With regard to the triple identity test, the ILA's Recommendation No. 3 provides that a prior award should have *res judicata* effect in subsequent arbitration proceedings if

1. It has decided on or disposed of a claim for relief which is sought or is being reargued in further arbitration proceedings;
2. It is based upon a cause of action which is invoked in further arbitration proceedings; and
3. It has been rendered between the same parties.

This triple identity test ensures the identicalness of the disputes in both proceedings and thereby avoids a party being deprived of its right of access to justice and its right to be heard with regard to a matter that has not already been decided in other or prior proceedings. By the same token, it also avoids unnecessary and wasteful duplications of proceedings: it is redundant to adjudicate the same dispute in more than one set of proceedings and it is undesirable for parties to a single dispute, through their own conduct, to generate inconsistent decisions regarding their rights and duties. These underlying rationales are the same whether the prior decision is a national court judgment or an international arbitral award. [...]

6.116 Regarding the cause of action requirement, the question arises whether international commercial arbitral tribunals should avoid the problematic distinction between identity of cause and object and replace these two requirements by the single requirement of 'identity of question in dispute'. It has been suggested that international arbitral tribunals may consider a dispute identical to a dispute previously decided where the same claim is based on the same factual background, to the exclusion of the claim's underlying legal grounds. This is in line with recent developments in civil law countries where courts now tend to adopt a broader and more pragmatic approach to assess the identity of the subject matter in dispute. This new approach aligns these civil law countries with the more pragmatic approach followed in common law countries, as well as the broad approach adopted by the ECJ when interpreting the identity of 'cause of action' requirement under the Brussels I Regulation. It also mirrors the tendency of international courts and tribunals to focus on the facts underlying the claims in order to determine whether or not two disputes are identical.

6.117 In line with these developments, it appears appropriate for international commercial arbitral tribunals to replace the two requirements of identity of cause and object by the single requirement of 'identity of question in dispute'. A reference to a claim's underlying 'cause' would not be necessary since the identity of questions in dispute would be determined only by reference to the totality of a claim's or counterclaim's underlying facts. The legal arguments that a party may have invoked in support of its claim or counterclaim would be irrelevant for determining whether there is identity of the
questions in dispute between two sets of proceedings for the purposes of applying the *res judicata* doctrine.

6.118 For the reasons mentioned above, the identity of the question in dispute requirement would cover not only claims and counterclaims, but also essential or fundamental issues of fact or law already debated and decided in the essential reasons of the earlier national court judgment. However, the notion of ‘question in dispute’ would not extend to claims or issues that were not raised and decided in the earlier judgment, unless raising such claims or issues in the subsequent arbitration would amount to procedural unfairness or abuse. 171 [...]  

### 4. Conclusion

6.222 Arbitral awards are generally recognized as having *res judicata* effects. Applying the transnational law method, international commercial arbitral tribunals should determine autonomously the type of awards capable of operating as a *res judicata* in further arbitral proceedings. This should usually apply to arbitral awards that finally resolve a specific issue affecting the rights and obligations of the parties, including arbitral decisions on provisional measures.

6.223 In order to become *res judicata*, arbitral awards must be final and binding, in the sense that, subject to the parties' agreement, they have been rendered and are not or no longer subject to an appeal with suspensive effects on the merits. It should usually not be relevant for the purposes of *res judicata* that an arbitral award remains subject to setting aside proceedings on the basis of restrictive grounds in the country where it was rendered. However, arbitral awards that were set aside at the arbitral seat should no longer be considered as 'valid' and thus no longer have *res judicata* effects in further arbitration proceedings. Finally, all final arbitral awards (full and partial) should be considered as 'on the merits' for *res judicata* purposes. Equally, positive and negative arbitral decisions on jurisdiction should generally be considered as arbitral awards and capable of having *res judicata* effects in other arbitration proceedings.

6.224 Arbitral awards that qualify as *res judicata* may generally give rise to claim preclusive effects in other or further arbitrations. Broadly speaking and unless the parties agree otherwise, these claim preclusive effects should extend to the award's underlying reasons. Moreover, as a general rule, arbitral awards should also give rise to issue preclusive effects. However, it is submitted that the issue preclusion doctrine should not usually apply where one arbitral tribunal has decided a specific preliminary issue in the award's reasons and the same issue arises again in another arbitration as the main issue. Nonetheless, final determinations of specific preliminary issues should have *res judicata* effects in further arbitration proceedings where they were decided in a partial award. Moreover, a partial award's underlying reasoning should be binding on the tribunal that rendered it. And international commercial arbitral tribunals should in any event give due consideration to a prior arbitral award's essential reasons in order to avoid inconsistent awards.

6.225 Furthermore, claims, causes of action, and issues that were not raised and decided in a prior award should be covered by the award's *res judicata* effects, provided the raising of such a claim, cause of action, or issue in the other arbitration would constitute an abuse of process or procedural unfairness.

6.226 With regard to the requirements that must be met for an award to operate as a *res judicata*, international commercial arbitral tribunals should generally apply the triple identity test to verify that the prior award involved the same parties and issues. Where the prior award has been refused recognition or enforcement in the country of the second arbitration for one of the grounds listed in Article V(1) of the New York Convention, the arbitral tribunal may prefer not to give the award *res judicata* effects.

---


166 In this sense, see Schreuer and Reinisch, para. 257.

167 For Switzerland, see paras 1.152 et seq. For France, see paras 1.116 et seq.
Referring Principles:

XIII.4.5 - Conclusive and preclusive effects of awards; res judicata