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## Res Judicata: An Analysis for the Sake of Public Policy

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The principle of *res judicata* is a universal principle recognized by the legal systems of all civilized nations. The *res judicata* principle should be applied by arbitral tribunals as the arbitral tribunals are alternative to the courts and when an award is enforced it becomes a part of the legal order of the country where it is enforced.<sup>1)</sup> The reflection of this doctrine in international arbitration is that where the matter in dispute has already been decided by a national court or by an earlier arbitrator, it should be barred by law as the existence of two enforceable awards on the same issue, between the same parties would be contrary to procedural public policy.

Although the *res judicata* doctrine is not codified in some countries' laws, it is established and recognized by case law. For instance, under [Article 190\(2\)\(e\) of the Swiss PIL](#), if the award is incompatible with public policy it is a reason for annulment.<sup>2)</sup> Not every violation of the mandatory laws of a country constitutes a violation of public policy, but rather only a violation of the fundamental rules of a country's legal system. The only case where a violation of procedural public policy was affirmed until 2013 under Swiss Law concerned an award that disregarded the fundamental procedural principal of *res judicata*.<sup>3)</sup> Therefore, under this doctrine, a tribunal should be barred from deciding in the event there is a final, conclusive and binding judgment or arbitration award regarding the same cause of action, with the same claims and between the same parties.

This principle was recognized in a [Swiss Federal Supreme Court Decision rendered in 2001 \(4P.37/2001\)](#) where the Supreme Court held that two contradicting decisions on the same subject matter between the same parties both of them enforceable within a specific legal order would be contrary to public policy.

Similarly, on 13 April 2010, the [Swiss Federal Supreme Court \(Decision 4A\\_490/2009\)](#) explained the obligation of an arbitral tribunal in respect of *res judicata* and emphasized that an arbitral tribunal sitting in Switzerland violates procedural public policy if it renders an award without taking into account the *res judicata* effect of a prior award or judgment between the same parties.

Four years later, the [Swiss Federal Supreme Court held, in a decision dated 27 May 2014 \(4A\\_508/2013\)](#), that an award issued by an international arbitral tribunal seated in Switzerland that disregards the preclusive effect of an earlier state court judgment or arbitral award violates the principle of *res judicata*, and breaches procedural public policy within the meaning of Article 190(2)(e) of the Swiss PIL. The Federal Court also stated that if in such a case the arbitral tribunal must hold the request inadmissible.

There are divergent views as to what constitutes the “subject matter of a dispute”. Some of the scholars suggest that it is comprised of the legal rule relied upon by a party as the legal basis of the claim. Some scholars defined it as the relief sought in the parties’ submissions and others suggest that the subject matter of a dispute comprises both the parties’ claims and the set of facts relied upon in support of the claims.

The Swiss Federal Court defined it as facts relied upon in support of the claim without reference to legal grounds, where it emphasized that the identity must be understood from a substantive and not grammatical point of view and that the *res judicata* effect extends to all the facts existing at the time of the first judgment, whether or not they were known to the parties, stated by them, or considered as proof by the first court. The Court concluded that ***“A new claim, no matter how it is formulated, will have the same object as the claim already adjudicated even if it appears to be its opposite or if it was already contained in the preceding action, such as a claim decided on the merits in the first litigation and presented as a preliminary issue in the second.”***

Another condition for *res judicata* is “*being capable of enforcement*”. As correctly described by the scholars, the logic behind this is that if the award does not meet the conditions for the enforcement, there would not be any risk for two enforceable conflicting decisions. In other words, a foreign judgment can never have effects in a country’s law that would not equally be available to a country’s domestic judgment. Therefore, the arbitral tribunals should carefully analyze whether the foreign state court judgment or foreign arbitral award meet the conditions of recognition as per the place of arbitration’s law.<sup>4)</sup>

It is accepted by Swiss scholars and by the Federal Court decisions that an arbitral tribunal with its seat in Switzerland may decide itself on the recognition of the foreign judgment subject to [Article 25 and 27 of Swiss PIL](#) or award as a preliminary issue before determining the *res judicata* effect in accordance with Art. 29(3) of the Swiss PIL.<sup>5)</sup>

In particular, the final [International Law Association Committee \(ILA\) Report on Res Judicata and Arbitration](#) identified the requirements for the application of the *res judicata* doctrine between arbitral tribunals. One of the requirements is a prior award that is final and binding and capable of recognition in the country where the arbitral tribunal of the subsequent arbitration proceedings has its seat. Where a request for recognition or enforcement has already been brought at the arbitral seat, the arbitral tribunal may deem it appropriate to await the enforcement court’s decision. However, where no such request has been brought, the arbitral tribunal have to determine whether the prior judgment was issued by a court that had jurisdiction in the international sense in accordance with [Article II \(3\) of the New York Convention on the Enforcement and Recognition of Foreign Arbitral Awards](#) and is capable of recognition at the arbitral seat.<sup>6)</sup>

In a recent decision of the [German Federal Court of Justice \(Bundesgerichtshof Beschluss\)](#) of [October 2018](#), the Court decided that a violation of *res judicata* not only occurs when a tribunal disregards that it is bound by the *res judicata* effect of an award or judgment rendered in a separate proceeding, but also where a tribunal incorrectly assumes to be bound by a decision or award rendered in a separate proceeding. The Court held that the underlying idea of this decision is due process, as one may be prevented from bringing a claim which it is entitled to pursue in court or arbitration in violation of German public policy under the [German Code of Civil Procedure Section 1059\(2\)](#).

Notwithstanding the arbitral tribunals' duty to carefully analyse whether they are bound by a previous award or court decision, the arbitrators' decision as a result of this analysis may be taken to the court for its review during the annulment. In fact, this was the case in the *Boxer Capital Corp. v. JEL Investments Ltd*<sup>7)</sup> decision of the British Columbia Court of Appeal where the court was asked to examine arbitrator's decision on not being bound by the earlier award of a previous arbitrator or the decision of the judge who heard an appeal from that earlier award. The Appeal Court decided that this is not purely a questions of *res judicata* but in fact it is a review of the arbitral tribunal's decision. The Appeal Court held that the court could only interfere with the tribunals jurisdiction when there is a complete loss of jurisdiction or a clear breach of a law as a result of the arbitrator's erroneous decision.

In other words, the court should respect the arbitrator's decision on the applicability of the *res judicata* doctrine. However, the arbitrators should conduct their analysis diligently when assessing the conditions of *res judicata* and limiting their powers accordingly as their incorrect decision as to be bound by an earlier award or judgment would also violate public policy.

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