute settlement: facts and figures*' UNCTAD Division on Investment and Enterprise. Issue 3. November, 2017: 1–9 in figure 7 < http://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf > accessed 21 September 2018.

[14] *See* Born, *supra* note 7, at 417.

3.2 Distinguishing features

In contrast to international commercial arbitrations, typically entailing disputes between private parties, investor-State arbitrations involve almost always disputes between sovereign States and foreign private investors. When an investor decides to invest internationally, its attention is focused on, i.a. the investment protection regime under international law and the legal framework for a fair and efficient settlement of disputes. From a State's perspective, while attracting foreign investors, its considerations may include the possibilities of adjustment of its business environment to changing circumstances, e.g. regulatory adjustments for environmental and public health considerations, which may trigger investor's claim for compensation based on provisions in an investment treaty (e.g. infringements of clauses concerning 'regulatory taking'). Thus, in contrast to many commercial disputes, investor-State arbitration often involve State interests and regulatory measures. To remedy the concerns of investors and to improve the flow of investment funds there have emerged treaty protections in the form of substantive investor rights under international investment agreements or treaties (IIAs) entered into between States, whether bilateral (BITs) or multilateral (MITs). For these reasons, investor-State arbitrations often implicate issues of treaty interpretation and substantive international law protection to governmental actions, with reference to a substantial body of investment awards, and can be considered more autonomous from national law. By contrast, commercial arbitrations mostly involve contract interpretation and parties are generally relying on national legislation and judicial decisions.[15] Many IIAs apply similar provisions with regard to key principles of investment protection, such as definition of 'investment', 'fair and equitable treatment', 'regulatory taking', 'non-discrimination' and 'umbrella clause'.[16] Prior to BITs era, investors enjoyed protection under customary international law, but the investor did not have access to a neutral forum; the traditional method then (alternative to the courts of the host state) was to ask the home State to exercise diplomatic protection.[17] Hence, investor-State arbitration is an essential aspect of IIAs for foreign investors, and, further, allows host States to avoid the economic and political pressure, with geopolitical undertones, exerted by powerful States of foreign investors within the framework of diplomatic protection. Therefore, the proponents of investment treaties consider that IIAs strengthen the rule of law at the international level – leading to de-politicized, neutral, fair and efficient procedure of disputes settlement – and reduce the risk of escalation into an inter-state conflict.[18] Since the 1990s there has been a

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[15] *See* Kanu Agrawal, 'Bilateral investment treaties: a developing history' (2016) 7(2) Jindal Global Law Review 175, at 175–177; Born, *supra* note 7, at 418–423; Kaj Hobér, 'Investment Treaty Arbitration and Its Future – If Any' (2015) 7(58) YB Arb & Mediation [1]–[8] at 3 < https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1030&context=arbitrationlawreview > accessed 21 September 2018. The number of BITs currently concluded amounts to 2,952 agreements, *see* the United Nations Conference on Trade and Development, '*UNCTAD Investment Policy Hub*' UNCTAD Division on Investment and Enterprise < http://investmentpolicyhub.unctad.org/IIA > accessed 21 September 2018.

[16] *See* Diego P. Fernández Arroyo, 'Private Adjudication Without Precedent?' in *Private International Law and Global Governance,* H. Muir Watt and Diego P. Fernández (eds), 119–140 [1]–[28], Oxford Scholarship Online, 2015, at [14]–[15] and [22]; Kaufmann-Kohler and Potestà, *supra* note 1, at 6; Andreas F. Lowenfeld, *International Economic Law* (2nd edn), Oxford: Oxford University Press, 2008, at 555.

[17] *See* Lowenfeld, *supra* note 16, at 468 and 482–485; Kaufmann-Kohler and Potestà, *supra* note 1, at 7; Philip Roche, 'Expropriation – Investment protection and mitigating the risks' *Norton Rose Fulbright.* September, 2010 < http://www.nortonrosefulbright.com/knowledge/publications/30459/expropriation-investment-protection-and-mitigating-the-risks > accessed 21 September 2018; Hobér, *supra* note 15, at 1–2.

[18] *See* Michael Waibel, 'Investment Arbitration: Jurisdiction and Admissibility' (2014) Legal Studies Research Paper Series: Paper no 9, Cambridge: University of Cambridge Faculty of Law, at 39; Hobér, *supra* note 15, at 2 and 3–5; Farouk El-Hosseny and Ezequiel H Vetulli, '*Amicus* Acceptance and Relevance: The Distinctive Example of *Philip Morris v. Uruguay*' (2017) 64(1) Neth Int Law Rev 73, at 74 < DOI: 10.1007/s40802-017-0077-2 > accessed 21 September 2018; Catherine A Rogers, 'The Politics of International Investment Arbitrators' (2014) 12(1) Santa Clara J Int'L Law 223, at 257 and 260 < https://digitalcommons.law.scu.edu/scujil/vol12/iss1/9 > accessed 21 September 2018; Kaufmann-Kohler and Potestà, *supra* note 1, at 8.

huge rise in investor-State arbitration, accounting to today to about 855 decided and pending cases.[19]

Notwithstanding the accomplishment of investor-State arbitration, critique has been raised against that regime and concerns, generally speaking; partly, the system, as such, i.e. if it is necessary and/or appropriate at all to provide for investor-State arbitration, i.a. due to the system being one-sided (IIAs impose obligations on States, but normally not on investors) and/or undermining the sovereignty of the host State, and partly, the specific aspects of the existing system of investor-State arbitration, e.g. transparency.[20] This is of importance when arbitrations involve public interest concerns, e.g. areas of environment, health and natural resources. Politicians and public interest groups have therefore demanded transparency in investor-State arbitrations.[21] Further critics have been raised, such as that standard key principles (see *supra* footnote 16) are formulated too vague, resulting in the grant of disproportionate discretion to arbitrators to apply those terms. Additionally, an area of criticism is the perceived unpredictability and inconsistently of awards, and that there is no appropriate control mechanism in place to remedy such shortcomings. This is due to, i.a. the fact that arbitral awards are based on treaties (that may differ in wording and scope), they are rendered within the framework of international law – in the form of relevant IIA, the Vienna Convention on the law of treaties, customary international law and general principles of law – which is a decentralized and non-hierarchic system of law, and the arbitration consist of a non-hierarchic system of tribunals and there is no principle of binding precedent; case law will develop gradually depending on each awards persuasive arguments and the transparency of the awards.[22] Such conditions may constitute a risk factor for the parties, insofar as these lead to difficulties for them to understand how they must act in order to, i.a. for States to comply with their legal obligations under an IIA when considering new regulations, and for investors, to invoke their rights in response to governmental actions and regulatory measures. For States, this can in turn lead to a possible regulatory chill on issues of important public concerns. A particular concern with investor-state Arbitration relates to the fact that the proceedings are lengthy and resource-intensive. For developing countries, these conditions are especially strenuous given the fact that the proceedings are financed by public funds. These reflections are specifically relevant considering the asymmetry in investor-State arbitration procedure, that is available only to foreign investors due to the fact that IIAs provide protection to investors, which in general have limited reciprocal obligations.[23]

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[19] *See* the United Nations Conference on Trade and Development, '*UNCTAD Investment Dispute Settlement Navigator*' UNCTAD Division on Investment and Enterprise < http://investmentpolicyhub.unctad.org/ISDS > accessed 21 September 2018.

[20] *See* Hobér, *supra* note 15, at 3; Born, *supra* note 7, at 424; the United Nations Commission on International Trade Law, 'Investor-State Dispute Settlement Reform' in Report of Working Group III on the thirty-fourth session (Vienna 27 November–1 December 2017) A/CN.9/930/Rev.1 paras 79–88, and A/CN.9/930/Add.1/Rev.1, para 4, and in Report of Working Group III on the thirty-fifth session (New York 23–27 April 2018) A/CN.9/935, paras 56 and 94 < http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html > accessed 21 September 2018.

[21] *See* Hobér, *supra* note 15 at 5–6; Julia Salasky and Corinne Montineri, 'UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration' (2013) 4(31) ASA Bulletin 774, at 776.

[22] *See* Kaufmann-Kohler and Potestà, *supra* note 1, at 10–13; Fernández Arroyo, H Muir Watt and Diego P Fernández (eds), *supra* note 16, at 2, 15, 21–22 and 27; Hobér, *supra* note 15, at 6–7; Andrea K Bjorklund, 'Investment Treaty Arbitral Decisions as Jurisprudence Constante' (2008) UC Davis Legal Studies Research Paper Series: Paper no 158, Davis: University of California School of Law, at 270–274; Born, *supra* note 7, at 372–374 and 423–426; Christoph H. Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary* (2nd edn) Cambridge: Cambridge University Press, 2009, at 604–609 and 1101–1102. More extensively on possible reforms of the investor-State arbitral process, *see* A/CN.9/930/Add.1/Rev.1, *supra* note 20, paras 9–35.

[23] *See* A/CN.9/935, *supra* note 20, paras 36–37, 94 and 97; A/CN.9/930/Rev.1, *supra* note 20, paras 37–39; A/CN.9/930/Add.1/Rev.1, *supra* note 20, para 4.

3.3 Applicable rules

As a general principle, the parties determine the scope of the arbitral tribunal's authority, and the parties' arbitration agreement is the primary source establishing the arbitral jurisdiction and the area of application of the dispute. Furthermore, the parties put forward the facts that are in the dispute, the evidence that shall prove them, the legal sources and the arguments that shall be basis for the award in their statements of claim or defence and the request for relief. Consequently, in principle it is the parties' agreements, submissions and pleadings that determine the limits of the dispute upon which the tribunal is appointed to decide. Thus, considering the distinguishing feature of arbitration such as its contractual foundation and party autonomy, the parties would be deemed to be in control of the *res judicata* effect and be unimpeded to agree on relitigating any issue determined by a previous tribunal. However, situation may arise where an arbitral tribunal may be required to render an award without having received sufficient instructions or arguments by the parties. As overall main rules, the arbitral tribunal must comply with the procedural role defined primarily of (i) the arbitration agreement, essentially the scope reflected in the arbitration clause, (ii) the rules of the relevant arbitral institution in case of institutional arbitration, or the arbitration rules chosen by the parties (if any) in case of *ad hoc* arbitration, and (iii) the rules in the applicable arbitration law in case of commercial arbitration or in the relevant convention in case of treaty based arbitration, such as investor-State arbitration.[24]

In investor-State disputes the arbitration agreement is generally based on applicable IIA, which normally set out the host State's consent to arbitrate. This is today the most common method. IIAs contain a variety of different arbitration mechanism, i.a. provision of ICSID and/or UNCITRAL arbitrations.[25]

In respect of investor-State arbitrations the ICSID Convention and its Arbitration Rules[26], is the most frequently used regime, and UNCITRAL Rules, the second most common used set of institutional rules.[27] These rules provide no guidance as to deal with issues of *res judicata*, besides general provisions prescribing that the tribunal must act within its jurisdiction and apply the applicable law.[28]

As regards arbitration law, national legislations varies, although many legislations connect to regulation contained in international conventions, such as the New York Convention[29] and ICSID Convention, and are harmonized with the not binding UNCITRAL Model Law[30]. It can be noted that the model law contains no procedural guidance on *res judicata*.

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[24] *See* Giuditta Cordero Moss, 'Is the Arbitral Tribunal Bound by the parties' factual and legal pleadings?' (2006) 3 Stockholm International Arbitration Review [1]–[31] at 1–2; Christer Söderlund, 'Lis pendens, res judicata and the issue of parallel judicial proceedings' in *The Swedish Arbitration Act of 1999, Five years on: A critical Review of Strengths and Weaknesses*, Lars Heuman and Sigvard Jarvin (eds), 347–366, Huntington: JurisNet, LLC, 2006, at 350–351; in respect to Swedish law, *see* e.g. the Weekly Law Reports, the Supreme Court of Sweden NJA 1998 p. 189.

[25] More extensively on this, *see* Waibel, *supra* note 18, at 12–14; Born, *supra* note 7, at 422.

[26] The Rules of Procedure for Arbitration Proceedings (Arbitration Rules), ICSID/15, April 2006, as adopted by the Administrative Council of the International Centre for Settlement of Investment Disputes (established pursuant to Article 1(1) of the ICSID Convention) pursuant to Article 6(1)(c) of the ICSID Convention, and in accordance with Rule 56(2) of the Arbitration Rules (referred to herein as the "ICSID Arbitration Rules").

[27] *See UNCTAD IIA Issues Note*, *supra* note 13, figure 7.

[28] *See* De Ly and Sheppard, supra note 5, at 60. *See e.g.* Articles 41–47 in the ICSID Convention, and Articles 17 and 35 in the UNCITRAL Rules.

[29] The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (referred to herein as the "New York Convention").

[30] The UNCITRAL Model Law on International Commercial Arbitration, as adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 1985, with amendments as adopted in 2006 (referred to herein as the "UNCITRAL Model Law").

Yet, the doctrine is a well-established principle of normative law in most legal systems, although the scope thereof varies.[31]

Furthermore, there is no generally applicable international code of arbitral procedure in investor-State arbitrations, and, absent an agreement, the tribunals employ international procedure adapted to the circumstances of specific cases.[32]

3.4 Finality of awards and some issues of reconsideration

Parties that conclude arbitration agreement are presumed to refrain from the possibility to let the arbitration award be reviewed on the merits of the case. The finality and binding effects of awards are prescribed in many arbitration rules. Such provisions confirm the conclusive effect of an award and by agreeing to arbitration pursuant to such rules, it might also be said that the parties accept the *res judicata* effect of any valid award.[33]

Notwithstanding the general principle of finality, the ICSID Convention (Articles 50–52) together with the ICSID Arbitration Rules (Rules 50–52) and the UNCITRAL Rules (Articles 37–39) provide for several remedies where a party considers a final award to be unsatisfactory in some respect, although limited in scope and function; and the remedies offer no means for reviewing disputes on the merits.[34] Notwithstanding the limitations, these rules do not expressly address the issue whether a tribunal has the power to reconsider its decisions made in the course of an arbitration dispute (save for provisional/interim measures, pursuant to Rule 39(3) in the ICSID Arbitration Rules and Article 26(5) in the UNCITRAL Rules). Arguable, lacking an explicit provision, a tribunal's power to reconsider a decision could possibly be founded in its inherent jurisdiction to control its own process, i.a. in situations where decisions are the product of false testimony or fraud.[35] For example, in *Standard Chartered Bank v. Tanzania,* after the claimant's request for review of a decision concerning jurisdiction, the tribunal considered that it had jurisdiction to review a prior decision, and concluded that decisions of ICSID tribunals – as opposed to their awards – do not become *res judicata*, based on the fact that under the convention that status only attains to final awards according to Article 53(1), but, nevertheless, the power to reconsider a decision is not unlimited. Although, this case was unique and concerned the respondent's deliberate withholding of important information before the tribunal.[36]

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[31] *See* De Ly and Sheppard, *supra* note 5, at 60 and 64.

[32] *See* Article 44 *in fine* in the ICSID Convention and Article 17(1) in the UNCITRAL Rules; Born, *supra* note 7, at 442; Eric A. Posner and Nathalie Voser, *supra* note 12, at 126–127; Joshua Karton, 'International Arbitration Culture and Global Governance' in *International Arbitration and Global Governance: Contending Theories and Evidence*, Walter Mattli and Thomas Dietz (eds), 70–116, Oxford: Oxford University Press, 2014, at 116.

[33] *See e.g.* Article 53(1) of the ICSID Convention, Article 34(2) and Article 35(1) of the UNCITRAL Rules and UNCITRAL Model Law, respectively; De Ly and Sheppard, *supra* note 5, at 60; Gavit, *supra* note 6, at 391; Schreuer et al, *supra* note 22, at 1099 and 1105.

[34] *See* Paul Stothard and Jenna de Jong, 'Requests for reconsideration in ICSID and UNCITRAL arbitrations: Is your international arbitration award really final and binding?' in *International arbitration report,* issue 8, Mark Baker and James Rogers (eds), 20–21. Norton Rose Fulbright, 2017, at 20–21. The UNCITRAL Rules do not provide for an annulment procedure, such remedy must be applied with a national court, *see* Born, *supra* note 7, at 444. More extensively on exceptional judicial review of arbitral awards, *see* Born, *supra* note 7, at 336–339.

[35] *See* Stothard and de Jong, Mark Baker and James Rogers (eds), *supra* note 34, at 20–21; *see* also Fernández-Armesto, *supra* note 5, at 130 and 137; Schreuer, *supra* note 1, at 211–212; This application has been acknowledged by the French Cour de Cassation, *see* De Ly and Sheppard, *supra* note 5, at 63.

[36] *See Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited (Tanesco)*, ICSID Case No ARB/10/20, Award (12 September 2016) [312]–[321], [333] and [349]; Stothard and de Jong, Mark Baker and James Rogers (eds), *supra* note 34, at 20–21.; *Cf. Perenco Ecuador Limited v. The Republic of Ecuador*, ICSID Case No ARB/08/6, Decision on Ecuador's Reconsideration Motion, (10 April 2015), [42] and, further, [3(c)]–[3(d)], [23 *in fine*], [32]–[33] and [85]–[86].

As far as UNCITRAL tribunals are concerned, the current perception is that they lack a general power to reconsider final decisions. But, possibly there is a limited power to reconsider decisions on the same basis as ICSID tribunals. This issue arose in *Methanex v. United States*, where the tribunal declared that there is nothing "to suggest [in para. 17(1)] that an arbitration tribunal has a broad jurisdiction to reconsider a final and binding award that it has already made", with a "possible exception for fraud by a party", which was not relevant on the facts of this case.[37]

4. Legal force and *res judicata*

4.1 Introduction

The principle of *res judicata* is a general principle of law and known both to international law and national law; its legal consequences have been developed mainly in the context of domestic litigation. Consequently, the application differs between legal systems. Although, the general ideas of the principle are that, in the public interest, there should be and end of litigation, avoiding damage to the credibility and resources of the legal system, and, as a matter of private justice, no one should be proceeded against twice for the same cause, imposing unnecessary litigation costs and risks. The core of the concept of *res judicata* can be said to constitute procedural *jus cogens*.[38]

As described earlier, when a situation of legal force arises with regard to two successive judicial processes, the award in the first process has legal force (negative or positive) in the latter process to the extent that the first award has determined the 'same' – or, an issue of fact or law that has conclusive effect to the – matter at issue in respect of which the latter action is instituted. In order to determine the importance of legal force it is necessary to assess the criteria on the identity of the 'matter at issue'.[39] In this assessment, the common law-systems differs from civil law-systems.[40] However, the functions of the concept of legal force ought to be similar in both systems, which can frame the basis for assessing some criteria(s) on the identity of matters at issue.[41] Assume that the first award contain irregularities attributable to the substance of the case; the losing party may not have invoked the legal or evidentiary facts required to obtain a correct outcome in the case or the tribunal may have applied the applicable law or evaluated the evidence incorrectly. In such case, the concept of legal force can be regarded as contributing to turn injustice into justice, and therefore contributing to create uncertainty in both business and social life, contrary to its purpose. What should it mean to abolish the concept of legal force? In complex cases where there are reasons for different opinions regarding the application of law or the probative value of evidence submitted, it would probably be worthwhile to bring a new action. The possibility to relitigate the dispute could lead to that the parties brought their action in the first proceeding less diligently. Furthermore, there is reason to assume that an abolition of the concept would lead to increased questioning of awards. Thus, in complex cases, if a losing party could, without limitation, bring the dispute to a new hearing, that would result in the award not providing any certainty for the winning party. For example, from an investor's point of view, when planning its economic activities, the investor should not be able to rely more on the investment as an asset than before the

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[37] *See Methanex Corporation v. United States of America*, UNCITRAL Arbitration (NAFTA). Final Award of the Tribunal on Jurisdiction and Merits. Award (3 August 2005) Part II – Chapter E - [33]–[35]; Stothard and de Jong, Mark Baker and James Rogers (eds), *supra* note 34, at 21.

[38] *See Amco v. Indonesia* (*supra* note 12) [26] and literature there cited; De Ly and Sheppard, *supra* note 5, at 36 and 55; Filip De Ly and Audley Sheppard, 'ILA Final Report on *Res Judicata* and Arbitration' (2009) 25(1) Arbitration International 67, at 79; Born, *supra* note 7, at 357; Andreas Kulick 'Article 60 ICJ Statute, Interpretation Proceedings, and the Competing Concepts of *Res Judicata*' (2015) 28(1) Leiden Journal of International Law 73, at 79–80; S.I. Strong, 'General Principles of Procedural Law and Procedural *Jus Cogens*' (2018) 122(2) Penn State Law Review 347, at 403.

[39] *See e.g.* Ekelöf et al, *supra* note 3, at 176.

[40] *See* De Ly and Sheppard, *supra* note 5, at 41–54.

[41] *See e.g.* Ekelöf et al, *supra* note 3, at 177; Born, *supra* note 7, at 359.

litigation. Moreover, under such circumstances, it would hardly be worthwhile to bring action in complex cases. From the host State's perspective, the same considerations apply if the investor's action against the State was dismissed upon the merits. If the investor could resume the action, the award would not provide any certainty for the State. The principle of legal force implying a conclusive settlement of a controversy between parties over their legal rights can thus in principle be justified by procedural economic reasons and by creating certainty in both business and social life.[42] The legal force of the award creates certainty by its legal consequences being easier to discern than the original IIA and implies that the rights of the parties are determined by the award and third persons will recognize them as so determined.[43]

The aforementioned are common arguments for the defence of the doctrine of *res judicata*, and as explained below, the value of these assumptions varies depending on how the doctrine is constructed in practice.

In principle, the notion of *res judicata* as applied to investor-State arbitration operates as follows: (i) Where the investor has brought an action based on, e.g. indirect expropriation, and a final award for the payment of damages is rendered in his favour, the investor's cause of action is merged in the award, and the only cause of action left is on the award; (ii) where a final award is rendered in favour of the respondent (normally the State, in the absence of a counterclaim[44]), the investor is barred from maintaining another action on the same cause of action; (iii) where a question of fact or law has been litigated and determined by a final award, the determination is conclusive between the parties in a subsequent action, and both will, absent agreement to relitigate, be collaterally estopped to deny the question decided.[45]

As a consequence of this, in assessing the effect of *res judicata* in a particular case it is essential to define the identity of the matter at issue and, traditionally, there are three elements for identification, the so-called triple identity test: the identity of the 'parties', 'object or claim for relief' and 'grounds or cause of action'.[46]

Below are briefly described the following different *res judicata* models: a broad-scope common law model; a narrow-scope civil law model; and international law and transnational approaches.

4.2 Common law

In common law the doctrine of *res judicata* (as relevant in this paper) is termed 'cause of action estoppel' or 'claim preclusion'.[47] There is no unanimously agreed definition of this notion, but in short it has a broad meaning, implying that all claims arising from a single event and relying on the same evidence will be treated as the same cause of action, even if different contractual provisions are alleged to have been breached; and it includes claim or defence that could have been presented in the first action by exercise of reasonable diligence, but was not, this is also referred to the rule against 'claim splitting'.[48]

Under common law, *res judicata* is a doctrine of substantive law. The concept has over time evolved towards a broader meaning implying that once the parties have litigated their

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[42] *See e.g.* Ekelöf et al, *supra* note 3, at 176–178; Gavit, *supra* note 6, at 388; M.W.K. 'Res Judicata: The requirement of Identity of Parties' (1943) 91(5) University of Pennsylvania Law Review and American Law Register 467, at 467; Sinai, *supra* note 6, at 360–363.

[43] *See e.g.* Ekelöf et al, *supra* note 3, at 180–182; Gavit, *supra* note 6, at 386, 390 and 393–395.

[44] More extensively on this, *see* A/CN.9/930/Add.1/Rev.1, *supra* note 20, paras 3–8.

[45] *See* M.W.K., *supra* note 42, at 467. An example of the latter can be a declaratory award on liability for violation of substantive rights under an IIA, that has conclusive effect in a subsequent proceeding regarding performance claim for damages, s*ee e.g.* Ekelöf et al, *supra* note 3, at 185.

[46] *See e.g.* Filip De Ly and Audley Sheppard 'ILA Recommendations on *Lis Pendens* and *Res Judicata* and Arbitration' (2009) 25(1) Arbitration International 83, at 85; Kulick, *supra* note 38, at 74.

[47] *See* Sinai, *supra* note 6, at 357; De Ly and Sheppard, *supra* note 5, at 41 and in footnote 57.

[48] *See* De Ly and Sheppard, *supra* note 5, at 42–43 and 47; Sinai, *supra* note 6, at 358–359 and 364; Born, *supra* note 7, at 357.

legal rights before a court/tribunal, good policy requires that the result reached be final, regardless of its actual lack of merits in some cases.[49] Although, to consider a plea of *res judicata*, courts expect the parties to raise it explicitly, because courts will not consider it *ex officio*. In the common law-system, the court can ignore former judgments if nobody complains. The doctrine is viewed as a product of the adversary system of litigation practised in common law courts, and the main importance is the desire for stability. The function of the courts is not first-hand to determine the truth but to resolve disputes impartially and to choose between arguments of law and fact laid before it by the litigants. Thus, one can argue that the broad-scope *res judicata* model is an outflow of the dominant conflict resolution model of the civil process in common law; the preservation of individual freedom in democratic society is central, and litigants express this freedom by conducting their own legal affairs. The judge recognizes these values through self-restraint and not interfering in the proceedings.[50]

Another example of this broad-scope *res judicata* model concerns the determination of the identity of parties in two consecutive proceedings. It is a generally accepted rule that only parties to the former determination may take advantage of or be bound by *res judicata*. In common law 'party' is extended to include their privies. Generally, a privy is one who claims an interest in the subject-matter affected by the award through or under one of the parties. Relevant to investor-State disputes, the effect of *res judicata* may apply to a third person who has not been made a party of record, but have had control over the former litigation, i.e. a right to intermeddle in some way in the conduct of the case. Thus, the court/tribunal may look through legal fictions to find the real party in interest.[51]

4.3 Civil law

The civil law-system applies a narrower *res judicata* model and generally take a more formalistic approach by recognizing that it is only the operative order of the court (the *dispositif*) that has *res judicata* effect. In practice, however, the underlying motivation is looked at to determine the scope of *res judicata*. The triple identity test is generally applied strictly. The main rule is that judgment binds the parties with respect to the subject matter of claims actually asserted and determined, but not by potential claims not submitted for adjudication. Furthermore, as a general rule, the doctrine applies to cause of actions that have been raised in the proceeding with regard to the legal consequence (claim/liability) submitted for adjudication.[52] A preclusion on the basis of *res judicata* could be, e.g. a case where a respondent cannot be obligated to a performance on the basis of one cause of action and another performance for the same cause of action; should both claims for performance be invoked in the same proceeding, it does not matter for which reason the relief is approved. In such cases, it is the same legal consequence in both litigations. If this is not the situation, the plaintiff is permitted to litigate in the first stage for a relief on the basis of a cause of action without endangering that another claim for relief on the same cause of action being blocked by estoppel.[53]

In civil law *res judicata* is a doctrine of procedural law and the general idea is that it primarily concerns public interest. Although, it differs among the national procedural laws whether domestic court shall, on its own motion, consider whether a previous judgment constitutes *res judicata* in a prevailing case.[54] Moreover, the main rule is that the *res judicata* effect is limited to the parties. Although, a judgment can be relevant in a new

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[49] *See* Gavit, *supra* note 6, at 386 and 388; Sinai, *supr*a note 6, at 353 and 363–365. *Cf.* De Ly and Sheppard, *supra* note 5, at 65.
[50] *See* Sinai, *supra* note 6, at 358, 364–369, 397 and literature there cited.
[51] *See* M.W.K., *supra* note 42, at 468–469; De Ly and Sheppard, *supra* note 5, at 43–45 and 48.
[52] *See* Sinai, *supra* note 6, at 384–385; De Ly and Sheppard, *supra* note 5, at 49–54; Born, *supra* note 7, at 359.
[53] *See e.g.* Weekly Law Reports, the Supreme Court of Sweden NJA 1999 p. 520; Ekelöf et al, *supra* note 3, at 195 and 209. *See* the example in *supra* note 45; *cf.* Kulick, *supra* note 38, at 74 in footnote 4–5.
[54] *See* Sinai, *supra* note 6, at 385; De Ly and Sheppard, *supra* note 5, at 51.

litigation of other parties by having conclusive effect. The third party could be affected by the legal force of a judgment in so far as he or she should have been bound by one of the parties' corresponding disposal, according to private law, of the contested legal situation.[55]

4.4 International law and transnational approach

As mentioned before, *res judicata* is a rule of international law, and as far as investor-State disputes are concerned arbitral tribunals have confirmed this doctrine as general principle of law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice. While formally equivalent to treaty and custom as source of law, general principles of law are considered an area of autonomous source of international law and as universal standards and rules of conduct; and, such principles are often used in investor-State arbitration to fill gaps left by the former sources and, typically, they involve questions of less political and more technical character. A process of comparative law, establishing features common to domestic systems, is the basis for these principles. Likewise, in international law, the triple identity test is applied in assessing the effect of *res judicata* in a particular case.[56]

In practice there has been a tendency in international arbitration to adopt pragmatic, non-technical approaches to *res judicata*, relying on general considerations of fairness and good procedural order, formulating *sui generis* international *res judicata* principles. This method can be argued to be in line with the definition and purpose of the parties agreement to international arbitration, i.e. an intention to establish a single, centralized dispute resolution mechanism for resolving their dispute; and not yield to technical application of complex domestic procedural law of any particular legal system. This approach is also in line with the aims of securing the final, binding character of arbitral award expressed in the above-mentioned institutional rules (see *supra* footnote 33) and the New York Convention in Articles II(1) and III.[57] This approach fits well, e.g. on cause of actions for violation of protection under IIAs that may rise unique challenges to the identity test. For instance, actions brought under different treaty instruments constitute in theory different 'causes'. In practice, this distinction may be artificial, e.g. in cases where the substantive claims are the same, such as denial of protection against expropriation.[58] This latter view was maintained in the *Southern Bluefin Tuna Case*[59]; and an opposite stance was taken in *CME v. The Czech Republic*, concluding that comparable investment protection granted in different BITs create rights that are not in all respects exactly the same and may not yield the same results, having regard to, i.a. differences in the respective contexts and subsequent practice of parties.[60]

In international precedents, the criterion of 'identity of the parties' has been decisively required for the application of *res judicata*. For example, in *CME v. The Czech Republic* the tribunal held that in international arbitration the 'company group' theory – through which formally independent companies would be regarded as the same party for *res judicata* purposes – is not generally accepted in international arbitration.[61] Moreover, it is in principle only the *dispositif* and not its reasoning that has *res judicata* effect, however,

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[55] *See e.g.* Ekelöf et al, *supra* note 3, at 232–240.

[56] *See e.g. Amco v. Indonesia* (*supra* note 12) [26]; *Waste Management, Inc. v. United Mexican States*, ICSID Case No ARB(AF)/00/3), Decision of the Tribunal (26 June 2002) [39]; Schreuer et al, *supra* note 22, at 607–609; De Ly and Sheppard, *supra* note 5, at 55–60.

[57] *See* Born, *supra* note 7, at 361–368.

[58] *See* De Ly and Sheppard, *supra* note 5, at 57.

[59] *See Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan*, 39 ILM 1359, Award on Jurisdiction and Admissibility (4 August 2000) [54].

[60] *See CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL Arbitration. Final Award (14 March 2003) [432]–[433], and reference to *The MOX Plant Case (Ireland v. United Kingdom)*, Request for Provisional Measures, ITLOS Case No 10 (3 December 2001) [51].

[61] See *CME v. The Czech Republic* (*supra* note 60) [432] and [436]; *see* also e.g. *Waste Management v. Mexico* (*supra* note 56) [39]; De Ly and Sheppard, *supra* note 5, at 58–59.

in practice necessary underlying motivation is looked at in determine the scope of *res judicata*.[62]

In a final report on the topic of *res judicata* submitted to the International Law Association (ILA) Conference in 2006, it was noted that *res judicata* regarding international arbitral awards should not necessarily be equated to *res judicata* of judgments of national courts. In view of the differences between various legal systems, this approach was motivated by the differences in the dispute resolution methods and the international character of arbitration in question.[63] Therefore, for the benefit of international commercial arbitrators facing *res judicata*, the report recommended a combined judicial approach, which meant that in some respects autonomous transnational rules should be developed, and in other parts, relevant national rules would apply. In short, it was recommended a more extensive application of *res judicata* – than is known in some civil law jurisdictions – which not only covers the *dispositif* but also the underlying reasoning; and, further, the introduction of a standard of abuse of process and procedural unfairness, which means precluding a party in subsequent litigation from raising subject matter (a claim or an issue) which the party, by the exercise of due diligence, could and should have brought before the court in the earlier proceedings. Besides this, the report recommended to maintain the traditional triple identity test and that the identity requirements are cumulative. In respect to the identity of the parties, the recommendations refrained from formulating autonomous rules and to make any comment on the common law concept of 'privies'.[64]

5. Conclusion

Parties to arbitration are assumed to make a conscious choice to submit to experienced and knowledgeable arbitrators to resolve their dispute, and for arbitrators' decision to be final and not subject to second-instance review. Although, it is not possible to guarantee an impeccable arbitration proceeding and justice in every instance. Nevertheless, the very idea of arbitration is that a review shall not be concerned with substantive correctness of the award.[65] Against this background, it is particularly important to determine the scope of the *res judicata* effect.

The scope of *res judicata* may be based on the fact that the legislator and the judiciary, in their deliberations, should consider the need to minimize and distribute risk taking in the participation in a dispute resolution mechanism and the conduct of proceedings, as well as the legal and factual possibilities to fulfill these considerations. A main ambition in the construction of rules of procedure could be to arrange the procedure so that the parties are safeguarded, to the extent possible, against making unnecessary procedural mistakes. Insofar as such measures are not possible or desirable, rules are needed that allocate procedural risks between the parties. From a legal policy point of view, the scope of *res judicata* could be justified by that there is a legitimate want not to be proceeded against twice for the same cause and, further, that a putative winning respondent should be given the highest level of certainty of its awarded position and that can be motivated on the basis of all the contentious issues which the claimant reasonably could be expected to foresee in the course of his action. A broad-scope *res judicata* model would concentrate the dispute into a single judicial process, thereby counteracting the splitting of related claims for adjudication in successive proceedings. Yet, this would imply that the claimant would be subject to a heavy burden of investigation in the first proceeding as regards alternative claims and grounds; this approach poses a risk on the claimant in the first proceeding to

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[62] *See Delimitation of the Continental Shelf (UK v. France),* 18 RIAA 271, Decision (14 March 1978) [28] 295; De Ly and Sheppard, *supra* note 5, at 59; Kulick, *supra* note 38, at 81–83.

[63] *See* De Ly and Sheppard, *supra* note 38, at 72–73.

[64] *See* De Ly and Sheppard, *supra* note 38, at 68 and 73; more extensively on this, see ibid. 76–80 and De Ly and Sheppard, *supra* note 5, at 51–52.

[65] *See* Fernández-Armesto, *supra* note 5, at 128–130 and 136; Schreuer et al, *supra* note 22, at 1099. More extensively on this, *see* Schreuer, *supra* note 1, at 211–225.

commit mistakes due to difficulties in being able to foresee which overlooked alternative claim or issue that may acquire *res judicata*. Thus, a broad-scope model can be seen as a drastic measure that forces plaintiff to press all claims to the utmost for fear of the future effects of *res judicata*. This could be harmful and negative to the litigation; if the plaintiff were permitted to instigate an action initially only for a portion of the remedies, without the risk of estoppel forthcoming over the other remedies, later the plaintiff may omit the other remedies or these may become irrelevant with time. Moreover, a broad-scope application could act as obstacle in reaching a settlement and force the parties into a broad legal battlefront that could harm a continued relationship, which probably would be against the interests of the parties and the public. As far as the argument about economic efficiency, a broad-scope model could possibly lead to fewer disputes being submitted to arbitration, but the cost of every claim might be much higher than that of a claim under narrow *res judicata* policy. Hence, a broad-scope model could increase litigation costs to a level that may prevent plaintiffs from submitting claims at all and thereby lead to forfeiture of rights. However, these shortcomings can be counteracted by that the rules on amendments to the claim are construed and applied generously, primarily in the case of broad-scope model of *res judicata*, but also in a narrower application, then, in principle, for procedural economic reasons it may be better to judge on the amendments to the claim in the ongoing proceeding than referring the claimant to a subsequent proceeding. A narrow-scope *res judicata* model, on the other hand, may imply that the parties' differences are not finally settled by an arbitration award, which is essential to this dispute resolution mechanism. Moreover, such an approach may allow for tactical maneuvers or abuse of process by the claimant on alternative claims, with continued litigation on related aspects of the same differences, which would not be consistent with the rational for the arbitration procedure to be an efficient dispute resolution mechanism. On the basis of the above-mentioned legal policy considerations, considering the demerits and merits, there is reason to advocate a broad-scope *res judicata* model in investors-State arbitration; not necessarily as broad as in common law, but by model of international law approach. This is particularly relevant considering the asymmetry in investor-State arbitration procedure, that is available only to foreign investors due to that IIAs provide protection to investors, which in turn have limited reciprocal obligations, and, further, when considering the issues of public interest or public policy which are usually at stake and thus the importance for States to understand how to act in the future. Though, from the perspective of seeing the civil process as a way of altering behavior by exacting a price for undesirable behavior, it may be motivated to allow the arbitral tribunal to reconsider an award that has acquired *res judicata* if fraud or collusion is alleged on either party.[66]

[66] *See* Sinai, *supra* note 6, at 358–359 and 367–379 and 398; De Ly and Sheppard, *supra* note 38, at 78–80; Peter Westerberg 'Advokatuppdrag och processuell undersökningsbörda – betydelsen av rättskraftens preklusionsverkan i tvistemål och skiljeförfarande' [Counselor-at-law and the burden of procedural investigation – the importance of the effect of preclusion in civil action and arbitration procedure] (1998-99) 10(2) Juridisk Tidskrift 398, at 399–411 and 426–430; A/CN.9/930/Add.1/Rev.1, *supra* note 20 paras 4 and 15; A/CN.9/935, *supra* note 20, paras 56, 83 and 94. *Cf.* the ALI/Unidroit Principles of Transnational Civil Procedure, recommending that the concept of issue preclusion should be applied only to prevent substantial injustice, ALI/Unidroit Principles of Transnational Civil Procedure (2004) 9(4) Unif L Rev 758, at 806 in principle 28.3. The principles aim at reconciling differences among various national rules of civil procedure, and may also be applied by analogy in international commercial arbitration. They are not binding rules, but may be considered to reflect a certain international consensus on the main aspects of some procedural questions; *see* Cordero Moss, *supra* note 24, at 5. For an example in public international law of *res judicata* application placed between a broader-scope and narrow-scope concept, *see* Kulick, *supra* note 38, at 82–83 and the reference to the Channel arbitration between UK and France (*see supra* note 62).

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Acknowledgements. I would like to thank Professor Diego P. Fernández Arroyo for his useful comments on this work. Responsibility for conclusions and any errors in the article remains my own.

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Skandia Mutual Life Insurance Company is a mutual insurance company incorporated and registered in Sweden, and the parent company within the Skandia group. The Skandia group is one of the largest independent providers of products for long-term savings and investments in Sweden. The Skandia group originally started out its Swedish insurance business in 1855. Skandia offer products and services that cater for various financial needs and security. Its operations are based on a combination of savings, insurance, advice and administration. The number of employees in the Skandia group are a little over 2,000 and the group has about 2 million customers.