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**State Courts and International Commercial Arbitration Tribunals:**

**Regulation of *Res Judicata*, Current and Emerging\***

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**Annotation:** *This Article provides an analysis of Russian legislation, as well as its interpretation in the decisions of the RF Constitutional Court and the RF Higher Arbitration Court, of the res judicata effect of awards of international commercial arbitration tribunals. The UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 and the judgments of the European Court of Human Rights have been proffered as grounds for adducing the res judicata effect to arbitral awards. This Article provides a research of the Principles of International Civil Procedure and the Resolution of the Association of International Law № 1/2006 “International Commercial Arbitration” regarding the res judicata effect of arbitral awards. It is argued that the matter of res judicata effect of arbitral awards requires international regulation.*

**Kew words:** *Claim preclusion, issue preclusion, lis pendens, res judicata, collateral estoppel, issue estoppel, estoppel in pais, arbitration, court, Russian legislation, the RF Constitutional Court, the RF Higher Arbitration Court, the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, protection of human rights, the European Court of Human Rights, the International Institute for the Unification of Private Law (UNIDROIT), the American Law Institute (ALI), the ALI/UNIDROIT Principles of Transnational Civil Procedure, the Association of International Law (AIL).*

***Res Judicata* Effect of International Commercial Arbitration in Russian Legislation**

Russian procedural law doctrine defines *res judicata* as having the effect of dispensing with the requirement of proof of the facts prior established in a court judgment or sentence having entered into its legal force. *Res judicata* has found regulation in the following articles of RF procedural Codes, namely, in Article 69 of the RF Code of Arbitration Procedure, in Article 61 of the RF Code of Civil Procedure and in Article 90 of the RF Code of Criminal Procedure.

Notwithstanding the differences of the definitions used in the said articles, each determined by their special subject-matter regulation, all three of them demonstrate rather a certain uniformity in the matter under our discussion, in that all the three deal with the *res judicata* effect of state court judgments, and all the three are silent about the awards of arbitration tribunals or international commercial arbitration courts or such tribunals. This conclusion directly follows from the texts of the said articles, as they use the terms “court”, “judgment in force” and “sentence in force”.

Had there been the intent of the legislator to recognize the *res judicata* effect of awards of arbitration tribunals or international commercial arbitration courts or tribunals (hereinafter, the “ICA” or ÏCAs”) on state courts, it must have directly named these tribunals in the corresponding articles of procedural Codes. These, however, speak of state courts only, and of the grounds dispensing with the requirement for proof of facts in relations among state court institutions. In this case we are prohibited from arbitrary and ungrounded broad treatment of the term “court”, as, in the appropriate cases as the legislator thinks fit, other terms are being used, such as “foreign arbitration tribunals”(in Chapter 45 of the RF Code of Civil Procedure) or “arbitration tribunals and international commercial arbitration courts” (in Chapter 31 of the RF Code of Arbitration Procedure). The law strictly distinguishes between a claim adjudication by a state judiciary institution and a “dispute resolution of the parties in an arbitration proceeding” (in Article 241 of the RF Code of Arbitration Procedure; Chapter 45 of the RF Code of Civil Procedure).

Nor is the *res judicata* effect of awards of arbitration tribunals recognized in the special acts regulating their status and procedure: neither the RF Law on Arbitration Tribunals in the Russian Federation, nor the RF Law on International Commercial Arbitration postulates the *res judicata* effect of their awards. Such paramount effect of arbitral awards may not be implied either.

It should therefore be stated that the current Russian legislation does not provide for the *res judicata* effect of awards by ICAs on state courts.

**The RF Constitutional Court on the *Res Judicata* effect of Awards by ICAs**

The RF Constitutional Court has on a number of occasions addressed the matter of the status of arbitration tribunals and ICAs, as well as the legal status of their decisions. Certain more important positions have been promulgated by the Court in its Determination on the Dismissal of a Claim by Tatyana Vladimirovna Sanaeva Alleging Violation of her Constitutional Rights by Action of Article 61 of the RF Code of Civil Procedure of September 25, 2014 № 2136-O (hereinafter, the “Determination № 2136-O).

Determination № 2136-O has stated as follows: “In accordance with Section 2 Article 61 of the RF Code of Civil Procedure the circumstances established in a final decision on a prior adjudicated case shall be binding on the court; the said circumstances require no further proof, nor may they be contested in another adjudication of the same parties. This normative position, read together with Section 1 Article 1, Section 1 Article 3, Article 5 and Section 1 Article 13 of the RF Code of Civil Procedure, shall mean that the ***res judicata effect shall be obtained in the circumstances established in judicial acts of general courts, but not in decisions of arbitration tribunals***, which corresponds to the status of arbitration tribunals as alternative vehicles of private-law dispute resolution, which tribunals, as was stated by the RF Constitutional Court in its Judgement of May 26, 2011 № 10-P, do not adjudicate disputes”. (*Author’s emphasis added.*)

The RF Constitutional Court has thus definitely opined on the matter, unequivocally and firmly: the “*res judicata* effect shall be obtained in the circumstances established in judicial acts of general courts, but not in decisions of arbitration tribunals”.

It is principally important that this position has been reaffirmed in a number of judgments of the RF Constitutional Court. Thus, in the above Judgment of May 26, 2011 № 10-P the Court has said, in particular*,* that, among the venues of private-law dispute resolution commonly accepted in modern society ruled by law, have existed “arbitration tribunals, such as international commercial arbitrations or domestic ones, whether permanent or *ad hoc*”. The Court thus determined, first, that domestic arbitration tribunals and ICAs possess the same nature and, second, confirmed that both are set up for private-law dispute resolution.

Further, Decision of May 26, 2011 № 10-P provides that the “private-law nature of the dispute, making it amenable to resolution by arbitration shall, having regard of the existing system of legal regulation, exclude the entertaining by arbitration tribunals of claims arising out of administrative or other public relations, as well as special claims not alleging a dispute of law (such as matters of establishing facts entailing legal consequences and others.)”

Decision of May 26, 2011 № 10-P makes it clear that the “submission to an arbitration tribunal of a dispute arising, or capable or arising, between the parties out of a certain legal relationship remains an alternative method of protection of rights and ***does not in and by itself create in an arbitration tribunal proceeding a proper judicial procedure of protection of rights, nor does it entail other legal consequences except for those envisioned by law for an arbitration award***” (*Author’s emphasis added.*) It follows that, decisions (awards) by arbitration tribunals and ICAs may not possess the quality of *res judicata*, since such an effect, by law, is only obtainable in state court judgments.

It should therefore be inferred from the reasonings of the RF Constitutional Court that it is impossible to equate the notions of a “court” and “arbitration tribunal”(“international commercial arbitration court or tribunal”), taking into consideration the function of administration of justice vested in state courts only. The RF Constitutional Court has directly and unequivocally ruled on the *res judicata* effect of judicial acts. The Court has stressed that the *res judicata* effect may only be obtainable in decisions of state courts, and not so in decisions (awards) of arbitration tribunals and ICAs.

It would appear that the above legal provisions and their interpretation by the RF Constitutional Court leave no doubt about the fact that the Russian legislation provide for no *res judicata* effect of the awards of ICAs, both domestic and foreign, on Russian state courts. In contrast, state court decisions are binding on arbitration tribunals. Russian doctrine (and, consequently, practice) however, undertakes numerous attempts to approach this matter differently.

Perhaps the most popular position is that an arbitral award has the quality of *res judicata* due to the fact of its binding force. This position is commonly based on the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (hereinafter, the “1958 New York Convention”).[[2]](#footnote-2)

***Res Judicata* and the 1958 New York Convention**

The 1958 New York Convention contains no special provisions on *res judicata* of recognized and enforceable arbitral awards. Some specialists are of the opinion, however, that such a provision may be inferred from the treatment of Article III of the Convention.

Article III of the 1958 New York Convention provides as follows: “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 …”

At the same time, it appears, the binding force of an arbitral award shall not be equivalent to its quality of *res judicata*. As appears to be the case, the Russian doctrine infers the *res judicata* effect (as applicable to state courts) from the legal force of a judgment. A judgment in force generates definite legal consequences, commonly known as the attributes of a judgment.

Such attributes pertain to a state court judgment, however, and it is groundless to vest those in decisions carried out under the jurisdiction of an arbitral tribunal. Allow us to repeat, that the quality of *res judicata* must be directly stated and may not be implied, as it is directly established for state courts, and not so for arbitration tribunals.

It should be admitted, however, that the doctrine has long posed the question if such attributes of a judgment as its *res judicata* effect and its binding force should not be considered unbundled. A judicial act obtains the quality of being binding, out of which emanate the other more specific qualities, namely, finality (incontestability), enforceability, exclusivity and *res judicata*.

Professor Litvinsky argues, for instance, that the concept of the legal force of a national court judgment “permits for the acceptance of only the full, not some partial, legal force…”[[3]](#footnote-3) How separate can the attributes of a court judgment be? Professor Chechina answers this, pointing out that *res judicata* is a special confluence of all three attributes of a judgment, those of finality, exceptionality and binding force. A judgment lacking just one of those qualities may not possess the effect of *res judicata*.[[4]](#footnote-4)

Another question arises here: To what extent the attributes of a court judgment may be extended to the awards rendered by ICAs? It has been suggested in national doctrine that the notion of the legal force of a court judgment could “in some measure be extended to the acts of arbitration tribunals and ICAs that are recognized and enforceable in the Russian Federation”.[[5]](#footnote-5) It is stressed, however, that only the awards enforceable in the Russian legal system are eligible, and it is unclear what exact “measure of legal force” may be extended to arbitral awards. This latter doctrinal position deserves support, it appears.

It should be noted that the 1958 New York Convention specially provides that foreign arbitral awards are enforced “in accordance with the rules of procedure of the territory where the award is relied upon” (Article III). This is to say, that the procedure for enforcement of an arbitral award and its consequences are established not in the 1958 New York Convention, but in the applicable national legislation.

The latter provision is of importance, since *res judicata* has differing definitions and regulation in the legal systems of states. Bearing that in mind, to argue that the 1958 New York Convention determines and presupposes the *res judicata* effect of an arbitral award would be to arbitrarily expand the scope of application of an international treaty.

At the same time, pursuant to Article 31 of the Vienna Convention on the Law of Treaties of May 23, 1969, in interpreting treaties (international agreements), in addition to the text and context, “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” must be taken notice of. In the absence of uniform understanding of the limits of *res judicata* either in national law or doctrine, but, rather, due to significant disparity in those, there are no grounds for broad interpretation of the provisions of the 1958 New York Convention.

***Res Judicata* and the Protection of Human Rights**

There exists an approach according to which the *res judicata* effect of arbitral awards is assured by the need for ensuring protection of human rights. This approach, in its most general terms, was advanced by Professor Kurochkin. Pointing out that the obligation of recognition of foreign judicial acts stems from the requirement of protection of human rights and that such an obligation rests not with states, but with private persons and organizations, whose rights and interests are to be protected by states, Professor Kurochkin argues that these provisions “remain equally true in cases of arbitration awards as well”.[[6]](#footnote-6)

This proposition is further elaborated by A.A. Kostin, who contends that, despite the absence of the requisite norm in the Russian legislation, there is no prohibition on the acceptance of the *res judicata* effect of the awards of ICAs. In his support A.A. Kostin argues that the establishment of justice in ICAs is not dissimilar to that of state arbitration court, as arbitral dispute resolution is grounded in the principles of adversarial procedure and direct finding of proof.[[7]](#footnote-7)

A.A. Kostin suggests to find the *res judicata* effect of awards by ICAs in the RF Higher Arbitration Court’s Determination of August 27, 2012 № VAS-17458/11. In this case the Court rejected recognition and enforcement of an award of the Moscow Trade Chamber International Arbitration Court on the ground of the prior judgment of the RF Higher Arbitration Court for annulment of the agreement of the same litigants. In this Determination the Court stated, in particular, that the recognition of an award “carried out in respect of an annulled agreement would create a situation when there would be in existence on the RF territory ***judicial acts of equal legal force*** containing contradictory resolutions, which would have run counter the principle of binding force of judicial acts” (*Author’s emphasis added.*)

Analysing the said judicial act, A.A. Kostin argues that the “RF Higher Arbitration Court, thus applying the 1958 New York Convention, comes to the conclusion that awards of international commercial arbitrations and decisions of state courts possess equal legal force,” from which follows that the “arbitral award possesses all the attributes of a state arbitration court decision”[[8]](#footnote-8)

It appears, however, that in this case A.A. Kostin is engaged in wishful thinking, in that, referring to equal legal force, the RF Higher Arbitration Court was speaking not of the ICA’s award, but of the decisions of two Russian state courts, namely, the court that had annulled the agreement of the parties and the one that had rejected recognition of a foreign arbitral award. It is not an accident that the Court has referred in this case not to the 1958 New York Convention, but to Article 6 of the RF Law on the Legal System of the Russian Federation, which latter provides that judgments in force become binding and unconditionally executable.

According to A.A. Kostin, the conclusion that awards by ICAs “obtain the *res judicata* effect” should also follow from the judgment of the European Court of Human Rights (ECHR) in the case of *Ateş Mimarlik Mühendislik A.Ş. v. Turkey*. A.A. Kostin contends that in this decision ECHR has concluded that a state court may not ignore facts established by decision of a foreign judicial institution as this would violate the right of party to fair trial provided for in Article 6 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (hereinafter, the “European Convention on Human Rights”)

A.A. Kostin argues that “despite the fact that this case dealt with the matter of recognition of facts established by a foreign court decision, its conclusions must extend the *res judicata* effect to awards by international commercial arbitrations. This conclusion follows from the ECHR judgment in the case of *Regent Company v. Ukraine*, according to which the term “court … includes not only state courts, but also non-state institutions in charge of dispute resolution, and, firstly, the international commercial arbitration tribunal”[[9]](#footnote-9)

In our opinion, nothing in the ECHR judgment in the case of *Ateş Mimarlik Mühendislik A.Ş. v. Turkey* should lead to the conclusion a “state court may not ignore facts established by decision of a foreign institution having jurisdiction”. Had the ECHR indeed so ruled, this would have undoubtedly revolutionized jurisprudence. The ECHR only ruled a violation by Turkey of Section 1 Article 6 of the Convention establishing the applicant’s right of access to court.

This author opines that the ECHR has exercised reasonable precaution in this case. The term “*res judicata*” has not been used in either dispositive or reasoning part of the judgment. Considering the impact of judgments carried out in one state on those of courts of other states the ECHR has reasoned as follows: “The Court considers that the development of common judicial standards and harmonisation of national laws in civil and commercial matters is an emerging phenomenon in international law. To this end, the national laws of Convention Contracting States, including Turkey, establish rules on the recognition and enforceability of a foreign judgment in their domestic systems with a view to ensuring legal certainty in international relations between private parties and to fostering predictability and coherence in rules and procedures governing those relations.” Thus, the ECHR has dealt with recognition and enforcement of foreign judgments, and not with recognition of their *res judicata* effect.

As to its judgment in the case of *Regent Company v. Ukraine*, in it the “Court reiterates that Article 6 does not preclude the setting up of arbitration tribunals in order to settle disputes between private entities. Indeed, the word “tribunal” in Article 6 § 1 is not necessarily to be understood as signifying a court of law of the classic kind, integrated within the standard judicial machinery of the country”. Citing the Ukrainian legislation, the ECHR has confirmed that the Ukrainian “Arbitration Tribunal’s award is treated as equivalent to an enforceable court judgment” (Section 54 of the Judgment). That is to say, in the *Regent Company v. Ukraine* case, the ECHR has not ruled on the *res judicata* effect of the award of the Ukrainian ICA, it only decided on the issue of its binding force (enforceability).

Without consenting to the arguments of A. A.Kostin, the main thrust of his article should be upheld, namely, in that that the issue of recognition of the *res judicata* effect of arbitral awards and requires positive regulation in law. It should be added here, though, that a change in domestic legislation alone shall not suffice and that a concerted effort at the international level is needed.

**Projects of International Regulation of *Res Judicata* of ICA’s Awards**

It appears obvious that transnational recognition of *res judicata* of ICA’s awards may only be made on the basis of internationally established rules, whose elaboration and adoption will, without a doubt, be impeded by substantive differences in the positions of states in this matter. Witness to this have been the attempts, to this day, at codification of any of uniform provisions regarding transnational acceptance of *res judicata* in general and that of ICA’s awards in particular.

The Principles of Transnational Civil Procedure elaborated by the International Institute for the Unification of Private Law (UNIDROIT) and the American Law Institute (ALI) (hereinafter, the “TCP Principles”) have become a reflection on what is of common nature in civil procedure in various legal systems. This document does not formally relate to arbitral matters or the relations between state courts and ICAs, at all. However, in their effort to establish unified procedural rules, the drafters of the TCP Principles have missed, at it seems, the unique opportunity to attempt to provide for the unification of the rules regarding *res judicata*. The TCP Principles contain a special Principle devoted to *res judicata*, albeit a rather cryptic one and quite of general nature.

Principle 28 “*Lis Pendens* and *Res Judicata*”, as stated in its Comment P-28A, is “designed to avoid repetitive litigation, whether concurrent (*lis pendens*) or successive (*res judicata*)”. Principle 28.3 states that the “concept of issue preclusion, as to an issue of fact or application of law, should be applied only to prevent substantial injustice.”[[10]](#footnote-10)

Comment P-28C says that “some legal systems, particularly those of common law, employ the concept of issue preclusion, sometimes referred to as collateral estoppel or issue estoppel. The concept is that a determination of an issue as a necessary element of a judgment generally should not be reexamined in a subsequent dispute in which the same issue is also presented. Under Principle 28.3, issue preclusion might be applied when, for example, a party has justifiably relied in its conduct on a determination of an issue of law or fact in a previous proceeding. … [T]he more limited concept in Principle 28.3 is derived from the principle of good faith, as it is referred to in civil-law systems, or *estoppel in pais*, as the principle is referred to in common-law systems.”[[11]](#footnote-11)

In other words, the drafters of the TCP Principles unequivocally succumb to the fact that it was impossible to reconcile the various concepts of *res judicata*, so different in nature and scope, thus reducing their definitions to the common provisions based in good faith.

Another attempt at unification of the various provisions relating to *res judicata* has been undertaken by the Association of International Law (AIL) at its 72nd Session held in Toronto in 2006. AIL adopted Resolution № 1/2006 “International Commercial Arbitration” attached to which were two annexes containing AIL “Recommendations on *Lis Pendens* and *Res Judicata* and Arbitration”.[[12]](#footnote-12)

In the AIL Final Report accompanying Resolution № 1/2006 there is the express reservation that AIL Recommendations on *res judicata* concern only arbitration and not court adjudication. However, it is also noted that these Recommendations may become, for state courts, a source of information on modern approaches to the *res judicata* effect of arbitral awards.

The AIL Recommendation, in Section 2, stresses as follows: “To promote efficiency and finality of international commercial arbitration, arbitral awards should have conclusive and preclusive effects in further arbitral proceedings.” It further sets out the conditions under which these effects may be recognized for ICA’s awards, which are, in general, as follows: the original and subsequent arbitral proceedings must be between the same parties and on the same cause of action; the original arbitral award has become final and binding in the country of origin and there is no impediment to recognition in the country of the place of the subsequent arbitration; an arbitral award has conclusive and preclusive effects in the further arbitral proceedings as to determinations and relief contained in its dispositive part as well as in all reasoning necessary thereto, as well as the issues of fact or law which have actually been arbitrated and determined by it, provided any such determination was essential or fundamental to the dispositive part of the arbitral award; the conclusive effects of an arbitral award can be invoked in further arbitration proceedings at any time permitted under the applicable procedure.

It must be admitted that AIL has succeeded in formulating, without undue verbosity or ambiguity, the fundamental premises of *res judicata* as applicable in international arbitration. We only contest the premise of Section 2 of Recommendation according to which the rules set for *res judicata* need not necessarily be governed by national law and may be governed by “transnational rules applicable to international commercial arbitration”. In our opinion, a reservation should have been made as to its use only in part not contradicting the relevant national provisions on *res judicata*.

**Conclusions**

It should be apparent that the provisions of law presented in this Article and their interpretation by the RF Constitutional Court should leave no doubt to the conclusion that Russian law denies the *res judicata* effect to awards of ICAs for state courts. A different approach, however, has been promulgated and supported in the doctrine. Most scholars are inclined to propose that, with respect to those arbitral awards that have been accepted for enforcement, it should be possible to speak of their *res judicata* powers obtained by way of legal force of a corresponding state court act.

Moreover, as proposed by Professor Yarkov, in the event an arbitral award had not been recognized and enforced, but was later contested under Chapter 30 of the RF Code of Arbitration Procedure and Chapter 46 of the RF Code of Civil Procedure, and stayed in effect and force by a competent court, this should allow for the conclusion that such an award does possess both the binding and *res judicata* effects, since certain facts had indeed been ascertained in the determination of the court rejecting the claim for dismissal or the said arbitral award.[[13]](#footnote-13) Had the arbitral award “not been contested in court and had not been recognized and enforced, it would have hardly been possible to assert any *res judicata* effect in such an award…”[[14]](#footnote-14)

Yet, if we were to reveal the *res judicata* effect only by way of recognition and enforcement of an arbitral award, or by way of its contestation, this would provide a rather shaky ground for such a complex substance as *res judicata*. It is best to concur with those scholars that perceive a *lacunae* here, requiring not just filling, but a careful elaboration of the criteria for its introduction, use and scope of application. It is quite evident, however, that, with respect to ICAs, measures adopted nationally will not suffice and such an issue may only be resolved by means of a corresponding international treaty.

Globalization of economies, the formation of a world market, broadening of relations of organizations and citizens of various states, all place the matter of transnational recognition of the legal consequences of their conduct and their legal relationships high on the agenda. “Their determination (fixation) by a competent institution in charge of administration of law may not, under certain conditions, … be reexamined in the resolving of subsequent disputes of the same parties”[[15]](#footnote-15)

As was demonstrated by our analysis, the issue of *res judicata* effect of arbitral awards will necessarily trigger yet more fundamental, and unresolved, one, that of status of arbitration tribunals generally. The position of the RF Constitutional Court that the arbitral jurisdiction does not provide for adjudication of disputes must be challenged in the present day. As it acts under law and applies law in establishing facts of law and relationships of the parties, the arbitration tribunal may not be declared a private institution. That an arbitration tribunal obtains its powers by and from decision of the parties does not undermine its status of a law-administering organ acting under law.

To support the above positon, the opinion of Judge Aranovsky of the RF Constitutional Court in its Judgment of May 26, 2011 № 10-P cited above comes in hand. Judge Aranovsky justly takes the position that the RF Constitution’s limitation of the “system of justice” by the enumerated types of judicial procedures only “does not in and of itself deny jurisdiction to non-state institutions… Jurisdictional powers to resolve disputes of law or matters of liability are vested even in non-judicial state organs (antimonopoly service, election committees); such powers are used in labor disputes, in decisions of qualifications colleges of judges and so on.”

It may be concluded that there stands before the lawgiver the principal question of whether jurisdictional powers may be administered beyond the system of state-instituted courts. The answer to this question will determine the fate of recognition (or non-recognition) of legal force, including the *res judicata* effect, of arbitral awards.

1. **\*** Continued from the Journal of International Private Law, 2015. № 2 (88). P.3-27; № 3 (89). P. 37-49.

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