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

An arbitral award has conclusive and preclusive effects in subsequent arbitral proceedings if:

i) it has become final and binding in the country of origin and there is no impediment to recognition in the country of the place of the subsequent arbitration;

ii) it has decided on or disposed of a claim for relief which is sought or is being reargued in the subsequent arbitration proceedings;

iii) it is based upon a cause of action which forms the basis for the subsequent arbitral proceedings; and

iv) it has been rendered between the same parties.

Commentary:

1 In times of increasing numbers of parallel and multiple proceedings concerning the same claim, the question of an arbitral award's conclusive and preclusive effect becomes ever more important. The foundation of international arbitration is that the process leads to a final and binding decision on the parties' dispute. If a claim that was subject to such a final and binding decision by an international arbitral tribunal is raised again in a subsequent arbitration, clear rules are required as to when and to which extent an arbitral award is res judicata.

2 Domestic laws address the question of res judicata in different ways. Two main approaches may be distinguished: "issue estoppel" and "cause of action estoppel". "Issue estoppel" only requires that the same parties argue about the same issue. "Cause of action estoppel" not only requires identity of the parties and issue but also of the legal basis under which the cause of action is brought (so-called "triple identity test").

3 The question then arises, which of these two concepts is more prevalent in international arbitration. To answer this question, the International Law Association (ILA) has conducted a comprehensive study on the approach arbitral tribunals have taken. The resulting ILA Recommendations follow the "triple identity test". This is in line with the fact that the "triple identity test" constitutes the lowest common denominator of the two main approaches. If all three prerequisites are fulfilled, all major legal systems will afford a decision res judicata effect. The "triple identity test" as reflected in the ILA Recommendations can thus be considered a transnational rule. The ILA Recommendations' text has accordingly been adopted as the basis for the present Principle.

4 The most difficult question to answer in practice is whether the "cause of action" is identical. There is a tendency to construe this term widely in that it suffices if the "question in dispute" is identical. The "question in dispute" would cover identical claims, counterclaims and all fundamental issues of fact and law already decided in the prior decision. However, it would not cover claims and defenses that were not raised in the earlier dispute.

5 Regarding such claims, however, res judicata may apply where not affording preclusive effect to a tribunal's prior decision would essentially amount to an abuse of rights or abuse of process by the party raising the claim in a second arbitration. This is the case where a claimant institutes a second arbitration for certain claims which it might just as well have raised in the first arbitration. The general Principle of good faith and fair dealing requires the claimant to raise all claims as early as possible under the circumstances and not intentionally withhold any claims for later determination.

6 The present Principle addresses the question under which circumstances "an arbitral award has conclusive and preclusive effects in subsequent arbitral proceedings". Similar questions may also arise in regard to whether a court judgment has preclusive effect in a subsequent arbitration or an arbitral award in a subsequent court action. While the former question will be answered by the arbitral tribunal constituted to hear the dispute, the answer to the latter question depends on the particular jurisdiction's requirements.