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DEFINITION OF THE *RES IUDICATA* EFFECTS OF FOREIGN ARBITRAL AWARDS IN A PERSPECTIVE OF EUROPEAN PRIVATE LAW

Relatore: Ch.mo Prof. Tommaso dalla Massara

Laureando: Jakob Tasser VR352358

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INTRODUCTION

It is not uncommon, these days, to speak of a crisis of the traditional concept of 'state sovereignty' as well as the various ways through which it originally found expression. In fact, national legal systems were mostly built around and concerned with domestic disputes. As such, they were badly prepared to meet the challenges of globalisation and to keep pace with growing international trade. In addition, the heterogeneity of national legal systems was felt to be irreconcilable with the workings and needs of the global market. Hardly anywhere has this schism been more evident than in relation to the exercise of jurisdiction and the recognition of binding effects to foreign decisions.

It shall be the ambition of this research to articulate these topics within a spectrum of guiding principles and national solutions, which is to say through the lense of European private law.

In this sense, if – as the very nature of the problems that will be raised compels to suggest – the goal is to look for solutions on a supranational level, the way there must nevertheless begin with a careful study of the answers that can be found in national law. In fact, to truly embrace European private law, is to constantly return to its foundations. With respect to the rules of jurisdiction and preclusion, an elaboration of the issues necessarily has to start from a national level, given that they are still deeply rooted in considerations of public policy and with an eye toward domestic litigation. A circumstance, which more and more is leading private interests to move away from the formal law and seek alternative means of dispute resolution that are less susceptible to national ideosyncrasies. In this context, parties have resorted especially to arbitration, since it provides «a neutral forum for dispute resolution, detached from the parties and

their respective home-state governments».[1] In addition, both conventions (particularly, the New York Convention 1958) and arbitration legislation (particularly the UNCITRAL Model Law) have been put in place to ensure that international arbitration agreements are more expeditiously recognised and enforced.[2]

Certainly for many national legal orders this trend has not gone unoticed and was in part even made possible thanks to a process of 'delocalisation' of jurisdiction that has marked in many countries the definitive abandonment of a concept of jurisdiction which accords the power to adjudicate over legal matters and to render a final and binding judgment exclusively to state courts (to the exclusion of all other courts).[3] On a national level, clear examples of 'delocalisation' are the revisions to the Italian system of conflict laws by l. 218/1995 as well as Articles 3 to 46 of the German EGBGB.

Yet, problems consistently arise with regard to the binding effects of arbitral awards which, after all, are essential to the arbitral system's objective of finally resolving disputes that are submitted to arbitration. Here also the problem seems to be a lack of uniformity regarding the doctrine of *res iudicata*. With respect to the EU, this results in Member States housing at times conflicting doctrines on preclusion (*infra* Ch.II, par.2 and Ch.III, par.3).[4] For parties to international commercial arbitration, this is reason for unease and stirs up feelings of uncertainty: «Arbitration is the quintessence of bespoke

[1] See G. B. BORN, *International Arbitration: Law and Practice*, Bedfordshire, 2012, p. 10. Also see C. BÜHRING-UHLE, *A Survey on Arbitration and Settlement in International Business Disputes*, in C. DRAHOZAL & R. NAIMARK, *Toward a Science of International Arbitration: Colected Empirical Research*, 2005, pp. 31, 35.

[2] See BORN, *International Arbitration*, cit., p. 11, wherein the a. also highlights the apparent lack of regional arrangements that seek to establish effective international enforcement for forum selection clauses. The a. points to the Brussels I Regulation (44/2001) as being the most notable among the few arrangements that provide for the enforceability of forum selection clauses.

[3] The original versions of Articles 2 and 3 of the Italian Code of Civil Procedure, for instance, expressly precluded the possibility of derogating Italian jurisdiction in favour of a foreign court and placed no importance on the fact that a case brought before Italian courts was already pending in front of a foreign court.

[4] Specific provisions on the binding effects of arbitral awards have also been adopted by many leading International Arbitration Institutions such as the ICC, LCIA, AAA, SIAC, ICSID, etc.

justice».[5] However, when principles on *res iudicata* differ from one state to another, outcomes become unpredictable.[6]

Again, it is advised that this discussion should be taking place within the Community *acquis*. If the tendency by arbitral tribunals to apply international and supranational principles of law is anything to go by, attention must necessarily be drawn to the *ius commune Europeum* which has arisen over the last few years.

In the recent *Gothaer* case the European Court of Justice has established a 'European' notion of *res iudicata* suggesting that there is, after all, a concept of *res iudicata* under European law – and thereby applicable to all Member States – which «does not attach only to the operative part of the judgment […], but also attaches to the *ratio decidendi* of that judgment».[7] Much in the spirit of the approach adopted by the research at hand, the ECJ has taken inspiration from ideas that have been progressively developed and circulated in Europe for quite some time.[8]

More generally, EU law has consistently worked in an effort to bridge the gap between the specific features of the domestic legal orders of its Member States and the increasingly intricate realities of the global market. It has done so – with varying degrees of success, one might add – through a process of harmonisation of the laws of Member States, particularly in areas most affected by international trade and, therefore, most necessitous of legal uniformity.[9]

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[5] See J. PAULSSON, *The Idea of Arbitration*, Oxford, 2013, p. 7.
[6] See S. SCHAFFSTEIN, *The Doctrine of Res iudicata before International Arbitral Tribunals*, Geneva, 2012, p. 2, who writes: «Parties to arbitration proceedings expect to be treated fairly and equally, especially since at the end of the arbitration there will be a final and binding award determining their legal rights, and this award will be enforceable virtually worldwide».
[7] Case C-456/11, *Gothaer Allgemeine Versicherungen AG* v. *Samskip GmbH*, ECLI:EU:C:2012:719, par. 40.
[8] See F. C. SAVIGNY, *System des heutigen römischen Rechts*, Band VI, Berlin, 1849; See A. ZEUNER, *Die objektiven Grenzen der Rechtskraft im Rahmen der rechtlichen Sinneszusammenhänge. Zur Lehre über das Verhältnis von Rechtskraft und Entscheidungsgründen im Zivilprozess;* Tübingen, 1959, Band XII.
[9] Just to name a few, Regulation (EC) n. 1206/2001 of the European Parliament and the Council of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters, in *OJ* n. L174 of 27 June 2001; Regulation (EC) n. 864/2007 of the European Parliament and the Council of 11 July 2007 on the law applicable to non-contractual obligations ('Rome

It shall be the underlying purpose of this research to provide a diachronic analysis of the doctrine of *res iudicata* as applied to international arbitration in the context of national, international and supranational legal systems, in an effort to identify frictions and, possibly, provide solutions and recommendations to various issues raised.

II'), in *OJ* n. L199 of 31 July 2007; Regulation (EC) n. 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations ('Rome I'), in *OJ* n. L177 of 4 July 2008; Regulation (EU) n. 1215/2012 of the European Parliament and the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in *OJ* n. L351 of 20 December 2012, as amended by Regulation (EU) n. 542/2014 of the European Parliament and Council of 15 May 2014 amending Regulation (EU) n. 1215/2012 as regards the rules to be applied with respect to the Unified Patent Court and the Benelux Court of Justice, in *OJ* n. L163 of 29 May 2014.

I) THE ORIGINS OF ARBITRATION AND ITS EFFECTS

The decision to entrust arbitrators with the resolution of private disputes – even of an 'international' nature[10] –, instead of relying on the judicial authority of the State, was, without a doubt, already common practice in ancient Rome.[11] In fact, it had once been believed that civil procedure in its original form, namely that of *legis actio,* had its roots in a dispute resolution process that bore close resemblence to that of arbitration.[12] Along the same lines, and keeping with consistent legal theory, there is reason to assume that the *praetor* modelled the procedures *per formulas* on the basis of a type of arbitration most likely used between Romans and peregrines, but also among private citizens for individual statutes not enforceable through *legis actiones.*[13]

In the classical period, arbiration and the use of preset *formulae* were two competing procedures.[14] Therefore, it comes as no suprise that the *praetor,* quite understandibly, 'favoured' a process of 'his own creation' while simultaneously thinking of arbitration as having no immediate foundation within the walls of preatorian jurisdiction: this led, at least initially, to arbitration agreements being denied legal

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[10] See E. DE RUGGIERO, *L'arbitrato pubblico in relazione col privato presso i Romani,* in *BDR,* Vol. V, 1892, p. 49 *et seq;* M. LEMOSSE, *Rèflexion sur la conception romain de l'arbitrage internationale,* in *Aktuelle Fragen aus modernem Recht und Rechtsgeschichte – Gedächtnisschrift für R. Schmidt,* 1966, p. 341 *et seq.;* A. TORRENT, *El arbitraje en el bronce de Contreiba,* in *Studi Sanfilippo,* Milano, 1982, p. 639 *et seq.*

[11] See D. ROEBUCK & B. DE LOYNES DE FUMICHON, *Roman Arbitration,* Oxford, 2004, p. 11 *et seq.,* wherein it is pointed out that Romans already distinguished arbitration from mediation on the basis of the former having adjudicative authority. There have nonetheless been examples of arbiters steering parties toward amicable settlement.

[12] See M. KASER, *Das römische Zivilprozessrecht,* München, 1966, p. 20 *et seq;* B. ALBANESE, *Il processo privato romano delle 'legis actiones',* Palermo, 1993, p. 12.

[13] See M. MARRONE, *Sull'arbitrato privato nell'esperienza giuridica romana,* in *Riv. Arb.,* 1996, p. 1.

[14] See G. TALAMANCA, *Ricerche in tema di 'compromissum',* Milano, 1958, p. 19, who suggests that a progressive assimilation of arbitration to the *iudicium* started to occur in the late classical period; G. LA PIRA, *Compromissum e litis contestatio formulare,* in *Studi in onore di S. Riccobono nel XL anno del suo insegnamento,* II, Palermo, 2009, who holds that by that time *compromissum* and *iudicium* had already been structurally identical; around the first century B.C., the *preator* introduced the *edictum de receptis* with which he promised to perform a *coercitio* against anyone who, after having accepted an appointment to arbitrate on a given dispute, suddenly refused to follow through on the performance for which he had been engaged, see M. MARRONE, *Sull'arbitrato privato,*cit., p. 2.

protection. However, case law was soon able to carve out a solution which would grant private parties that resorted to arbitration a right they could enforce in a process *per formulas* in case of a violation of the arbitration agreement. Parties would give rise to reciprocal *stipulationes poenali*, according to which each party promised the other to pay a predetermined amount of money, i.e. a *poena,* in the event the promisor failed to uphold his commitment to have their dispute decided by an *arbiter*. This *arbiter* was to be freely chosen in concert with the promisee.[15] The act of promissing each party performed in favour of the other was called *compromittere,* and the legal relationship resulting from it a *compromissum.*[16] It is important to note at this point that the *compromissum,* in and of itself, did not affect the substantive legal relationship, but merely gave rise to binding legal effects; this way, the underlying legal relationship was flanked by a second agreement which, while meant to be subservient to the former, occupied no space that would have allowed for instances of direct interference between the two.[17] As a legal instrument the *stipulatio* enjoyed legal protection, meaning the *preator* had no way of rejecting an *actio ex stipulatu* put to him by the party that emerged victourious from an arbitration, in an effort to pressure the other contracting party into enforcing an outcome that it wouldn't have otherwise spontaneously enforced.[18] By threatening legal action for

[15] See M. MARRONE, *Sull'arbitrato privato,* cit., p. 1; being an abstract contract, the *causa* of the *stipulatio* was irrelevant *iure civili*, as long as the socio-economic function it performed wasn't that of another non-abstract juridical act, see A. BURDESE, *Manuale di diritto romano,* 4th ed., Torino, 2012, p. 441.

[16] See M. MARRONE, *Sull'arbitrato privato,* cit., p.2

[17] See T. DALLA MASSARA, *Reciproche relazioni ed integrazioni tra arbitrato e 'iudicium': un itinerario nella giurisprudenza classica,* in *Il giudice privato nel processo civile romano – Omaggio ad Alberto Burdese,* Tomo I, 2015, p. 164, «*Si potrebbe dire che l'arbitrato corre su un binario parallelo rispetto al giudizio ordinario: le promesse stipulatorie si 'sovrappongono' ma non toccano il rapporto sostanziale*»; Of a completely opposite view, G. LA PIRA, *Compromissum e litis contestatio formulare,* cit., p. 202, who argued in favour of an interchangeability and substitutability of *compromissum* and *litis contestatio*: «*le reciproche stipulazioni del compromissum vengono qui sostituite dallo scambio della formula (dare et accipere iudicium) e […] la redazione del iudicium, nonostante sia atto di parte, avviene con l'approvazione, all'occorenza, anche con la cooperazione del magistrato. Ma queste differenze estrinseche non toccano per nulla l'identità intrinseca di struttura dei due istituti. Infatti il dare et accipere iudicium della litis contestatio è atto sostanzialmente identico a quello che le parti compromittenti compiono pronuziando la formula stipulatoria ed assoggettandosi a stare alla sententia dell'arbitro*».

[18] See T. DALLA MASSARA, *Reciproche relazioni ed integrazioni tra arbitrato e 'iudicium'*, cit., p. 160, who summarised the effectiveness and legal protection accorded to arbitral awards thusly: «*Com'è noto,*

payment of the *poena*, the winning party in the arbitration dispute was able to indirectly enforce the arbitral award.[19]

As far as arbitration prior to the introduction of the process *per formulas* is concerned, Marrone notes that its widespread application might be based on the fact that arbitration performed a niche function, at a time when the excessively rigid system of the *legis actiones* appeared to be the only means of legal recourse available to private citizens.[20]

Similarly, while sharing many parallels with the formulary procedure[21], arbitration in comparison was less 'scripted' and allowed greater freedom to parties desirous of entering into a legal relationship.[22] In fact, parties experienced considerable limitations with regard to the *thema decidendum* and the written instructions they could refer to the *iudex*: both had to be made to fit into pre-determined 'types' of lawsuits and be approved at any one time by a magistrate. By the same token, the *praetor* had to accept the judge, parties had chosen to decide their case.[23]

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non è a disposizione delle parti un'eccezione di compromesso; né una preclusione processuale deriva dalla pronuncia del lodo; né, infine, è esperibile un'azione per l'esecuzione del lodo stesso. L'efficacia della decisione arbitrale è rimessa unicamente alla commissio poenae *connessa alla violazione delle promesse in forma di stipulatio nelle quali si trasfonde l'accordo di compromesso*».

[19] Roman sources often referred to the decision taken by the arbitrator in terms of *sententia,* applying the same terminology that was also used in relation to court decisions, see T. DALLA MASSARA, *Reciproche relazioni ed integrazioni tra arbitrato e 'iudicium'*, cit., p. 118.

[20] See M. MARRONE, *Sull'arbitrato privato,* cit., p. 4 *et seq.*, «*tant'è che queste [le leges actiones] per l'eccessivo formalismo, come ci dice Gaio in un passo notissimo* (4.31), *da un certo momento* in odium venerunt*. Dico di più: se è vero che la prassi del supposto arbitrato preformulare dipese sopratutto dal non ancora avvenuto riconoscimento, a Roma, di tutela giudiziaria a rapporti che non erano del* ius civile vetus *e a rapporti tra Romani e stranieri o tra stranieri soltanto, ecco che esso non soltanto offriva maggiori vantaggi, quanto era addirittura inevitabile*».

[21] Both in arbitration and in formulary procedures, parties could largely take part in the outlining of the framework of the dispute as well as the choice of the person taking the decision.

[22] Parties to an arbitration where able to freely chose the person who would arbitrate their dispute, had autonomy to determine the rules applicable as well as have questions resolved that didn't fall into the edicts provided by the *praetor.* Also see T. DALLA MASSARA, *Reciproche relazioni ed integrazioni tra arbitrato e 'iudicium',* cit., p. 115, wherein the a. points to the procedural differences between arbitration and the formulary process: «*In prima approssimazione, si può dire che l'arbitrato romano si caratterizza per essere una figura giuridica complessa, giacché presuppone l'esistenza di un accordo di* compromissum*, sul quale trova fondamento un* iter *procedimentale alquanto libero cui è sconosciuta la distinzione tra fase in iure e fase* apud iudicem*; tale iter è interamente gestito da uno o più arbitri cittadini privati, ai quali è affidato anche il momento culminante della decisione*».

[23] See M. MARRONE, *Sull'arbitrato privato,* cit., p. 6.

On the downside, being a process by which parties consensually undertook to submit a dispute to a private decision-maker, decisions taken by the *arbitri ex compromisso* were generally believed not to carry *res iudicata* effects and not to be subject to appeal.[24] It was theorised, however, that an *exceptio doli* was given in instances of willful misconduct on the part of the *arbiter.* [25]

The reason why arbitration did not produce *res iudicata* effects is justified when considered within the confines of the function it was supposed to realise. Through the channel of arbitration, parties were able to resolve a wide variety of disputes; however, it was not intended for the resulting award to preclude the parties from bringing an action on the same claim in subsequent proceedings.[26] Instead, parties had to enter into a second agreement, the *compromissum,* which in turn served the purpose of inducing the parties – by pain of incurring monetary sanctions in the form of a fee (i.e. the *comissio poenae*)

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[24] See PS. 5.5a.1.: «*Ex compromisso autem iudex sumptus rem iudicatam non facit*»; C. 2.55(56).1*: Imp. Antoninus. A. Nepotianae. Ex sententia arbitri ex compromisso iure perfecto aditi appellari non posse saepe rescriptum est, quia nec iudicati actio inde praestari potest ed ob hoc invicem poena promittitur, ut metu eius a placitis non recedatur. Sed si ultra diem compromisso comprehensum iudicatum est, sententia nulla est, nec nullam poenam committit qui ei non paruerit*; also on this topic, K.H. ZIEGLER, *Das private Schiedsgericht im antiken römischen Recht*, München, 1971, p. 53 *et seq.*

[25] Paul. 13 *ad.ed.* D. 4.8.32.14: *Cum quidam arbiter ex aliis causis inimicus manifeste apparuisset, testationibus etiam conventus, ne sententiam diceret, nihilo minus nullo cogente dicere perseverasset, libelle cuiusdam id querentis imperator Antonius subscripsit posse eum uti doli mali exceptione. Et idem, cum a iudice consuleretur, apud quem poena petebatur, rescripsit, etiamsi appellari non potest, doli mali in exceptionem in poenae petitione obstaturam. Per hanc ergo exceptionem quedam appellandi species est, cum liceat retractare de sententia arbitri*. S. SERANGELI (*Diritto romano e* Rota Provinciae Marchiae, I, Torino, 1995, p. 278 *et seq*) points to the use of the word *retractare* instead of *appellare,* as being indicative of a general awareness that the judgment handed down by the *iudex,* was different in nature from the award rendered by the *arbiter ex compromisso.* Also see T. DALLA MASSARA, *Reciproche relazioni ed integrazioni tra arbitrato e 'iudicium',* cit., p. 156 *et seq*;

[26] Which, as was mentioned earlier, was due to a lack of direct legal protection that would have allowed parties to directly enforce the rights conferred to them by the award. Iluminating on the subject of the objective limits of *res iudicata* is the work by E. SCIANDRELLO, *Osservazioni sui limiti oggettivi del giudicato in epoca formulare: 'Iudicia contraria' e nessi logico-sostanziali tra processi*, in *Res iudicata,* a cura di L. Garofalo, Napoli, 2015, p. 331 *et seq.*, wherein the a. gives account of three passages all extrapolated from a commentary to Ulpians edict, in an effort to understand whether or not a party was entitled to lodge a claim for the recognition of a credit, that the same party had introduced as a set-off claim (*ex eadem causa*) during the *apud iudicem* stage of prior proceedings. The Roman scholar concludes that the demand for recognition will not be affected by the outcome of the prior proceedings, and can thus be asserted by a *iudicium contrarium,* as long as the *iudex* of the prior proceedings, has not taken the set-off claim into account to render his ruling. On the topic of the preclusive effects of *res iudicata,* see T. DALLA MASSARA, *'Pars in toto est': Brevi riflessioni sull'idea di 'parte' di giudicato,* in *Res Judiacta,* a cura di L. GAROFALO, Napoli, 2015, p. 357 *et seq,* particularly interesting the author's diachronic refections on the preclusive effects of *res iudicata* in *cross-boarder* settings, p. 369 *et seq*.

– to conform with the decision of the *arbiter*. As has been pointed out, *«[p]er regola generale, non si sarebbe vista scaturire dal compromesso l'eccezione di patto, perché gli effetti di tale eccezione sarebbero risultati fatalmente analoghi a quelli di* un'exceptio rei iudicatae vel in iudicium deductae. *E ciò non era conforme alla ratio stessa che è al fondo dell'accordo di* compromissum».[27]

Only in 529 A.D. would an *actio in factum* be put in place that closely resembled the *actio iudicati* so as to grant parties, given certain circumstances, a direct right of action to have their award enforced.[28]

As an instrument, firmly rooted in legal history that has taken on many forms throughout the years and has been witness to changes of regimes and political systems, arbitration to this day can be characterised by the following key features: it is fundamentally a process that is an expression of party autonomy[29], grounded in the believe that rather than delegating decisional powers over a dispute to a state entity, it is better to have the controversy resolved by «one of their own».

[27] See T. DALLA MASSARA, *Reciproche relazioni ed integrazioni tra arbitrato e 'iudicium',* cit., p. 165;
[28] *Imp. Iustinianus A. Iuliano pp.: Cum antea sancitum fuerat in arbitris eligendis, quos neque poena compromissi vallabat neque iudex dederat, sed nulla praecedente sententia communis electio, ut in illorum sententia stetur, procreabat, si quidem pro parte pulsata forma arbitralis procederet, exceptionem ei veluti pacti generari, sin autem pro actore calculus poneretur, nihil ex eo procedere ei praesidii: sancimus in eos arbitros, quos praediximus et quos talis consensus elegerit sub eo pacto in scriptis vel non in scriptis habito, ut eorum definitioni stetur, si quidem subscripserint, postquam definitio procedit, quod non displicet ambabus partibus eorum sententia, non solum reo exceptionem veluti pacti generari, sed etiam actori ex nostro numine in factum actionem, quatenus possit sententia eius exsecutioni mandari, sed in hac quidem regia civitate ab officio eminentis- simae praefecturae vel eius, cuius forum pars sequitur fugientis, in provinciis autem tam per moderatores quam apparitiones eorum, vel per iudices, quorum regimen pars pertime- scat pulsata* (a. 530). However, the system introduced by Justinian did not stay for long and was changed back (by the same emperor) to its classical form only 10 years later. It is also worth noticing that *stipulationes* had been undergoing some changes during that time (C. 2.55.4.7), changing from a contract requirering non particular form into a necessarily written agreement.
[29] See M. MARRONE, *Sull'arbitrato privato,* cit., p. 7, wherein the a. speaks of «gruppi 'amicali'» and «sociali».

II) INTERNATIONAL COMMERCIAL ARBITRATION AND *RES IUDICATA* IN THE GERMAN LEGAL SYSTEM

1. INTRODUCTION

The importance of arbitration as a means for resolving private disputes, has long been acknowledged by the German legislator and has, in fact, been given apporpriate legislative attention throughout the years. One such example, is the amendment of the Arbitration Act (*Schiedsverfahrens-Neuregelungsgesetz*) of December 22 1997[30] that has led to the overhaul of Book 10 of the ZPO. The aim was to implement the already widely known and highly regarded 'UNCITRAL Model Law on International Arbitration'[31] of 1985 into the German legal order.[32] Coupled with the already ratified 'New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958[33], the newly revamped legislation was believed to put Germany in a position that would allow it to respond to the increasing importance international commercial arbitration had gained for commercial enterprises.[34] Like most other legal systems, German law contains a provision that establishes the so called 'autonomy principle' of arbitration agreements. § 1040 ZPO stipulates that an arbitration agreement is seperate and distinct from the main contract. Consequently, challenges to the main contract's validity do not adversely affect the arbitration agreement, such that, in the event of the aforesaid challange, the contracting parties would still be required to submit their dispute to arbitration.

[30] BGB1. I 1997, 3224.
[31] Available at www.uncitral.org.
[32] There are some differences between the two models. For example, in order to apply the DIS-Arbitration Rules, it is not necessary for the dispute to be commercial in nature.
[33] Germany has been a party to the Convention since 1961.
[34] See A. LIONNET, *Schiedsgerichtsbarkeit in Deutschland,* 2007, available at www.fr-lawfirm.de.

In addition to the abovementioned measures, Germany disposes of an internationally recognised arbitral institution, the DIS (*Deutsche Institution für Schiedsgerichtsbarkeit*)[35], which renders both domestic and international awards, in application of its very own Arbitration Rules, i.e. the *DIS-Shiedsgerichtsordnung* (DIS-Arbitration Rules 98).[36]

By virtue of § 38 DIS-Arbitration Rules – and in accordance with § 1055 ZPO – awards rendered by the DIS are final and have «the same effects between the parties as a final and binding court judgment». The true scope and nature of those binding effects, however, has undergone some significant changes. Following the tradition of the 'Pandects'[37], some writers in older doctrine were of the opinion that *res iudicata* was not merely a procedural issue, but instead had a direct effect on substantive law, in the sense that «*res iudicata facit ius inter partes*» - in Germany this theory is also referred to as the *materielle Theorie*.[38] The theory fundamentally distinguishes between right and wrong decisions. A right decision confirms the already existing legal position and simply grants an additional suitable title for the enforcement of the right awarded in this context. As a result, the decision only issues a declaratory *Tenor*. A wrong decision on the other hand, positively encroaches upon the previously existing substantive legal situation and produces constitutive effects. Consequently, should a court erroneously recognise a non-existing legal situtation, once the decision has become final and binding, the legal

[35] The founding of the DIS (known at the time as DAS, i.e. *Deutscher Ausschuss für Schiedsgerichtswesen*) dates back to 1920. Following the end of WWII, the DAS' functions were limited to the nomination of aribtrators. Only in 1988 did the DAS once again function as an arbitral institution. In 1974 the DIS (*Deutsches Institut für Schiedsgerichtswesen*) was founded and shortly after merged with the already existing DAS, with the goal to promote arbitration in Germany. The functions performed by the DIS were a continuation of the functions previously performed by the DAS, namely providing arbitration services, independent rules of arbitration, assistance as well as the administration of arbitral proceedings. Today, the DIS is a registered association based in Berlin.

[36] In force as of July 1, 1998.

[37] See B. WINDSCHEID, *Lehrbuch des Pandektenrechts. Erster Band,* 2nd ed., 1867, § 129; also see A. ZEUNER & H. KOCH, *Effects of Judgments (Res iudicata),* (1887) *Reprint* 2012, Vol. 16.

[38] See British Institute of International and Comparitive Law, *The Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, Res iudicata and Abuse of Process – Germany,* p. 19.

consequences will form nonetheless. The same holds true for the opposite scenario where an actually existing legal situation is dismissed by the court; the right will be extinguished once *res iudicata* sets in.[39] Thus, the outcome of the court's decision not only dictates the substantive legal relationship existing between the parties, but moreover binds the judges of subsequent proceedings.

Indeed, according to this theory the legal situation as it is determined by the court and the true substantive legal situation, are one and the same. This is to avoid the unfortunate possiblity of the parties contemporaneously being subject to two different legal orders.[40]

Modern legal theorists are in favour of the *prozessuale Theorie* (also referred to in the German-speaking area as the *publizistische Theorie*).[41] The major point of discrepancy between the two theories is the function that is served by the judgment: rather than determining the legal situation, the court simply rules on an already pre-existing substantive legal reality. The court's judgment has mere declaratory value.[42] No statement is made as to the 'correctness' of the judgment which can lead to the parties being exposed to a kind of 'dual legal order'.[43] The impact of the *res iudicata* effects of the prior judgment is limited to it being binding on courts in later proceedings. The *Bundesgerichtshof* has summerised the power of *res iudicata* in the following: «*die im*

[39] See H. ROTH, *Materielle und Prozessuelle Rechtskrafttheorien,* in *Ritsumeikan Law Review,* No. 33, 2016, p. 84.
[40] See F. STEIN & M. JONAS, *Zivilprozessordnung,* 22nd ed., 2008, § 322, Rn. 22. The *materielle Rechtskraftstheorie* also characterises US and British civil procedural law. It is generally held that procedural law is merely instrumental to establishing the substantive legal situation. Judicial protection starts from substantive legal reality and to substantive legal reality it must return. Any given cause of action is extinguished by a final judgment (or, in the case of former recovery, the earlier judgment) by 'merging' with that judgment.
[41] The procedural theory of *res iudicata* was established by F. STEIN (*Über die bindende Kraft der richterlichen Entscheidungen nach der neuen österreicherischen CPO,* 1897) and K. M. HELLWIG (*System des deutschen Zivilprozessrechts, Erster Teil,* 1912, § 229).
[42] See H. ROTH, *Materielle und Prozessuelle Rechtskrafttheorien,* cit., p. 86; also see F. F. HEIM, *Die Feststellungswirkung des Zivilurteils: Abhandlungen zum Privatrecht und Zivilprozess des Deutschen Reichs*, Beck, 1912, p. 112 *et seq.*
[43] *Ibid,* cit.

öffentlichen Interesse an der Erhaltung des Rechtsfriedens und der Rechtssicherheit verwurzelte Rechtskraft enfaltet eine so starke Wirkung, dass sie selbst dann hingenommen werden muss, wenn die Entscheidung unrichtig ist. Diesem öffentlichen Anliegen muss auch das materielle Recht des Einzelnen weichen».[44]

The *materielle Theorie* was adopted by the German *Reichsgericht* in the year 1900[45] and was replaced by the *prozessuale Theorie* around the year 1930.[46]

Old and new doctrine also clash with respect to the scope of substantive *res iudicata*. Savigny, for instance, was in favour of far-reaching binding effects of judgments, that went beyond the '*Entscheidungstenor'* so as to attach also to other elements (including the grounds) of the decision – reffered to by Savigny as '*Urteilselemente'*[47]: «*Rechtskräftig werden die objectiven Gründe, und diese müssen wir aufsuchen, wo sie auch zu finden seyn mögen*».[48] According to Savigny, when determining which elements of the decision become *res iudicata*, the operative part has higher priority than the other components of the judgment; only then, were it necessary, should the grounds for the decision (*Entscheidungsgründe*) be taken into account to determine the legal relationship the court was invited to resolve. Others argued their case in favour of the extended effects of *res iudicata* by pointing to the binding effects of preliminary rulings in later proceedings. According to Zeuner, for instance, the teleological connection that characterises the relationship between preliminary and

[44] BGHZ 3, 82, 85.
[45] *RGZ* 46, 334, 336; 78, 389, 395; the Court explicitly noted that what is declared in the judgment shall become the law, «*auch wenn es dem vorher materiellen Recht bei dessem richitigem Verständnis nicht entsprach*».
[46] *RGZ* 129, 246, 248; for a more detailed Exposé on the different forms the two theories have taken ('*Bindungstheorie'* and *'ne bis in idem Lehre'*) as well as their practical ripercussions and the various attempts of reconciliation, see See ROTH, *Materielle und Prozessuelle Rechtskrafttheorien.*
[47] See F. C. SAVIGNY, *System des heutigen römischen Rechts*, Band VI, Berlin, 1849; K. REISCHL (*Die objektiven Grenzen der Rechtskraft im Zivilprozess*, Tübingen, 2002, p. 77) notes that Savigny doesn't base his theory on roman legal tradition, but instead relies on factual considerations for the purposes of protecting the procedural positions of both parties, thereby focusing on the *social* aspects of civil procedure.
[48] See F. C. SAVIGNY, *System des heutigen römischen Rechts*, cit., p. 372.

principal issues, also describes the interplay between *res iudicata* and the underlying reasons of the decision: *«[f]ür die Beziehung zwischen Rechtskraft und Entscheidungsgründen folgt aus diesem Prinzip, dass eine Bindung bezüglich der in den Entscheidungsgründen zu behandelnden Fragen insoweit – und nur insoweit – geboten ist, als von hier aus das Ziel des Festgestellten bestimmt wird und über eine Rechtslage zu befinden ist, die zu dem, was rechtskräftig festgestellt ist, in einem teleologischen Zusammenhang der erwähnten Art steh*t».[49]

Modern doctrine tends to dismiss these arguments by alluding to the wording of § 322 ZPO, which explicitly limits *res iudicata* to the operative part of the judgment: «*Gegenstand der Entscheidung ist und bleibt der prozessuale Anspruch. Das Wesen der Entscheidung aber ist der Subsumtionsschluss […], also eine Folgerung, bei der die festgestellten Tatsachen und das angewendete materielle Recht Elemente des Schlusses darstellen. In Rechtskraft erwächst nach § 322 ZPO die Entscheidung, also der Schluss, nicht aber die Elemente oder Glieder des Schlusses*».[50]

2. ARBITRATION IN GERMANY:

«German law recognises three types of judicial decisions: *Urteile* (judgments, § 313 ZPO), *Beschlüsse* (orders, § 329 ZPO) and *Verfügungen* (procedural decisions, § 329 ZPO). Only *Urteile* and *Beschlüsse* can have *res iudicata* effects».[51] However, pursuant

[49] See A. ZEUNER, *Die objektiven Grenzen der Rechtskraft im Rahmen der rechtlichen Sinneszusammenhänge. Zur Lehre über das Verhältnis von Rechtskraft und Entscheidungsgründen im Zivilprozess*, Tübingen, 1959, Band XII, p. 57; in response to Zeuner, see K. H. SCHWAB (*Review,* in *Juristen Zeitung,* 14. Jahrg., Nr. 23/24, December 1959, p. 786 *et seq*) who notes that the justifications for an extension of *res iudicata* are to be found in the interpretation of the decision, that is in relation to the desired objective.

[50] See K. H. SCHWAB, *Review,* cit., p.787.

[51] See BIICL, *The Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, Res iudicata and Abuse of Process – Germany,* cit., p. 5.

to § 1055 ZPO arbitral awards are equivalent to state judgments.[52] In fact, arbitral awards are accorded the same effect between the parties as a final and binding court judgment.[53] This holds true just as much when it comes to the recognition and enforcement of arbitral awards in Germany.

Moreover, § 1061 ZPO specifically regulates foreign arbitral awards. The assessment whether or not a decision – in terms of its content – qualifies as an award (or a partial award for that matter)[54], has to take place pursuant to German criteria, since the Section's reference to the 'New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (*UNÜ*) in paragraph 1 only becomes effective, once the existence of a foreign element in the arbitration has been established.[55] However, because Germany is a signatory to the New York Convention[56], when such an assessment is made, emphasis should nonetheless be placed on the independent rules contained in the Convention.[57] This is to avoid frictions between the treaty and § 1061(1) ZPO which could otherwise arise in cases where a decision is qualified as an award by the Convention, but not by the provisions of the German code of civil procedure. This is even more true when one considers that the reference made in § 1061(2) ZPO to the validity of the «provisions of other treaties on the recognition and enforcement of arbitral awards» [58] does not also extend to the Convention. Therefore, once it has been established that the

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[52] See R. ZÖLLER, *Zivilprozeßordnung,* 30th edn., Köln, 2013, § 1055, no. 7.
[53] See R. ZÖLLER, *Zivilprozeßordnung,* cit., § 1055, no. 1; and G. LÖRCHER & T. LÖRCHER, *Das Schiedsverfahren – national/international – nach Deutschem Recht,* Heidelberg, 2001, p. 87.
[54] BGH, MDR, 2007, at 864.
[55] See STEIN, JONAS – SCHLOSSER, § 1061, Rn. 16; according to old law, see, A. ERNEMANN, *Zur Anerkennung und Vollstreckung ausländischer Schiedsprüche nach § 1044 ZPO,* 1979, S. 6f., 38
[56] Including awards of non-signatory states, since Germany has not opted for the reservation by which the rules would only apply to treaty states. Since the repeal of § 1044 ZPO by virtue of the 'Arbitration-Reorganisation' Act (*Schiedsverfahrens-Neuregelungsgesetz*) which came into effect in 1998, German procedural law no longer contains independent provisions for the recognition of foreign arbitral awards.
[57] For a view in favour of a rigorous application of the criterion of 'double qualification' (*Doppelqualifikation),* see I. MÜNCH, in *Münchener Kommentar zur Zivilprozessordnung,* 3. Aufl., München, Rn. 9.
[58] § 1061(2) ZPO reads as follows: *«[d]ie Vorschriften in anderen Staatsverträgen über die Anerkennung und Vollstreckung von Schiedssprüchen bleiben unberührt*». For the full translation visit http://www.trans-lex.org/600550.

award is non-domestic in nature, the Convention's provisions are applied in place of the German rules of civil procedure. For instance, pursuant to Article IV(1) it is required of the party applying for recognition and enforcement to supply (*i*) the duly authenticated original award or a duly certified copy thereof; as well as (*ii*) the original agreement referred to in Article II of the same Convention or a duly certified copy thereof.

In this respect, the standards set out in Article IV are stricter than the requirements stipulated in § 1031 ZPO for domestic arbitral awards.[59]

Complications arise where a foreign arbitral award was rendered on the basis of an arbitration agreement that, while not meeting the standards of Article II New York Convention, is in line with the form requirements prescribed in § 1031 ZPO. In fact, it is unclear whether the 'most-favoured-nation' principle of Article VII New York Convention finds application under such circumstances.[60]

Parts of the literature oppose the application of the 'most-favoured-nation' principle in similar cases, on the grounds that it would defeat the principle's practical purpose. The argument is made that, since German law no longer contains an indipendent system for the recognition of foreign arbitral awards but instead has assimilated the rules set out in the New York Convention, there is but one option for the recognition of foreign awards available to the parties, namely the provision directly contained in the New York Convention.[61] In other words, § 1061(1) ZPO effectively disables the *in favorem*

[59] Although § 1031 too calls for the arbitration agreement to be contained «either in a document signed by the parties or in an exchange of letters, telefaxes, telegrams or other means of telecommunication which provide a record of the agreement», unlike Article IV of the New York Convention, it is deemed sufficient that the agreement be contained in a «document transmitted from one party to the other party or by a third party to both parties» and – if no objection was raised in good time – that the contents of such document be considered to be part of the contract «in accordance with common usage».

[60] Article VII(1) expressly states that the provisions of the Convention shall not «deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extend allowed by the law or the treaties of the country where such award is sought to be relied upon».

[61] See I. MÜNCH, in *Münchener Kommentar zur Zivilprozessordnung*, 5th ed., München, 2003, § 1061 Rn. 19; H.J. MUSIELAK & W. VOIT, *Zivilprozessordnung*, 7th ed., 2009, § 1061 Rn. 14.

recognitionis safety net in Germany.[62] Consequently, the more lenient requirements of § 1031 ZPO would only apply to arbitral awards that are 'native' to Germany.[63]

The opposing view takes a more ideological approach: the intention of the New York Convention, at its conception, was to make the recognition of arbitration agreements easier. That its ratification, as a result of mere happenstance, has led in some signatory states to the implementation of stricter rules than were in place previously, should not distract from the Convention's true purpose.[64] Therefore, in the spirit of the Convention, where a more *recognition-friendly* national law is available, it should be applied by the court, even in the absence of an explicit request in that sense by the parties.[65]

The latest case law seems to suggest that many *Oberlandesgerichte* already lean toward this more *recognition-friendly* position.[66] In a decision of 2010, the Federal Court of Justice (*Bundesgerichtshof*) held that, based on the 'most-favoured-nation' principle of Article VII New York Convention, a foreign arbitral award is enforceable if it complies with the formal standards relating to domestic awards.[67] The Court argued its position maintaining that the 'most-favoured-nation' principle enabled a German court to rely on the more favourable German law and to disregard the requirements set out in Article II New York Convention. Notwithstanding that § 1061(1) ZPO provides for foreign awards to be recognised and enforced solely by reason of the New York Convention, the Court noted that a strict adherence to that rule would render the principle meaningless and, as a result, would treat foreign awards less favourably.[68] The Court therefore concluded that

[62] See R. ZÖLLER & R. GEIMER, 28th ed., 2010, § 1061 Rn. 22a.
[63] See H. J. MUSIELAK & VOIT, 11th ed., 2014, § 1061 Rn.18.
[64] See J. ADOLPHSEN, in *Münchener Kommentar zur Zivilprozessordnung*, 3rd ed., § 1061 Annex 1 *UNÜ* Rn. 18; PRÜTTING, GEHRLEIN – RAESCHKE – KESSLER, in *Zivilprozessordnung*, 2nd ed., 2010, § 1061 Rn. 14f; STEIN, JONAS – SCHLOSSER, in *Zivilprozessordnung*, 22nd edn., Annex § 1061 Rn. 50, 76, 159.
[65] See PRÜTTING, GEHRLEIN – RAESCHKE – KESSLER, in *Zivilprozessordnung*, 2nd ed., 2010, § 1061 Rn. 14f.
[66] OLG Celle, order of December 14, 2006 – 8 Sch 14/05, p. 10 (retrievable from the DIS-data base); BayOLG, order of December 12, 2002, 4Z Sch 16/02, NJW-RR, 2003, at 349.
[67] BGH, order of September 30, 2010 – III ZB 69/09 – OLG Frankfurt am Main.
[68] BGH, order of September 30, 2010 – III ZB 69/09, p. 5.

Article II New York Convention «was to be interpreted as setting the maximum standard, which did not preclude any reliance on the more favourable German law».[69]

In addition, the Court made reference to a UNCITRAL recommendation on the interpretation of Articles II and VII New York Convention[70] and the revision of Article 7 of the Uncitral Model Law on International Commercial Arbitration, suggesting that, when it comes to international commercial arbitration, a broader interpretation of the 'most-favoured-nation' principles be adopted, with the possibility of relying on more favourable national law if necessary.

As far as the definition of the term 'award' under German law is concerned, the status of 'award' is generally not accorded to decisions which do not finally settle the dispute to the exclusion of ordinary courts of law, but merely function as a prerequisite for the bringing of an action before a state court (e.g. the *lodo di arbitrato irrituale* of the Italian legal system).[71] Furthermore, in situations where German law would classify a foreign decision as an award, but the same decision, on the basis of the other country's procedural laws, would classify as a state judgment, instead of applying § 1061 ZPO, the German court in front of which the proceedings for recognition have been installed must resolve the matter pursuant to §§ 328 and 722 ZPO.[72]

[69] See S. WILSKE & C. KRAPFL, *Federal Court of Justice on most-favoured-nation principle and the recognition of foreign arbitral awards*, at uk.practicallaw.com.
[70] General Assembly Resolution 61/33 dated 4 December, 2006, Official Records Sixty-first Session, Supplement No. 17 A/61/17, Annex II.
[71] BayObLG, NJW-RR, 2003, 502; also see LACHMANN, Rn. 2516.
[72] See R. ZÖLLER-R. GEIMER, 28th ed., Rn. 5.

3. THE RECOGNITION OF FOREIGN JUDGMENTS IN GERMANY AND FURTHER CONSIDERATIONS ON THE CONCEPT OF *RES IUDICATA*:

Within settled case law and civil procedural literature there is general agreement with regard to the purpose of substantive *res iudicata.* The term refers to the general doctrine that an adjudication which finally closes the proceedings is conclusive and cannot be re-litigated in subsequent proceedings involving the same subject matter or relief.[73]

There is less unanimity, however, with regard to the issue of recognition of foreign judgments. To that effect, several solutions have been put forward and implemented: (*i*) according to the *Wirkungserstreckungstheorie* – or the theory of *extended effects* – the procedural effects that are accorded to the judgment in its state of origin, are also extended to the state where recognition is sought. Following this theory, the recognition of a foreign judgment can never have the effect of attributing to that judgment effects it wouldn't also have in its state of origin;[74] (*ii*) a second approach brings about the *nationalisation* of foreign judgments. By virtue of the *Gleichstellungstheorie*, a foreign judgment produces the same effects in the state of recognition, as would otherwise be the case with national decisions;[75] (*iii*) there has also been a third, *intermediate* approach which is a combination of the former two and has proven to be of great appeal especially in Germany. The original effects of a foreign judgment are still brought over to the state where recognition is sought, but only to the extent that they conform with the effects of a judgment rendered

[73] See O. JAUERNING & B. HESS, *Zivilprozessrecht,* 30th ed., München, 2011, § 62, Rn. 1; also see H. ROTH, *Materielle und Prozessuelle Rechtskrafttheorien,* in *Ritsumeikan Law Review,* No. 33, 2016, p. 83, where the *Bundesverfassungsgerichtshof*'s stance on the importance of *res iudicata* for a state governed by the rule of law is summerised thusly: *«[d]er inhaltliche Bestand der Entscheidung verwirklicht die Rechtssicherheit, die ein wesentliches Element des Rechtsstaatsprinzips ist»*;

[74] See S. DORNBLÜHT, *Die europäische Regelung der Anerkennung und Vollstreckbarerklärung von Ehe- und Kindschaftsentscheidungen,* Tübingen, 2003, p. 30.

[75] See S. A. VILLATA, *I limiti oggettivi dell'autorità di una sentenza straniera nel sistema «Bruxelles»,* in *Riv. Dir. Proc.* n. 3, May-June, 2015, pp. 830-831.

by a national court.[76] Where a foreign judgment is awarded effects by its own legal system that are unknown to the legal system of the state where recognition is sought, those effects will not find recognition.[77]

The *Kumulationstheorie,* while keeping the parties from having unpleasent suprises when applying for the recognition of a judgment in another state, shares with the *Wirkungsgleichstellungslehre* the same potential for creating disharmonious outcomes on an international level.[78] This raises some inconsistencies: by recognising a foreign judgment, one also accepts the application of foreign law; there is little reason to suggest that this should be any different for the application of foreign rules on the effects of judgments.[79] An exception is to be made of course for when the application of such rules would go against public policy.

The limits of the extension of effects are particularly contentious with regard to substantive *res iudicata*. In most cases *res iudicata* is limited to the operative part of the judgment and does not extend to findings of fact or prejudicial legal relationships.[80]

There are fundamentally two different approaches in Europe with respect to substantive *res iudicata* of foreign judgments: (*i*) the French approach, on the basis of which the *chose jugée* attaches not only to the operative part, but to all issues which provide the *soutien nécessaire* of the judgment; (*ii*) and the German approach,[81] which

[76] See R. GEIMER, *Zur Prüfung der Gerichtsbarkeit und der internationalen Zuständigkeit bei der Anerkennung ausländischer Urteile,* Bielefeld, 1966, p. 25 *et seq*.
[77] See R. GEIMER, *Internationales Zivilprozessrecht,* 7th ed., Köln, 2014, Rn. 2782. There are also legal minds of great renown in Italy that subscribe to this theory, e.g. see C. CONSOLO, *Evoluzioni nel riconoscimento delle sentenze,* in *Nuovi problemi di diritto processuale internazionale,* Milano, 2002, p. 3 *et seq.*
[78] See S. DORNBLÜHT, *Die europäische Regelung der Anerkennung und Vollstreckbarerklärung von Ehe- und Kindschaftsentscheidungen,* cit., p. 31.
[79] See P. GOTTWALD, in *Münchener Kommentar zur Zivilprozessordnung,* 3rd ed., 1994, § 328, Rn. 5.
[80] The risk being that the binding effect of erroneous reasoning or faulty preliminary issues leads to the perpetuation of judicial errors.
[81] Wich is also the approach taken by the Italian legal system.

pursuant to § 256(2), ZPO requires an additional declaratory judgment, the *Zwischenfestellungsklage,* for the preliminary question to become *res iudicata*.

Pursuant to § 322 ZPO, most judgments are capable of having substantive *res iudicata.* Paragraph 1 of the same Section, however, limits the scope of *res iudicata* merely to the subject matter that was the object of the parties' demands (*Anspruch*)[82] and on which the court has made a decision.[83] Although the applicant determines the object of the *Streiggegenstand, res iudicata* is not necessarily bound by it, but can instead go beyond the applicant's request so as to extend also to claims which, while not applied for by the parties, were nonetheless (erroneously) decided upon by the court.[84] Further, *res iudicata* only arises with regard to the operative part (*Urteilstenor*) of the judgment and does not include preliminary matters or elements of the reasoning. It would be remiss, however, not to mention that the operative part of the judgment, though separated from the facts of the case in the drafting of the judgment, can only be understood by giving due consideration to the facts on which the parties based their claims. It has been pointed out that «[t]his becomes particularly important if a claim is dismissed because the operative part of [a claim] just states «[t]he claim is dismissed» without specifying which claim (i.e. based on which facts) is dismissed. Even if there is a clear distinction between operative part of the judgment (*Urteilsformel/Tenor*) and the reasons (*Entscheidungsründe*), it is common opinion that the operative part of the judgment may be interpreted with a view to the reasons».[85] The facts and the reasoning of the judgment may only be relevant for the interpretation of the *Urteilstenor*.[86] In fact, it is within the

[82] The term '*Anspruch'* is to be interpreted in terms of its procedural relevance, and therefore as referring to the '*Streitgegenstand*', i.e. the subject matter.
[83] See BIICL, *The effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, Res iudicata and Abuse of Process – Germany,* p. 14.
[84] See MUSIELAK & VOIT, 7th ed., 2009, § 322, Rn. 16.
[85] See BIICL, *The effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, Res iudicata and Abuse of Process – Germany,* p. 10; also see O. JAUERNING & B. HESS, *Zivilprozessrecht,* 30th ed., München, 2011, § 322.
[86] *Ibid,* p. 14.

Urteilstenor that lies the result of the *Subsumtionsschluss* which, through the application by the court of the abstract legal rule, is brought to bear upon the relevent facts. To limit substantive *res iudicata* only to the result of the *Subsumtionsschluss,* was a deliberate decision of the German legislator. Indeed, during consultations for the wording of § 322(1) ZPO, the consequences of a broad interpretation of *res iudicata* were discussed and then consciously limited to attach only to the '*Anspruch*'.[87] As mentioned above, «[i]f a party wants to extend the scope of *res iudicata*, it is open for her to request additional declaratory judgment on preliminary points if these preliminary questions [constitute] a legal relationship in the sense of § 256(2) ZPO (*Zwischenfeststellungsklage*). If the party does so and the court rules on the issue, the declaratory judgment may establish the particular legal relationship by issueing a declaratory *Tenor* («it is declared that…»). A declaratory judgment must be specifically asked for by any party».[88]

The wording of § 322(1) ZPO allows for the following conclusions: (*i*) that the findings of fact contained in the reasoning that underlies the court's judgment do not have the power of *res iudicata*[89]; (*ii*) and that, moreover, the preliminary legal relationships on which the court's decision is based, are exempt from producing *res iudicata* effects as well.[90]

As to the first conclusion, where a court should find that a contract is to be declared null and void on the grounds of fraudulent misrepresentation, *res iudicata* will only attach to the invalidity of the contract, not also to the reasons underpinning the decision. None of the reasons that led the court to declare the nullity of the contract would become binding on the parties. This potentially open avenues for the rejection of a second

[87] See H. J. MUSIELAK & W. VOIT, 11th ed., 2014, § 322, Rn. 2; BAG, NJW, 2003, 1204, 1205.
[88] See BIICL, *The effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, Res iudicata and Abuse of Process – Germany*, p. 14.
[89] BGH, NJW-RR, 2003, 757, Rn. 6.
[90] BGH, NJW, 2003, 3058, 3059; BGH, NJW-RR, 2008, 1397, 1398; OLG Zweibrücken, NJW-RR, 2008, 405.

claim for damages, on account of the fact that the second court – not being bound by the first court's preliminary findings – reaches a different conclusion as to the fraudulent behaviour of the defendant.[91]

As to the second conclusion, a judgment that grants the plaintiff's claim for the delivery or conveyance of goods on the grounds of his right of ownership, does not also extend its binding effects to the right of ownership.[92]

[91] Example taken from MUSIELAK & VOIT, 11th ed., 2014, § 322, Rn. 17.
[92] Example taken from MUSIELAK & VOIT, 11th ed., 2014, § 322, Rn. 17.

III) INTERNATIONAL COMMERCIAL ARBITRATION AND *RES IUDICATA* IN THE ITALIAN LEGAL SYSTEM

1. INTRODUCTION:

The steady 'crumbling' of the State's monopoly on jurisdiction, although 'nothing new under sun', has rapidly been gaining interest among legal scholars.[93] In fact several works have attempted to highlight the 'onslaught' of alternative dispute resolution processes, not just in Italy but around the world.[94] Others have referred to this phenomenon in terms of a «metamorphosis» of the State's monopoly on jurisdiction, that has since gone beyond a *baron de la Brède et de Montesquieu* inspired constitutionalism, to accept a kind of *delocalisation* of judicial powers and promote an ever more substantial role of party autonomy in the choice of jurisdiction.[95] It is in light of these circumstances that the *Corte Costituzionale*, when called upon to decide an issue of constitutionality involving Artt. 1341, comma II, 1342, comma II, c.c. and Art. 4, comma II, l. 218/1995, decided to reject the question stating that «*in quanto il legislatore del 1995 nell'ambito di una imponente tendenza di delocalizzazione della giurisdizione manifestatasi negli usi del commercio internazionale, nella normativa pattizia e negli ordinamenti sopranazionali, ha inteso favorire una più libera esplicazione dell'autonomia privata*

[93] See S. M. CARBONE, *Per un'interpretazione internazionalmente orientata della disciplina italiana dell'arbitrato: Prospettive di sviluppo,* in *Riv. Arb.*, fasc. 3, 2015, p. 429 *et seq,* who refers to this phenomenon in terms of a «sgretolamento della sovranità statale rispetto all'esercizion della giurisdizione».
[94] See, *inter alia*, V. PUNZI, *Dalla crisi del monopolio statale della giurisdizione al superamento dell'alternativa contrattualità-giurisdizionalità dell'arbitrato,* in *Riv. dir. proc.*, 2014, p. 1 *et seq;* V. PUNZI, *Le nuove frontiere dell'arbitrato,* in *Riv. dir. proc.*, 2015, p. 1 *et seq;* N. PICARDI, *La giurisdizione all'alba del terzo millenio,* Milano, 2007.
[95] See F. CARPI, *La metamorfosi del monopolio statale sulla giurisdizione,* in *Riv. trim. dir. proc. civ.*, fasc. 3, 2016, p. 811.

nella scelta della giurisdizione, tanto più che, con riguardo alla tutela del consumatore – contraente debole – la tutela è specificamente assicurata da altre norme di diritto interno e internazionale».[96]

These remarks perfectly incapsulate Italy's attitude in its efforts of reforming the field of arbitration and should serve as an interpretative guideline for the more detailed illustration of the single steps taken by the Italian legislator that is about to follow.

2. Nature and Effects of Arbitration within the Italian legal system:

Prior to the reform of 1983[97], the Italian *lodo rituale,* i.e. arbitral award, required type approval by the hands of a state judge before producing any effects. The award had to be lodged within five days of it being rendered by the arbitrator(s), on pain of being declared null and void or non-existent.[98] In terms of the award's ability to circulate, this system was in clear violation of the New York convention, to which Italy had been a signatory state and that was officially ratified by the Italian Parliament in 1968.

The reform should therefore be seen as Italy's attempt to make good past delays and to introduce a system of recognition and enforcement of (foreign) awards on par with the legal systems of other signatory states.[99] Some of the more noteworthy changes introduced by the '*miniriforma'*, included the deadline for the lodging of the award being brought up from five days to one year; as well as the transformation of said registration

[96] C. cost., ord., 18 October 2000, n. 428, in *Corr. giur.*, 2001, p. 504 *et seq.*
[97] L. 9 February 1983, n. 28; for commentary see A. Giardina, *La nuova disciplina dell'arbitrato in Italia,* in *RDIPP*, 1983, p.449 *et seq*; V. Punzi, *La riforma dell'arbitrato,* in *RDP*, 1983, p. 78 *et seq.*
[98] Prior to the reform this was an obligation falling on the arbitrators themselves.
[99] Italy's eagerness to make up leeway, however – even following the reforms of 1994 and 2006 – hasn't as of yet been fully realized.

from an obligation falling on the arbitrators themselves, into a burden that besets the parties.[100]

By far the most important change introduced by the reform – at least for the purposes of this thesis – was the legislator's decision to give awards 'binding effects' as of the date on which they were last signed.[101] The true implications of this change will be examined further below (*infra* Ch. III, par.3).

What remained an open question was the legality of a plea of nullity against an award that hadn't yet been officially approved by a state judge.[102] The availability of this particular plea to parties meaning to challenge a non-type approved award, aside from sparking a controversy surrounding the subject-matter of the appeal[103], heavily influenced the debate on the nature of arbitral rulings within the Italian legal order. The alternative was between attributing 'contractual' or 'procedural' nature to awards. A situation that was summarised thusly: «*in sintesi, si era soliti far dipendere dalla esperibilità della impugnazione per nullità l'efficacia processuale o negoziale del lodo non ancora omologato, ritenendosi la natura giurisdizionale dei suoi effetti, strettamente collegata alla possibilità di censura offerta da tale strumento di contollo*».[104] Those who argued that even with regard to non-type approved arbitral awards an action for annulment was on offer to the parties, thought arbitral awards to be equivalent to court judgments.

[100] Art. 825, I comma, c.p.c.
[101] Art. 823, ult. comma, lett. d), c.p.c
[102] The problem is explained in great detail by A. ATTERITANO, *L'Enforcement delle Sentenze Arbitrali del Commercio Internazionale: Il Principio del Rispetto della Volontà Delle Parti,* Milano, 2009, p. 37 *et seq.*
[103] In fact, Italian legal doctrine was divided on the issue. Supporters of the litteral approach suggested that, since Articles 827 *et seq* c.p.c. explicitly referred only to type approved awards as being subject to appeal (letting the time limits allowed for the launching of an appeal only take effect as of the date of official approval), there was no remedy against non-type approved awards in Italian civil procedure. Those also in favour of an action against non-type approved awards, on the other hand, argued that the relevant provisions had to be readjusted in a way that would allow for an action for annulment to be brought against all awards, be they officially approved or not. One suggestion was to have the date from which the time limit for challenges to non-type approved awards starts to run changed to the day of issuance of the award. Following l. 25/1994, Article 827, comma 2nd c.p.c was amended so as to allow actions for annulment to be brought also against non-type approved awards.
[104] See A. ATTERITANO, *L'Enforcement delle Sentenze Arbitrali,* cit., p. 38.

Consequently, awards were accorded procedural effects. Those holding arbitral awards to be essentially private in nature, on the other hand, restricted the effects of awards to being merely 'contractual'.

Since its amendmend by l. 25/1994, Article 827, comma 2nd c.p.c. provides also for non-type approved awards to be subject to appeal. A revision which would be in support of the widely held supposition that, by enacting the reform of 1994, the Italian legislator wanted arbitral awards to be functionally equivalent to court judgments and hence to have 'procedural' effects.[105] If it wasn't the legislator's intent to give court judgments and arbitral awards equal legal standing, then it becomes difficult to see why the reform of 1994 would have even been necessary in the first place. In fact, for the purposes of according to arbitral awards effects similar to other contractual instruments, the system put in place by the reform of 1983 would have sufficed.[106]

As mentioned, another topic of fierce debate revolved around the 'nature' of arbitration.

Courts in particular decided to weigh in on the issue, trying to set groundrules for the determination of the nature of arbitration within the Italian legal order. Infact, the issue at hand would be difficult to fully grasp, if done without a fervent study of the available case law. The issue even found a way into Italy's most prestigious courts, culminating in two contrasting rulings – one emphasising the private nature of

[105] See, *ex multis*, C. DELLE DONNE, *La Cassazione e i (difficili) rapporti tra arbitrato ritual ed irrituale: il dubbio tenore della convenzione arbitrale fa presumere l'opzione per la via arbitrale,* in *Riv. Arb.*, fasc. 3, 2015, p. 525, who writes: «*agli arbitri rituali compete, già alla luce della disciplina positiva risultante dalle modifiche apportatevi dalla l. 25/1994 […] una funzione schiettamente giurisdizionale e perciò in tali limiti alternativa a quella dei giudici togati*»; M. BOVE, *Note in tema di arbitrato libero,* in *Riv. dir. proc.*, 1999, who with regard to *arbitrati rituali «[essi] presentano tutti i connotati della giurisdizione in senso lato, ossia intesa come un'attività di risoluzione della controversia giuridica*»; for a contrasting view, see Cass. Civ., sez. I, 01/07/2004, n. 12031, wherein the court held that *«[c]on la novella di cui alla l. n. 25/1994, il lodo è divenuto una risoluzione negoziale della controversia non più rapportabile ad una 'sentenza'»; however, more recently the court seems to have adopted the opposite view, claiming that «l'arbitrato rituale ha natura giurisdizionale per cui l'impugnazione del lodo è soggetta alla disciplina e ai principi che regolano il giudizio di appello, in quanto compatibili*», Cass. Civ., sez. I, 18/06/2014, n. 13898.

[106] See A. ATTERITANO, *L'Enforcement delle Sentenze Arbitrali,* cit., p. 42.

arbitration[107], the other argueing in favour of *ius dicere* being performed also by arbitrators.

In case n. 527/2000[108] the *Corte di Cassazione*, denying the admissibility of a *Regolamento di giurisdizione* to determine arbitral competence in ordinary proceedings, emphasised that arbitrators are private judges who derive their power of *ius dicere* from the parties' will to have a claim adjudicated in a private forum. Taking into due consideration those facts, the court concluded that by the very nature of their mandate, arbitrators do not participate in the *ius imperii* which is innate in the exercise of state authority and, thereby, inherent also to state jurisdiction.[109]

In the words of the court: «*il processo arbitrale non potrà essere pertanto considerato quale affidamento agli arbitri di una frazione dello stesso potere giurisdizionale che la legge atrribuisce ai giudici dello Stato[110] […] [L]'orientamento di questa Corte è nel senso […] della natura privata dell'arbitrato rituale e del dictum che lo definisce*».

The court ultimately concluded that the issue of referring a dispute to arbitration, in cases where the law requires such disputes to be brought before ordinary jurisdictions, is an issue of merit and not one of jurisdiction: «*anche nell'arbitrato rituale, la pronunzia ha natura di atto di autonomia privata e correlativamente il compromesso si configura quale deroga alla giurisdizione. Pertanto, il contrasto sulla non deferibilità agli arbitri di una controversia per essere questa devoluta, per legge, alla giurisdizione di legittimità o esclusiva del giudice amministrativo costituisce questione, non già di giurisdizione in*

[107] By so doing, distancing itself form the Supreme Courts previously held position. To that effect, see Cass. Civ. 4 July, 1981, n. 4360, in *FI*, 1981, I, 1860 *et seq*., with commentary by C. M. BARONE.
[108] Cass. Civ., sez. I, 3 August, 2000, n. 527, with commentary by E. FAZZALARI, *Una svolta attesa in ordine alla 'natura' dell'arbitrato,* in *Riv. Arb.*, 2000, p. 699 *et seq.*
[109] See A. ATTERITANO, *L'Enfrocement delle Sentenze Arbitrali,* cit., p. 39.
[110] See E. F. RICCI, *La 'funzione giudicante' degli arbitri e l'efficacia del lodo (un grande arrêt della Corte Costituzionale),* in *RDP*, 2002, p. 351 *et seq*, where reference is made to this part of the decision.

senso tecnico, ma di merito, in quanto inerente alla validità del compromesso o della clausola compromissoria».[111]

Although the court's position on the nature of arbitral awards is clearcut, it is nonetheless worth examining the (apparent) *liaison* it has set up between nature and effects, as well as the reasons underpinning the court's decision. The court's argument starts from the assumption that the basis of arbitration is to be found in the autonomy of the parties. It is by the parties' will to have their dispute resolved through arbitration that the arbitrators are able to render a binding award.[112] By ruling on the nature of arbitration, finding it to rest fundamentally on a private choice to have a dispute adjudicated outside of official channels, the court didn't also mean to take a position on the effects of the resulting award. In fact, the court unequivocally clarified to be aware of the effects accorded to arbitral awards under l. 25/1994, by making explicit reference to it in its ruling.[113] In other words, the court tried to make a clear distinction between what is the 'wellspring' of a legal act, and what are the effects it can produce within a particular jurisdiction. The effects an award produces stand in no immediate relationship to its nature, but rather are the expression of an external choice made by the legislator with no regard for the essence of the award itself.[114] After all, a contract also finds its basis in the parties' autonomy, its existence being the result of an encounter of private intentions. Now, the effects the contract produces between the stipulating parties are determined by

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[111] Cass. 527/2000, also see the Report by C. CONSOLO, *Arbitration and EC Law – An Italian reaction in the Heidelberg Colloquium*, in *Int'l Lis.,* fasc. 2, 2009, p. 105 *et seq*, who summarises the court's position on the nature of arbitration in the following: «that the issue of arbitral competence in ordinary proceedings should be addressed as one of merit and not as one of jurisdiction, given the contractual nature of arbitration as a private alternative to ordinary jurisdiction».

[112] There is however reason to believe that the arbitrators' conduct as well as the rules they are requested to adhere to, are not solely shaped by what the parties agree to in the arbitration agreement, *infra* Ch. IV, par. 3.

[113] Cass. 527/2000, wherein the court explicitly states that *«[i]l rilievo che, per legge, il lodo è dotato […] di tutti o taluno degli effetti della sentenza pronunciata dai giudici dello Stato, non è determinante ai fini della soluzione del problema sulla natura dell'arbitrato*».

[114] See A. ATTERITANO, *L'Enforcement delle Sentenze Arbitrali,* cit., p. 42, in reference to N. IRTI, *L'interpretazione del lodo arbitrale*, in *DRAETTA – KLECHER – RINOLDI, Arbitrato nazionale e internazionale – Interpretazione ed esecuzione del lodo*, Milano, 1989, p. 3 *et seq.*

Art. 1372 c.c. to carry the full power of the law. If the nature of the contract were to be determined in relation to its effects, one would have to conclude that contracts and laws share the same origin. This has led to the following assertion: «*ritenendosi di natura privata il lodo arbitrale, ed essendo presente una norma che attribuisce efficacia vincolante al contratto, il lodo conseguirebbe gli effetti negoziali sin dal giorno della sua adozione (ovviamente se assenti ostacoli normative). Qunado il legislatore, dunque, interviene nella definizione di questi effetti, è ovvio che l'intento è quello di attribuire al provvedimento un* quid pluris *che, per quel che concerne le scelte italiane, riguarda una efficacia di accertamento. Ciò avvicina il lodo alla sentenza anche se non comporta che tutti gli effetti tipici della sentenza possano essere* sic et sempliciter *estesi al lodo*».[115] Reading the judgment of Cass. 527/2000 against the background of l. 25/1994, what seeps through is that, while arguing in support of the 'private' nature of arbitration, the court nonetheless acknowledges the award's effect of finally settling a dispute in a manner similar to a court judgment.[116]

It has been suggested that because the Italian legal system supports a «*quoad effectum*» comparison of arbitral awards and court decisions, arbitral awards would produce the same *res iudicata* effects as court judgments only in so far as the legal system contained a specific provision to that effect. Consequently, since no mention of similar *res iudicata* effects was made in l. 25/1994, legal scholars generally refrained from equating arbitration with litigation. [117] In a judgment of 2003 the *Corte Cassazione* even went so far as to deny any similarity between arbitration and litigation holding that, since

[115] *Ibid,* cit., p. 42.
[116] The Supreme Court has since changed its position on the nature of ('ritual') awards, Cass. civ., sez. un., 25 October 2013, n. 24153, «*Affermata la natura giurisdizionale e non negoziale del arbitrato rituale quale conseguenza delle varie novelle susseguitesi, ed essenzialmente del d.lgs. 2 febbraio 2006 n. 40…*».
[117] *Ibid,* p. 44. However, with the siging into law of D.lgs. 2 February 2006, n. 40 and the introduction of Art. 834-bis c.p.c., there is reason to believe that such distinction, at least with respect to 'ritual arbitration', is no longer justified, see *infra* Ch. III, par. 3.

foreign arbitral awards are not equivalent to ordinary judgments, the stipulation of an arbitration agreement is indicative of a waiver to bring an action before ordinary courts.[118] However, Art. 824-bis c.p.c. – introduced by Italy's most recent reform of 2006 on arbitration[119] - explicitly provides for arbitral awards to produce the same effects as court decisions.[120] Art. 829, comma I, n. 8, c.p.c., moreover, would seem to suggest that in terms of the binding effects of the decision, arbitration is equivalent to litigation.[121] With respect to Article 829 c.p.c. Italy's highest Court recently explained that *«[n]el giudizio di impugnazione del lodo, ove le parti abbiano concordato sulla natura rituale dell'arbitrato e sull'applicazione ad esso delle regole processuali civili vigenti, vanno conseguentemente applicati i principi giurisprudenziali in tema di accertamento*».[122]

That arbitration is functionally equivalent to litigation was further held by the Italian *Corte Costituzionale.*[123] The Court granted the power to raise issues of constitutionality also to arbitrators – for the fact that the Constitutional Law of 1953 accorded that power to the «*giudicante*» in general – and justified its decision by making reference to the many ways in which arbitrators perform their adjudicative function in application of the same standards and principles whose observance otherwise instructs the state court's authority to render a binding decision.[124] In the words of the Court:

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[118] Cass. civ., Sez. un., 18 April, 2003, n. 6349, *«[l]'accordo compromissorio per arbitrato estero comporta la rinuncia ad ogni tipo di giurisdizione, sia italiana che straniera, attesa la natura privatistica dell'arbitrato. Ne segue che la eccezione proposta davanti al giudice italiano e fondata su tale accordo è qualificabile non già come eccezione di difetto di giurisdizione, bensì come eccezione di merito e segnatamente di improponibilità della domanda (senza che su tale qualificazione influisca l'art. II della convenzione di New York 10 giugno 1958), e che pertanto non è sottoponibile alle Sezioni unite della Corte di cassazione mediante regolamento preventivo di giurisdizione, il quale se proposta va dichiarato inammissibile*».

[119] D.lgs. 2 February 2006, n. 40.

[120] Except as provided in Art. 825.

[121] Art. 829, comma I, n. 8, c.p.c. reads as follows: «*L'impugnazione per nullità è ammessa, nonostante qualunque preventiva rinuncia, nei casi seguenti: se il lodo è contrario ad altro precedente lodo non più impugnabile o a precedente sentenza passata in giudicato tra le parti, purchè tale lodo o tale sentenza sia stata prodotta nel procedimento*».

[122] Cass. Civ., sez. I, 14 February, 2014, n. 3558.

[123] C. Cost., 28 November, 2001, n. 376.

[124] See C. PUNZI, *Disegno Sistematico dell' Arbitrato,* 2nd ed., Padova, 2012, p. 200 *et seq.*

«*[a]tteso che l'arbitrato costituisce un procedimento previsto e disciplinato dal c.p.c. per l'applicazione obiettiva del diritto nel caso concreto, ai fini della risoluzione di una controversia, con le garanzie del contradditorio e di imparzialità tipiche della giurisdizione civile ordinaria, che – per quanto riguarda la ricerca e l'interpretazione delle norme applicabili alla fattispecie – il giudizio arbitrale non si differenzia da quello che si svolge davanti agli organi statali della giurisdizione*».

The two cases referred to above, although seemingly in conflict with eachother, following a more thorough analysis, reveal to be perfectly compatible.[125] In fact, while the judgment handed down by the Italian Supreme Court in 527/2000 was concerned primarily with exploring the nature of arbitral awards (finding them to ultimately emerge out of an encounter of private wills), the *Corte Costituzionale*, in its ruling, was more concerned with describing the standards and principles of law arbitrators have to uphold in the conduct of their assigned tasks, as well as the consequences that ultimately derive from the proper performance of those tasks.

A combined reading of the two decisions, leads to the following conclusion: if arbitral awards have the same effect as court decisions to finally settle a dispute, permitting arbitrators to raise issues of constitutionality is not only desireable, but becomes necessary to avoid the crystallisation of decisions founded on provisions or interpretations that are unconstitutional.[126] Art. 819-bis, comma I, n. 3, c.p.c. which was introduced by the latest reform on arbitration of 2006, now also permits arbitrators to suspend arbitration proceedings whenever they raise an issue of constitutionality pursuant to art. 23 of l. 11 March 1953, n. 87.[127]

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[125] See A. ATTERITANO, *L'Enforcement delle Sentenze Arbitrali,* cit., p. 45 *et seq*.
[126] See A. BRIGUGLIO, *La qualificazione dell'eccezione di compromesso per arbitrato estero quale eccezione di merito: problematiche connesse di diritto interno e di diritto onternazionale,* in *RDP*, 2005, p. 269 *et seq.*
[127] D.lgs. 2 February, n. 40, 2006.

Bearing in mind the gradual abandonment of the Italian legislator of a notion of an absolute State authority over the so called «*servizio giustizia*»[128] (L. n. 25/1994, L. n. 218/1995 and, most recently, d.lgs. n. 40/2006), it comes as no surprise that, in a recent judgment, the Italian Supreme Court, in its plenary composition, has declared arbitral awards to be of 'juridical' nature and, consequently, to view an objection of settlement through arbitration as an issue of jurisdiction and not of merit.[129]

3. ORIGIN AND SCOPE OF *RES IUDICATA* IN THE ITALIAN LEGAL SYSTEM:

Italian pivate law is mostly a combination of two legal systems that can be best described in opposition to eachother. Reference, of course, is made to the French system, on the one hand, and the German system on the other. Two legal orders that have always stood out for their contending approaches with respect to what traditionally have been some of the most fiercely debated issues of private law theory.[130] Along the same lines, the expression «*auctoritas rei iudicatae*»[131], still in use today to describe the court's ability to render a decision on the merits that is conclusive between the parties, derives its origins from Civil Codes of Roman origin. For instance, the *Code Napoléon* and others like it contain provisions that qualify final judgments as evidence and describe its legal status in terms of a legal presumption. [132] This specific legal characterisation can be traced

[128] A service which, pursuant to Art. 24 of the Constitution, the State is, in any case, still obliged to provide.
[129] Cass. civ., sez. un., 25 October 2013, n. 24153, «*L'eccezione di arbitrato estero può essere sottoposta alla Cassazione mediante regolamento preventivo di giurisdizione. La questione è di rito, anche se l'art. II, par. 3, della convenzione di New York 10 giugno 1958 sul riconoscimento delle sentenze arbitrali straniere (l. 19 gennaio 1968 n. 62) impone al giudice l'esame della validità, operatività ed applicabilità della clausola arbitrale in via preliminare rispetto alla verifica della giurisdizione; non si forma infatti in proposito alcun giudicato sulla questione pregiudiziale di merito*».
[130] The *principio consensualistico* of Art. 1376, for instance, has his origins in Art. 1134 of the *Code Napoléon* and stands in opposition to the transfer rules of the German legals system which, along with Roman tradition, is still characterised by the separation of *titulus* and *modus adcquirendi.*
[131] See A. SALOMONE, *Riflessioni in tema di 'auctoritas rei iudicatae',* in *Res Iudicata*, a cura di L. GAROFALO, Tomo primo, Napoli, 2015, p. 99 *et seq.*
[132] Art. 1350 Code Civil: «*La présomption légale est celle qui est attachée par une loi spéciale à certains actes ou à certains faits; tells sont: 1) Les actes que la loi déclare nuls, comme présumés faits en fraude de*

back to the commentators (i.e. *glossatori*) and their reading of well-known Roman maxims such as «*res iudicata pro veritate accipitur*»[133] or «*sententia facit ius*».[134] On the basis of the same maxims, but under the guidance of the 'Pandects'[135], German scholars devised a different theory of the *res iudicata* effects of judgments as effectively determining substantive legal reality (*infra* Ch. II, par. 1).[136]

With respect to Italy, what seems to have prevailed under the old Code of Civil Procedure and Art. 1351 of the Civil Code (both signed into law in 1865) was the French logic of the *présomption légale* attached to *res iudicata*.[137] The enactment of the new Code of Civil Procedure of 1940 and Art. 2909 of the newly penned Civil Code (1942), however, have revigorated the debate surrounding the scope and effects of *res iudicata*.[138]

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ses dispositions, d'après leur seule qualité; 2) Les cas dans lesquels la loi déclare la propriété ou la libération résulter de certaines circonstances déterminéées; 3) L'autorité que la loi attribute à la chose jugée; 4) La force que la loi attache à l'aceu de la partie ou à son serment».

[133] See Ulp. 1 *ad leg. Iul. et Pap.* D. 1.5.25: «*Ingenuum accipere debemus etiam eum, de quo sentential lata est, quamvis fuerit libertinus: quia res iudicata pro veritate accipitur*»; Ulp. 1 *ad Iul. et Pap.* 50.17.207: «Res iudicata pro veritate accipitur».

[134] See Paul. 2 *quaest.* D. 5.2.17.1: «*Cum contra testamentum ut inofficiosum iudicatur, testament factionem habuisse defunctus non creditor. Non idem probandum est, si herede non respondente secundum praesentem iudicatum sit: hoc enim casu non creditor ius ex sentential iudicis fieri: et ideo libertates competent et legata petuntur»; Ulp. 34 ad ed. D. 25.3.3. pr.: «Sive contra pronuntiaverit, non fore suum, quamvis suus fuerit: placet enim eius rei iudicem ius facere. Et ita Marcellus libro septimo digestorum probat, eoque iure utimur*».

[135] See B. WINDSCHEID, *Lehrbuch des Pandektenrechts. Erster Band,* 2nd ed., 1867, § 129; also see A. ZEUNER & H. KOCH, *Effects of Judgments (Res iudicata),* (1887), Vol. 16 *Reprint* 2012.

[136] See G. PUGLIESE, *Scritti giuridici scelti - Problemi di diritto vigente,* Vol. V., Napoli, 1986, p. 3, who defines the different theory of German stamp as a theory «*della finzione di verità progenitrice diretta […] della teoria che attribuisce alla cosa giudicata un'efficacia sostanziale*».

[137] See E. F. RICCI, *Corso teorico pratico di diritto civile,* Vol. VI, Torino, 1886, p. 547 *et seq.*; L. MATTIROLO, *Trattato di diritto giudiziario civile italiano,* Vol. III, 1884, p. 283 *et seq.*

[138] See C. CONSOLO, *Spiegazioni di diritto processuale civili – Profili generali,* Vol. II, 2nd ed., Torino, 2012, p. 192. Legal theorists also split into different camps on the issue of the nature of *res iudicata,* that is whether the final and binding effects of the judgment were directed at the judges (procedural theory), in front of which the parties appeard to have the same claim re-litigated, or the parties who had already seen their dispute being finally adjudicated in prior proceedings (substantive theory). See A. SALOMONE, *Riflessioni in tema di 'auctoritas rei iudicatae',* cit., who refers to G. PUGLIESE, voce *Giudicato civile (dir. vig.),* cit., p. 794. Also unclear was whether it was possible to distinguish between the 'effects' and the 'authority' of the judgment. To that effect, see E.T. LIEBMANN, *Efficacia ed autorità della sentenza,* Milano, 1935, who held that a final judgment not only precluded the parties from having the same claim re-litigated another time in subsequent proceedings, but moreover prevented a differing judgment to be rendered in relation to the same legal relationship. According to Liebman, since decisions (as conceived by modern legal systems) had lost the «creative powers» Roman law had instilled them with, nothing prevented a judge in subsequent proceedings from re-examining a claim that had already been finally adjudicated in prior proceedings. To prevent that from happening, a prior judgment had to be given the 'authority' to bar the same claim from being re-litigated a second time. In the words of the a., «*l'efficacia di una sentenza non può in sè e per sè impedire ad un giudice posterior, investito anche esso dell pienezza dei poteri esercitati*

Articles 2907, 2908, 2909 c.c., as is well known, form the bedrock of the Italian procedural law and describe the exercise of the jurisdictional role in Italy in its entirety: from the action brought by the parties to the final judgment delivered by the court.[139] Art. 2909 c.c. defines the effects of substantive *res iudicata* in terms of «*fare stato*» (i.e. «having binding effect») of what has been finally determined in the judgment pursuant to Art. 324 c.p.c. Italian law makes a clear distinction between the finality of the decision (i.e. *giudicato in senso formale*) and the function of the judgment to conclusively settle a dispute (*cosa giudicata in senso sostanziale*). The *giudicato formale* simply refers to the definitiveness of the decision in terms of being no longer subject to any form of appeal.[140] Pursuant to Art. 324 c.p.c., every court judgment, independent of the contents or grounds of the judgment, their nature or the effects they produce, can become incontrovertible.[141] The *giudicato sostanziale*, on the other hand, describes the disposition of what was determined in the judgment to also produce binding effects outside the proceedings in which it was formed.[142] However, dominant legal theory is of the opinion that, for Italian law, only decisions adjudicating claims concerning a subjective right have the power to become *res iudicata.*[143] This has the collateral effect of excluding from *res iudicata* all

dal giudice che ha emanato la sentenza, di riesaminare il caso deciso e di giudicare in modo difforme. Solo una ragione di utilità politica e sociale […] iterviene ad evitare questa possibilità rendendo il commando immutabile quando il processo sia giunto alla sua conclusion con la preclusione delle impugnative contro la sentenza in esso pronunciata», p. 40.

[139] See C. CONSOLO, *Spiegazioni di diritto processuale civili*, cit., p. 87

[140] Pursuant to Art. 324 c.p.c.

[141] Art. 324 c.p.c. provides as follows: «*si intende passata in giudicato la sentenza che non è più soggetta nè a regolamento di competenza, nè ad appello, nè a ricorso per cassazione, nè a revocazione per i motivi di cui ai numeri 4 e 5 dell'articolo 395*»; also see L. P. COMOGLIO – C. FERRI – M. TARUFFO, *Lezioni sul processo civile – il processo ordinario di cognizione*, Vol. I, 4th ed., Bologna, 2006, p. 691, wherein it is state that «*tutte le sentenze sono idonee ad acquistare, come atti, la caratteristica-qualità della non modificabilità, qualunque sia il loro contenuto o la natura dei loro effetti. Infatti, tutte le sentenze definitive o non definitive, di rito o di merito, sono astrattemente idonee a passare in giudicato formale se non impugnate*».

[142] See L. P. COMOGLIO – C. FERRI – M. TARUFFO, *Lezioni sul processo civile*, cit., p. 691 *et seq.*

[143] See C. CONSOLO, *Spiegazioni di diritto processuale civili*, cit., pp. 10, 32, 87; A. ATTARDI, *in tema di limiti oggettivi della cosa giudicata,* in *Riv. trim. dir. proc. civ.,* 1990, p. 475 *et seq;* L. P. COMOGLIO – C. FERRI – M. TARUFFO, *Lezioni sul processo civile,* cit., p. 691; A. PROTO PISANI, *Appunti sul giudicato civile e sui suoi limiti oggettivi,* in *Riv. dir. proc.,* 1990, p. 386 *et seq*.

preliminary issues of fact and law which the court only decides on in passing; regardless of whether or not the court touched upon these issues in order to determine the nature or scope of the concrete claim brought before it. In a recent report by Consolo, regarding an international commercial arbitration case, acting in his capacity as expert witness, the author noted that some of Italy's most renowned scholars (Satta, Montesano, Proto Pisani, Luiso)[144] «agree that preliminary issues of merit cannot be the subject of *res iudicata*».[145] Consolo arrives at this conclusion, firstly, through a combined reading of Artt. 2907 and 2909 c.c.: «*res iudicata* in Italy […] may not have as its subject matter single (many or few) preliminary issues of fact or law […] which are dealt with by the court before reaching its final decision on the subjective right claimed by the plaintiff».[146] Still unclear however, and source of many clashes of opinions especially between doctrine and case law, are the *res iudicata* effects of prejudicial issues. Unlike preliminary issues, which concern specific facts or controversial points of law, prejudicial issues are grander in scope covering questions pertaining to subjective rights, matters of legal status and, most importantly, «the validity of the so called 'fundamental legal relationship', the

[144] See, *inter alia*, L. MONTESANO, *In tema di accertamento incidentale e di limiti oggettivi del giudicato,* in *Riv. dir. proc.*, fasc. 1, 1951, p. 329 *et seq*; F. P. LUISO, *Diritto processuale civile,* I, VII ed., Milano, 2013, p. 152 *et seq*, 222 *et seqi*; A. PROTO PISANI, *Lezioni di diritto processuale civile,* Napoli, 2006, p. 68 *et seq*; ID., *Le tutele giurisdizionali dei diritti,* Napoli, 2003, pp. 299-300.

[145] See C. CONSOLO, *Sulla natura del precedente arbitrato e sui limiti oggettivi dell'efficacia vincolante del relativo lodo,* in *Int'lis,* fasc. 1, 2016, p. 25 *et seq.*

[146] Ibid, p. 32; Cass. civ., sez. lav., 10 July 2002, n. 10039, «*È inammissibile, per diffetto di interesse ad agire, l'azione tesa ad accertare, in vista di eventuali postumi indennizzabili, il nesso di causalità tra infortunio e prestazione di lavoro, atteso che il processo può essere utilizzato solo a tutela di diritti sostanziali e deve concludersi (salvi casi eccezionali) con il raggiungimento dell'effetto giuridico tipico, cioè con l'affermazione o la negazione del diritto dedotto in giudizio, onde i fatti possono essere accertati dal giudice solo come fondamento del diritto fatto valere in giudizio e non di per sè e degli effetti possibili e futuri che da tale accertamento si vorrebbero ricavare, dovendosi rilevare che la natura lavorativa dell'infortunio non costituisce una questione pregiudiziale al diritto alla rendita […], bensì uno degli elementi costitutivi del diritto medesimo*»; Cass. civ., sez. lav., 19 April 1991, n. 4208, «*L'interesse ad agire con azione di accertamento postula un'obiettiva incertezza circa l'esistenza di un rapporto giuridico, o l'esatta portata dei diritti e degli obblighi da esso scaturenti, e la necessità di rimuovere detta incertezza per eliminare la lesione attuale di un diritto o, almeno, il pericolo attuale di tale lesione. Detto interesse va pertanto escluso in ordine all'azione volta esclusivamente alla determinazione dei limiti dell'efficacia privilegiata, ai sensi dell'art. 2700 c.c., di un verbale redatto e notificato dal servizio contributi agricoli unificati, ove […] su di esso non sia stata ancora fondata nessuna specifica pretesa, attesa l'esclusione della configurabilità stessa di un pericolo attuale di lesione del diritto dell'attore quanto all'efficacia probatoria del citato verbale per il futuro recupero di contributi od in sede d'impugnazione di tale atto*».

Grundverhältnis, from which the single right which is the object of the claim derives».[147] The concept of the 'fundamental legal relationship' describes the 'way of being' of a single substantial relationship, which in and of itself is of no immediate legal utility as it doesn't grant any concrete asset (i.e. *bene della vita*), but from which a variety of legally relevant effects can originate.[148] In a dispute involving one or more of those legal effects, the court may well decide to also assess the existence or non-existence of the underlying 'fundamental legal relationship'. What has fostered scholarly as well as judicial debate is the following question: if a court, in order to rule on the existence or non-existence of a right that constitutes the subject matter of the claim, decides to also take a position on the existence (validity, qualification, etc.) of the underlying 'fundamental legal relationship', will that assessment also yield *res iudicata* effects?[149] The issue is incredibly complex and has produced a rich collection of scholarly writings and case law; reference to it, therefore, must necessarily be rather summary.

As far as the Italian legal system is concerned, two solutions have been put forward: (*i*) the first, suggesting that prejudicial issues may become *res iudicata*, even without being the subject matter of a specific claim[150]; (*ii*) the second, holding that only

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[147] See C. CONSOLO, *Sulla natura del precedente arbitrato,* cit., p. 33. The a. also points out the peculiarity of the concept of 'fundamental legal relationships' – also referred to by Italian legal sholars as '*antecedente logico necessario*' – and the lack of any real conceptual equivalent in other legal systems. Also aware of the problem F. P. LUISO (*Diritto processuale civile*, I, cit., p. 164), *«[i]n particolare, nel caso di dipendenza [tecnica], la soluzione appena esposta, e che si fonda sull'art. 34 c.p.c., è praticamente indiscussa con riferimento alla impotesi in cui un diritto entra a comporre la fattispecie di un altro diritto (c.d. pregiudizialità in senso tecnico). Il problema che si pone […] è se la stessa disciplina appena illustrate si applica anche alla c.d. pregiudizialità in senso logico, cioè a quelle ipotesi in cui viene dedotto in giudizio uno degli effetti di un rapport giuridico […]. Se il giudice, per decidere dell'esistenza o inesistenza del diritto, che costituisce uno degli effetti del rapport giuridico, ha preso posizione sull'esistenza o sulla qualificazione del rapporto a cui quell'effetto si riallaccia, ci si domanda se tale statuizione estende la sua efficacia anche all'esistenza o inesistenza o qualificazione del rapporto giuridico presupposto*»; see also L. P. COMOGLIO – C. FERRI – M. TARUFFO, *Lezioni sul processo civile*, cit., p. 693.

[148] For example, several legal effects derive from a purchase agreement: delivery of the goods being transacted, payment of the purchase price, transfer of ownership, guarantee which covers any defects of the purchased goods, etc.

[149] See F. P. LUISO, *Diritto processuale civile,* cit., p. 164.

[150] S. MENCHINI, *I limiti oggettivi del giudicato civile,* Milano, 1987, p. 189 *et seq.*; ID., *Disorientamenti giurisprudenziali in tema di limiti oggettivi del giudicato in ordine a giudizi concernenti ratei di obbligazioni periodiche,* in *Giur. it.,* 1991, I, pp. 235, 238; ID., *Il giudicato civile,* Torino, 2002, p. 86 *et*

when forming the subject matter of an incidental declaratory claim (i.e. *domanda riconvenzionale*) pursuant to Art. 34 c.p.c., can a prejudicial issue be ascertained with *res iudicata* effects.[151]

Those in favour of a spill-over effect of *res iudicata* on prejudicial issues, argue that Art. 34 c.p.c. is only applicable to actual rights, not also to an entity as «instrumental and artificial» as the assessment over the existence or qualification of the underlying substantial situation, which, in the interest of consistency, merely serves the purpose of making the effects and rights that emerge from it homogeneous.[152] This position is also held by a significant portion of case law.[153]

Advocates of the opposite solution, on the other hand, find the tendency to accord *res iudicata* to everything that was subject of the decision, including characterisations of legal relationships and findings of fact which were necessary antecedents or the «juridical and logical foundation for the final declaration on the ascertained right, whether those premises are express […] or even implied», to be leftovers from «a long tradition of French law» from which, however, the Italian system had moved on definitively with the introduction of Art. 34 of the new Code of Civil Procedure.[154]

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seq; F. P. LUISO, *Diritto processuale civile,* cit., p. 165; S. SATTA, *Accertamento incidentale,* in *Enc. dir.*, I, Milano, 1958, p. 243.

[151] See G. CHIOVENDA, *Istituzioni di diritto processuale civile,* Vol. I, Napoli, 1960, pp. 348 *et seq*; L. MONTESANO, *In tema di accertamento incidentale e di limiti oggettivi del giudicato,* cit., p. 329 *et seq.;* ID., *La tutela giurisdizionale dei diritti,* Torino, 1995; ID., *Domande e questioni nei giudizi arbitrali,* in *Riv. dir. proc.,* 2000, p. 621 *et seq.*; The approach taken by the Italian legislator is very much similar to the German *Zwischenfeststellungsklage,* see *infra* Ch. II, par. 2.

[152] See F. P. LUISO, *Diritto processuale civile,* cit., pp. 165-166.

[153] *Ex multis*, Cass. civ., 12 May 2003, n. 7272; Cass. civ., 7 June 2005, n. 11793; Cass. civ., 13 September 2006, n. 19559; Cass. civ., 27 March 2006, n. 6628, «*Se l'accertamento dell'esistenza, validità e natura giuridica di un contratto, fonte diun rapporto obbligatiorio, costituisce il presupposto logico-giuridico di un diritto derivatone, il giudicato si estende al predetto accertamento e, pertanto, spiega effetto in ogni altro giudizio, tra le stesse parti, nel quale il medesimo contratto è posto a fondamento di ulteriori diritti, inerenti al medesimo rapporto*»; with respect to periodic or long term legal relationships, see Cass. civ., 23 July 2015, n. 15493

[154] See C. CONSOLO, *Sulla natura del precedente arbitrato,* cit., p. 34; moreover, legal scholars have stressed that a distinction needs to be drawn between what in Italian legal terminology is referred to as the '*giudicato implicito*' (i.e. *res iudicata* that attaches to a legal issue that, although not expressly put to the court for a ruling, was resolved by the court on the basis of its complementary and indissoluble link with the principal question; Cass., Sez. Un., 29 April 2003, n. 6632; Cass., 27 October 2011, n. 22416) and an incidental declaratory claim *ex* Art. 34 c.p.c. While the former is subject to the principle of the 'inferred or

According to Consolo the signing into law of the post-liberal codifications also marked an overthrow of the «theoretical assumptions of the *soutien nécessaire* inspired by French law and by the abrogated Article 1351 of the Civil Code of 1865. Those olden maxims», observes Consolo, «are not to be followed anymore since they are in contrast with current law».[155]

This opinion, although adopted by a majority of Italian legal literature, is not followed unanimously. Satta, for instance, holds that an assessment on the validity of an underlying 'fundamental relationship' can become *res iudicata* in cases where its connection with the principal claim is so strong that it would be impossible to consider it by itself.[156] More recently, Luiso has argued in favour of the non-applicability of Art. 34 c.p.c. to a legal relationship that constitutes a logical and necessary antecedent, emphasising the instrumental nature of such relationships.[157]

What remains to be determined is the extent to which the above arguments are applicable to international commercial arbitration.

A combined reading of Articles 2909 c.c. and 824-bis c.p.c. would suggest that arbitral awards are capable of having the same *res iudicata* effects as court judgments.

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inferrable' and therefore also precludes rights that could have been submitted but were not from being brought in subsequent proceedings, prejudicial issues can only become *res iudicata*, insofar as they form the object of an incidental declaratory claim *ex* Art. 34 c.p.c. or the law specifically mandates for such effects to be produced.

[155] See C. CONSOLO, *Spiegazioni di diritto processuale civile,* cit., p. 192; ID., *Sulla natura del precedente arbitrato,* cit., p. 34. The a., apart from referring the recent developments with regard to the objective limits of *res iudicata* in tax matters, acknowledges the possibile application of a wider notion of *res iudicata* with respect to legal relationships where one party has the power to unilaterally modify the agreement: «only in these particular situations is there a need to conform the exercise of the power by its holder, and this contributed to the development of a line of thought embraced by some scholars (including myself) which enhances the *res iudicata* effects as a regulatory tool to prevent a repeated and abusive exercise of the power by the stronger party». To not mention at this point that the a. does admit «a more incisive efficacy or *res iudicata,* assigning some relevance to the underlying reasons, but only in view of well determined and subsequent proceedings», would amount to an inaccurate portrayal of his views on this complex subject (CONSOLO, *Sulla natura del precedente arbitrato,* cit., p. 40; ID., *Oggetto del giudicato e principio dispositivo – I. Deil limiti oggettivi del giudicato e del giudicato costitutivo,* in *Riv. trim. dir. proc. civ.*, 1991, p. 215 *et seq.*).

[156] See S. SATTA, *Accertamenti incidentali e principi generali di diritto,* in *Enc. dir.*, I, Milano, 1958, p. 243.

[157] See F. P. LUISO, *Diritto processuale civile,* I, cit., p. 165.

As has been pointed out, *«[i]n generale, l'efficacia che opera dando piena certezza ai rapport giuridici è quellavche caratterizza le sentenze, emesse a conclusione di un processo a cognizione piena, sentenze di merito che decidono sulla domanda*».[158] Simple court orders such as injunctions, orders upholding a notice to vacate or of eviction, don't carry the authority of *res iudicata*. In fact, Art. 2909 c.c. explicitly provides only for what has been examined and ascertained as part of a court decision to produce *res iudicata* effects. By putting arbitral awards on equal footing with court decisions through the introduction of Art. 824-bis c.p.c., the Italian legislator made a conscious decision to let arbitrators adjudicate upon disputes brought before them with *res iudicata* effects. This being said, however, not every award is capable of producing *res iudicata*. As mentioned earlier, the Italian legal system recognises two types of awards, only one of which produces effects similar to an actual judgment.[159] 'Irritual awards' are contractual decisions that do not involve the protection of subjective rights, but rather concern the resolution by a third party of specific contractual matters; They do therefore not fall within the scope of Art. 824-bis.[160] Only awards «ascertaining duties and obligations, offering relief for their infringements» can become final and binding.[161] Moreover, the Italian Supreme Court has repeatedly held that, whenever an arbitration agreement is ambigious with respect to the exact type of arbitration the parties intended to install in the event of a dispute, the doubt as to the correct interpretation shall be resolved in favour of

[158] See L. P. COMIGLIO – C. FERRI – M. TARUFFO, *Lezioni sul processo civile*, cit., p. 692. For decisions containing preliminary issues on the merits, see CONSOLO, *Sulla natura del precedente arbitrato,* cit., p. 25 *et seq.*

[159] Aside from 'irritual awards', Italian law also recognises the concept of arbitrage (Art. 1349 c.c.) which describes the practice by which the parties provide that with regard to certain elements of a contract (e.g. price revision), the expertise of a third party will be taken into advise. The expert is required to give a fair and reasoned assessment.

[160] Cass. civ., sez. I, 10 October 2013, n. 23086, «*a seguito di arbitrato irrituale, o di arbitraggio o di perizia contrattuale […], dato che in ciascuno di questi casi, la decisione, di natura negoziale, che li conclude è sfornita dell'elemento che caratterizza l'arbitrato rituale, ossia l'attitudine a divenire 'sentenza' a seguito del deposito del lodo…*»; also see Cass. civ., sez. I, 28 April 2010, n. 10221.

[161] See C. CONSOLO, *Sulla natura del precedente arbitrato,* cit., p. 28.

'ritual arbitration'.[162] In other words, only 'ritual awards' that amount to a final adjudication on the existence of a subjective right are in accordance with the specific requirement contained in Art. 2907 c.c., namely the jurisdictional protection of rights, and are accorded *res iudicata* effects. The same holds true for foreign awards as has been pointed out repeatedly by the *Corte di Cassazione*.[163]

Lastly, in the last few years Italian case law has given rise to some interesting developments with respect to *res iudicata* on tax matters, reminiscent of Zeuner's *Bergündungstheorie*.[164] In a decision resolving a conflict that had arisen within its Tax Division, the plenary composition of the Italian Supreme Court held that the objective limits of *res iudicata* on tax matters were capable of «expanding» beyond the confines of a particular fiscal year so as to be binding also in future proceedings concerning the same tax in the following tax years.[165] The broad notion of *res iudicata* in tax matters, however, has been linked to the particular nature of tax proceedings which do not allow for the bringing of incidental declaratory petitions concerning the underlying 'fundamental relationship' of the principal claim.[166]

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[162] Cass. civ., sez. un., 25 October 2013, n. 24153; Cass. civ., 7 April 2015, n. 6909, «*In tema di interpretazione del patto compromissorio, anche con riferimento alla disciplina applicabile prima della introduzione dell'art. 808-ter cod. proc. civ. ad opera del d.lgs. 2 febbraio 2006, n. 40, il dubbio sull'interpretazione dell'effettiva volontà dei contraenti va risolto nel senso della ritualità dell'arbitrato, tenuto conto della natura eccezionale della deroga alla norma per cui il lodo ha efficacia di sentenza giudiziaria*»; also see C. DELLE DONNE, *La Cassazione e i (difficili) rapporti tra arbitrato rituale ed irrituale: il dubbio tenore della convenzione arbitrale fa presumere l'opzione per la via rituale,* in *Riv. Arb.*, fasc. 3, 2015, p. 524 *et seq.*

[163] Cass. civ., sez. un., 25 October 2013, n. 24153, «*Affermata la natura giurisdizionale e non negoziale del arbitrato rituale quale conseguenza delle varie novelle susseguitesi, ed essenzialmente del d.lgs. 2 febbraio 2006 n. 40, lo stesso va affermato anche per l'arbitrato estero, per la cui natura giurisdizionale militano anzi altri elementi*»;

[164] See V. ZEUNER, *Die objektiven Grenzen der Rechtskraft im Rahmen rechtlicher Sinneszusammenhänge,* Tübingen, 1959; also see C. CONSOLO, *Il cumulo condizionale di domande,* I, Padova, 1985, p. 501 *et seq.*

[165] Cass. civ. sez. un., 16 June 2006, n. 13916, in *Giur. trib.*, 2006, p. 755 *et seq.*, with commentary by C. MAGNANI, pp. 760-761; also see S. DALLA BONTÀ, *Una «benefica inquietudine» - Note comparate in tema di oggetto del giudicato nella giurisprudenza alla luce delle tesi zeuneriane,* in *Giust. proc.*, fasc. 3, 2011, p. 891 *et seq*.

[166] See C. CONSOLO, *Il percorso della Corte di Giustizia, la sentenza Omniclub e gli eventuali limiti di diritto europeo all'efficacia esterna ultrannuale del giudicato tributario (davvero ridimensionato in funzione antielusiva Iva del divieto comunitario di abusi della libertà negoziale?),* in *Riv. dir. trib.*, 2010, p. 1134 *et seq.*

4. RECOGNITION OF FOREIGN AWARDS IN ITALY:

Following the receipt of the notification of the arbitration panel ruling to the parties, arbitrators have officially ended their *functus officio*.[167] By defenition, international commercial arbitration is an alternative means to finally resolve a private dispute, risulting in the issuance of an arbitral award that is binding on the parties.[168] It is expected of the parties to spontaneously abide by all the ascertainments set forth therein.

However, where one (or both) of the parties refuse to carry out the award, enforcement has to be sought in front of a national court, under that court's legal system and in accordance with the relevant international conventions. In fact, while elsewhere mention was made of a steady 'crumbling' of State monopoly over jurisdiction, states still largely retain sovereignty over questions of validity and effects of arbitral awards, whose recognition and enforcement is sought in their jurisdiction.[169]

National rules on recognition and enforcement of awards, however, especially in recent years, have started drawing inspiration from international sources which has led to a 'harmonisation' of national legislations on arbitration (*infra* Ch. II par. I, Ch. III par.

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[167] See P. BERNARDINI, *Riconoscimento ed esecuzione dei lodi stranieri in Italia,* in *Riv. arb.,* fasc. 3, 2010, p. 429 *et seq.*

[168] Art. 34(2) of the Uncitral revised Arbitration Rules reads: «all awards shall be made in writing and shall be final and binding on the parties»; along the same lines, Art. 34(6) of ICC Rules of Arbitration: «every award shall be binding on the parties…»; Art. 26(8) of LCIA Arbitration Rules: «every award (including reasons for such award) shall be final and binding on the parties. The parties carry out any award immediately and without any delay».

[169] See S. M. CARBONE, *Per un'interpretazione internazionalmente orientata della disciplina italiana dell'arbitrato: Prospettive di sviluppo,* in *Riv. Arb.,* fasc. 3, 2011, p. 429 *et seq,* who writes: «*gli effetti di lodi (nazionali o esteri) nell'ambito dei vari ordinamenti statali dipendono non tanto dalla disciplina e dagli esiti dei controlli dello Stato della sede dell'arbitrato, ma piuttosto da quelli dello Stato in cui il lodo viene portato ad esecuzione. Sono, infatti, questi ultimi profili della disciplina arbitrale di cui ogni Stato conserva l'esclusiva ed il monopolio, anche se il relativo esercizio deve avvenire entro i limiti stabiliti da fonti normative di vario tipo adottate (con effetti più o meno vincolanti) nell'ambito della Comunità internazionale, con particolare riferimento ai rapporti di commercio internazionale ed all'arbitrato commerciale internazionale*».

2).[170] Art. 822 c.p.c. requires arbitrators to decide according to «the rules of law». Considering the internationally oriented route national legislation on arbitration has taken, it is not far-fetched to assume that, instead of applying rules that are grounded in a specific national legal system, arbitrators can look to international or supranational regimes for the resolution of the disputes that are put to them. Moreover, Art. 832 c.p.c. explicitly authorises arbitration to take place according to pre-established arbitration rules (e.g. ICC Arbitration Rules or UNCITRAL Arbitration Rules for *ad hoc* arbitration), thus further feeding into the idea of an 'international' reading of Art. 822 c.p.c.[171]

Moreover, faced with these trends of internationalisation and the ever-increasing relevance of party autonomy with respect to the choice of the 'rules of law' that will govern disputes submitted to arbitration, a move away from national recognition and enforcement rules and towards the application of 'international and supranational' standards might be necessary.

[170] Examples for legislation in the field of arbitration indicative of – either explicitly or implicitly – an international undertone can be found in a number of legal systems. In Italy, l. n. 28/1983, l. n. 25/1994 as well as more recently d.lgs. n. 40/2006 where inspired by the New York Convention 1958; § 1061 ZPO expressly refers to the New York Convention 1958; the same can also be said of Art. 1505 of the French Code on Civil Procedure.

[171] See S. M. CARBONE, *Per un'interpretazione internazionalmente orientata della disciplina italiana dell'arbitrato,* cit., p. 434, who notes «*Si conferma, dunque, l'evoluzione normativa e giurisdizionale dell'ordinamento italiano secondo una tendenza rivolta a rinnegare definitivamente, e nel modo più fermo, l'impostazione 'pubblicistica' e stato-centrica della giurisdizione. Inoltre, emerge anche un sistema sempre più orientato a riconoscere gli effetti delle clausole di deroga alla giurisdizione a favore di giudici stranieri e di soluzioni arbitrali, con riferimento alle quali viene riservato ampio spazio all'esercizio dell'autonomia private (secondo regole uniformi previste sulla base di parametri normativi elaborati in ambito internazionale di cui si tende ad estendere l'operatività anche ai c.d. arbitrati nazionali)*».

IV) INTERNATIONAL ARBITRATION INSTITUTIONS AND THE DOCTRINE OF *RES IUDICATA*

1. INTRODUCTION:

The binding effect of arbitral awards is prescribed by many institutional rules. One such example, is Article 34(6) of the ICC Rules which provides that «every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay…».[172] Similar provisions can be found in the LCIA Rules, Article 26.8[173], and the UNCITRAL Rules, Article 34(2).[174]

At first glance, it seems that these provisions only confirm the *positive res iudicata* effect of an award and give no indication as to whether or not the subject matter of the award can be re-litigated a second time. It is possible to conclude, however, that by agreeing to arbitration pursuant to such rules, the parties also accept any *negative res iudicata* effects a valid award may give rise to. Moreover, it appears that ICC Articles 34(6) and 37(4), as well as similar provisions, operate under an understanding that the term 'award' includes also 'the reasons', and by so doing, extent the power of *res iudicata* to the necessary underlying motivation of such award.[175] An arbitral award derives its power from the parties' will to have a claim adjudicated in a private forum. From this, it

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[172] Visit http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/.

[173] Visit http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Article%2026.

[174] Visit http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf.

[175] See V.V. VEEDER, *Issue Estoppel, Reasons for Awards and Transnational Arbitration,* in *Complex Arbitrations: Perspectives on their Procedural Implications,* (Special Supplement – ICC International Court of Arbitration Bulletin, 2003), p. 73. Particularly interesting is the wording of Article 26.8. In fact, the 2014 version of the LCIA Arbitration Rules now explicitly provides for the reasons of the award too to be final and binding on the parties. The Article now reads as follows: «Every award (including reasons for such award) shall be final and binding on the parties».

follows that it is ultimately in the parties' discretion to determine the extent to which they are willing to be bound by the award.[176] If the parties, when determining the rules of the arbitration (in the case of *ad hoc* arbitration) or when agreeing to a set of pre-existing rules (in the case of institutional arbitration), require the arbitrator to state the «reasons» the award is based on, it is not at all far-fetched to assume that, by so doing, they also agree for the necessary underlying motivation of such award to produce *res iudicata* effects.

This is not the case under current AAA (American Arbitration Association) Rules, according to which the award of the arbitrators, though in writing, must not state any reasons or findings supporting the decision.[177] In fact, there have been several instances in which the AAA has encouraged its arbitrators not to issue written opinions explaining their decisions, fearing that such explanations «might open avenues for attack on the award by the losing party».[178]

It is also worth noting that, as of now and unlike most civil law systems of continental Europe, the Rules issued by most arbitration institutions don't give guidance as to how a tribunal should deal with issues of *res iudicata*, either raised by the parties or *ex officio*. In fact, most arbitration statutes impose virtually no specific procedural requirements on the arbitral proceedings other than the general due process requirements.[179]

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[176] The mixed nature of the doctrine of *res iudicata*, pertaining to both public policy and private justice, as well as the limitations party autonomy can be made subject to, will be elaborated in greater detail in Ch. V, par. 2.

[177] AAA Commercial Arbitration Rules, R-46(b).

[178] AMERCIAN ARBITRATION ASSOCIATION, *A Guide for Commercial Arbitrators*, p. 16, (undated).

[179] See G. B. BORN, *International Arbitration: Law and Practice*, p.152 *et seq*; International Law Association's *Interim Report* on «*Res iudicata* and Arbitration«, *Report of the Seventy-First ILA Conference*, Berlin, 2004, available from the International Law Association and in pdf format at www.ila-hq.org.

This lack of regulatory zeal, however, is mitigated by arbitral practice as well as overriding mandatory rules.[180] Arbitral awards are generally regarded by arbitral tribunals as having *res iudicata* effect.[181] There are many reported cases where arbitral tribunals have applied *res iudicata* principles in their awards.[182] In fact, there is general consensus that the principles of *res iudicata*, in one way or another, are recognised as either a rule of customary international law or a general principle of law.[183]

To take just one example, in a Swiss award of 2002 the tribunal held that «it is settled law by now that an arbitral tribunal sitting in an international arbitration in Switzerland must apply the same rules as would a Swiss court in matters of *res iudicata*».*[184]* A recent ruling by the Swiss Supreme Court confirmed this position, stating that where a claim, which is identical to a claim between the same parties that has been finally resolved by a foreign court decision, is brought before an arbitral tribunal seated in Switzerland, the tribunal must dismiss the claim to the extend that the foreign decision can be recognised in Switzerland.[185]

As to the doctrine of *res iudicata*, we can find examples of ICC awards that, at least as far as ICC case-law is concerned, seem to establish a notion of *res iudicata* that goes beyond the *dispositif/tenor*.

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[180] See *supra* Chapter III. par. 3.
[181] See e.g. P. FOUCHARD, E. GAILLARD & B. GOLDMAN on *International Commercial Arbitration*, Kluwer, The Hague, 1999, para 1419; A. REDFERN & M. HUNTER, *Law and Practice of International Commercial Arbitration*, Sweet & Maxwell, London, 1999 p. 395; and M. RUBINO-SAMMARTANO, *International Arbitration Law and Practice,* 2nd edn, The Hague, 2001, p. 21.
[182] See e.g. B. HANOTIAU, *The Res iudicata Effect of Arbitral Awards,* published in *Complex Arbitrations: Perspectives on their Procedural Implications*, Special Supplement – *ICC International Court of Arbitration Bulletin,* 2003, p. 43; D. HASCHER, *L'autorité de la chose jugé des sentences arbitrales*, in *Travaux du Comité Français de DIP*, Pédone, 2004; the cases published in the four volumes of *Collection of ICC Arbitral Awards* (ICC Publishing, Paris), the *Yearbook of Commercial Arbitration* (Kluwer, The Hague), and the Kluwer Arbitration website www.arbitration.com.
[183] See G. B. BORN, *International Arbitration,* cit., p. 352.
[184] *A v Z,* order no 5 of 2 May 2002, *ASA Bulletin,* vol 21 no 4, 2003 at 810. The tribunal comprised Marcus Wirth (Chairman), Gabrielle Kaufmann-Kohler, and Franz Kellerhans.
[185] Supreme Court 4A_124/2010, October 4 2010; *res iudicata* has acquired the status of a fundamental principle which cannot be ignored without violating procedural public policy.

The cases in question are ICC Cases Nos. 2745 and 2762 (1977).[186] Both cases dealt with chain sales contracts. In Case No. 2762 (1970) the first buyer in the chain was held to be liable to the subsequent buyer in the chain. It was stated only in the motivation (not in the *dictum*) of the award, that *force majeure* or breach by further companies couldn't be invoked by the first buyer in order to escape liability. When the subsequent party was sued in ICC Case No. 2745 by the party next in the chain, it referred to Case No. 2762 against the first buyer, seeking to be held harmless were it to be found liable. The arbitral tribunal held the prior ICC award to be binding to the extend that it was disposing of the relationship between the same parties as in Case No. 2762. The tribunal justified its decision by pointing out that it would indeed be paradoxical not to be bound by a prior ICC award. It further ascertained that the *res iudicata* effect had to be determined in accordance with French concepts and that German law, being merely the law of the sales contract, was not to be applied.[187] France adopts a larger notion of *res iudicata* that extends to those elements of the reasoning which form the necessary support for the operative part (*infra* Chapter III. par. 3) . In contrast, the German concept is largely considered to be limited to the *dictum* only.[188]

In ICC Case No. 3383 (1979) an ICC arbitral clause was substituted for a clause that instituted *ad hoc* arbitration. Under the applicable law, the *ad hoc* arbitrator declined jurisdiction whereupon the claimant referred the claim to ICC arbitration. The sole

[186] *Collection of ICC Arbitral Awards 1973-1985,* ICC Publishing, Paris, 1990, at p. 326.
[187] In G. B. BORN, *International Arbitration*, p. 112 *et seq,* wherein the a notes that «in virtually all cases, the procedural law of the arbitration is the law of the arbitral seat. Usually by virtue of choosing the seat, the parties will simultaneously have chosen the procedural law or *lex arbitri* of the seat to govern the arbitral proceedings»; in *Karaha Bodas Co.v Perusahaan Pertambangan Minyak Das Gas Bumi Negara*, 364 F.3d 291 (5th Cir. 2004) the Court put the matter more vividly, observing that «an agreement providing that one country wil be the site of the arbitration but the proceedings will be held under the arbitration law of another country [is] 'exceptional'; 'almost unknown'; a 'purely academic invention'; 'almost never used in practice'; a possibility 'more theoratical than real'; and a 'once-in-a-blue-moon set of circumstences'».
[188] For a dissenting view, see *Oberlandesgericht* (Higher Regional Court) Bremen, 25 April 2014 – 2 U 102/13, where it is noted that in *cross-boarder* disputes, the notion of *res iudicata* applicable under German law ought to be the European notion: «auf diesen Rechtskraftbegriff des Unionsrechts sei hier abzustellen».

arbitrator, however, felt bound by the previous *ad hoc* award, concluding that both the *ad hoc* as well as the ICC agreements to arbitrate had terminated.[189]

In ICC Case No. 3267 (1984) a similar conclusion was reached. Here, applying Swiss law, the tribunal, when asked to consider the *res iudicata* effect of its earlier partial award, concluded that «the binding effect of its first award is not limited to the content of the order thereof adjudicating or dismissing certain claims, but that it extends to the legal reasons that were necessary for such order, i.e. the *ratio decidendi* of such award».[190]

One would be remiss not to mention the UNCITRAL Arbitration Rules, which occupy an important position in contemporary arbitration. The Rules' objective, as was made clear in the wake of the Rules' promulgation by the U.N General Assembly in December 1976, is to offer a predictable procedural framework for international arbitration acceptable to all legal systems and commercial interests.[191] In *ad hoc* arbitrations agreements, parties will often select the UNCITRAL Arbitration Rules as a pre-existing set of procedural rules to guide their arbitration.[192]

The combined provisions of Article 34(2) and (3) declare that «all awards […] shall be final and binding on the parties» and that, when giving the award, «the arbitral tribunal shall state the reasons upon which the award is based». In consideration of the

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[189] See e.g. ICC Case No. 3383, 1979, *Collection of Arbitral Awards 1974-1985*, ICC Publishing, Paris, 1990, p.100 and 394, commentary by Y. DERAINS.

[190] In *Antoine Biloune and Marine Drive Complex Ltd v Ghana Investment Centre and the Government of Ghana*, Awards of October 27 1989 and June 30 1990, reprinted in *XIX Yearbook Commercial Arbitration* 11, pp. 22-23 the tribunal in this *ad hoc* arbitration held under UNCITRAL Rules, identified exceptions to the general recognition of *res iudicata* of partial final awards in cases of fraud, asserting that «a court or Tribunal, including this international arbitral Tribunal, has an inherent power to take cognisance of credible evidence, timely placed before it, that its previous determinations were the product of false testimony, forged documents or other egregious 'fraud on the tribunal' […] Certainly if such fraud in the evidence would justify an international or national court in voiding or refusing to enforce the award, the Tribunal also, so long as it still has jurisdiction over the dispute, can take necessary corrective action…«.

[191] The Rules were revised in 2010 to allow for a more liberal joinder of parties and establish the tribunal's authority to grant injunctions and order the preservation of evidence. See *Report of the Secretary General on the Revised Draft Set of Arbitration Rules*, UNCITRAL, Introduction, par. 17, UN Doc. A/CN.9/112 (1975).

[192] See «National Reports» on the law and practice of arbitration of sixty countries, in P. SANDERS, *Yearbook*, vols. 1-10, Deventer, 1976-85; R. DAVID, *Arbitration in International Trade*, Deventer, 1985.

arguments made with regard to the conclusive and preclusive effects of *res iudicata* in arbitration, the upshot of these provisions is that, again in this case, the 'award' does include 'the reasons', leading to an extended notion of *res iudicata* which includes the *ratio decidendi*.[193]

2. KEY ISSUES OF *RES IUDICATA* IN INTERNATIONAL ARBITRATION

In international arbitration, the existence of a notion of *res iudicata* is – to a greater of lesser extent – generally accepted. However, complications do arise as to its application. Such questions concern: *i)* the requirements that have to be met in order for *res iudicata* to arise; *ii)* the applicable law for determining the *res iudicata* effect of a prior award; and *iii)* the scope of *res iudicata* in the ambit of international commercial arbitration.

On these issues the International Law Association Committee has produced various reports which have culminated in a list of *Recommendations* on *res iudicata* pertaining to international commercial arbitration.[194]

These *Recommendations* concern the effect of an international commercial arbitral award upon subsequent and further proceedings between the same parties.[195]

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[193] See V. V. VEEDER, *Issue Estoppel, Reasons for Awards and Transnational Arbitration*, cit., p. 73.

[194] For the full list of *Recommendations* see Resolution No. 1/2006, 72th Conference of the International Law Association, Toronto, Canada, 4-8 June. These Recommendations are the culmination of a four-year study of *res iudicata* by the Committee, starting just before the New Delhi Conference in 2002. The Recommendations have been discussed and agreed by the Committee at meetings in Auckland (October 2004), Geneva (March 2005), Paris (May 2005), Prague (September 2005), and Zürich (January 2006) and discussed at the Conference Working Session in Toronto (June 2006). Also see *ILA Final Report on Res iudicata and Arbitration*, 72nd International Law Association Conference on International Commercial Arbitration, Toronto, June 2006.

[195] In the context of these *Recommendations*, «subsequent» meaning different arbitration proceedings and «further» meaning both subsequent proceedings and proceedings which continue within the same arbitration proceedings in which the previous award was rendered) proceedings between the same parties. See *ILA Interim Report*, Berlin, 2004, pp. 3-4.

The *Recommendations* are meant to aid international commercial arbitrators faced with *res iudicata* issues. Thus, they are not directly aimed at state courts dealing with *res iudicata* effects of arbitral awards. The determination of *res iudicata* effects of domestic arbitrations is left to the discretion of their respective courts. Similarly, the *Recommendations* do not apply where a prior state judgment is invoked in arbitral proceedings. However, the Association itself was swift to point out that «nothing stands in the way of the *Recommendations* and their foregoing reports constituting persuasive authority for domestic courts when considering *res iudicata* effects of international commercial arbitral awards or when seized of a *res iudicata* question regarding domestic awards».

3. The Conclusive and Preclusive Effects of *Res iudicata*

The problems involving *res iudicata* are manifold and complications already arise starting with its terminology. It has been repeatedly pointed out that domestic law and notions of *res iudicata* can differ significantly between jurisdictions. For that reason, the *ILA* Committee decided to use the nomenclature of «conclusive and preclusive effects» of awards in its *Final Report*. The former makes a previous award between the parties final and binding (e.g. enables the parties to rely on previous findings). As to the latter, it stops the subject matter of a previous award from being re-litigated in further or subsequent proceedings. Moreover, as was affirmed by the Committee, the use of such terminology «has the added advantage, of covering the full scope of the doctrine of *res iudicata* and similar concepts».[196] The full range of application of the doctrine, including

[196] *ILA Final Report*, para. 15.

'cause of action estoppel'[197], 'issue estoppel'[198] and 'abuse of process'[199], which are principles that pertain mostly to common law jurisdictions, are themselves very vast and complex topics and won't be elaborated further in this research.[200]

According to the *ILA* Committee, for the *Recommendations* to apply – and therefore an award to qualify for conclusive and preclusive effects – the award must contain «final determinations». This causes not only final awards (including awards on agreed terms)[201], but also partial final awards to fall within the *Recommendations'* scope.

The *Recommendations* do not take any position in relation to provisional awards, awards regarding interim measures or procedural decisions, as the *ILA* Committee was of the opinion that such awards and decisions should be governed by the law of the seat of the prior arbitration.[202]

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[197] Cause of action estoppel prevents a party in subsequent proceedings from asserting or denying the existence of a certain cause of action that has already been determined in a prior litigation between the same parties. See *Thoday v. Thoday*, 1964, P.181, 197; B. HANOTIAU, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions*, in J. LEW *(Ed), International Arbitration Law Library*, 2005, par. 526.

[198] Issue estoppel prevents fundamental issues that have been determined in earlier proceedings from being raised in later proceedings. See *Carl Zeiss Stiftung v. Rayner & Keeler Ltd.* (No.2), 1967, 1 A. C. 853; HANOTIAU, *Complex Arbitrations*, cit., par. 527.

[199] This requires parties to bring their whole case before the court in order to decide all aspects of it at once and for all. See *Henderson v. Henderson*, 1843, 3 Hare 100, 67 E. R. 313; B. HANOTIAU, *Complex Arbitrations*, cit., par. 528; Civil law systems generally do not have a notion of issue estoppel or abuse of process. Although civil procedural law may subscribe to a doctrine of «abuse of rights». To that effect, see Y. SHANY, *The Competing Jurisdictions of International Courts and Tribunals*, in *Oxford University Press*, 2003, p. 255 *et seq.*

[200] In this respect, *res iudicata* should be distinguished from *i)* invoking previous awards rendered between different parties rendered as persuasive precedent, *ii)* correction of arbitral awards rendered between the same parties in order to have an error in an arbitral award corrected, which in many countries is regulated by specific rules of the *lex arbitri, iii)* interpretation of arbitral awards rendered between the same parties for reasons of clarification, or *iiii)* revision of arbitral awards rendered between the same parties, on the basis of facts discovered after the rendering of the award that were unavailable at the time of rendering of the award, and the existence of which the party was unaware of and could not reasonably be expected to have been aware of at the time the award was made, which in some countries is covered by the *lex arbitri;*

[201] See G.R. SCHELL, *Res iudicata and collateral estoppel effects of commercial arbitration*, 35 *UCLA Rev.* 1988, p. 659, emphasizing the limited issue estoppel effects of consent awards as well as of default awards and unreasoned awards.

[202] *ILA Final Report*, para. 22.

4. Requirements for Conclusive and Preclusive Effects in International Arbitration

Traditionally, for an arbitral award to have conclusive and preclusive effects it must meet five conditions: *i)* the prior award must be final and binding and capable of recognition in the country where the arbitral tribunal of the subsequent proceedings has its seat[203]; *ii)* the arbitration proceedings in which the *res iudicata* issue is raised, must pertain to the same legal order as the prior award; *iii)* there must be identity of subject-matter; *iiii)* identity of the cause of action; and *iiiii)* identity of the parties.

These conditions are generally thought to be cumulative.[204]

Recommendation 3 of the *ILA Recommendations* on *res iudicata*, however, preserves only four of the five traditionally held requirements.

Recommendation 3.1 begins by requiring that in order for an award to be valid and have conclusive and preclusive effects, it must have «become final and binding in the country of origin». Additionally, there must be «no impediment to recognition in the country of the place of the subsequent arbitration».[205]

In its *Final Report* the Committee states that it was its intention for *Recommendation 3.1* to provide a link with the New York Convention which pursuant to

[203] Laws of States that are party to the New York Convention of 1958 have seen great harmonization pursuant to Article III of the Convention which states that «each contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon».

[204] The above mentioned requirements are not exhaustive. It is also necessary to determine the moment at which arbitral awards constitute *res iudicata*. Depending on the applicable law, that moment may vary significantly so that an arbitral award may constitute *res iudicata* between the parties as of the time the award is rendered, sent to or received by the parties or at such time as means of recourse can no longer be instituted against the award. The *Recommendations* put forth by the *ILA* Committee operate on the understanding that the award can no longer be subject to review before a domestic court at the place of arbitration. For this reason, the *Recommendations* apply only once the arbitral award has become final and binding at the place of arbitration.

[205] It goes without saying that in international cases, the prior award must also be capable of recognition at the place of arbitration of the further arbitration proceedings, when different from the place of arbitration of the prior award.

Article V,1(e) provides that recognition and enforcement of an award may be refused if the competent authority where the recognition and enforcement is sought, is furnished with proof that «the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made».

This implies, on the one hand, that questions pertaining to the awards validity will not come into play where no such challenges have been brought or where challenges have been brought, but have been finally dismissed at the place of arbitration. On the other hand, it suggests that a prior award which has been set aside at the place of arbitration by a final judgment, wont be valid and, consequently, will no longer produce *res iudicata* effects. [206]

As seen above, for an arbitral award in which a *res iudicata* issue is raised to produce conclusive and preclusive effects, it must pertain to the same legal order as the prior award. This requirement prevents an arbitral award rendered between States (and which would therefore be part of public international law), from having *res iudicata* effects in the ambit of international commercial arbitration.

Though the *ILA* Committee refrained from including the same legal order-requirement under *Recommendation 3*, it explained that state courts and international commercial arbitral tribunals are to be regarded as belonging to the same legal order, since both resolve disputes between parties that are governed by private law.[207]

These conservative views have recently been challenged by the ever rising phenomenon of investment arbitrations, where foreign investors under Bilateral

[206] However, recognition may be based on the more favourable treatment provision of the New York Convention as well as on other international conventions or domestic recognition rules.
[207] *ILA Final Report*, para. 35.

Investment Treaties ('BITs') have a direct cause of action against States for violation of investment protections, giving rise to State responsibility.[208]

The many existing BITs and the lack of a palpable definition of the term «investor» have repeatedly led to treaty shopping and instances of parallel arbitrations, which often give rise to *res iudicata* issues. Such issues may arise not only in relation to the 'same legal order' requirement, but can also involve the application of the 'identity of cause of action' and 'identity of the parties' requirements.

The perhaps most controversial cases of investment arbitration involving *res iudicata* were the *CME/Lauder v. Czech Republic* cases.[209] Both cases concerned the granting of broadcasting licences.[210] In 2001 two international UNCITRAL tribunals handed down two different and, most importantly, two contradictory arbitral awards in concurring proceedings, which arose from the same legal action. In the *Lauder*

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[208] For some criticism and topics of discord, see UNCTAD (2012), *World Investment Report 2012: Towardsa New Generationof Investment Policies*, New York and Geneva: UN, p. 86 *et seq*; , C. BALCHIN, K.H. CHUNG, A. KAUSHAL & M.WAIBEL, *The Backlash against Investment Arbitration,* Alphen aan den Rijn, 2010; A. KULICK, *Sneaking through the backdoor – reflection on public interest in international investment arbitration,* in *Arbitration International*, 2013, Vol.29(3), p.435 *et seq*; also see CROSS, SCHLIEMANN-RADBRUCH, *When Investment Arbitration Curbs Domestic Regulatory Space: Consistent Solutions through Amicus Curiae Submissions by Regional Organizations*, in *Law and Development Review*, 2013, Vol.6(2), p.67 *et seq*; FRY, REPOUSIS, *Intertemporality and International Investment Arbitration: Protecting the Jurisdiction of Established Tribunals*, in *Arbitration International*, 2015; C.TITI, *The Arbitrator as a Lawmaker: Jurisgenerative Processes in Investment Arbitration*, in *The Journal of World Investment & Trade,* 2013, Vol.14(5), pp. 829-851.

[209] *Ronald S. Lauder* v. *The Czech Republic*, Final Award, September 3, 2001 (UNCITRAL Arbitration Rules); *CME Czech Republic B.V.* v. *The Czech Republic*, Partial Award, September 13, 2001 (UNCITRAL Arbitration Rules).

[210] After the Czech Council for Radio and Television Broadcasts (Media Council) granted a broadcasting licence to a Czech company, Central European Television (CET 21), a proposal was put forward for the formation of a new company, Ceskà nezavista televizni spolecnost, spol.s.r.o (CNTS). CET 21, the Central European Development Corporation GmbH (CEDC) and a Czech savings bank entered into a Memorandum of Association as well as an Investment Agreement. CEDC was a German company, controlled by a US citizen, Roland Lauder. According to the Memorandum CET 21 was to transfer the broadcasting license to CEDC in exchange for shares in CNTS, a structure which the Media Council refused to accept, insisting instead that CEDC could only hold shares in CNTS. In August 1994, CME Media Enterprises B.V. (CME Media), a Dutch company also controlled by Lauder acquired CEDC's shareholding in CNTS. In 1997 CME Media transferred its interests in CNTS to a wholly owned subsidiary, CME Czech Republic B.V. (CME), also a Dutch company. CET 21 and CNTS entered into a service agreement which governed CET 21's responsibility for programming and CNTS's rights and obligations as an exclusive service company. In 1999, CET 21 terminated its service agreement with CNTS, allegedly under the coercion of the Media Council, on the ground that CNTS had failed to deliver daily broadcast reports. See R.D. BISHOP J. CRAWFORD, W. M. REISMAN, *Foreign Investment Disputes – Cases, Materials and Commentary,* 2005, p.1564 *et seq.*

proceedings, the London arbitral tribunal dismissed Mr. Lauder's claim, citing a breach of the US-Czech Republic BIT (1991). Simultaneously, the Dutch company, CME, had initiated in its own capacity separate UNCITRAL arbitration proceedings in Stockholm concerning the same action. Contrary to the London arbitral tribunal, in a partial award of 2001, the Stockholm arbitral tribunal allowed CME's compensation claim under the Netherland-Czech Republic BIT (1991), and ultimately found the Czech Republic to be liable in a final award of 2003.[211] After the London arbitral tribunal in its final award had ruled in favour of the Czech Republic in the *Lauder* proceedings, the Czech Republic tried to stop the arbitral proceedings with CME on the basis of the principle of *res iudicata*. Nevertheless, the Stockholm arbitral tribunal rejected every attempt to annul the partial award it had already given or to suspend the arbitral proceedings on the basis of the concurrent London arbitral proceedings.[212]

The Stockholm arbitral tribunal explained its decision, firstly, by referring to the fact that the Czech Republic had rejected the claimant's proposal of consolidation of the two arbitrations and had, thereby, also abandoned its right to rely on the *res iudicata* defence.[213]

Secondly, and in concert with the findings of the London arbitral tribunal, the Stockholm arbitral tribunal also held that the arbitral proceedings had been brought by different parties and under different investment protection treaties.

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[211] Initially the Czech Republic had refused a consolidation of the proceedings. The CME tribunal also refused the Czech Republic's objection to the proceedings, based on the proceedings in the Czech Civil Courts, despite the acknoledgment that the *petitum* of both cases was «the same», see *CME Czech Republic B.V. (The Netherlands) v. Czech Republic*, Partial UNCITRAL Award dated 13 September 2001, available at http://ita.law.uvic.ca/documents/CME-2001PartialAward.pdf. Final UNCITRAL Award dated 14 March 2003, available at http://ita.law.uvic.ca/documents/CME-2003-Final_001.pdf. For more literature on this case see C. N. BROWER, *A Crisis of Legitimacy*, 2002, available at http://www.lancs.as.uk/fss/law/inlaw/ibuslaw/docs/brower2002.pdf; W. KÜHN, U. GANTENBERG, *Die CME Saga – Ein internationaler Investitionsstreit*, in *SchiedsVZ* 2004, p. 1 *et seq*.

[212] See excerpt from the Decision, *SchiedsVZ 2004*, pp. 50-55.

[213] See *CME v. Czech Republic, supra* fn. 38 (Partial Award), in para. 412 the tribunal affirms that «this has the consequence that there will be two awards on the same subject which may be consistent with each other or may differ».

The Czech Republic, faced with the predicament of two inconsistent awards, applied to the Svea Court of Appeal to have the Stockholm award vacated.[214] However, the Svea Court of Appeal rejected the application explaining that it had no jurisdiction to reconcile two decisions where one did not bind the other. It thereby concluded that, though possible in theory, in this particular case, *lis pendens* and *res iudicata* could not form the basis for setting aside an award.

The Court's inability to provide a remedy to such a crass discrepancy, highlights the need for a 'overreaching' appellate body to ensure the ongoing viability of investment treaty arbitration.

The *Recommendations* do not directly envisage parallel arbitrations between a BIT arbitration and international commercial arbitration. BITs fall under public international law rather than international commercial arbitration or at least are part of the hybrid legal order of BIT arbitrations.[215]

The confusion as to the legal domain best suited for international commercial arbitration in Europe might be best addressed by the rules and principles set by European private law. In fact, EU law may have an impact on these issues and may also create a same legal order impediment to *res iudicata* (*infra* Chapter V).

Recommendation 3 maintains the triple identity requirement – which is to say identity of claims, of cause of action and of the parties. The principles are uncontroversial and accepted in both civil and common law systems.[216]

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[214] See *The Czech Republic v. CME Czech Republic B.V.*, Svea Court of Appeal Judgment, 15 May 2003, available at http://ita.law.uvic.ca/documents/CME2003-SveaCourtofAppeal_000.pdf.
[215] See *ILA Final Report*, para. 36 and 37.
[216] In civil law systems the triple identity test has largely been codified, see Article 1351 of the French Civil Code, Article 39 of the Italian Code of Civil Procedure and Cass 85/811, Article 23 of the Belgium Code of Civil Procedure. In English common law the preclusive effect of a judgment *in personam* in subsequent proceedings is limited according to the rules of privity and mutuality. Under common law the rule of privity prescribes that the only persons that are bound by a judgment and hence can take advantage of its preclusive effects, are the parties to the proceedings from which the judgment derived, or their «privies», see P. BARNETT, *Res iudicata, Estoppel and Foreign Judgments*, in *Oxford University Press*, 2000, p. 62 *et seq*; the rule of mutuality requires that the estoppel must be mutual, which means that each party to subsequent

As far as the effects of *res iudicata* are concerned, pursuant to *Recommendation 3.2*, conclusive and preclusive effects only arise where a prior arbitral award «has decided on or disposed of a claim for relief which is sought or is being reargued in the further arbitration proceedings». *Recommendation 3.2* further explains that for a prior award to produce *res iudicata* effects in further arbitral proceedings, the claims made or pleas for relief sought must be «based upon a cause of action which is invoked in the further arbitration proceedings or which forms the basis for the subsequent arbitral proceedings».

Finally, the arbitral award must have been «rendered between the same parties» (*Recommendation 3.4)*. If there is no identity of parties in further arbitration proceedings, the prior award will not produce conclusive or preclusive effects on a different party.

Recommendation 3 does not discuss the requirement of mutuality[217] and leaves its definition and scope to the applicable law. The *Recommendation* also refrains form formulating a definition of the notion of parties. Given the varieties of ways in which a particular party can be bound to obligations of a predecessor (i.e. by virtue of assignment, succession, close relationship or otherwise) as well as the difficult relationship of civil law systems with the common law concept of 'privies', the Committee held it would be best if these issues were left to the applicable law.

proceedings – or their privies for that matter –must have been a party to the earlier proceedings, and must claim or defend in the subsequent proceedings in the same capacity as they claimed or defended in the prior proceedings, see S.BREKOULAKIS, *The Effect of An Arbitral Award and Third Parties in International Arbitration: Res iudicata Revisited,* in 16 *Am. Rev. Int'l Arb.,* 2005, pp. 177, 185.

[217] See *supra* fn. 216.

5. THE APPLICABLE LAW FOR DETERMINING *RES IUDICATA* IN INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL APPROACH

International commercial arbitrations, as the name already suggests, resolve disputes that contain international elements. Given the diversity of parties to international commercial disputes and the practical inevitability of a seat in a jurisdiction which is foreign to at least one of the parties, it is not at all surprising that more than one legal system becomes relevant to the conduct of international commercial arbitral proceedings. When determining the *res iudicata* effect of a prior award, there are three different legal systems to consider: *i)* the emitting legal system (which is the system where the first decision was made); *ii)* the *lex fori* (which is the law of the judicial forum where enforcement of the agreement or the award is sought); *iii)* the *lex arbitralis* (which is the law of the jurisdiction in which the arbitration is seated).

The *lex causae,* which is to say the law that governs the parties' relationship is not relevant in this context. In common law jurisdictions, when no express choice was made by the parties, the substantive law will be ascertained by applying conflict of law rules.[218]

Though an agreement to arbitrate will often be part of a broader commercial contract (usually in the form of an arbitration clause), the principle of separability

[218] In *Uganda Telecom Ltd. v. Hi-Tech Telecom Pty Ltd.* FCA 131 (2011) a Ugandan corporation entered into a service contract with an Australian corporation, which contained an arbitration clause, though it did not specify the seat, the arbitral law or the procedural rules to be followed in the event of an arbitration. A dispute arose and the Ugandan corporation commenced an arbitration in Uganda before a sole arbitrator. The Australian Company did not participate. After the tribunal had ruled in favour of the Ugandan corporation, it applied to the Australian Federal Court to seek enforcement of the award under the IAA. The Australian corporation resisted the enforcement of the award, submitting that the arbitration was void for uncertainty because it did not specify the seat of the arbitration, the number of arbitrators, the arbitral law or the procedural rules to apply. The Court rejected this argument noting that the contract was made in Uganda and that therefore Ugandan law had to apply. The Ugandan Arbitration and Conciliation Act of 2000, which is based on the UNCITRAL Model Law, however, provided a mechanism for resolving all of the omissions raised. The Court also noted that the award, having been made in Uganda, was clearly a foreign award and that under Australian public policy arbitral awards had to be enforced «wherever possible». For similar cases, see A. MONICHINO, *International Arbitration in Australia – 2010/2011 in review,* in 22 *ADRJ* 215, 2011.

predicates that the arbitration agreement is separate and distinct from the substantive contract. As a consequence, the validity of the underlying substantive contract has no bearing on the validity and enforceability of the arbitration agreement.[219]

In its *Final Report* the *ILA* Committee noted that some aspects pertaining to *res iudicata* as set forth in the *Recommendations* were to be characterized autonomously, since *res iudicata* regarding international arbitral awards should not necessarily be equated to *res iudicata* effects of judgments of state courts, and thus were capable of being treated differently from *res iudicata* under domestic law.

The Committee pointed to the differences that exist between international commercial arbitration and domestic court dispute settlements, as well as the international character of arbitration, which makes a reduction to domestic notions of *res iudicata,* although valid in domestic settings, hardly appropriate in an international context.

Consequently, the Committee agreed on a mixed model under which «the conclusive and preclusive effects of arbitral awards in further arbitral proceedings […] may be governed by transnational rules« (*Recommendation 2),* while remaining issues were to be referred to domestic law under acceptable conflict rules.[220]

In reaching this conclusion, the Committee argued that an approach solely based on conflict of laws would raise issues as to the nature – substantive or procedural – of the

[219] The principle is also known as the «positive effect» of the principle of competence-competence and is recognised by Article 16(1) of the UNCITRAL Model Law (and therefore also by the vast majority of countries) which provides that «the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void, shall not entail ipso iure the invalidity of the arbitration clause». On the «negative effect» of competence-competence see E.GAILLARD, *Convention d'arbitrage,* in *Juris Classeur: Droit International* Fasc. 586-5, 1994, p. 49 *et seq*; E. GAILLARD, J. SAVAGE, P. FOUCHARD, E. GAILLARD & B. GOLDMAN on *International Commercial Arbitration*, The Hague, 1999, p. 660 *et seq;* on the prima facie review in particular, see E. GAILLARD, *L'effet nègatif de la compétence-compétencé,* in *Etudes de procedure et d'arbitrage en l'honneur de Jean-François Poudret*, Univ. Lausanne, 1999; B.ANCEL, *Le controle de la validité de la convention d'arbitrage: l'effet négatif de la compétence-compétencé,* in Brazilian Congress on Arbitration, Curitiba, 14-16 September 2004.

[220] *ILA Final Report,* par. 26.

res iudicata effects. In addition, such an approach would imply difficult choices between three different systems of law: *i)* the law of the place of arbitration of the proceedings leading to the prior award; *ii)* the law of the place of arbitration of the proceedings where *res iudicata* is invoked; and *iii)* the law governing the contract.[221]

Recommendations 3 through *7* reflect the issues of *res iudicata* which the Committee believed were capable of being governed by transnational rules. All the aspect that are not covered in the *Recommendations* are, therefore, in the eyes of the Committee to be determined under domestic law referred to by a conflict rule.[222]

6. The Scope of Res iudicata in International Commercial Arbitraton: Beyond the *Dispositif*

One of the aspects of *res iudicata* that, according to the *ILA* Committee, should be governed by transnational rules, is the scope of its effects.

Recommendation 4 endorses a more extensive notion of *res iudicata* that encompasses not only the operative part of an award, but instead includes also its underlying reasoning. In the words of the Committee: «an arbitral award has conclusive and preclusive effects in the further proceedings as to: determinations and relief contained in its dispositive part as well as in all reasoning necessary thereto». In fact, if on the basis of the tribunal's reasoning it appears that the dispositive part is to be interpreted in such a way as to prevent further and subsequent arbitration proceedings, claim preclusion

[221] See D. Hascher, *L'autorité de la chose jugée des sentences arbitrales,* in *Trav. Com. fr. dr. int. privé,* Paris, Pédone, 2004, p. 18 *et seq*.
[222] *ILA Final Report,* par. 28.

ought to follow for the sake of efficiency and finality.[223] If a claim is estopped on the basis of the same *causa petendi* as a result of *res iudicata* extending also to the *ratio decidendi*, if follows that some evidence or legal argument regarding that cause of action alluded to in the tribunal's reasoning, will also be barred from being reargued.

Recommendation 4.1 also endorses claim preclusion in relation to recovery. Consequently, relief in addition to the one formerly recovered or obtained cannot be claimed where it is based on the same cause of action.[224]

Recommendation 4.2, by stating that the conclusive and preclusive effects of an arbitral award also apply to «issues of fact or law which have actually been arbitrated by it, provided any such determination was essential or fundamental to the dispositive part of the arbitral award», wholeheartedly endorses the common law concepts of issue estoppel.[225] Although, such concepts are unknown to civil law jurisdictions, the *ILA* Committee holds nonetheless that, for reasons of efficiency and finality, they should be acceptable globally. To underscore this point, the Committee makes reference to a decision by the Swedish Supreme Court which indicated that broader concepts regarding preclusive effects of arbitral awards were also acceptable in a civil law context.[226]

In the case, a claimant had commenced arbitration proceedings against a respondent, who itself believed to hold a much more significant counterclaim against the claimant. However, at the time of the proceedings it was not possible for a counterclaim

[223] See *ILA Final Report*, par. 52; for cases involving the application of an extended notion of *res iudicata, ex multis* ICC Cases Nos. 2745 and 2762.
[224] See *ILA Final Report*, par. 54.
[225] As pointed out by the *ILA* Committee in it *Final Report*, the *Recommendations* follow the approach of R.W. HULBERT (*Arbitral procedure and the preclusive effects of awards in international commercial arbitration*, in 7 *Int. Tax and Bus. L*, 1989, p. 155 *et seq.*) who advocates that «the procedures and reasoned awards typical of international commercial arbitration support the application of preclusion doctrine to international commercial arbitration to the same extent as to domestic judicial decisions».
[226] NJA 1998, p.189. This case is commented on in *Stockholm Arb. Rep.* no. 2, 1999, p. 177.

to be joined to a principal claim submitted in arbitration. The respondent decided, therefore, to invoke part of its counterclaim for sett-off purposes. [227]

Although from a procedural standpoint a set-off defence is under many aspects similar to most other substantive defences, there are nontheless discernible differences between the introduction of a set-off defence and the lodging of a counterclaim that have to be taken into account; especially when considering these two defences under through the prism of *res iudicata*.[228]

A set-off defence, similar to other substantive defences, aims at obtaining the rejection of the claimant's claim. Different from other defences, however, «even if a set-off defence is fully successful, no award in the respondent's favour will be given».[229] This would indicate that, to the extent to which the judgment addresses the subject matter of the set-off claim, *res iudicata* would not come into effect. In response to this problem, an amendment was made to the Swedish Code on Judicial Procedure which provided for the *res iudicata* effect of a court judgment to include a counterclaim in its entirety, even where part of it had been entered for set-off purposes in a prior action.[230]

Following the rejection of the set-off defence by the Swedish tribunal, the former respondent initiated a second arbitration, this time requesting payment of the entire amount of its claim. The former claimant, on the other hand, called for the claim's

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[227] See V. PAVIC, *Counterclaim and Set-off in International Commercial Arbitration*, in 1 *Belgrad Law Review*, 2006, p. 101, who rightfully points out that "[c]omparative systems of civil procedure clearly distinguish between the counterclaim (*Widerklare, demande reconventionelle, domanda riconvenzionale*) and the set-off defense (*Prozessaufrechnung* (*Verrechnung* in Switzerland), *compensation legale, eccezione di compensazione*); in *Danvaern Production A/S v. Schuhfabriken Otterbeck GmbH & Co., C-341/93*, paras. 17-18 the European Court of Justice distinguished between 'counterclaim' and 'set-off as a defence' by stating that "Article 6(3) of the [Brussels Convention of 1968] only applies to claims by defendants which seek the pronouncement of a separate judgment or decree. It does not apply to the situation where a defendant raises, as a pure defence, a claim which he allegedly has against the plaintiff."
[228] See C. SÖDERLUND, *Lis Pendens, Res iudicata and the Issue of Parallel Judicial Proceedings*, in *Journal of International Arbitration* 22(4), 2005, p. 301 *et seq.*
[229] See C. SÖDERLUND, *Lis Pendens, Res iudicata and the Issue of Parallel Judicial Proceedings*, cit., p. 317.
[230] See C. SÖDERLUND, *Lis Pendens, Res iudicata and the Issue of Parallel Judicial Proceedings*, cit., p. 318.

dismissal on the grounds that it had already been finally decided in its entirety, regardless of the fact that the set-off defence which took in place in the first arbitration only dealt with a fraction of that claim and was therefore lesser in scope.

It thus fell onto the tribunal to decide whether the Swedish Act on Procedure's provisions on *res iudicata* could also be extended to arbitration.

The tribunal's response was in the sense that only the amount that was invoked for set-off purposes in the first arbitration was covered by *res iudicata*, while the exceeding amount of the claim could still be reviewed on its merits in a second arbitration. Although the claimant emerged victorious, the tribunal decided to reduce the amount of the claim by the set-off amount.

However, one of the arbitrators who chaired the tribunal voiced a dissenting opinion, maintaining that the set-off claim of the prior arbitration not only constituted *res iudicata* with regards to the set-off amount, but also prevented the case from being retried a second time to retrieve the remaining amount that exceeded the one invoked for set-off purposes. The arbitrator based his argument on §17, art.11, 2nd of the Swedish Code on Judicial Procedure which provides that «[a] judgment also has legal force to the extent that it adjudicates a debt claimed as a set-off» and that «[a] question thus determined may not be adjudicated again».[231]

The dissenting opinion was later upheld by the Swedish Supreme Court which accepted that the claim submitted in the second arbitration was covered by *res iudicata* in its entirety, and, as a result, set aside the award.

Had German law been the applicable law, the solution would have been the exact opposite. In fact, §322(2) of the ZPO provides that «should the defendant have asserted the set-off of a counterclaim, the decision as to the counterclaim not existing shall be able

[231] For the full English version of the Swedish Code on Judicial Procedure visit http://www.imolin.org/doc/amlid/Sweden_Code%20of%20Judicial%20Procedure.pdf.

to attain legal validity up to the amount for which the set-off has been asserted».[232] According to the principle requiring correspondence between the remedy sought and the judgment, the effects of *res iudicata* have to be kept within the limits of the decision on the subject-matter.[233]

Art.35 of the Italian *Codice Processual Civile* determines under what circumstances the exceeding amount of a set-off claim is covered by *res iudicata*. [234] If the set-off amount exceeds the amount of the principal claim, the former is *split* (one equal in value to the plaintiff's claim; the other made up of the remaining balance) and *res iudicata* only forms in relation to the amount invoked for set-off purposes. However, if the plaintiff attacks the set-off claim as to its validity, that *separation* doesn't occur.[235]

Finally, the Swedish Supreme Court's position on preclusive effects in civile law systems has gained new momentum, since only recently the ECJ has come down clearly in favour of a broad notion of *res iudicata* that extends the binding effects of judgments also to the *dispositif* (*infra* Chapter V. par. 4).

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[232] §322(2) ZPO in its original version reads as follows «*hat der Beklagte die Aufrechnung einer Gegenforderung geltend gemacht, so ist die Entscheidung, dass die Gegenforderung nicht besteht, bis zur Höhe des Betrages, für den die Aufrechnung geltend gemacht worden ist, der Rechtskraft fähig»;* for the English version of the ZPO in its entirety visit http://www.gesetze-im-internet.de/englisch_zpo/.

[233] The above advocated has further been confirmed by the BGH (*Bundesgerichtshof*, German Supreme Court) which in *BGH*, NJW 1986, 2509 had to say the following: «the *res iudicata* effects of a judgment (§322 ZPO) are limited to it's immediate subject matter, which is to say to the legal consequences that stem from the *dictum* only».

[234] The Italian version of Art.35 of the *Codice Processuale Civile* reads as follows «*quando è opposto in compensazione un credito che è contestato e eccede la competenza per valore del giudice adito, questi, se la domanda è fondata su titolo non controverso e facilmente accertabile, può decidere su di essa e rimettere le parti al giudice competente per la decisione relativa all'eccezione di competenza, subordinando, quando occorre, l'esecuzione della sentenza alla prestazione di una cauzione; altrimenti provvede a norma dell'articolo precedente».*

[235] This is to prevent a second investigation (one for the pending proceedings, the other for future proceedings), see F.P. LUISO, *Diritto Processuale Civile I – Principi Generali*, VII ed., Milano, 2013, p. 282.

V) INTERNATIONAL COMMERCIAL ARBITRATION AND ISSUES REGARDING THE DOCTRINE OF *RES IUDICATA* WITHIN EUROPEAN PRIVATE LAW

1. INTRODUCTION:

Since its conception, the EU has enacted a very ambitios policy of creating, maintaining and developing an area of freedom, security and justice founded on the *constitutional* principle that the territories of all Member States «may be regarded as forming a single entity».[236] Out of this policy were born, *inter alia*, the so called Regulations Rome I[237], II[238] and III[239] and the law applicable respectively to contractual and non-contractual obligations and to divorce and legal seperation, the Regulation on insolvency proceedings[240], the Regulation on the taking of evidence[241], as well as the so called Regulation Brussels I-*bis*. [242]

[236] Judgment of 10 February 1994, in Case C-398/92, *Mund & Fester*, par. 19.
[237] Regulation (EC) n. 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations ('Rome I'), in *OJ* n. L177 of 4 July 2008.
[238] Regulation (EC) n. 864/2007 of the European Parliament and the Council of 11 July 2007 on the law applicable to non-contractual obligations ('Rome II'), in *OJ* n. L199 of 31 July 2007.
[239] Council Regulation (EU) n. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation ('Rome III'), in *OJ* n. L343 of 29 December 2010.
[240] Regulation (EC) n. 1346/2000 of the European Parliament and the Council of 29 May 2000 on insolvency proceedings, in *OJ* n. L160 of 30 June 2000.
[241] Regulation (EC) n. 1206/2001 of the European Parliament and the Council of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters, in *OJ* n. L174 of 27 June 2001.
[242] Regulation (EU) n. 1215/2012 of the European Parliament and the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in *OJ* n. L351 of 20 December 2012, as amended by Regulation (EU) n. 542/2014 of the European Parliament and Council of 15 May 2014 amending Regulation (EU) n. 1215/2012 as regards the rules to be applied with respect to the Unified Patent Court and the Benelux Court of Justice, in *OJ* n. L163 of 29 May 2014.

In *TNT Express Nederland* the ECJ found that the principles which underlie judicial cooperation in civil and commercial matters in the European Union include the «free movement of judgments in civil and commercial matters»[243], the «predictability as to the courts having jurisdiction», «legal certainty for litigants», the «sound administration of justice», the «minimisation of risk of concurrent proceedings», a «mutual trust in the administration of justice in the European union» and the «favor executionis».[244]

The Court of *TNT Express Nederland* further stressed that «observance of each of those principles is necessary for the sound operation of the internal market».[245] It's been pointed out that ECJ's position in *TNT Express Nederland* has effectively put the process of harmonisation of the rules of international private and procedural law into a new perspective. In fact, the creation of an efficient European system in this area was not so much conceived as an objective to be pursued in its own right, but rather as a common European interest.[246]

In this respect, the *Jenard Report* on the Brussels Convention of 1968 had already introduced the notion – borrowing from a note sent by the Commission to the Member States on 22 October 1959 – that «a true internal market between the six States will be achieved only if adequate legal protection can be secured. The economic life of the Community may be subject to disturbances and difficulties unless it is possible, where

[243] In the case of the principles of free movement of judgments and mutual trust in the administration of justice, see, in particular, Case C-283/05 *ASML* [2006] ECR I-12041, par. 23; Case C-185/07 *Allianz and Generali Assicurazioni Generali* [2009] ECR I-663, par. 24; and Case C-420/07 *Apostolides* [2009] ECR I-0000, par. 73.
[244] Case C-533/08, *TNT Express Nederland BV* v. *AXA Versicherung AG* [2010], ECR I-4107, paras. 49-56.
[245] Case C-533/08, *TNT Express Nederland* [2010], par. 50.
[246] Article 81 TFEU reads as follows: «the Union shall develop judicial cooperation in civil matters having cross-boarder implications, based on the principal of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States»; P. BERTOLI, *Diritto Europeo dell'Arbitrato Internazionale,* Milan, 2015, p. 4; ID., *Corte di giustizia, integrazione comunitaria e diritto internazionale private e processuale*, Milano, 2005, p. 405 *et seq*; S. CARBONE, *Base giuridica e criteri interpretative delle norme comunitarie sullo spazio giudiziario euripeo,* in *Contratto e Impresa/Europa,* 2003, pp. 183, 195

necessary by judicial means, to ensure the recognition and enforcement of the various rights arising from the existence of a multiplicity of legal relationships. As jurisdiction in both civil and commercial matters is derived from the sovereignty of Member States, and since the effect of judicial acts is confined to each national territory, legal protections and, hence, legal certainty in the common market are essentially dependent on the adoption by the Member States of a satisfactory solution to the problem of recognition and enforcement of judgments».[247]

It comes therefore as a suprise that with regard to the establishment and maintenance of a European legal and judicial area, the EU has sistematically set its face against the proposal to also include arbitration (this has come to be known as the so called *arbitration exception*). Especially, since arbitral proceedings are functionally synonymous with judicial proceedings. Both are seeking to resolve disputes in civil and commercial matters, ending in a decision which produces *res iudicata* effects and may be the ground for enforcement actions.

The position of the European Union on international commercial arbitration has traditionally been that its *communitarization* would only prove to be a redundant excercise, since many international treaties, among which the New York Convention of 1958[248] and the Geneva Convention of 1961[249], already extensively deal with the issues of recognition and enforceability that many EU States are expected to run into. The proposition as to a revision of the *arbitration exception*, although lively debated, ultimately fell on deaf ears. The reasons for keeping arbitration out of the reach of European intervention were found by the European Commission to be lying mainly in the

[247] See P. JENARD, *Report on the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of September 27, 1968*, ('Jenard Report'), in *OJ* n. C59 of 5 March 1979, p. 3.
[248] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958; for the full text visit http://www.uncitral.org/uncitral/it/uncitral_texts/arbitration/NYConvention.html.
[249] European Convention on International Commercial Arbitration, Geneva, 1961; for the full text visit http://www.newyorkconvention.org/other+relevant+conventions.

«general satisfaction with the operation of the 1958 New York Convention which should not be undermined by any Union action on the matter».[250] Moreover, such an endevour was deemed not only to be useless, but potentially even dangerous, as it might have hindered EU Member States from enacting *arbitration-friendly* legislation to attract business.[251]

In other words, because harmonisation has already been achieved through international multilateral treaties (which have been ratified by all Mamber States), additional harmonisation at the European level would be superfluous.[252]

However, what had been regretfully neglected in that debate, was that the incorporation of arbitration into the area of freedom, security and justice could also be accomplished in areas that are currently governed by the national law of the Member States. This would have allowed for a *communitarization* of international commercial arbitration without modifying or altering the operational mechanisms of the New York Convention.[253]

The exclusion of arbitration was once again perpetuated in 1978 which marked the accession of the UK, Ireland and Denmark to the Brussels Convention.[254] The

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[250] Proposal of the European Commission for a recast of Regulation (EC) no. 44/2011 ('Brussels I'), COM(2010) 749 final, par. 2.

[251] See the submissions by the I.B.A. Arbitration Committee Working Group, the Comité français de l'arbitrage, the Group the travail of the ICC, the Association of International Arbitration, the Bar Council of England and Wales made in the context of the the public consultation on the Green Paper launched by the European Commission, all reported in http://ec.europa.eu/justice/news/consulting_public/news_consulting_0002_en.htm.; see also A. PULLEN, *The Future of International Arbitration in Europe: West Tankers and the EU Green Paper,* in 12 *Int. Arb. Law Rev.*, 2009, p. 56 *et seq.*

[252] See M. BENEDETTELLI, *'Communitarization' of International Arbitration: A New Spectre Haunting Europe?,* in *Arbitration International,* Vol.27, No. 4., p. 583 *et seq*

[253] Moreover, the success of the Convention does not seem to be a good enough reason for denying an intervention at the Community level, but does instead even appear to be authorized by the Convention itself. In fact, Article VII, par. 1 reads:«the provision of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition or enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon»; see P. BERTOLI, *Diritto Europeo dell'Arbitrato*, cit., p. 7.

[254] Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 27 September, 1968; for a more detailed look, see ¸ L. ROSSI, *Le convenzioni fra gli Stati membri dell'unione europea,* Milano, 2000.

Schlosser Report on the Convention remarked that, with regard to the problem of arbitration, «the new Member States can deal with this problem of interpretation in their implementing legislation», notwithstanding the fact that almost all Member States, with the exception of Luxembourg and Ireland, «had in the meantime become parties to the United Nations Convention of 10 June 1958 on the recognition and enforcement of foreign arbitral awards».[255]

This refusal to truly consider arbitration as a subject of 'European importance' would find continuation also in future Regulations (e.g. Brussels I and I-bis) and would become representative of Europe's rather *schizophrenic* attitude towards arbitration at large.[256]

Yet, it has been suggested that Europe's tendency to view the scope and depth of its own harmonisation efforts and the enactment of 'arbitration-friendly' legislation to be non-overlapping, is indicative of a failure to fully appreciate the various ways in which such intervention could occur, whilst still being considerate of already existing international legislation and, at the same time, «providing a correct 'balance' of the various EU, State and private interests involved».[257]

A lengthy illustration of the solutions that have been put forward goes beyond the scope of this chapter and will only be considered to the extent to which it facilitates the discussion on the concept of *res iudicata* which remains this thesis' principal concern.

[255] P. SCHLOSSER, *Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice* ('Schlosser Report'), in *OJ*, n. C59 5 March 1979, par. 61.
[256] See M. BENEDETELLI, *'Communitarization'*, cit., p. 593.
[257] See M. BENEDETELLI, *'Communitarization'*, cit., p. 583.

2. The European Union and Arbitration: A Europe between long held convictions and new ideas

Throughout the years, the approach that the EU has taken when posed the question of arbitration, has been a mixed bag of sentiments alternating attitudes of 'favor', 'indifference' and, at times, even down right 'hostility'.[258]

There has been at least on instance in which the EU has looked favourably at arbitration as a means of achieving fundamental policy objectives.

In the *Elf Aquitaine-Thyssen/Minol* Case of 1992 which involved the acquisition by Elf Mineralöle GmbH (EMO) of Minol Mineralölhandel AG (Minol) and other assets held in trust by the Treuhandanstal, a trust institution created under public law by the German State, the Commission was called upon to investigate the merger's compatibility with the common market.[259]

In this occasion, the Commission ordered disputes relating to the application of the agreement to be settled by arbitration which the Commission may impose when granting conditional merger clearences under Articles 6, paragraph 1, *lit.* (b) and 8, paragraph 2, *lit.* (b), Reg. (EC) no. 139/2004. The same practice has been adopted by the Commission in various other cases, more recently in *Ericson/Nortel Group.*[260] It's been correctly observed that «this shows a belief that the 'private enforcement' of anti-trust law can be better achieved if private parties vindicate their relevant rights before arbitrators rather than before judicial courts».[261]

[258] See M. Benedetelli, *'Communitarization'*, cit., p. 583.
[259] Decision September 4, 1992 in case IV/M.235, available in the *CELEX* database under n. 392MO235.
[260] Decision March 2, 2011 in case COMP/M.6095, *Ericson/Nortel Group,* available in the *EUR-Lex* database under n. 32011M6095.
[261] See M. Benedetelli, *'Communitarization'*, cit., p. 594.

More in general, the EU seems to have at least some regard for arbitration, considering that under Article 272 TFEU (ex Article 238 TEC) the ECJ «shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law». In *Eco Swiss* the ECJ placed emphasis on its interest in efficient arbitration proceedings and the need for reviews of the resulting awards to be «limited in scope», as well as for annulment or the refusal of recognition of an award to «be possible only in exceptional circumstances».[262]

However, with regard to consumer law the Union's view on arbitration appears to be quite the opposite. According to Article 3 of Annex (q) to Directive no.93/13/EEC, for instance, terms which would require the consumer to «take disputes exclusively to arbitration not covered by legal provisions» are considered to be 'unfair'.[263] Also, the EU Commission's insistence that «the consumer's recourse to the out-of-court procedure may not be the result of a commitment prior to the materialisation of the dispute» expressed in its Recommendation of 30 March 1998 on consumer's access to justice[264], was only reinforced by the EJC in *Mostaza Claro.*[265] In the case in question, the Court ruled that where a national court is seised of an action for annulment of an arbitration award, it must first determine whether the arbitration agreement is void and «annul that award where that agreement contains an unfair term, even though the consumer has not pleaded that invalidity in the course of the arbitration proceedings, but only in that of the action for annulment».[266]

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[262] Case C-126/97 *Eco Swiss Chine Time Ltd.* v. *Benetton International NV* [1991] E.C.R. I-3019, at par. 35.
[263] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, in *OJ*, April 21, 1993 L95, 29.
[264] Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, in *OJ*, April 17, 1998, L115, 31, p. 34.
[265] Case C-168/05, *Mostaza Claro* [2006] E.C.R. I-10421.
[266] See *Mostaza Claro*, par. 39.

In his conclusions to *Eco Swiss,* Advocate General Saggio suggested that in order to preserve the *effet utile* of EU law, national procedural rules on arbitral awards must be set aside, whenever those rules (*i*) do not allow for awards to be annuled for breach of EU law; (*ii*) do not enable State judges to rule on the interpretation and application of EU law when connected issues were raised in the arbitration proceedings; and (*iii*) only allow national courts to consider questions of EU law where they were raised by the parties.[267]

More evidence of the Union's rather 'hostile' attitude towards arbitration can be found in the case-law of the ECJ relating to the issue of judicial review of arbitration awards. In *Nordsee* the Court held that arbitrators cannot be regarded as a «court or tribunal» within the meaning of Article 177 EC (now Article 267 TFEU) and further ruled that they should therefore be denied to refer questions to the Court pursuant to Article 177.[268] This has led some to believe that «the ECJ considers that arbitrators do not perform a function equivalent to that of the State judiciaries and cannot contribute through their decision-making power to the correct application of EU law».[269]

Although it is true that, when it comes to arbitration, the EU does at times consider arbitration favourably in some areas and unfavourably in others, there has been a «prevailing trend within the EU» that «has mostly been one of 'indifference'».[270]

This has mostly to do with the rather broad scope that has been given to the *arbitration exception* within the Brussels Convention as well as the Brussels I Regulation. Consequently, not only should the recognition and enforcement of arbitral awards be

[267] [1991] E.C.R. I- 3055, paras. 31-46, where Advocate General makes several references to previous ECJ judgments such as Case C-102/81 *Nordsee* [1982] E.C.R. I-1095; Case C-312/93 *Peterbroeck* [1995] E.C.R. I-4599; and Case C-393/92 *Almeno* [1994] E.C.R. I-1477.

[268] Case C-102/81 *Nordsee* [1982], paras. 9-13, where the Court went on to suggest that «if private arbitrators were allowed to refer questions to the Court under Article 177 the objectives which the parties seek to achieve in submitting their dispute to arbitration – speed, finality and privacy – would be frustrated; on this topic see ˛P. BERTOLI, *Diritto Europeo dell'Arbitrato,*cit., p. 83 *et seq*; and S. PELLERITI, *Refferal for a Preliminary Ruling of the European Court of Justice from an Arbitral Tribunal: Recent Developments in light of case C-555/13*, in *Dir. Comm. Int.*, 2014, p. 815 *et seq.*

[269] See M. BENEDETTELLI, *'Communitarization',* cit., p. 594 *et seq.*

[270] *Ibid,* cit., p. 595.

outside the scope of the Brussels I regime, but the *exception* should be construed in a way so as to refer to arbitration as a whole. In fact, following the *Jenard* and *Schlosser Reports*, the *exception* does not simply disallow the «intra-Community circulation of awards and of judgments on their recognition/enforcement, but also the fixing of common grounds of jurisdiction on all disputes relating to arbitration».[271]

A similarly broad interpretation of the *arbitration exception* was adopted by the Court in *Marc Rich* where, with regard to the application of the Brussels Convention, it concluded that the exclusion contained in Article 1(4) «extends to litigation pending before a national court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation».[272] According to the same Court «in order to determinte whether a dispute falls within the scope of the Convention, reference must be made solely to the subject-matter of the dispute».[273] A similar decision was later reached in *Van Uden.*[274]

More recently, the ECJ has flatly rejected such a broad reading of the *arbitration exception*, under the guise of safeguarding the *effet utile* of the uniform rules on the

[271] *Ibid*, cit., p. 595.
[272] Case C-190/89, *Marc Rich & Co. AG* v. *Società Italiana Impianti SpA* [1991] E.C.R. I-3855, para. 29.
[273] Case C-190/89, *Marc Rich & Co. AG* v. *Società Italiana Impianti SpA* [1991] E.C.R. I-3855, para. 26.
[274] Case C-391/95, *Van Uden Maritime BV* v. *Kommanditgesellschaft in Firma Deco-line* [1998] E.C.R. I-7091, here the Court established that where «the subject-matter of an application for provisional measures relates to a question falling within the scope *ratione materiae*» of the Regulation, the Regulation is applicable and Article 31 «thereof may confer jurisdiction on the court hearing that application even where proceedings have already been, or may be, commenced on the substance of the case and even where those proceedings are to be conducted before arbitrators».

circulation of court judgments, in the now historic – and widely debated[275] - *West Tankers* case.[276]

The disputed revolved around the following: a vessel owned by West Tankers and chartered by Erg Petroli SpA, collided in Syracuse with a jetty owned by Erg Petroli SpA and caused damages. The charterparty was governed by English law and contained a clause providing for arbitration in London. Erg Petroli SpA claimed compensation from its insurers Allianz and Generali up to the limit of its insurance cover and commenced arbitration proceedings in London against West Tankers for the excess. Having paid compensation and on the basis of their statutory right of subrogation, Allianz and Generali brought proceedings against West Tankers before the Tribunale di Siracusa in order to recover the sums they had paid to Erg Petroli SpA. West Tankers raised an objection of lack of jurisdiction on the basis of the existence of the arbitration agreement. In parallel, West Tankers brought proceedings before the High Court of Justice of England and Wales, Queen's Bench Division, seeking a declaration that the dispute between itself and Allianz and Generali was to be settled by arbitration pursuant to the arbitration agreement. West Tankers also sought an injunction restraining Allianz and Generali from pursuing any proceedings other than arbitration and requiring them to discontinue the proceedings commenced before the Tribunale di Siracusa. According to the ECJ, the anti-suit injunction issued by the English Tribunal (*i*) «is contrary to the general principle which emerges from the case-law of the Court on the Brussels Convention, that every court

[275] See R. ASARIOTIS, *Anti-suit injunctions for breach of an English choice of forum agreement and the European Court of judgment: a brief update on the status quo,* in *Scritti in onore di Francesco Berlingieri,* Genova, 2010, p. 111 *et seq.;* Z. CRESPI REGHIZZI, *'Mutual Trust' and 'Arbitration Exception' in the European Judicial Area: The West Tankers Judgment of the ECJ,* in *Yearb. Priv. Int. Law,* 2009, p. 17 *et seq;* E. D'ALESSANDRO, *La Corte di giustizia dichiara le anti-suit injunctions a tutela dell'arbitrato inglese incompatibili con il sistema del Reg. n. 44/2011,* in *Riv. arb.,* 2009, p. 83 *et seq.;* F. PERILLO, *Arbitrato comunitario e anti-suit injunctions nella sentenza West Tankers della Corte di Giustizia,* in *Dir. comm. int.,* 2009, p. 351 *et seq.;* A. PULLEN, *The future of International Arbitration in Europe: West Tankers and the EU Green Paper,* cit., p. 56 *et seq.;*

[276] Case C-185/07, *Allianz* v. *West Tankers* [2009] E.C.R. I-663.

seised itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it»;[277] and furthermore (*ii*) «runs counter to the trust which the Member States accord to one another's legal systems and judicial institutions and on which the system of jurisdiction under Regulation No. 44/2001 is based»;[278] all of this, the Court concluded, (*iii*) would bear the risk of depriving a party «of a form of judicial protection to which it is entitled».[279]

In summary, whenever a dispute on the basis of its subject-matter, «that is, the nature of the rights to be protected in proceedings», falls within the scope of Regulation No. 44/2001, the *arbitration exception* doesn't exclude preliminary issues concerning the applicability of an arbitration agreement, «including in particular its validity»[280], from also being governed by the Regulation.[281]

Under the Brussels I regime, in the event of a judgment on the merits of a dispute given by a court of a Member State in conflict with an award given by arbitrators in another State on the same subject-matter, a different Member State confronted with simultaneous requests for recognition, would have had to give precedence to the court's judgment, notwithstanding the fact that the award had already become *res iudicata*.[282]

In 2009 the European Commission published a Green Paper[283] suggesting, *inter alia,* a deletion of the exclusion of arbitration from the scope of the Regulation and the introduction of a rule which would allow for the refusal of recognition and enforcement

[277] Case C-185/07, *Allianz* v. *West Tankers* [2009], cit., par. 29.
[278] Case C-185/07, *Allianz* v. *West Tankers* [2009], cit., par. 30.
[279] Case C-185/07, *Allianz* v. *West Tankers* [2009], cit., par. 31.
[280] Case C-185/07, *Allianz* v. *West Tankers* [2009], cit., par. 26.
[281] For more on the implications of the West Tankers judgment, see P. BARTOLI, *Diritto Europeo Dell'Arbitrato,* cit., p. 84, who also points out how in *exequatur* procedures, this principle would suggest that a decision which ascertains the non-existence, invalidity or inapplicability of an arbitration agreement and thus rules on the substance of the dispute, would circulate freely under Brussels I, undeterred by its divergence with a foreign award; also see P. ROGERSON, in MAGNUS & MANKOWSKI (eds.), *The Brussels I Regulation,* 2nd ed., München, 2012, p. 70.
[282] See M. BENEDETTELLI, *'Communitarization',* cti., p. 590.
[283] Green Paper on the review of Council Regulation (EC) no 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2009), 175 fin. ('Green Paper').

of judgments that are irreconcilable with awards enforceable under the New York Convention.

The Commission's suggestions certainly did not go unnoticed and recieved their fair share of criticism.[284] Those criticisms can be divided into two camps: one idealistic, the other technical.

For the idealistic camp, to make arbitration part of uniform law at the EU level is «in principle and in general not advisable».[285] It is argued that arbitration has its very own «idiosyncratic structure and elements» and that it «simply is not litigation and would call for a specific regulatory effort».[286] According to this line of thought, «EU law is regional and tends to achieve uniformity in national laws», where as arbitration is «a product of international trade law» and fundamentally «global in nature».[287] Arbitration's 'plasticity' in the face of special private needs, along with the fact that there is no uniform concept of arbitration, but rather varying notions in each Member State, supposedly make it a bad candidate for EU harmonisation.

In the technical camp, criticism has been more constructive, in the sense that it adresses specific questions raised by the Green Paper. The proposal to include judgments on the validity of arbitration agreements as well as arbitral awards in the scope of the system of free circulation, for instance, was met with concerns as to the possible difficulties it could create «in the interface with other applicable instruments of private international law» and the adverse affects it might have «on the proper functioning of the

[284] BERTOLI, in *Diritto Europeo Dell'Arbitrato Internazionale*, cit., p. 26 suggests this distinction.
[285] See U. MAGNUS & P. MANKOWSKI, *Joint Response to the Green Paper on the Review of the Brussels I Regulation*, http://ec.europa.eu/justice/newsroom/civil/opinion/files/090630/civil_society_ngo_academics_others/prof_magnus_and_prof_mankowski_university_of_hamburg_en.pdf.
[286] See MAGNUS & MANKOWSKI, *Joint Response*, cit., p. 13.
[287] See U. DRAETTA & A. SANTINI, *Arbitration Exception and Brussels I Regulation: No Need for Change*, in *Dir. comm. int.*, 2009, p. 547 *et seq.*

New York Convention 1958».[288] Emmanuel Gaillard in his comment on the observations and propositions made by the European Commission in its Green Paper voiced concerns that «the proposed measure would be highly detrimental to the future of arbitration in the European Union in the short and medium terms» and that they «would run counter to the legislation of EU countries that are most favorable to arbitration, could well deprive arbitration of its main attraction for the parties, and will probably create more problems that they solve».[289] The British Government expressed an opinion along the same lines observing that «as long as there is no obligation under the Regulation to give priority to other Member States' courts that may be seized first, or to recognize and enforce their decisions on arbitration matters, then difficulties such as parrallel proceedings are resolved by the NY Convention and national laws. In other words, the arbitration regime within the EU would simply be brought back into line with that outside of the EU, where the problems identified in the Green Paper are regularly resolved by a combination of the international and the relevant national arbitration regime».[290]

In December 2010, the Commission published its proposal for the reformation of Brussels I.[291] The goal of the proposal was to improve the interface between arbitration

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[288] See DRAETTA & SANTINI, *Arbitration Exception,* cit., p. 554 *et seq*; Position Paper of the Chamber of National and International Arbitration of Milan on the European Commission's Report and Green Paper on the Revision of Regulation EC 44/2001 on jurisdiction and enforcement of judgments in civil and commercial matters, available at http://ec.europa.eu/justice/newsroom/civil/opinion/files/090630/civil_society_ngo_academics_others/chamber_of_national_and_international_arbitration_of_milan_en.pdf;

[289] See E. GAILLARD, available at http://ec.europa.eu/justice/newsroom/civil/opinion/files/090630/civil_society_ngo_academics_others/mr_emmanuel_gaillard_en.pdf.

[290] Visit http://ec.europa.eu/justice/newsroom/civil/opinion/files/090630/ms_governments/united_kingdom_en.pdf The House of Lords, on the other hand, was of a different view suggesting that «the idea of giving exclusive jurisdiction to the courts of the Member State of the seat of the proposed arbitration to determine issues relating to the existence (including validity), scope and applicability of an arbitration agreement is a promising one». (http://ec.europa.eu/justice/newsroom/civil/opinion/files/090630/ms_parliaments/united_kingdom_house_of_lords_en.pdf, par. 96).

[291] Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, doc. COM(2010) 748 fin. ('Proposal of the Commission').

and litigation. The final outline, however, ended up being rather conservative, with a perpetuation of the *arbitration exclusion* contained in Article 1(2)(d) and the recommendation of a new Article 29, par. 4 on the basis of which «where the agreed or designated seat of an arbitration is in a Member State, the courts of another Member State whose jurisdition is contested on the basis of an arbitration agreement shall stay proceedings once the court of the Member State where the seat of the arbitration is located or the arbitral tribunal have been seised to determine, as their main object or as an incidental question, the existence, validity or effects of that arbitration agreement». The Commission's stated goal was to «enhance the effectiveness of arbitration agreements in Europe, prevent parallel court and arbitration proceedings, and eliminate the incentive for abusive litigation tactics».[292] Parties would have been able to block parallel proceedings in front of State courts, simply by initiating arbitration or bringing proceedings to the court of the State where the seat of the arbitration was located, effectively putting a sort of 'private' *anti-suit injunction* in the hands of the disputing parties (propably so as to appease the criticisms that had been moved toward the *West Tankers* judgment).[293]

Article 29, par. 4 of the Commission's Proposal was ultimately dismissed, in accordance with the principle that «the whole matter of arbitration should be excluded from the scope of this Regulation».[294] The justifications for the exclusion remained largely the same, namely the existence of international treaties that already exstensively deal with the issues of coordination that the EU Member States face in this area.

[292] Proposal of the Commission, p. 9; The Commission was referring to the risk of initiating so called 'torpedo' actions before complacent or slow-moving jurisdictions, as was the case with the 'anti-arbitration torpedo' launched in the *West Tankers* case.
[293] See P. BERTOLI, *Diritto Europeo Dell'Arbitrato,* cit., p. 32; L. RADICATI DI BROZOLO, *L'arbitrato e la proposta di revision del Regolamento Bruxelles I,* in *Riv. arb.*, 2011, p. 204 *et seq*.
[294] Report on the proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (COM(2010)0748 – C7-0433/2010 – 2010/0383(COD)), recital no. 11.

Regulation Brussels I-bis therefore confirmed the *arbitration exclusion*. The Regulation dedicated recital 12 to international commercial arbitration stating that, though the Regulation should not apply to arbitration, (*i*) it does not prevent a court of a Member State, that is seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the agreement is null and void, inoperative or incapable of being performed, in accordance with their national law; (*ii*) that any ruling made by a court of a Member State as to the nature of the arbitration agreement should not be subject to the rules of recognition and enforcement of the Regulation, regardless of the court deciding on this as a principal issue or an incidental question.

3. POSSIBLE SOLUTIONS:

When it comes to the administration of justice in civil and commercial matters, EU law has a determinative impact on the laws of Member States. Given that the EU, for the most part, doesn't hold enforcement powers, the enforcement and effectiveness of its laws is delegated to the Member States. In fact, the ECJ has in multiple occasions noted that all Member States's judiciaries are given the task of ensuring the correct application of all those provisions of EU law that, directly or indirectly, regulate private relationships which also results in the EU's ability to review the State courts' application of its laws.[295]

[295] In Case C-432/05 *Unibet* [2007] E.C.R. I-2316, par. 38, the Court noted that «under the principle of cooperation laid down in Article 10 EC, it is for the Member States to ensure the judicial protection of an individual's rights under the Community law». See, to that effect, Case C-33/76 *Rewe* [1976] E.C.R. 1989, par. 5; Case C-45/76 *Comet* [1967] E.C.R. 2043, par. 12; Case C-106/77 *Simmenthal* [1978] E.C.R. 629, paras. 21-22; Case C-312/92 *Peterbroeck* [1995] E.C.R. I-4599, par. 12;

Moreover, according to the EU, the procedural autonomy of Member States can potentially represent an obstacle to «the sound operation of the internal market» and the effectiveness of EU law in general[296] and therefore has to find an encompassing limit in the safeguard of the *effet utile* of its provisions.[297]

Article 81 TFEU explicitly grants the EU authority to «develop judicial cooperation in civil matters having cross-boarder implications, based on the principle of mutual recognition» not only of judgments, but also of «decisions in extrajudicial cases».

It has been pointed out that «there is no reason why arbitration should not be seen as a component of the administration of justice within Member States and should not also be subject to all these influences of EU law».[298]

For instance, it is widely held that arbitrators have to give effect to overriding mandatory rules. In its *Final Report On Public Policy As A Bar To Enforcement Of International Arbitral Awards* as well as in the subsequent *Recommendations*, the *ILA* Committee pointed out how «in disputes implicating rules of public policy or other rules from which the parties may not derogate, arbitrators may be justified in taking measures appropirate to determine the applicability and contents of such rules, including by making independent research, raising with the parties new issues (whether legal or factual), and giving appropriate instructions or ordering appropriate measures insofar as they consider this necessary to abide by those rules or to protect against challenges to the award».[299]

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[296] See S. TARULLO, *Il giusto processo amministrativo: studio sull'effettività della tutela giurisdizionale nella prospettiva europea*, Milano, 2004, where it is clarified that a system of protection of rights in order to be effective has to meet certain requirements, such as (*i*) *enforceability* and a *right to judge*, without excessive restrictions; (*ii*) a system that is *adequate* with regard to the situations it aims to protect; (*iii*) the *completeness* of the protection; (*iv*) the ability to act *promptly* and (*v*) its *compliance* with EU law.

[297] See Recitals 2 and 18 of Regulation 44/2001.

[298] See M. BENEDETTELLI, *'Communitarization',* cit., p. 599.

[299] Resolution No. 6/2008, International Law Association Recommendations on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration, Rio de Janeiro, 2008; BERTOLI, in *Diritto Europeo Dell'Arbitrato Internazionale,* alludes to the innate complexity of this topic: (*i*) arbitrators, as opposed to State judges, cannot refer to a *lex fori* which would normally specify the overriding mandatory rules that have to be upheld; (*ii*) generally speaking, there are no uniform, national or arbitral rules that regulate the matter; (*iii*) arbitration, as a matter of principle, is based on and developed within the frame of the partie's autonomy. Therefore, when it comes to arbitration, there is a general tendency to limit

Similarly, arbitrators are also believed to have to adhere to the usages and customs of international trade as well as to those instruments of *soft law* that reiterate the general duty to apply mandatory rules.[300] Along those same lines, Article 1.4 of the UNIDROIT Principles states that «nothing in these principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law».[301] According to the comment to Article 1.4, the notion of 'mandatory rules' is to be understood in a broad sense, «so as to cover both specific statutory provisions and general principles of public policy», be they of national or international origin or adopted by supranational organisations (e.g. the European Union).[302]

Article 1:103, par. 2, of the *Principles of European Contract Law* (PECL) contains a provision which is very similar to the one contained in the UNIDROIT Principles: «effect should nevertheless be given to those mandatory rules of national, supranational and international law which, according to the relevant rules of private international law, are applicable irrespective of the law governing the contract».[303]

There has been some backlash, suggesting that overriding principles (such as mandatory rules) don't hold particular relevance in relation to arbitration as they might interfere with the parties' power to chose the applicable law.[304] Against such claims however, it has been submitted that the advocates of this position incur in a

interference outside factors such as provisions or principles that could lead to results potentially different from those reasonably expected by the parties.

[300] See F. MARELLA, *La nuova lex mercatoria. Principi Unidroit ed usi dei contratti del commercio internazionale*, Padova, 2003.

[301] The UNIDROIT Principles of International Commercial Contracts (2010) are available on the website www.unidroit.org.

[302] See comment to the Article at www.unidroit.org.

[303] Full Text available at http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf.

[304] See T. H. CHENG, *New Tools for an Old Quest: A Commentary on Kleinheisterkamp, the Impact of Internationally Mandatory Laws on the Enforceability of Arbitration Agreements,* in *World Arb. Med. Rev.*, 2009, p. 121 *et seq;* S. RAU, *Comment: Mandatory Rules and the Enforceability of Arbitration Agreements,* in *World Arb. Med. Rev.*, 2009, p. 133; A. N. PAPEIL, *Conflict of Overriding Mandatory Rules in Arbitration,* in FERRARI, KRÖLL, *Conflict of Laws*, p. 344.

methodological error, since they fail to appreciate that, if the basis of arbitration is to be found in the autonomy of the parties, such autonomy can only produce legal effects, insofar as there is a legal system which allows for such effects to be produced in the first place. As a result, the parties' autonomy is axiomatically limited by that legal system's laws. In other words, private autonomy and the parties' expectations are at the 'finish line', not the 'starting point': they recieve legal protection from the law which confers legal power to them and which for that exact reason also has the authority to limit and condition their scope.[305]

The leading criterion arbitrators should follow in deciding which mandatory rules and principles (including any relevant European principles) to apply, was best described in the *ILA Recommendations on Ascertaining The Contents Of Applicable Law In International Commercial Arbitration*: «[a]rbitrators should seek to understand and apply such mandatory laws not because they have, like a court, some public duty to participate in enforcing those laws, but because doing so may be necessary to rendering a valid and enforceable award».[306] Following this line of reasoning, the place of enforcement of the award would act as an implicit conflict rule and should help arbitrators better understand which mandatory rules and public policies to apply to specific cases.[307] This alone should give reason to believe that arbitral tribunals, regardless of their seat, should apply European mandatory rules in cases where it is foreseeable that enforcement of the award will be sought in one or more Member States.[308]

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[305] See P. BERTOLI, *Diritto Europeo Dell'Arbitrato,* cit., p. 76.

[306] See *ILA Recommendations*, cit.; also see G. B. BORN, *International Commercial Arbitration,* 2009, cit., p. 1043: «[w]here the parties' contract raises issues of […] violations of public policy or mandatory law […], then the tribunal's mandate must necessarlily include consideration of those issues insofar as they would affect its decision or the enforceability of its award»; Article 41 of the ICC Rules of Arbitration states that «[i]n all matters not expressly provided in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law».

[307] See P. BERTOLI, *Diritto Europeo Dell'Arbitrato,* cit., p. 82.

[308] Moreover, it has been theorised that the rendering of a valid and enforceable award isn't necessarily the only reason why arbitral tribunals should have regard for European overriding mandatory rules. In fact, since arbitration gets its legal authority from a given legal system, one might also assume that arbitral

Moreover, since it's been established that arbitral awards are also 'decisions' on civil and commercial matters that become *res iudicata* as well as be grounds for enforcement actions, and «most Member States' procedural laws consider arbitration to be functionally equivalent to judicial litigation»[309], the exclusion of arbitral matters from the Brussels I regime and, consequently, the EU legislator's decision to apply the uniform rules on recognition only to court judgments, should be revisited.[310]

If one were to accept that arbitrators are bound by overriding mandatory rules, be they of national or supranational origin, and to apply them should they affect the arbitrators' decision or the enforceability of their award, as much should hold true with regard to the European rules on *res iudicata*; especially given the broad spectrum of rules (ranging from specific statutory provisions to general principles of public policy) the notion of 'mandatory rules' entails. In fact, *«[c]omme toute autre ordre juridique, celui de l'Union ne pourrait se permettre de faire abstraction d'un des fondements de toute organisation moderne de la justice, à savoir un principe essentiel pour la stabilité des situations juridiques, l'autorité même du pouvoir judiciaire et in fine la paix sociale*».[311] Along the same lines, the BIICL in the framework of the project directed by J. van de Velden noted how the doctrine of *res iudicata* «constitutes a general principle of law»

tribunals with a seat in a Member State have a duty to uphold the unwaivable legal principles of that State and, therefore, have an autonomous duty to give effect to European mandatory rules, regardless of the place of enforcement of the award. To that effect, see RADICATI DI BRONZOLO, *Mandatory rules*, cit., p. 69, who borrows from P. MAYER, *Mandatory Rules of Law and International Arbitration,* in *Arb. Int.,* 1986, p. 274 *et seq.*

[309] See M. BENEDETTELLI, *'Communitarization',* cit., p. 595.

[310] Especially, since the ECJ, when asked in *Gothaer* to give an answer as to how the term 'judgment' in Article 32 of Regulation 44/2001 was to be interpreted, noted that «the concept of 'judgment' covers 'any' judgment given by a court of a Member State, without any distinction being drawn according to the content of the judgment in question». Most Member States don't distinguish between arbitral awards and court judgments which, were it not for the *arbitration exclusion* in Article 1(2)(d), would open a gateway for arbitration to be included in the Regulation.

[311] See B. GENCARELLI & A. TIZZANO, *Droit de l'Union et Décisions Nationales Définitives dans la Jurisprudence Récente de la Cour de Justice,* in *Dir. Un. Eur.*, Vol. 4, 2010, p.789, «as fundamental as it may be, the interpretation of the effect of a general principle such as *res iudicata* is not only a question of national law, but rather one which must also take account of the requirements imposed by EU law».

and that «national rules on *res iudicata* must not be framed in such a way as to undermine the effectiveness of EU law».[312]

With regard to the preclusive effects of arbitral awards, they are strongly connected to issues of choice-of-law. Indeed, there are various alternative answers to the question by which law the preclusive effects of an award should be defined: (*i*) the law of a State where a new claim is brought; (*ii*) the law of the place where the prior decision was made; (*iii*) the law of a state which the dispute is connected to in some other way (e.g., the law governing the parties' dispute or the arbitration agreement); (*iv*) international preclusion rules, derived from international treaties (e.g., New York Convention 1958) or otherwise.[313] Historically, it has been assumed that, because *res iudicata* is a procedural rule, the award had to be governed by the law of the forum where the new claim was brought.[314] It has been argued that «[f]rom a more functional perspective, the inefficiencies and new costs of relitigation of a dispute fall principally upon the forum where relitigation is attempted, aguably making it appropriate to apply that forum's preclusion rules».[315] However, it is also argued that the relevant law should be that of the forum where the judgment was rendered, to avoid the waste of forum

[312] See British Institute of International Law and Comparative Law, *The Effect in the European Community of Judgment in Civil and Commercial Matters: Recognition, Res iudicata and Abuse of Process,* cit., p. 37. For a summary of the results, see http://www.biicl.org/files/4608_comparative_report_-_jls_2006_fpc_21_-_final.pdf. The situation described above arose in *Lucchini* (Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato* v. *Lucchini Spa* [2007] *unpublished*), in relation to the recovery of State aid granted in breach of EC law which was later found to be incompatible with the common market in an irreversible decision by the European Commission. In the case at hand, the Italian rules on *res iudicata* hindered the reopening of already expressly and definitively determined pleas of law in a second set of proceedings, but furthermore prevented the examination of matter which could have been raised in earlier proceeding but were not. To prevent the risk of such rules attributing effects to a decision of a national court which would exceed its limits of jurisdiction under EC law, the Court held that the scope of the preclusive effects of judicial decisions of national courts should be restricted to those matters that fall within their subject-matter jurisdiction as determined in EC law.

[313] See G. B. BORN, *International Commercial Arbitration,* cit., p. 2908 *et seq*.

[314] See A. SHEPPARD, *Res iudicata and Estoppel,* in J. D. M. LEW & B. M. CREMADES ROMÀN, *Parallel State and Arbitral Procedures in International Arbitration,* Paris, ICC, 2005, p. 219 *et seq.*, «the tribunal – as law and practice stand today – must apply the *res iudicata* rules of the place of arbitration».

[315] See G. BORN, *International Arbitration: Law and Practice,* cit., p. 358.

resources and preserve the intergrity of the rendering forum's judicial processes.[316] Born suggests that, rather than tieing the choice-of-law analysis with regard to the preclusive effects of an international award to a particular legal system, judges and abitrators alike should apply 'international preclusion standards' so as to avoid «the lack of uniformity associated with application of the enforcement forum's preclusion rules».[317] If the parties intention going into international arbitration is to finally resolve their dispute, then allowing the preclusion rules of a particular legal system to be applied, could have the adverse effect of enabling the disappointed party to re-litigate the dispute in front of «whatever forum it can find that has the least effective rules of preclusion», effectively cancelling the parties' rationale to arbitrate.[318]

Born proposes applying to international arbitration the standards that can be derived from the New York Convention. However, by the same token – and keeping in mind what has been said in relation to the role that supranational mandatory rules and principles play in arbitration – the applicability of European standards (at least) to international arbitration taking place within the Community *acquis* shouldn't be dismissed precipitously.

4. THE 'EUROPEAN' NOTION OF *RES IUDICATA*

The notion of *res iudicata*, first and foremost, fulfills a function that is of substantive value, rather than of procedural importance. It represents a moment of closure

[316] See A. SHEPPARD, *Res iudicata and Estoppel*, cit., «[t]he place where the prior decision was made might place some constraint or limitation on the scope of *res iudicata*. For example, under that law, only the *dispositif* might have *res iudicata* effect. This should then be respected at the place of arbitration».
[317] See G. B. BORN, *International Arbitration*, cit., p. 359.
[318] *Ibid.*

of the judicial process, through which abstract provisions are given concrete applications. In a sense, *res iudicata* has the effect of 'unhooking' the legal relevance of an individual case from the abstract rule so as to then 'bind' it to the contents of a judgment.[319] Defining the concept of *res iudicata* is, therefore, of immediate interest, not only to national procedural law, but also the European legal order.

The EU's capacity to shape national procedural law has already been established in the previous section of this chapter. For the purposes of the discussion about to follow it is thus sufficient to repeat that, while it is generally accepted that national procedural law is an expression of state sovereignty and therefore outside the scope of European harmonisation,[320] the European Union makes nonetheless use of national procedural laws to ensure the effectiveness of rights conferred by EU law. Indeed, in *Köbler* the Court remarked that «the importance of the principle of *res iudicata* cannot be disputed […] In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called in question».[321]

In recent years, the ECJ has had the opportunity to take a decision on several aspects regarding the doctrine of *res iudicata*, amongst which in particular, the configuration of the concept of *res iudicata* under EU law. Be it with regard to its interpretation of the requirement of the identity of the 'subject-matter'[322], the identity of

[319] See A. L. MARCONI, M. MATTA, I. SANDULLI, *Primazia del diritto dell'Unione e giudicato interno: relazioni e prospettive de iure condendo,* at www.personaedanno.it, p. 6.
[320] As is mentioned *supra,* an exception has to be made in relation to Article 81 TFEU which expressly grants the EU power to «develop judicial cooperation in civil matters having cross-boarder implications». In fact, based on this authority, the EU has already given birth to uniform instruments such as Regulation 1896/2006 establishing a European order for payment procedure, and Reguation 861/2007 creating a European Small Claims Procedure.
[321] Case C-224/01, *Gerhard Köbler* v. *Republik Österreich* [2003], E.C.R. I-10239, par. 38; see also Case C-234/04, *Rosmarie Kapferer* v. *Schlank & Schick GmbH* [2006] E.C.R. I-2585, par. 20.
[322] Joined Cases C-442/03 and C-471/03, *P&Q European Ferries (Vizcaya) and Diputación Foral de Vizcaya* v. *Commission* [2006], E.C.R. I-4845.

the 'cause of action'[323], the identity of the parties[324] or the scope of its preclusive effects, contrary to many national iterations, the 'Luxemburgian' notion of *res iudicata*[325] has traditionally stood out for its rather generous contours.

In fact, the ECJ has in several occasions reminded of the existence of a European notion of *res iudicata* that goes beyond the *dispositif* and extents to the *ratio decidendi*, i.e. the underlying necessary motivation of the judgment.

In *Asteris*, when posed the question which measures an institution was obliged to take under Article 176 (EEC) in order to comply with a judgment of the Court of Justice annuling a measure adopted by it, the Court held that «the institution is required to have regard not only to the operative part of the judgment but also to the grounds which led to the judgment and constitute its essential basis, in so far as they are necessary to determine the exact meaning of what is stated in the operative part». [326]

It seems that – at least initially – the Community's primary concern was to accord the largest possible scope to the binding effect of judgments rendered by the ECJ itself. However, it soon became evident that, to ensure the recognition in one Member State of the effects of a decision that applied Community law rendered in another Member State, a specific concept of *res iudicata* had to be defined at the Community level, rather than vary according to different national rules.

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[323] Case C-144/86, *Gubisch Maschinenfabrik KG* v. *Giulio Palumbo* [1987] E.C.R. I-4861, par. 16, wherein the Court held that two proceedings involve the same cause of action, once the same subject-matter «lies at the heart of the two actions».

[324] Case C-351/96, *Drouot assurances SA* v. *Consolidated metallurgical industries et al.* [1998] E.C.R. I-03075, paras. 19 *et seq.*, where the Court held that parties, although formally not identical, may netherthelss deemed to be the same parties if the degree of identity in relation to the interests involved that a judgment delivered against one would have the force of *res iudicata* against the other.

[325] See B. GENCARELLI & A. TIZZANO, *Droit de l'Union*, cit., p. 789 *et seq*.

[326] Joined Cases 97, 193, 99 and 215/86, *Asteris AE* v. *Commission of the European Communities* [1988], E.C.R. 2181, par. 27; also see Case C-310/97, *Commission of the European Communities* v. *Assi Domän Kraft Products AB* [1999], E.C.R. I-5363, par. 54, wherein the Court held that «the authority *erga omnes* exerted by an annulling judgment of a court of the Community judicature attaches to both the operative part and the *ratio decidendi* of the judgment».

To that end, not only was it necessary to implement rules allocating jurisdiction among European courts as well as rules facilitating the movement of judgments across the European Union, but, first and foremost, that a mechanism be put in place which made it so norms on jurisdiction and on recognition and enforcement of judgments would be coherent and consistent among themselves.[327] In fact, the objective of Regulation 44/2001 – explicitly affirmed in Article 33(1) – was «the establishment of a simplified system for the recognition and enforcement of judgments». A European concept of *res iudicata*, however, does not appear in the Regulation, and instead was first coined by the ECJ in the (in)famous *Gothaer* case.[328]

In the specific case, a question was referred to the Court as to the binding effects of a judgment by which a court of a Member State (Belgium) declines jurisdiction on the basis of a jurisdiction clause (attributing jurisdiction to an Icelandic *forum*), even though that judgment is classified as a 'procedural judgment' by another Member State (Germany). The *Landgericht* Bremen, which was later seized of an action for compensation by the plaintiff, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling: (*i*) the possibility of a recognition of procedural judgments;[329] (*ii*) whether judgments declining international jurisdiction on the basis of a jurisdiction clause fall within the meaning of the term 'judgment' as set out in Articles 32 and 33; (*iii*) the applicability of the principle of *extended effects* – i.e the principle that calls for decisions seeking recognition in another country to be accorded the same authority they would hold in their country of origin[330] - also to the finding as to

[327] See E. RODRÍGUEZ-PINEAU & E. TORRALBA-MENDIOLA, *Two's Company, Three's A Crowd: Jurisdiction, Recognition and Res iudicata in The European Union,* in *J. Priv. Int. Law,* Vol. 10(3), 2014, p. 403 *et seq*.
[328] Case C-456/11, *Gothaer Allgemeine Versicherungen AG* v. *Samskip GmbH*, ECLI:EU:C:2012:719.
[329] For more on this topic see A. CARRATA, *La sentenza civile straniera fra «riconoscimento» ed «estensione dell'efficacia»,* in *Il diritto processuale civile nell'avvicinamento giuridico internazionale,*, p. 783 *et seq.*
[330] The principle was first set forth in the *Jenard Report*, cit., par. 44, and endorsed by the ECJ in various instances, *ex multis*, Case C-145/86, *Hoffmann* [1988], E.C.R. I-645; Case C-420/07, *Apostolides* [2009],

the effectiveness of a jurisdiction clause (a finding which is given binding effect by the legal system of origin), even where the decision on that point forms part of a procedural judgment dismissing the action. Especially in response to the third question and driven by the need to ensure the mutual trust between courts of all Member States, the Court outlined the specific effects of a judgment by which a court declines jurisdiction. In the eyes of the Court, to allow a court of a Member State in which recognition is sought to review the validity of a jurisdiction clause which a court of the Member State of origin has held to be valid, particularly in circumstances where, had it not been for that clause, the latter might very likely have ruled to have jurisdiction, would have the adverse effect of calling into question not only the intermediate finding of that court as to the validity of the jurisdiction clause, but, *a fortiori*, also the very decision to decline its own jurisdiction.[331] The Court therefore concluded that the effects produced by a judgment by which a court of a Member State has declined jurisdiction on the basis of a jurisdiciton clause had to be determined under EU law which, when it comes to the concept of *res iudicata,* does not restrict its effect merely to the operative part, but attaches also to the underlying motivation of the judgment.[332]

In *Gothaer* the ECJ substantially challenged the 'settled' understanding of the EU model of judgment recognition by declaring that it falls no longer onto a Member State to define the effects of its judgments, but rather EU law and its application under the guidance of the ECJ.[333]

E.C.R. I-3571; see also, S. M. CARBONE, *Lo spazion giudiziario europeo in materia civile e commerciale, da Bruxelles I al Regolamento CE n. 805/2004*, Turin, 2009, p. 222 *et seq.*

[331] Case C-456/11, *Gothaer Allgemeine Versicherungen AG* v. *Samskip GmbH* [2012], cit., par. 38.

[332] Case C-456/11, *Gothaer Allgemeine Versicherungen AG* v. *Samskip GmbH* [2012], cit., par. 40.

[333] See RODRÍGUEZ-PINEAU & TORRALBA-MENDIOLA, *Two's Company, Three's A Crowd: Jurisdiction, Recognition and Res iudicata in The European Union*, cit., p. 424; on the risk of courts being beholden to different standards depending on what law is applicable, see M. AUDIT, *La compatibilité du principe de l'autonomie procédurale avec l'edification de l'espace judiciaire européen,* in J. DUTHEIL DE LA ROCHÉRE, *L'execution de droit de l'Union, entre mécanismes communautaires et droits nationaux,* Bruylant, 2009, p. 253, 261.

The impact of this 'overthrow' of long held standards of judgment recognition will not only be felt by national courts, but to a certain degree also by the parties, since, if «something as essential as the effects of a judgment is [no longer] defined by the law of the state in which a proceeding is initiated, the parties must modify their procedural strategy and, in order to avoid any procedural risk, extend litigation to all aspects for which, in accordance with the [ECJ's] autonomous interpretation of what is *res iudicata,* a judgment could have *res iudicata* effects», that is if they want to reopen those issues in later proceedings.[334]

It is not at all suprising therefore, that the ruling in the *Gothaer* Case has recieved its fair share of criticism, not least for the existing contradictions between the principle of *extended effects* that the judgment has in the country of origin and the establishment of a European concept of *res iudicata* indipendent of any of the national iterations[335], as well as the not very rigorous attitude with which the Court had decided to tackle a problem of such great legal complexity.[336] Likewise, legal-scholarly debate has not failed to reveal the inconsistency of ECJ case-law with regard to the scope of *res iudicata*, having occasionally given the concept a more restricted definition extending to «the matters of fact and law actually or necessarily settled by the decision in question»[337], and a wider interpretation extending it to «the *ratio decidendi* of the judgment which is inseparable from it».[338] Furthermore, it has been observed that the solution adopted by the Court can

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[334] See E. RODRÍGUEZ-PINEAU & E. TORRALBA-MENDIOLA, *Two's Company, Three's A Crowd: Jurisdiction, Recognition and Res iudicata in The European Union,* cit., p. 425.

[335] To that effect, see E. D'ALESSANDRO, *Pronunce declinatorie,* cit., par. 3, who highlights how, in relation to a judgment by which a court declines its own jurisdiction on the basis of a jurisdiction clause, it is not true that Article 32 of Regulation 44/2001 confers the same authority at the place where recognition is sought, than it would at the place of origin. «Piuttosto l'art. 32 conferisce a siffatte decisioni, nel momento in cui circolano, nuovi limiti oggettivi di efficacia, uniformemente delineate a livello europeo. Formalmente la Corte di Giustizia si è limitata ad interpretare l'art. 32 del regolamento 44/2001/Ce; di fatto è andata ben oltre la mera esegesi».

[336] See A. HENKE, *Verso una nozione europea di 'res iudicata',* in *Dir. comm. int.*, 2013, p. 1095.

[337] Case C-526/08, *Commission* v. *Luxemburg* [2010] E.C.R. I-6151, par. 27 and Case C-352/09, *ThyssenKrupp Nirosta GmbH* v. *Commission* [2011], E.C.R. I-2359, par. 123.

[338] Joined Cases C-442/03 P and C-471/03 P *P&O European Ferries, Vizcaya y Diputación Foral de Vizcaya* v. *Commission* [2006], E.C.R. I-4845, par. 44; see E. RODRÍGUEZ-PINEAU & E. TORRALBA-

lead to instances where *res iudicata* is accorded to assessments which, were it for the application of national rules, would not produce binding effects neither in the Member State of origin nor in the Member State where recognition is sought.[339] The same 'points of weakness' of the *Gothaer* case appear to also have animated the Italian Supreme Court to only accept a unitary concept of *res iudicata* with some reservations in the recent *Barthel* case.[340]

5. THE LIMITS OF THE 'EUROPEAN' NOTION OF *RES IUDICATA*

Although a litteral reading of *Gothaer* seems to suggest that the new European model of recognition of judgments should only apply to procedural decisions[341], it is nonetheless worth asking whether it is possible to extend it to substantive issues as well.[342]

MENDIOLA, *Two's Company, Three's A Crowd: Jurisdiction, Recognition and Res iudicata in The European Union*, cit., pp. 422 and, in particular, 409 where the authors rightly point to the system of examination as to jurisdiction set out in Regulation 44/2001, which is based on the examination by the courts of a state of their own jurisdiction free from interference by courts of other Member States. In *West Tankers* the ECJ found that the admission of anti-suit injunctions at EU level runs counter to the objectives that the Regulation is trying to achieve, since it would obstruct a court of a Member State from excercising the jurisdiction it has under the Brussels I regime.

[339] To that effect, see I. BACH, *Deine Rechtskraft?*, cit., p. 58, who also poses the question whether the second court's obligation of adherence to the first court's decision extents to preliminary matters, which, though functionally connected to the judgment by which the court declines its own jurisdiction, are also relevant to the substantive ruling of the second court. Can a second court rule differently on the same preliminary matter? Following the *dictum* of the ECJ, the answer appears to be negative.

[340] Cass. Civ. Sez. II, 6 February 2014, n. 10853.

[341] Along those lines, see RODRÍGUEZ-PINEAU & TORRALBA-MENDIOLA, *Two's Company, Three's A Crowd: Jurisdiction, Recognition and Res iudicata in The European Union,* cit., p. 426, who argue that this would seem to be the case, since the recognition of judgments under Regulation 44/2001 is a judgment rendered by a court of a Member State pursuant to uniform EU rules on jurisdiction and, therefore, is governed by its own *sui generis* system.

[342] See M. F. MEROTTO, *Verso una nozione di 'cosa giudicata' sovranazionale?,* in *Giur. it.* 2015, p. 362 *et seq*, who in light of a recent decision rendered by the Italian Supreme Court (n. 10835/2014) envisions uniform concept of *res iudicata* capable of overcoming the principle of *extended effects*, so as to operate consistently in a system of increasing harmonisation such as the EU. Radically opposed, on the other hand, E. D'ALESSANDRO, *La legge regolatrice*, cit., p. 102, who reminds of the ECJ's own admission in its response to the objections raised by the Federal Republic of Germany, that judgments on jurisdiction, being rendered in application of uniform law, are subject to a *sui generis* regime.

It has been pointed out that, indeed, the Court couldn't have done otherwise considering, first and foremost, the tenor of the questions referred to it for a preliminary ruling.[343]

The application of a *sui generis* system should only be justified in cases where decisions of national courts are made in application of uniform rules, which, although generally not the case for judgments on the merits of an action, would, at least in theory, allow for an extension of the modified model of recognition to judgments where the substantive rules stem directly or can be derived from EU law.[344]

If that were the case, then it becomes all the more necessary for the ECJ to clarify the implications of its ruling in *Gothaer* and let its position on such important matters contribute to legal certainty, rather then be a disruptive force.

In fact, one of the most pressing questions still left unanswered, is the ECJ's understanding of *res iudicata*: does *res iudicata* extend to the *ratio decidendi* only *strictu sensu*, i.e. only to the parts of the reasoning which were «absolutely necessary for the court to come to its conclusion in the operative part of the judgment», so that, had they been disregarded, the judgment would have been different;[345] or is *res iudicata* also accorded to other reasons which may have been less decisive, but nevertheless have led to the same outcome.

On these questions the ball is the ECJ's court.

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[343] See E. D'ALESSANDRO, *Volli, sempre volli, fortissimamente volli: la Corte di giustizia si pronuncia sul caso Gazprom*, in *Riv. Arb.*, 2015, fasc. 2, p. 304 *et seq*.

[344] See, in particular, E. RODRÍGUEZ-PINEAU & E. TORRALBA-MENDIOLA, *Two's Company, Three's A Crowd: Jurisdiction, Recognition and Res iudicata in the European Union*, cit., p. 426, who, accepting the premise of a possible extension of the uniform concept of *res iudicata*, inquire as to the forms such extension could take: «[s]hould we conclude that the [ECJ] is willing to go a step further and propose that this modified model of recognition can be extended to judgments on the merits of the action where the substantive rules contained in an EU Regulation (and thereby unified) are applied? Or extended to rules that are the result of harmonisation through an EU Directive? Or even extended to national laws that aim at contributing to greater European Union integration? »

[345] See E. RODRÍGUEZ-PINEAU & E. TORRALBA-MENDIOLA, *Two's Company, Three's A Crowd: Jurisdiction, Recognition and Res iudicata in the European Union*, cit., p.426.

CONCLUSIONS

In the field of international commercial arbitration clearly there is still confusion with regard to the binding effects of arbitral awards. The uncertainty stems mostly from the fact that, being generally regarded as a part of public policy[346], notions of *res iudicata* can vary considerably in different jurisdictions. This is true not only between civil and common law systems[347], but also between individual civil law jurisdictions – the German and French systems most notably. National laws always carry the risk of unexpected consequences that could potentially alter the outcome of an arbitration. The inadequacy of domestic laws to address issues of international arbitration had already been pointed out during the drafting of the UNCITRAL Model Law of 1985. In that occasion the UNCITRAL secreteriat noted that «[e]ven most of the [national] laws that appear to be up-to-date and comprehensive were drafted with domestic arbitration primarily, if not exclusively, in mind […] Unexpected or undesired restrictions found in national laws may prevent the parties, for example, from submitting future disputes to arbitration, […] or from having the arbitral proceedings conducted according to agreed rules of procedure and with no more court involvement than appropriate».[348] The problem of uncertainty of *res iudicata* effects isn't solved completely by the New York Convention 1958 either. In fact, at first glance the Convention repeatedly refers back to national provisions as a means to resolve issues of recognition and enforceability. In the introduction to the Convention, it is noted that «[t]he central obligation imposed on the Parties is to recognize

[346] In France, a judicial decision annulled an award on public policy grounds, for failing to give *res iudicata* effects to a prior judgment. The court reasoned that such a failure contradicted French public policy (*Paris Cour d'appel,* judgment 28 September 1979, 1980 Rev. arb. 506).
[347] Common law systems generally endorse concepts of 'cause of action estoppel', 'issue estoppel' as well as 'abuse of process', mostly unknown to civil law jurisdictions. As far as the preclusive effects of a judgment *in personam* are concerned some common law systems also subscribe to the rule of privity thereby extending not just the objective limits but also the subjective limits of *res iudicata*.
[348] Explanatory Note by the UNCITRAL secretariat, Part two, cit., pp. 24-25.

all arbitral awards within the scheme as binding and enforce them, if requested to do so, under the *lex fori*». Moreover, the Convention specifically allows for courts to refuse recognition and enforcement of an award, on its own motion, for reasons of arbitrability and public policy.

Yet there might be ways to go about implementing more homogenised rules on the *res iudicata* effects of arbitral awards.

As has been mentioned above (*infra* Ch.V, par.3), the choice-of-law analysis in relation to the *res iudicata* effects of international arbitral awards in national courts and arbitral tribunals should be based on the application of international preclusion standards and a regard for the objectives of the arbitral process.[349] Article II of the New York Convention gives effect to arbitration agreements by requirering each signatory State to recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. The «presumptive expectation» which parties going into arbitration have that their dispute «will be finally solved in a single, expeditious proceeding […] provides the basis for preclusion principles that include *res iudicata*».[350]

The rules of institutional arbitration usually don't refer to 'national law' but to 'rules of law', in an effort to broaden the range of options parties can choose from. This way, arbitration tribunals not only apply their respective arbitration rules, but can incorporate 'rules of law' into their ruling that operate indipendent of any national laws.[351]

[349] See G. B. BORN, *International Arbitration*, cit., p. 359.
[350] *Ibid,* cit., p. 359.
[351] Art. 19 of the ICC Rules of Arbitration states: «The proceedings before the arbitral tribunal shall be governed by the Rules, and where the Rules are silent, by any rules which the parties of, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration»; Art. 14.5 of the LCIA Rules reads as follows: «The Arbitral

Arbitral tribunals have a tendency to avoid applying overly complicated domestic rules on *res iudicata* and instead adopt pragmatic approaches more in line with the objectives of the parties, sometimes even adopting broader notions of *res iudicata* in order to further the arbitration agreements goals. In the final award of the already mentioned ICC Case No. 3267, the arbitrators concluded that «the binding effect of its first award is not limited to the contents of the order thereof adjudicating or dismissing certain claims, but that it extends to the legal reasons that were necessary for such order, i.e., to the *ratio decidendi* of such award. Irrespective from the academic views that may be entertained on the extent of the principle of *res iudicata* on the reasons of a decision, it would be unfair to both parties to depart in a final award from the views held in the previous award, to the extent they were necessary for the disposition of certain issues».[352]

Born concludes that the lack of uniformity associated with the application of national preclusion rules (e.g. the enforcement forum's rules on preclusion) «contradict[s] the parties' objective, in agreeing to international arbitration, of establishing a single, uniform international dispute resolution mechanism, and would lead to unpredictable results, depending on where a disappointed party seeks to relitigate a dispute […] This result disserves the arbitral process and frustrates the pruposes of the parties' agreement to arbitrate».[353]

With respect to international commercial arbitration in Europe, arbitrators should embrace the 'European *mentalité*' and borrow from the many rules and principles that make up the *ius commune Europeum.* To not tap into the abbundant literature that has

Tribunal shall have the widest discretion to discharge these general duties, subject to such mandatory rule(s) or rules of law as the Arbitral Tribunal may decide to be applicable»; also see E. BRÖDERMANN, *The Impact of the UNIDROIT Principles on International Contract and Arbitration Practice – the Experience of a German Lawyer,* in *Rev. dr. unif*, Vol. 16, 2011, p. 589-612.

[352] *Final Award* in ICC Case No. 3267, XII Y.B. Comm. Arb., pp. 87, 89 (1987); also see G. BORN, *International Commercial Arbitration,* p. 2918.

[353] See G. B. BORN, *International Arbitration,* cit., p. 359.

been produced on the topic of European private law, could harm the purposes of the partie's agreement to arbitrate, not further them. However, if one were to disregard the academic views available – much in the way it was implied in ICC Case No. 3267 –, there are nonetheless various legislative instruments from which to draw principles of European private law: aside from the New York Convention and the provisions of the UNCITRAL Model Law, what should serve as a 'checklist' and as a basis for issues regarding the effects of *res iudicata* for arbitral tribunals and state courts[354], is the European Convention on International Commercial Arbitration of 1961.[355] While the Conventions' impact is rather modest being designed to supplement the New York Convention and, therefore, dealing only with the effects of a judicial decision annulling an award in the arbitral seat in other jurisdictions and, some lessons can nonetheless be drawn from it. In the commentary to Article VII on the applicable law, it is expressly stated that parties are free «to select international or supranational rules» and that, should the parties not have designated the applicable law, «arbitrators must apply the proper law under the rule of conflict that they deem applicable». Arbitrators are given complete freedom and may look to conflict rules that are not supplied by a specific national system or private international law or resort to a cumulative application of the conflict rules involved in the litigation.[356]

As far as the application by arbitral tribunals and state courts of the 'European' notion of *res iudicata* is concerned, two factors have to be taken into consideration: (*i*) the notion was established with regard to issues of jurisdiction, so it is unclear whether or not the ECJ had envisioned a concept of *res iudicata* that is applicable also to substantive

[354] National courts have the authority to consider jurisdictional objections on an interlocutory basis.
[355] European Convention on International Commercial Arbitration, 21 April 1961, 484 U.N.T.S.; see G. B. BORN, *International Commercial Arbitration*, p. 102 *et seq*.
[356] These principles should be applied alongside generally accepted principles and commercial rules, also known as *lex mercatoria.* See F. GALGANO, *Lex Mercatoria*, Bologna, 1993; U. DRAETTA, *Diritto dei contratti internazionali*, Padova, 1984;

issues (*infra* Ch.V, par.6); (*ii*) since the 'European' notion of *res iudicata* was established in application of the Brussels I Regulation – a Regulation which explicitly excludes arbitration from its scope – it is not entirerly clear if it can be applied in arbitration proceedings.

Missing a clear position by the ECJ on the scope of the 'European' notion of *res iudicata,* one can only speculate on the solution to these issues. It would also be advisable the EU took a decisive stance on the role of arbitration within the Community *acquis.* This could be achieved through the abolition of the *arbitration exception* and, consequently, an inclusion of arbitration in the Brussels I(-*bis*) regime, so that the mechanisms and techniques contained in the Regulation as well as the vast case law integrating the Regulation are also available to arbitral tribunals. Of course, International commercial arbitration in Europe is not impracticable and therefore not everyone believes substantial reform to be necessary. As noted by one practitioner: «The current system is not broken, that is my position and I feel very strongly abou that […] What we are seeing are normal growing pains for a new area of law like this».[357] This position was summarized by reference to a well-known French dictum: «*le mieux est l'ennemi du bien*» or, in other words, «if it's not broke, don't fix it».[358]

It is simply supposed to mean that issues of arbitration can be best dealt with through small and progressive adjustments of already existing techniques. This is not necessarily in conflict with the solutions proposed so far. In fact, here it is merely suggested that these adjustments be also addressed on a supranational level.

[357] See D. BISHOP, *The Case for an Appellate Panel and its Scope of Review,* in *Transnational Dispute Management,* 2(2), 2005; also see J. GILL, *Inconsistent Decisions: An Issue to be Addressed of a Fact of Life?,* in *Transnational Dispute Management,* 2(2), 2005, p. 12 *et seq;*
[358] See F. SPOORENBERG & J. E. VIÑUALES, *Conflicting Decisions in International Arbitration,* in *The Law and Practice of International Courts and Tribunals,* 8, 2009, p. 91 *et seq.*

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