

# ASA Bulletin

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# No Force of Res Judicata for an Award's Underlying Reasoning

Note on 4A\_633/2014 of 29 May 2015\*

BERNHARD BERGER\*\*

## I. Background

A. LLP is an international law firm seated in the United States. B. is a lawyer domiciled in Germany. A Business Combination Agreement (BCA) had been concluded between the Parties in 2008, by which the law firm C. was merged into A. LLP. The BCA was governed by German law and provided for ICC arbitration in Zurich, Switzerland.

In 2010, B. commenced ICC arbitration proceedings against A. LLP in which he sought an award ordering A. LLP to pay him the difference between (i) the yearly Floor Amount of EUR 2 million (as defined in the BCA) for the years 2009 and 2010, and (ii) the actual payments received for those years (the “**First Arbitration**”). The place of the First Arbitration was in Frankfurt, Germany, pursuant to the subsequent agreement of the Parties.

In 2011, the arbitral tribunal in the First Arbitration (the “**First Tribunal**”) rendered an award dismissing B.’s claims (the “**First Award**”). It reasoned that the Floor Amount is only due if and when the relevant Partner of the firm has fulfilled certain prerequisites for activities, devotion and performance, which B. had failed to comply with. These prerequisites were defined in Clause 5.3 of the BCA as follows:

*“5.3 The tier placements and Floor Amount set out in Schedule 5 for each Partner are agreed with the understanding that the respective Partner will continue as active partner of A. LLP devoting his/her full time and efforts to the business of A. LLP going forward consistent with his/her past practices and concentrations as a partner of [the C. firm], which is to be considered based on a holistic approach taking into consideration all relevant aspects (disregarding, however, past individual deviations from common standards, e.g. over- or underperformance in total or billable hours per year) including,*

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\* ASA Bull. 3/2015, p. 599. The Judgment will be published as BGE/ATF in the Swiss Federal Tribunal’s Official Collection of Decisions.

\*\* Dr. iur. (Berne), LL.M. (Harvard), Partner at Kellerhals Carrard, Basel/Bern/Lausanne/Zürich.

*among others, billable and total hours, availability, vacation, quality of work, turn-over from billable hours, general market conditions in a specific industry and potential effects of the business combination contemplated herein, it being understood that no single aspect alone shall be decisive and that it will be taken into account to which extent these factors are under the control of the respective Partner.”*

In 2013, B. commenced new ICC arbitration proceedings against A. LLP in which he sought an award ordering A. LLP to pay him the difference between (i) the yearly Floor Amount of EUR 2 million for the years 2011 and 2012, and (ii) the actual payments received for those years (the “**Second Arbitration**”). The place of the Second Arbitration was in Zurich, Switzerland, pursuant to the arbitration clause in the BCA.

On 29 September 2014, the arbitral tribunal in the Second Arbitration (the “**Second Tribunal**”) rendered an award by which it admitted B.’s claims in part and ordered A. LLP to pay him a portion of the difference between the Floor Amount and the sums actually received for the years 2011 and 2012 (the “**Second Award**”). The Second Tribunal determined that it was not bound by the reasons for the decision in the First Award. It noted that the First Tribunal had dismissed B.’s claims because its primary focus was on the prerequisites of “billable and total hours” and “turnover from billable hours”. However, the Second Tribunal considered that this interpretation was incompatible with the “holistic approach” as prescribed by Clause 5.3 of the BCA. Determining that B. had complied with the other prerequisites mentioned in Clause 5.3 of the BCA, the Second Tribunal decided that B. was in principle entitled to the Floor Amounts for the years 2011 and 2012 which, however, it reduced by close to 50% by application of § 254 BGB due to a contributory negligence of B.

By action for annulment submitted to the Swiss Federal Tribunal (the “**Federal Tribunal**”), A. LLP applied for the setting aside of the Second Award on the ground that the Second Tribunal has violated public policy by having disregarded the res judicata effect of the First Award.<sup>1</sup> The Federal

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<sup>1</sup> It should be noted that B. argued that the motion to set aside was inadmissible due to a waiver of annulment in terms of Article 192(1) of the Swiss Private International Law Statute (the “**PILS**”); and that B. and the Second Tribunal argued that the motion was inadmissible since A. LLP had failed to seek the annulment of the Tribunal’s Order No. 5 by which it had already dismissed the res judicata defence. These aspects of the Judgment will not be dealt with herein.

Tribunal dismissed the action for annulment by judgment of 29 May 2015 (the “**Judgment**”).<sup>2</sup>

## II. Summary of the Petitioner’s arguments

The arguments put forward by A. LLP (the “**Petitioner**”) in support of its res judicata defence as they appear from the Judgment can be summarized as follows:<sup>3</sup>

- The First Award was with prejudice for preliminary and sub-questions of the Second Arbitration, with the result that the Second Tribunal was bound by the final and binding determinations of legal and factual questions of the First Tribunal.
- In international arbitration proceedings, an international notion of res judicata should be applied rather than the traditional (Swiss) notion, with the result that, due to the special interests at stake for the parties to an international arbitration, the res judicata effect should be extended to the decisive underlying reasoning of the First Award. The latter would follow, among other things, from the ILA Final Report on Res Judicata and Arbitration of 2006.<sup>4</sup>
- Therefore, the Second Tribunal was bound by the findings in the First Award, pursuant to which the Floor Amount was only due to be paid if and when in the relevant year the prerequisites of “billable hours” und “turnover from billable hours” as per Clause 5.3 of the BCA were fulfilled.
- By finding that the failure to fulfill the prerequisites of “billable hours” and “turnover from billable hours” was insufficient to deny B.’s entitlement to the Floor Amounts, the Second Tribunal disregarded the res judicata effect of the First Award, and thereby violated public policy within the meaning of Article 190(2)(e) of the PILS.
- Even if one were to apply the traditional (Swiss) notion of res judicata, the Second Tribunal would have been bound by the underlying reasoning of the First Award, since the reasons of a decision may be with prejudice for subsequent proceedings, in particular in case of a dismissal of a claim.

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<sup>2</sup> Judgment 4A\_633/2014 of 29 May 2015 E.4.

<sup>3</sup> Judgment 4A\_633/2014 of 29 May 2015 E.3.1.

<sup>4</sup> Arb. Int. 25/1 (2009) p. 67 ss.

### III. Summary of the Federal Tribunal's considerations

The Federal Tribunal's reasons for rejecting the Petitioner's res judicata defence can be summarized as follows:<sup>5</sup>

- An arbitral tribunal violates public policy in the sense of Article 190(2)(e) of the PILS if it disregards the force of res judicata of an earlier decision.<sup>6</sup>
- The force of res judicata applies at the national and international level and governs in particular the relations between an arbitral tribunal seated in Switzerland and a foreign court or foreign arbitral tribunal. An arbitral tribunal seated in Switzerland is thus required, when confronted with a res judicata defence arising from a foreign arbitral award, to examine, as a first step, whether such foreign award can be recognized in Switzerland, pursuant to Article 194 of the PILS and the relevant provisions of the New York Convention.<sup>7</sup>
- If so, unless an international treaty provides otherwise, the question whether a foreign arbitral award has the force of res judicata for a claim brought before an arbitral tribunal seated in Switzerland is to be determined in accordance with the *lex fori*, i.e. the relevant legal principles on the force of res judicata developed by the Federal Tribunal. Since the force of res judicata of a foreign decision as such is governed by the law of the country of its origin, its effect in Switzerland is defined by the prerequisites and limits of that foreign law, on one hand, and by the force of res judicata which an identical decision of a Swiss court or arbitral tribunal seated in Switzerland would have, on the other.<sup>8</sup>
- The latter means that the underlying reasoning of a foreign arbitral award cannot be attributed the force of res judicata in a subsequent arbitration seated in Switzerland: The legal principles governing the force of res judicata developed by the Federal Tribunal apply also in arbitration, with the result that in Switzerland the res judicata effect of an international arbitral award is limited to its dispositive part, and does not extend to its underlying reasoning. Therefore, the Petitioner's position that the res judicata effect of a foreign arbitral

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<sup>5</sup> Judgment 4A\_633/2014 of 29 May 2015 E.3.1.

<sup>6</sup> Judgment 4A\_633/2014 of 29 May 2015 E.3.2.1.

<sup>7</sup> Judgment 4A\_633/2014 of 29 May 2015 E.3.2.2.

<sup>8</sup> Judgment 4A\_633/2014 of 29 May 2015 E.3.2.3.



award should encompass the decisive reasoning of the decision cannot be followed.<sup>9</sup>

- Neither the alleged special interests at stake for the parties to an international arbitration, nor the desirability for internationally harmonized standards and transnational concepts, justify changing the legal situation. There is no legal basis for applying a wide notion of *res judicata* “based on a worldwide-spread concept of Anglo-American origin”, as suggested by the Petitioner. Moreover, the Petitioner ignores the fact that, first of all, the *res judicata* effect of a foreign arbitral award is defined by the prerequisites and limits of the law of the country of its origin. However, the Petitioner does not contend that the *res judicata* effect of the First Award, which was rendered in Frankfurt, would, as a matter of German law, go beyond the dispositive part and include the underlying reasoning.<sup>10</sup>
- The Petitioner also wrongly submits that, even if one were to apply the traditional (Swiss) notion of *res judicata*, the Second Tribunal would have been bound by the First Tribunal’s determinations as to the prerequisites for B.’s entitlement to the Floor Amounts. It is true that it was necessary for the Second Tribunal to analyze the underlying reasoning of the First Award in order to determine which claims of B. had been dismissed with prejudice, namely those for the years 2009 and 2010. But the Second Tribunal then correctly found that the claims brought before it were not identical with those in the First Arbitration, since they concerned the Floor Amounts for the years 2011 and 2012. Contrary to the Petitioner, the underlying reasoning of the First Award had no further binding effect; the interpretation of Clause 5.3 of the BCA concerned mere links in the chain of the First Tribunal’s legal analysis, which for itself do not become *res judicata*.<sup>11</sup>

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<sup>9</sup> Judgment 4A\_633/2014 of 29 May 2015 E.3.2.4.

<sup>10</sup> Judgment 4A\_633/2014 of 29 May 2015 E.3.2.5.

<sup>11</sup> Judgment 4A\_633/2014 of 29 May 2015 E.3.2.6.

## IV. Analysis and comments

### 1. Conflict of laws

When a court or arbitral tribunal is confronted with a plea of res judicata, the first question to be addressed is to find the law governing that issue.

The answer to the question seems relatively straightforward in a purely “domestic” context, i.e. a situation where the earlier decision on which the plea of res judicata relies was rendered by a court (or arbitral tribunal) based in the same jurisdiction as the court (or arbitral tribunal) seized with the second proceeding. In that scenario, there is no issue of conflict between different legal systems, since both the first and second proceedings are subject to the same legal framework. Also, in that case, there is no need for recognition of the earlier decision in the second proceeding. Rather, the relevant issues to be decided are limited to determining whether the earlier decision has become res judicata and, if so, whether the claim brought in the second proceeding is precluded by the force of res judicata of the earlier decision.

The answer is more complex if the plea of res judicata is raised in an “international” context, i.e. a situation where the earlier decision on which the plea is based was rendered by a court (or arbitral tribunal) based in a different jurisdiction. In that scenario, the first issue that arises is whether the earlier decision can be recognized in the second proceeding. This is so because, without recognition, there is no way of even considering whether and to what extent the earlier decision might have a preclusive effect on any matters to be decided in the second proceeding. Only if the earlier decision can be recognized, then the next issue is to identify the rules of law the court (or arbitral tribunal) in the second proceeding shall apply to determine whether and to what extent the earlier decision precludes the second dispute from being decided on the merits.

If so, should the court (or arbitral tribunal) in the second proceeding apply the principles of res judicata that the earlier decision would produce under the law in the country of its origin – i.e. the *lex loci decisionis*? Should the court (or arbitral tribunal), instead, apply the principles of res judicata that apply under the law of the jurisdiction in which it is located – i.e. the *lex fori* or *lex arbitri*? Or should the court (or arbitral tribunal), instead, apply some other law, e.g. the principles of res judicata that apply under the law governing the contract (*lex causae*), or some tailor-made concept of res judicata which it determines to be appropriate?

## 2. The significance of res judicata in Swiss arbitration law

In the case at hand, the Second Tribunal had its seat in Zurich, Switzerland. As such, the Second Arbitration was bound by the mandatory provisions of the Swiss *lex arbitri*, as codified in the 12<sup>th</sup> Chapter of the PILS. This means, among other things, that the Second Tribunal had to comply with those procedural principles which, according to the Federal Tribunal, are so fundamental that they form part of public policy within the meaning of Article 190(2)(e) of the PILS.

As early as in the *Fomento*-case of 2001, the Federal Tribunal had noted that it “is contrary to public policy that, in a determined legal order, two contradictory decisions on the same subject-matter between the same parties exist, which are equally and simultaneously enforceable (...)”.<sup>12</sup> In the *Aletico Madrid*-case of 2010, the Federal Tribunal thus emphasized that the “arbitral tribunal violates procedural public policy if, in its award, it disregards the force of res judicata of an earlier decision”.<sup>13</sup>

The latter case concerned an international arbitral tribunal seated in Lausanne, Switzerland, acting under the 12<sup>th</sup> Chapter of the PILS, which – as the Federal Tribunal decided – had disregarded the force of res judicata of an earlier decision of the Commercial Court of the Canton of Zurich, Switzerland. In that case, although neither party had its domicile in Switzerland, the plea of res judicata nevertheless concerned a purely “domestic” situation (as described above), since the earlier decision had been issued by the Commercial Court of the Canton of Zurich, and thus by a court based in the same jurisdiction (Switzerland) as the subsequently seized arbitral tribunal had its seat (Lausanne, Switzerland).

Later on, the Federal Tribunal had at least on two occasions the opportunity to address an “international” situation of res judicata in the arbitration context. In a recent leading case of 2014, an arbitral tribunal seated in Switzerland had to deal with a plea of res judicata that was said to arise from a foreign court judgment.<sup>14</sup> In a case decided on 26 February 2015, the plea of res judicata invoked before an arbitral tribunal seated in Switzerland arose from a foreign arbitral award, but that plea did not go to the merits because the Federal Tribunal ultimately found that recognition of the foreign award had to be refused.<sup>15</sup>

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<sup>12</sup> BGE 127 III 279 E.2b (ASA Bull. 3/2001, p. 544).

<sup>13</sup> BGE 136 III 345 E. 2.1 (ASA Bull. 3/2010, p. 511).

<sup>14</sup> BGE 140 III 278 (Judgment 4A\_508/2013 of 27 May 2014 (will be published in ASA Bull. 4/2015 with an article by Nathalie Voser and Julie Raneda).

<sup>15</sup> Judgment 4A\_374/2014 of 26 February 2015, ASA Bull. 3/2015, p. 576.

To the best of my knowledge, the case at hand<sup>16</sup> was the first time the Federal Tribunal actually had the opportunity to decide a situation involving a plea of res judicata invoked before an arbitral tribunal seated in Switzerland that was argued to originate from an earlier foreign arbitral award. Thus, it was the first opportunity to decide what effects such foreign arbitral award is capable of producing before the subsequently seized arbitral tribunal seated in Switzerland.

### **3. The concept of “controlled extension of effects”**

#### **a. Relevant principles of Swiss law**

It should be noted that the Federal Tribunal had established, in a judgment of 2011, well-settled terms to be followed by a Swiss court in case it is confronted with a plea of res judicata originating from a foreign arbitral award. These were summarized as follows:

- The conditions under which a foreign arbitral award can be recognized by a Swiss court are, pursuant to Article 194 of the PILS, those set forth in the New York Convention of 10 June 1958.<sup>17</sup>
- If the requirements for recognition of the foreign award are met, the latter will generally be treated like a domestic decision. This means in turn that the foreign award cannot unfold broader effects in Switzerland than in its country of origin; the recognition can only extend those effects of the foreign award to Switzerland that are existing in the country of origin, but it cannot create any new ones. On the other hand, the decision – once recognized – cannot have any other, significantly more extensive effects as compared to a corresponding domestic decision.<sup>18</sup>
- Consequently, the force of res judicata of a foreign arbitral award can produce effects in Switzerland only insofar as provided by the procedural law of the country in which that foreign award was rendered. Conversely, such force of res judicata cannot go beyond the preclusive effect of an identical decision rendered by an arbitral tribunal seated in Switzerland.<sup>19</sup>

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<sup>16</sup> Judgment 4A\_633/2014 of 29 May 2015.

<sup>17</sup> Judgment 4A\_508/2010 of 14 February 2011, ASA Bull. 1/2012, p. 108, E.3.2.

<sup>18</sup> Judgment 4A\_508/2010 of 14 February 2011 E.3.3.

<sup>19</sup> Judgment 4A\_508/2010 of 14 February 2011 E.3.3.

In other words, the Federal Tribunal made it clear in that judgment of 2011 that a Swiss court has to ascertain the force of *res judicata* of a foreign arbitral award in accordance with the same principles as applicable when the force of *res judicata* of a foreign court judgment is at issue. These principles are based on the well-established concept of “controlled extension of effects” (in German: *kontrollierte Wirkungserstreckung*; in French: *effet exécutoire contrôlé*), which means that, as a matter of Swiss law:<sup>20</sup>

- The *res judicata* effect of a foreign decision is governed by the procedural law of the country in which that decision was rendered; but
- The force of *res judicata* of the foreign decision in Switzerland cannot go beyond the preclusive effects that an identical “Swiss” decision would produce within Switzerland.

Hence, the ultimate bar for determining the *res judicata* effect that a foreign decision can produce in Switzerland is the notion of *res judicata* as established under Swiss law. This is so because the concept of “controlled extension of effects” means that:

- Where the notion of *res judicata* under the (foreign) law of the country in which the decision was rendered is narrower than under Swiss law, that narrower concept shall prevail; but
- Where the notion of *res judicata* under the (foreign) law of the country in which the decision was rendered goes beyond the Swiss notion, the latter shall prevail.

The concept of “controlled extension of effects” is widely accepted in Swiss legal writing on both international arbitration and civil procedure.<sup>21</sup>

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<sup>20</sup> For the concept of “controlled extension of effects”, see e.g. BGE 134 III 366 E.5.1.2 with further reference to BGE 130 III 336 E.2.5.

<sup>21</sup> *In the arbitration context*, see e.g. Paolo Michele Patocchi and Cesare Jermini, in: BSK-IPRG, 3<sup>rd</sup> edn. 2013, Art. 194 N 136; Andreas Bucher, in: CR-LDIP, 2011, Art. 194 N 12; Tarkan Göksu, Schiedsgerichtsbarkeit, 2014, N 2450 ss; Bernhard Berger and Franz Kellerhals, International and Domestic Arbitration in Switzerland, 3rd edn. 2015, N 1659-1664; Christian Josi, Die Anerkennung und Vollstreckung der Schiedssprüche in der Schweiz, Diss. Bern 2004, p. 8. Apparently contra: Martin Bernet and Philipp Meier, in: Geisinger and Voser (eds.), International Arbitration in Switzerland, 2013, p. 202, considering that recognition means “that the award is given the same effect in Switzerland as in its country of origin”. Also apparently in support of a concept of unlimited extension of effects (“*Wirkungsübernahme*”): Niklaus Zaugg, Verfahrensgliederung in der internationalen Schiedsgerichtsbarkeit – Wirkungsweise von Teil- und Zwischenschiedssprüchen unter dem 12. Kapitel IPRG, Diss. Luzern 2014, N 605 ss. *In the general context of civil procedure*, see e.g. Paul Volken, in: ZK-IPRG, 2nd edn. 2004, Art. 25 N 34 ss; Dorothee Schramm, Axel Buhr, CHK-Handkommentar zum Schweizer

In the already cited leading case of 2014, the Federal Tribunal decided that the concept of “controlled extension of effects” is to be applied by arbitral tribunals seated in Switzerland as well. As mentioned, that case concerned a plea of *res judicata* arising from a foreign court judgment.<sup>22</sup>

In the case at hand, the Federal Tribunal has now closed the “last gap” by deciding that the concept of “controlled extension of effects” also applies if an arbitral tribunal seated in Switzerland is confronted with a plea of *res judicata* arising from a foreign arbitral award.<sup>23</sup>

#### **b. Application to the case at hand**

In the present case, the Second Tribunal had its seat in Zurich, Switzerland. It had to determine whether or not the claim brought before it was precluded by the *res judicata* effect of the First Award, which had been rendered in Frankfurt, Germany. In deciding this issue, Swiss arbitration law required the Second Tribunal to apply the following test:

*First*, it had to examine whether the First Award can be recognized in Switzerland, pursuant to Article 194 of the PILS and the conditions for recognition set forth in the New York Convention. It appears that there was no dispute between the Parties as to the fact that the First Award was capable of being recognized.

*Second*, the Tribunal had to examine the *res judicata* effect that could be afforded to the First Award if an identical decision had been rendered in Switzerland. Referring to its well-established practice, the Federal Tribunal noted that the force of *res judicata* of a decision rendered in Switzerland is limited to its dispositive part, meaning that the underlying reasoning of the First Award could in any event not be attributed the force of *res judicata*.<sup>24</sup>

*Third*, the Tribunal had to assess the *res judicata* effect of the First Award under German law as the procedural law of the country in which the First Award was rendered. It follows from the Federal Tribunal's

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Privatrecht, 2<sup>nd</sup> edn 2012, Art. 25 N 1; Anton Schnyder and Manuel Liatowitsch, Internationales Privat- und Zivilverfahrensrecht, 3<sup>rd</sup> edn. 2011, N 354-357; Alexander Markus, Internationales Zivilprozessrecht, 2014, N 1320 ss; Daniel Staehelin, in: Sutter-Sohm, Hasenböhler and Leuenberger (eds), Kommentar zur Schweizerischen Zivilprozessordnung, 2<sup>nd</sup> edn. 2013, Art. 335 N 10. Adrian Staehelin, Daniel Staehelin and Pascal Grolimund, Zivilprozessrecht, Unter Einbezug des Anwaltsrechts und des internationalen Zivilprozessrechts, 2<sup>nd</sup> edn. 2013, § 28 N 12.

<sup>22</sup> BGE 140 III 278, (Judgment 4A\_508/2013 of 27 May 2014 (will be published in ASA Bull. 4/2015 with an article by Nathalie Voser and Julie Raneda), E.3.2.

<sup>23</sup> Judgment 4A\_633/2014 of 29 May 2015 E.3.2.3.

<sup>24</sup> Judgment 4A\_633/2014 of 29 May 2015 E.3.2.3 and 3.2.4.

considerations that there was no dispute between the Parties as to the fact that, as a matter of German law, the force of res judicata of the First Award did not go beyond its dispositive part.<sup>25</sup> Assuming, for the sake of the argument, that under German law the force of res judicata would extend to the underlying reasoning, the concept of “controlled extension of effects” would have required the Second Tribunal to give preference to the narrower Swiss notion of res judicata.

#### 4. The Swiss notion of res judicata

##### a. Relevant principles of Swiss law

As a matter of Swiss law, the concept of res judicata (*autorité de la chose jugée, materielle Rechtskraft*) of a decision prevents a court or arbitral tribunal from ruling a second time on the same subject-matter between the same parties. According to the Federal Tribunal, “[a] disputed claim is res judicata if it is identical with a claim that has already been decided in a final and binding manner.”<sup>26</sup>

This means that, according to Swiss law, a plea of res judicata is successful if, and only if, there is both (i) identity of the parties and (ii) identity of the subject-matter on which the new claim is based. The latter criterion is defined in narrow terms. It is based on the concept that preclusion only extends to the individualised claim, namely in the form as its final determination is expressed in the dispositive part (*dispositif, Tenor*) of the court judgment or arbitral award.<sup>27</sup> In other words, the force of res judicata does not extend to the underlying reasoning (*motifs, Urteilsgründe*) of the decision, which means that the underlying reasoning is subject to review and re-examination in any subsequent proceeding between the same parties (always provided that there is no identity of claims).<sup>28</sup>

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<sup>25</sup> Judgment 4A\_633/2014 of 29 May 2015 E.3.2.5. In other words, the result with regard to the issue at stake before the Federal Tribunal would have been the same even if the place of the Second Arbitration, like that of the First Arbitration, had been in Frankfurt, Germany.

<sup>26</sup> See, e.g. BGE 125 III 241 E.1.

<sup>27</sup> BGE 136 III 345 (ASA Bull. 3/2010, p. 511). E. 2.1 stating “[t]he force of res judicata is limited to the dispositive part”.

<sup>28</sup> BGE 121 III 474 E.4a: “The findings of fact and the legal considerations of a decision do not belong to the dispositive part. They have no binding effect in another dispute.” BGE 121 III 474 E.5b: “Even logically compelling deductions from the underlying reasoning of the court remain, if they are not expressed in the dispositive part, at best hypothetical reasons of the process of subsumtion, but do not take part in the res judicata effect of the decision.”

## **b. Application to the case at hand**

In the present case, the Second Tribunal seated in Zurich had to determine whether the First Award rendered in Frankfurt produced *res judicata* effects for the claim brought before it.

In view of the above, the Second Tribunal thus had to compare the subject-matter of the dispute that had been decided in the First Award with the subject-matter of B.'s claims in the Second Arbitration, and assess whether the latter claims were identical with the former. In so doing, the Tribunal first had to examine the dispositive part and, as admitted by the Federal Tribunal, then had to analyze the underlying reasoning of the First Award in order to find out that the claims in the First Arbitration had concerned the Floor Amounts for the years 2009 and 2010, while the claims in the Second Arbitration pertained to the Floor Amounts for the years 2011 and 2012. Consequently, and in fact uncontested by the Parties, it found that there was no identity of claims.<sup>29</sup>

Once the Second Tribunal had made this determination, its examination as to whether the First Award had the force of *res judicata* for the claims in the Second Arbitration ended there. As a matter of Swiss law, the First Award had no force of *res judicata* whatsoever for the decision to be made in the Second Arbitration, simply by reason of the fact that B.'s claims raised in the Second Arbitration were different from those he had raised in the First Arbitration. No identity of claim, no basis for a plea of *res judicata*.

## **5. No “special treatment” for international arbitration**

As already mentioned, the Federal Tribunal declined the Petitioner's proposition that “the special interests at stake in international arbitration” and “the desirability for internationally harmonized standards and transnational concepts” would per se warrant that a foreign arbitral award be afforded a wide notion of *res judicata*.

International harmonization is certainly a relevant concern, also with respect to the issue of *res judicata*.<sup>30</sup> However, as long as such harmonization does not flow from an international treaty, it would indeed seem awkward if the Federal Tribunal were to abandon well-established principles and,

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<sup>29</sup> Judgment 4A\_633/2014 of 29 May 2015 E.3.2.6.

<sup>30</sup> For such harmonization proposals, see e.g. the ILA Final Report on *Res Judicata* and Arbitration of 2006, *Arb. Int.* 25/1 (2009) p. 67 ss; Berger and Kellerhals, *op. cit.* (fn. 21), N 1666 ss.



instead, create a “special regime” exclusively tailored to be applied by international arbitral tribunals seated in Switzerland when confronted with a plea of *res judicata* arising from a foreign arbitral award.

It should not be ignored that arbitration (including international arbitration) does not take place in a “no man’s land” but is always seated in, or linked to, a particular jurisdiction. If, as in Switzerland, compliance by an international arbitral tribunal with the principles of *res judicata* is a requirement of procedural public policy, it cannot therefore be left to the arbitral tribunal to determine itself the “rules” it deems appropriate to comply with public policy in terms of Article 190(2)(e) of the PILS.

As for the Federal Tribunal, when defining the scope and limits of *res judicata* within the ambit of Article 190(2)(e) of the PILS, it must keep in mind that the notion of public policy “does not seek to protect the Swiss legal system”.<sup>31</sup> But the Federal Tribunal shall also consider that it is located “in a country linked to a particular civilisation, where certain values are favoured over others”, and called to shape the notion of public policy subject to the “sensitivities and the essential values on which that civilisation is formed”.<sup>32</sup>

In view of the above, and in the absence of evidence that the prevailing fundamental rule in all civilised nations is that the underlying reasoning of an arbitral award has the force of *res judicata*, the Federal Tribunal therefore rightly declined to accept a “broader” notion of *res judicata* as argued by the Petitioner, and correctly reverted to the concept of *res judicata* that prevails in Switzerland.<sup>33</sup>

Beyond this, it is suggested that the result of the narrow notion of *res judicata* as applied by the Federal Tribunal was not inappropriate in the circumstances of the case at hand. If different claims are at issue in the subsequent proceeding (the Floor Amounts for the years 2011 and 2012 as opposed to those for the years 2009 and 2010), there is a priori no risk for two conflicting decisions on the same subject-matter. Therefore, there is also a priori no compelling reason to find that the successful Party of the

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<sup>31</sup> BGE 132 III 389 (ASA Bull. 2/2006, p. 363) E.2.2.2.

<sup>32</sup> BGE 132 III 389 (ibid) E.2.2.2.

<sup>33</sup> In Berger and Kellerhals, *op. cit.* (fn. 21), N 1671 it has been cautiously suggested that a Swiss court or arbitral tribunal seated in Switzerland might take inspiration from the (broader) notion of the conclusive and preclusive effects as described in the ILA Final Report on *Res Judicata* and Arbitration when determining the binding effects of an international arbitral award. In light of the reflections hereinabove, it became clear that this “recommendation” is difficult to be maintained. This does not mean that harmonization in the field of *res judicata* remains desirable and should be pursued.

First Arbitration (A. LLP) should have been entitled to have the claims in the Second Arbitration dismissed relying on the First Tribunal's contractual interpretation. The First Tribunal's approach may have been wrong on the facts and/or the law, i.e. on issues which, in many arbitral jurisdictions, nowadays are not subject to any meaningful judicial review. Keeping also this in mind, it does not seem unfair or inequitable that B. had a "second chance" to obtain a "better result" on the contractual interpretation of Clause 5.3 of the BCA in the Second Arbitration. It is suggested that these concerns of fairness are not ousted by other valid considerations such as, e.g. the concern for the policy objectives of procedural efficiency and finality.

For completeness, it should be noted that the Second Award could not have been challenged at all if the Second Tribunal, based on its own autonomous contractual interpretation, had come to the same conclusion as the First Tribunal, namely that the claims for the 2011 and 2012 Floor Amounts should be dismissed because B. had missed the targets in relation to "billable and total hours" and "turnover from billable hours". However, as mentioned, that was not the case, since the Second Tribunal concluded that this would have been incompatible with the "holistic approach" stipulated in Clause 5.3 of the BCA.

After all, the Federal Tribunal seems to have left open some room for further debate in that it noted that the contractual interpretation in the First Award was "not itself the object of the dispute in the sense that a declaratory judgment would have been rendered on this question".<sup>34</sup> Hence, the Federal Tribunal seems to say that the Second Tribunal would arguably have been bound by the First Tribunal's contractual interpretation if the result of that interpretation had been expressly recorded in the dispositive part of the First Award. That, however, raises another delicate issue which cannot be further explored herein, namely how far declaratory relief is admissible in arbitration, and whether the party seeking to obtain declaratory relief must show a legitimate legal interest to be protected in obtaining such relief (*Rechtsschutzinteresse*).<sup>35</sup>

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<sup>34</sup> Judgment 4A\_633/2014 of 29 May 2015 E.3.2.6.

<sup>35</sup> On this issue, see e.g. Stefan Leimgruber, *Die negative Feststellungsklage vor internationalen Schiedsgerichten mit Sitz in der Schweiz*, Diss. Luzern 2013, pp. 79 ss, in particular paras 263 ss.

## 6. Wrongful attribution of res judicata as part of public policy

It is well-settled that an arbitral tribunal seated in Switzerland violates procedural public policy in terms of Article 190(2)(e) of the PILS if it disregards the force of res judicata of an earlier decision and decides the case before it anew although the same subject-matter between the same parties has previously been decided.<sup>36</sup> In the same sense, the Federal Tribunal accepts that the principle of ne bis in idem – as the “*aspect négatif*” of the res judicata principle – also falls within the scope of public policy in terms of Article 190(2)(e) of the PILS.<sup>37</sup>

However, to the best of my knowledge, the Federal Tribunal so far never had the opportunity to decide the opposite scenario, namely the situation in which an arbitral award is challenged on the ground that the arbitral tribunal has wrongly attributed res judicata effects to an earlier decision, i.e. has considered itself precluded from deciding the claim brought before it due to the alleged force of res judicata of an earlier decision.

It is therefore significant that, in the case at hand, the Federal Tribunal noted at the end of its considerations that the Second Tribunal would indeed have violated public policy if it had considered itself bound by the contractual interpretation of the First Tribunal as laid down in the underlying reasoning of the First Award, although different claims had been decided in the First Award.<sup>38</sup>

This conclusion of the Federal Tribunal is insofar remarkable as no justification at all is given as to why this opposite scenario would (also) be incompatible with public policy. It should be noted that if a court (or arbitral tribunal) wrongly considers itself precluded from deciding a new claim due to the force of res judicata of an earlier decision, there is a priori no concern of public policy in the sense of a risk for the potential existence of two contradictory decisions on the same subject-matter between the same parties.<sup>39</sup> Therefore, the justification for finding that the opposite scenario also amounts to a violation of public policy must be found elsewhere.

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<sup>36</sup> See, e.g. BGE 136 III 345 (ASA Bull. 3/2010, p. 511) E. 2.1.

<sup>37</sup> See, e.g. Judgment 4A\_386/2010 (ASA Bull. 3/2011, p. 688) of 3 January 2011 E.9.3.

<sup>38</sup> Judgment 4A\_633/2014 of 29 May 2015 E.3.2.6.

<sup>39</sup> The concern for the avoidance of conflicting decisions on the same subject-matter between the same parties is the traditional ground for finding that disregarding the force of res judicata of an earlier decision is incompatible with public policy (see, e.g. BGE 127 III 279 (ASA Bull. 3/2001, p. 544) E.2b). However, it is important to note that this reasoning only works where the court (or arbitral tribunal) wrongly attributes res judicata to an

In my opinion, if a court (or arbitral tribunal) wrongly attributes res judicata to an earlier decision and thus decides to reject a claim or declare it inadmissible, its decision results in a denial of the right of access to justice and, as such, in a violation of the right to a fair trial.<sup>40</sup> In fact, if there were no remedy at all against a wrongful attribution of res judicata, this would result in a situation where the respective claim would never be considered. However, the law of civilized jurisdictions provides that each individual for its claims has a fundamental right to a fair trial before a court established by law.<sup>41</sup> This fundamental principle falls within the scope of procedural public policy within the meaning of Article 190(2)(e) PILS.

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earlier decision, but not where it wrongly considers itself bound by the force of res judicata of an earlier decision.

<sup>40</sup> The right to a fair trial ("*le droit à un procès équitable*") is among the accepted fundamental principles of procedural public policy. See Judgment 4P.143/2001 (ASA Bull. 2/2002, p. 311) of 18 September 2001 E.3a/aa.

<sup>41</sup> See, e.g. Article 6(1) of the ECHR, Article 14 of the International Covenant on Civil and Political Rights, or Article 30(1) of the Swiss Constitution.

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Manuscripts and related correspondence should be sent to the Editor. At the time the manuscript is submitted, written assurance must be given that the article has not been published, submitted, or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within eight to twelve weeks. Manuscripts may be drafted in German, French, Italian or English. They should be submitted by e-mail to the Editor (**mscherer@lalive.ch**) and may range from 3,000 to 8,000 words, together with a summary of the contents in English language (max. ½ page). The author should submit biographical data, including his or her current affiliation.

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Switzerland is generally regarded as one of the World's leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world's best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

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