# THE EFFECT OF AN ARBITRAL AWARD AND THIRD PARTIES IN INTERNATIONAL ARBITRATION: *RES JUDICATA* REVISITED

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## I. INTRODUCTION

Interest in the topic of an arbitral award's effect and *res judicata* has increased in recent years.[1] This has to some extent been stimulated by the rendering of conflicting awards in some cases. The matter is directly related to the application, or rather the non-application, of the doctrine of *res judicata* or any other kind of third-party effect of an arbitral award in the context of international arbitration.[2]

The danger of conflicting awards is particularly noticeable in the case of jurisdictionally fragmented multiparty relationships**:** in other words, the case where some of the several parties to a multiparty relationship have opted for

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[1] *See* the Interim Report of the International Law Association (ILA), Committee on *Res judicata and Arbitration* (Berlin Conference 2004), *available at* http://www.ila-hq.org/html/layout_committee.htm; 20th Anniversary Conference of School of International Arbitration: *Contemporary Problems in International Arbitration*, 10-12 April 2005, London, in the section: *The Impact of Third Par*ties *on International Arbitration*; N. Gallagher, *Parallel Proceedings, Res Judicata and Lis Pendens: Problems and Possible Solutions*, *in* PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION, ch.17 (Loukas Mistelis et al. eds., 2006); DOSSIERS-ICC INSTITUTE OF WORLD BUSINESS LAW (No. 692), PARALLEL STATE AND ARBITRAL PROCEDURES IN INTERNATIONAL ARBITRATION (Bernardo M. Cremades & Julian D. M. Lew eds., 2005); Bernard Hanotiau, *The Res Judicata Effect of Arbitral Awards*, in COMPLEX ARBITRATIONS, ICC ARBITRATION BULL. SPECIAL SUPPLEMENT, 43 (2003).

[2] *See* UNCITRAL Arbitration Tribunal, final award, September 3, 2001, R.S.Lauder v. Czech Republic, (2002) 14 World Trade and Arbitration Material 35 (Final Award); UNCITRAL Arbitral Tribunal, partial award, September 13, 2001, CME Czech Republic v The Czech Republic, (2002) 14 World Trade and Arbitration Materials 109; and Svea Court of Appeals (Sweden), May 15, 2003, CME Czech Republic v The Czech Republic, (2003) 15 World Trade and Arbitration Materials 171.

arbitration while others remain subject to the jurisdiction of national courts or another arbitral tribunal.

This article explores the international framework relating to the effect of an international arbitral award in general**,** and**,** in particular**,** with regard to third parties. Section II first undertakes a comparative analysis of several arbitral rules and national laws. This analysis shows that the current national and international framework relating to the arbitral effect is, where it exists at all, divergent and incomplete; in any event, it fails to meet the particular needs of international arbitration. Section II then explores features of *res judicata* that constitute a common denominator in different legal systems. The results of this examination provide the conceptual basis for defining the appropriate effect of an arbitral award on third parties in Section IV.

Section III outlines the problems and limitations of the application of the doctrine of *res judicata* (collateral estoppel in the U.S.) vis-à-vis third parties that have not taken part in the arbitral proceedings. Here the article challenges the practice according to which an international award, once it is recognized by a national jurisdiction, is equated to a national judgment in terms of its effect. It is argued that this practice overlooks the international character of an international award, which should survive even after the award has been incorporated into the national legal system. Most importantly, though, this practice fails to accommodate the systemic problems arising in international arbitration with regard to intertwined multiparty relationships.

Section IV puts forward the article's principal suggestion, the need to distinguish between different types of arbitral effects that would apply to different categories of third parties. In particular, it distinguishes between different groups of third parties based on the degree of their substantive identification with the parties to the proceedings. Thus, with regard to some categories of third parties, the case is made for the application of an arbitral effect different from that of *res judicata*, both in terms of quality and intensity, but that is nevertheless conclusive.

Section V completes the discussion of the suggested third-party arbitral effect by exploring the legal basis of the arbitral effect at an international level. Here, the focus is on the need for a harmonized regulation of the arbitral effect, instead of the current fragmented and**,** on many occasions, conflicting national regimes.

It is essential at the outset to clarify the sense in which *res judicata* will be used in this article. The expression is often used to describe the effect produced both by a judgment and an arbitral award.[3] However, as will be shown, *res judicata* is a term of art developed in the context of national civil procedures, where it refers to a particularly technical and sophisticated procedural mechanism. It is thus debatable whether the term should be used to describe the effect of an award in the fundamentally different context of international arbitration. Accordingly, the descriptive term "arbitral effect" is

[3] *See, e.g.*, the ILA Report, *supra* note 1.

used in this article with regard to the arbitration award, while the term *res judicata* is confined to national judgments.

## II. THE ARBITRAL EFFECT

Despite the great divergence in national jurisdictions, the principle that a valid determination, either judgment or award, produces a conclusive effect with regard to the subject matter and the parties of the dispute constitutes a fundamental legal principle embedded in every legal system.[4]

In the context of international arbitration, in particular, the arbitral effect comes as a legal and logical corollary of the jurisdictional nature of the arbitral award. It is true that arbitration begins as a contractual phenomenon, with the arbitration agreement binding only those parties that have manifestly submitted to its jurisdiction. However, as the arbitral procedure unfolds**,** the initial contractual agreement is transformed into a phenomenon with jurisdictional dimensions.[5] The result of the arbitral proceedings is an award which is enforceable worldwide. It has authoritative clout and demands recognition against any natural, legal or state entity. This is why the award is not enforced as a simple contract, but is enforced with the aid of a state's coercive mechanisms as would any other judicial judgment.

Irrespective of any theoretical debate on the nature of the arbitral award, there are important practical implications relating to the arbitral effect. It is suggested that the conclusive effect of a decision, in general, serves both public and private interests.[6] While public concerns, such as the preservation of legal resources, are less relevant in the context of international arbitration than they are in national litigation, private considerations such as the need for commercial security resulting from the finality and repose of the dispute are critical for the interests and the expectations of the parties in international arbitration. Parties resort to arbitration to have their disputes finally resolved

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[4] PETER R. BARNETT, RES JUDICATA, ESTOPPEL AND FOREIGN JUDGMENTS, para.1.12 (2001): "The doctrine encapsulates the principle inherent in all judicial systems which provides that an earlier adjudication is conclusive in a second suit involving the same subject matter and the same legal bases." *See id.* for the legislative history of the principle that goes back to Roman and ancient Greek times. It was even recognized in the Hindu text of *Katyayana*.

[5] Julian D. M. Lew, *The Law Applicable to the Form and Substance of the Arbitration Clause*, *in* ICCA CONGRESS SERIES NO. 9, IMPROVING THE EFFICIENCY OF ARBITRATION AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 114 (Albert Jan van den Berg ed., 1999) ("arbitration agreement has both jurisdictional and contractual nature. It is contractual by virtue of the required agreement of the parties. It is jurisdictional by virtue of conferring jurisdiction upon the arbitration tribunal").

[6] *Cf.* BARNETT, *supra* note 4, para. 1.13 and Richard Shell, *Res Judicata and Collateral Estoppel Effects on Commercial Arbitration*, 35 UCLA 623, 640-641 (1988), for an analysis on the importance of *res judicata* on both public and private grounds.

by the award.[7] If the issues determined in the first award were open to a fresh determination, parties' expectations of finality and repose of their dispute would be thwarted and the effectiveness of arbitration would be compromised.

A. *Legal Framework Regarding Arbitral Effect*

The current arbitration rules and laws constitute a suggested rather than a clear and comprehensive legal framework regarding the conclusive effect of an arbitral award. In particular, most arbitral rules merely state that "the award shall be binding on the parties."[8] Similarly unsatisfactory is the way in which national arbitration laws address the issue, lacking, as they do, any regulation regarding an arbitral effect specifically designed for international arbitration. Instead, it is accepted in both civil[9] and common-law[10] jurisdictions that international arbitral awards, after their recognition by the national domestic

[7] In arbitration, unlike litigation, no appellate procedure is normally provided.

[8] UNCITRAL ARBITRATION RULES, Art. 32(2); AMERICAN ARBITRATION ASSOCIATION INT'L ARBITRATION RULES, Art. 27(1); CIETAC ARBITRATION RULES, Art. 60; ICC ARBITRATION RULES, Art. 28(6); LCIA RULES, Art. 29(6); WIPO ARBITRATION RULES, Art. 64(b).

[9] This is expressly stated in the French NCPC Art. 1476 (for domestic arbitration) and Art. 1500 (for international). *See also* Cass. Soc. 19 March 1981, (1982) REV ARB. 44; in the Netherlands Arbitration Act 1986, Art. 1059; in the Belgian Judicial Code, Art. 1703(1); in Greece, Art. 35(2) of the 2735/1999 Act read in tandem with Art. 896 of the Code of Civil Procedure, *see also* ΑΠ 448/1969, (1970) NoB 36. *Cf.* UNCITRAL Model Law Art., 35(1) and German ZPO, Art. 1055: "the award is binding." These provisions practically refer to national provisions regarding *res judicata*. *Cf.* HARALD KOCH & FRANK DIEDRICH, CIVIL PROCEDURE IN GERMANY para. 92 (1998). In Swiss Law, it is accepted that a final award produces the effects of *res judicata*. Swiss law also applies *res judicata* to a foreign arbitral award to the same extent that the law of the country in which the award was made would recognize that award. On the other hand, these effects cannot go beyond those which the award would have if it were a Swiss award made in Switzerland. *See* Art. 190 of the Private International Law Statute (1990) and INTERNATIONAL ARBITRATION IN SWITZERLAND, Art. 190, para.6 and Art. 194, para.134 et seq. (S.Berti ed., 2000).

[10] In the U.S., despite the fact that the FAA lacks any specific reference to the effect of an arbitral award, it is accepted law that the award has the same effect as a national judgment under the rules of *res judicata*, subject to the same exceptions and qualifications. *See* RESTATEMENT (SECOND) JUDGMENTS, para. 84 (1982); Shell, *supra* note 6 at 641 and the relevant case law therein: "The American courts have long held that *res judicata* applies to arbitration awards." The same is accepted in England, although the English Arbitration Act 1996 (EAA), s.58(1) merely refers to a "final and binding" award. *See* Fidelitas Shipping Ltd v. V/O Exportchleb, [1965] 1 Lloyd's Rep 13; ROBERT MERKIN, ARBITRATION LAW, para. 16.116 (LLP London); *see also* EAA s.101(3): "Where leave [on enforcement] is so given, judgment may be entered in terms of the award," *i.e.*, judgment and award are equated after the recognition of the award in the domestic jurisdiction. *Cf.* also the Hong Kong Arbitration Ordinance, ss. 2GG (applicable to both domestic and international arbitration), 40B.2 (domestic only) and 42 (international only).

jurisdiction, have the same effect as domestic judgments: that is, they have the national *res judicata* effect.

Nor can adequate regulation regarding the effect of an international award be found in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("New York Convention"). This highly authoritative international treaty deals with the enforcement rather than the conclusiveness of an arbitral award. This explains the lack of any detailed provision with respect to the arbitral effect of an international award, apart from the brief statement in Article III that "[e]ach Contracting State shall recognize arbitral awards as binding…"

Laconic, almost cryptic, the above national and international laws and rules fail to address a series of important issues with regard to the effect of an arbitral award. A series of questions remains unanswered:

- To what extent, if at all, does the arbitral award prevent the re-litigation of the issues that have been determined therein? Does it merely cover the legal claims or does it extend to the facts?
- Does the arbitral effect apply only to the dispositive part of the award or does it extend to the reasoning as well?
- To what extent is a subsequent arbitration tribunal or a national court bound by the findings of an award previously rendered?
- Does the arbitral effect cover any issue that was not raised in the arbitral proceedings, but which ought to have been raised?
- Which parties are bound by the arbitral effect? Does the effect extend to or in any other way affect any third party?

No answer can be given to any of the above questions, since the current arbitral framework falls short of providing a sufficient and autonomous regulation of the effect of international arbitral awards. Instead, the issue is referred, either expressly or impliedly, to the domestic provisions on *res judicata* that apply to national judgments. However, as the following two sections show, the national *res judicata* regimes are not only divergent**,** but also designed for domestic litigation and national judgments. They are thus unsuitable in practical terms for application to international arbitration and arbitral awards.

B. *National Regimes on Res Judicata: Differences and Constituent Elements*

The doctrine of *res judicata* has developed as one of the most sophisticated, technical and overregulated doctrines in national civil procedures. A detailed consideration of the different national regimes on *res judicata* goes far beyond the scope of this article. The aim of this brief comparative overview is first to highlight the divergent approaches taken by legal systems with regard to *res judicata*, and second to ascertain the constituent elements of the meaning of *res judicata*.

1. *Differences*

There is a great divergence among national legal regimes with regard to *res judicata*. The difference is particularly marked between common and civil-law jurisdictions. The basic difference in their approach may be summarized as follows:

- In common-law countries, case law has developed a broader notion of *res judicata* which prevents the re-litigation not only of the claims[11] but also the issues,[12] factual and legal, adjudicated in the judgment. From this it appears that common-law countries consider that a judgment represents a judicial record of what actually happened with regard to the dispute. *Res judicata* in this sense carries a fact-finding value. It is considered as a means of evidence, as an authoritative determination of the whole "story" of the dispute. The term *estoppel per rem judicata* comes from the term *estoppel by record* in common law and reflects exactly this common-law approach to *res judicata*,[13] which is closer to the Roman rule that "*res judicata pro veritate accipitur.*"[14]
- In contrast, in modern civil procedural systems, the codified *res judicata*[15] is normally confined to the claims rather than the issues determined in a judgment.[16] The prevailing view here is to separate

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[11] In England, the term used is "Cause of action estoppel"; *see* Barnett, *supra* note 5, para. 1-38 *et seq*, HALSBURY, LAWS OF ENGLAND 179-180, (4th ed. 2003). In the U.S., the term used is "Claim preclusion"; *see* Parklane Hosiery v. Shore, 439 U.S. 322 (1979), RESTATEMENT, *supra* note 10, para. 18-20, and Shell, *supra* note 6 at 639.

[12] In England, the term used is "issue estoppel"; *see* Carl-Zeiss Stiftung v. Rayner & Keeler Ltd, [1967] 1 AC 853, and New Brunswick Ry v. Britisch and French Trust Corp [1939] AC 1, HL (Lord Maugham LC), at 20, referring to issue estoppel ("it is unjust and unreasonable to permit the same issue to be litigated afresh"), and HALSBURY, *supra* note 11 at 434 ("issue estoppel applies whether the point involved in the earlier decision is one of fact or one of law or one of mixed fact and law"). In the U.S., the term used is "collateral estoppel"; *see* RESTATEMENT, *supra* note 10, para. 27, and Shell, *supra* note 6 at 647.

[13] *See* HALSBURY, *supra* note 11, para. 964.

[14] Note, however, that the French notion of *res judicata* seems close to this concept, since *res judicata* is promulgated by Code Civil, Art. 1351 under Section III, which deals with evidentiary presumptions, of Chapter VI, which deals with issues of proof. It follows that they too give *res judicata* an evidentiary power; *cf. also* VINCENT-GUINCHARD, PROCÉDURE CIVILE, para.179 (27th ed. 2003).

[15] France, NCPC, Art. 480, Belgian Code of Civil Procedure, Art. 23, German ZPO Art. 322, Greece Code of Civil Procedure, Art. 321 *et seq*. The doctrine is not codified in Switzerland.

[16] ILA Report, *supra* note 1 at 16. *See also* Berti, *supra* note 9, Art. 187 para. 41 (for Switzerland); Κεραμεύς Κονδύλης Νίκας, *ΕρμΚΠολΔ*, (Σάκκουλας Αθήνα Θεσσαλονίκη 2000), αρθρ.321-334 (for Greece), Dalloz, NCPC, 97th ed. (2005), Art. 480 and Vincent-Guinchard, *supra* note 15 (for France); Fabienne Hohl, *Procedure Civil*, Tom I, (Staempfi Berne 2001), para. 1292 (for Switzerland).

> *res judicata* from any fact-finding power. Civil-law countries seem to subscribe to the view that a judicial determination is fallible by nature and**,** in that sense**,** can only determine the legal consequences of what seems to have happened rather than determine what actually happened, that is, the facts. Parties are thus free to re-litigate facts determined in a judgment simply because *res judicata* does not bear any evidentiary significance for them.

2. *Constituent Elements of Res Judicata*

It may be helpful at this point to explore conceptual features of *res judicata* common to different legal jurisdictions. This common denominator will effectively provide the constituent elements of the meaning of *res judicata* which will prove essential, in Section IV, to determining the third-party effect of an international arbitral award.

The *raison d'être* of *res judicata* is the preservation of a decision's authority. While a decision determines the legal status of the dispute in question, *res judicata* ensures that this determination is not circumvented or overturned by subsequent conflicting determinations.[17] To achieve this objective, *res judicata* produces different kinds of effects:

1. *Prohibits reassertion*: this kind of effect comes into play in a case where the subject matter and the parties to the second set of proceedings coincide with those of the first set. In these cases the *res judicata* effect precludes the reassertion of the cause of action adjudicated in the first judgment. This type of effect reflects the fundamental principle of the *ne bis in idem* in accordance with which a party cannot be granted relief twice on the same cause of action.[18]
2. *Preclusive effect*: this kind of effect prevents the re-litigation of any plea which was determined in the judgment and which plea arises in the second set of proceedings not as the main subject matter but as an issue necessary to determine the main subject matter.[19] The preclusive effect follows from the *ne bis in idem*

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[17] As used here, "*res judicata*" encompasses the doctrine of "collateral estoppel" as well.

[18] In the common law, the previous cause of action is considered to be merged, and thus extinguished, with the first judgment. *See* Barnett, *supra* note 5 para. 1.41; *cf.* Thoday v. Thoday, [1964] P 181 CA (Diplock LJ) at 197: "…it is a plea that prevents a party in subsequent litigation from asserting or denying the existence of a particular cause of action, the non existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties or their privies." In civil-law countries the prohibition on reassertion is considered more like a procedural impediment to exercise the same cause of action twice.

[19] RESTATEMENT, *supra* note 10, ch. 1, *Introduction*: "'Preclusive effects' refers to limitations on the opportunity in a second action to litigate claims or issues which

principle, but applies only in a case where the two sets of proceedings to some extent overlap. [20] [21]

3. *Conclusive effect*: *Res judicata* does not simply prohibit re-litigation. It prevents the inconsistent determination of the issues already adjudicated. Thus, in a case where a previously determined claim is raised in the second set of proceedings, the second forum, in accordance with the conclusive effect of the first decision, should take the determination of the first judgment as a logical and legal basis**,** and reach a decision that is in line with the determination of the first judgment. Only the combination of preclusive and conclusive effects can effectively preserve the authoritative status of a decision.
4. *Enforcement*: The *res judicata* effect is interrelated with the enforcement of a judgment. *Res judicata* and enforcement are two sides of the same coin and their boundaries, in terms of *ratione personae*, necessarily coincide.[22] Thus, in principle, a judgment is enforceable against those parties and only those parties that are bound by *res judicata*. In this sense, the enforcement is a legal and logical corollary of the conclusiveness of the decision. The

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have been or could have been litigated in a prior action. In general terms, these limitations include the rules of claim preclusion and issue preclusion."

[20] This preclusive effect under particular circumstances may be extended not only to the issues that were actually raised in the proceedings but also to those that, by due diligence, could have been raised but eventually were not (the extended form of *res judicata*). This is clearly the case in England, where this type of effect is understood as part of the principle of abuse of process. *See* Henderson v. Henderson, [1844] 6 QB 288 and the more recent Johnson v. Gore Wood & Co., [2000] 2 AC 1; *cf. also* EAA s.73(1)d. The extended preclusive effect also operates slightly differently in the U.S., *see* RESTATEMENT, *supra* note 10 para. 27. In addition, it is found in some civil-law countries, but not as part of the abuse of process principle, which is unknown to these jurisdictions. *See e.g.*, the Greek Civil Procedure Code, Art. 330: "*Res judicata* covers those pleas that have been raised, as well as those that could have been raised but were not."

[21] Although there is a fundamental difference between the common and the civil law regarding the extent of this effect (it is extended to both claims and issues (factual and legal) in common law but only to claims in civil, *supra*), the preclusive effect constitutes a basic common denominator of the *res judicata* concept in both legal systems. *See* VINCENT-GUINCHARD, *supra* note 14, para. 179.b.

[22] *See* VINCENT-S.GUINCHARD, *supra* note 14, para. 178: « l'autorité de la chose jugée s'identifie alors avec la force obligatoire de la sentence ». In Switzerland *see* Fabienne Hohl, *supra* note 17, para. 4-1. In England *cf.* s.58 EAA: " unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding, both on parties and *on any persons claiming through or under them*" (subjective boundaries of an arbitral award) with s.82(2): "…a party to an arbitration agreement include *any person claiming under or through a party to the agreement*" (subjective boundaries of an arbitration agreement) (emphasis added). *See also* KOCH & DIEDRICH, *supra* note 9, para. 133.

converse is also the case: *res judicata* is a condition precedent for enforcement. [23]

## III. *RES JUDICATA* AND THIRD PARTIES

### A. *The "Same Parties" Requirement: Rule and Exceptions*

The above four different kinds of effect explain *how* the *res judicata* effect should apply. It is also important, however, to determine *the parties* that should be affected by *res judicata*. Hence, this subsection examines the "same parties" requirement, the analysis of which will define who is bound by *res judicata***,** including the extent to which third parties may be affected.

The "same parties" requirement means that, as a rule, a decision affects only those that took part in the proceedings that resulted in the decision**:** real parties as opposed to third parties. This requirement serves the fundamental principle of due process, that is, the right of the party to be heard. This rule, however, is by no means without exceptions. Almost every legal system under certain circumstances provides for exceptions to the "same parties" requirement.

This is true in common, civil and even Shari'a law.[24] The extent of these exceptions, of course, differs among jurisdictions, but the extension of the effect to a "circle" of parties other than the real parties constitutes a general principle common to almost every legal system. In civil-law countries this circle of third parties, to which *res judicata* is extended, is limited and is normally determined *a priori*, by civil and procedural codes.[25]

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[23] This is not to say that *res judicata* and enforceability have the same effect. In order to be enforced a judgment normally requires an order which is granted by the national courts (*exequatur*). All that is suggested here is that the *res judicata* is, as a rule, a condition precedent for the enforcement of a judgment, as both effects implement the authoritative determination of the decision.

[24] For example**,** the judgment is extended to the heirs of the deceased when it has been issued against the deceased and against the debtor if issued against the guarantor. *See* ʿALĪ HAY DAR DURAR AL-HUKKĀM, COMMENTARIES OF MAJALLA, Art. 1842, found in SAMIR SALEH, COMMERCIAL ARBITRATION THE ARAB MIDDLE EAST 70 (2nd ed. 2006).

[25] Thus, in Germany, the German Code of Civil Procedure (ZPO) ss.326-327 provides for the extension of *res judicata* to the successors, assignors and executors. In France, as an exception to the general rule stipulated in the French Civil Code Art. 1351, it is accepted that *res judicata* is extended to those third parties that are deemed to be represented by the parties to the proceedings. The exception is applied in the case of universal successors, assignors, and jointly and severally liable debtors of a party. *See, in general*, Dalloz, Code Civil, Art. 1351, VINCENT-GUINCHARD, *supra* note 14, para. 179b.1 and Boyer, *Les effets des jugements a l'egard des t*iers, 49 REV. TRIM. DR. CIV. 163 (1951). In Greece, *res judicata* extends, *inter alia*, to the assignor and successor in right, the trustee, the executor, and the guarantor (but only in a case where the judgment is for the debtor against the creditor). *See* Greek Code Civil

In contrast, in common-law countries the circle consists of the so-called privities.[26] Defining the concept of privity is difficult,[27] not least because it has a different meaning in the U.S.[28] from that which it has in England.[29] It suffices to mention that, partially due to the abandonment of the mutuality principle with regard to collateral estoppel,[30] U.S. courts have greatly

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Procedure, Arts. 325-329 ΑΠ 936/1986, NoB 1987, 1219 Κεραμεύς Κονδύλης Νίκας, *supra* note 17, Art. 325.

[26] RESTATEMENT (FIRST) JUDGMENTS, (1942), para. 83: "A person who is not a party but who is in privity with the parties in an action terminating in a valid judgment is bound by and entitled to the benefits of the rules of *res judicata*."

[27] The RESTATEMENT (SECOND) notes**,** characteristically**,** "It may be less misleading if not much more meaningful to use the term 'relationship' between parties instead of 'privity.'" RESTATEMENT (SECOND), *supra* note 10, para. 1 (*Introduction*); and again: "The term 'privity,' unless it refers to some definite legal relationship such as bailment or assignment, is so amorphous that it often operates as a conclusion rather than an explanation," RESTATEMENT (SECOND), para. 62.

[28] In general, the U.S. law takes a broad view of privity, encompassing all persons that have a title or a substantive right of their own but do not take part in the litigation with the real parties, either because they choose not to or because they are not allowed to. This includes, for example, the executor, administrator, guardian, cases of principal and agent, the assignor-assignee, bailor-bailee, and certain cases of partnership; *see* Shell, *supra* note 6, at 640: "The notion of privity in the law of *res judicata* has also been flexible and it simply signifies that parties are in such relationship to one another that a judgment involving one may justly be conclusive upon the other"; *see, in general*, RESTATEMENT, *supra* note 10, paras. 34-62 *et seq*, for a detailed presentation of the different types of third parties affected by *res judicata* and Herbert Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457, 1460 (1968): "some cases have stretched the concept of privity to the constitutional limit and perhaps beyond," referring to the example of *Makariw* v. *Rinard*, 222 F. Supp. 336 (E.D. Pa 1963).

[29] English law takes a much narrower view of privitiy, limiting the "circle" to parties that claim a title or a right under, through or on behalf of another party. This group includes the case of the ancestors and heirs (privies in blood) or the case of a successor to rights or liability (privies in title) or the case of a trustee-beneficiary (privies in interest). *See* HALSBURY, *supra* note 11, at 452 *et seq*; Barnett, *supra* note 5, paras. 3-20 *et seq*; *cf. also* Carl Zeiss, *supra* note 12; *cf*. EAA ss. 58 & 82(2) and House of Spring Gardens v. Waite, [1991] 1 QB 241(CA).

[30] *See* RESTATEMENT, *supra* note 10, Reporter's note, para. 29; Semmel, *supra* note 27, at 1457; Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 329 (1971), *on remand*, 334 F.Supp. 2d 47 (N.D.Ill.1971), *aff'd*, 465 F.2d 380 (7th Cir. 1972), *cert. den.*, 409 U.S. 1061, (1972); Parklane Hosiery v. Shore, 439 U.S. 322 (1979). In contrast, English law remains firm on the doctrine of mutuality. Hence, any preclusive effect requires that both parties have taken part in both proceedings in the same right. *See*, however, Lord Denning's attempt to change this view in *McIlkenny* v. *Chief Constable of the West Midlands*, [1980] QB283, 317 (CA): "If a decision has been given *against* a man on the identical issue arising in previous proceedings - and he had full and fair opportunity of defending himself in it - then he is estopped from contesting it again in subsequent

expanded the applicability of collateral estoppel in civil cases. They have also extended the right of non-parties to a prior litigation to assert both offensive and defensive collateral estoppel in a subsequent action against a person who was a party in the prior case.[31] Thus, even a third party, either as a claimant or as a defendant in subsequent proceedings may rely on an issue determined in a first judgment against one of the real parties (third-party preclusive effect).[32]

This does not mean that the third party ever becomes a real party to the first proceedings. The parties in this group remain third parties. Yet they enjoy a high degree of identification with the real parties in the sense that their legal positions to a great degree coincide. The real parties are, therefore, reasonably considered to represent the third parties in the arbitration.[33] In general, it may be argued that the basic test to extend the *res judicata* effect to a third party is the "community of interest" test between the real and third party, so that the third party's interests "are represented by a party to the action."[34] This means that the parties must have a considerable degree of identification (common interests) to share the *res judicata* effect of a judgment.[35]

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proceedings"(*contra* Goff L.J. and Sir George Baker). The mutuality principle was confirmed by the House of Lords in *Hunter v Chief Constable of the West Midlands*, [1982] AC 529 (HL); in *Carl Zeiss*, *supra* note 12, and the recent *Sun Life Insurance Company of Canada* v. *The Lincoln National Life Insurance Company*, [2004] 1 Lloyd's Rep.606.

[31] *Id.* AUTHOR: WHAT DOES ID REFER TO?

[32] However, the converse does not apply, so that the real party may not use against a third party a judgment issued in proceedings where the former did take part but the latter did not. *See* DeWitt v. Hall, 225 N.E.2d 195 (1967); Bernhard v Bank of America Nat'l Sav. & Trust Ass'n, 122 P.2d 892 (1942); Blonder-Tongue Laboratories v University of Illinois Foundation 402 U.S. 313 (1971).

[33] This identification is basically substantive: co-owners in property, for example. However, it may also be procedural, as is the relationship between the trustee and the beneficiary. It is usually contractual but may be tortious. Thus, tortfeasors are considered in privity. *See* House of Spring Gardens v. Waite, [1991] 1 QB 241 (CA) and in the U.S., RESTATEMENT, *supra* note 10, para. 48; different in Barnett, *supra* note 1, paras. 3-17, who puts tortfeasors under the category of "deemed parties" as well.

[34] Gary Cunningham, *Collateral Estoppel: The Changing Role of The Rule of Mutuality*, 41 MO. L. REV. 521, 522 (1976); *cf.* Shiels v. Blakeley, (1986) 2 NZLR 262,268 (NZCA): " there must be shown such union or nexus, such a community or mutuality of interest, such an identity between a party to the first proceeding and the person claimed to be estopped in the subsequent proceeding that to estop the latter will produce a fair and just result."

[35] *Cf.* ECJ Drouot Assurances S.A. v. Consolidated Metallurgical Industries, Protea Assurance and GIE, Case C-351/96, [1998] I.L.Pr.485 (AUTHOR: WHAT IS THIS CITE?)that employs the criterion of "identical and indissociable interests"; *see also* para. 19: "there had to be such a degree of identity between the interests of the insurer and the insured that a judgment in relation to one would be *res judicata* for the other"; *cf.* PETER KAYE, LAW OF THE EUROPEAN JUDGMENTS CONVENTION 2780 (1999): "the fundamental underlying criterion for assessment of whether insurer and

Two conclusions may be drawn: First, the exception to the "same parties" rule is so well-established in almost every legal system that it may be argued that the rule is also a constituent element of *res judicata*. It follows that the common denominator of the *res judicata* effect with regard to the parties should read: *res judicata* applies to the parties to the proceedings and also, in certain circumstances, to third parties.

Second, the circle of the third parties bound by *res judicata* is extremely narrow, since a substantial degree of identification between the real and third party is required for the extension. As the "identification test" is so strict, it is only in very limited circumstances that the *res judicata* effect is extended to a third party.

This strict test thus leaves all other third parties beyond the reach of any judgment effect. This rule, in principle, applies to arbitration as well, since awards and judgments are equated in terms of effect.[36] Thus, the effect of an arbitral award may not bind any person other than one substantially identified with the real parties. However, as the next sections will show, there is a fundamental difference between the case of national litigation and international arbitration that would justify different types of arbitral effect vis-à-vis third parties. The circle of third parties that may be affected by an international arbitral award should be wider than that affected by *res judicata* resulting from a judgment. By the same token, however, the *kind* of third-party effect produced by an international award should be different from the *res judicata* effect produced by a judgment. Subsection III B defines the *group* of third parties that should be affected by an arbitral effect, whereas Section IV will focus on the *kind* of arbitral effect, highlighting its differences from *res judicata*.

### B. *False Third Parties: The Problem*

The parties in this group are also third parties to the arbitration in the sense that they have neither signed the arbitration agreement nor taken part in the arbitral process. However, they sustain close contractual links with the real parties. These contractual links are not as strong as in the case of privity. They fall short of privity**,** or**,** more generally**,** there is a looser identification between them and the real parties. Nevertheless, there is still a strong substantive nexus between these third parties and the real parties. Their contractual rights are inextricably intertwined with the rights of one of the real parties,[37] so that any

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insured are to be treated as same parties **…** is whether they have such identical and indissociable interests as to satisfy the requirements of the efficient administration of justice and avoidance of irreconcilable judgments balanced against fairness to parties without denial of justice through trial."

[36] See *supra* Sec. II A.

[37] In many cases the terms "joint debtors" or "joint and several debtors" are used to describe the degree of substantive identification between parties in a multiparty

factual or legal determination in the first proceeding with regard to the real parties will inevitably affect their legal position. Hence, they are neither real parties nor pure third parties who are complete strangers to the arbitration between the two real parties: they may be labeled "false third parties" in order to distinguish them from the other categories.

Indeed, in many cases modern international transactions are extremely complicated and require the participation of several parties for the delivery of large-scale projects.[38] This is the case in the construction and maritime industries as well as in many secured transactions and much of international trade. The modern corporate structure has also become highly sophisticated, so that disputes between one legal entity and its contractual counter-party may affect the legal position of the affiliates, or subsidiary companies, or officers, directors, stockholders and members of that legal entity.

In these cases it frequently happens that several parties do not sign a multiparty arbitration agreement. Thus, in a case where a dispute arises out of the multiparty contractual relationship, arbitration proceedings will take place between those parties, and only those parties, that have signed the arbitration agreement, leaving out those parties to the same multiparty relationship that have not signed the arbitration agreement. Due to the consensual nature of arbitration, the latter will remain third parties upon which the arbitral award has no effect whatsoever. Thus, parties with an active role in the actual business project are excluded from the arbitration process, in which they have a considerable legal and economic interest.[39] To give some examples**:**

- The guarantor may remain outside the arbitration between the creditor and the principal debtor. This is so despite the fact that this arbitration may well determine that the guaranteed debt has been extinguished, in which case the guarantor would cease to be liable.
- The subcontractor may not take part in the arbitration between the owner and the contractor, although this arbitration may well determine that the project effectively delivered by the subcontractor is defective.
- A team of stockholders may not take part in the arbitration between the corporation and another party, although the arbitration may find against the corporation with considerable financial repercussions for the stockholders.

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relationship. However, these terms have different meaning in different jurisdictions and, thus, it is preferable to avoid them in an international comparative context.

[38] *See, in general*, Bernard Hanotiau, *Problems Raised by Complex Arbitration involving Multiple Contracts-Parties-Issues-An Analysis*, 18 J.INT'L.ARB. 251 (2001).

[39] *Compare* the very interesting analysis of the third parties' interests in Alexis Mourre, L'Intervention des Tiers à l'Arbitrage, Les Cahiers de l'Arbitrage, Recueil, Vol. I, 100 (2000-2002) arguing for the analogous application of national intervention mechanisms in arbitration.

Conversely, the parties to the arbitration process are denied the chance to confront other parties that play an active role in the actual business project:

- An affiliate or a subsidiary of the company of one of the real parties may stay out of the arbitration between the parent and the other real party, although it was actually the subsidiary that performed the contract.
- The guarantor may stay outside the arbitration between the creditor and the principal debtor, although, this time, the arbitration may well determine that the guaranteed debt exists, in which case the creditor would have an obvious interest in binding the guarantor.

This may cause the fragmentation of the substantive unit and provoke a proliferation of legal proceedings, either arbitral or judicial (jurisdictional proliferation).[40] This**,** in turn**,** may result in a considerable waste of legal and financial resources. More importantly**,** though**,** it may result in inconsistent, if not conflicting, decisions: either these are two arbitral awards or one award and one national judgment. This result will eventually frustrate parties' expectations and may well undermine the authority of the first arbitral award**,** and**,** in the end**,** the effectiveness of arbitration.[41]

There is a clear need for communication between the two or more proceedings that arise out of the same multiparty substantive relationship, so that the holdings of the several proceedings are**,** to some extent**,** harmonized. The problem is not, of course, new. It is, in fact, intrinsic to the very nature of multiparty relationships; in many cases they simply need procedural mechanisms to "coordinate" the several proceedings and harmonize their several decisions.

There are two ways in which this communication may be achieved: the first is during the hearings stage, where the several proceedings could be consolidated; the second is in the period after the decision is given. With regard to the former, national civil procedural systems have developed**,** over many decades**,** highly sophisticated but technical and inflexible procedural mechanisms that address the intrinsic problems arising out of multiparty

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[40] *See* Audley Sheppard, *Res Judicata and Estoppel*, *in* DOSSIERS-ICC, INSTITUTE OF WORLD BUSINESS LAW, *supra* note 2, at 213.

[41] There is a slight difference between "conflicting" and "irreconcilable" decisions: the former are stricter, referring to decisions between the same two parties but with mutually exclusive legal consequences, whereas the latter is wider, referring to contradictory decisions in the case of multiparty relationships. However, problematic situations may arise not only from "conflicting" but also from "irreconcilable" decisions. *Cf.* Council Regulation (EC) No.44/2001, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Art.34.4 which provides for resistance to the recognition of "irreconcilable" rather than "conflicting" judgments.

relationships. Hence, in litigation there are extensive possibilities for harmonization of the separate proceedings before the judgment is given:

- either at the stage where the jurisdiction of national courts is established (class action, common jurisdictional bases for the several parties);[42]
- or at the stage during the proceedings, (*lis pendens*, intervention, consolidation, inderpleader, joinder –sometimes even compulsory).[43]

The second method of communication is achieved after the first decision has been given. In this case the judgment is extended to the third party, which, while remaining a third party, is bound by the determinations of the judgment. This is the case of the extension of the *res judicata* effect to the third parties, as was explained above.

As a matter of general policy, the procedural harmonization of multiparty relationships is welcome at as early a stage as possible. It is difficult to resolve any inconsistency after the conflicting judgments have been given, since at that stage both judgments enjoy a status of authority and are presumed enforceable.[44] Hence, all national procedural systems provide for extensive possibilities for harmonization, even unification**,** in the form of consolidation of the several procedures in the pre-judgment stage**.** However, they provide for an extension of the judgment only in limited cases, as was shown above. The third-party effect is allowed only under the strict criterion of identification which clearly limits its application. This restricted third-party effect is fully justified in the context of national litigation: parties that have wasted the opportunity, given at an early stage, to achieve a unified result for the multiparty relationship, should not be given more chances. Thus, depending on the particular circumstances of each case, national laws provide the parties with opportunities to sue collectively all other parties involved in an intertwined multiparty situation or to join them at a later stage.[45] However, in a case where these opportunities are not exploited, the *res judicata* effect does not normally extend to the parties left outside the common proceedings.

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[42] U.S. FEDERAL RULES OF CIVIL PROCEDURE, Rule.23, England CPR r.19 (Group litigation), French NCPC Art. 59, German ZPO ss. 59-63, Greece Art.31, European Regulation No. 44/2001, Art. 6.

[43] *See* U.S. FEDERAL RULES OF CIVIL PROCEDURE, Rules 19-24; *see also* Semmel, *supra* note 28, at 1458; see also RESTATEMENT, *supra* note 10, para. 62; French NCPC Arts. 66 and 327 *et seq* (intervention -- compulsory and voluntarily), Art.100 *et seq* (*lis pendens*); German ZPO ss.64 *et seq*; Greek Code Civil Procedure, Arts. 74-93 (intervention, interpleader, joinder), EU Regulation, No. 44/2001, Arts. 27-28 (*lis pendens*).

[44] *Cf.* KAYE, *supra* note 35, at 2631: "It is better to prevent the situation from arising in the recognition context in the first place by tackling the problem at the adjudicatory stage."

[45] *See* German ZPO ss.59-60; in the U.S. FEDERAL RULES OF CIVIL PROCEDURE, Rule.20; England, CPR 19.2, EC Regulation No. 44/2001, Art.6(2).

The policy of an early harmonization, however, cannot apply in arbitration due to the fundamental principle of party autonomy, which prevents third parties from taking part in the arbitration proceedings. In this way, arbitration is left without any means of harmonization at all: at the pre-award stage the party autonomy principle (which does not apply in litigation) is in effect. This does not allow enforcement of the arbitration agreement by or against a third party or intervention of the third party in the arbitral proceedings.[46] At the stage after the award has been made, it obtains the status of a judgment and thus has limited third-party effects, or at least third-party effects that do not extend to false third parties. Hence the subcontractor, the surety, the partner, the affiliated company and many other cases of false third parties remain, as a rule, unaffected, both by the arbitral proceedings and the award, between the real parties.

It follows that the arbitral award should obtain a different status from that of the national judgment with regard to false third parties, precisely because the mechanism, the principles and the needs in international arbitration are different from those that obtain in national litigation. It should acquire a status that could accommodate the intrinsic problems arising out of the multiparty relationship and compensate for the lack of a harmonizing mechanism at an earlier stage analogous to the mechanism provided in the context of litigation.

The need to avoid conflicting decisions, or, in other words, the need for procedural harmonization, applies in international arbitration as well as in litigation. This is not only because the prevention of conflicting decisions is a general principle inherent in all legal systems, but also because it is directly linked to parties' expectations. Parties trust international arbitration as a worldwide authoritative mechanism to obtain a final and binding determination of their disputes which will remove any uncertainty regarding their business relationship. In a case where this dispute or this relationship happens to involve other parties as well, the real parties want the award to have the authority to determine at least the facts once and for all, rather than to leave the way open for third parties to challenge this determination before a different forum. The real parties want an arbitral award with as much clout as possible. Their expectations would be defeated and the enforceability of their award would become doubtful were it to conflict with another award or judgment.

Parties' choice for international arbitration should not be taken as a waiver of their expectations of a coherent and consistent solution with regard to their multiparty relationship. Therefore, they should not be deprived of the means to reach a harmonized – or at least not a piecemeal or conflicting--result. The

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[46] *See in general* LEW-MISTELIS-KROLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION, paras.16-39 et seq (2003); *ICC Final Report on Multiparty Arbitrations*, 6 ICC BULLETIN, para.49 (1995); Martin Platte, *When Should an Arbitrator Join Cases*?, 18 ARB.INT'L 68 (2002); for Greece see the case Εφ Θες 302/1955, 22 EEN at 12028 (1955).

considerable investment in the arbitration process should be understood as an endorsement of an effective award.

C. *Legal Background to the Problem*

Academic discourse and arbitral practice have faced the issue of false third parties on many occasions and have dealt with it in different ways:

- In some cases, all the parties involved in the multiparty relationship have been joined without their consent in common arbitral proceedings. On some occasions the basis for this has been found in unduly interventionist national provisions.[47] On other occasions, the courts have employed debatable theoretical constructions overstretching the limits of a putative "consent" in order to establish arbitral bonds, where it is at least doubtful whether the third parties had any intention to arbitrate at all.[48]
- In some other cases, courts have even rendered the arbitration agreement inoperative for failing to address the whole multiparty relationship, negating the parties' clear intention to arbitrate.[49]
- On other occasions, the courts and tribunals have ignored the substantive multiparty interrelationship and have treated false third parties as strangers. They have applied a strict version of party autonomy, failing to recognize any impact whatsoever of the arbitration vis-à-vis the false third parties.[50]
- Relatively recently there has been an interesting theoretical construction by the U.S. courts to enforce an arbitration agreement against a third party, based not on consent but on estoppel.[51]

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[47] *See, e.g.*, the Netherlands Code of Civil Procedure, Art.1046 or NAFTA, Art.1126.

[48] See the well known *Compania Espanola de Petroleos SA v. Nereus Shipping SA*, 527 F 2d 966 (2d Cir 1975) where the court, despite the lack of a common consensus of all the parties, ordered the consolidation of the two separate arbitrations (between the ship owner and the charterer on the one hand and the ship owner and the charterer's guarantor on the other) on the ground that the two arbitrations had intertwined common questions of law and fact.

[49] Prince George (City) v. McElhannery Engineering Services, (1997) 6 ADRLJ 315 (BCSP 1994).

[50] *See, e.g.*, in England *Bruns* v. *Colocotronis (The "Vasso"),* [1979] 2 Lloyd's Rep 412 (Commercial Court) and *In Re Kitchin, ex parte Young*, (1881) 19 ChD 668, both holding that an award issued in arbitral proceedings between the principal debtor and the creditor should not, in any way, affect the later proceedings between the same creditor and the surety.

[51] The term here reflects the principle of *non venire contra factum proprium* rather than the *estoppel per res judicatam*. Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753 (11th Cir.1993); McBro Planning and Dev. Co. v. Triangle Electrical Const. Co., 741 F.2d 342 (11th Cir.1984); Choctaw Generation v. American

However**,** none of the above solutions has proved effective, basically because they are all based on an "all or nothing" approach:

- Either they treat the false third parties as strangers leaving the multiparty relationship procedurally fragmented;
- Or they treat them as real parties, compelling them to appear before the tribunal, extending the full effect of an arbitration to them.

Procedural fragmentation should be considered the least favorable option. The parties in a multiparty relationship have a great deal of contractual interrelation that should be acknowledged and reflected at a procedural level. On the other hand, unification of the parallel proceedings, by way of enforcing an arbitration agreement against a third party, is equally unattractive. Had the parties wanted to arbitrate together, they would presumably have signed a multiparty arbitration agreement.

Instead**,** a "proportional" harmonization would be a more workable solution. In other words, there is a need for a third-party effect analogous to the degree of substantive identification between the third and the real parties. The substantive interrelation between them should be reflected in the arbitral process proportionally. A full enforcement of the arbitration agreement or the extension of the full effect of an award to third parties should be rejected as excessive and thus inappropriate for arbitration.

The next section argues for a suitable and, thus, proportional third-party effect of the arbitral award which would simultaneously keep intact both the principle of party autonomy and the principle of due process. Any solution should operate within the context of party autonomy respecting the contractual nature of arbitration. These principles constitute the ultimate limit of any theoretical construction.

## IV. THE SUGGESTED THIRD-PARTY ARBITRAL EFFECT

The suggested solution should be**:**

- First, to recognize a kind of third-party effect of the arbitral award, as outlined in this section.
- Second, to recognize this effect as an autonomous, inherent element of the international arbitral award, rather than an effect recognized by national legal systems depending on divergent conditions. This legal basis of the third party arbitral effect is considered in Section V.

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Home Assurance, 271 F.3d 403 (2d Cir 2001). *See also* J.A. Jones v. The Bank of Tokyo-Mitsubishi*,* 1999 WL 1940003 (E.D. N.C. Feb. 11, 1999) and International Paper Company v Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411 (4th Cir. 2000).

A. *Examination of the Suggested Effect*

The idea that the degree of a substantive interrelation determines the impact of a judgment upon a third party is not new and can also be found in the context of litigation. Under certain circumstances, some jurisdictions, particularly in civil-law countries, recognize a kind of third-party effect that is different from that of *res judicata*. It suffices to mention here that this effect is more like an adverse effect or a prejudice vis-à-vis third parties rather than a full extension of *res judicata*. It usually requires previous notice of the proceedings to the third party, which, if it does not intervene in the ongoing proceedings between the real parties, loses the right of recourse against the judgment. However, the judgment does not produce any conclusive effect[52] vis-à-vis the third party nor can it be enforced by or against the third party. Thus, in principle, a judgment may have an impact which is weaker that that of *res judicata* against a specific group of third parties, who are linked to the real parties by a loose, rather than a strong, contractual nexus.[53]

The same principle, by way of cautious analogy, can be found in EC Regulation 44/2001 on Jurisdiction and Recognition of Judgments in Civil and Commercial Matters. Here, the focus is on the impact of a set of proceedings (*lis pendens*) rather than a judgment (*res judicata*) vis-à-vis third parties. The European Regulation sets out the following *litispendens* mechanism:

- Article 27 provides that when two different courts are seized of the same subject matter, the court seized of the second case must stay and, after the jurisdiction of the first court is established, decline jurisdiction on its own motion. In other words, it provides for the *litispendens* effect of the first set of proceedings upon the second one. In order to operate, Article 27 requires that the parties in the parallel proceedings be the same or that they be third parties that share a substantial degree of identification with them, and that the two claims in question almost coincide.
- Article 28, on the other hand, provides for the situation where the two parallel proceedings are not identical but merely similar[54] both in terms of the subject matter and in terms of the parties. Thus, there is

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[52] In the sense described *supra* in Sec. II B 2.

[53] *See, e.g.*, the French NCPC, Art. 581 and *cf.* Art.1481 for arbitration: they provide for "tierce opposition," a means by which a third party may attack a judgment, that just affects the third party rather than binding it with a *res judicata* effect. The effect may prejudice the interests of the third party. *See* Dalloz, Art. 583, para.7 for those parties that may use the "tierce opposition": only those that are neither parties to the proceedings not represented by the real parties. *Cf.* Civ.2e, 16 May 1973, Bull. Civ. II, No. 165. The same in the Greek Code of Civil Procedure, Art.92 and Art. 583 *et seq* (where again a third party may attack a judgment by which it is not bound by *res judicata*).

[54] *I.e.*,"closely connected."

> no need for the parties in the second set of proceedings to be substantially identified with the parties in the first. Even substantially different third parties in the second set may be subject to the *litispendens* effect of the first set. It is enough that the third party in the second set has a loose substantive relationship with the parties in the first set (contractually intertwined). However, the consequences in Article 28 are different: the court, on the application of one of the parties, has mere discretion, rather than an *ex officio* obligation, to stay[55] the proceedings.[56]

Thus, the threshold requirement of a substantive degree of identity, for Article 27 to apply, is high and the resulting *litispendens* effect is accordingly drastic: an *ex officio* duty to decline jurisdiction. The threshold requirement of similar, rather than identical proceedings, for Article 28 to apply, is**,** however**,** lower and the *litispendens* effect is accordingly less drastic: the mere discretion to stay the proceedings on application of one of the parties. In this way, the Regulation provides for a different kind of *litispendens* effect depending on the degree of substantive identification of the two cases and the parties.

It is submitted that the following third-party effect mechanism can be considered in respect of either a set of proceedings (judicial or arbitral) or a decision (judicial or arbitral):.

- Looser conditions (looser identity / contractually intertwined parties) $\Rightarrow$ less drastic effect
- Strict identity of parties + claim $\Rightarrow$ more drastic effect

This system may also apply in arbitration: the degree of substantive identification between a real party and a third party to an arbitration should determine the intensity of the arbitral effect upon the third party, that is, the extent of procedural repercussions for the third party. Thus, where the third parties share a great degree of substantive identification with the real parties, as in the case of privity, the arbitral award should produce a full *res judicata* effect vis-à-vis the third parties. The community of interests between real and third parties calls for a full extension of the arbitral effect to all such third parties. However, where there is a loose substantive identification between the real and the third parties, as in a multiparty contractually intertwined relationship such as those mentioned above, the arbitral award should still have an impact upon the "false third party," but, this time, a lesser one.

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[55] Or decline only in case the stricter conditions of 28(2) apply.

[56] Substantive interrelation has procedural repercussions also in the case of the common-law rules of *Forum Non Conveniens*: the courts in exercising their discretion to decline jurisdiction should take into account the existence of proceedings abroad that are substantively connected to the proceedings. In England, *see* PETER KAYE, CIVIL JURISDICTION AND ENFORCEMENT OF FOREIGN JUDGMENTS 1233-1234 (1987).

B. *Characteristics of the Third-Party Arbitral Effect--Distinction from Res Judicata*

The suggested third-party effect of an arbitral award should be clearly distinguished from the *res judicata* technical effect which is particularly drastic and linked to the enforceability of the award. In particular, the third-party arbitral effect should not include:

1. *A prohibition against reassertion*: The first arbitral proceedings between the real parties have a different subject matter from that of the proceedings between the third party and one of the real parties. The third party is not prohibited from bringing his claim against a real party, and vice versa, before a different tribunal or national court. The first arbitral award does not extinguish this claim. It falls outside the jurisdiction of the tribunal to decide on a third party's claim that it is not the subject matter of the arbitration.
2. *The enforceability effect*: The first award cannot be enforced by or against the false third party. A second trial is indispensable for the third party's claim to be determined. Any claim or objection with regard to the false third party should be the subject matter of a new trial and a new decision, which, in turn, would be enforceable vis-à-vis the false third party. Otherwise, the extension of the enforceable effect of the award against a third party would clearly violate the due process principle. This is also consistent with the contractual nature of arbitration, the ambit of which is determined by the subject matter of the arbitration agreement. The parties bound by the arbitration agreement should coincide with those bound by the arbitral award. Since the arbitration agreement cannot and should not be enforced by or against any third party,[57] neither should the arbitral award resulting from this arbitration agreement be enforced by or against this false third party.

However, the award should produce, vis-à-vis the false third party, both a conclusive and preclusive effect.[58] This kind of double effect is a necessary corollary of the strong contractual interrelation between the real and the false third party. Due to this substantive proximity, it is inevitable that the second proceedings would have to examine factual and legal issues already examined and determined by the first award. Thus, the preclusive effect of the first award should prevent any re-litigation of these issues, while the conclusive effect would provide the logical and legal basis for the second forum to reach a decision in accordance with the determination of the first judgment. Applied in this way, the combined arbitral effect harmonizes the legal and factual

[57] Not even in the case where the third party is contractually intertwined with the real parties.

[58] In the sense in which they have been explained above in Sec. IIB2.

ground of the multiparty relationship and ensures that any contradictory result is avoided.

More particularly the arbitral third-party effect should cover:

- *Both legal and factual issues*: As has already been mentioned, most civil-law jurisdictions do not extend the *res judicata* effect to facts on the ground that a judgment or an award is inherently fallible and thus can never completely determine the truth. However, the conclusiveness of a decision stems precisely from the concession that courts and tribunals are not infallible. Decisions ". . . are not final because [they] are infallible but [they] are infallible only because [they] are final."[59] They are agents of justice rather than the truth. The law of *res judicata* is a "convention designed to compensate for man's incomplete knowledge and strong tendency to quarrel."[60] Thus, any conclusive effect of a determination in a decision effectively constitutes a convention: although the decision may, by nature, be fallible, all issues, factual as well as legal, must**,** at some point**,** be finally determined, infallibly or not, so that the dispute is eventually laid to rest.[61] For this reason, the suggested effect of the arbitral award should include legal issues as well as facts. It would be wrong to adhere to a dogmatic distinction between facts and law. Apart from anything else, it is, on many occasions, too difficult to separate facts from law.[62]
- *Issues that are common in both proceedings*: It is inevitable that, due to the contractual interrelation among the several parties to the multiparty relationship, issues that were examined and finally determined in the first award will arise in the second proceedings. This legal and factual ground, common to both proceedings, should be subject to the preclusive and conclusive effect of the first award. All determinations that can be clearly inferred from the first award, regarding issues that have been examined, proved and authoritatively determined, should not be re-litigated. In addition, the issue in question before the second forum must have been essential for the first

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[59] Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J. concurring).

[60] RESTATEMENT (SECOND) JUDGMENTS, *supra* note 10, Ch.1, Introduction.

[61] *Id.* "The law of *res judicata* cumulatively reinforces the authoritativeness of the law itself" and "compels repose." *See also id.*, "The rules of *res judicata* in modern procedure . . . may fairly be characterized as illiberal toward the opportunity for relitigation" and this applies to the re-litigation of either claims or a facts.

[62] There are cases where factual and legal issues are inextricably tied up. *See id.* para. 28, referring to "genuinely mixed issues of fact and law."

award, in the sense that the relevant issue directly supports the operative part of the award.[63]

C. *Requirements of the Arbitral Effect*

The conditions required for the effect to operate are:

- *A contractually intertwined multiparty relationship*, with closely interwoven rights and duties, arising out of common factual circumstances. These multiparty cases cannot be exhaustively determined *a priori*. There is a need for an *ad hoc* investigation, depending on the specific facts at hand. However, it could be argued that multiparty relationships such as those referred to in Section IIIB would normally qualify.
- *Procedural fragmentation of this relationship*, where some of the several parties to the multiparty relationship have agreed on arbitration whereas others have agreed on litigation or a different arbitration.
- *A valid arbitral award*, resulting from proceedings between two of the several parties involved in the multiparty relationship.[64]
- *Previous invitation to the false third party to join the first arbitral proceedings*. An arbitrator faced with an intertwined multiparty relationship should assume the initiative and suggest to the parties the joinder of the false third party. Arbitrations should be joined if, and only if, all parties, real and third, agree on the joinder or the consolidation.[65] Any unilateral joining mechanism is contrary to the party autonomy principle. If all parties agree to the joinder, the procedural unification of the multiparty relationship will be achieved in the best possible and simplest way, leaving no need for other theoretical contractions. However, it is likely that some of the real parties or the false third party will reject the joinder. In this case the third-party effect of the arbitral award will arise.
- *A second set of arbitral or judicial proceedings*, between one of the real parties to the first arbitration and the false third party. Here the

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[63] *Cf.* Hanotiau, *supra* note 1 paras. 34-35. This is also required in litigation. *See, e.g.*, the English case Carl Zeiss, *supra* note 12; in the U.S. *cf.* RESTATEMENT, *supra* note 10, para. 27 and Bahler v Fletcher, 474 P.2d 329,338 (Ore. 1970), holding that collateral estoppel applies only to those issues that have "necessarily been decided in the prior action and [are] decisive of the present action." This principle is applied in civil law as well, where *obiter dicta* are not covered by *res judicata*. *See, e.g.*, ΑΠ 1366/1996, Ελλδνη 1997, 1785.

[64] All arbitral awards, in principle, are presumed valid and enforceable in accordance with the N.Y. Convention unless they are proved otherwise.

[65] *See in general*, Martin Platte, *When Should an Arbitrator Join Cases?*, 18 ARB. INT'L 67 (2002).

role of the second tribunal or court becomes crucial. The latter should make an in-depth analysis of the contractual relationship in question and determine whether, and to what extent, it is intertwined with the subject matter of the first award. In a case where the subject matter of the award and that of the pending proceedings are, indeed, closely interwoven, the second forum should refuse to re-examine issues determined in the award (preclusive effect) and accept the determination therein of these issues as conclusive (conclusive effect). This is of particular importance where the first award has undergone a fact-finding procedure, the result of which can be deduced from the award.[66] The use of different standards of proof or different evidentiary procedures by the tribunal should not be taken as an argument against the third-party effect of the award, as long as the arbitral proceedings met the standards of due process.[67]

- *Discretionary application by the courts or tribunals*: the decision on the third party effect rests in the discretion of the second tribunal or court, which should exercise this discretion taking into account all the relevant factors and the competing interests.
- *Relief from the effect*: The false third party should be given the **o**pportunity to obtain relief from the conclusive effect of the award in case of fraud or collusion between the original parties.[68] In such a case the award cannot be determinative. Therefore, the second forum should ignore it and make a fresh examination of common ground between the two proceedings.[69]

D. *The Parties Affected*

While *res judicata* regulates the relations between the real parties, the third- party effect refers to the relations of the real parties to a false third party. There are two occasions on which the relevance of this effect could arise:

1) The effect can be used by the third party in a second set of proceedings against one of the real parties acting either as claimant or as a defendant. Take, for example, the case of a secured transaction

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[66] It is true, however, that awards are not always particularly detailed, making any inference difficult. *See* Shell, *supra* note 5 at 660.

[67] Under the N.Y. Convention scheme, once the award is issued, it is presumed to meet due process standards. The due process requirement, in the context of international arbitration, is determined by international standards rather than by procedural technicalities of national laws. *See* LEW MISTELIS KROLL, *supra* note 46, para. 28-80 *et seq*; *cf*. Semmel, *supra* note 28 at 1469.

[68] *Cf*. also RESTATEMENT, *supra* note 10, Ch.5.

[69] The burden of proving the fraud or collusion would lie upon the third party according to the fundamental procedural rule that each party should prove the facts upon which it relies. *See* LEW MISTELIS KROLL, *supra* note 46, para. 22-25.

where a surety has guaranteed the performance of a seller. In the first arbitration between the seller and the buyer, the seller is awarded the full price of goods sold and delivered. This award necessarily includes an implied decision that the goods involved were of the quality specified in the sales contract. This determination of the award should be conclusive on the buyer in the event of a second trial against the surety. This is a straightforward application of the third-party effect and should not create any theoretical difficulties. The real party had a full day in court, where he had the opportunity to present his arguments and defend his legal position.[70] Any inconvenience caused to the real party should yield before the need for an effective arbitral award that would harmonize the procedurally fragmented multiparty relationship and prevent conflicting decisions.[71] This is accepted in some national procedural systems with regard to the binding effect of national judgments,[72] while it has also has been accepted and applied in some arbitral cases.[73]

2) The converse situation, however, calls for a more careful analysis of the competing interests. The question that arises here is whether the real party should be given the right to invoke the arbitral award against the false third party, and rely on issues determined therein. What is really at stake in this case is the fundamental[74] due process right of the third party to present his case. The general rule is that only parties that have taken part in the proceedings should be bound by the award resulting from these proceedings. However, due process is duly observed in this case, since:

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[70] *Cf.* Lord Denning in McIlkenny v Chief Constable of the West Midlands, [1980] QB 283, 317 (CA): "If a decision has been given against a man on the identical issue arising in previous proceedings - and he had full and fair opportunity of defending himself in it - then he is estopped from contesting it again in subsequent proceedings . . . ."

[71] There is authority suggesting that we should distinguish between the case where the party in the first set of proceedings is claimant in the second set and the case where it is defendant. According to this view we should accept the preclusive effect of the first decision against the claimant in the former case, but we should reject it in the latter, on the ground that it would be unfair to establish liability for the defendant in this way. *See* Cunningham, *supra* note 34 at 530 and case law therein. However, the fact that the party in the first proceedings has been given a fair and full opportunity to litigate should be enough, whether it acts as claimant or as defendant in the second proceedings. *See* Parklane Hosiery v. Shore, 439 U.S.322 (1979), Popp v. Eberlein, 409 F.2d 309 (7th Cir. 1969), *cert denied*, 396 U.S. 909 (1969).

[72] This is the case particularly in the U.S., where the mutuality requirement has been abandoned.

[73] *See* Blumberg v. Berland, 678 F.2d 1068 (11th Cir. 1982), Sports Factory v. Chanoff, 586 F.Supp. 342 (E.D. Pa 1984); *cf.* Shell, *supra* note 6, at 667-68.

[74] *See* in the U.S., Blonder-Tongue Laboratories v. University of Illinois Foundation, 402 U.S. 313, 329, (1971) and RESTATEMENT, *supra* note 10, para. 34.

- First, as mentioned above, the third party should always be given the opportunity to join the arbitral proceedings at an early stage. An opportunity for a party to be heard in the proceedings is enough to meet the due process standards.[75] A party that wastes this opportunity, standing by and choosing the wait-and-see tactic, should have to accept any adverse consequence arising from such tactic. This is a principle that can be found in different legal systems.[76]
- Second, after the award is rendered, the third party is given the means to obtain relief from the conclusive effect of the award in the case of fraud or collusion by the original parties. [77]

The third party thus is not left without recourse against the third-party arbitral effect. On the contrary, it is given a twofold "protection" which safeguards its right to be heard: the pre-award invitation to join and the post-award possibility of obtaining relief.

In any case, there is a fundamental difference between the case where a third party *is bound* by an award and the case where he is merely *affected* by an award. In the former case the full effect of an award -in the sense of *res judicata*- is extended to the third party. In contrast, in the case of the suggested third-party effect, the third party is merely *affected* by the award. The effect does not pre-empt any of the third party's rights or duties. In fact, the award should not refer to the third party at all: if it does so, it will exceed its jurisdiction. The award may only refer to factual and legal issues which relate to the real parties. Nevertheless, since all parties, real and third, are involved in the same contractual multiparty relationship, it is inevitable that the third party's legal position is, to some extent, affected by the determination of the award. However, this should be understood as a logical corollary of the inextricable interrelation between the several parties rather than an argument against the third- party effect. This false third party is not a contingent stranger to the real parties. It becomes contractually involved in a multiparty situation, which it necessarily accepts. The surety, for example, accepts the risk that the debtor may fail to perform and activate its own liability.

It should finally be noted that the burden of proving that the issue in question in the second action is identical to the issue which has been determined in the first will lie with the real party. This can prove a difficult burden to discharge, especially in those not infrequent arbitration cases where the awards are written in a concise form, avoiding disclosure of detail on the

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[75] *Cf*. LEW MISTELIS KROLL, *supra* note 46, para 26-86.

[76] *See, e.g.,* the *Henderson v. Henderson* principle of abuse of process, *supra* note 19, or Semmel, *supra* note 27 at 1474-77 and Cunningham, *supra* note 34, at.526.

[77] *Cf*. *also* RESTATEMENT, *supra* note 10, para.75.

matters determined.[78] This burden may, thus, to some extent mitigate any inconvenience caused to the third party.[79]

The above sets out an adequate protective framework for the third party that would justify the use of the effect even against the false third party. Thus, to extend the secured transaction example, if the award finds that the quality of the goods was not as agreed, this determination should also be opposed by the buyer against the surety in subsequent proceedings. A second example is that of a construction dispute between the owner and the contractor, where the award, based on a meticulous fact-finding process involving several experts, witnesses, onsite inspections etc, finds that the work actually carried out is defective. There should be no valid reason for this authoritative determination not to constitute the basis of subsequent proceedings between the contractor and the subcontractor.

It is not suggested here that the first award should be conclusive of the subcontractor's liability. This would not, in any event, be possible since the subcontractor's liability would fall outside the subject matter of the first arbitration. The subcontractor's liability falls exclusively under the jurisdiction of the second proceedings, during which the the latter will have the opportunity to make use of any personal defense vis-à-vis the contractor and, possibly, escape liability in accordance with the terms of the subcontract. The first tribunal, however, has the exclusive jurisdiction to determine whether the contractor was liable or not, a determination which, as a legal and logical necessity, presupposes the determination of whether the work actually performed by the subcontractor was defective.

## V. THE LEGAL BASIS OF THE EFFECT OF AN INTERNATIONAL AWARD

This section makes a tentative rather than an exhaustive suggestion as to the legal basis of the arbitral effect, which suggestion is not necessarily limited to the third-party arbitral effect. In fact, it extends beyond this to the legal basis of the effect of the international arbitral award in general.

As has been mentioned above, the international arbitration framework lacks a harmonized regulation of the effect of an international award. Instead, different national regimes result in a confusing divergence in this respect. This falls short of the unparalleled uniformity that the NewYork Convention has established with regard to the enforcement of international arbitral awards. The NewYork Convention abolished national technicalities and created a self-regulated international arena where the arbitral award has achieved independence from national regimes. The validity and enforceability of an international award are generally examined in accordance with uniform and international, rather than national, standards established by the Convention. This policy has promoted equality and predictability in international business,

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[78] See *supra* note 65.

[79] *See* Cunningham, *supra* note 34, n. 55; *contra* Semmel, *supra* note 28, at 665.

and has enhanced the effectiveness of the arbitral award as a means of international dispute resolution.

This unrivalled success of the New York Convention has strengthened the argument in favor of de-nationalization of international arbitration. Thus, harmonized a-national procedural[80] and substantive[81] standards are developing and becoming more relevant in international arbitration than ever before. In fact, one of the few aspects of international arbitration that remains in the exclusive domain of national jurisdictions is the regulation of the effect of the arbitral award. The practice whereby an arbitral award is equated to a national judgment in terms of its effect causes unpredictability and undermines the effectiveness of the international award. The effects of an international arbitral award depend on the different, and, in many cases conflicting, regulations of the different national jurisdictions. Take, for example, the same international award between a creditor and a debtor:

- Enforced in England, it will not have any effect vis-à-vis the surety;[82]
- Enforced in Greece, it will be *res judicata* vis-à-vis the surety, in a case where it is favorable to the debtor, but not in a case in which it is favorable to the creditor;[83]
- Enforced in the U.S., it will be used as *prima facie* evidence vis-à-vis the surety.[84]

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[80] The fundamental principles of "due process" and "fair hearing" constitute basically the unified procedural principles in international arbitration. *See* LEW-MISTELIS-KROLL, *supra* note 46, para. 5-68 *et seq*. *See also* Alex.Baum, *International Arbitration: the Path toward Uniform Procedures*, *in* GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION, LIBER AMICORUM IN HONOR OF ROBERT BRINER 51 (Gerald Aksen et al. eds., ICC pub. No. 693, 2005).

[81] *E.g*. the application of *lex mercatoria* or international sets of rules such as the INCOTERMS, UCP, UNIDROIT principles etc. *See* in general LEW-MISTELIS-KROLL, *supra* note 46, para.18-41 et seq.

[82] *See* Re Kitchin, exp Young, (1881) 19 ChD 668 and Bruns v. Colocotronis (The "Vasso"), [1979] 2 Lloyd's Rep 412, (Commercial Court).

[83] Greek Code of Civil Procedure, Arts. 896 and 328.

[84] Norris v. Mersereau, 74 Mich 687, 690; 42 NW 153 (1889); Sauer v. Detroit Fidelity & Surety Co, 237 Mich 697, 702; 213 NW 98; 51 ALR 1485 (1927); Kent Probate Judge v. American Employers Insurance Co, 283 Mich 328, 334-335; 278 NW 85 (1938), PR Post Corporation v. Maryland Casualty Company, 68 Mich. App. 182; 242 N.W.2d 62 (Mich. App.1976).where it was held that the award will have be used as "prima facie" evidence against a third party (surety) Or see the cases Fidelity and Deposit v. Parsons & Whittemore Contractors, 48 N.Y.2d 127 (N.Y. 1979) and Madawick Contracting v. Travelers Insurance Company, 307 N.Y. 111; 120 N.E.2d 520 (N.Y.1954) where it was held that the award between the contractor and the subcontractor is binding upon the surety with regard to the issue of the subcontractor's liability, which should not be re-litigated in a later suit of the contractor against the surety.

The international status of an arbitration award disappears after it is recognized and enters the national jurisdiction. Thus, the harmonization produced by the New York Convention is exhausted after providing the conditions for the recognition of an international arbitral award. This, however, is in conflict with the spirit of the Convention, which has created an international arena where the enforcement and, thus, the free movement of awards is facilitated.[85] It follows that enforceable awards should obtain the maximum degree of effectiveness within the international arena. Allowing divergent regulation of the arbitral effect by national systems reduces the effectiveness of the international award and hampers the free movement of international awards.

National states are reluctant to relinquish their right to control and regulate the effects of a judgment or an award, the consequences of which are "felt" within their own jurisdiction. This may be a reasonable argument as far as national judgments are concerned. Allowing foreign judgments, from several different jurisdictions to carry their own national status and effect into the country of enforcement, would cause chaotic divergence and uncertainty. It is necessary, therefore, that the enforcing country should regulate and determine the effects of foreign judgments, assimilating their effects with those of domestic judgments.[86]

The argument, however, is less persuasive in the context of international arbitration. An international arbitration, by definition, has no national forum. Thus, the arbitral award is not the product of a particular national legal system, and, in any case, the seat of arbitration bears no relation to the effect of an arbitral award. An international arbitral award does not carry any national *res judicata* status. It is "given" the status of *res judicata* only after it enters national jurisdictions. It seems contradictory that an international award rendered and recognized exclusively according to international standards should be given a national status with regard to its conclusiveness and effect. Instead, international awards should have an international harmonized effect, designed for the particular needs of international arbitration, an effect which the award should carry into national jurisdictions. There should be a shift from a national to an international point of view regarding the effects of arbitral awards.

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[85] *Cf*. Lew-Mistelis-Kroll, *supra* note 46, para. 26-36.

[86] *See* RESTATEMENT, *supra* note 10, para. 98. *See also* Panama Processes v. Cities Service, 796 P.2d 276 (Okl. 1990): in enforcing a Brazilian judgment, the U.S. courts decided to apply their domestic law of *res judicata* as opposed to Brazilian law. *Cf*. McCord v. Jet Spray, 847 F.Supp. 436 (D.Mas.1994), assuming that the Belgian concept of *res judicata* was comparable to the American concept the U.S. court concluded that it would recognize the judgment with the conclusive power that it would have under Belgian law. *See also* Berti, *supra* note 9, Art. 194, para 134 *et seq*: Swiss law also applies *res judicata* to a foreign arbitral award to the extent that the law of the country in which the award was made, would recognize that award. On the other hand, these effects could not go beyond those which the award would have if it were a Swiss award made in Switzerland.

National jurisdictions should retain, as a safety net, the right to reject the effect only if this violates the international public policy of the country in question. This, in fact, is the real scope of the N.Y. Convention, Article V(2)(b). Enforcement is the judicial process that gives effect to the mandate of the award.[87] In other words, enforcement is the vehicle by which the effects of the award are transplanted to the enforcement country. In cases where the courts of the enforcement country consider that the effects of the award to be enforced manifestly violate its public policy, they will not allow the enforcement process to proceed. Thus, the New York Convention, in Article V(2) (b), determines the boundaries of the legitimate authority of the national state over an international award regarding the effects of the award. The national state has, indeed, a legitimate interest in reviewing, rather than determining as a whole, the effects of an international award. The legitimacy of this interest, however, is strictly related to public policy considerations and cannot be extended beyond public policy boundaries.

## VI. CONCLUSION

The purpose of this article has been to show that the technical mechanism of *res judicata* recognized in relation to national judgments is not always suitable for international awards. The principal argument outlined here has been that the arbitral award should produce a third-party effect, which differs from the *res judicata* effect, and is designed for the needs of international arbitration. The content and boundaries of this third-party effect, as well as the conditions of its application have also been considered here. Finally, a tentative suggestion as to the legal basis of the arbitral effect, in general, has been made.

The suggested third-party effect of an international arbitral award strikes a satisfactory compromise between the several conflicting interests:

- It accommodates the problems arising out of multiparty contractual relationships in the context of international arbitration.
- It reduces the chances of conflicting awards.
- It is consistent with the consensual nature of arbitration.
- It is flexible, giving the courts and tribunals the discretion to recognize a third- party effect, on a case by a case basis.
- It promotes the efficiency of international commercial arbitration.

This is not to suggest that the proposal is ideal. The problems arising out of the relationship between arbitration and third parties are arguably the most complicated and delicate problems in the area of international arbitration. On many occasions the scholar or the practitioner finds himself in a "catch-22" situation. On the one hand, bringing all the parties in a multiparty situation

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[87] *See* LEW-MISTELIS-KROLL, *supra* note 46, para 26-12.

before a common arbitral forum may violate the fundamental principle of consent. On the other hand, allowing the several parties to bring overlapping claims before different fora leaves the door open for conflicting decisions. This may undermine the effectiveness of international arbitration and frustrate parties' expectations.

The main idea lying behind this article is the suggestion that the problems of a multiparty situation may be addressed more effectively by the arbitral award than by an arbitration agreement. This is because the contractual nature of an arbitration agreement cannot penetrate the circle of the contracting parties, while the jurisdictional clout of an arbitral award may and, under certain circumstances should, extend to third parties. In other words, in international arbitration, unlike litigation, the necessary harmonization of parallel proceedings may be achieved more effectively at the stage after the first award is issued rather than at the stage of the hearings.

Academic debate on the arbitral effect is ongoing,[88] and continues to provoke wide differences of opinion. It is to be hoped that this study has contributed to this discussion and has shed light on some other aspects of the arbitral effect, in particular with regard to the third parties.

[88] See Resolution No. 1/2006 issued by the International Arbitration Committee of the International Law Association , at the Conference held in Toronto June 4-8, 2006. Available at http://www.ila-hq.org/html/layout_committee.htm. The final ILA report on *Res Judicata* will be available by the end of 2006. *See* http://www.ila2006.org.