



KIEV ARBITRATION DAYS 2013

THE EFFECTS OF *RES JUDICATA*

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The Triple-Identity Criteria

- Identical relief (*petitum*)
- Identical legal grounds (cause of action, *causa petendi*)
- Identical parties

Common law jurisdictions

- Issue estoppel (US: Issue preclusion, collateral estoppel) (excluding subsidiary and collateral elements and *obiter dicta*)
- Abuse of process (a maxim of general application)

The reach of *res judicata*

- Scope of *res judicata* of a partial award in relation to a final award (e.g. liability and *quantum*)?
- Who decides on the *res judicata* defense, the arbitrator or the court?
- Can a prior award (between different parties) dealing with an identical cause of action be admitted as evidence?
- Does a consent award constitute *res judicata* or an award by arbitrators acting as *amiables compositeurs*?
- *Res judicata* effect of a prior default judgment?
- A prior arbitral award against which a setting-aside action is in progress?


Effects of *res judicata*

- Positive: Finality of decision
- Negative: Bar against re-litigation

Is the application of *res judicata* a matter of

- Public policy?
- Positive law?
- Party agreement?

The national court's perspective

- Prior domestic court judgment
 - Prior foreign court judgment
-  The decisive matter is the enforcement of the foreign judgment
- European Council Regulation No. 44/2001
 - Section 9: *Lis pendens*
 - Chapter III: Recognition and enforcement

The arbitrator's perspective

- Prior court judgments
 - A matter of jurisdiction
 - Timing not decisive
- Prior arbitral awards
 - Time critical
 - A matter of finality
- The paramount role of the supervisory court

Some standard scenarios

Claimant commences arbitration – respondent turns to local court on home turf and

- Local court declares the arbitration invalid; or
- Local court declares on the merits (“no liability”)

What then?

Claimant commences arbitration against an assignee of contract rights

- Local court at the place of the assignee declares the assignment invalid

What then?

The Rakoil affair

- Arbitration commenced in Switzerland
- Court proceedings commenced by respondent in its home jurisdiction, asking for a negative declaration with respect to the claimant's request
- The court delivering a judgment affirming the local party's position (prior to the rendering of the award)

The arbitral tribunal noted that “the court decision would not prevent the arbitration tribunal to proceed with the arbitration and to award on the merits of the case”.

Deutsche Schachtbau und Tiefbohrgesellschaft mbH (DST) and others v R'as Al Khaimah Oil Company (Rakoil) and others, 14 Y.B. Com. Arb. 111 (1989)

Archangel Diamond Corporation v OAO Archangelsk-geoldobycha

- Award of 25 June 2001, dismissing the arbitration for lack of jurisdiction
- Final judgment of 15 November 2004 of the Stockholm Court of Appeal, positively affirming the tribunal's jurisdiction

An example of mandatory rules referring the particular dispute to court adjudication – a case of parallel proceedings.

Svea Court of Appeal (Stockholm), Case No. T8735-01, 15 May 2003

Identical cause of action and claim – “almost” identical parties

Parties: Ronald S Lauder v The Czech Republic

Applicable treaty: Czech Republic – United States BIT

Seat of arbitration: London

Parties: CME Czech Republic B.V. v the Czech Republic

Applicable treaty: Czech Republic – Netherlands BIT

Seat of arbitration: Stockholm

