

Reflections on finality in arbitration*

Christa Roodt

BLC, LLB, LLM, LLD

Lecturer, University of Aberdeen, Scotland; Research Fellow, Department of Jurisprudence, University of South Africa

OPSOMMING

Ondersoek na die Finaliteit van 'n Arbitrasiebevel

Hierdie artikel oorweeg die *Telcordia*- en *Lufuno*-sake vanuit die oogpunt van die finaliteit van 'n arbitrasiebevel. Die vraag wat te berde kom, is wanneer 'n arbitrasiebevel finaliteit bereik waar 'n saak voor meer as een forum (arbitrasie en staatlke howe), in meer as een jurisdiksie gevoer word. Die prosedurele meganismes wat Amerikaanse en Suid-Afrikaanse howe tydens die *Telcordia*-dispuut toegepas het asook hul onderskeie benaderings tot *res iudicata*, het 'n groot mate van ooreenstemming getoon.

Dit is te verstane dat die afhandeling van 'n internasionale proses vertraag kan word deur bepaalde grondwetlike regte wat die spoed van die afhandeling van 'n saak kan beïnvloed. Nietemin, indien die reg op 'n billike verhoor op enige stadium in die verrigtinge gepleit mag word, word 'n geleentheid geskep vir die dispuut om vryelik te eskaleer gedurende die verhoor. Dit kan die hofproses oopstel vir misbruik en die afhandeling van die geskil vertraag. Die minderheidsbeslissing in *Lufuno* skenk 'n mate van oorweging aan die potensiele negatiewe implikasies hiervan. Die finaliteit van die geskilbeslegtingsproses kan na behore bestuur word aan die hand van 'n wyer interpretasie van *res iudicata* in internasionale dispute en 'n meer geredelike ondersoek hierna, op die hof se inisiatief.

Die moontlikheid dat die *Telcordia*-dispuut verder bespoedig sou kon word, word ondersoek met verwysing na die New York Konvensie op die Erkenning en Afdwing van Arbitrasiebevele van 1958, en aan die hand van aanbevelings wat deur ander gerekende internasionale liggame uitgereik is.

1 Introduction

It is untenable to differentiate sharply between national and international law in the context of international commercial arbitration. Transactions that are international in some respect may fall squarely within the ambit of a domestic body of law; and the quality of the domestic implementation of the international obligations imposed by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the NYC),¹ may largely determine whether a

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1 Concluded 1958-06-10; 9 USCA §§ 201–8. Compare Art 8 UNCITRAL Model Law on International Commercial Arbitration, first adopted on 1985-06-21

state court or an arbitral tribunal will be competent to rule on the matter. Domestic law has a role in respect of the right of access to justice, due process of law, and “who decides” (the doctrine and practice of *compétence-compétence*). Domestically, the policy goal may be to centralise judicial review of arbitral proceedings; respect arbitral autonomy; or to optimise the relationship between arbitral tribunals and courts. In the case of a regional grouping such as the European Union, the policy goal is different, because the Internal Market must be safeguarded.² The international context and consequences of parallel or sequential proceedings in multiple fora remain relevant to both the domestic and regional contexts, on account of considerations of procedural efficiency and public policy.

Under Article II(3) of the NYC, state courts (in the states party) are obliged to refer the parties who entered into an arbitration agreement, to arbitration and to decline jurisdiction, if the court is seized with a claim on the same subject matter, unless the arbitration agreement is null and void, inoperative or incapable of being performed. The international duty imposed by the NYC is intended to prevent parties to an arbitration agreement from resorting to dilatory tactics in the form of parallel court proceedings. The wording of the provision leaves little room for judicial discretion so as to avoid an unjustified exercise of jurisdiction, except perhaps for an anti-suit injunction in support of an arbitration agreement. Article II(3) of the NYC effectively removes the weighing of factors associated with a referral. Court proceedings brought in violation of the arbitration agreement are to be stayed in order to “allow arbitration to be determinative”,³ provided only that basic prerequisites are met. The prerequisites are that parties agreed to arbitrate, the arbitration agreement falls under the NYC, a dispute exists, the dispute is arguably within the scope of the arbitration agreement, the arbitration agreement is in writing, and the subject-matter is capable of being settled by arbitration. While the interpretation of the text of the NYC is subject to different positions adopted by national courts,⁴ and Article II(3) fails to take account of jurisdictions that never “refer” parties to arbitration, the construction of the arbitration agreement is intended to be harmonised among the Contracting States. To this end, the terms “null and void, inoperable or incapable of being performed” are to be construed

(*UN doc A/40/17 Annex I*), and amended in 2006 by UNCITRAL's report on the work of its 39th session (*UN Doc A/61/17 Annex I*).

- 2 Roodt “Border Skirmishes Between Courts and Arbitral Tribunals in the EU: Finality in Conflicts of Competence” 2011 *Yearbook of Priv Int L* 91.
- 3 Van den Berg *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981) 128–31; Huang “Which Treaties Reign Supreme? The Dormant Supremacy Clause Effect of Implemented Non-Self-Executing Treaties” 2011 *Fordham LR* 2211 2236.
- 4 Interpretation can be directed by (a) Arts 31 and 32 of the 1969 Vienna Convention on the Law of Treaties; or (b) constitutional or other sources of domestic law; or (c) domestic and foreign precedent; or (d) the *travaux préparatoires* of the NYC.

narrowly.⁵ By and large, a uniform standard in Article II(3) is what safeguards many of the time and cost benefits of arbitration and underpins the parties' trust in this form of dispute resolution.⁶

When an arbitral award holder approaches a court abroad to enforce an award that had been set aside or vacated by the court of the seat, questions may arise as to conflicts of competence and of legal standards and substantive rules. Several procedural devices are potentially relevant to the allocation and exercise of adjudicatory competence by courts and arbitral tribunals. These devices are intended for managing proceedings in front of courts in different jurisdictions. *Forum non conveniens* informs the decision of a court to decline or stay jurisdiction and *lis pendens* considers where the suit was first filed when there is the possibility of parallel adjudication in multiple forums. In England and Scotland a *forum non conveniens* analysis is the result of an inherent jurisdiction of a court to stay its own proceedings, in the interests of justice.⁷ The discretionary nature of *forum non conveniens* and its susceptibility to judicial review do not support finality in parallel adjudication in multiple forums. From a national perspective, an international obligation may be met through a discretionary test, but such a test falls short of the standard associated with the duty in international law terms.⁸ This device introduces unpredictability in conflicts between courts.⁹ Ultimately, judicial discretion to stay proceedings could obscure the limits on the regulatory authority of states imposed by international law. In conflicts that involve arbitral tribunals, it potentially becomes even less helpful. Which forum should make the discretionary determination: the state court or the arbitral tribunal? An application to stay proceedings in more complex conflicts involving arbitration on the basis of a court's international duty is quite unlike a discretionary power to stay proceedings where two judicial proceedings are related.¹⁰

Civil Law courts are averse to judicial discretion in conflicts between

5 Van den Berg "The New York Convention of 1958: An Overview" 2008 *International Council for Commercial Arbitration* available at http://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf (accessed 2012-02-13).

6 Roodt 130ff.

7 *Eg Reichhold Norway ASA v Goldman Sachs International* [2000] 1 WLR 173 (CA).

8 Mills *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (2009) 238.

9 International Commercial Arbitration Committee ILA "Interim Report on Res Judicata and Arbitration, Seventy-First Conference, Berlin, 2004" par 4.6.

10 *Eg JP Morgan Chase Bank NA v Berliner Verkehrsbetriebe (BVG) Anstalt des öffentlichen Recht* [2009] 2 All ER (Comm) 1167.

courts.¹¹ They manage parallel litigation in an international setting by the application of *lis pendens*. The credentials and legitimacy of this mechanism has come under increasing attack when used to deal with parallel adjudication that involves courts and arbitral tribunals.¹² These adjudicatory bodies are neither equal nor comparable in status. Some jurisdictions have had the foresight to adapt and condition the *lis pendens* rule for more complex contexts,¹³ placing more emphasis on finality as an aspect of public policy.¹⁴

Estoppel by *res judicata* is a potentially significant factor in the recognition or enforcement of conflicting rulings. Without a clear-cut rule for finality, there is the risk of relitigation of claims or issues. Delays and increased cost then become unavoidable. One of the crucial questions is whether the notions of *res judicata* in different Common Law and hybrid jurisdictions are sufficiently similar to constructively manage parallel adjudication in multiple forums, or whether these approaches are so far apart that they require coordination by conflict rules. The International Law Association (ILA) raised the issue in its *Interim Report on Res Judicata and Arbitration* of 2004.¹⁵

However, relevant recent South African cases do not attach much significance to finality and the point at which it is supposed to be reached. *Telkom v Boswood*¹⁶ represented the very first instance of review and setting aside of an arbitral award by a seat court in South Africa. The parties had excluded in the Integrated Agreement the right to rely on estoppel.¹⁷ The arbitral award had been issued by Boswood who sat as a sole arbitrator. Contestation followed in courts in the US and South Africa in *Telcordia Technologies Inc v Telkom SA Ltd*.¹⁸ The proceedings ended relatively quickly, within four years after legal action

11 Courts in the EU Member States owe this duty to the legal systems and judicial institutions of other EU Member States in conflicts of competence between courts, which prevents them from standing in judgment of another court's competency to decide a case. Case C-281/02 *Owusu v Jackson* [2005] ECR I-1383.

12 Eg Roodt 125. In general Cuniberti "Parallel Litigation and Foreign Investment Dispute Settlement" 2006 *ICSID Review - Foreign Investment LJ* 381.

13 Art 9 Swiss Federal Act on Private International Law Act of 1987-12-18; see also arts 7, 186. Roodt "Autonomy and Due Process in Arbitration: Recalibrating the Balance" 2011 *CILSA* 311 335-337.

14 In the context of the Swiss Federal Act on Private International Law, see Swiss Federal Supreme Court, First Civil Chamber, 4A_490/2009 of 2009-04-13, published 2010-07-02; and Arbitration CAS 2010/A/2058 *British Equestrian Federation (BEF) v Fédération Équestre Internationale*, award of 2010-07-13.

15 International Commercial Arbitration Committee ILA "Interim Report on Res Judicata and Arbitration, Seventy-First Conference, Berlin, 2004" *ILA* (www.ila-hq.org (accessed 2012-02-13)) 26.

16 *Telkom SA Limited v Anthony Boswood QC* case no 26/05 (unreported) 2005 TPD.

17 *Telcordia Technologies Inc v Telkom SA Ltd* 2007 3 SA 266 (SCA) par 11.

18 *Telcordia Technologies v Telkom SA Ltd* 458 F 3d 172; *Telcordia Technologies Inc v Telkom SA Ltd* 2007 3 SA 266 (SCA).

commenced.¹⁹ The rulings did not conflict at any point. The United States Court of Appeals reversed the ruling of the District Court of New Jersey on the basis of the freedom which party autonomy accords to a plaintiff to choose the forum.²⁰ The case did not reach the Supreme Court of the US. Nevertheless, the question prompted by considerations of procedural efficiency remains, and it has public policy implications. Did the arbitral award have any *res judicata* effect before the Supreme Court of Appeal (SCA) issued its ruling to overturn the set-aside?

To determine the point of finality of a ruling in a dispute that was subject to arbitration, it is necessary to consider what *res judicata* means, what effect appeals have and whether a choice to exclude estoppel deserves the respect of a court in practice. The possibility that the dispute may have been settled with even greater celerity on the basis of the finality of the arbitral award, is explored with reference to the constitutional context of private arbitration, the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards and recommendations issued by the International Law Association.

2 The *Telcordia Technologies* Dispute

A Delaware corporation, D, contracted with a South African company, K, for the supply and installation of telecommunications software in 1999, for which K undertook to pay D \$249 million. The transaction was riddled with disputes over the specifications from the start. The International Chamber of Commerce appointed an arbitrator in London. He commenced the arbitration in March 2002. He issued a partial award in favour of D in September 2002. Shortly thereafter, D sought to have the arbitral award confirmed in the District Court for the District of Columbia. K filed proceedings in the High Court in South Africa to have the award set aside in November 2002. K claimed that the arbitrator had committed a material error of law, and was guilty of misconduct or a reviewable irregularity under section 33(1) of the Arbitration Act.²¹ The case started to wend its way through the South African appeals process.

In July 2003 the District Court for the District of Columbia dismissed D's petition without prejudice on the basis that it lacked jurisdiction over K. It granted a stay of the action on *forum non conveniens* grounds,²² a decision that is open to evaluation on appeal with reference to the

19 *Telcordia Technologies v Telkom SA Ltd* 95 F App'x 361, 362–63; *Telcordia Technologies v Telkom SA Ltd* 458 F 3d 172; *Telcordia Technologies Inc v Telkom SA Ltd* 2007 3 SA 266 (SCA).

20 *Telcordia Technologies v Telkom SA Ltd* 458 F 3d 172.

21 42 of 1965. S 33(1) sets out limited grounds for review.

22 *Telcordia Technologies v Telkom SA Ltd* 458 F 3d 172 par 9. The origins of the doctrine are found in Scots law. It was received into English law by virtue of *Spiliada Maritime Co v Cansulex* 1987 AC 460 and *RTZ v Connolly* 1998 AC 854.

standard of abuse of discretion.²³ The case went on appeal in the District of Columbia Circuit.²⁴

In November 2003 the South African High Court set aside the arbitral award²⁵ and ordered a new arbitration. Three retired South African judges were appointed as the new arbitrators in disregard of International Chamber of Commerce appointment procedure that requires arbitrators to have a neutral nationality. The court concluded that the errors of law committed by the arbitrator were tantamount to gross irregularity resulting in an unfair trial, which was clearly a reviewable error. A taint of impropriety accompanied the ruling, due to the breach of ICC standards.²⁶

In April 2004 D again sought enforcement of the award in the Circuit Court of Appeals in the District of Columbia. The court upheld the dismissal of the petition without prejudice, and the merits of the case were not argued. The basis of the ruling was Article VI of the NYC, which enables the court at first instance to stay (adjourn) the decision on the enforcement of the arbitral award if an application for the setting aside or suspension thereof has been made. Technically, a set aside application was pending in an appropriate jurisdiction and so a stay or adjournment of the decision on enforcement appears reasonable enough. The complication was that the neutrality rule had been dishonoured; a discretionary stay that is susceptible to judicial review all but supports finality in disputes in which both state courts and arbitral tribunals are competent. Also, while a stay may be justifiable in the enforcement stage, courts should remain conscious of the delay caused in that stage.²⁷

K petitioned the District Court of New Jersey to dismiss D's petition to confirm the arbitral award. The District Court of New Jersey did so in two separate orders. The first order granted K's motion to dismiss D's petition. Later that month, it dismissed D's petition *with* prejudice because the previous decision by the District of Columbia Circuit Court of Appeals gave rise to issue preclusion. The District Court of New Jersey desisted from enforcing the award at that point.²⁸

23 *Paramedics Electronmedicina Commercial Ltda v GE Medical System Information Technologies Inc* 369 F 3d 645. Compare Principle 2.5 Committee on International Civil and Commercial Litigation ILC "Third Interim Report on Declining & Referring Jurisdiction in International Litigation" available at www.ila-hq.org/en/committees/index.cfm/cid/18 (accessed 2012-02-13).

24 *Telcordia Technologies v Telkom SA Ltd* 458 F 3d 172.

25 *Telkom SA Limited v Anthony Boswood QC* case no 26/05 (unreported) 2005 TPD.

26 Park & Yanos "Treaty Obligations and National Law" 2006 *Hastings LR* 251 266.

27 Eg *Monagasque de Reassurances SAM (Monde Re) v NAK Naftogaz of Ukraine and State of Ukraine* 311 F 3d 488 (affirmed dismissal of action to enforce award on *forum non conveniens* grounds); 42 *ILM* (2003) 384, 386.

28 *Telcordia Technologies v Telkom SA Ltd* 458 F 3d 172. The right to rely on estoppel (not issue estoppel) was excluded in the non-variation clause of the

In November 2004, the Supreme Court of Appeal in South Africa (SCA) agreed to hear D's petition to get the High Court's previous decision to set the award aside, overturned. Both technically and functionally, D's application was pending before the SCA when K petitioned the District Court of New Jersey to dismiss D's petition to confirm the arbitral award.

On appeal in the US Court of Appeals 3rd Circuit in August 2006, the first order issued by the District Court of New Jersey was affirmed but the dismissal with prejudice was reversed.²⁹ The reversal had more to do with K's right to choose the forum and the decision pending in South Africa at the time, than with the exclusion of the right to rely on estoppel.³⁰ In a section of the judgment bearing the heading "B. Issue preclusion", the court indicated that a decision on the merits by the District Court for the District of Columbia would have been given preclusive effect.

The Court of Appeals 3rd Circuit recognised the competence of the High Court in South Africa and reviewed the issues that came before the District Court of New Jersey as well as its two orders for abuse of discretion. Summing up its ruling, it held:

- (a) The District Court of New Jersey had jurisdiction over K because the "minimum contacts test" was satisfied as K purposefully directed activities at D.³¹
- (b) K could not argue that the dismissal in the court *a quo* was "with prejudice".
- (c) K was free to argue that the action in South Africa was still pending (*lis pendens*), further to which the Circuit Court of Appeals in the District of Columbia could conceivably exercise its discretion not to enforce. This discretionary determination would be left undisturbed.³²
- (d) Its own ruling did not have preclusive effects against D.³³
- (e) D could refile in New Jersey³⁴ once the SCA in South Africa had issued a judgment in the case.³⁵

D therefore remained able to file action in the US throughout. It was not made clear whether having excluded the right to rely on estoppel in the agreement had any relevance in this regard.

In November 2006, the SCA set aside the order of the High Court and reinstated the arbitral award to the satisfaction of D. The SCA ruled that

28 Integrated Agreement; *Telcordia Technologies Inc v Telkom SA Ltd* 2007 3 SA 266 (SCA) *parr* 11, 28.

29 *Telcordia Technologies v Telkom SA Ltd* 458 F 3d 172 *par* 36.

30 *Telcordia Technologies v Telkom SA Ltd* 458 F 3d 172 *parr* 30-36.

31 The test requires that a court may assert jurisdiction over a party if that party can "reasonably expect to be haled into court in that state". *Telcordia Technologies v Telkom SA Ltd* 458 F 3d 172 *parr* 17-29.

32 *Ibid* *par* 33, 43.

33 *Idem*.

34 *Ibid* *par* 34.

35 *Ibid* *par* 44.

the arbitral award favouring Telcordia was not reviewable, for even if the arbitrator had committed a material error of law, no gross irregularity had been committed. Consequently, the full *res judicata* effect of the arbitral award was confirmed and K's liability was clear. The question is whether the arbitral award had any *res judicata* effect prior to the ruling issued by the SCA, given the rule against appeals contained in the Arbitration Act³⁶ and the breach of international arbitration regulations committed by the High Court. Discretionary decisions (see points (c) to (e) above) precluded D from proceedings in the US at that point. Had the final order issued in the SCA gone against D, there could have been a skirmish over the competence to decide the case. As things turned out, however, no conflict of competence arose, but opposing rulings were issued in respect of the same case by courts in the seat of the arbitration. The "conflict" concerned legal standards.

This ruling can be better understood in the light of constitutional standards of fairness in arbitration, the meaning of *res judicata* in national and international law, and the implications of showing respect for international private rights.

3 The Constitutional Standard of Fairness in Arbitration

*Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews*³⁷ is the first consideration of the constitutional standard of fairness in private arbitrations since the inception of the Constitutional Court. The facts of the case did not present a constitutional issue, but concerned a "matter connected to a decision on a constitutional issue which it is in the interests of justice to decide".³⁸ The constitutional issue referred to, concerned the application of section 34 of the Constitution³⁹ to private arbitration. Significantly, the case had already proceeded from the court of first instance upwards and it was quite late into the subsequent proceedings before the SCA when the losing party objected that the arbitrator's irregular behaviour had compromised its constitutional right to a fair trial. There was no international element to the arbitration that formed the subject matter of the case, but the treatment given to *res judicata* here may well be followed in international cases.

36 42 of 1965. "S 28 Award to be binding: Unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this Act, be final and not subject to appeal ...".

37 *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* (CCT 97/07) [2009] ZACC 6 (2009-03-20).

38 Par 238.

39 Constitution of the Republic of South Africa, 1996: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

The case concerned an application that was made for leave to appeal to the Constitutional Court against a decision of the SCA. The SCA upheld a judgment of the High Court in Pretoria dismissing an application for the review and set aside of the arbitral award issued by a quantity surveyor. The award fixed the amount owed by the respondent for services rendered to the applicant. The application for the review of the arbitrator's award was based on his alleged commission of an error of law or fact on procedural grounds pursuant to section 33 of the Arbitration Act.⁴⁰ The grounds for setting aside an arbitration award are confined to (a) misconduct by an arbitrator; (b) gross irregularity in the conduct of the proceedings; and (c) obtaining an award improperly. The alleged error arose because the arbitrator held secret meetings with the respondent, did not provide the applicant access to correspondence between himself and the respondent, and awarded more than the amount claimed in the pleadings.

The arbitration agreement did not provide for appeal. Nonetheless, the Constitutional Court ruled that the interests of justice would be served by granting leave to appeal.⁴¹ The appeal failed.

The majority ruling indicated that constitutional values permit parties to seek a quicker and cheaper alternative to litigation in the ordinary courts to resolve disputes,⁴² but how these values impact on the question of finality of the arbitral award, was not considered. No mention was made of issue preclusion, constructive *res judicata* or its effect on the right to a fair trial. Considerations of procedural efficiency and public policy prompt the question of how broadly *res judicata* is defined in respect of arbitral awards in South African law. In a dissenting judgment,⁴³ Justice Ngcobo (as he then was) discerned a duty to raise objections at the earliest opportunity in circumstances where it would be tantamount to abuse of procedure not to do so.⁴⁴ He stated that where a party had ample time and opportunity to raise objections either before or during the proceedings, late objections that are nothing but "an afterthought in order to get the ear of this court" ought to be barred.⁴⁵

The minority judgment shows a keen awareness of the need for state courts to be able to scrutinise arbitral awards without enabling unscrupulous litigants to use the courts in order to delay justice.⁴⁶

40 42 of 1965.

41 Par 238.

42 Par 197.

43 Parr 281-308.

44 Parr 286, 292.

45 Par 293.

46 Parr 196, 222-232.

4 Procedural Efficiency and the Public Policy Implications of Concept of *Res Judicata*

Procedural efficiency requires that adjudicatory institutions demonstrate judicial comity or respect for the capacity of foreign institutions to resolve disputes. The interests of both the parties and the public are served by efficient procedures in dispute resolution.⁴⁷ Resources (judicial and otherwise) will be wasted if claims are duplicated and relitigated, or when issues are ventilated twice.⁴⁸

Two well-known maxims are relevant in this regard.⁴⁹ First, the public interest requires that litigation or dispute resolution must be final and not be allowed to continue (*interest reipublicae ut sit finis litium*). This tenet describes the positive, conclusive and formal effect of the decisions contained in an award in other proceedings (whether between the same or other parties). In Common Law jurisdictions, issue estoppel is a particular application of the general rule of public policy that there should be finality in litigation; as a matter of public policy, few exceptions ought to be permitted. If the award disposes of all the issues raised in the new proceedings, it puts an end to the new proceedings, as the matters in issue between the parties have already been decided. If the award disposes of only some of the issues raised in the new proceedings, recognition is necessary to prevent the issues that have already been dealt with from being raised again. The award is not enforced, but its issue estoppel effect is recognised.⁵⁰

The second maxim serves the interests of private justice, to the effect that a party should not be twice vexed in the same manner for the same cause (*nemo debet bis vexari pro una et eadem causa*). This tenet describes the negative, preclusive and material effect of the doctrine (*ne bis in idem*) that forecloses further litigation between the same parties on a matter that has formed the subject of a prior arbitral award.⁵¹ The finality of litigation or *res judicata* reflects a public policy interest in its own right.

Res judicata is part of the general principles of law recognised by civilised nations within the meaning of Article 38 of the Statute of the

47 *Johnson v Gore Wood* [2002] 2 AC 1 31A-D *per* Lord Bingham, quoted with approval in *Lanes Group Plc v Galliford Try Infrastructure Ltd* [2011] EWHC 1679 (TCC) par 45.

48 McLachlan *Lis Pendens in International Litigation* (2009) 461-467.

49 Cremades & Madalena "Parallel Proceedings in International Arbitration" 2008 *Arbitration Int* 3 12.

50 Blackaby & Partasides *Redfern and Hunter on International Commercial Arbitration* (2009) par 11-21.

51 In the German Constitution, this idea is expressed in the rule that debtors should be confronted only with a single enforceable instrument claiming a debt, since to allow the creditor several different avenues for recovering the amount owed would be unreasonable. *Bundesgerichtshof*, judgment dated 2009-07-02, IX ZR 152/06 2009 *NJW* 2826.

International Court of Justice,⁵² but its basic constituting elements are not based on uniform concepts that enjoy application across different legal families. In fact, the tag “*res judicata*” hides a wonderful diversity in terms of scope and effect, ranging from finality to just stopping short of the non-finality of judgments.⁵³

Common Law courts rely on an inherent judicial discretion to manage parallel adjudication in multiple forums. A court would allow actions to proceed simultaneously “until a judgment is reached in one which can be pled as *res judicata* in the other”.⁵⁴ It makes use of a broad-based concept of *res judicata* that does not always depend on whether the parallel proceedings are between the same parties and/or concern the same cause of action.⁵⁵ A court may ignore former judgments if no one complains of being vexed or harassed by the reventilation of the same claim (or issue).⁵⁶

Civil Law courts rely on a rule-based system. *Res judicata* has a narrow scope that renders it applicable only when the same dispute between the same parties and regarding the same subject-matter or relief (*petitum*) and the same legal grounds (*causa petendi*) is brought before another forum.⁵⁷ Most civilian legal systems apply the test of identity of action in an earlier and final judgment or arbitral award in a strict fashion.⁵⁸ The Civil Law conception that *res judicata* concerns the public interest has led to stricter statutory requirements, by which courts are duty-bound to take account of former judgments on their own initiative.⁵⁹

On the stricter end of the Civil Law continuum is German civil procedure. Parties would be entitled to have any case tried *de novo* until the highest authority has spoken, except within the narrow confines of *res judicata*.⁶⁰ On the liberal end of the continuum is the French model, which follows a non-formalistic approach to *res judicata*.⁶¹ The arbitral

52 See Radicati Di Brozolo “*Res Judicata* and International Arbitral Awards” (<http://ssrn.com/abstract=1842685> (due for publication in *ASA Special Series* 2011)) 3.

53 Andrews *The Three Paths of Justice: Court Proceedings, Arbitration, and Mediation in England* (2012) 228-235, 251; Sinai “Reconsidering *Res Judicata*: A Comparative Perspective” 21 *Duke J of Comp and Int L* 2011 353ff.

54 *Laker Airways Ltd v Sabena Belgian World Airlines* 731 F 2d 909 926-7.

55 International Law Association “Final Report on Lis Pendens and Arbitration, Report of the Seventy-Second Conference, Toronto, 2006” parr 2.13, 2.5-2.7, 2.12-2.13.

56 Sinai 363.

57 Cremades & Madalena 3.

58 McLachlan 112-130.

59 Sinai 385.

60 Sinai 384 386.

61 Supreme Court, Plenary Section, 2006-07-07, *Césaréo v Césaréo* 04-10.627 in *Juris-Classeur Périodique* 2007 II 10070; Supreme Court, First Civil Section, 2008-05-28, *Société Prodim v Société G et A Distribution* 07-13266; Kleiman “Supreme Court Broadens Scope of *Res Judicata*” (www.internationallawoffice.com/newsletters/detail.aspx?g=2daf6213-8023-4bfa-bf44-141a1016548f (accessed 2012-06-08)).

award has the authority of *res judicata* in relation to the dispute which it has determined from the moment it is given, regardless of whether it was made in France or abroad. Arbitral autonomy is sufficiently able to resolve a dispute with finality.⁶² Further classification is possible in accordance with the conception of finality or *res judicata*. For instance, the *res judicata* doctrine applies only to preclude claims; in most of the civilian jurisdictions issue preclusion is unfamiliar terrain.⁶³ A small sub-category of Common Law jurisdictions rely on a unique and particularly broad conception of *res judicata* to counter the negative effects of parallelism and multiplicity of litigation.⁶⁴

India's civil procedure allows the unconditional application of the widest possible form of *res judicata*,⁶⁵ coupled with a distinct preference for the resolution of disputes by arbitration.⁶⁶ Valid arbitral awards give rise to *res judicata*. Any foreign award that would be enforceable can be relied upon and is to be treated as binding.⁶⁷ Indian law recognises the doctrine of constructive *res judicata* as a sub-set of the doctrine of *res judicata*.⁶⁸ Constructive *res judicata* functions as a rule of prudence that seeks to bar determination and enforcement of claims which have not been raised at an appropriate point in earlier judicial proceedings.⁶⁹ If the earlier award did not dispose of all the issues raised, and some issues⁷⁰ remain undecided, recognition of the award would mean that issues decided and issues not dealt with, are also prevented from being raised later. Any matter which might and ought to have been raised, or raised as a defence or attack in a previous proceeding, but was not so made, is deemed to have been constructively in issue and is taken as decided.⁷¹ Recognition of an arbitral award under the Foreign Awards

62 Art 1476 French *Nouveau Code de Procédure Civile* (NCPC); Art 1500 NCPC; Delvolvé, Rouché & Pointon *French Arbitration Law and Practice* (2004) 194-196.

63 International Commercial Arbitration Committee ILA "Interim Report on Res Judicata and Arbitration, Seventy-First Conference, Berlin, 2004" 14; Radicati Di Brozolo 21; Sinai 384.

64 International Commercial Arbitration Committee ILA, *Interim Report on Res Judicata and Arbitration*, Seventy-First Conference, Berlin, 2004 (www.ila-hq.org (accessed 2012-06-08)) 3.

65 See eg *Hope Plantation Ltd v Taluk Land Board* (1999) 5 SCC 590 (Sup Ct).

66 This is by virtue of a constitutional imperative in Article 51 of the Constitution of India (1950) to the effect that the State has to encourage settlement of international disputes by arbitration.

67 S 46 Arbitration and Conciliation Act 1996.

68 S 11 Code of Civil Procedure.

69 *Ramchandra Dagdu Sonavane (Dead) by LRs v Vithu Hira Mahar (Dead) by LRs* AIR 2010 SC 818.

70 *Amalgamated Coal Fields Ltd v Janapada Sabha* AIR 1964 SC 1013 (Assertion of fact or of the legal consequences of facts must be an essential element in the cause of action or defence, and must be directly and substantially in issue).

71 *The Workmen of Cochin Port Trust v The Board of Trustees of the Cochin Port Trust* AIR 1978 SC 1285.

(Recognition and Enforcement) Act of 1961 can be used as a shield against re-agitation in court of issues that the award deals with.⁷²

A pragmatic Common Law conception of *res judicata* has been shown to be more cost-effective than the Continental counterpart.⁷³

Anglo-Welsh law presents an influential model in the light of which other models can be better understood. Because English common law tends to view *res judicata* as a species of estoppel that confers force equivalent to *res judicata* onto awards, courts in England are more likely to call it “estoppel”.⁷⁴ Pleas of cause of action estoppel and issue estoppel are both recognised.⁷⁵ The “cause of action” refers to the claim whereas the “issue” can be explained as a point of fact or law, a finding that is necessary for the court’s final determination of the claim, or one of the “conditions for establishing a cause of action”.⁷⁶ Cause of action estoppel operates as an evidential or procedural bar, preventing contradiction of the earlier decision. In general terms, it precludes a party from relitigating a cause or claim that has been considered by a court and finally determined. It is justified where the very right or cause of action claimed or put in suit has, in the former proceedings, passed into or merged into judgment and no longer has an independent existence. Issue estoppel precludes a party from relitigating an issue previously decided in other proceedings, even if the cause of action is not identical. It is justified where a state of fact or law is alleged or denied when its existence was a matter necessarily decided by the prior judgment, decree or order.⁷⁷ How a court defines an “issue” will inform how broadly or narrowly issue preclusion is applied in the subsequent action. It depends whether the court extends the doctrine to prevent a party raising issues in subsequent proceedings that could have been raised in earlier proceedings, but were not.

Abuse of process is intimately related to *res judicata* in the Common Law world, but can be considerably wider than its Civil Law counterpart. In *Henderson v Henderson*,⁷⁸ the court precluded a party in subsequent litigation from raising subject matter (a claim or an issue) which the

72 *Brace Transport Corporation of Monrovia Bermuda v Orient Middle East Lines Ltd Saudi Arabia* AIR 1994 SC 1715 par 13.

73 *Commings v Heard* (1869) LRQB 4 669. “When once a matter has been decided between parties, the parties ought to be concluded by the adjudication” per Lush J (673). Sinai 385.

74 There are exceptions, such as Barnett; Handley.

75 Collins (general ed) *Dicey, Morris and Collins on the Conflict of Laws Vol 1* 14 ed (2006) Rule 14-021, Rule 14-112; Clarkson & Hill *The Conflict of Laws* (2011) 178-180.

76 British Institute of International and Comparative Law *Comparative Report on the Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, Res Judicata and Abuse of Process* (Van de Velden & Stefanelli) (2008) 28.

77 *Blair v Curran* [1939] 62 CLR 464 532; *Yukos Capital SarL v OJSC Rosneft Oil Company* [2011] EWHC 1461 (Comm).

78 (1843) 3 Hare 100 114-115.

party, by the exercise of due diligence, could and should have brought before the court in the earlier proceedings:

... *res judicata* ... is not confined to the issues which the Court is actually asked to decide, but ... covers issues ... which are so clearly part of the subject matter of the litigation, so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.⁷⁹

There has been a long line of English decisions since, but *Johnson v Gore Wood & Co*⁸⁰ was a confirmation by the House of Lords that the *Henderson* rule is considered to be a category of the “abuse of process” doctrine rather than an extension of the principles of estoppel.⁸¹ Courts may remain passive until a party complains of being harassed or vexed.

For arbitral awards, English law requires a final award on the merits pronounced by a tribunal of competent jurisdiction and binding the same parties.⁸²

The rulings issued by different fora in the *Telcordia* example raise a number of issues. By ruling “without prejudice”, the Circuit Court of Appeals in the District of Columbia held any conclusive and preclusive effects for D at bay. *Res judicata* was put on ice. Not having considered *res judicata* in *Telcordia Technologies Inc v Telkom SA Ltd*⁸³ it may be asked if the Common Law and civilian features of *res judicata* are compatible. No real conflict of competence arose, but can the court entertain this defence *sua sponte* or only when a party raises it? What form does *res judicata* assume in South African and US law?

4 1 Conceptions of *Res Judicata* in South African Law

South African law has long-standing historical ties with English law.⁸⁴ This influence is still evident in the area of the recognition and

79 Also *Greenhalgh v Mallard* [1947] 2 All ER 255 (CA) *per* Somervell LJ. In general Barnett *Res Judicata, Estoppel, and Foreign Judgments* 288ff; Handley *Spencer Bower and Handley Res Judicata* (2009) 307.

80 *Johnson v Gore Wood* [2002] 2 AC 1, recently confirmed in *Lanes Group Plc v Galliford Try Infrastructure Ltd* [2011] EWHC 1679 (TCC).

81 1967 2 All ER 100 104.

82 S 58 Arbitration Act 1996. At common law, a foreign judgment has to be “final and conclusive” before it will be recognised or enforced in England. “International jurisdiction” implies that a judgment from a foreign court should be recognised by the receiving court as rendering the issue between the parties *res judicata* if the foreign court had jurisdiction in the international sense in the eye of the receiving court. Briggs “Crossing the River by Feeling the Stones: Rethinking the Law on Foreign Judgments” 8 *SYBIL* 2004 1 3.

83 *Telcordia Technologies Inc v Telkom SA Ltd* 2007 3 SA 266 (SCA) (set aside of order of court *a quo* in *Telkom SA Ltd v Boswood* Case No 26/05 unreported (TPD)).

84 The English common law was received into South African law when the British occupied the Cape from 1795-1803; and then again from 1806-1910. The infiltration and reception of English law continued after the Southern African colonies formed the Union of South Africa in 1910.

enforcement of foreign judgments, where considerations of public policy and fairness inform relevant doctrines. If the same defences on the facts and issues already disposed of in a judgment could be raised in a subsequent case, there would be a risk that conflicting judicial decisions may be granted. A plea of *res judicata* aims to prevent the repetition of lawsuits.⁸⁵ It avoids an unfair multiplicity of actions or a situation in which a defendant could raise the same defence in a number of actions instituted against it, having relied on that defence in litigation to which the litigating parties or their privies were parties.

The requisites of a valid defence of *res judicata* in Roman Dutch Law are that the matter adjudicated upon, on which the defence relies in both cases, must have been for the same cause, between the same parties and the same relief must have been claimed.⁸⁶ The judgment or order must be a final and definitive judgment or order on the merits of the matter and the judgment must have been issued by a competent court.⁸⁷

Although there is no doctrine of issue estoppel in Roman Dutch law, a plea of *res judicata* is regarded as the romanistic equivalent of the English concept “estoppel by judgment” or “estoppel by record”.⁸⁸ It has never been formally incorporated into South African law, but has taken root and could succeed as a defence.⁸⁹ The question whether issue estoppel can be recognised in addition to the romanistic conception or applied to Roman Dutch principles, has been confronted more than once.⁹⁰

The defence of *res judicata* prevents a party to previous litigation from relying upon the same cause of action. *Res judicata* necessarily involves a judicial determination of some question of law or issue of fact that could not have been legitimately or rationally pronounced without necessarily determining that question or issue in a particular way. Such determination is deemed to constitute an integral part of that decision as

85 Rabie & Sonnekus *The Law of Estoppel in South Africa* (2000) 18.

86 *Union Wine Ltd v E Snell and Co Ltd* 19902 SA 189 (C) 195E-196A on the “once and for all rule”; *Horowitz v Brock* 1988 2 SA 160 (A) 178H-179C; *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 3 SA 462 (D) 472; *Mitford's Executor v Ebdon's Executors* 1917 AD 682 686; *Bertram v Wood* 189310 SC 177 181. Voet *Commentarius ad Pandectas* 44 2 3; Salant “Distinguishing *Res Judicata* and Issue Estoppel” (<http://salantattorneys.co.za/articles/ARTICLE%20RES%20JUDICATA.doc> (accessed 2012-06-08)).

87 *Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk* 1995 1 SA 653 (A); *Liley v Johannesburg Turf Club* 1983 4 SA 548 (W); *Boshoff v Union Government* 1932 TPD 345.

88 Rabie & Sonnekus 19; De Wet “*Estoppel by Representation*” in *die Suid-Afrikaanse Reg* (proefskrif Universiteit van Stellenbosch (1939)).

89 *Richtersveld Community v Alexkor Ltd* 2000 1 SA 337 (LCC) 342C; *Horowitz v Brock* 1988 2 SA 160 (A) 178-179.

90 *Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk* 1995 1 SA 653 (A) 664-669; *Le Roux v Le Roux* 1967 1 SA 446 (A) 463.

if it had been declared in express terms on the face of the recorded decision.⁹¹

The same test is used for issue estoppel and the *exceptio res judicata*, but while issue estoppel prevents such a party from disputing an issue decided by the previous court, it does not require the same cause for the same relief. The lesser requirements of issue estoppel can be permissible. Where a court in a final judgment on a cause has determined an issue involved in the cause of action in a certain way, and the same issue is again involved and would determine the right to reclaim, the determination in the prior action may be advanced as an estoppel in a subsequent action between the same parties, even if that action is then founded on a different cause of action.⁹² In practice, both the judgment and the pleadings are examined before issue estoppel is sustained. A judgment would create an issue estoppel only if the determination of that issue had formed an essential part of the *ratio decidendi*.⁹³ Every case must be decided on its own facts.⁹⁴

Arguably, the relaxation of the strict requirements associated with the defence of *res judicata* in certain cases allows South African law to fit the small subcategory of ideal jurisdictions identified in the ILA Report.⁹⁵ This classification is confirmed by the fact that the due diligence rule in *Henderson* also applies in South African law.⁹⁶ Exceptional cases apart, the principle of *res judicata* applies not only to points upon which the court was required by the parties to pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties might have brought forward at the time had they exercised reasonable diligence. Points omitted through negligence, inadvertence or accident cannot be raised in subsequent proceedings.⁹⁷ The cost- and time saving rule of *Henderson* broadens the concept of *res judicata*.

Arbitration is not the preferred method of resolving disputes in commercial transactions in South Africa. Domestically, there is no constitutional imperative to resort to arbitration. The system based on the 1958 NYC⁹⁸ is supposed to apply but the implementation of this

91 *Liley v Johannesburg Turf Club* 1983 4 SA 548 (W); *Horowitz v Brock* 1988 (2) SA 160 (A); *Boland Bank v Steel* 1994 1 SA 259 (T); *Kommisaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 1 SA 653 (A). Also Salant.

92 *Bafokeng Tribe v Impala Platinum Ltd* 1999 3 SA 517 (B) 566F; *Kommisaris van Binnelandse Inkomste v ABSA Bank Bpk* 1995 1 SA 653 (A) 664F-671C; *Horowitz v Brock* 1988 2 SA 160 (A) 178H-179A. Also Salant.

93 *Ex parte Viviers et Uxor* 2001 3 SA 240 (T).

94 *Kommisaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 1 SA 653 (A) 699G-I.

95 International Commercial Arbitration Committee ILA, *Interim Report on Res Judicata and Arbitration*, Seventy-First Conference, Berlin, 2004 (www.ila-hq.org (accessed 2012-06-08)) 3.

96 *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd* (2) 2005 6 SA 23 (C) *per* Blignaut J.

97 Par 50 (46G-47B); par 52 (47E-F).

98 South Africa acceded on 1976-05-03; entry into force 1976-07-01.

instrument is ambiguous and ineffective.⁹⁹ The facts of the *Lufuno* case did not render it necessary to consider the proper incorporation of the state's obligations under the NYC.

Judicial discretion to stay proceedings is subject to exceedingly lax controls in the Arbitration Act.¹⁰⁰ State courts have discretion to stay their proceedings on the basis of factors that water down the legal effect of the parties' choice in favour of arbitration. The legislative framework is dated and the powers of courts and arbitral tribunals are out of balance, but an overhaul is not on the cards. In the meantime, judicial policy has to fill the void that has formed in legislative policy. *Aveng (Africa) Ltd v Midros Investments (Pty) Ltd*¹⁰¹ shows that the judiciary is willing to limit its own discretion.

The cost- and time saving rule of *Henderson* deserves more visibility in international arbitration cases in South Africa. International arbitration cases may also benefit from the dissenting judgment in the *Lufuno* case in future, because of its reliance on the *res judicata* effects of arbitral awards even when not specifically pleaded. This approach combines the strongest features of the different legal traditions from the viewpoint of finality. It also resonates with an interesting arbitration in France¹⁰² that held that the right to a fair trial does not entitle a party to pursue an opponent twice on the same cause. The scope of the *res judicata* effect of arbitral awards was widened in a domestic arbitration that may well provide guidance in international arbitration proceedings in future.

Unlike the continental models that assume that appeal remains possible until the highest court has spoken, the conception of finality in South African law does not concern whether a case may be taken on appeal or not. In South African law, the requirement of finality of the judgment relates to the form and effect of the judgment.¹⁰³ The arbitration process itself is not necessarily open to proper appeal.¹⁰⁴ Less formal modes of dispute resolution tend to restrict appeals to the courts. This is the case in the South African legislative framework for arbitration. Section 28 of the Arbitration Act¹⁰⁵ provides that:

99 Ss 3, 6 Arbitration Act 42 of 1965. Roodt 315.

100 42 of 1965.

101 *Aveng (Africa) Ltd v Midros Investments (Pty) Ltd* 2011 3 SA 631 (KZD) par 14.

102 *Société G et A Distribution v Prodim* 2008 Rev arb 461, note L Weiller; App. Paris, 2010-03-18, *Prodim v Société G et A Distribution*, 2010 Rev arb 388 on remand. Also Supreme Court, First Civil Section, 2008-05-28, *Prodim v Société G et A Distribution* 07-13266.

103 *CTP Limited v Independent Newspapers Holdings Ltd* 1999 (1) SA 542 (W); *Liley v Johannesburg Turf Club* 1983 4 SA 548 (W) 552F; *Le Roux v Le Roux* 1967 1 SA 446 (A) 462G-463G.

104 Dundas "The Finality of Arbitration Awards and the Jurisdiction of the Court of Appeal" 2007 *Arbitration* 127; Roodt "Autonomy and Due Process in Arbitration" 2011 *European J of L Ref* 413 424; 2011 *CILSA* 323-324.

105 42 of 1965.

Unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this Act, be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms.¹⁰⁶

In both the *Telcordia* and *Lufuno* disputes, appeals were permitted. The *Lufuno* ruling illustrates that the constitutional standard of fairness in arbitration is likely to prevail over the statutory framework, even if the challenge of arbitral awards on the merits is precluded in principle. In general terms, the SCA may, on appeal, overrule a court order in violation of procedural fairness. It may also review a decision to allow an appeal. In principle these issues may be vented in the Constitutional Court if connected to a decision on a constitutional issue.

4 2 Conceptions of *Res Judicata* in US Law

In the US, the “*res judicata*” tag is often used to refer to the entire topic of former adjudication, including both claim and issue preclusion. Doctrine does not confine *res judicata* to claims “between the same parties” but extends also to third parties.¹⁰⁷ US courts apply *res judicata* to prevent a claimant bringing the same claim or seeking further relief; prevent a respondent from denying rulings made against it in earlier proceedings;¹⁰⁸ stop parties from litigating a claim that has already been settled in arbitration; and stop them from litigating claims that could have been, but were not, arbitrated in a prior proceeding.¹⁰⁹ If an arbitral tribunal has determined an issue of fact or law necessary to the final award, the decision on the issue may preclude re-litigation or re-arbitration of the issue as part of a different claim.¹¹⁰ Parties are deemed to have waived an objection if they fail to raise it in earlier judicial proceedings.¹¹¹

Because issue estoppel does not require for its application that the same thing must have been demanded as *res judicata* does, some cases and commentators differentiate between claim preclusion (*res judicata*) and issue preclusion or collateral estoppel.¹¹² Issue preclusion may not be applied if the award does not set out the reasons, since it may be

106 S 28 Arbitration Act 42 of 1965.

107 See *Restatement (Second) of Judgments* Ch 3 par 13-33; International Commercial Arbitration Committee ILA “Interim Report on Res Judicata and Arbitration, Seventy-First Conference, Berlin, 2004” 11.

108 International Commercial Arbitration Committee ILA “Interim Report on Res Judicata and Arbitration, Seventy-First Conference, Berlin, 2004” 3.

109 Moses *The Principles and Practice of International Commercial Arbitration* (2008) 188.

110 *Bryson v Gere* 268 F Supp 2d 46; *Telcordia Technologies v Telkom SA Ltd* 95 F App’x 361, 362–63; *Telcordia Technologies v Telkom SA Ltd* 458 F 3d 172; Moses 189.

111 *Cobec Brazilian Trading & Warehousing Corp v Isbrandtsen* 524 F Supp 7, 9.

112 International Commercial Arbitration Committee ILA “Interim Report on Res Judicata and Arbitration, Seventy-First Conference, Berlin, 2004” 11. Moses 189 describes the doctrine of collateral estoppel as precluding issues that have been previously determined by arbitration from being determined

unclear which issues disposed of the claim and which did not.¹¹³ This approach is narrower than the radical Indian model, but it is still firmly part of the sub-set of jurisdictions that have extended *res judicata* to issues that could have been raised but were not. This ideal and broad-based approach is confirmed in the *Restatement (Second) of Judgments* § 27, which declares:

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination of that issue is conclusive in a subsequent action, whether on the same or a different claim.

Comment “e” of the *Restatement (Second)* refers to a number of reasons why a party might have chosen not to raise an issue. Conserving judicial resources, maintaining consistency, and avoiding harassment of the adverse party are specifically mentioned. There is no reference to abuse of process, however. The first tentative draft of the *Restatement Third, The US Law of International Commercial Arbitration* was approved in 2010, and work on this project is still ongoing.¹¹⁴

4 3 When is Finality Reached Under the NYC?

The South African and US concepts and practice in respect of *res judicata* have been shown to belong to the same ILA category of jurisdictions. As such, they are highly compatible. Courts would be justified to apply issue estoppel even without D having to raise it if such an approach is permitted under the NYC. The NYC does not address *res judicata* expressly. It confers a duty on states to “recognise arbitral awards as binding” in which case they can be enforced as domestic judgments.¹¹⁵ The words “final” and “finality” were deleted from the text of the NYC because they consistently caused problems.¹¹⁶ The “autonomous” interpretation theory has long won the day on the point of whether an award is binding.¹¹⁷ National legal systems tend to contain mirroring provisions. For instance, under English law the formula “final, conclusive and binding” in an arbitration clause indicates that the award would be final as a matter of *res judicata*, that findings of fact would be binding but that the award is not open for appeal on a point of law.¹¹⁸

in a subsequent action that is not between the same parties, or does not involve the same cause of action.

113 International Commercial Arbitration Committee ILA “Interim Report on Res Judicata and Arbitration, Seventy-First Conference, Berlin, 2004” 25.

114 Bermann “The American Law Institute Goes Global: The Restatement of International Commercial Arbitration” 2008 *Willamette J of Int L and Disp Res* 300.

115 Article III NYC.

116 Harnik “Recognition and Enforcement of Foreign Arbitral Awards” 1983 *American J of Comp L* 703 708.

117 *Dowans Holding SA and another v Tanzania Electric Supply Co Ltd* [2011] EWHC 1957 (Comm).

118 Andrews 239.

Because the basic constituting elements of *res judicata* are so diverse across different legal systems, they work out for themselves which part of an award is binding, when abuse of process is evident, or whether a claim based in right to a fair trial can constitute abuse of process. Nonetheless, the finality question should not be answered by reference to the local law (of the home jurisdiction), but is best decided by reference to an international interpretation of the NYC, bearing in mind:

- (a) the features of an ideal model which the ILA has identified, and
- (b) the need for cost-effectiveness in parallel proceedings.

The confirmation of a court is generally required before an arbitral award displays *res judicata* effects.¹¹⁹ Article III of the NYC provides that Contracting States shall recognise arbitral awards “in accordance with the rules of procedure of the territory where the award is relied upon”. While this can be taken to depict administrative formalities in the US for an application to confirm or enforce an award, it also highlights the opportunity the US court had to recognise the award given the breach of international commercial arbitration rules by the High Court in South Africa. This aspect is discussed in more detail under 5 below.

4 4 A Liberal Approach to Finality: ILA Recommendations

In 2000 the ILA stressed the need for a provision that would enable a court to decline jurisdiction when the pursuit of a case would constitute an abuse of procedure. The domestic rules of civil procedure in the relevant state might not enable a court to determine jurisdiction before the litigant pleads on the merits,¹²⁰ but it was considered important to enable courts to prevent abuse of process. Subsequently, the ILA *Interim Report* referred to the application of collateral estoppel in arbitral tribunals, but denied that they could apply any principle akin to abuse of process.¹²¹ The *Report* quotes an ICC award handed down by a tribunal sitting in France but applying New York law. The ILA *Report* sought the answer in the applicable law, but managed to avoid falling into the choice of law “trap” by finding that the claimant had a full and fair opportunity to assert its present claim by way of counterclaim or defence in earlier ICC proceedings, but had failed. As such, it was barred from bringing a second action seeking relief inconsistent with the earlier award. The US principle of claim preclusion was applied in that instance. Nonetheless, the ruling had all the markings of abuse of process.

119 *West Tankers Inc v Allianz Spa & Another* [2011] 2 Lloyd’s Rep 117 (CA); McLachlan 60.

120 Committee on International Civil and Commercial Litigation ILA “Third Interim Report on Declining & Referring Jurisdiction in International Litigation” available at www.ila-hq.org/en/committees/index.cfm/cid/18 (accessed 2012-06-08) 4.

121 *Ibid* 12; Moses 189.

With regard to finality, the ILA's *Resolution No. 1/2006, Recommendation No 5 Annex 2* took cognisance of the sub-category of Common Law jurisdictions:

[a]n arbitral award has preclusive effects in the further arbitral proceedings as to a claim, cause of action or issue of fact or law, which could have been raised, but was not, in the proceedings resulting in that award, provided that the raising of any such new claim, cause of action or new issue of fact or law amounts to procedural unfairness or abuse.

The ILA *Recommendation No 3.1* of the same *Resolution*¹²² requires that an award must have become "final and binding in the country of origin", facing no impediment to recognition in the country of the seat of the subsequent arbitration.

On the basis of *Recommendation No 1*, US courts could have noted the procedural unfairness of K approaching the SCA when the original arbitral award is incontestable, rather than proceeding on the basis of *forum non conveniens* and *lis pendens*. The relatively short duration of the concurrent proceedings can be attributed to the vital corrective action adopted by the SCA in respect of the illegal treatment of the arbitral award by the court at first instance. However, a more plausible explanation is that the US and South Africa subscribe to similar concepts and mechanisms in parallel proceedings. The fact that no conflict of mechanisms was provoked, meant that the proceedings could be brought to an end within a short time span.

On the basis of *Recommendation No 3*, the pending appeal could possibly be interpreted as an impediment to recognition. The hierarchy of application of legal norms at the horizontal and vertical levels would also need to be taken into account.¹²³ This aspect is considered next.

5 Respect for International Private Rights

Private international law functions as an integral part of the international system and operates by national courts through national law.¹²⁴ Operating thus, it limits the overlap in jurisdiction of national courts and avoids the need to relitigate disputes before enforcing them in other states in the form of a foreign judgment or arbitral award.¹²⁵ In international commercial arbitration, states act as agents for the implementation of an international law duty. Just as national courts take

122 *Resolution No 1/2006 Annex 2*; ILA "Final Report on Lis Pendens and Arbitration, Reports of the Seventy-Second Conference, Toronto, 2006" par 2.13. Kleiman "Supreme Court Broadens Scope of Res Judicata", available at www.Internationallawoffice.com/newsletters/detail.aspx?g=2daf6213-8023-4bfa-bf44-141a1016548f (accessed 2012-06-08).

123 Mills 224.

124 Mills 112; Sterio "Clash of the Titans: Collisions of Economic Regulations and the Need to Harmonise Prescriptive Jurisdiction Rules" 2007 *UC Davis J of Int L and Pcy* 95.

125 Mills 206.

responsibility under the NYC to oversee the integrity of the international system designed for the recognition and enforcement of arbitral awards, national courts have a general international law responsibility to allocate regulatory authority by means of private regulatory mechanisms. In this regard, state law is both a prerequisite for the functioning of these mechanisms and a safety net in the event of their failure.¹²⁶

National courts lend vital support to an arbitral tribunal, but may not deliberately overstep the boundaries of their supervisory jurisdiction over international arbitration.¹²⁷ Interference with the autonomy of the arbitral tribunal is justifiable only for the sake of safeguarding due process standards – the “universally accepted standards of justice observed by civilised nations which observe the rule of law”.¹²⁸ In such circumstances, interference is necessary as well as appropriate.

The “international law of coexistence” offers distinct domestic legal systems a framework in support of their orderly co-existence.¹²⁹ A horizontal relationship between the courts of different states, wherever they may be seated, requires the allocation of regulatory authority and the structural coordination that this would imply. When arbitral tribunals are involved, the NYC plays a part in this allocation. A methodology that counters abuse of process is more appropriate than one that fails to do so. The vertical aspect to the relationship between courts and arbitral tribunals has implications for the protection of international private rights that manifest in accordance with the hierarchy of legal norms. If a state fails to accord respect for rights established under international law (international private rights), it also foregoes pluralist respect since its conduct is linked to international public policy. Other states and their institutions have a choice not to accord its law respect. The decisions of its judicial institutions run the risk of being denied mutual recognition.¹³⁰

The implications of private international law in this context extend beyond *lis pendens* and *forum non conveniens* to comity. Comity requires state courts to be quick to restore respect for international private rights, including rights won by means of an agreement to arbitrate. This argument applies in every jurisdiction, including in the US

126 *Saipem v Bangladesh* ICSID Case No ARB/05/07 award of 2009-03-21 and 2209-06-30; Rühl “The Problem of International Transactions: Conflict of Laws Revisited” 2010 *J of Priv Int L* 59 86.

127 State courts interfered with or disrupted the arbitration in *Himpurna California Energy Ltd v The Republic of Indonesia*, Interim Award of 26 September 1999, vol xxv (2000) *Yearbook Commercial Arbitration* 109; *Salini Costruttori Energy Ltd v The Federal Republic of Ethiopia* (ICC Case No 10623/AER/ACS) award regarding the suspension of the proceedings and jurisdiction of 2001-12-07 ASA Bull 1/2003 82; *Saipem v Bangladesh* ICSID Case No ARB/05/07 award of 2009-03-21 and 2009-06-30.

128 *Thomas Baptiste* [2000] 2 AC 1.

129 Batiffol *Aspects Philosophiques du Droit International Privé* (1956) 311-335; American Law Institute *Restatement of the Conflict of Laws (Second)* (1971) par 6, 13.

130 Mills 276.

where courts presume the NYC to be non-self executing and implemented by national or federal legislation.¹³¹ A final arbitral award that is respectful of the international law duties imposed by the NYC and of international private rights ought to have *res judicata* effect. If a state's judicial institutions fail to accord respect for rights established under international law, their judicial decisions cannot demand pluralist respect. In a recent investment arbitration, for instance, the resulting award was declared inexistent under the law of the seat, or annulled, but it remained fully amenable to recognition and enforcement by courts in countries other than the seat and it circulated internationally.¹³² Arguably, this is an important way in which the comparative advantages of arbitration can be secured.

This point is contentious, but the argument is firmly based in international law. Article V of the NYC resolves any inconsistency between an arbitral award and a foreign judgment by allowing the state in which the award holder seeks enforcement thereof to decide whether to follow the arbitrator's award or the foreign court's judgment. Recognition or enforcement of an award may be refused if it was annulled by the court of the country who made the award,¹³³ while foreign arbitral awards are enforceable to the full extent of the laws of the country in which enforcement is sought.¹³⁴ The NYC does not make a firm choice between the territorial view that puts the country of origin or seat in the special juridical position to determine the validity of arbitral awards and the denationalised view of arbitration that does not put the seat in a special position. The NYC also remains silent regarding the standards for annulling an arbitration award or when annulments should have extraterritorial effect.¹³⁵

Nothing in the NYC prevents a reviewing nation from enforcing an award. The grounds for refusal are permissive rather than mandatory.¹³⁶

Cohen maintains that the interplay between Article V and Article VII creates opportunities for disparate national rules of enforcement and for conflicting decisions in the same dispute if an award that has been set aside in the place of arbitration, is enforced.¹³⁷ However, Mourre and

¹³¹ Huang 54.

¹³² Eg *Saipern v Bangladesh* ICSID Case No ARB/05/07 award of 2009-03-21 and 2009-06-30 (illegal expropriation ordered by courts of the seat). Radicati di Brozolo "Interference by National Courts with International Arbitration: The Situation after *Saipern v Bangladesh*" in *New Developments in International Commercial Arbitration* (eds Müller & Rigozzi) (2009) 1 27.

¹³³ Art V(i)(e) NYC.

¹³⁴ Art VII NYC.

¹³⁵ Cohen "The New York Convention at Age 50: A Primer on the International Regime for Enforcement of Foreign Arbitral Awards" 2008 *NY Disp Res Lawyer* 47 49.

¹³⁶ Davis "Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards" 2002 *Texas Int LJ* 43 58-62. See *In re Chromalloy Aeroservices v Arab Republic of Egypt* 939 F Supp 907 912-913 (DDC 1996).

¹³⁷ Cohen 49.

Vagenheim posit that Article V(i)(e) is a mere faculty for the courts of the requested country to refuse recognition of awards annulled at the seat while Article VII allows contracting states to apply more favourable domestic law that allows the recognition of awards that have been annulled in their country of origin.¹³⁸

Several US decisions, among which the controversial *Chromalloy* decision,¹³⁹ dealt with facts that highlighted the tension existing between these two provisions in the NYC.¹⁴⁰ The District Court of Columbia invoked Article VII to enforce an award made in Egypt that had been annulled by another Egyptian court, because US domestic arbitration law would not have annulled the award. Since then, several foreign judgments annulling awards have been accorded comity. In *TermoRio SA ESP v Electranta SP*¹⁴¹ this approach was confirmed except in respect of awards given where there is evidence that the foreign court proceedings were fatally flawed procedurally or the judgment lacked authenticity. US case law in respect of the enforcement of annulled awards is not uniform, but the arbitral award issued in the *Telcordia* dispute is similar in many respects to the award on which *Chromalloy* was based. A fatal flaw attached to the High Court ruling to set aside the arbitral award.

One of the limited grounds for refusing recognition and enforcement of an arbitral award under the NYC is triggered when a competent authority in the rendering state sets aside the award. K applied to have the award set aside on this basis. In the *Telcordia* dispute, the award which had been vacated could be treated as *res judicata* in practice, circulate internationally and be recognised by courts in countries other than seat without infringing international comity. Even a South African court that exercises its discretion in an international arbitration ought to take into account that South Africa is in breach of its obligations under international law.¹⁴² The fact that there is no proper counterpart for the duty contained in Article II(3) of the NYC in the South African legislative framework, should not impose burdens on other jurisdictions.

The possibility of enforcing an award that has been annulled in the seat has profound theoretical implications for the nature of international commercial arbitration. The draft Restatement subscribes to the view

138 Mourre & Vagenheim "The Arbitration Exclusion in Regulation 44/2001 after West Tankers" 2009 *Int Arb LR* 75, 82.

139 *In re Chromalloy Aeroservices v Arab Republic of Egypt* 939 F Supp 907 912-913 (Article VII of the NYC justifies enforcing an award that had been set aside by Egyptian courts at the seat of the arbitration).

140 Davis 48.

141 *TermoRio SA ESP v Electranta SP* 487 F 3d 928 941.

142 Butler "The Desirability of a Common Arbitration Statute for International Commercial Arbitration in SADC Jurisdictions: A Comparison Between the UNCITRAL Model Law and the OHADA Uniform Act" 12 (copy on file with author) makes this point with reference to s 233 of the Constitution, which obliges courts to interpret legislation in a manner consistent with international law.

that Article VII does not permit a foreign Convention award to be confirmed or vacated under the Federal Arbitration Act Chapter 1.¹⁴³ The NYC accommodates such an approach alongside progressive and denationalised approaches to international commercial arbitration.

The international legal order remains fragmented, but the NYC effects an international ordering which is not *ad hoc*. Given the general terms in which the duty imposed by the NYC has been couched, national courts are continually tempted by ideology and by legal argument from lawyers to use domestic notions when the arbitration agreement is interpreted and when the effects of international awards need to be determined. If the attachment to national interests is too intense, interpretive approaches easily turn arbitration-hostile. Legal systems that permit a wide view of *res judicata* and a clear approach to the protection of private international rights will have less of an issue with the enforcement of an annulled award. If the seat court disrupts the international arbitration illegally, oversteps its supervisory powers or breaches its international obligations, the set aside of the arbitral award cannot be treated as absolute. In the circumstances of the *Telcordia* dispute, the annulled award could have been enforced against K in a court in the US even before the SCA reinstated arbitral award. The award disposed of all the issues raised in the new proceedings. The *res judicata* effect of the award commenced when it was made.

6 Conclusion

This analysis has taken a bold look at the finality of the arbitral award granted in recent South African cases and at the management of parallel proceedings in multiple forums. In the *Telcordia* dispute, the compatibility of the devices used in the course of parallel proceedings in South Africa and the US prevented the case from becoming excessively protracted. However, the protection of international private rights and procedural efficiency supported even greater celerity. The *Lufuno* ruling indicates that the likelihood exists that this kind of speed and efficiency could hit a speed bump if a litigant raises his or her constitutional right to a fair trial. Allowing this right to be raised at any point in the proceedings creates opportunities for using recourse to court as a mere dilatory tactic. It is necessary for the court to keep a check on the tendency of disputes to evolve freely during arbitral proceedings. Article II(3) of the NYC forms part of a single, broadly defined international system of law interested in preventing such manipulative tactics. Treating this global instrument as an example of *ad hoc* coordination invites national interests to take precedence. A discretionary national approach in respect of referral to arbitration is a highly inappropriate means by which to facilitate parallel exercises of adjudicatory authority where there is identity of action. A wide construction of *res judicata* is appropriate, because it provides the

¹⁴³ *The Restatement of the Law (Third): The US Law of International Commercial Arbitration Tentative Draft No 1* (May 2010) parr 5-12.

court with the means by which to control dilatory tactics, safeguards international private rights and helps to counter abuses of the judicial process. Its use is in line with the arbitral rules emanating from the ICC, the *ILA Resolution No. 1/2006* and practice in jurisdictions that make the most of cost-efficient mechanisms. The wider the interpretation given to *res judicata* in international disputes, the easier it is to resolve conflicts in the standards and the competence of courts and arbitrators.