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Avoiding Res Judicata – Collateral Estoppel Pitfalls in Multi-Fora Disputes

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A slate of recent cases reminded us how important are the doctrines of *res judicata* and/or collateral estoppel. Put simply, *res judicata* is known as claim preclusion because a judicial judgment or arbitral award deciding a particular "claim" will be binding on the parties who participated in that proceeding, whereas collateral estoppel is known as issue preclusion because a party is prevented from re-litigating with another party an issue of fact or law that was previously addressed and dealt with in a prior litigation. Both doctrines, as we will see in this post, are instrumental in multi-fora disputes: that is when parties or related parties engage in separate proceedings (either in parallel or in sequence) on related issues and claims.

Anticipate Multiple Battlegrounds

More often than not, multilateral transactions do not have the benefit of a multi-party arbitration clause that can encapsulate all the ways in which parties or related parties will litigate issues of fact and law in one or more settings. In this scenario, any lawyer dealing with a multilateral transaction and/or multiple parties should anticipate that a party (or a related party to a transaction) will at some point either attempt to initiate a new litigation to relitigate the parties' previous dispute and/or attempt to litigate new claims relying on similar or identical issues of fact and law as the ones addressed in a prior litigation.

Faced with the likelihood of multiple proceedings, and provided there are no jurisdictional issues at play, one should consider first some pre-emptive ways to avoid any potential pitfalls of *res judicata* and/or collateral estoppel. This can be done with mechanisms that can provide for (i) a consolidated forum to litigate disputes or (ii) some sort of protection that would allow for issues and claims to be dealt with in different fora. To this end, one should consider:

1. drafting a post-hoc arbitration agreement that will allow for all issues and claims to be dealt with in a single forum. This of course will require all of the parties' (and related parties) consent, which could be tricky if non-signatories are involved.
2. using institutional rules' mechanisms for consolidation of arbitrations or joinder of multiple parties.
3. appointing the same arbitrators if separate arbitrations are unavoidable.

4. raising *lis pendens* arguments, such as *forum non conveniens*, abuse of process, or requesting an anti-suit injunction to avoid parallel proceedings. While each have different goals, the overall purpose of *lis pendens* arguments or anti-suit injunction is to convince a court or arbitral tribunal to either stay the proceedings, decline their jurisdiction, or restrain the parties from seizing other courts.

There are other mechanisms as well, but these are particularly relevant in the context of parallel litigations before national courts (such as third party notices and intervention) or in the context of parallel litigations before national courts and arbitral tribunals (such as arbitration laws in treaties and/or national laws that deal with these specific instances). For the sake of brevity, these are not addressed here.

Be Aware of Your Surroundings

Res judicata and collateral estoppel really come into focus when multi-fora disputes are inevitable. In these circumstances, the quintessential issue is whether the multi-fora disputes entail the application of the doctrines of *res judicata* and/or collateral estoppel from a civil law or a common law perspective (sometimes even transnational law). Likewise, one should be particular cognizant of which law will ultimately be applicable to the *res judicata* and collateral estoppel issues, as this will greatly influence your legal strategy if the multi-fora disputes are running in parallel or if one can reasonably anticipate which forum will be the last to hear the related issues or claims subject of the multi-fora disputes.

For example, if a party is facing parallel arbitrations with the same parties regarding similar or identical claims and/or issues of fact or law, the prudent course of action would be to withdraw without prejudice from one proceeding and focus all issues and claims in the remaining proceeding. Things, however, get complicated if the party not seeking withdrawal refuses to terminate one of the proceedings unless the party seeking withdrawal does so with prejudice. This is because a dismissal with prejudice, even if the case was not argued at all, could have a *res judicata* effect on any subsequent proceeding brought by the same parties regarding similar or identical issues and claims.

This is particularly the case in civil law systems, where most civil law jurisdictions apply a restrictive approach to *res judicata*. In essence, civil law jurisdictions recur to what is commonly known as the “triple identity” test, which will be met when the same parties submit the same claims relying on the same facts or legal grounds. In addition, and with respect to the same claims and same facts or legal grounds, certain civil law systems, like Switzerland, apply an even more restrictive approach as some jurisdictions only look at the dispositive portions of the decision or award, while others, such as Belgium and France, might look into the reasoning as well. This means that *res judicata* applies only to the judgment’s holding, that is what has been judged (granted or denied), and the reasons of the judgment have no binding effect whatsoever on this assessment (but may be used in certain circumstances to assist the analysis for purposes of understanding the judgment’s holding). And in some limited cases, certain civil law systems might apply a form of common law collateral estoppel (as explained below), which requires a party to assert all claims arising from the same nucleus of facts or legal grounds in one proceeding. If a party does not, any subsequent claims based on that nucleus of facts or legal grounds will be precluded.

Against this backdrop, and in the presence of different parallel arbitrations applying different civil law principles of *res judicata*, it is imperative to know which civil law system will be the most favorable for a party if that party were to withdraw with prejudice from one of the proceedings; or if it could reasonably anticipate which proceeding will end first. By favorable I mean designing a legal strategy that would ensure that any *res judicata* defense heard by a subsequent tribunal would force that tribunal to apply the most restrictive and narrow application of *res judicata*, thus making it hard for that subsequent tribunal to dismiss a party's claims.

The "plot thickens" when common law jurisdictions are involved. Contrary to civil law jurisdictions, common law systems like the United States (New York in particular) tend to make a clear distinction between claim preclusion (i.e. *res judicata*) and issue preclusion (i.e. collateral estoppel). Issue preclusion essentially means that a party will be prevented from re-litigating with another party to a previous proceeding (or even a related third party), an issue of fact or law that was addressed and dealt with in the prior proceeding.

The relevance of issue preclusion in multi-fora disputes was recently highlighted in the arbitral award in Lao Holdings v. Lao People's Democratic Republic of 11 August 2021. The recent award is the latest culmination in a decade-long multi-fora dispute that involved two treaty arbitrations and three commercial arbitrations between a series of related parties. In this most recent commercial arbitration, the tribunal was required to apply the doctrine of collateral estoppel under New York law. In doing so, the tribunal found that most of the claimants' claims in the latest commercial arbitration were barred under collateral estoppel, thereby dismissing them.

More specifically, the Tribunal found that the doctrine of collateral estoppel:

1. prevents "*re-litigation of an issue of law or fact that was raised, litigated, and actually decided by a judgment in a prior proceeding between the parties* […] *regardless of whether or not the two proceedings are based on the same claim*". (See Par. 137.)
2. applies between cases with different parties so long as the related parties are "in privity." In privity requires some connection between the related parties, be it as an agent, successor or any other form that will establish a relationship justifying preclusion. (See Par. 147.)
3. requires: (1) the presence of identical issues; (2) which are necessarily decided in the prior action; (3) and are decisive of the present action; and (4) whereby the party facing estoppel had a full and fair opportunity to contest the prior decision. (See Par. 157.)

After analyzing the above, the Tribunal found that all of these requirements were met. Of note, however, the Tribunal held that the requirement of identical issues does not need to amount to the exact same claims, so long as the issue decided "*by necessary implication*" in the first action is enough to preclude the second action. Therefore, collateral estoppel under common law systems provide greater latitude for barring a subsequent action than *res judicata* under civil law systems, particularly since neither identity of parties nor identity of claims is required; it is sufficient to have parties "in privity" and claims addressed, even by implication, between both proceedings.

Conclusion

In the presence of multi-fora disputes, always bear in mind that *res judicata* and/or collateral estoppel are just around the corner. This is certainly what recent experience has demonstrated, particularly when it is used as a sword to completely undermine subsequent proceedings between

identical or related parties. To avoid this, then, one should, as a measure of good practice, foresee the possibility of multi-fora disputes so that one can either (i) implement mechanisms early on that will allow for multiple proceedings to go unfettered; or (ii) be fully cognizant of the applicable jurisdictions at play so one can design the best legal strategy once faced with a *res judicata* or collateral estoppel defense. Either way, plan ahead and thread carefully!

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