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## Only One Kick at the Cat: A Contextual Rubric for Evaluating Res Judicata and Collateral Estoppel in International Commercial Arbitration

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# ONLY ONE KICK AT THE CAT: A CONTEXTUAL RUBRIC FOR EVALUATING RES JUDICATA AND COLLATERAL ESTOPPEL IN INTERNATIONAL COMMERCIAL ARBITRATION

*Randy D. Gordon\**

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## I. INTRODUCTION

At a time long after clogged civil dockets and fears of foreign judicial systems first pushed international commercial disputants towards arbitration as a primary method of conflict resolution, it is now worthwhile to consider carefully any procedural mechanism designed to promote the central aims of this alternative to litigation. One central aim is to provide swift, sure, and settled decision-making, particularly in those numerous cases in which malingering might lead to the ruin of one or both parties. To this end, the traditional doctrines of preclusion—namely, *res judicata* and collateral estoppel<sup>1</sup>—provide an attractive force with which to buttress the conclusive nature of arbitral awards.

Unfortunately, for a couple of reasons, one cannot simply import—without at least some reflection and adjustment—preclusionary devices from litigation into arbitration. First, simply stated, arbitration is not litigation: for example, procedures may vary from one arbitration to the next, strict fidelity to the law is not required in arbitration, and the basis of an award may be relatively obscure.<sup>2</sup> Thus, it may be difficult to

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1. The Court in *Lawlor v. Nat'l Screen Service Corp.*, 349 U.S. 322, 326 (1955) stated:

[U]nder the doctrine of *res judicata*, a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit.

2. See *Postlewaite v. McGraw-Hill*, 333 F.3d 42, 48-49 (2d Cir. 2003) (stating that "[a]rbitrators need not explain the reasons for their award"), *aff'd*, 411 F.3d 63 (2d Cir. 2005); *Universal Am. Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131, 1137 (5th Cir. 1991) (stating that district court must consider the procedural differences between arbitration and court proceedings in assessing prejudice on the part of party challenging use of collateral estoppel); Richard W. Hulbert, *Arbitral Procedures and the Preclusive Effect of Awards in International Commercial Arbitration*, 7 INT'L TAX & BUS. LAW. 156, 195 (1989) (examining whether the effect a U.S. court gives to an international arbitral award should differ from the effect given to a judgment from a

tell which claims and issues were, or could have been, fully and fairly heard by the tribunal, the *sine qua non* of any definition of preclusion. Second, the policy grounds from which *res judicata* and collateral estoppel first sprung are not present in the arbitral arena, at least in the form of a one-to-one correspondence.<sup>3</sup> Neither of these reasons is enough, however, to defeat all possibility of the preclusive effect of arbitral awards. A number of cogent arguments can be advanced in favor of application, but these arguments must necessarily be based on a theory that directly addresses—rather than skirts—the obvious differences between arbitration and litigation.

As a point of departure, it will prove helpful to pause and consider the traditional policy justifications that militate in favor of preclusion in litigation. Once this groundwork is established, the justifications vis-à-vis commercial arbitration generally may be considered, then against international arbitration specifically. This distinction between domestic and international arbitration is important because there are a number of special considerations in the international context that some courts and commentators ignore when they take up the issue of preclusion. To facilitate the flow of this analysis, the remainder of this Article is broken into four major parts, three that develop a conceptual framework and vocabulary, one that makes conclusions and recommendations. Part II, which immediately follows this Introduction, examines the preclusion rules as they evolved in the litigation context. Part III traces the various ways that preclusion rules have been applied domestically when arbitration is at issue either as the forum or the source of a prior decision. This section establishes a rubric based on context that brings clarity to an area that is often confused. Part IV maps the contextual rubric onto the international context and considers whether international arbitral findings should bind U.S. courts and subsequent arbitrations. The Article concludes with suggestions for bringing both clarity and conformity to the question of whether international arbitral awards should be binding in subsequent proceedings.

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U.S. court); G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. REV. 623, 663-64 (1988).

3. See *Brody v. Hankin*, 299 F. Supp. 2d 454, 459 (E.D. Pa. 2004) (“Generally, *res judicata* rules must sometimes be adapted to fit the arbitration context.”).

## II. POLICY CONSIDERATIONS IN LITIGATION

In its most naked form, the policy driving the twin doctrines of res judicata and collateral estoppel arises from the interimplication of notions concerning fairness, certainty and judicial economy. The complexity of modern society has only heightened our sense that disputes must be resolved for all parties at one sitting:

New methods of marketing and transportation, contemporary consumer concerns, and growing government contribute to the fact that when injury occurs, or is thought to occur, there are multiple victims, or multiple perpetrators, or both. And when those injuries lead to litigation, they regularly yield multiple suits involving the same issues.<sup>4</sup>

Thus, if each suit out of many is decided in isolation—i.e., if each is handled as if its fellows did not exist—a duplicative burden on scarce resources is an obvious and wasteful consequence.<sup>5</sup> Even if some observers have made too much of the dangers that multiple litigation poses, the main point—namely, that economy, certainty, and finality all suggest that a transaction and its central issues be heard only once—is well taken. None of this is mere idle academic speculation, either; there is adequate empirical evidence to suggest that courts favor preclusion as one important tool for handling ever-increasing caseloads.<sup>6</sup>

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4. See John C. McCoid, *A Single Package for Multiparty Disputes*, 28 STAN. L. REV. 707 (1976), reprinted in PERSPECTIVES ON CIVIL PROCEDURE 243 (Geoffrey C. Hazard, Jr. & Jan Vetter eds., 1987).

5. McCoid writes:

Either repetitive litigation requires the expenditure of additional resources on adjudication, or, if expenditure remains constant, it diverts those resources from resolution of other controversies of significance. That diversion may appear as delay; or it may be a reduction of the time given to examination of any or all controversies presented, with resulting loss of quality. Another product of multiplicity is inconsistency. The spectre of public dismay over a system that decides like cases differently is a disturbing one. Perhaps that concern is overrated, but it is easy to see that different triers of law and fact, responding perhaps to slightly different evidence or presentation at different times or places, might well reach different judgments on the same transaction.

*Id.* at 243-44.

6. See Shell, *supra* note 2, at 626 (stating that wide use of arbitration has helped to ease overloaded courts by funneling civil cases into alternative forums); RICHARD A. POSNER, *FEDERAL COURTS: CRISIS AND REFORM* 321 (1985).

Of the two preclusionary doctrines, *res judicata*, or claim preclusion, is the more general, referring to the practice of precluding the relitigation of claims that either were or could have been brought in a prior proceeding.<sup>7</sup> *Res judicata* is itself further divided into two subcategories: merger and bar. Merger, in its classic casebook manifestation, involves the “splitting” of a claim. In *Dearden v. Hey*,<sup>8</sup> for example, the plaintiff brought a tort action for personal injuries suffered in a car crash caused by the defendant’s negligence.<sup>9</sup> However, the plaintiff had already sued and recovered for property damages to his car arising from the same negligent act.<sup>10</sup> The court held “that damages resulting from a single tort, even though such damages be partly property damages and partly personal injury damages, are, when suffered by one person, the subject of only one suit as against the wrongdoer.”<sup>11</sup> This rule is based largely upon the proposition that the defendant’s wrongful act is single, that the cause of action must be single, and that the different injuries occasioned by it are merely items of damage proceeding from the same wrong.<sup>12</sup>

A plaintiff is thus encouraged to bring all claims arising from a single transaction in a single proceeding because the final judgment will prevent him from later raising issues and theories of recovery grounded on the same transaction—even if he did not actually raise them.<sup>13</sup> In effect, the original cause of action no longer exists; it is merged into the plaintiff’s

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7. See *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948):

The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound, not only as to every matter which was offered and received to sustain the claim or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.

*Wolf v. Gruntal & Co., Inc.*, 45 F.3d 524, 527 (1st Cir. 1995) (“[R]es judicata (claim preclusion) normally bars (i) relitigation of claims actually asserted in a tribunal of competent jurisdiction, and (ii) litigation of claims that arose from the same set of operative facts and *could have been raised* in the prior proceeding.”) (citations omitted) (emphasis added); *Brody*, 299 F. Supp. 2d at 458 (“*Res judicata* applies to all claims actually brought or which could have been brought in a prior action regardless of whether they were asserted or determined in the prior proceeding.”). Many courts and commentators employ the term “*res judicata*” as a catch-all encompassing all forms of preclusion: merger, bar and collateral estoppel. In this Article, I refer to this usage as “broad.” The “narrow” definition refers to merger and bar only.

8. 24 N.E.2d 644, 659 (1939).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 663.

13. RESTATEMENT (SECOND) OF JUDGMENTS § 18 (1982).

judgment, which itself becomes a new and wholly distinct cause of action should the defendant fail to satisfy it.<sup>14</sup>

Bar, which is almost—but not quite—a mirror image of merger, blocks a plaintiff's attempt to relitigate a claim upon which the defendant has already prevailed in a previous action.<sup>15</sup> The one significant point of divergence from merger is that a second action will be barred if and only if the judgment in the first action was "on the merits."<sup>16</sup> As one might expect, determining exactly whether a judgment was had on the merits can be difficult, especially in cases in which a defendant receives a final judgment of dismissal based on lack of jurisdiction, misjoinder of parties, improper venue and the like.<sup>17</sup> However, a generally received doctrine has evolved to address such judgments, under which these cases are treated as exceptions to the rule of bar.<sup>18</sup>

Collateral estoppel, or issue preclusion, has a somewhat more circumscribed ambit than does *res judicata*.<sup>19</sup> This is to say that both doctrines address certain common concerns, but with a differing emphasis.<sup>20</sup> One commentator aptly noted, "[r]es judicata focuses on the general interest in finality and repose of judgments. Collateral estoppel, by contrast, emphasizes finality of specific instances of fact-finding."<sup>21</sup> To this policy end, collateral estoppel seeks to block the relitigation of

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14. See ROBERT CASAD & PETER SIMON, *CIVIL PROCEDURE: CASES AND MATERIALS* 731 (1984).

15. RESTATEMENT (SECOND) OF JUDGMENTS § 19 (1982).

16. See CASAD & SIMON, *supra* note 14, at 736.

17. This problem typically arises when it is unclear from the face of the judgment whether a dismissal was made with or without prejudice. See, e.g., *Costello v. U.S.*, 365 U.S. 265, 285-88 (1961) (holding that failure of district court in denaturalization proceeding to specify dismissal (for lack of jurisdiction) as being 'without prejudice,' did not bar second proceeding).

18. RESTATEMENT (SECOND) OF JUDGMENTS § 20 (1982).

19. In keeping with the one-bite-at-the-apple metaphor typically used in discussions of preclusion, many commentators suggest that collateral estoppel leaves narrow, but deep, teeth marks, *res judicata* leaves wide, yet shallow, marks. See JOSEPH W. GLANNON, *CIVIL PROCEDURE: EXAMPLES AND EXPLANATIONS* 485 (4th ed. 2001):

*Res judicata* acts like a bludgeon, indiscriminately smashing all efforts of a party to relitigate events that have already been litigated and decided in a prior suit. Collateral estoppel, by contrast, operates like a scalpel, dissecting a lawsuit into its various issues and surgically removing from reconsideration any that have been properly decided in a prior action.

20. Accordingly, some courts hold that the "finality requirement for issue preclusion is less stringent than for claim preclusion." *Nicor Int'l Corp. v. El Paso Corp.*, 292 F. Supp. 2d 1357, 1368 (S.D. Fla. 2003) (citing *Christo v. Padgett*, 223 F.3d 1324, 1339 (11th Cir. 2000)).

21. Shell, *supra* note 2, at 648.

specific factual and legal issues that have been decided in prior litigation based on a different claim.<sup>22</sup> It should come as no surprise, then, that collateral estoppel jurisprudence—because of the specific nature of the inquiry—has developed a rather elaborate scheme against which to measure the preclusive potential of any given set of facts.<sup>23</sup>

Under this scheme, the party seeking preclusion in most situations must prove (1) that there is a strict identity between the issue contested in the present action and an issue in the past action,<sup>24</sup> (2) that the issue was actually litigated,<sup>25</sup> (3) that the issue was necessary to the previous judgment,<sup>26</sup> (4) that the party against whom preclusion is sought was a party to the prior action or in privity,<sup>27</sup> and (5) that the party to be barred had a full and fair opportunity to contest, in the first proceeding, the evidence relevant to the issue.<sup>28</sup> If these threshold elements are met, a

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22. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

23. The elements of collateral estoppel vary somewhat across jurisdictions, even domestically. Although the question is beyond the scope of the present discussion, we should note that there is a good deal of confusion as to whether the rules of collateral estoppel are procedural or substantive (and thus subject to an *Erie* conflicts analysis). See *Bryson v. Gere*, 268 F. Supp. 46, 55 (D.D.C. 2003) (“[C]ase law is unclear whether collateral estoppel is procedural or substantive.”). This issue becomes doubly complicated when an arbitral award—rather than a judgment—is at issue. *Pike v. Freeman*, 266 F.3d 78, 91 n.14 (2d Cir. 2001) (“This argument raises the question whether federal law or state law should govern a federal court’s determination of the preclusive effect of an arbitral award—a question that unfortunately has not been much developed.”) (internal quotation marks omitted).

24. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

25. *French v. Jinright & Ryan*, P.C., 735 F.2d 433, 436 (11th Cir. 1984); see also *Shell*, *supra* note 2, at 647-48.

26. *French*, 735 F.2d at 436.

27. *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 323-24 (1971).

28. *Id.* at 329 (stating that requirement of determining “whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard.”); *Vans, Inc. v. Rosendahl (In re Rosendahl)*, 307 B.R. 199, 209 (Bankr. D. Ore. 2004) (stating five-part test). Many courts collapse this five-part test into a four-part test. The court in *Central Transport, Inc. v. Four Phase Systems, Inc.*, 936 F.2d 256, 259 (6th Cir. 1991) stated:

This court has held that the four requisites for issue preclusion are: 1) the issue precluded must be the same one involved in the prior proceeding; 2) the issue must actually have been litigated in the prior proceeding; 3) determination of the issue must have been a critical and necessary part of the decision in the prior proceeding; and 4) the prior forum must have provided the party against whom estoppel is asserted a full and fair opportunity to litigate the issue.

See also *Bryson v. Gere*, 268 F. Supp. 2d 46, 56-57 (D.D.C. Cir. 2003) (stating four-part test).

second court will bind itself to the findings of a first court and thereby prevent relitigation of the contested issues.<sup>29</sup>

### III. A COMPARATIVE LOOK AT DOMESTIC COMMERCIAL ARBITRATION AND LITIGATION<sup>30</sup>

It should be abundantly clear at this point that both claim and issue preclusion serve the desirable social end of keeping stale and settled disputes from impinging too sharply on the present. More generally:

Their enforcement represents an attempt to secure a prompt and nonrepetitious judicial system by putting an end to litigation. Other objectives are to reduce the number of inconsistent results; to maintain the prestige of the courts by prohibiting litigants from indirectly overturning a court decision through relitigation of the same claim or issue; to save money and time of litigants, courts and the public; and to protect parties from being twice harassed for the same cause. Thus, the application of the preclusion doctrines results in the maintenance of certainty in legal relations and the easing of congested court calendars.<sup>31</sup>

The next consideration is whether these policy aims are relevant not only in the litigation context but also in arbitration. At first blush, certain justifications (e.g., finality) seem more or less plausible vis-à-vis arbitration; others (e.g., easing crowded dockets) do not appear so facially applicable. Nonetheless, nearly all these policy considerations are relevant in some situations. The problem is to narrow our focus to consider a single context at a time. That is, the first attempt will be to establish whether there are identifiable categories that require their own balancing of policy aims. What one ultimately finds is that the question of whether a court judgment should preclusively bind a subsequent arbitral tribunal is

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29. *Blonder-Tongue*, 402 U.S. at 324 (stating that any party may invoke issue preclusion "defensively" against a plaintiff who has already lost on that issue in a prior action); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (holding that a plaintiff in second action may assert collateral estoppel "offensively" against defendant who has lost on issue in previous action).

30. For extended discussions of this issue, see Shell, *supra* note 2; Melissa Hope Biren, *Res Judicata/Collateral Estoppel Effect of a Court Determination in Subsequent Arbitration*, 45 ALB. L. REV. 1029 (1981); Hiroshi Motomura, *Arbitration and Collateral Estoppel: Using Preclusion to Shape Procedural Choices*, 63 TUL. L. REV. 29 (1988) (discussing effects of collateral estoppel on findings made in arbitration).

31. Biren, *supra* note 30, at 1036-37.

analytically distinct from the question whether an arbitral award should bind a subsequent litigation. The question of whether an arbitral award should bind a subsequent arbitration triggers yet another balancing of competing policies.

There are many subtleties that plague attempts to generalize about preclusion when arbitration is at issue. It is helpful to frame any particular analysis according to (1) the type of decision for which preclusive effect is sought (i.e., arbitral award or court judgment) and (2) the type of subsequent proceeding in which preclusion is sought (i.e., an arbitration or a litigation). A two-by-two matrix captures the possible categories:

		TYPE OF DECISION	
		Award	Judgment
TYPE OF PROCEEDING	Arbitration	1 Award	2 Judgment
	Litigation	4 Award	3 Judgment
		Arbitration	Arbitration
		Litigation	Litigation

The diagram illustrates that different rules—and different underlying policies—occur in each of these contexts. For the present discussion, the third quadrant of this matrix (*viz.*, the effect of a judgment on a later litigation) may be ignored, but the remaining three are worth examining in some detail.

Before tackling these issues directly, one should briefly look at the purposes behind arbitration and the procedures that actually implement these purposes. This becomes necessary because arbitration varies so significantly from litigation that some courts and tribunals have shied from applying *res judicata* and collateral estoppel when presented with the opportunity.<sup>32</sup> It is only by highlighting certain distinctions that an

32. See, e.g., *Postlewaite v. McGraw-Hill, Inc.*, 333 F.3d 42, 48 (2d Cir. 2003) (“Application of the estoppel following arbitration . . . may be problematic because arbitrators are not required

observer can determine whether they are significant or merely apparent vis-à-vis issues of preclusion. Fortunately, these distinctions need not be considered in a policy vacuum: many of the policy discussions undertaken in the context of domestic *intra*-and *inter*-system preclusion are informative,<sup>33</sup> if not wholly controlling.<sup>34</sup>

### A. *Setting the Stage: Domestic Arbitration and Litigation*

Domestic commercial arbitration and litigation are relevant to the ultimate discussion for two reasons. First, many examinations of preclusion in this area develop arguments based wholly on an understanding of domestic arbitration. Second, these same arguments assume the presence of domestic courts and rules of civil procedure lurking in the background—neither of which, of course, exist in the international arena.<sup>35</sup> One must recognize that international arbitration has unique features, and that, therefore, analytical paradigms devised for use in a separate adjudicatory system cannot be simply transported from the one context into the other without undermining the integrity of international arbitration as a self-sufficient means of dispute resolution. None of this is to suggest that domestic arbitration and litigation are irrelevant in an examination of international arbitration. To the contrary, an understanding of the way that preclusion is treated in domestic arbitration—and the biases this treatment reveals when compared to litigation—is a prerequisite to the arguments, both for and against, as they are advanced with respect to the international forum.

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to provide an explanation for their decision.”); *Wolf v. Gruntal & Co., Inc.*, 45 F.3d 524, 528-29 (1st Cir. 1995) (stating that award was not preclusive vis-à-vis claim outside scope of arbitration clause); *Gruntal & Co., Inc. v. Steinberg*, 854 F. Supp. 324, 337 (D.N.J. 1994) (holding that an unconfirmed arbitral award lacked preclusive force), *aff’d*, 46 F.3d 1116 (3d Cir. 1994); *Schlaifer Nance & Co., Inc. v. Estate of Warhol*, 764 F. Supp. 43, 46 (S.D.N.Y. 1991) (stating that second proceeding was not barred because “parties consented to claim splitting in their agreement to a limited arbitration clause.”), *aff’d*, 119 F.3d 91 (2d Cir. 1997).

33. E.g., why should a state-court judgment bind a federal court?

34. See 18 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 133 (3d ed. 1997) (examining preclusion principles as they arise in “intersystemic” contexts—e.g., whether a state court should give preclusive effect to a federal judgment and vice versa).

35. There is no International Commercial Court, and there are no International Rules of Civil Procedure.

### B. General Nature of and Procedures in Domestic Arbitration

Foremost, arbitration is a *private* and *contractual* means of dispute resolution.<sup>36</sup> As a creature of contract, any particular arbitration owes its existence—and attendant limitations—to an arbitral agreement.<sup>37</sup> This means that, in practice, the parties select their own “judges,” forum, and rules.<sup>38</sup> By agreeing to arbitration, parties hope to achieve several goals:

First, parties in ongoing commercial relationships with one another, such as traders in particular markets or participants in certain industries, often seek arbitration as a means of preserving their relationship by avoiding the antagonisms that attend hard-fought court adjudication. Second, arbitration allows experts familiar with the customs and practices peculiar to an industry to serve as judges. Finally, parties agree to commercial arbitration simply to avoid the cost and delay of formal court proceedings—with their attendant discovery procedures, evidence rules, and rights of appeal—when they anticipate having routine business disputes. Arbitration has proven to be quicker, cheaper, and more predictable than litigation as a means of resolving many types of commercial claims.<sup>39</sup>

This complex set of motives leads to a system that is at once broader and narrower than litigation. It is “broader” because an arbitrator is likely to evaluate the ongoing relationship between the parties, as opposed to the specific dispute at hand. It is “narrower” because the scope of the arbitration is controlled by the agreement.<sup>40</sup>

The arbitrators’ concern for a “suitable” rather than a legally correct decision has important consequences for the conduct of the arbitral process

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36. MARTIN DOMKE, DOMKE ON COMMERCIAL ARBITRATION 1 (Gabriel M. Wilner ed., 1984); *Chiron Corp. v. Ortho Diagnostic Systems, Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000) (“[A]n agreement to arbitrate is a matter of contract.”).

37. FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 321 (3d ed. 1973); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (“[I]t is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.”).

38. An arbitration agreement either directly or indirectly (via a selection of some organization’s rules) allows the parties to select their own judges, who do not, incidentally, need to be judges or even lawyers. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 n.18 (1974).

39. Shell, *supra* note 2, at 629.

40. Motomura, *supra* note 30, at 38 (stating that this broader perspective “is partly a practical consideration; an arbitrator’s professional success depends heavily on whether the disputants are satisfied with the award. Such satisfaction may turn as much on the viability of the disputants’ continuing relationship as on the ‘correct’ resolution of the dispute in isolation.”).

itself. First, arbitrators are not bound by the law, substantive or procedural.<sup>41</sup> Thus, numerous courts and commentators have quite aptly analogized arbitration to a classic suit in equity, in which the Chancellor was more concerned with justice than with a slavish adherence to legal formalities.<sup>42</sup> Second, arbitrators are free to render compromise rather than winner-take-all awards.<sup>43</sup> Moreover, this freedom to compromise does not appear to be an unexercised abstraction: empirical evidence strongly suggests that arbitrators do tend to "split the difference."<sup>44</sup>

This freedom to make compromise awards is a manifestation of two further—yet related—distinctions between arbitration and litigation: the absence of an obligation to justify the precise basis of an award and the limited grounds under which an award may be reviewed. In practice, this means that an arbitrator need not write a judicially appropriate decision that offers a *ratio decidendi* tied to particular facts.<sup>45</sup> As Justice Blackmun flatly put it, "arbitrators are not bound by precedent and are actually discouraged by their associations from giving reasons for a decision."<sup>46</sup> This divergence from what we think of as normal judicial practice is supportable mainly because an award itself (i.e., not the reasoning behind

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41. See, e.g., *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203 (1956) ("Arbitration carries no right to trial by jury that is guaranteed by both the Seventh Amendment and by Ch. 1, Art. 12th, of the Vermont Constitution . . . the record of their proceedings is not as complete as it is in a court trial."); *Mulholland Constr. Co. v. Lee Pare & Ass'n*, 576 A.2d 1236, 1238 (R.I. 1990) ("It must be remembered that an arbitration proceeding is not constricted by the rules of pleading and other legal parameters that might attach to an action at law or in equity."). For a discussion of the very limited constraints placed on arbitrators with respect to substantive law, see *infra* text accompanying notes 53 & 106.

42. See, e.g., *Bd. of Educ. Bellmore-Merrick Cent. High Sch. Dist. v. Bellmore-Merrick United Secondary Teachers, Inc.*, 347 N.E.2d 603, 606 (stating that arbitrator has power to disregard technicalities in reaching just results). See also *Biren*, *supra* note 30, at 1043 n.64.

43. See *Duferco Int'l Steel v. T. Klaveness Shipping*, 333 F.3d 383, 389 (2d Cir. 2003) ("It should be remembered that arbitrators are hired by parties to reach a result that conforms to industry norms and to the arbitrator's notions of fairness."); *Mulholland*, 576 A.2d at 1238 ("As long as the award is drawn from the essence of the contract and is not wholly irrational, the arbitrators may make determinations that might otherwise not be possible to a judicial tribunal."); *Shell*, *supra* note 2, at 633.

44. See David E. Bloom, *Empirical Models of Arbitrator Behavior Under Conventional Arbitration*, 68 REV. ECON. & STAT. 578, 584 (1986).

45. *BBS Norwalk One, Inc. v. Raccolta, Inc.*, 117 F.3d 674, 678 (2d Cir. 1997) ("While the arbitrator gave no reasons for his decision, New York law did not require him to do so.")

46. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 259 (1987) (Blackmun, J., dissenting).

it) is respected by the judiciary as nearly inviolate.<sup>47</sup> Accordingly, a court has no authority to vacate an award because a tribunal appears to ignore the law<sup>48</sup> or if the decision does not track with the results that a court would have reached.<sup>49</sup> The Federal Arbitration Act (FAA)<sup>50</sup> provides, for instance, that an award is final and confirmable unless a complaining party can show:

- (1) that the award was procured by corruption, fraud, or undo means; or
- (2) that the arbitrators exhibited "evident partiality"; or
- (3) that there was gross misconduct by the arbitrators; or
- (4) that the arbitrators failed to render a final decision.<sup>51</sup>

The U.S. Supreme Court has authorized a fifth avenue by which to attack an award: namely, a "manifest disregard" for applicable law.<sup>52</sup> One should not, however, equate "manifest disregard" with a mere error of law or fact; as a general rule a court does "not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts."<sup>53</sup>

There is another class of differences between the two methods of dispute settlement that causes considerable discomfort for commentators contemplating the application of preclusion in arbitration. This type of

47. See *Nat'l Wrecking Co. v. Int'l Bd. of Teamsters*, 990 F.2d 957, 960 (7th Cir. 1993) (stating that arbitrators are not "junior varsity trial courts."); *Stulberg v. Intermedics Orthopedics, Inc.*, 997 F. Supp. 1060, 1063 (N.D. Ill. 1998) ("Federal courts extend extraordinary deference to the decisions of arbitrators.").

48. See *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), *overruled by*, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (holding that disputes under the Securities Act of 1933 should proceed to arbitration because arbitration would not affect the substantive provisions of the Act, thus overturning *Wilko v. Swan*, which was found to be no longer applicable).

49. See *Grace Lines, Inc. v. Nat'l Marine Eng'rs Beneficial Ass'n.*, 239 N.Y.S.2d 293, 298 (N.Y. Sup. Ct. 1963) (stating that "an award may not be set aside because others might have reached a different conclusion."), *aff'd*, 246 N.Y.S.2d 994 (N.Y. App. Div. 1st Dep't 1964).

50. 9 U.S.C. §§ 1-14 (2005).

51. *Shell*, *supra* note 2, at 637.

52. See *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 259 (1987).

53. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987). Some Circuit Courts have taken this to mean that an arbitrator must have understood a controlling point of law and decided to ignore it anyway. See, e.g., *Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346, 355-58 (5th Cir. 2004) (discussing the high threshold for demonstrating a "manifest disregard of the law."). The Seventh Circuit has taken an even more restrictive view, one "limited to the situation in which the arbitral award directs the parties to violate the law." *IDS Life Ins. Co. v. Royal Alliance Assocs., Inc.*, 266 F.3d 645, 650 (7th Cir. 2001).

difference, which we may broadly refer to as “procedure,” is relevant to preclusion because it goes to the question of whether a particular issue was fully and fairly heard or whether an issue or claim was even heard at all.<sup>54</sup> A catalogue of these procedural differences is seemingly infinite, but there are a few that seem to make most everyone’s short list:

As a rule, those who sponsor or conduct arbitration have considerable discretion to adopt procedures that they deem appropriate. While some arbitrations are elaborate, more typically they are less formal than court litigation. As a practical matter, discovery is often limited or unavailable. Arbitrators are not bound by the rules of evidence and indeed may draw on their personal knowledge in making awards. Witnesses need not be required to testify under oath. If a written record of a proceeding exists, it need not be as complete as in litigation.<sup>55</sup>

Now that the outline by which to conduct a differential analysis of litigation and arbitration exists, one must examine whether and to what extent these differences influence the application of *res judicata* and collateral estoppel in domestic arbitration.

### 1. Should Judicial Decisions Be Binding in a Subsequent Arbitration?<sup>56</sup>

Whether a prior court decision should preclude issues or claims in a subsequent arbitration presents the easiest case for analysis. It is the “easiest” primarily because there is generally little room to debate whether adequate procedures were followed in a litigation. That is, one can safely assume that the rules of evidence and the rules of civil procedure were followed and that formal records sufficiently memorialize both the proceeding itself and the ultimate decision. Procedural regularity is mentioned not necessarily because it is an analytic tool, but because so many jurists and scholars see it as an impediment to the application of preclusionary doctrines.<sup>57</sup>

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54. See, e.g., *Matter of Guetta* [Raxon Fabrics Corp.], 510 N.Y.S.2d 576, 578 (N.Y. App. Div. 1987) (“[T]he arbitrator was under no obligation to explain his decision in the first place; even less was he required to specifically mention the particular issues he decided or to set forth his findings with respect thereto.”) (citation omitted).

55. Motomura, *supra* note 30, at 36.

56. For a discussion devoted entirely to this topic, see Biren, *supra* note 30.

57. See *Universal Am. Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131, 1137 (5th Cir. 1991) (“It is true that arbitral findings typically lack the supervisory scrutiny of authoritative review, giving rise to the argument that arbitration risks determinations based on irrelevant or hearsay evidence,

There are two archetypal and regularly recurring situations in which a tribunal may be called upon to decide whether claims or issues before it are barred by *res judicata*.<sup>58</sup> In the first type of case, the parties have sought a court determination regarding the arbitrability of a dispute, either by moving to compel or stay arbitration. Once they have the court's decision in hand, this is clearly a case for collateral estoppel; it would be wasteful to allow either one of the parties to raise the issue of arbitrability before a subsequent tribunal. There is a second—and also easily dispensed with—type of case in which a prior court decision should preclude. Here, the parties commence litigation in the face of a valid arbitration agreement and proceed to judgment without either party objecting. Later, the disappointed party invokes the arbitration clause and attempts to reopen the case before a tribunal. In this type of case all the policy considerations such as fairness, judicial repose, and economy are relevant. There is no countervailing policy that supports this type of judgment shopping, particularly when the parties have expressly or impliedly waived their right to arbitrate.<sup>59</sup> Thus, the tribunal need only determine an identity of parties, issues, and claims to allow preclusion to take its course.<sup>60</sup>

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or the personal whims of arbitral panel members.”); *Gruntal & Co, Inc. v. Steinberg*, 854 F. Supp. 324, 337 (D.N.J. 1994) (“In reviewing an arbitral award for issue preclusive effect, it must be kept in mind that arbitration panels are not courts of law and that arbitral procedures often vary significantly from judicial procedures.”).

58. For a discussion devoted entirely to this topic, see Biren, *supra* note 30.

59. *Hoffman Constr. v. Active Erectors & Installers, Inc.*, 969 F.2d 796, 798-99 (9th Cir. 1992) (holding that a waiver of arbitration in favor of a state-court suit constituted waiver of right to arbitrate subsequent RICO claim); *John Morrell & Co. v. Local Union 304A of the United Food & Commercial Workers*, 913 F.2d 544, 564 (8th Cir. 1990) (“[W]e are satisfied that the jury’s verdict . . . was sufficiently final to bind the arbitrators here.”); *Miller Brewing Co. v. Ft. Worth Distrib. Co.*, 781 F.2d 494, 501 (5th Cir. 1986) (“We conclude . . . that, even if waiver considerations did not apply, [claimant] is barred from arbitration under the doctrine of *res judicata* because it could have included, and implicitly did include, in its state court proceedings a claim for the damages it now seeks to arbitrate.”); *HG Estate v. Corporacion Durango, S.A. DE de C.V.*, 271 F. Supp. 2d 587, 592 n.5 (S.D.N.Y. 2003) (“[P]resumably arbitrators would give some preclusive effect to prior litigation results.”); *Esquire Indus., Inc. v. E. Bay Textiles, Inc.*, 414 N.Y.S.2d 336 (N.Y. App. Div. 1979) (finding that parties can waive arbitration by their conduct, such as by plaintiff’s service of summons and defendant’s application to stay arbitration).

60. There is another, and somewhat trickier, type of case that arises from time to time. Suppose two parties litigate a matter that is related to an arbitration between one of the parties and a stranger to the litigation. Should the stranger be able to invoke collateral estoppel against the litigant with whom he has the related dispute? The answer to that question is beyond the scope of this Article, but there is ample discussion of it in the domestic arbitration literature. See, e.g., Biren, *supra* note 30, at 1051-56.

## 2. When Should Arbitral Awards Be Preclusive?

Although most courts concede that arbitral awards can be preclusive, they are nonetheless reluctant to afford awards conclusive effect, at least absent what appears to be a heightened showing. The problem arises from courts' suspicion of arbitral procedures: "Because arbitrations are not conducted in courts of law and arbitrators are not bound by the same rules of evidence and procedure that judges are, 'courts must be cautious of procedural variances between arbitral procedures and judicial proceedings when deciding whether to give preclusive effect to the former.'"<sup>61</sup> Thus, the most restrictive courts will not allow preclusion to attach to arbitral findings unless "the arbitration had the elements of an adjudicatory procedure."<sup>62</sup> Courts operating in this mode look at a range of factors to determine whether an arbitration provided "the requisite procedural safeguards to give it issue-preclusive effect:"

(1) the [arbitration] was conducted in a judicial-like adversary proceeding; (2) the proceedings required witnesses to testify under oath; (3) the [arbitral] determination involved the adjudicatory application of rules to a single set of facts; (4) the proceedings were conducted before an impartial hearing officer; (5) the parties had the right to subpoena witnesses and present documentary evidence; and (6) the [arbitrator] maintained a verbatim record of the proceedings. Additional factors include whether the hearing officer's decision was adjudicatory and in writing with a statement of reasons. Finally, [whether] that reasoned decision [was] adopted by the director of the agency with the potential for later judicial review.<sup>63</sup>

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61. *Shtab v. Greate Bay Hotel & Casino, Inc.*, 173 F. Supp. 2d 255, 261 (D.N.J. 2001) (citing *Gruntal*, 854 F. Supp. at 337) (citing *Universal Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131, 1137 (5th Cir. 1991)). The court in *Vandenberg v. Superior Ct.*, 982 P.2d 229, 237 (Cal. 1999) stated:

Whether collateral estoppel is fair and consistent with public policy in a particular case depends in part upon the character of the forum that first decided the issue later sought to be foreclosed. In this regard, courts consider the judicial nature of the prior forum, *i.e.*, its legal formality, the scope of its jurisdiction, and its procedural safeguards, particularly including the opportunity for judicial review of adverse rulings.

62. *Jacobs v. CBS Broad. Inc.*, 291 F.3d 1173, 1178 (9th Cir. 2002) (quoting *Kelly v. Vons Cos.*, 79 Cal. Rptr. 2d 763, 767 (Cal. Ct. App. 1998)).

63. *Jacobs*, 291 F.3d at 1179 (quoting *Imen v. Glassford*, 247 Cal. Rptr. 514, 518 (Cal. Ct. App. 1988)).

But other courts are not particularly concerned about arbitration's relative informality because the parties chose to contract for it.<sup>64</sup> There is no way to reconcile these extremes, but a more general review of case law demonstrates that courts more often follow a middle course, one that is deferential to arbitral findings, so long as they are reasonably clear and treating them as conclusive would not work an injustice.

"The law provides two separate bases for a federal court to afford prior judgments preclusive effect."<sup>65</sup> The question presented thus becomes whether an *unconfirmed* arbitral award qualifies as a "judgment" under either basis.<sup>66</sup> The first potential source of preclusion is statutory: the Full Faith and Credit Act mandates that state "judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they shall have by law or usage in the courts of such State."<sup>67</sup> As a general matter, this means that a federal court must give preclusive effect to a state court judgment.<sup>68</sup> The Supreme Court, however, has held that the Full Faith and Credit Act does not apply to unconfirmed arbitration awards because they are not "judicial proceedings" within the meaning of that act.<sup>69</sup> "Thus, it is clear that an unconfirmed arbitration award does not have preclusive effect on a federal court judgment under 28 U.S.C. § 1738."<sup>70</sup>

"Nevertheless, under certain circumstances, where the parties have had full opportunity to be heard in arbitration, federal courts may give

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64. "Within exceedingly broad limits, the parties to an arbitration agreement choose their method of dispute resolution and are bound by it however bad their choice appears to be either *ex ante* or *ex post*." *IDS Life Ins. Co. v. Royal Alliance Ass'n*, 266 F.3d 645, 649, 651 (7th Cir. 2001) (stating that claims arising out of "the dispute the arbitrators were asked to resolve and we think did resolve, are closed to further litigation by the principles of *res judicata* and collateral estoppel," even though record suggested that "the arbitrators lacked the professional competence required to resolve the parties' disputes.").

65. *Stulberg v. Intermedics Orthopedics, Inc.*, 997 F. Supp. 1060, 1065-66 (N.D. Ill. 1998) (emphasis added) (holding that in this private contract dispute, previous arbitration award had preclusive effect).

66. As noted elsewhere, arbitral awards are often confirmed by the judgment of a court. *See Shell*, *supra* note 2, at 642.

67. 28 U.S.C. § 1738 (2005).

68. *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 794 (1986); *Stulberg*, 997 F. Supp. at 1066.

69. *McDonald v. City of W. Branch, Mich.*, 466 U.S. 284, 287-88 (1984); *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 477 (1982).

70. *Stulberg*, 997 F. Supp. at 1066; *but see Witkowski v. Welch*, 173 F.3d 192, 199 (3d Cir. 1999) ("Under Pennsylvania law, arbitration proceedings and their findings are considered final judgments for the purpose of collateral estoppel."); *Hartford Accident. & Indem. Co. v. Columbia Cas. Co.*, 98 F. Supp. 2d 251, 255 (D. Conn. 2000) ("Under Connecticut law, a final arbitration award (even one never reviewed by any court) is accorded *res judicata* or collateral estoppel effect in much the same manner as a judgment of a court.").

arbitration judgments preclusive effect as a matter of public policy.”<sup>71</sup> This is so because, as the U.S. Supreme Court has recognized, courts “have frequently fashioned common-law rules of preclusion in the absence of a governing statute.”<sup>72</sup> Thus, unconfirmed awards “can, but do not necessarily, have preclusive effect on subsequent federal court proceedings.”<sup>73</sup> As one district court has described it, this is a permissive standard under which “courts are not *required* to afford previous unconfirmed arbitration awards preclusive effect on later federal proceedings; however, courts *may impose* such preclusion in appropriate cases.”<sup>74</sup>

In applying this standard, one finds that courts make a rough distinction between situations involving federal civil rights and those turning on purely commercial relationships. Courts generally attribute this distinction to *McDonald v. City of West Branch*, in which the Supreme Court conceded that “arbitration is well suited to resolving contractual disputes” but held that arbitration “cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 [a civil rights statute] is designed to safeguard.”<sup>75</sup> This holding is not as broad as it might seem. Subsequent case law has made it clear that most federal claims are arbitrable and that once they are reduced to decision, they can be preclusive.<sup>76</sup>

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71. *Pritchard v. Dent Wizard Int’l Corp.*, 275 F. Supp. 2d 903, 914 (S.D. Ohio 2003) (refusing to give St. Louis arbitrator’s decision preclusive effect where parties did not have full opportunity to litigate).

72. *Univ. of Tenn. v. Elliott*, 478 U.S. at 794.

73. *Leddy v. Standard Drywall, Inc.*, 875 F.2d 383, 385 (2d Cir. 1989) (holding that arbitrator’s award was not preclusive because it was never confirmed as required by New York civil law); *but see Brody v. Hankin*, 299 F. Supp. 2d 454, 461 (E.D. Pa. 2004) (“[W]e find that whether or not the Common Pleas Court has yet to formally confirm the award . . . the arbitration award rendered in this case constitutes a final judgment on the merits . . .”).

74. *Siulberg*, 997 F. Supp. at 1066 (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 223 (1985) for the proposition that “federal courts may determine the preclusive effect to be given to an arbitration proceeding.”).

75. 466 U.S. 284, 290 (1984).

76. The Court in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 n.21 stated:

Where an arbitral determination gives full consideration to an employee’s Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record.

*See also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (finding that nothing in the Age Discrimination in Employment Act (ADEA) specifically precludes arbitration of claims).

### a. Special Problems in Res Judicata

The scope of an arbitral award's preclusive force—as with a judgment—can be quite extensive. But because arbitration is a creature of contract, that scope often has interesting wrinkles at its margins.<sup>77</sup> *Gemco Latinoamercia, Inc. v. Seiko Time Corp.*<sup>78</sup> is paradigmatic in several respects because the relationship between the parties is a common one, the dispute arose from fairly routine facts, and the court struggled to determine the preclusive effect of an arbitral award. For over a decade, Gemco was the exclusive distributor of Seiko-brand products in Puerto Rico.<sup>79</sup> At some point, the relationship soured, and Gemco claimed that Seiko had retaliated against it for selling outside its territory and Seiko claimed that Gemco had abandoned its territory.<sup>80</sup> An arbitration ensued, in which Seiko sought nearly three million dollars for goods sold and delivered, and Gemco counterclaimed for, *inter alia*, breach of contract and violation of a Puerto Rico dealership law.<sup>81</sup>

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77. One of these wrinkles raises a fundamental question that is often overlooked: *viz.*, what tribunal should decide the preclusive effect of an award? Most courts have held that—so long as there is a broad arbitration agreement between the parties—a res judicata defense is itself a matter for arbitration. See *Chiron v. Ortho*, 207 F.3d 1126, 1132 (9th Cir. 2000) (“[A] res judicata objection based on a prior arbitration proceeding is a legal defense that, in turn, is a component of the dispute on the merits and must be considered by the arbitrator, not the court.”); *Nat’l Union Fire Ins. Co. v. Balco Petroleum Corp.*, 88 F.3d 129, 135 (2d Cir. 1996) (stating that the defense of preclusion is matter for arbitrator because “it is itself a component of the dispute on the merits.”). This appears to be the majority rule in federal courts. See Kenneth R. Pierce, *The Liar’s Paradox: Arbitrability Conundrums under the Federal Arbitration Act*, 13 MEALEY’S LITIGATION REPORTER: REINSURANCE 5 (Mar. 20, 2003) (“The majority of cases decided under the Federal Arbitration Act have held that both claim preclusion (res judicata) and issue preclusion (collateral estoppel) are part of the merits of a dispute which should be resolved by arbitrators rather than courts.”); *But see Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 985 F.2d 1067, 1069 (11th Cir. 1993) (“We think the better rule is that courts can decide res judicata.”). Although it is beyond the scope of this Article exhaustively to examine whether the preclusive effect of an award is a matter for arbitration or for litigation, one must note that—outside federal courts—there is a clear split of authority on the issue. One commentator has demonstrated, for example, that New York courts may answer the question one way if New York arbitration law applies and another way if the FAA applies. See Daniel L. Elsborg, *Federal Arbitration Act vs. New York State Arbitration Law*, N.Y.L.J., May 6, 2005, at 4.

78. 671 F. Supp. 972 (S.D.N.Y. 1987), *modified*, 685 F. Supp. 400 (S.D.N.Y. 1988).

79. *Id.* at 973.

80. *Id.* at 974.

81. *Id.*

The arbitrators made no factual findings; they awarded Seiko most of its requested relief and dismissed the counterclaims.<sup>82</sup> In a brief responding to Seiko's defenses to the counterclaims, Gemco argued that Seiko's retaliation against it was part of (1) a horizontal conspiracy to drive it from the market and (2) a vertical attempt to fix resale prices.<sup>83</sup> After the arbitration concluded, Gemco sued for antitrust violations arising from the same facts that had given rise to the arbitration.<sup>84</sup> The court reviewed the complaint, concluded that the facts alleged therein were "virtually identical to those involved in the arbitration," and held that "absent an exception to the operation of the res judicata doctrine, the judgment confirming the arbitration award precludes relitigation of the antitrust and unfair competition claims against Seiko Time in this proceeding."<sup>85</sup> The court went on to hold that—via collateral estoppel—the dismissal of the antitrust claims would *not* extend to two of Seiko's corporate family members, neither of which participated in the arbitration, because the affiliates committed independent anticompetitive acts.<sup>86</sup>

Two lessons emerge here. First, a claimant in arbitration (or a counterclaimant) must assert all theories of recovery that are transactionally related to the subject matter of the lawsuit or risk having them barred in a subsequent proceeding. Second, an arbitration panel's failure to make detailed findings can make it impossible for a later tribunal to determine whether a particular issue was in fact resolved.<sup>87</sup> This is especially problematic in dealer termination cases because a dealer quite often will claim that its termination was part and parcel of an antitrust violation. Res judicata may well bar litigation of that claim between the parties, but non-parties (e.g., affiliates or individuals) will not benefit from this bar unless the arbitral tribunal makes findings sufficient to satisfy the elements of collateral estoppel.

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82. *Id.* at 975.

83. *Gemco Latinoamerica*, 671 F. Supp. at 975.

84. *Id.* at 977-78.

85. *Id.* at 978.

86. On a motion to reconsider, the court concluded that—even if there were not independent acts—collateral estoppel would not apply because it was impossible to tell with certainty why the arbitrators had rejected the antitrust defense to Seiko's business justification defense. *Gemco Latinoamerica*, 685 F. Supp. at 403.

87. See *BBS Norwalk One, Inc. v. Raccolta, Inc.*, 117 F.3d 674, 678 (2d Cir. 1997) (holding that "Delphic quality" of unreasoned award required remand to district court for review of arbitration record prior to passing on collateral estoppel).

### b. Special Problems in Collateral Estoppel

A somewhat controversial case within which to consider preclusion arises when an arbitral award is the putative basis for *res judicata*. As noted earlier, the effect that an award will have upon a litigation is roughly a direct function of the particular court's conception of preclusion. Thus, a court that embraces the broad transactional formulation advanced in the Restatement (Second) of Judgments<sup>88</sup> will be more likely to preclude than will a court in the grips of the narrower "a claim equals a specific theory of recovery" school. Moreover, it seems that there is a lingering suspicion of arbitration that may lead even those courts that favor the Restatement position in the context of pure litigation to adopt the narrower view when faced with an arbitral award. This is not to suggest, however, that preclusion is out the window when a court evaluates the impact of an arbitral award. Rather, courts often make a subtle shift in emphasis from claims to issues; that is, they bar on the basis of collateral estoppel, not *res judicata* (in the narrow sense).<sup>89</sup>

For instance, in what many courts and commentators view as an essential case on the subject of arbitral collateral estoppel, *City of Gainesville v. Island Creek Coal Sales Co.*,<sup>90</sup> the City—in the midst of an arbitration with Island Creek—sued a coal supply company for fraud and RICO violations.<sup>91</sup> In the meantime, the arbitrators found that Island Creek had not breached its contract with the City and was therefore entitled to collect according to the contract terms. The court was then faced with the possibility of barring the City's entire claim, a possibility that it apparently did not relish. In a deft dodge of the issue, the court found that the City had presented different claims than had been decided in arbitration, but dismissed the suit anyway. In reaching this conclusion, the circuit court reasoned that the contractual issues settled in arbitration effectively

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88. RESTATEMENT (SECOND) OF JUDGMENTS § 24(2). *See also* Shell, *supra* note 2, at 641-42 ("Under most arbitration rules . . . arbitration awards do not need judicial confirmation to be binding on parties.").

89. *Clarke v. UFI, Inc.*, 98 F. Supp. 2d 320, 335-36 (E.D.N.Y. 2000) ("Courts will apply collateral estoppel and not *res judicata* because the values of avoiding embarrassing inconsistencies and avoiding burdening a court and an adversary with repetitious litigation are 'served more directly by issue preclusion than by claim preclusion.'"). Of course, some courts will preclude on the basis of claims. *See Goldstein v. Doft*, 236 F. Supp. 730 (S.D.N.Y. 1964), *aff'd*, 353 F.2d 484 (2d Cir. 1965); *Century Int'l Arms, Ltd. v. Fed. State Unitary Enter. State Corp. 'Rosvoorouzhnie'*, 172 F. Supp. 2d 79, 97 (D.D.C. 2001) ("Under the doctrine of *res judicata* . . . all of these claims were required to be litigated before the Tribunal;" also noting that claims were precluded on grounds of collateral estoppel).

90. 618 F. Supp. 513 (N.D. Fla. 1984), *aff'd*, 771 F.2d 1495 (11th Cir. 1985).

91. *Id.* at 516.

stripped away—via collateral estoppel—the legal underpinnings of the new claims.<sup>92</sup>

Of course reliance upon collateral estoppel as the mechanism of choice for precluding issues settled in arbitration is not without its own problems. The primary hurdle that a party invoking issue preclusion must overcome is built on the four essential elements of collateral estoppel: identity of issue, actually litigated and necessary to the decision, privity, and full and fair opportunity to litigate. Given the differences between arbitration and litigation, it is not surprising that challenges to collateral estoppel focus on those differences, particularly relating to the question of whether the party to be precluded had a full and fair opportunity to litigate.<sup>93</sup>

In a much discussed case on this point, *Matter of American Insurance Co. [Messinger—Aetna Casualty and Surety Co.]*<sup>94</sup> the New York Court of Appeals undertook an examination of when arbitral findings might adhere to a subsequent court proceeding, even though the arbitration lacked most of the formalities associated with litigation. The issue of preclusion arose out of an arbitration involving slightly less than \$5,000 in property damage resulting from an automobile accident.<sup>95</sup> Aetna disclaimed coverage, but the arbitrators awarded about \$1,200 to American anyway.<sup>96</sup> In reaching its decision the tribunal relied wholly on each company's files: there were no hearings, no witnesses, and no oral or written arguments.<sup>97</sup> The award provided no specific findings to suggest how or upon what it was based.<sup>98</sup>

Aetna then sued, once again asserting the issue of coverage.<sup>99</sup> American, sensing *deja vu*, pled collateral estoppel, a contention with which the trial court agreed, thereby barring the disclaimer of coverage defense.<sup>100</sup> Aetna appealed and American joined Aetna in arguing that collateral estoppel could endanger the industry's small claims dispute mechanism.<sup>101</sup> The New York Court of Appeals was unimpressed, holding that—absent a specific contractual agreement not to preclude—relitigation

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92. *Id.* at 518.

93. The other issues arise, but not to the extent of "full and fair opportunity to litigate."

94. 371 N.E.2d 798 (N.Y. 1977).

95. *Id.* at 800.

96. *Id.*

97. *Id.* at 803.

98. *Id.* Also note that this case raises issues of "actually litigated and necessary to the award," given that there was no written statement of reasons.

99. *Am. Ins. Co.*, 371 N.E.2d at 800.

100. *Id.*

101. *Id.* at 800-01.

of the coverage issue was inappropriate.<sup>102</sup> The Court reasoned that the parties had agreed to arbitrate with relative informality, and, moreover, that the mere existence of an award logically preempted Aetna's argument that the tribunal might not have decided the coverage issue.<sup>103</sup> Subsequent New York case law has extended this holding beyond the small claims sphere, thus allowing arbitral decisions to preclude in much larger cases, even in the face of a New York statute allowing de novo review of awards (made under the New York no-fault scheme) of \$5,000 and up.<sup>104</sup>

### 3. Must Arbitrators Give Preclusive Effect to Prior Decisions?

The remaining issues arising from the matrix (i.e., whether a judgment or award should bind a subsequent arbitration) appear deceptively simple. In other words, since it has been established that both judgments and awards can be preclusive, what else is there to discuss? To answer this question, one must recall that the preclusion equation is a function of *two* variables: the decision offered as conclusive (award or judgment) and the forum in which preclusion is sought (arbitration or litigation). What one finds is that the second variable is as important as the first, owing largely to the special nature of arbitration.

Simply stated, "Arbitrators need not follow judicial notions of issue and claim preclusion . . . ."<sup>105</sup> This is a specific application of the more general notion that arbitrators are not bound to follow the law.<sup>106</sup> Thus,

Although *res judicata* and collateral estoppel usually attach to arbitration awards, they do so (if they do so) as a matter of contract rather than as a matter of law. The preclusive effect of the award is

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102. *Id.* at 802-04.

103. *Id.* at 803.

104. See N.Y. INSURANCE LAW § 5106(c) (McKinney 1985). See also Shell, *supra* note 2, at 654 n.158 (citing State Farm Mut. Auto Ins. Co. v. Clacher, 491 N.Y.S.2d 253 (1985) (holding that an unconfirmed arbitration award finding an insured was unable to work because of disabling injuries was preclusive on all issues resolved by the arbitration award); Sansiviero v. Royal Globe Ins., 486 N.Y.S.2d 366 (1985) (finding that an arbitration award of less than \$5000 barred an insured's complaint for additional damages from car accident injuries); Clemens v. Apple, 477 N.Y.S.2d 774 (1984), *aff'd*, 481 N.E.2d 560 (1985) (holding that a plaintiff who lost an arbitration suit for \$2000 was later precluded in \$250,000 negligence action stemming from the same injuries).

105. Lindland v. U.S. of Am. Wrestling Ass'n, 230 F.3d 1036, 1039 (7th Cir. 2000).

106. See generally Postlewaite v. McGraw-Hill, Inc., 333 F.3d 42, 49 (2d Cir. 2003) (holding that an award was confirmable "if there is even a barely colorable justification for the outcome reached.") (citing Willemign Houdstermaatschappij, BV v. Standard Microsystems Corp., 103 F.3d at 13).

as much a creature of the arbitration contract as any other aspect of the legal-dispute machinery established by such a contract.<sup>107</sup>

This does not mean, of course, that an arbitral panel should not give preclusive effect to prior judgments and awards.<sup>108</sup> But it does mean that parties to arbitral agreements should make it clear in those agreements that they intend prior decisions to be binding.<sup>109</sup>

#### IV. PRECLUSION IN THE INTERNATIONAL CONTEXT

At the outset of this section, it is perhaps useful to collect, condense, and catalogue the differences between arbitration and litigation that prove most troublesome for those contemplating preclusion in the domestic context. As the above discussions reveal, it is the fact that arbitration is only imperfectly analogous to litigation that provides the greatest stumbling block for courts and commentators. Certainly, a number of specific objections arise from arbitration's method of fact-finding and decision-making; this—as we have seen—tends to be the focus of a court that takes up the matter. However, there is a class of policy objections that is not so obviously manifest in case law, but which proves equally troublesome for commentators:

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107. *IDS Life Ins. Co. v. Royal Alliance Ass'n*, 266 F.3d 645, 651 (7th Cir. 2001) (citations omitted).

108. *Hoffman Constr. v. Active Erectors & Installers*, 969 F.2d 796, 799 (9th Cir. 1992) (enjoining arbitration on grounds of *res judicata*); *John Morrell & Co. v. Local Union 304A of the United Food & Commercial Workers*, 913 F.2d 544, 563 (8th Cir. 1990) ("For the arbitrator to reject the jury verdict was to disregard the law and to substitute his own brand of industrial justice for the deliberations and verdict of the jury." (internal citations omitted)).

109. See, e.g., *United Indus. Workers v. Gov't of Virgin Is.*, 987 F.2d 162, 169 (3d Cir. 1993) ("Absent a collective bargaining agreement provision that requires arbitrators to be bound by earlier arbitration awards, the parties delegate to the arbitrator the power to decide the preclusive effect of prior arbitration awards."). The Court in *HRH Constr. Corp. v. Bethlehem Steel Corp.*, 384 N.E.2d 1289 (N.Y. 1978) stated that:

We hold that a provision in an otherwise broad arbitration clause that the determination of particular disputes in another judicial or arbitration proceeding shall be determinative and conclusive between the parties, does not limit the scope of arbitration but constitutes a directive as to how the dispute in question shall be resolved in arbitration.

[T]he social and institutional interests that attach to court adjudication do not attach to arbitration proceedings. Courts are public institutions created and maintained by the state. Court judgments are publicly recorded and maintained by the state as reliable evidence of how the rights of citizens have been interpreted under the law. In addition, litigation frequently results in the declaration of rules for deciding future cases, a matter of great public interest. Arbitration, on the other hand, is a private institution created and sustained by contract. Arbitration awards are private documents maintained only by the involved parties and signal only that a dispute between them has been resolved. Arbitration decisions have no effect on future cases, even in the rare instances when the arbitrators write opinions explaining their awards.<sup>110</sup>

Probably the most significant of these differences for most commentators is that arbitration is a creature of contract. This fixation on contract has led, unfortunately, to some scholars making an overly restrictive conclusion: namely, that arbitral awards should have only the barest preclusive effect.<sup>111</sup> There is nonetheless a general agreement that *claim* preclusion is a necessary prerequisite for the existence of a functioning system of international arbitration; anything less would make a sham of the process:

If res judicata did not apply to arbitration, parties could safely ignore demands to arbitrate knowing that a default judgment against them would not prejudice their case in a later lawsuit. Losing parties in arbitration could relitigate their claims in court, and winning parties could attempt to supplement their victories with additional claims and damage theories arising from the same transaction addressed by the arbitrators.<sup>112</sup>

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110. Shell, *supra* note 2, at 658.

111. See, e.g., Motomura, *supra* note 30, at 81 (stating that this restrictive perspective offers the benefit of giving “courts maximum freedom to find that disputes are arbitrable because they would know that findings in an arbitration would not be subject to collateral estoppel” and allows arbitration to be a basic dispute resolution forum without being hampered by inefficient lawmaking effects).

112. Shell, *supra* note 2, at 664. One can argue that—in the international context—the Convention tacitly endorses application of claim preclusion but not issue preclusion. Author Sabrina Sudol states:

Thus under the Convention, res judicata is certain—a future action based on the same claim is precluded if it has been decided in a foreign arbitration. However,

Issue preclusion is viewed with somewhat more suspicious eyes; some even favor “a rule that arbitral findings never have collateral estoppel effect, unless the arbitration agreement clearly and expressly provides for it.”<sup>113</sup> Whether this contract-based reasoning is sound even in the domestic context is a discussion for another day. What is clear, though, is that in the international context, this mode of analysis leads nowhere, primarily because there is no bundle of litigation policy to pit directly against a bundle of contract policy. That is, traditional biases against arbitration first arose because arbitration was an alternative to litigation.<sup>114</sup> And because not every policy justification for preclusion obtains with respect to arbitration, then any justification for preclusion in the new arbitral context must reflect what the parties bargained for and no more.<sup>115</sup>

There are a number of reasons why this reasoning fails when applied to international commercial arbitration. First, and most important, arbitration is not just an alternative to litigation vis-à-vis international disputes. Absent a system of international civil courts, arbitration is the only possibility for parties to find a neutral forum.<sup>116</sup> The only alternative would be to bring suits in national courts, hardly a satisfactory situation.<sup>117</sup>

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collateral estoppel is not necessarily mandated—an issue which has already been determined in a prior arbitration could be relitigated if the new action is based on a different claim.

Sabrina M. Sudol, *The U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards and Issue Preclusion: A Traditional Collateral Estoppel Determination*, 65 U. PITT. L. REV. 931, 940 (2004).

113. Motomura, *supra* note 30, at 81.

114. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 n.4 (1974) (noting historical common-law prejudice against arbitration).

115. See Brian Levine, Note, *Preclusion Confusion: A Call for Per Se Rules Preventing the Application of Collateral Estoppel to Findings Made in Nontraditional Litigation*, 4 ANN. SURV. AM. L. 435 (1999).

116. Accordingly, “The binding effect of arbitral awards is prescribed by many institutional rules.” INTERNATIONAL LAW ASSOCIATION, INTERIM REPORT: “RES JUDICATA” AND ARBITRATION 22 (2004) [hereinafter INTERIM REPORT].

117. Considering the policy behind federal diversity jurisdiction in the United States:

All forms of arbitration usually implicate perceptions about cost, efficiency and expertise. International arbitration, however, involves greater emphasis on foreclosing the gamesmanship of parallel foreign litigation in each side’s home court . . . When a dispute has contacts with multiple countries, the parties may seek a playing field that is more neutral (procedurally, politically, and linguistically) than national courts.

Thus, arbitration is no mere supplement or alternative to litigation; it is the only game in town. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*,<sup>118</sup> the U.S. Supreme Court—in a specific discussion of arbitrability—acknowledged the growing significance of and necessity for international arbitration:

As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade. The controversies that international arbitral institutions are called upon to resolve have increased in diversity as well as in complexity. Yet the potential of these tribunals for efficient disposition of legal disagreements arising from commercial relations has not yet been tested. If they are to take a central place in the international legal order, national courts will need to “shake off the old judicial hostility to arbitration” . . . and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal. To this extent, at least, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration.<sup>119</sup>

Second, it is fallacious to assume that the international legal community has any less interest in the repose and finality of decisions than does a national legal system.<sup>120</sup> True, there is not a direct “drain on limited public resources” argument to be made, but the costs of multiple international dispute resolutions—though initially borne solely by the parties involved—are surely passed on to consumers. Moreover, one must assume that parties—although perhaps disappointed by certain particular decisions—are no less interested than their domestic counterparts in general legal certainty. Res judicata has always rested—in some fundamental way—on considerations of fairness. In most legal systems, mechanisms have evolved to ensure (absent extraordinary circumstances) that disputants get only one chance to either bring or defend a cause of action.

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William W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT'L L. 1241, 1256 (2003).

118. 473 U.S. 614 (1985).

119. *Id.* at 638-39 (citation omitted).

120. See INTERIM REPORT, *supra* note 116, at 3. (“It is generally accepted that the *res judicata* doctrine applies in the context of international arbitration, such that a final award has *res judicata* effect . . .”).

Third, the old argument that the arbitral process is too unlike litigation to allow preclusion makes even less sense when applied to international arbitration. The reasons for not allowing preclusion when arbitration is involved fall into one of two broad categories. On the one hand, objections may be based on the lack of discovery or the failure to follow the rules of evidence.<sup>121</sup> On the other hand, there are complaints about the lack of legal acumen on the part of arbitrators and the failure of arbitrators to offer a reasoned analysis of their awards.<sup>122</sup> The first objection, even if it has some validity domestically, makes no sense in the international field. A party would rarely get U.S. style discovery or procedure outside a U.S. court anyway, and, moreover, this lack has never stopped other jurisdictions from developing some form of domestic *res judicata*.<sup>123</sup> Too, international arbitrations tend to be relatively formal, employing well-defined procedural norms (via the rules of a sponsoring institution).<sup>124</sup> The second objection carries no more persuasive force than the first: arbitrators are often international legal experts, and their written awards are no less reasoned and detailed than judicial opinions.<sup>125</sup>

Fourth, one can make powerful arguments to preempt the "arbitration as contract" attack on *res judicata* and collateral estoppel. The central policy behind preclusion involves fairness and the fact that arbitration grows out of an agreement between concerned parties actually enables

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121. See Motomura, *supra* note 30, at 36 ("As a rule, those who sponsor or conduct arbitration(s) have considerable discretion to adopt procedures that they deem appropriate. While some arbitrations are elaborate, more typically they are less formal than court litigation.").

122. See Biren, *supra* note 30, at 1055-56:

The first alternative requires the arbitrator to decide the technical issue of when to apply collateral estoppel. This is unsatisfactory for several reasons. To begin with, the arbitrator would be bound to make the determination in accordance [*with generally accepted criteria*]. This decision may well be beyond the competence of the arbitrator who generally is not required to possess legal skills . . . Further, such a requirement is inconsistent with the arbitral process because the arbitrator is not bound by rules of law unless the parties state that he should be. . . .

123. See, e.g., INTERIM REPORT, *supra* note 116, at 6-18 (identifying and discussing preclusion standards in the United States, England, Ireland, Canada, Australia, New Zealand, France, Belgium, The Netherlands, Germany, Italy, Sweden, Denmark).

124. "While not all international arbitrations are conducted under the auspices of arbitral institutions, the overwhelming majority are." Catherine A. Rogers, *Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitrations*, 39 STAN. J. INT'L L. 1, \*2 n.125 (2003). Even ad hoc arbitrations are governed by some type of rules, often those of an institution. *Id.* at \*2 n.126.

125. See Hulbert, *supra* note 2, at 183, n.165. "[B]etween ninety and ninety-five percent of the sole arbitrators and chairmen appointed by the ICC have legal training . . . ."

rather than disables a line of reasoning in favor of application. In other words, because parties have such a great measure of control over arbitration (they select the rules, the arbitrators and the forum), it is not unfair for them to be bound by the decisions that they so extensively shaped.<sup>126</sup>

Now that the differences between international and domestic arbitration have been discussed, it is time to look more closely at how preclusion actually works in the international setting. As discussed earlier, the case of an arbitral award potentially binding a subsequent arbitration is an interesting and not uncommon one. Moreover, such a case inherently raises most—if not quite all—issues and objections that would appear in any context (i.e., litigation-arbitration, arbitration-litigation, arbitration-arbitration).<sup>127</sup> A lack of recognition does not, however, make the logic in favor of preclusion any less persuasive; rather, it suggests that the national system in question should reconsider its position.

### A. *Are International Arbitral Findings Binding on U.S. Courts?*

#### 1. The Question of Arbitrability

In the international arena, the preclusive force of arbitral awards is most often debated in two circumstances, jurisdictional and substantive. The jurisdictional issue arises when one party attempts to invoke a federal court's subject-matter jurisdiction to confirm an award and the other party opposes on the ground that the arbitral panel lacked authority to render the award.<sup>128</sup> This essentially presents a two-part argument: Does the

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126. See Kenneth R. Davis, *Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 37 TEX. INT'L L.J. 43, 44 (2002) ("Because arbitration is contractual, it affords the parties the flexibility to tailor the process to suit their mutual objectives . . . the key to arbitration is simply the freedom of contract.").

127. I use the qualifier "most" rather than the absolute "all," because there are certain technical difficulties that cannot be resolved solely within the international arbitration community. I am thinking particularly of the case where a national legal system does not recognize a particular type of preclusion. For a comprehensive discussion of this issue, see Robert C. Casad, *Issue Preclusion and Foreign Country Judgments: Whose Law?*, 70 IOWA L. REV. 53, 55-56, 62-70 (1984). For example, Germany does not give preclusive effect to findings of fact or law. See Motomura, *supra* note 30, at 78. See also GERMAN COMMERCIAL CODE AND CODE OF CIVIL PROCEDURE § 322 (Charles E. Stewart trans., 2001) (stating that "[j]udgments have legal force only to such extent as they decide the demand raised by the complaint or counterclaim." Given the omission of language specifying otherwise, it seems evident that German civil procedural laws only give preclusive effect to claims or demands rather than findings of fact or law as well).

128. See, e.g., *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286 (11th Cir. 2004) (dismissing arbitration award given that the proponent of award failed to meet agreement-in-writing

Convention on the Recognition and Enforcement of Arbitral Awards require a party seeking confirmation to show that the award was rendered pursuant to a written agreement to arbitrate? If so, is a federal district court bound by an arbitral panel's determination that the parties agreed to arbitrate?<sup>129</sup> For present purposes, it is sufficient to note with respect to the first question that courts have indeed required a party seeking confirmation to show—as a jurisdictional prerequisite—an enforceable agreement to arbitrate.<sup>130</sup> Satisfying this standard becomes more complicated when the party seeking confirmation does not produce an agreement-in-writing, but, rather, an arbitral *finding* of an agreement. A pair of recent circuit-court decisions carefully examines this issue and holds that an arbitral finding of arbitrability should be subject to at least minimal review.

In *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, a dispute arose between a New Jersey corporation and a corporation organized and existing under the laws of the People's Republic of China.<sup>131</sup> By the time of the dispute, the parties disagreed about every salient feature of their relationship.<sup>132</sup> They could not, for example, agree whether a transaction between them was for the sale of goods or a currency conversion or whether they had entered a written or oral contract.<sup>133</sup> At some point, Minmetals initiated an arbitration against Chi Mei before the China International Economic and Trade Arbitration Commission (CIETAC) pursuant to arbitration clauses in the sale of goods contracts.<sup>134</sup> Chi Mei appeared in the arbitration but repeatedly objected to the tribunal's jurisdiction on the ground that the contracts containing the arbitration clauses were forged.<sup>135</sup> The panel ultimately rejected Chi Mei's forgery defense and awarded Minmetals over \$4 million.<sup>136</sup> A U.S. District Court confirmed the award without opinion and an appeal to the Third Circuit ensued.<sup>137</sup>

The primary issue on appeal was whether a district court may properly enforce a foreign arbitral award where the arbitral panel rejected a party's

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requirement to establish court's jurisdiction); *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274 (3d Cir. 2003).

129. See, e.g., *Czarina*, 358 F.3d at 1286.

130. *Id.* at 1292 (holding that a party seeking confirmation must demonstrate agreement-in-writing "to establish the district court's subject matter jurisdiction to confirm the award.").

131. *China Minmetals*, 334 F.3d at 276-77.

132. *Id.* at 277.

133. *Id.*

134. *Id.* at 277-78.

135. *Id.* at 278.

136. *China Minmetals*, 334 F.3d at 278.

137. *Id.*

arguments that the documents providing for arbitration were forgeries and, consequently, there was no valid writing expressing an intent to arbitrate.<sup>138</sup> As the Third Circuit saw it, this issue rested on two distinct questions:

First, we must consider whether a foreign arbitration award might be enforceable regardless of the validity of the arbitration clause on which the foreign body rested its jurisdiction. In this regard, Minmetals points out that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") differs somewhat from the general provisions of the Federal Arbitration Act ("FAA"), and particularly argues that Article V of the Convention requires enforcement of foreign awards in all but a handful of very limited circumstances, one of which is not the necessity for there to be a valid written agreement providing for arbitration. If we conclude, however, that only those awards based on a valid agreement to arbitrate are enforceable, we also must consider who makes the ultimate determination of the validity of the clause at issue. Thus, in considering the second question, we must examine the district court's role, if any, in reviewing the foreign arbitral panel's finding that there was a valid agreement to arbitrate.<sup>139</sup>

The first question is not particularly relevant, but the Court reviewed the language and structure of the Convention to determine whether lack of a valid agreement to arbitrate is a ground for declining to enforce an award, even though that ground is not enumerated in Article V of the

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138. *Id.* at 279. This situation is to be contrasted with that in which there is no dispute as to the agreement to arbitrate but there is a dispute as to the existence of an underlying, substantive contract. *See Europcar Italia, S.P.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 315 (2d Cir. 1998):

Maiellano has apparently confused the issue of a fraudulently obtained arbitration agreement or award, which might violate public policy and therefore preclude enforcement with the issue of whether the underlying contract that is the subject of the arbitrated dispute was forged or fraudulently induced—a matter to be determined exclusively by the arbitrators.

*See also* *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967) (holding that the validity of underlying agreement, as opposed to arbitration clause at issue, was to be decided by arbitrator).

139. *China Minmentals*, 334 F.3d at 279.

Convention.<sup>140</sup> The Court concluded that it is, even though “Consistently with the policy favoring enforcement of foreign arbitration awards, courts strictly have limited defenses to enforcement to the defenses set forth in Article V of the Convention, and generally have construed those exceptions narrowly.”<sup>141</sup>

The Court seemed to believe that its principal task was to determine “whether the culture of international arbitration, which informs the structure, history, and policy of the Convention, provides a basis for distinguishing this case from *First Options*,” in which the U.S. Supreme Court held that—under the FAA—a district court, not an arbitration panel, must decide the question of arbitrability.<sup>142</sup> According to the Third Circuit,

If this case had arisen under the domestic FAA, *First Options* clearly would have settled in Chi Mei’s favor both the question of the need for a valid agreement to arbitrate and the question of the district court’s role in reviewing an arbitrator’s determination of arbitrability when an award is sought to be enforced.<sup>143</sup>

The Court therefore looked at the “international posture” of the case for reasons that might remove it from the ambit of *First Options*.<sup>144</sup> Paramount among those international policies is the rule of competence-competence, which gives arbitrators the power to pass on their own jurisdiction.<sup>145</sup>

This rule—also known as kompetenz-kompetenz—has traditionally held greater currency on the stage of international arbitration than of domestic arbitration.<sup>146</sup> Indeed, “international arbitration rules normally

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140. *Id.* at 280.

141. *Id.* at 283.

142. *Id.* at 281, 284. See also *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 947-48 (1995). Some have noted a certain “tension” between the *First Options* rule and the holding of *Prima Paint*, which held that a claim of fraudulent inducement that goes to the validity of a contract containing an arbitration clause is a matter for the arbitrator. See *Guang Dong Light Headgear Factory Co. v. ACI Int’l, Inc.*, No. 03-41 65-JAR, 2005 U.S. Dist. LEXIS 8810, at \*27-28 (D. Kan. May 10, 2005).

143. *China Minmetals*, 334 F.3d at 281.

144. *Id.* at 287. Many observers are convinced that the differences between domestic and international arbitration are so profound that the United States should consider separate regimes for reviewing international and domestic awards. See *Park*, *supra* note 117, at 1306 (stating that, for example, the domestic doctrine of “manifest disregard of the law” might be misapplied in the international setting. As such, bifurcated models from France and Switzerland, for instance, could serve as useful models for the United States).

145. *China Minmetals*, 334 F.3d at 287.

146. *Id.*

provide explicitly that the arbitrators have the power to determine their own jurisdiction;" therefore, agreements incorporating the rules of particular arbitral bodies qualify as an exception to *First Options*.<sup>147</sup> The rules of CIETAC—under whose auspices the China Minmetals-Chi Mei arbitration took place—allow arbitrators to determine their jurisdiction.<sup>148</sup> But the court concluded that the analysis would not end with this point because "incorporation of this rule into the contract is relevant only if the parties actually agreed to its incorporation."<sup>149</sup> Here, of course, Chi Mei argued that the contract was forged, so the Court went on to consider "whether international norms favoring competence-competence, as well as American policy favoring arbitration particularly strongly in international cases, are sufficient to render *First Options* inapplicable in the international context."<sup>150</sup>

The Court reviewed several nations' views of competence-competence, as well as the Model Law on International Commercial Arbitration of the U.N. Commission on International Trade Law and found:

It therefore seems clear that international law overwhelmingly favors some form of judicial review of an arbitral tribunal's decision that it has jurisdiction over a dispute, at least where the challenging party claims that the contract on which the tribunal rested its jurisdiction was invalid. International norms of competence-competence are therefore not inconsistent with the Supreme Court's holding in *First Options*, at least insofar as the holding is applied in a case where, as here, the party resisting enforcement alleges that the contract on which arbitral jurisdiction was founded is and always has been void.<sup>151</sup>

Less than a year after the *China Minmetals* decision, the Eleventh Circuit adopted its rationale and affirmed a district court's refusal "to accept at face value [an] arbitration panel's finding" that the parties had agreed to arbitrate.<sup>152</sup> This largely parallels the *China Minmetals* Court's

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147. *Id.* (quoting IAN R. MACNEIL ET AL., IV FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT § 44.15.1 (Supp. 1996)).

148. *Id.* at 288.

149. *Id.*

150. *China Minmetals*, 334 F.3d at 288.

151. *Id.* at 289.

152. *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1293 (11th Cir. 2004). Lower courts are also following *China Minmetals*. See, e.g., *Guang Dong Light Headgear Factory Co. v. ACI Int'l, Inc.*, No. 03-41 65-JAR, 2005 U.S. Dist. LEXIS 8810, at \*29 (D. Kan. May 10, 2005)

recognition that a court may revisit arbitrability even though “an arbitral tribunal already has rendered a decision, and has made explicit findings concerning the alleged forgery of the contract, including the arbitration clause.”<sup>153</sup> In light of these factual findings, one of the most dissatisfying aspects of both opinions is the failure to even mention preclusion. That is, even if the courts were correct that enforcement of a foreign award may be avoided by challenging the existence of a valid arbitration clause,<sup>154</sup> one is left to wonder why neither court considered the wisdom of reexamining—on jurisdictional grounds—issues that had been fully and fairly decided in arbitrations. With respect to *judgments*, “there emerges the general rule that a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court’s inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.”<sup>155</sup>

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(holding that the Court should make an independent determination of contract’s validity, “and therefore the arbitrability of this dispute.”).

153. *China Minmetals*, 334 F.3d 274 at 282. The Second Circuit recently reached the same conclusion, albeit by a slightly different route. *Sarhank Group v. Oracle Corp.*, 404 F.3d 657 (2d Cir. 2005). The *Czarina* court, for instance, held that—to invoke a federal district court’s subject-matter jurisdiction—a party must produce evidence of an agreement to arbitrate that would satisfy Article II of the Convention. *Czarina*, 358 F.3d at 1290-92 (holding that a party seeking confirmation must comply with agreement-in-writing requirement of Article II of the Convention for the court to have subject-matter jurisdiction). The *Oracle* court specifically rejected this approach. *Oracle*, 404 F.3d at 660. Moreover, in the Second Circuit’s view, the international overlay of the arbitration before it was unimportant. *But see Baker Marine (Nig.), Ltd. v. Chevron (Nig.), Ltd.*, 191 F.3d 194, 197 n.2 (2d Cir. 1999) (“[M]echanical application of domestic arbitral law to foreign awards under the Convention would seriously undermine finality and regularly produce conflicting judgments.”) This is so because:

[First] Article V(2) of the Convention provides that a United States court is not required to enforce an [arbitration] agreement . . . if enforcement of the arbitral award would be contrary to American public policy, . . . [second] [F]ederal arbitration law controls in deciding this issue, [third] . . . [u]nder American law, whether a party has consented to arbitrate is an issue to be decided by the Court in which enforcement of an award is sought, [and] the Court decides, based on general principles of domestic contract law, whether the parties agreed to submit the issue of arbitrability to the arbitrators.

*Sarhank Group*, 404 F.3d at 661 (citing *First Options, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)).

154. *See Slaney v. Int’l Amateur Athletic Fed’n*, 244 F.3d 580, 591 (7th Cir. 2001) (“[T]he fact that Slaney suggests there is no written agreement to arbitrate, as mandated by Article II of the New York Convention is irrelevant.”); *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys “R” Us, Inc.*, 126 F.3d 15, 25 (2d Cir. 1997) (“[T]he state may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention.”).

155. *Durfee v. Duke*, 375 U.S. 106, 111 (1963) (Supreme Court finding that fully litigated

## 2. The Preclusive Force of an Award

Any discussion of the preclusive force of a foreign arbitral award on a U.S. court must start with the "Convention on Recognition and Enforcement of Arbitral Awards" (Convention).<sup>156</sup> As one very thoughtful court has recently observed, a decision whether to recognize a foreign arbitral award turns on two related inquiries.<sup>157</sup> First, what does the Convention dictate? Second, how do the doctrine of res judicata and notions of international comity come into play?<sup>158</sup> The case is paradigmatic in several respects, and thus worthy of close consideration.

*Gulf Petro* arose out of a dispute over a joint venture between the plaintiff, a Texas corporation, and the defendant, a Nigerian national petroleum company, the purpose of which was to reclaim and salvage petroleum that the Nigerian company discarded in connection with its daily operations.<sup>159</sup> The joint venture did not work out as planned and the Texas corporation filed a demand and claim for arbitration with the Chamber of Commerce and Industry of Geneva.<sup>160</sup> After some delay, the arbitration commenced; by agreement, the arbitration was bifurcated into liability and damages phases.<sup>161</sup> The Texas corporation prevailed in the liability phase, which resulted in a Partial Award in its favor.<sup>162</sup> But on the last day of the damages phase, the Nigerian company challenged the Texas corporation's standing, arguing that the Texas corporation was formed

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jurisdictional issues in Nebraska court precluded Missouri court from further inquiries).

156. 21 U.S.T. 2517, *implemented by*, 9 U.S.C. §§ 201-208 (2005).

157. *Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp.*, 288 F. Supp. 2d 783 (N.D. Tex. 2003), *aff'd*, 115 Fed. Appx. 201 (5th Cir. 2004).

158. *Id.* at 792; *see also* *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907, 914 (1996). The Court held that the Egyptian court's decision nullifying arbitration award did not have res judicata effect:

The question is whether this court should give res judicata effect to the decision of the Egyptian Court of Appeal, not whether that court properly decided the matter under Egyptian law. Since the "act of state doctrine" as a whole does not require U.S. courts to defer to a foreign sovereign on these facts, comity, which is but one of several "policies" that underlie the act of state "doctrine," does not require such deference either.

*Id.* (citing *W.S. Kirkpatrick & Co., v. Env'tl. Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990)).

159. *Gulf Petro*, 288 F. Supp. at 785.

160. *Id.*

161. *Id.*

162. *Id.*

after the execution of the joint venture and demand for arbitration.<sup>163</sup> The arbitration panel agreed, and held in its Final Award that the plaintiff "did not have standing or capacity to make and/or to sustain the claims against [the defendant]."<sup>164</sup>

The Texas corporation appealed the Final Award to the Federal Court in Switzerland, which "issued a decision rejecting [plaintiff's] arguments for canceling the Final Award and, in so doing, upheld the Panel's determination that [plaintiff] lacked standing to maintain its claims."<sup>165</sup> The plaintiff subsequently brought an action in the Northern District of Texas to confirm the Partial Award and to ignore the Final Award and later judgment of the Swiss court confirming the Final Award.<sup>166</sup>

The district court began its analysis by considering whether it had the power to set aside or modify the Final Award.<sup>167</sup> It first looked to the Convention, under which "a foreign court is empowered to enter one of two judgments when faced with an arbitral award issued in another nation: (1) enforce the award, or (2) refuse to enforce the award upon specified conditions."<sup>168</sup> Given this statutory stricture, the court concluded that the Convention "precludes a foreign court from setting aside or modifying an arbitral award."<sup>169</sup> It reached this conclusion with principal reliance on

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163. *Id.* at 786.

164. *Gulf Petro*, 288 F. Supp. at 786.

165. *Id.*

166. *Id.*

167. *Id.* at 792.

168. *Id.*

169. *Gulf Petro*, 288 F. Supp. at 792; *see also* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, *implemented by*, 9 U.S.C. § 201 (2005):

### Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

### Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid

*Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, in which the Second Circuit found:

[T]hat the Convention mandates very different regimes for the review of arbitral awards (1) in the state in which, or under the law of which, the award was made, and (2) in other states where recognition and enforcement are sought. The Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief. *See* Convention art. V(1)(e). However, the Convention is equally clear that when an action for enforcement is brought in a foreign state, the state may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention.<sup>170</sup>

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under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

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170. 126 F.3d 15, 24-25 (2d Cir. 1997); *See also* *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357 (5th Cir. 2003) ("the country in which, or under the [arbitration] law of which, [an] award was made' is said to have *primary jurisdiction* over the arbitration award. All other signatory States are *secondary* jurisdictions, in

The court also seemed to find it persuasive (1) that the relationship between the parties did not involve U.S. domestic law (e.g., the contract provided for Swiss arbitration under Nigerian law)<sup>171</sup> and (2) that the Fifth Circuit had recently admonished district courts to refrain from meddling in foreign arbitrations.<sup>172</sup> But ultimately, the court's decision can be read as one based on *policy*, not statutory construction: "a practice of modifying or amending a foreign arbitral award, which has been upheld by foreign court, could disrupt the reliability of international arbitration established under the Convention over four decades. To rule otherwise would encourage forum shopping among countries willing to modify or amend arbitration awards."<sup>173</sup>

The next step in the court's analysis was to consider whether the Partial Award was enforceable in light of the Final Award and the Swiss judgment. Although the court did not note the issue, this scenario suggests that determining the preclusive effect of a court-confirmed or court-vacated award quickly collapses into a discussion of the preclusive effects of a foreign *judgment*.<sup>174</sup> Accordingly, the court framed its discussion in terms of the *res judicata* effects of foreign judgments, and the doctrine's roots in notions of international comity. Under this rubric,

[A] foreign court's determination of a matter is conclusive in a federal court where:

(1) the foreign judgment was rendered by a court of competent jurisdiction, which had jurisdiction over the cause and parties; (2) the judgment is supported by due allegations and proof; (3) the relevant parties had an opportunity to be heard; and (4) the foreign court follows civilized procedural rules.<sup>175</sup>

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which parties can only contest whether that State should enforce the arbitral award.") (quoting New York Convention) (brackets in original) (emphasis added).

171. *Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp.*, 288 F. Supp. 2d 783, 793 (N.D. Tex. 2003).

172. *Id.* ("[I]t is not the district court's burden . . . to protect [a party] from all the legal hardships it might undergo in a foreign country as a result of this foreign arbitration or the international commercial dispute that spawned it.").

173. *Id.* (citing *Baker Marine (Nig.), Ltd. v. Chevron (Nig.), Ltd.*, 191 F.3d 194, 197 n.2 (2d Cir. 1999)) (suggesting that the "mechanical application of domestic arbitral law to foreign awards under the Convention would seriously undermine finality and regularly produce conflicting judgments.").

174. *See* Sudol, *supra* note 112, nn.59-60. (discussing relevant cases). For thorough discussions of this mechanism, see, e.g., *Foreign Judgments Based on Foreign Arbitral Awards: The Applicability of Res Judicata*, 124 U. PA. L. REV. 223 (1975); *see also* Casad, *supra* note 127.

175. *Gulf Petro Trading*, 288 F. Supp. 2d at 794 (citing *Hilton v. Guyot*, 159 U.S. 113, 205-06

On the facts presented (i.e., with evidence of a court of competent jurisdiction, pleadings, proof and a record thereof, and opportunity to be heard, and use of civilized procedural rules) the court held that res judicata and international comity barred the complaint.<sup>176</sup>

### *B. Are International Arbitral Awards Binding in a Subsequent Arbitration?*

The final permutation to be considered involves an arbitral award's preclusive effect on a subsequent arbitration. The questions that spring from the arbitration context are not wholly distinct from those discussed in relation to the other contexts. In fact, one might usefully characterize the analytical paradigm for evaluating this relationship as a conflation of the paradigms described above.

In international commercial arbitration, there is often an elaborate interplay of arbitral awards and court rulings that one must sort out to determine what is preclusive—and against whom.<sup>177</sup> *Nicor Int'l Corp. v.*

(1895)). *Hilton* is considered a landmark case regarding the recognition and enforcement of foreign judgments. It offers two key foundations: 1) the grounds for non-recognition of a foreign judgment such as lack of due process, personal or subject matter jurisdiction, insufficient notice, etc., all of which have been codified in statutes and decisions and 2) the basis for recognizing foreign judgments founded on international comity. Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675, 716 (2003).

176. *Id.* at 794-95. See also *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 146 (1992) (finding that because "Avco was 'unable to present [its] case' within the meaning of Article V(1)(b), and enforcement of the Award was properly denied."). In an unusual turn, the *Gulf Petro* plaintiffs later alleged in a separate suit that they had been victims of arbitral corruption. This case was dismissed on jurisdictional grounds. See *Gulf Petro Trading Co., Inc. v. Nigerian Nat'l Petroleum Corp.*, Case No. 1:05CV619 (E.D. Tex.) (Order on Defendants' Motion to Dismiss, Mar. 15, 2006).

177. Although it is beyond the scope of the matter at hand, the question of whether third parties may be bound by arbitral findings is worth a brief mention. One recurring scenario involves the "vouching" of a putative indemnitor into a proceeding. Vouching is a common-law device whereby a defendant notifies the "vouchee" of a proceeding, asserts a right to indemnity, tenders the right to defend and puts the vouchee on notice that it will be bound by factual determinations necessary to the original judgment. *Universal Am. Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131, 1138 (5th Cir. 1991). The Fifth Circuit has held that a vouchee can be bound by arbitral findings, even if it does not appear in the arbitration:

A district court, in the exercise of its discretion, may preclude relitigation of issues previously determined in an arbitration if the court finds, under the facts of that case, that the arbitral procedures afforded due process, that the requirements of offensive collateral estoppel are met, and that the case raises no federal interests warranting special protection. Further, a putative indemnitor may be vouched into an arbitration, and may suffer issue-preclusive effects from arbitral findings under

*El Paso Corp.*<sup>178</sup> is representative of this complexity. This case arose out of dispute concerning a professional services agreement (PSA) between Coastal Corporation (later merged into El Paso Corp.), a Texas-based, diversified energy holding company, and Nicor, a Panamanian consulting company.<sup>179</sup> Under the PSA, Nicor was to provide consulting services for energy-related projects in the Dominican Republic.<sup>180</sup> At some point, Coastal pursued projects in the Dominican Republic through CEEP, a company in which Coastal had an ownership interest.<sup>181</sup> Nicor claimed that this activity breached the PSA, and so informed Coastal.<sup>182</sup> Soon thereafter, Nicor assigned its rights to Carib, which was a fifty-percent owner of Nicor.<sup>183</sup> Litigation and arbitration quickly followed.<sup>184</sup>

First, Carib (Nicor's assignee) filed suit against Coastal and its subsidiaries.<sup>185</sup> The Dominican *nisi prius* court ruled that it had no jurisdiction in light of the broad arbitration clause in the PSA.<sup>186</sup> However, an intermediate appellate court "'repealed' the lower court's judgment, based, in part, on a finding that Coastal had 'renounced' arbitration."<sup>187</sup> The Supreme Court of the Dominican Republic subsequently dismissed Coastal's appeal.<sup>188</sup> As Carib's litigation worked its way through the Dominican courts, Coastal instituted a parallel ICC arbitration, which initially resulted in "finding[s] that Coastal had not waived its right to arbitrate and that [the arbitrator] had jurisdiction to hear the parties' dispute."<sup>189</sup> Later, the arbitrator issued a Final Award holding that Coastal had not breached the PSA and that it was entitled to fees and costs.<sup>190</sup> Undaunted, Carib pushed forward with its Dominican litigation, which

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the offensive collateral estoppel rules peculiar to vouching, if the indemnitor declines to appear in the arbitration. But offensive collateral estoppel is not available as a matter of law on any issue that was tainted by conflict of interest between the putative indemnitor and indemnitee in the arbitration.

*Id.* at 1139, 1142.

178. 292 F. Supp. 2d 1357 (S.D. Fla. 2003).

179. *Id.* at 1361.

180. *Id.* at 1362.

181. *Id.*

182. *Id.*

183. *Nicor*, 292 F. Supp. at 1362.

184. *Id.* at 1362-63.

185. *Id.* at 1362.

186. *Id.*

187. *Id.*

188. *Nicor*, 292 F. Supp. at 1362.

189. *Id.* at 1362-63.

190. *Id.* at 1363.

resulted in a “sentence” in favor of Carib/Nicor.<sup>191</sup> Under the terms of the sentence, Carib/Nicor submitted a “statement of damages” to which Coastal offered no response.<sup>192</sup> Still later, “El Paso filed a ‘Request to Grant Exequatur to a Foreign Arbitration Award’ in the Dominican Republic Court.”<sup>193</sup> The Dominican courts denied that petition.<sup>194</sup>

After concluding their respective forays into the Dominican courts and the ICC arbitration, Carib/Nicor filed suit in the Southern District of Florida against El Paso/Coastal seeking, among other things, to domesticate the Dominican judgment.<sup>195</sup> Coastal counterclaimed to confirm the arbitration award.<sup>196</sup> The court began with an analysis of the Dominican “sentence.”<sup>197</sup> It first concluded that the sentence—even if coupled with Nicor’s “Statement of Damages”—did not qualify as a “judgment” entitled to recognition under Florida’s version of the Uniform Out-of-Country Money-Judgments Recognition Act because it did not award a specific “sum of money.”<sup>198</sup> The court also paused to consider whether the Dominican appellate court’s finding that Coastal had waived its right to arbitrate precluded the arbitrator from reaching an inconsistent result on that issue.<sup>199</sup> The Court concluded—for two reasons, one legal, one factual—that collateral estoppel did not debar the arbitrator from reexamining the waiver. First, the court noted that

[T]he law in this circuit is that a res judicata defense is to be raised and decided by the arbitrator in the first instance; and that only if the arbitrator ignores the defense would it then be appropriate for the court to vacate an arbitration award. Notably, although not addressed yet in this circuit, other courts have held that the res judicata effect of a *foreign* judgment is similarly an issue for the arbitrator to resolve.<sup>200</sup>

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191. *Id.*

192. *Id.*

193. *Nicor*, 292 F. Supp. at 1363.

194. *Id.*

195. *Id.* at 1361.

196. *Id.*

197. *Id.* at 1364-71.

198. *Nicor*, 292 F. Supp. at 1367. The Court also noted that it need not recognize the sentence because it was entered in derogation of the parties’ agreement to arbitrate. *Id.* See also Florida’s Uniform Out-of-Country Foreign Money-Judgment Recognition Act, FLA. STAT. ch. 55.602 (2005) (stating in part that “[f]oreign judgment” means any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine, or other penalty.”).

199. *Nicor*, 292 F. Supp. 2d at 1368.

200. *Id.* at 1369 (citing *In re Arbitration between South Ionian Shipping Co. v. Hugh Neu &*

Second, as a factual matter, the court concluded that “the record evidence is clear that the Sole Arbitrator did not disregard the Dominican court’s ruling. Indeed, the Sole Arbitrator premised its finding that Coastal did not waive arbitration on ‘all the facts’ and ‘procedural steps’ of the parties.”<sup>201</sup> Once the court satisfied itself that the arbitrator’s decision on waiver was not precluded, the court turned to the related question of whether that decision was itself preclusive.<sup>202</sup> The court found that “the arbitration proceeding afforded the parties the basic elements of an adjudicatory procedure” and that, therefore, “the Sole Arbitrator’s resolution of the issue of waiver precludes this Court from resurrecting it.”<sup>203</sup>

Although the *Nicor* court had much to sort out, the situation can be even more complicated. In *Amco v. Indonesia*,<sup>204</sup> an International Centre for Settlement of Investment Disputes (ICSID) tribunal was called upon to decide the preclusive reach of three layers of arbitral awards. This arbitration arose out of a 1968 contract between Amco and Indonesia for the construction of the Kartika Plaza Hotel. The investment was to run for thirty years, and to facilitate the investment, Amco (a U.S. corporation) applied to establish a subsidiary, P.T. Amco Indonesia, under Indonesian

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Sons Int’l Sales Corp., 545 F. Supp. 323, 342-25 (S.D.N.Y. 1982) (res judicata effect of Greek judgment is issue for arbitrator)).

201. *Id.* at 1369. The court also found that application of collateral estoppel on these facts would be unfair and that there was no evidence that the precise issue of whether *Nicor/Carib* had actually carried their “heavy burden” of demonstrating waiver. *Id.* at 1370. This latter issue is not unique to the international context. If one tribunal’s findings are made under a standard of proof lower from that employed by a subsequent tribunal, preclusion may be inappropriate. *See, e.g., Cobb v. Pozzi*, 363 F.3d 89, 113 (2d Cir. 2003) (“[C]hange in the burden of proof can render issues in two different proceedings non-identical and thereby make collateral estoppel inappropriate.”); The RESTATEMENT (SECOND) OF JUDGMENTS § 28(4) (1982) states:

[R]elitigation of the issue in a subsequent action between the parties is not precluded . . . [where] [t]he party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action . . . or the adversary has a significantly heavier burden than he had in the first action.

202. *Nicor Int’l Corp. v. El Paso Corp.*, 292 F. Supp. 2d 1357, 1371 (S.D. Fla. 2003).

203. *Id.* at 1371. The court also held that res judicata barred *Nicor/Carib*’s attempt to assert a breach of contract claim because the arbitrator had already adversely ruled on that claim. *Id.* at 1375-76. The court did not consider whether *Nicor/Carib*’s remaining claims were barred under either claim or issue preclusion; rather, it found that each of those claims failed as a matter of law. *Id.* at 1376-78.

204. 14 Y.B. COM. ARB. 92 (1989).

law.<sup>205</sup> The application contained an arbitration clause that referred all disputes to ICSID. As the tribunal characterized the facts:

On 31 March-1 April 1980, the hotel was allegedly seized in an armed military action, and the management effectively taken over by P.T. Wisma, owner of the land on which the hotel was built. Subsequently, the investment license was revoked by the Indonesian Capital Investment Coordination Board (BKPM), which found that P.T. Aeropacific rather than P.T. Amco Indonesia had carried out P.T. Amco's obligation to manage the hotel, and that P.T. Amco Indonesia had not contributed the full sum promised in its application for an investment license and in the Lease and Management Contract with P.T. Wisma. Further, the Lease and Management Contract was rescinded by the Jakarta Court in an action initiated by P.T. Wisma against P.T. Amco Indonesia.<sup>206</sup>

Amco then filed a request for arbitration with ICSID (Panel 1), disputing the right of the Indonesian government to seize the investment and terminate the license.<sup>207</sup> Ultimately, Amco was awarded \$3.2 million dollars plus interest. However, this award was annulled "as a whole" by an Ad Hoc ICSID tribunal (Panel 2), a decision that did not extend to the original arbitrators' finding that the armed seizure of the hotel was illegal.<sup>208</sup> The instant tribunal (Panel 3) was forced, therefore, to sort out—as a preliminary matter—the preclusive effects of both the original arbitration and the ad hoc annulment.

As its first order of business, the Panel 3 tribunal had to establish a general approach to res judicata (in the broad sense). This tribunal noted that

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205. *Id.* at 93.

206. *Id.*

207. *Id.*

208. *Id.* at 94. The final paragraph of the Panel 2 decision held that:

The ad hoc committee by unanimous decision annuls the award as a whole for the reasons and with the qualifications set out above. The annulment does not extend to the tribunal's findings that the action of the Army and Police personnel on 31 March-1 April 1980 was illegal. The annulment extends, however, to the findings on the duration of such illegality and on the amount of the indemnity due on this account . . . .

There is no quarrel between the parties with Professor Reisman's (who had apparently submitted a written opinion to the tribunal) view that when an ad hoc committee issues a qualified nullification of an award rendered by an ICSID tribunal, a subsequent tribunal, initiated by the claim of one or both of the original parties, must treat the unannulled parts of the award as binding on the parties and *res judicata* and hear relitigation of and decide only those parts which were nullified by the ad hoc committee.<sup>209</sup>

Panel 3 immediately recognized, however, that a general rule was of limited use in this case, not because it was difficult to decide which parts of the Panel 1 award were unannulled, but because Indonesia asked that the Panel 2 decision be considered barred by *res judicata*, not only as to the dispositive but to the reasoning leading to the dispositive as well.<sup>210</sup> Indonesia's tactic here was to minimize the preclusive effect of Panel 1 by throwing a cloud over Panel 1's findings; that is, if Panel 2's findings were given preclusive effect, then they might be said to preempt Panel 1's findings. Thus, the problem is

[W]hether reasons of the ad hoc committee are to be treated as *res judicata*, even if that has the effect of rendering annulled parts of the Award as effectively closed off from redetermination, notwithstanding that the normal effect of a partial annulment is to place the "parties in the legal position in which they stood before the commencement of the proceedings which gave rise to the award which has been impeached."<sup>211</sup>

Panel 3 was comfortable with what we would think of as collateral estoppel.<sup>212</sup> The tribunal went on to review relevant principles of international law and concluded that "it is by no means clear that the basic trend in international law is to accept reasoning, preliminary or incidental determinations as part of what constitutes *res judicata*."<sup>213</sup> Panel 3's

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209. *Amco*, 14 Y.B. COM. ARB. at 96.

210. *Id.* at 96-97. ("dispositive"—i.e., the "operative part" of an award).

211. *Id.* at 98 (citations omitted).

212. "The general principle, announced in numerous cases is that a right, question, or fact distinctly put in issue and distinctly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed," but issue preclusion does not dispose of the question concerning reasoning. *Id.* at 99.

213. *Id.*

assessment of the situation finds further support in the very nature of a Panel 2-type proceeding:

Occasionally states have agreed to submit the question whether an arbitral award was void to a second ad hoc tribunal. In such a case, the second tribunal sits as a court of cassation rather than of appeal. It may only uphold or quash the award, in whole or in part; it cannot substitute findings of its own.<sup>214</sup>

Ultimately, the Panel 3 tribunal made a well-founded decision that serves the interests of fairness to both parties:

- Matters sought by a party to be annulled by the ad hoc committee, but expressly not annulled, or expressly confirmed, are res judicata.
- Matters decided by the first tribunal but never put forward for annulment are binding on the parties and cannot be relitigated. This is not because, as Indonesia suggests . . . such matters are implicitly confirmed by the ad hoc committee and are therefore binding, but simply because, never having been before the ad hoc committee, they remain binding as res judicata of the first tribunal. However, it follows from the present tribunal's general approach to res judicata that, while unchallenged findings of the first tribunal will constitute res judicata, not every incidental statement or procedural ruling made by the first tribunal is to be treated as a finding to which this principle applies.
- Matters expressly annulled can therefore be relitigated.
- As indicated above, the present tribunal is unable to accept the very broad view of res judicata, whereby matters said to be 'integral' to nullity decisions [sic] of the ad hoc committee are said to be binding, even if the conclusion to which they lead is the striking down of a prior finding by the tribunal and a rehearing upon such prior findings.<sup>215</sup>

This decision—both in its general and specific pronouncements—seems to balance quite well the policy reasons that weigh in favor of preclusion with a studied respect for diverse legal traditions. It ultimately serves,

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214. *Amco*, 14 Y.B. COM. ARB. at 101 (citing J.L. SIMPSON & HAZEL FOX, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 259 (1959)).

215. *Id.* at 102-03 (citation omitted).

therefore, as an effective model for preclusion in all commercial arbitration—domestic or international.

## V. CONCLUSIONS AND RECOMMENDATIONS

To facilitate the uniform application of both claim and issue preclusion in international commercial arbitration, there are measures that arbitral institutions, states, and parties can take to regularize the application of preclusion in common situations. First, states could specifically address preclusion in their arbitration acts.<sup>216</sup> In the Netherlands, for instance, the Arbitration Act specifically provides for preclusion:

### *Res judicata* of the award

1. Only a final or partial final arbitral award is capable of acquiring the force of *res judicata*. The award shall have such force from the day on which it is made.
2. If, however, an appeal to a second arbitral tribunal is provided for, the final or partial final award shall have the force of *res judicata* from the day on which the time limit for lodging the appeal has lapsed or, if the appeal has been lodged, the day on which a decision is rendered on appeal, if and to the extent that the award rendered at first instance is affirmed on appeal.<sup>217</sup>

As an alternative, a state could include a rule in its rules or code of civil procedure that comprehends the preclusive effect of arbitral awards. The Swedish Rättegångsbalk, for instance, "includes a basic prescription concerning the significance of a judgment in future controversies."<sup>218</sup> And although the relevant statute facially speaks only of judgments, courts apply it to arbitral awards as well.<sup>219</sup> Interestingly, the Swedish system

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216. Even in the European Union, member-state preclusion rules remain vital. Indeed, contrary to the usual logic, they can trump Community law. See Case C-126/97, *Eco Swiss China Time Ltd. v. Benetton Int'l NV*, 2000 5 C.M.L.R. 816, 838 (stating that an interim award that acquires the force of *res judicata* under domestic rules may no longer be called into question by a subsequent arbitration award, even if this is necessary to examine, in proceedings for annulment of a subsequent arbitration award, whether an agreement which the interim award held to be valid in law is nevertheless void under Article 81 EC (ex Article 85) [a competition law]).

217. WETBOEK VAN BURGERLIJKE RECHTSVORDERING [R.V.] art. 1059 (Neth.); see also 15 YB. COM. ARB. 56 (1990).

218. RUTH BADER GINSBURG & ANDERS BRUZELIUS, *CIVIL PROCEDURE IN SWEDEN* 305 (Hans Smit ed., 1965).

219. *Id.* at 306 n.525.

does not recognize collateral estoppel in all situations; it requires, rather, that an issue to be precluded be “red flagged” by presenting a separate demand for a declaratory judgment on the issue.<sup>220</sup> This dual system within which res judicata and collateral estoppel are covered by different rules is probably unnecessary, though workable. The wiser course would be to bring both doctrines within the same general framework.

Second, arbitral institutions could likewise make provisions in their procedural rules that would put parties on notice that preclusion could affect both claims and issues in dispute.<sup>221</sup> The mere existence of these rules might provide the added benefit of encouraging disputants to consolidate related claims and to attempt to join related parties. At the very least, such rules would enhance the uniformity of decision-making, thereby lending stability to an area that is now in flux. Like it or not, the question of whether to preclude will continue to pop up in international commercial arbitration, and justice is probably best served when the rules of the game are relatively fixed and known to all.

Third, states could—if they have not already done so—bifurcate their arbitration acts into “domestic” and “international” components.<sup>222</sup> As one commentator has aptly suggested, “An optimum legal framework for international arbitrations would limit court scrutiny to narrow review standards, regardless of whatever judicially administered anti-abuse measures might be appropriate for domestic cases.”<sup>223</sup> In practice, this would allow a loser to challenge gross procedural unfairness (e.g., corruption), but not the particular merits of an award.

Finally, parties have considerable latitude in determining whether an award is to be preclusive and—in some jurisdictions—whether it is subject to expanded review.<sup>224</sup> In essence, a lawyer drafting an arbitration clause is presented with an opportunity to choose the shape of an eventual award:

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220. *Id.* at 307.

221. Although the rules of many arbitral institutions provide that awards shall be “binding” or “final,” they might be amended more clearly to mandate that the subject matter of the award cannot be relitigated. *See Interim Report, supra* note 117, at 22 (discussing particular associations’ rules). Thus, by incorporating specific rules in an arbitration clause, a stronger argument could be made that the parties intended each proceeding to be preclusive.

222. One reason some nations have been hesitant to develop separate legal frameworks for domestic and international arbitration is fear “that such distinctions conflict with treaty prohibitions on nationality-based discrimination.” *See* William W. Park, *Duty and Discretion in International Arbitration*, 93 AM. J. INT’L L. 805, 822 (1999).

223. Park, *supra* note 117, at 1269.

224. *See, e.g., Hughes Training, Inc. v. Cook*, 254 F.3d 588, 592-93 (5th Cir. 2001) (stating that because parties can customize their arbitration agreements, as a result, they can “expand judicial review of an arbitration award beyond the scope of the Federal Arbitration Act.”).

one that is conclusive or one that is subject to review. This requires a balancing of interests—the relative speed and economy of arbitration versus the procedural safeguards of judicial review. Plainly, this is an inquiry that must be individually tailored. But in resolving the issues a drafter would be wise to heed the warning of one former Magistrate Judge: “Nominal winners in litigation are often real losers in terms of the costs and time expended in the matter.”<sup>225</sup>

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225. Pamela Tynes, *The Art of Drafting Arbitration Agreements*, TEXAS LAW., May 2, 2005, at 35 (discussing the tailoring of arbitration agreements to expand scope of judicial review).