

THE PRINCIPLE OF RES JUDICATA IN INTERNATIONAL LAW

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Abstract: The legal system of any given society, whether national or international, requires that legal disputes between the parties must be finally concluded and settled. Abiding by judgments made by international courts and prevention of contradictory judgments are related to international public order. Variety of international courts, arbitration tribunals and commissions increases the possibility of conflict of jurisdiction and issue of different and sometimes conflicting judgments at the international level. Such a situation, instead of final settlement of disputes will widen and intensify the international disputes and therefore is not desirable considering the fact the certain unsolved and outstanding international disputes may threaten international peace and security.

The principle of *res judicata* is one of the valuable principles of civil and criminal procedure of national legal system. Today increase and plurality of judicial and quasi-judicial international arbitration mechanisms may serve as appropriate arrangements in international proceedings and to attain legal stability and reinforcement of peace and security in international arena.

The present article will conclude that the principle of *res judicata* is well- recognized in international proceedings and arbitration and relied upon in numerous disputes. This reality may effectively decrease the existing concern regarding increase of international courts and issue of conflicting judgments.

Key words: Res Judicata, Parties to Dispute, Quasi judicial, Umpire, Compensation, Identity of Parties.

I. INTRODUCTION

The term *res judicata* refers to the principle that an earlier and final adjudication by a court or arbitration is conclusive in subsequent proceedings involving the same subject matter or relief, the same legal grounds and the same parties (the so-called «triple-identity» criteria).

The *res judicata* principle has existed for many centuries and in different legal cultures, it was amongst the principles of the Roman jurists, and it was also recognized in ancient Hindu texts (Barnett, 2001: p.8). It is said to be a clear example of a general principle of law recognized by civilized nations (Chang, 1953: P.336). *Res judicata* is said to have a positive effect namely, that a judgment rendered is final and binding between the parties and should be implemented, subject to any available appeal or challenge and, a negative effect namely that the subject matter of the judgment or award cannot be re-litigated a second time (Chang, 1953: p. 337-339). The rationale for the *res judicata* principle finds expression in two Latin maxims:

- 1) *Interest reipublice ut sit finis litium* (it is in the public interest that there should be an end of litigation).
- 2) *Nemo debet bis vexari pro una et eadem causa* (no one should be proceeded against twice for the same cause).

The former is a matter of public policy, and the latter is a matter of private justice (Reinisch, 2004. p.43).

The principle undoubtedly applies in all principal legal systems to prevent the same claimant bringing the same claim against the exact same respondent.

In mainly common law jurisdiction, the principle also applies to prevent the same parties rearguing an issue that has been determined in earlier proceedings between them. The principle has been further extended in a limited number of those common law jurisdictions to prevent a party raising issues in subsequent proceedings, between the same parties, that could have been raised in the earlier proceedings but were not raised when the principle is described, it is generally stated that the parties must be the same in the two sets of proceedings for the principle to apply or at least, legally deemed to be the same, which the common law refers to as «privies», e.g. trustee and beneficiary (Sinai, 2011. p.357-360). However, the strictness of this requirement varies between legal systems. In addition, this requirement has been relaxed somewhat in the United States, where third parties may rely on the principle in some circumstances (Sinai, 2011. p.363-366).

II.RES JUDICATA IN INERNATIONAL LAW

Doubts about the existence of res judicata as a rule of international law seem to be unfounded. While some authors refer to it as rule of customary international law (Dodge,2000: p.365), most scholarly authorities regard it as a general principle of law(Chang, 1953, p.336). In a number of case before international courts and arbitral tribunals res judicata has been identified as a legally binding principle(Reinisch,2004: p.44-45).

The early leading case is the Pious Fund Arbitration between the US and Mexico.

In the initial dispute brought before the US-Mexican claims commission in 1870 the issue was whether bishops in Upper California (ceded in 1848 to the US after the US-Mexican war of 1846) were entitled to annual interest payments from a « Pious Found of the California's » established in the 17th century. Such claim was upheld by the decision of an umpire in 1875. Upon payment of this sum in a accordance with the arbitral decision Mexico considered the US to be satisfied and refused to continue making annual payments. The US demand for further payments become the subject of the first arbitration before the permanent court of Arbitration in The Hague. In its 1902 award the arbitral tribunal held that the earlier award by the umpire in 1875 constituted res judicata between the parties in the matter. As a result, Mexico's obligation to make payments to a « Pious Found of the California's » could not be questioned again. The decision demonstrates a positive and a negative effect of res judicata. Because the umpire's decision of 1875 was final and binding(positive effect),it could not be re-litigated in 1902 (negative effect). In the words of the tribunal « all the parts of the judgment [...]serve to [...]determine the points upon which there is res judicata and which thereafter cannot be put in question». With regard to res judicata in general the arbitral tribunal added that:« this rule applies not only to the judgments of tribunals created by the state, but equally to arbitral sentences rendered within the limits of the jurisdiction fixed by the compromise»(Reinisch,2004: p.45).

In a similarly broad fashion, the arbitrators in the trial semester case, the well-known Canadian-US arbitration over border emissions which have become a celebrated precursor of international environmental litigation, stat:« that the sanctity of res judicata attaches to a final decision of an international law »(Trial , 1941. p.1950). In his famous dissenting opinion in the Chorzow factory case before the permanent court of international justice(PCIJ)judge Anzillotti referred to res judicata as one of the general principles of law recognized by civilized nations (P.C.I.J.1927: p.27) in the sense of Article 38 of the PCIJ statute, now Article 38 of the statue of the ICJ.

The ICJ has also repeatedly recognized and applied the principle of res judicata. For instance, in the 1960 Arbitral Award case (I.C.J.Reports 1960: para.192) the world court rejected a challenge to an arbitral award rendered in 1906 by the king of Spain in a boundary dispute between Honduras and Nicaragua. Instead, the ICJ considered the award a res judicata between the parties. In the UN administrative tribunal case, which dealt with the power of the UN general assembly to establish an administrative tribunal competent to hear staff disputes, the ICJ referred to res judicata as a well established and generally recognized principle of law(I.C.J.Reports,1954: p.53). In its most recent practice the ICJ has relied on the res judicata principle in a matter of course fashion without even stating that it considers this rule a general principle of law.

For instance, in the request for interpretation of the judgment of 11 hune 1998 in the land and Martine Boundary case between Cameroon and Nigeria (I.C.J. Reports 1999: p.39) and in the boundary dispute between Qatar and Bahrian case(I.C.J. Reports 2001: para.303) the validity of the res judicata principle was taken for granted. In a sense also article 59 of the statute of the ICJ , according to which the decision of the court has no finding force except between the parties and in respect of that particular case, can be viewed as an affirmation of the res judicata principle (Chang, 1953: p.340-341). Although this prevision was mainly intended to exclude the possibility of a common law type doctrine of binding precedent or stare decisis(Shahabudden, 1996: p.99), it clearly reaffirmed the principle that the parties are bound by a judgment in respect of a particular case .also in arbitral proceedings such as the 1978 channel Arbitration (UK V.France,1977: p.271) between France and the UK concerning the delimitation of the continental shelf, res judicata was recognized.

The arbitral court considered it to be well settled that in international proceedings the authority of res judicata attaches (UK V.France,1977: p.2-95) to decisions like the earlier arbitral award of 1977 in the same matter. As Bin change put it succinctly, «there seems little, if indeed any question as to res judicata being a general principle of law or as to its applicability in international judicial proceedings » (Chang, 1953: p.336) this view is shared by Clive parry who said that: «there is invariably in municipal legal systems a doctrine to the effect that once a matter is judicially determined that matter may not be litigated again by the same parties or parties in the same interest.

This doctrine, commonly called res judicata, applies equally to international arbitral tribunals and judicial decision(Parry,1986: p.339).

The European court of justice (ECJ) has also relied upon res judicata in declaring action inadmissible in cases that have already been decided by previous judgments although the court's rules of procedure do not expressly refer to res judicata (Parry,1986: p.339).

Broadly speaking, there are four preconditions for the doctrine of res judicata to apply in international law, namely proceedings must: (i)

Have been conducted before courts or tribunals in the international legal order ;(ii) involve the same relief; (iii) involve the same grounds; and (IV) be between the same parties.

III.SAME LEGAL ORDER

Res judicata in international law relates only to the effect of a decision of one international tribunal on subsequent international tribunal.

International dispute settlement organs are not considered to be bound by decisions of national courts tribunals. Included in the same legal order are tribunals established under treaties and mixed arbitration tribunals (between private investors and host states) (Lasok, 1994: p.50).

IV.IDENTITY OF RELIFE

Res judicata applies only if the «object»or«petitum»of two claims are the same (Chang,1953: p.340). Whilst this requirement is said to apply strictly, «claim splitting»will not always be accepted (for example, by first seeking restitution in integrum and later in separate proceedings seeking monetary compensation) (Chang,1953: p.344).

V.IDENTITY OF GROUNDS

For Res judicata to apply, the «cause»or«grounds»or «causa petendi»of the two claims must also be the same(Chang,1953: p.345). is not uncommon that acts and omissions of states (or other international actors) are subject to more than one treaty instrument, actions brought under different instruments constitute different «cause». In some cases, however, this might be an ratification, for example if the legal obligation (e.g. not to expropriate an investment) is the same.

In the southern Bluefin case (2000),an arbitral tribunal under the 1982 UN convention on the law of the sea(«UNCLOS») had to determine whether a dispute about Japanese finishing practices was to be settled under the convention for the conservation of southern blufin TUNA1993(«CCSBT»)or also under UNCLOS. In the course of assessing the character of the legal dispute at issue, the UNCLOS tribunal stated: «The parties to this dispute... are the same parties grappling not with two separate disputes but with what in fact is a single dispute arising under both convention. To find that, in this case, there is a dispute actually arising under UNCLOS which is distinct from the dispute that arose under the CCSBT would be artificial» (Australia and New Zealand v. japan, 4 August 2000: para.54). A number of commentators favor an approach that looks at the underlying nature of a dispute and not at its formal classification(Reinisch,2004: pp.64-70). However, the authorities seem to be divided on this issue.

For instance, the tribunal in CME CZECH Republic BV V THE CZECH republic (2003) indicated that claims brought under separate bilateral investment treaties by an investor and its controlling shareholder, concerning the exact same alleged acts of expropriation, constituted separate causes (CME Czech republic BV v. the Czech republic, final Award, dated 14 march 2003. para.433). The CME tribunal quoted the tribunal in the MOX plant case (2001), which stated that:«the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, inter alia, differences in the respective contexts, objects and purposes, subsequent practice of parties and travaux preparatoires» (The mox plant case (Ireland v. UK), request for provisional measures, ITLOS, case no. 10,3 december 2001: para.51). The CME tribunal also noted that:«Moreover, the fact that one tribunal is competent to resolve the dispute brought before it does not necessarily affect the authority of another tribunal, constituted under a different agreement, to resolve a dispute even if it were the same dispute» (CME Czech republic BV v. the Czech republic, final Award, dated 14 march 2003. para.435). In contrast to the possibility of multiple claims brought under the same or various investment treaties in respect of the same investment, article 1121 of NAFTA precludes an investor from bringing a NAFTA claim against one of the NAFTA parties while he (or an enterprise that he«owns or controls») simultaneously brings another claim arising out of the same governmental measure (Dodge,2000: p.366).

VI.IDENTITY OF PARTIES

«Identity Of The Parties» is unequivocally stated as a requirement for the application of res judicata in a almost all of the international precedents(waste management inc v. mexico (mexico's preliminary objection), ICSID, decision dated 26 June 2003,41 ILM 1315. para.39). International tribunals have not always taken a very strict approach, however.

Arbitral tribunals operating under the auspices of ICSID have on occasions followed an «economic approach »with regard to jurisdiction(Schreuer, 2001: p.216).

It may be argued that if such an economic approach is accepted for jurisdictional purposes, the same standard should also be applied for purposes of res judicata: otherwise individual companies of a corporate group (constituting a single economic entity) might avail themselves of the possibility to endlessly re-litigate the same dispute under the disguise of formally separate legal identities.

Other fields of modern international economic law have adopted a similar «economic or realistic approach»VIS-À-VIS corporate entities by Focusing on the underlying economic realities instead of the formal legal structure of corporate groupings, for example in EC competition law (case 48169 ICI v. commission (dyestuffs case), ECR 679,1972: para.133).

However, the tribunal in *CME Czech republic BV v the Czech republic*, applying international law, held that *res judicata* did not apply to the earlier award made by the tribunal in *lauder v the Czech republic* because, *inter alia*, the claimants in each arbitration were different (albeit that Mr lauder was the controlling shareholder of CME) (*CME Czech republic BV v. the Czech republic*, final Award, dated 14 march 2003. para.432).

The tribunal stated that: «only in exceptional cases, in particular in competition law, have tribunals or law courts accepted a concept of a «single economic entity», which allows discounting of the separate legal existences of the shareholder and the company, mostly, to allow the joining of a parent of a subsidiary to an arbitration. Also a «company group» theory is not generally accepted in international arbitration (although promoted by prominent authorities) and there are no precedents of which this tribunal is aware for its general acceptance. In this arbitration the situation is even less compelling. Mr Lauder, although apparently CME media Ltd, the claimant's ultimate parent company, is not the majority shareholder of the company and the cause of action in each proceeding was based on different bilateral investment treaties. This conclusion accords with established international law (*CME Czech republic BV v. the Czech republic*, final Award, dated 14 march 2003. para.436).

VII.RES JUDICATA EXTENDING BEYOND DISPOSITIF

The debate whether *res judicata* attaches to the entire decision including its reasoning or to the ruling or dispositive only also occurs in reselect of international law decisions (Scobbie, 1999: p.303). In the channel Arbitration (1978), the tribunal stated that although *res judicata* «attaches in principle only to the provisions of [the decision's] dispositive and not to its reasoning», it was equally clear that «having regard to the close links that exist between the reasoning of a decision and the provisions of its dispositive, recourse may in principle be had to the reasoning in Order to elucidate the meaning and scope of the dispositif »(UK V.France,1977: p.2-95). Professor Vaughan law notes that to have *res judicata* effect, it is not necessary that a particular finding be «executed»by the ordering of action in implementation in the dispositit, and that it is enough that the finding be clearly determination by the tribunal(Lowe, 1996: p.40).

Concerning the ECJ, it has been said that the «extent of the effect of *res judicata* is defined by reference to the operative part of the judgment and to the reasoning in the judgment which supports it. The effect covers only those questions of fact and law actually or necessarily decided in the judgment » (Lasok, 1994: p.220).

VIII. INTERNATIONAL ARBIRATION

The binding effect of arbitral awards is prescribed by many institutional rules.

For example, article 28(6) of the ICC Rules provides: «each award shall be binding on the parties. By submitting the dispute to arbitration under these rules, the parties under take to carry out any award without delay... »

The LCIA rules, article 26.9, and the UNCITRAL rules, article 32(2), provide that the award shall be «binding».such provision confirm the positive *res judicata* effect of an award. It might also be said that by agreeing to arbitration pursuant to such rules, the parties accept the negative *res judicata* effect of any valid arbitral award.

Moreover, the ICC rules prescribe, in article 25(2) that an award shall «state the reasons upon which it is bases».other institutional rules have similar provisions (e.g. LCIA article 26.1 UNCITR article 32.3).

Veeder QC has argued that the upshot of ICC Articles 25(2) and 28(6), and similar provisions in the other rules, is that the «award»includes« the reasons» and that therefore the reasons are also final binding (Veeder QC, 2003: p.73).

1. UNCITRAL MODEL LAW

Article 35(1) of the Uncitral model law in international commercial arbitration states that an arbitral award, irrespective of the country in which it was made, shall be recognizes as binding. Thus, the *res judicata* effect of arbitral awards is recognizes. The legislative history of the Model law indicates.

That it was debated whether the binding effect of awards should be clarified as to mean only between the parties to the award; however, this was considered not to be necessary and the effort was abandoned(Holtzmann & Neuhaus, 1989: pp.1010-1011). The Model LAW does not expressly address whether an award can be set aside, or its enforcement refused, if it is inconsistent with an decision in the forum that is *res judicata*.

2. NATIONAL LAWS

A number of civil law jurisdictions expressly recognize in legislation that arbitral awards have *res judicata* effect. Professor schlosser has observed that: «Nowhere in a statue of a common law country is it stated than an arbitral award has *res judicata* effect like a judgment. Nevertheless, the *res judicata* effect of an award is well established by case law jurisdictions »(Schlosser, 2001: p.21).

3. New York Convention

Article 3 of the1958 New York convention 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 under the conditions

laid down in the following articles.» this provision recognizes that an arbitral award has *res judicata* effect, but the convention does not expressly address what an enforcement court should do if faced with more than one decision concerning the same dispute.

4. Arbitral practice

Arbitral awards are generally regarded as having *res judicata* effect, to a greater or lesser extent (Sammartano, 2001: pp.787-797). There are many reported cases where commercial arbitral tribunals applied *res judicata* principles (Hanotiau, 2003: p.43). To take just example, a recent Swiss award (2002) held that « it is settled law by now that an arbitral sitting in an international arbitration in Switzerland must apply the same rules as would a Swiss court in matters of *res judicata* » (A.V.Z., Order, 2003: p.810).

5. Res judicata extending beyond dispute

ICC case Nos 2745 and 2762 (1977) may be cited as examples of application of the extended doctrine. These cases involved chain sales contracts. In ICC case No. 1762 (1970), the first buyer in the chain was held to be liable to the subsequent in the chain. In motivation (but not in the dictum) of the award, it was held that the first buyer could not invoke force majeure or breach by further companies in the chain to escape from liability. When the subsequent party was sued in ICC case No. 2745 by the following party in the chain, it brought case No. 2762 against the first buyer seeking to be held harmless if it were to be found liable. The case being joined, the arbitral tribunal held that it was bound by the prior ICC award in case No. 1762 disposing of the relationship between the same parties as in case No. 2762 in the opinion of the tribunal, it would be paradoxical not to be bound by another prior ICC award. Also, the tribunal sitting in Paris held that *res judicata* was to be determined in accordance with French concepts, being the law of the place of the arbitration chosen by the parties. German law as the law of the sales contract was not to be applied. The larger French notion of *res judicata* extending to the elements of the reasoning which form the necessary support for holding was followed rather than the stricter German concept of the dictum only. A similar conclusion was reached in ICC case No. 3267 (1984). A tribunal chaired by Professor Reymond, applying Swiss law, when asked to consider *res judicata* effect of its earlier partial award, held that « the binding effect of its first award is not limited to the content of the order there of 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 » (Collection of ICC Arbitral Awards 1974-1985, 1990: pp.326-330).

IX. CONCLUSION

The procedural principle of *res judicata* has also been suggested as being useful for dealing with the danger of conflicting decisions by courts.

The use of such principle in the legal systems originates from « requirements of good order that are applicable to each and every judicial system » (Lowe, 1999: p.202). This principle is widely used in domestic systems and its appropriateness of its application to the international legal system is being explored at the wake of the multiplicity of international courts and tribunals. In general, this judicial principle is meant to maintain judicial economy, promote legal security, and avoid conflicting judgments (Reinisch, 2004: p.44). As indicated above, the principle of *res judicata* is said to have both positive and negative effects. The positive effect entails that a judgment or award is final binding between the parties and should be implemented, subject to any available appeal or challenge. On the other hand, the negative effect, this applies in criminal law, entails that the subject matter of the judgment or award cannot be re-litigated a second time, also referred to as *ne bis in idem* and as prohibition of double jeopardy. While the negative sense is applicable to criminal case, for civil cases including international litigation, *res judicata*, is the most appropriate in its positive sense of finality. Therefore, the existence of *res judicata* means judgments of courts are final and could not be reopened, obviously by the court that rendered the judgment, and by other courts. The fact that *res judicata* is also accepted as a general principle in international law means that it is binding on international courts and tribunals, even if their constitutive instrument says nothing about it.

Furthermore, the principle of judicial comity requires tribunals not to reopen cases that are completed otherwise, a court that does open cases finalized opened elsewhere may find its own cases being reopened.

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