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**SOFT LAW AND TRANSNATIONAL
STANDARDS IN ARBITRATION: THE
CHALLENGES OF RES JUDICATA**

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Soft Law and Transnational Standards in Arbitration: The Challenge of Res Judicata

William W. Park*

The life of the law has not been logic: it has been experience.†

Abstract

Among the legal artifacts of international arbitration, few prove more significant in practice than the norms governing the nitty gritty conduct of proceedings in matters like evidence and discovery. In proceedings between adversaries from different countries, a transnational “soft law” often finds expression in rules, guidelines and canons of professional associations which serve to supplement the “hard law” of national statutes and court decisions. Memorializing the experience of those who sit as arbitrators or serve as counsel, such standards contain a degree of circularity, in that relevant norms both derive from and apply to cross-border arbitration.

When a key procedural question eludes the parties’ agreement, either expressly or by reference to rules, arbitrators called to decide the quarrel often look to international standards as one analytic tool to balance efficiency and fairness. On many topics a reasonable consensus indicates shared pre-dispute expectations. Written witness statements stand as evidence in chief, with oral hearings devoted to cross-examination. Pre-trial discovery restricts itself to narrow and specific categories of documents. And the deontology of modern arbitration normally precludes *ex parte* communication about the case between arbitrator and counsel. By contrast, a common culture eludes other questions, such as when and why the loser should pay legal costs of the prevailing party, a matter that has long divided British and American legal traditions.

Neither the nature nor the limits of “soft law” always present themselves with clarity. One salient illustration lies in the challenges faced by arbitrators applying doctrines of *res judicata*. When will an earlier judgment or award bind an arbitrator deciding a later case? Although most legal systems impose some finality for prior decisions, differences remain on many questions, including the preclusive effect of reasoning (as opposed to holding) and the right to relief on a theory that could have been, but was not, asserted in an earlier action. Often the litigants’ agreement fails to provide standards on controverted questions whose answers fall beyond common practice. In such instances, the integrity of the process requires a healthy humility from scholars and practitioners professing to summarize arbitral standards.

I. Soft Law in International Arbitration

When people talk about law, they usually invoke governmental instruments such as statutes, court cases, treaties, and administrative regulations. Increasingly, however, the field of international arbitration has witnessed the appearance of a “soft law” derived from an emerging

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† Oliver Wendell Holmes, Jr., THE COMMON LAW 1 (1881).

legal culture common to participants in the arbitral process.¹ These principles build on institutional rules and professional guidelines addressing procedural questions such as presentation of evidence and conflicts of interest.² Examples include International Bar Association pronouncements (fixing rules on taking of evidence and ethical conduct),³ along with the International Law Association recommendations on matters such as *res judicata* and applicable law.⁴

On some topics “soft law” addresses problems lying in the interstices between substantive norms and arbitral procedure. A notable example presents itself in the body of awards addressing when arbitration clauses extend to non-signatories, a matter encompassing arbitral practice as well as contract law principles on doctrines like agency or estoppel.⁵

Some scholars object to the term “soft law” seeing law as having a binary character, either on or off, lacking a dimmer making norms brighter or darker.⁶ In this connection, the legitimacy

¹ On the culture of international arbitration, to which we shall later revert in more detail, see generally JOSHUA KARTON, *THE CULTURE OF INTERNATIONAL ARBITRATION AND THE EVOLUTION OF CONTRACT LAW* (2013).

² See e.g., HANNEKE VAN SCHOOTEN & JONATHAN VERSCHUUREN, *INTERNATIONAL GOVERNANCE AND LAW STATE REGULATION AND NON-STATE LAW* 19 (2008); William W. Park, *Procedural Default Rules Revisited*, in *ARBITRATION INSIGHTS: TWENTY YEARS OF THE ANNUAL LECTURE OF THE SCHOOL OF INTERNATIONAL ARBITRATION* (Julian D.M. Lew & Loukas A. Mistelis, eds. 2007).

³ IBA, *GUIDELINES ON CONFLICT OF INTEREST IN INTERNATIONAL ARBITRATION* (2014); IBA *RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION* (2010); IBA, *GUIDELINES ON PARTY REPRESENTATION IN INTERNATIONAL ARBITRATION* (2013). See also COLLEGE OF COMMERCIAL ARBITRATORS, *GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION* (James M. Gaitis, Carl F. Ingwolson, Jr. & Vivien B. Shelanski, eds. 3rd ed. 2013).

⁴ See generally Filip de Ly & Audley Sheppard, *ILA Final Report on Res Judicata in Arbitration*, 25 *ARB. INT’L* 63 (2009); *International Law Association International Commercial Arbitration Committee’s Report and Recommendations on Ascertainning the Contents of the Applicable Law in International Commercial Arbitration*, 26 *ARB. INT’L* 193 (2010).

⁵ See William W. Park, *Non-signatories and International Contracts: An Arbitrator’s Dilemma*, in *MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION* 3 (Permanent Court of Arbitration, 2009), adapted in WILLIAM W. PARK, *ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES* 297 (2d Ed 2012) (Chapter II-A-6).

⁶ THOMAS SCHULTZ, *TRANSNATIONAL LEGALITY: STATELESS LAW AND INTERNATIONAL ARBITRATION* 18-19 (2014); W. Michael Reisman, *Soft Law and Law Jobs*, 2 *J. INT’L DISP. SETTLEMENT* 26-27 (2011). Compare Reisman’s earlier exploration of “micro legal systems” such as *staring* or *standing in line*: W. MICHAEL REISMAN, *LAW IN BRIEF ENCOUNTERS* (1999).

of “soft law” has been obscured by conflation of two notions. On the one hand, an inappropriate form of “soft law” seeks simply a fig leaf to hide an arbitrator’s idiosyncratic personal preferences, pressed into service to justify derogation from a duty to apply relevant and predictable norms. On the other hand, “soft law” which represents a fruit of careful thought by experienced practitioners, hailing from different legal cultures, provides a tool to help fill procedural gaps on matters like document production, witness statements and conflicts of interest.⁷

Debate on the nature of “soft law” recalls the proverbial controversy over whether public international is really “law” in the same sense as national law. Clearly, differences exist. The Massachusetts Consumer Protection Act, protecting buyers of footwear in Boston shops, differs in quality from the customary “law of nations” elaborated through state practice on maritime boundaries and diplomatic protection.⁸

Yet each category of law serves a similar purpose. Each legal system assists those entrusted with authoritative dispute resolution by providing information on community expectations, substantive and procedural.

Much the same might be said of “soft law” norms. To ask whether the different legal orders should be lumped together as “law” may be a bit like inquiring whether chess should be called a

⁷ See, e.g., Gabrielle Kaufmann-Kohler, *Soft Law in International Arbitration: Codification and Normativity*, 1 J. INT’L DISP. SETTLE’T 283, 297 (2010) (“It is clear from these developments that soft law enjoys some degree of normativity, which could be called soft normativity. This normativity may be considered soft because soft law exercises a certain influence and is regarded with deference without being perceived as mandatory in the classic sense of the word.”); see also Lawrence W. Newman & David Zaslowsky, *Soft Law Guides Parties on Procedures in International Arbitration*, 24 March 2011 New York Law Journal NYLJ p.3, col.1 Volume 245; Issue 56 (2011); THOMAS STIPANOWICH, *SOFT LAW IN THE ORGANIZATION AND GENERAL CONDUCT OF COMMERCIAL ARBITRATION PROCEEDINGS* (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2407187.

⁸ To expand the analogy, one notes that English legal tradition differs in significant ways from foundations of law in Continental Europe, the latter restricting law-making power of courts, an attitude derived from anxiety in Revolutionary France over judicial tyranny in the *ancien régime*. Article 5 of French *Code civil* forbids judges from purporting to make general rules: “Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises.” (It is forbidden for judges to decide cases submitted to them by general or regulatory dispositions.) In practice, of course, French judges remain mindful of hierarchy, often citing scholarly summaries. See generally, Denis TALLON, *PRECEDENT*, IN *DICTIONNAIRE DE LA CULTURE JURIDIQUE* 1185-1187 (2003).

game. Chess differs dramatically from baseball, football, squash and tennis, involving little vigorous physical activity, and lacking round objects to throw or to hit. Yet chess, just like baseball, football, squash and tennis, represents activity engaged in for amusement to which common parlance assigns “game” as a generic tag.

Sometimes “soft law” dovetails into hard law, finding its way into national court cases to fill procedural interstices.⁹ This has happened, for example, in American cases involving judicial annulment of awards for “evident partiality”¹⁰ and non-disclosure of negotiations with one side to the proceedings.¹¹ Thus soft-law instruments give rise to hard-law rulings providing guidance to emerging norms of a more permanent character.

II. Content of Soft Law

A. Easy Cases

Determining its content of “soft law” will be easier in some instances than in others.¹² Some cases implicate relatively strong consensus among practitioners and scholars about what

⁹ Compare George A. Bermann, “*International Standards*” as a Choice of Law Option in *International Commercial Arbitration*, LIBER AMICORUM EN L’HONNEUR DE WILLIAM LAURENCE CRAIG 17 (2016), listing a category of topics that includes joinder of non-signatories and the waiver of a right to arbitrate.

¹⁰ See *Applied Indus. Materials Corp. (AIMCOR) v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 2006 WL 1816383, at *1 (S.D.N.Y. June 28, 2006) *aff’d* 492 F.3d 132 (2d Cir. 2007). In vacating an award for arbitrator failure to investigate relevant business contacts with one party’s affiliate, the district court made reference to the IBA Guidelines on Conflict of Interest as well as the American Arbitration Association Code of Ethics of Arbitrators.

¹¹ See *New Regency Prods., Inc. v. Nippon Herald Films, Inc.* 501 F.3d 1101 (9th Cir. 2007), upholding challenge to an award between a film distribution company and production company, where the arbitrator failed to disclose work as a senior executive with a company negotiating with one of the parties to finance a motion picture. The Ninth Circuit stated that although the IBA Guidelines on Conflict of Interest are “not binding authority and do not have the force of law, when considered along with an attorney’s traditional duty to avoid conflicts of interest, they reinforce [the conclusion] that a reasonable impression of partiality can form when an actual conflict of interest exists and the lawyer has constructive knowledge of it.” *Id.* at 1110.

¹² Larry A. DiMatteo, *Soft Law and the Principle of Fair and Equitable Decision Making in International Contract Arbitration*, 1 CHIN. J. COMP. L. 221, 234 (2013), quoting COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 30-1 (Dinah Shelton, ed. 2000).

represents best practice, where rules and guidelines have crossed the line from the parties' will in a particular case to a broader consensus on related scenarios.¹³

In the category of generally accepted rules one might list principles on disclosure and witness statements, where a broad consensus has arisen that document requests must be tailored more narrowly than in United States courts, even if broader in scope than in France or Switzerland. Similarly, it will be rare to find direct testimony in an international arbitration given orally rather than through written witness statements, with evidentiary hearings devoted to cross examination. In each of these areas, consensus among different legal traditions yielded a hybrid of transnational procedure, initially generated in the lore of international arbitration as presented in symposia speeches and professional articles, with codification through efforts of professional associations articulating common traditions and industry standard.¹⁴

Another example presents itself in the IBA Guidelines on Conflict of Interest, which aim to summarize commonly accepted practices in international arbitration, with reasonable arbitrators consulting the Guidelines prior to making decisions on disclosure. Arbitral institutions like the London Court of International Arbitration (LCIA) often refer to the IBA Guidelines on Conflicts of Interest for guidance on the parameters of required independence and impartiality.¹⁵

Things which go without saying may go even better said. Memorialization of a general practice conveys useful information to those entering the community. Although seasoned

¹³ Paula Hodges, *The Proliferation of "Soft Laws" in International Arbitration: Time to Draw the Line?*, in AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 2015 205 (Christian Klausegger et al. eds., 2015) ("These guidelines and rules seek to codify best, or at least internationally accepted, practice and to offer parties the chance to introduce a degree of consistency and predictability to the arbitral process."). In some instances, however, guidelines go beyond consensus. See William W. Park, *A Fair Fight: Professional Guidelines in International Arbitration*, 30 ARB. INT'L 409, 419 (2014).

¹⁴ See e.g., Detlev Kuhner, *The Revised IBA Rules on the Taking of Evidence in International Arbitration*, 27 J. INT'L. ARB. 667, 667 (2010) ("Reference to the IBA Rules [on the Taking of Evidence] has steadily increased over the last decade; as a result it may be said, without exaggeration, that the IBA Rules have developed into a commonly accepted standard in international arbitration proceedings."); Raymond Bender, *Presenting Witness Testimony in U.S. Domestic Arbitration: Should Written Witness Statements Become the Norm?*, DISP. RES. J., 2014, Vol.69(4), 39-58.

¹⁵ See Thomas W. Walsh & Ruth Teitelbaum, *The LCIA Court Decisions on Challenges to Arbitrators: An Introduction*, 27 ARB. INT'L 283 (2011).

arbitrators rarely attempt *ex parte* communications with counsel,¹⁶ not all arbitrators possess the same experience. Until 2004, practice in the United States presumed party-nominated arbitrators to be non-neutral and thus allowed unilateral communication with their appointers.

Even today, the arbitration rules of the International Chamber of Commerce remain silent on *ex parte* communications. In one case, an arbitrator doing his first ICC arbitration objected that nothing prohibited him from talking alone to his appointer. While this was true under those rules, a unilateral information lead would have threatened the integrity of the arbitration. Thus the presiding arbitrator's only recourse was to tender a resignation, hardly an easy path.¹⁷

B. Harder Cases

Sometimes "soft law" norms must address more difficult cases. One example would be the relationships of one British barrister to another for conflicts of interest purposes. Barristers' chambers will not generally be equated with American law firms, in that barristers share expenses but not profits. Understandably, however, the IBA Guidelines on Conflicts of Interest include shared chambers as one item for disclosure, under the so-called "orange list" of situations which may, depending on circumstances, give rise to doubts about an arbitrator's impartiality or independence.¹⁸

Overlap can exist between "soft law" and the parties' agreement, particularly in reference to institutional rules. Article 18.3 of the 2014 LCIA Rules contains a provision permitting an arbitral tribunal to disqualify counsel because of a change in representation that occurs late in the proceedings. Concern arises when a respondent surprises a tribunal by appearing at oral hearings represented by an individual from the same firm or chambers as an arbitrator, thus putting into

¹⁶ See Canon III An arbitrator or prospective arbitrator should not discuss a proceeding with any party in the absence of any other party; *see also* Ben H. Sheppard, *A New Era of Arbitrator Ethics for the United States: The 2004 Revision to the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes* ("Discussion of the merits of the case is specifically prohibited."). The European tradition has long condemned *ex parte* communication between counsel and the arbitrators. Until recently, however, American practice presumed party-nominated arbitrators to be non-neutral and thus permitted *ex parte* communication with.

¹⁷ William W. Park, *A Fair Fight: Professional Guidelines in International Arbitration*, 30 *ARB. INT'L* 409, 415 (2014).

¹⁸ Section 3.3.2 of the Guidelines defines a disclosable relationship to include one where two arbitrators, and an arbitrator and counsel for one side, share same barristers' chambers.

question the integrity of the proceedings. In this respect, the parties' agreement to LCIA Rules tracks earlier decisions giving a tribunal power to police such behavior.¹⁹

Difficult situations can arise with respect to procedural norms which share rough analogues, yet on closer examination also diverge sharply in detail. Attorney-client privilege in the United States shares common attributes with professional secrecy in some parts of Europe. However, in-house counsel in Switzerland and Germany do not qualify as lawyers for that purpose. Bar association rules there require an independence considered incompatible with a salaried relationship.²⁰ Thus communications between managers of American companies and their in-house lawyers might be privileged,²¹ while similar information would not be protected in communication between managers and legal departments in European corporations.²² An arbitrator might be faced with the need to devise rules on privilege which respect equality of arms between the two sides, while recognizing that notions diverge dramatically on what it means to be a lawyer for purposes of professional secrecy.

The allocation of costs also proves fertile breeding ground for conflicts, as between contract terms and applicable law, as well as among legal cultures. England restricts attempts to avoid the "loser pays" principle, sometimes termed "fee shifting" for legal expenses and arbitrator fees. In advance of the dispute, parties may not tell an arbitrator to allocate costs in disregard of who wins. In contrast, the so-called "American rule" expects each side to pay its own costs regardless of the litigation outcome, absent abuse or frivolous conduct.²³ The English provision casts a wide net, catching even informed arrangements between sophisticated managers.²⁴

¹⁹ See *Hrvatska Elektroprivreda, dd v. Slovenia*, ICSID Case No. ARB/05/24 (2008).

²⁰ In Switzerland, the notion of lawyer (*avocat / Rechtsanwalt*) depends on activity of an independent character. Employment as an in-house counsel disqualifies from lawyer status. See Article 231, *Code Pénal* and Article 13, *Loi fédérale sur la libre circulation des avocats* (23 June 2000), establishing the obligation of professional secrecy. See also Article 29 of the *Loi fédérale d'organisation judiciaire* (limiting a right to represent clients to practicing lawyers and university professors). See Peter Burckhardt, *Legal Professional Secrecy and Privilege in Switzerland*, IBA Int'l Litigation News 33 (Oct. 2004); Bernard Corboz, *Le Secret professionnel de l'avocat selon l'article 321 CP*, *Semaine Judiciaire* 77 (1993).

²¹ See, e.g., *NCK Organization Ltd v. Bregman*, 542 F. 2d 128, 133 (2d Cir. 1976).

²² See Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT'L L. 341, 378 (2002).

²³ See Section 60, Arbitration Act of 1996. Section 61 goes on to set forth the general principle that "costs should follow the event except where it appears to the tribunal that in the

III. Res Judicata: Consensus and Divergence

A. The Arbitrator's Dilemma

As arbitral “soft law”, notions of *res judicata* pose special intellectual challenges. From one legal culture to another, the nature of *res judicata* carries both considerable consensus and deep divergence.²⁵ The core principle of *res judicata* (from Latin for “a thing adjudged”) holds that the same case should not be litigated twice. Thus the first decision will be considered as binding.

To say that a tribunal should recognize principles of *res judicata* begs the question of which version of that doctrine the arbitrators should implement. Although national law generally operates in harmony with two cases involving several classical unities (same parties, same claim, and same legal theory),²⁶ divergence exists among legal systems in defining and in applying those unities.

circumstances this is not appropriate in relation to the whole or part of the costs.” This standard, however, is made subject to the parties’ agreement otherwise, which in context with Section 60 would be an agreement after the dispute has arisen. The rule’s most understandable application lies in an anti-abuse mechanism to prevent clauses that would require weaker parties to pay all costs, thus discouraging otherwise legitimate claims. *See generally* John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 J. LAW & CONTEMPORARY PROBLEMS 9 (1984); John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person’s Access to Justice*, 42 AM. U. L. REV. 1576 (1993); Arthur L. Goodhart, *Costs*, 38 YALE L. J. 849 (1929).

²⁴ Imagine, for example, that an international contract provides for arbitration in London but with New York law applicable to interpret the agreement. The contract also stipulates that each side bears its own legal costs. A conscientious arbitrator falls between Scylla and Charybdis, faced with inconsistent mandates from the law of the arbitral situs and the applicable substantive law. Aiming at fidelity to the parties’ contract, an arbitrator may let the costs lie where they fall. To do so, however, risks award annulment in London. The contrary course, allocating expenses in disregard of the parties’ agreement, carries its own risk in the form of annulment for excess of arbitral authority as viewed by a New York court asked to enforce an award contrary to clearly accepted contract provisions and the party-selected substantive law.

²⁵ Notions of *res judicata* take various formulations in different legal systems, such as the literal “chose jugée” in France and the concept of “Rechtskräftig” in German, whereby a judgment takes on “*formelle Rechtskraft*” see ZPO Articles 704 -707.

²⁶ See generally, Audley Sheppard, *Res Judicata and Estoppel*, in PARALLEL STATE AND ARBITRAL PROCEDURES IN INTERNATIONAL ARBITRATION 219, 224 (Bernardo M. Cremades & Julian D.M. Lew, eds., 2005); Kaj Hobér, *Res Judicata and Lis Pendens in International Arbitration*, 366 RECUEIL DES COURS 99, 121 (2013) (“Despite the general acceptance of *res judicata*, and its constituent parts, there are . . . significant differences between legal systems.”);

For example, American jurisdictions often follow a transactional method, precluding a second litigation arising from the same occurrence, even if raised on a different theory and implicating slightly different facts.²⁷ Thus if a claimant could have brought five causes of action but presented only four (excluding a fraud claim, for example), the omitted theory will normally be barred in a second action. Moreover, American jurisdictions generally endorse what has been called “issue preclusion” (collateral estoppel) which binds a party to a determination of a matter of law or contract construction, even in a later case on a different cause of action.

By contrast, Continental courts often deny binding effect to the reasoning of an earlier decision, even between the same parties as to related claims. Illustrative in this connection, a decision of Switzerland’s highest court addressed the relationship between two arbitral awards concerning performance under the same contract by the same individual, but for different years. The Swiss approach (unlike that of many American jurisdictions) denied binding effect to the contract interpretation in first award.²⁸

Judges who address *res judicata* usually look to the law of the forum, consulting published cases, civil procedure codes, and scholarly writings relating to their own jurisdiction. In some cases, arbitrators also will also be able to apply the norms of a given substantive legal system agreed by the two sides.

Not always, however. In many instances the path for arbitrators will prove less certain, due to ambiguity in the parties’ choice-of-law provision.

In such instances, one path *not* normally be open to a conscientious arbitrator or scholar would be the invention of a purported procedural standard where no established principles in fact

Pedro J. Martinez-Fraga & Harout Jack Samra, *The Role of Precedent in Defining Res Judicata in Investor-State Arbitration*, 32 NW. J. INT’L & BUS. 419, 423 (2012).

²⁷ See, e.g. *Edcare Management v. Delisi*, 50 A.3d 448 (D.C. Court of Appeals, 2012), barring actions against a hospital on a tort after an arbitration award issued for breach of contract; also Restatement (Second) of Judgments § 24 (Am. Law. Inst. 1982);

²⁸ See Swiss *Tribunal Fédéral/Bundesgericht*, ATF/BGE, 4A_633/2014, 29 May 2015, discussed *infra*. A dispute between an American firm and one of its German partners led to a first award in Frankfurt addressing years 2009 and 2010, and a second award in Zürich concerning 2011 and 2012. See generally, Charles Poncet & Luisa Mockler, *Res Judicata: A Contribution to the Debate on Claim Preclusion in International Arbitration*, in LIBER AMICORUM EN L’HONNEUR DE WILLIAM LAURENCE CRAIG 309, at 311 (2016) (“The preclusive effects of a judgment in Switzerland are strictly interpreted to attach only to the dispositive part of the decision.”).

exist. Even the most sincere convictions about the best policy should not parade as disguised advocacy. Absent special authorization by the parties (such as a power of *amiable composition*) arbitrators remain law appliers, not law makers.

The starting point for commercial arbitrators seeking guidance would normally be the litigants' agreement itself. It will always be possible for the contracting parties to include a provision such as "questions of collateral estoppel and issue preclusion will be governed by the civil procedure law of Indiana."

The choice-of-law clause will not always, however, be drafted with such precision. Having come to the end of a long negotiation, when things are finalized at 2:18 in the morning after hard fighting on the basic commercial terms of price and delivery, the contracting parties will sometimes content themselves with simply stating, "Contract interpreted according to the law of New York." On its face, such a clause may not say much about issue preclusion.

In some instances, however, the contracting parties will go further, providing more than simply rules for contract construction. The relevant clause might say, for example, "The Contract and any matter arising therefrom, as well as the determination of any dispute related to this transaction, shall be governed by the laws of Massachusetts." From such a clause the arbitrators would likely find more assistance.

On occasion, reference to particular arbitration rules may be of assistance. Certain rules require awards to be reasoned, causing some commentators to argue that by agreeing to such rules, parties implicitly accept that the reasons given in an earlier award bind them in subsequent proceedings.²⁹ At least one arbitration institution revised its rules to reflect this approach explicitly.³⁰

B. Points of Divergence: National Law

²⁹ ICC Arbitration Rules, Article 31(2) (specifying that the award will contain reasons for tribunal's decision), 34(6) (stating that the award will be binding). See also discussion, *infra*, Apotex II Award, ¶7.33, noting Respondent's submission on the combined effect of Articles 32(2) and 32(3) of the UNCITRAL Arbitration Rules 1976, whereby reasons in the earlier award would have effect *res judicata* as between the Parties just as much as its operative part.

³⁰ LCIA Arbitration Rules 2014, Article 26(8), providing "every award (including reasons for such award) shall be binding on the parties."

1. Overview

When the choice-of-law clause leaves loose ends, the arbitrators may be urged to adopt some transnational solution, whether labelled “soft law” or something such as international arbitral procedure. The content of any such principles, however, will not always yield to facile analysis.

National systems, like public international law and scholarly commentary,³¹ recognize some *res judicata* principle as extended to arbitral awards.³² Major legal jurisdictions usually look to certain “identities” that precludes re-litigation, such as (i) the same parties; (ii) the claim (*petita*) (also referenced as “object”, “subject matter”, “cause of action” or “prayer for relief”), and (iii) the same legal theory (*causa petendi*).

Consensus does not go much further, however. Many civil law countries understand claim (*petita*) narrowly as a relief sought, permitting a litigant to get a second bite at an apple. In contrast, as discussed below, for common law jurisdictions the notion of “same claim” has often been viewed broadly, so as to open doors for preclusive effect of the earlier court’s determination of issues and reasoning, or the legal and factual premises on which a ruling rests.³³

³¹ See e.g., Sections 4-9 and 4-10 of American Law Institute, *Restatement of the Law Third: The U.S. Law of International Commercial Arbitration*.

³² Kaj Hobér, *Res Judicata and Lis Pendens in International Arbitration*, 366 RECUEIL DES COURS 99, 120 (2013); Gretta Walters, *Fitting a Square Peg into a Round Hole: Do Res Judicata Challenges in International Arbitration Constitute Jurisdictional or Admissibility Problems?*, 29 J. INT’L ARB. 652, 652 (2012); Audley Sheppard, *Res Judicata and Estoppel*, in PARALLEL STATE AND ARBITRAL PROCEDURES IN INTERNATIONAL ARBITRATION 219 (Bernardo M. Cremades & Julian D.M. Lew, eds., 2005) (“As well as applying in national court proceedings, *res judicata* is a well-recognized principle of international law.”); *Waste Management v. Mexico*, ICSID Case No. ARB(AF)/00/3, ¶39 (2 June 2002), 41 ILM 1315 (2002) (“There is no doubt that *res judicata* is a principle of international law.”); Pedro J. Martinez-Fraga & Harout Jack Samra, *The Role of Precedent in Defining Res Judicata in Investor-State Arbitration*, 32 NW. J. INT’L & BUS. 419, 421 (2012); Vaughan Lowe, *Res Judicata and the Rule of Law in International Arbitration*, 8 AFR. J. INT’L & COMP. L. 38, 40 (1996).

³³ Luca G. Radicati di Brozolo, *Res Judicata and International Arbitral Awards*, in *Post Award Issues*, ASA Special Series no. 38, at 127 (P. Tercier, ed., 2011) (“The consensus does not go much further. Indeed, most of the crucial issues relevant for the solution of concrete problems remain open.”); SILJA SCHAFFSTEIN, *THE DOCTRINE OF RES JUDICATA BEFORE INTERNATIONAL COMMERCIAL ARBITRAL TRIBUNALS* ¶1.118 (2016) (discussing French understanding of civil procedure); HANNO WEHLAND, *THE COORDINATION OF MULTIPLE PROCEEDINGS IN INVESTMENT TREATY ARBITRATION* 6.64 (2013) (discussing *res judicata* in international law and noting that *petitum* as “requested relief” is closer to civil law tradition); Kaj Hobér, *Res Judicata and Lis Pendens in International Arbitration*, 366 RECUEIL DES COURS 99, 121 (2013) (“Despite the

2. Claim Preclusion

Broadly speaking, claim preclusion prevents parties from rearguing a claim already decided by a competent decision-maker. In civil law countries the element of claim (*petita*) has often been interpreted narrowly, causing some to suggest a party must seek identical relief in the second case in order to trigger *res judicata*.³⁴ Some countries require that the second claim be founded in the same legal theory, a reading of the “unities” in *res judicata* that may cause a slight modification in a prayer for relief to prevent preclusive effect to the earlier decision.³⁵

In German law, it appears that subsequent proceedings may be permitted where the parties request different relief albeit arising from the same factual circumstances.³⁶ Thus a car accident victim is not precluded from bringing a later case for property damages after an earlier judgment for personal injury, even though both losses resulted from the same occurrence.³⁷ A similar approach seems to be taken in Switzerland where notions of “claim” would be interpreted narrowly, covering only prayers for relief.³⁸

general acceptance of *res judicata*, and its constituent parts, there are . . . significant differences between legal systems.”).

³⁴ See ILA Report p. 52 (discussing French approach).

³⁵ Pedro J. Martinez-Fraga & Harout Jack Samra, *The Role of Precedent in Defining Res Judicata in Investor-State Arbitration*, 32 NW. J. INT’L & BUS. 419, 427 (2012). Some might suggest that difference between civil and common law traditions derives from an emphasis, in civil law jurisdictions, on a judicial search for truth rather than resolution of a dispute between two adversaries. The former approach requires a more active role of the court and could perceive a broad notion of *res judicata* as an unnecessary limitation on judicial authority. See Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y. L. REV. 911, 929 (2011).

³⁶ See JACOB VAN DE VELDEN & JUSTINE STEFANELLI, *COMPARATIVE REPORT: THE EFFECT IN THE EUROPEAN COMMUNITY OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS: RECOGNITION, RES JUDICATA AND ABUSE OF PROCESS* 16 (2006), http://www.biiicl.org/files/4608_comparative_report_-_jls_2006_fpc_21_-_final.pdf.

³⁷ CHRISTIAN A. HEINZE, *THE EFFECT IN THE EUROPEAN COMMUNITY OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS: RECOGNITION, RES JUDICATA AND ABUSE OF PROCESS* 18 & 21 (2006), http://www.biiicl.org/files/3482_germany_final_c.pdf. It may be that civil law traditions reject a broad scope for preclusion due to the more active role of civil law judges in case administration. See Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y. L. REV. 911, 929 (2011).

³⁸ It has been suggested that in Switzerland a judgment dismissing a contract claim not precluding the same damages sought based on the same facts but asserted in later proceedings based on an alleged tort. PAUL OBERHAMMER & URS H. HOFFMANN-NOWOTNY, *THE EFFECT IN*

For claim preclusion to apply, some civil law countries, appear to require an identity of the legal cause of action and the relief claimed,³⁹ although commentators have noted that neither relief nor cause of action is clearly defined in French law.⁴⁰ Moreover, although civil law claim preclusion has traditionally been narrower than analogous common law concepts, some Continental jurisdictions show a disposition towards “concentration of claims” which expands the notion of claim or object of proceedings.⁴¹

In common law systems, *res judicata* takes a more transactional hue, with transaction understood broadly as facts giving rise to a remedy, thereby precluding a second bite at the apple with respect to the same basic occurrence.⁴² A claim comprises rights with respect to all or any part of a series of connected events from which the action arose.⁴³

THE EUROPEAN COMMUNITY OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS: RECOGNITION, RES JUDICATA AND ABUSE OF PROCESS (SWITZERLAND) 18 (2006), http://www.biicl.org/files/3487_switzerland_final_c.pdf.

³⁹ Hobér, *supra*, at 131; JACOB VAN DE VELDEN & JUSTINE STEFANELLI, COMPARATIVE REPORT: THE EFFECT IN THE EUROPEAN COMMUNITY OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS: RECOGNITION, RES JUDICATA AND ABUSE OF PROCESS 16 (2006), http://www.biicl.org/files/4608_comparative_report_-_jls_2006_fpc_21_-_final.pdf; SILJA SCHAFFSTEIN, THE DOCTRINE OF RES JUDICATA BEFORE INTERNATIONAL COMMERCIAL ARBITRAL TRIBUNALS ¶1.118 (2016) (the need for parties in both proceedings to ask for the same thing and assert the same rights).

⁴⁰ EMMANUEL JEULAND, THE EFFECT IN THE EUROPEAN COMMUNITY OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS: RECOGNITION, RES JUDICATA AND ABUSE OF PROCESS (FRANCE) 23 (2006), http://www.biicl.org/files/3481_france_final_c.pdf; *see also* SILJA SCHAFFSTEIN, THE DOCTRINE OF RES JUDICATA BEFORE INTERNATIONAL COMMERCIAL ARBITRAL TRIBUNALS ¶1.116 (2016) (explaining that in France the exact notion of “identity of object” remains uncertain).

⁴¹ SILJA SCHAFFSTEIN, THE DOCTRINE OF RES JUDICATA BEFORE INTERNATIONAL COMMERCIAL ARBITRAL TRIBUNALS ¶1.124 & 1.126 and n.259 (2016), discussing *Cesareo v. Cesareo*, Cour de cassation, 7 July 2006, where in the first action the plaintiff brought a claim for deferred wages, while in the second case he claimed unjust enrichment and noting that Cour de cassation held that both claims were based on identical causes. (“[B]y imposing on the parties an obligation to raise all possible legal grounds underlying their claim in the first action . . . the position of the Cour de cassation . . . also echoes the US doctrine of claim preclusion.”)

⁴² *See* ILA Interim Report, at 36, 52.

⁴³ *See Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 593 (7th Cir. 1986), emphasizing that transaction is understood as “a single core of operative facts' which give[s] rise to a remedy”. Thus when a set of facts causes injury all claims arising from that transaction must be brought in

English law takes the approach that all claims arising from a single event and relying on the same evidence will be treated as the same cause of action. Other than for fraud or collusion, there may be no re-litigation of the action on grounds not raised in the earlier proceedings.⁴⁴ The identity of causes of action is determined as a matter of substance. The cause of action consists of all facts and circumstances necessary to give rise to relief.

Courts in the United States American courts take a similar approach to claim preclusion.⁴⁵ New York courts explained that “once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy.”⁴⁶ Moreover, when alternative theories are available to recover what is essentially the same relief for harm arising out of the same or related facts, the mere existence of different elements of proof will not justify presenting the claim by different actions.

Federal court dictum in the United States seems to have affirmed this approach. In *Citigroup, Inc. v. Abu Dhabi Investment Authority*,⁴⁷ Citigroup and Abu Dhabi Investment Authority (ADIA) were parties to the Investment Agreement, pursuant to which ADIA invested in Citigroup. Arguing that Citigroup by its actions diluted the value of the investment, ADIA

one suit or be lost. The Court concluded that RICO claims were barred by res judicata doctrine because the earlier judgment addressed an antitrust suit arising from the same events.

⁴⁴ SPENSER BOWER AND HANDLEY, RES JUDICATA 94-95 (2009); see also SILJA SCHAFFSTEIN, THE DOCTRINE OF RES JUDICATA BEFORE INTERNATIONAL COMMERCIAL ARBITRAL TRIBUNALS ¶1.20 (2016) (citing Lord Diplock in *Letang v. Cooper* [1965] 1 QB 232).

⁴⁵ The Restatement (Second) of Judgments requires that courts in defining a “transaction” for purposes of claim preclusion “giv[e] weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties’ expectations or business understanding or usage.” RESTATEMENT (SECOND) OF JUDGMENTS § 24 (Am. Law Inst. 1982); Yuval Sinai, *Reconsidering Res Judicata: A Comparative Perspective*, 21 DUKE J. COMP. & INT’L L. 353, 359 (2011). See *Edcare Management v. Delisi*, 50 A.3d 448 (D.C. Court of Appeals, 2012), discussed *supra*, where a tort action against a hospital by an emergency-care management agency, was held to be barred after an arbitration award against the hospital for breach of contract.

⁴⁶ *UBS Sec. LLC v. Highland Capital Mgmt., L.P.*, 927 N.Y.S.2d 59, 64 (2011).

⁴⁷ 776 F.3d 126 (2d Cir. 2015). The Second Circuit held that the issue of res judicata must be left for the arbitrators to decide, rather than for the courts. The holding itself was that the “extraordinary remedies” authorized by the All Writs Act, 28 U.S.C. § 1651, does not permit a district court to enjoin an arbitration based on the claim-preclusive effect that may result a prior judgment that merely confirmed the earlier arbitration award without considering its merits.

initiated the arbitration and asserted several claims.⁴⁸ The arbitrators found for Citigroup. Unsatisfied with the result, ADIA initiated the second arbitration asserting claims slightly different from those in the first arbitration, but also related to breach of contract the implied covenant of good faith and fair dealing.

Citigroup sought to enjoin the second arbitration invoking the doctrine of claim preclusion in the U.S. district court. The district court as well as the Court of Appeals ruled that the arbitrators in the second arbitration should decide if ADIA's second set of claims is barred by the doctrine of claim preclusion. In passing, however, the Second Circuit explained that "the doctrine of claim preclusion, or *res judicata*, bars the subsequent litigation of any claims that were or could have been raised in a prior action."⁴⁹

3. Issue Preclusion

Unlike civil law countries, common law jurisdictions usually extend preclusive effect not only to the disposition part of the award but also to the award's reasoning.⁵⁰ This is done by means of issue preclusion, also called issue estoppel, a notion that precludes a party in subsequent proceedings from contradicting an issue of fact or the legal consequences already raised and decided in earlier proceedings.⁵¹

Issue preclusion does not confer binding effect on every statement in the earlier award. However, a determination essential to the judgment would be conclusive in a subsequent action, whether on the same or a different claim.⁵²

⁴⁸ These claims sounded in fraud, securities fraud, negligent misrepresentation, breach of fiduciary duty, breach of contract, breach of implied covenant of good faith and fair dealing.

⁴⁹ *Citigroup, Inc. v. Abu Dhabi Inv. Auth.*, 776 F.3d 126, 128 n.1 (2d Cir. 2015).

⁵⁰ *ILA Interim Report*, at 42, 47. Audley Sheppard, *Res Judicata and Estoppel*, in *PARALLEL STATE AND ARBITRAL PROCEDURES IN INTERNATIONAL ARBITRATION* 219, 225 (Bernardo M. Cremades & Julian D.M. Lew, eds., 2005).

⁵¹ *S. Pac. R. Co. v. United States*, 168 U.S. 1, 38 (1897) ("A right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established . . .").

⁵² *ILA Interim Report* at 42, 47; V.V. Veeder, *Issue Estoppel, Reasons for Awards and Transnational Arbitration*, in *Complex Arbitrations*, Special Supplement 2003, ICC International Court of Arbitration Bulletin at 75 (quoting *Mills v. Cooper* [1967] 2 Q.B. 459 at 468-69).

In contrast, in civil law jurisdictions seem generally disposed to accept that an earlier judgment's reasons are not binding in a second litigation. Nevertheless, reasons may sometimes be taken into account to interpret the operative part of a prior judgment.⁵³

As mentioned earlier, a recent decision of the Swiss Federal Supreme in a dispute between an international law firm and its attorney illustrates a civil law approach to *res judicata*.⁵⁴ One of the German partners of the U.S. law firms had a special arrangement concerning his remuneration in the Business Combination Agreement (BCA), which provided a "Floor Amount" representing minimum amount per annum payable to the partner. The agreement subject to German law and contained an arbitration agreement providing for an arbitration under the ICC Rules in Zurich, Switzerland.

The first arbitration concerning the payment for 2009-2010 between the German partner and the U.S. law firm was decided by the ICC Tribunal seated in Frankfurt.⁵⁵ The Frankfurt tribunal denied lawyer's claims. In particular, the tribunal interpreted the BCA and indicated that the Floor Amount pursuant to Art. 5.2 BCA was owed only if a partner had fulfilled the prerequisites under the BCA providing for 'activities, devotion and performance' and concluded that the partner had not satisfied such prerequisites in the relevant period.

Later the German partner initiated a second arbitration against the U.S. law based on the same contract, the same legal theory, but for a different time period: 2011 and 2012. An ICC Tribunal seated Zurich offered a different interpretation of the BCA and found in favor of the partner notwithstanding the law firm arguments that the second tribunal was bound by the first tribunal's finding as to the interpretation of the BCA. The case reached the Swiss court when the U.S. law firm tried to set aside the award of the second tribunal.

⁵³ See French civil code article 1351, limiting *res judicata* effect only the "dispositif" part of the award, roughly analogous to the "holding" in common law. (L'autorité de la chose jugée n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement Il faut que la chose demandée soit la même ; que la demande soit fondée sur la même cause ; que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité.)

⁵⁴ Swiss ATF/BGE, 4A_633/2014, 29 May 2015.

⁵⁵ Apparently, for the purposes of this second arbitration the parties changed the seat of the proceedings.

The Swiss Supreme Court concluded that the legal force of an arbitral award restricts itself to the dispositive portions, with considerations forming no part of *res judicata* regardless of the desirability of having transnational concepts applicable *res judicata*.

4. Other Preclusive Doctrines

Some countries developed other preclusive doctrines that go beyond traditional triple identity *res judicata* and nonetheless prevent litigants from taking inconsistent positions in subsequent cases. In the United States a concept of judicial estoppel serves this preclusive role. Judicial estoppel as the traditional *res judicata* aims to protect the adjudicatory system from abusive use by the parties,⁵⁶ promote fairness of dispute resolution and finality of judicial rulings, and purports to avoid inconsistent results.⁵⁷ Although no uniform formulation of judicial estoppel exists in the United States, most states apply this doctrine when a party in an earlier case has relied on a position, accepted by the earlier court, which is incompatible with arguments in a second case.⁵⁸

American judicial estoppel bears some similarities to English doctrine on abuse of process, which precludes a party from raising in a subsequent proceeding issues that could have

⁵⁶ George Klidonas & Keith R. Murphy, *Judicial Estoppel Revisited*, 31(5) AM. BANKR. INSTITUTE J. 18-19, 89-90 (2012).

⁵⁷ Eric A. Schreiber, *Judicial Estoppel*, 30 LOY. L.A. L. REV. 323, 326 (1997).

⁵⁸ Kira A. Davis, *Judicial Estoppel and Inconsistent Positions of Law Applied to Fact and Pure Law*, 89 CORNELL L. REV. 191 (2003); Eric A. Schreiber, *Judicial Estoppel*, 30 LOY. L.A. L. REV. 323, 324 (1997). Application of judicial estoppel might follow if: (i) the same party took two positions; (ii) these positions were taken in judicial or quasi-judicial proceedings; (iii) the party was successful in adopting the first position, the tribunal accepting it as true; (iv) the two positions are inconsistent; and (v) the first position was not taken as a result of ignorance, fraud or mistake. See *International Engine Parts Inc. v. Feddersen*, 64 Cal. App. 4th 345 (Cal App. 1998); *Aguilar v. Lerner*, 32 Cal 4th 251 (Cal App. 2004).

been raised during a prior proceeding.⁵⁹ Both doctrines aim to protect the integrity of the judicial system as well as parties' interests in finality.⁶⁰

In contrast, civil law countries seem less inclined to accept notions of judicial estoppel or abuse of process. Nevertheless, in some instances the doctrine of abuse of rights (*abus de droit*) stands not far in function from English notion of abuse of process,⁶¹ although the French legal tradition may be more inclined to requiring the abusive party to pay damages rather than to dismiss the second set of claims⁶²

C. Public Law Standards: *Apotex* as a Case Study

The search for relatively clear standards of *res judicata* vexes public law disputes as well as commercial arbitration. In recent NAFTA proceedings addressing expropriation, denial of national treatment, and violation of fair and equitable treatment, an arbitral tribunal had to grapple not only with the meaning of *res judicata* but also with the sources of authority for determining the contours of relevant doctrine.

Three international arbitration claims were brought by the members of the same Canadian pharmaceutical group Apotex. All alleged violations of Chapter 11 of the North American Free

⁵⁹ Audley Sheppard, *Res Judicata and Estoppel*, in PARALLEL STATE AND ARBITRAL PROCEDURES IN INTERNATIONAL ARBITRATION 219, 236 (Bernardo M. Cremades & Julian D.M. Lew, eds., 2005). See also David A.R. Williams & Mark Tushingham, *The Application of the Henderson v. Henderson Rule in International Arbitration*, 26 Singapore Academy of Law Journal 1036 (2014), commenting on seminal English judgment concerning abuse of process, *Henderson v. Henderson*, 1844 6 QB 288. Following a debt action in Newfoundland, a court in England refused to hear a defense that a widow was not entitled to sue in the name of her husband, since that argument could have been raised in the earlier action.

⁶⁰ ILA Interim Report, at 43 (“[T]he doctrine of abuse of process prescribes that subsequent proceedings should be precluded if it is necessary for a court to prevent a misuse of its procedure in the face of unfairness to another party, or to avoid the risk that the administration of justice might be brought into disrepute among right-thinking people.”); see also *Arbitration Matters: Spring 2007*, OSBORNE CLARKE (Apr. 19, 2007) <http://www.osborneclarke.com/connected-insights/publications/arbitration-matters-spring-2007/> (quoting *Johnson v. Gore Wood & Co* [2001] 1 All ER 481).

⁶¹ Audley Sheppard, *Res Judicata and Estoppel*, in PARALLEL STATE AND ARBITRAL PROCEDURES IN INTERNATIONAL ARBITRATION 219, 236 (Bernardo M. Cremades & Julian D.M. Lew, eds., 2005).

⁶² EMMANUEL JEULAND, *THE EFFECT IN THE EUROPEAN COMMUNITY OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS: RECOGNITION, RES JUDICATA AND ABUSE OF PROCESS (FRANCE)* 33 (2006), http://www.biicl.org/files/3481_france_final_c.pdf. See also Michael Byers, *Abuse of Rights: An Old Principle, A New Age*, 47 MCGILL L.J. 389, 392 (2002).

Trade Agreement. All were decided pursuant to the UNCITRAL Arbitration Rules and the ICSID Additional Facility. In 2013, an initial award decided two different claims brought by Apotex which were heard concurrently, although not formally consolidated. This Award held that the Canadian claimant did not qualify as an investor within the meaning of NAFTA Chapter Eleven. Certain marketing authorizations (Abbreviated New Drug Applications or “ANDA’s”) were held not to constitute “investments” for purposes of NAFTA.⁶³

A little more than a year later, in a second arbitration,⁶⁴ a different tribunal gave *res judicata* effect to the earlier award, dismissing for want of jurisdiction claims brought by the same Canadian group based on the same marketing authorizations. As suggested by the dissent, one difference between the two sets of proceedings lay in the fact that the marketing authorizations relevant to the later award had been given final approval by the United States authorities, as contrasted with tentative approval to the authorizations considered in the earlier arbitrations.⁶⁵

In both sets of claims, the Canadian group manufactured generic drugs for export to the United States pursuant to authorizations permitting exclusive sales of certain generic drugs for six months following expiration of patents for the brand name drugs. In an arbitration seated in New York addressing the duration of exclusivity period, the first tribunal found that the marketing authorizations could not be considered property within the scope of NAFTA Chapter 11, thus permitting no jurisdiction over claims by Apotex.⁶⁶

The facts giving rise to the second award were slightly different, in that the United States FDA issued an import alert which prevented importation of drugs produced in certain

⁶³ So-called Apotex I & II, Award rendered on 14 June 2013.

⁶⁴ Apotex Holdings Inc. & Apotex Inc. v. USA, ICSID Case ARB(AF)/12/1, decided 25 August 2014 (ICSID Additional Facility, UNCITRAL Rules). Tribunal of V.V. Veeder, John R. Crook and J. William Rowley, with Rowley dissenting in part. A certain confusion sometimes creeps into discussion of these decisions. Three cases were brought, but only two awards were rendered. The 2013 Award addressed claims in Apotex I and Apotex II, and the 2014 award addressed claims in the Apotex III. To avoid unduly muddling analysis, the present discussion generally employs the labels “2013 Award” and “2014 Award”.

⁶⁵ Apotex 2014 Award, at ¶2.53.

⁶⁶ Apotex 2013 Award, ¶358, finding “Apotex does not qualify as an ‘investor’, who has made an ‘investment’ in the U.S., for the purposes of NAFTA Articles 1116 and 1139, and accordingly both the Sertraline and Pravastatin Claims are hereby dismissed in their entirety, on the basis that the Tribunal lacks jurisdiction in relation thereto.”

facilities. The claimants again alleged breaches of treaty-granted protections for NAFTA investors.

In response, the United States argued that the marketing authorizations were not within the definition of investment set out in NAFTA. This argument rested on an assumption that *res judicata* effect extended the reasoning of the first award, which defined “investment” for NAFTA purposes, rather than simply the dispositive portions relating to similar although different marketing authorizations.

By a majority vote, the 2014 Award held that that Apotex was barred from re-litigating the question of whether the marketing authorizations qualified as investments under NAFTA. Trying to avoid making any clear choice for a the broader “common law” approach rather than the stricter “civil law” tradition, the 2014 award purported to discern no “sharp divide between these two legal systems,” finding instead that courts and tribunals deciding cases under international law have taken account of a prior tribunal’s “reasoning, and the argument it considered, in determining the scope, and thus the preclusive effect, of the prior award’s operative part.”⁶⁷ The majority found the reasoning of the 2013 award to be an integral part of its determination.⁶⁸ Consequently, the tribunal did not, in its view, apply the first award’s reasons independently from its operative part.⁶⁹

IV. Conclusion

The observation that the life of the law remains logic rather than experience applies with special force in exploring the role of “soft law” for cross-border arbitration. In elaborating

⁶⁷ Apotex 2014 Award, ¶¶7.18 & 7.23.

⁶⁸ Apotex 2014 Award, ¶7.35. A careful observer will note that even absent *res judicata* the tribunal said it would have reached the same conclusion, finding that Apotex Inc. never had any “presence, activity or other investment in the territory of the USA, including the non-payment of any relevant US taxes.” *Id.* ¶7.62.

⁶⁹ The Tribunal found additional support for its decision in choice of the UNCITRAL Arbitration Rules for the first set of arbitration proceedings, which in Article 32 make an award final and binding and also requires a tribunal to state reasons on which the award is based. It was Respondent’s case that the combined effect of those two parts of Article 32 meant that the reasons in the first award had as much effect as its operative part. The Tribunal ultimately did not have to rely on this argument, but did express an inclination “to accept this submission as a matter of legal logic.” *Id.* at ¶7.35. See generally, Charles T. Kotuby Jr. & James A. Egerton-Vernon, *Apotex Holdings Inc and Apotex Inc v The Government of the United States of America*, 30(3) ICSID REV. 486, 487 (2015), suggesting that the 2014 award accepted collateral estoppel under the UNCITRAL Arbitration Rules.

international standards, sound analysis requires both restraint and rigor in ascertaining those principles which have, and have not, found consensus in the international community. Just as general propositions do not necessarily decide concrete cases, the propositions themselves will often prove stubbornly elusive.

In this connection, arbitrators often face particular challenges in finding *res judicata* principles without express application of a national legal tradition. Most legal systems accord some degree of finality to a prior judgment or award. Less agreement exists, however, with respect to questions the preclusive effect of reasoning, rather than result, and the definition of claims decided.⁷⁰

On any particular topic, prophecy remains highly problematic with respect to both when and how compromise will evolve to bridge the gap between legal cultures. A measure of modesty befits any attempt to portray or to pronounce cross-border consensus.

⁷⁰ See generally Pierre Mayer, *Autorité de la chose jugée et arbitrage* (Colloque du Comité français de l'arbitrage, Paris 23 Oct 2015), 2016 *Revue de l'Arbitrage* 91; Stavros Brekoulakis, *The Effect of an Arbitral Award and Third Parties in International Arbitration: Res judicata revisited*, 16 *Am. Rev of Int'l Arb* 1 (2005).