# HOW ARBITRATORS SHOULD TREAT PRIOR AWARDS RENDERED ON THE SAME CONTRACT

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**Abstract**

*Arbitral awards often address disputes as to the interpretation of contractual terms without ending the contractual relationship between the parties. This is particularly relevant to long-term contracts wherein a new dispute between the same parties and related to the same contract as the first arbitral award may arise. This article explores the significance of the first arbitral award and discusses how a tribunal can take that award under consideration. When an arbitral award adjudicates issues of contractual interpretation, this interpretation will have both a legal and a practical effect on the subsequent interpretation of that contract. An arbitral tribunal has different legal and practical tools at its disposal to give meaning to the first award. This article will explore these different tools from an efficiency and utility perspective. It becomes clear from this study that arbitral tribunals pay attention to the consistency of the positions adopted by the parties.*

## I. Introduction

Arbitral awards often address disputes as to the interpretation of contractual terms without necessarily ending the contractual relationship between the parties. Therefore, this could give rise to a situation wherein there is a new dispute between the same parties and related to the same contract as the first arbitral award. This article explores the significance of the first arbitral award, and how an arbitral tribunal, formed to consider later disputes under the same contract, can take that award under consideration. This is particularly relevant to long-term contracts, which can often be the subject of multiple disputes during their life-time. Long-term contracts are, by definition, entered into for an extended period of time, sometimes up to thirty, forty years or more, especially in the extractive industries.

Following a first dispute that goes through the entire process of arbitration, an arbitral award will address some issues of interpretation of the contract in question. This decision will have both a legal and a practical effect. The question then becomes how best to deal with a situation where subsequent disputes arise out of the same disputed issues during the lifetime of the same contract, and in particular, the effect and impact of a prior arbitral award.

In order to answer this question, it is useful to identify first – without necessarily being exhaustive – issues that are likely to be re-litigated every time there is a dispute between the contracting parties to a long-term contract. Chapter II of this article identifies such issues and examines the consequences derived from the re-litigation of the same issues in long-term contracts. Once the relevant issues have been ascertained, Chapter III will survey possible solutions. An arbitral tribunal may consider the first award in different ways using different legal and practical tools at its disposal. This article will explore these different tools from an efficiency and utility perspective.

We will see below that it is clear that, while arbitral tribunals prefer not to tie their hands in advance, they do pay attention to the consistency of the positions adopted by the parties.

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## II. Issues that Arise from a First Award

Among the issues that can arise from existing binding decisions between the parties in long-term contracts, some are very practical in nature (A), whilst others are more theoretical (B).

### A. Practical Issues

Long-term agreements include, *inter alia*, build-operate-transfer agreements, turnkey agreements, concession agreements, and commodities sales and purchase or exchange agreements.

The key economic issue for these contracts is the ability of the contract to withstand changes of circumstances that necessarily occur during the lifetime of the contract. To this end, parties have a wide range of mechanisms available to them to address the potential for changing circumstances. This article will set out the various mechanisms that are often used to allow the parties to renegotiate the terms of their contract (1). The fundamental mechanism is that of renegotiation clauses. This article will explore these renegotiation clauses, in particular price review clauses that are found in gas supply agreements (2). There are also contracts that do not include such mechanisms and pose a different problem. The issue then becomes whether the contract can be adjusted at all. The answer may lie in the interpretation of certain contractual provisions that are not ostensibly intended to function as adjustment mechanisms, but may often also be found in the law governing the contract itself (3).

#### *i. Mechanisms to Deal with Changing Circumstances*

As stated above, a long-term contract can span over several decades. Naturally, over such a large period of time, there can be a host of unforeseen changes in the circumstances surrounding a contract. This can range from changes in the proxy pricing mechanism beyond the control of the parties in an extraction contract to an outbreak of war.

Contracting parties have developed several mechanisms to help maintain, as far as possible, the original bargain of the contract and allow renegotiation of the contract, should the change in circumstances prove to be too onerous for one of the parties. These mechanisms will be briefly addressed to demonstrate how an interpretation from an arbitral award can impact the future relationship between the parties. Although these examples do not purport to be exhaustive, they are archetypal, in that they present the types of issues that a prior contractual interpretation can address and the impact that has on the future relationship of the parties.

The first type of mechanism available is a stabilisation clause. These clauses are often used in investment agreements and long-term extractive contracts. They are intended to make a particular project independent of adverse changes to the legal and tax environment. This can cause some tension between public policy of a State's ability to regulate its own laws and the protections afforded to a particular project. Should a dispute related to the scope of the stabilisation clause arise, an arbitral tribunal would be tasked with determining the interpretation of the particular stabilisation clause and how strictly it must be applied. The impact of such a decision could affect, on a micro scale, the investor's ability to bring subsequent cases on any other changes in the regulatory environment. On a larger scale, it could affect the way in which the government is able to alter its legal and tax environment in so far as it impacts the stabilisation clause.

The next type of mechanism available to contracting parties is a hardship clause. According to the UNIDROIT Principles, a hardship is defined as a situation "*where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished.*"[1] This applies where a change in circumstances beyond the control of the parties makes the performance of the contract excessively onerous on one of the parties. In such circumstances a hardship clause offers a flexible approach for dealing with such an unforeseen change in circumstances, thereby providing a framework for the parties to renegotiate.

Often, the key issue that arises when a tribunal is tasked with interpreting a hardship clause is defining what constitutes 'hardship'. Naturally, upon entering any contract, there is an element of assuming a risk. The determination made by the first tribunal would impact how the parties continue their contractual relationship and under what circumstances and bargaining power would they be able to renegotiate in the future.

Another key mechanism that parties contract for is a *force majeure* clause. "*This operates as an express risk allocation mechanism between parties in situations that are beyond the parties' control. Examples include the outbreak of war, strikes and so-called Acts of God.*"[2] There is usually an onus on the parties that they should exercise reasonable diligence to avoid or mitigate such an event. The key element here is that, exercising a *force majeure* clause would result in the suspension, reduction or exemption of the parties' obligations under the contract, according to the language of the *force majeure* clause. Again, such a clause would have to be interpreted by an arbitral tribunal, which would establish the boundaries of what is considered as *force majeure*. This would impact future decision-making of the parties as to whether to trigger the *force majeure* clause and whether or not they would continue to be bound by their contractual obligations.

*ii. Renegotiation Clauses/ Price Review Clauses*

The most typical mechanism available to the parties is a renegotiation clause. This type of clause allows the parties to renegotiate the terms of their contract if certain events take place. This section will concentrate on one particularly prevalent form of renegotiation clause, the price review clause, which is often found in long-term gas supply agreements.

A typical gas sales and purchase agreement contains certain principles that are characteristic of such contracts. Among other key principles, long-term gas sales and purchase agreements provide for a risk allocation mechanism, take or pay obligations, price formulae and, most importantly for our purposes, an adjustment clause to regulate the pricing mechanism for the sale of gas in order to follow changes in the relevant market.[3]

The price review clause allows parties to reset the price of gas periodically during the lifetime of the contract. These clauses are crucial to the functioning of long-term gas sales and purchase

1 International Institute for the Unification of Private Law [UNIDROIT] Principles 2010, art. 6.2.2.

2 S. Lee, *Interpretation of Force Majeure Clauses*, SING. INT'L. ARB. BLOG *available at* https://singaporeinternationalarbitration.com/2012/06/28/interpretation-of-force-majeure-clauses/.

3 For a complete discussion of these issues, *see* Marco Lorefice, *Crossroads in Gas Price Review Arbitrations*, *in* GAR GUIDE TO ENERGY ARBITRATION 161 (J. William Rowley ed., 2015); *See also* Marc Levy, *Drafting an effective Price Review Clause*, *in* GAS PRICE ARBITRATIONS 9 (Mark Levy ed., 2014).

agreements as the parties need a reliable mechanism to ensure that the price matches, at regular intervals, the changing economic conditions of the market in which gas is sold.[4] This periodic resetting of the price is important for both the buyer and the seller. It ensures that the price at which the gas is bought is not wholly inconsistent with the price at which the buyer can resell it on the relevant market.

In price review cases, the parties argue over the meaning to be attributed to certain specific terms in order to arrive at the best price formula for their respective purposes. The manner in which these terms are interpreted may have a profound impact on how the specific adjustment clause will work in the future between the same parties.

A typical gas price adjustment clause includes several key constituent elements which in turn open the door for renegotiation of the price.[5] The first is the triggering mechanism for the adjustment clause, often referred to as the "trigger".[6] The trigger of the price revision clause is typically a significant or substantial change in the market.[7] This calls into question the definition of change and the threshold for such a change to be significant. The clause often provides that as a result of the substantial changes, the contracting price of the gas is no longer reflective of the value of gas in the relevant market. An arbitral tribunal must determine, for example, what data to consider and which market to consider. Finally, the revision of the price should be done so as to let the buyer, who will resell the gas, to be able to economically market the gas (or any equivalent formula). Although by no means is every price adjustment clause as simple as this, and they can vary to a large extent, these elements are regularly found and at least some form of them can be considered as fundamental principles of a price review clause.

All of the elements described above are reduced to contractual provisions that must be interpreted and they can all be viewed in a number of ways. An arbitral award that decides upon the interpretation of these terms can provide clarity for the contracting parties when deciding whether to pursue a price review at a given time in the future. With a clear decision, parties will be more capable of organising their behaviour over the life-time of the contract.

Whatever the interpretation given by a first arbitral tribunal to these constituent elements may be, it will have a profound impact on the parties. A determination of the term "economically market the gas", for example, will have a particularly important impact on the manner in which the parties carry out their obligations under the contract. A tribunal may decide that this term requires the buyer to be able to, under any circumstances, resell the gas at a profit. This is primarily the case because price review requests are often driven by the fact that the buyer is no longer able to make a profit on reselling the gas as a result of a change in market conditions.

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4 David Mildon QC, *The Adjustment Phase*, *in* GAS PRICE ARBITRATIONS 129 (Mark Levy ed., 2014).

5 *See* MARK LEVY ET AL., GAS PRICE ARBITRATIONS (2014).

6 *See*, *e.g.*, the price revision clause in Gas Natural Aprovisionamientos, SDG, S.A. v. Atlantic LNG Company of Trinidad and Tobago, 4344525 WL (S.D.N.Y. 2008).

7 Marnix Leitjen, *The Trigger Phase*, *in* GAS PRICE ARBITRATIONS 33-36 (Mark Levy ed., 2014).

This, in turn, would raise the question as to whether the "economically market the gas" test is the so-called controlling factor of the price review mechanism[8] and whether it can be used as an independent trigger.[9] That is to say, whether the test of "economically market the gas" can, in and of itself, constitute the basis of instigating a price review.

These are the types of issues that can arise and that are likely to be solved in a first award that interprets a renegotiation clause, and in particular a price adjustment clause. These issues risk being re-litigated each time there is a price review, which could occur on a regular basis. These litigations require the parties to invest a significant amount of costs and time. It seems highly unlikely that the parties would wish to dedicate equal amounts of costs and time to re-litigate the interpretation of the same clause.

*iii. Contracts Without a Specific Adjustment Mechanism*

It is also not uncommon for long-term contracts, especially for older long-term contracts, not to contain any adjustment provision at all. Arbitral awards that interpret the provisions of these contracts, or of the applicable law, can have an equally direct impact on the future relationship of the contracting parties as well as on any future disputes between them.

For example, consider a long-term contract which contains in its preamble a general statement that the parties wish to maintain the original bargain of the relationship, or the original risk allocation, for the lifetime of the contract but no specific adjustment mechanism. Such a clause could provide that, taking into account the long-term nature of the present contract, the parties intend from the start that the balance of their relationship be preserved, so as to prevent a manifestly unfavourable change to the detriment of either of the parties. This type of contractual stipulation is not an "out" in the sense of a force majeure clause or even a hardship clause, but rather a general declaration of intent to have the global equilibrium of the contract maintained, without, however, providing for a specific mechanism to this effect.

A tribunal's decision interpreting this clause will have a long-standing impact on how the relationship between the parties plays out for the remainder of the contract. The issue here is far more fundamental than simply how the adjustment mechanism works in practice; it is whether there is an obligation to adjust the contract at all. The answer to this question will, of course, largely be case-specific. In particular, it will depend on the facts and the contractual language in question, in light of the principles of the applicable law. Whether the tribunal concludes that there is an obligation to renegotiate or not will shape the relationship of the parties for the remainder of the life of the contract.

An arbitral award would also regulate what the burden of negotiating in good faith means and how far it stretches. If therefore, the tribunal finds that there is an obligation to negotiate in good faith, it must decide whether this is simply an obligation to meet, or to enter into full-fledged negotiations or indeed an obligation to enter into an adjustment (although this seems difficult to conceive precisely in the absence of a specific mechanism). The tribunal must also

8 Marco Lorefice, *Crossroads in Gas Price Review Arbitrations*, *in* GAR GUIDE TO ENERGY ARBITRATION 171 (J. William Rowley ed., 2015).

9 Leitjen, *supra* note 7 at 44; Philippe Pinsolle, *Confidentiality in Gas Price Review Arbitrations*, *in* GAS PRICE ARBITRATIONS 60 (Mark Levy ed., 2014).

decide upon the scope, or the intensity of the obligation to meet and/ or to adjust. The tribunal would take into account many considerations, including the impact of past practice between the parties, to shed light on the manner in which it is most appropriate to interpret the contract. Any future arbitration resulting from an imbalance in the relationship of the parties will first have to pass the test that was set by the previous award as to whether the parties had negotiated in good faith.

Separately, a duty to renegotiate can also be found in the applicable law itself, regardless of the contractual stipulations. A classic example in the energy sector is Article 107, alinéa 3, of the Algerian Civil Code which provides:

*When […] as a result of exceptional and unforeseeable events of general character, the performance of the contractual obligation, without becoming impossible, becomes excessively onerous in such a way as to threaten the debtor with exorbitant loss, the judge may, according to the circumstances, and after taking into consideration the interests of both parties, reduce to reasonable limits, the obligation that has become excessive. Any agreement to the contrary is void.*[10]

This provision is not isolated. There are many similar examples of such a duty in various jurisdictions that are important in the energy sector.[11]

Other legal systems have adopted a solution leading to the termination of the contract when its performance becomes excessively onerous for one of the parties.[12] Here again, an arbitral tribunal may render an award concluding that, under the applicable law, there is an obligation to renegotiate even if there is no contractual provision to this effect. This can create a precedent that will have a major impact on the parties' future dealings.

### B. Theoretical Issues

There are certain fundamental concerns that arise when dealing with the issue of repeat arbitrations on the same contract. They have a more pervasive component to them, that is to say, these concerns affect not necessarily specific questions in an arbitration but their very nature as repeat arbitrations. This section briefly considers these concerns in a non-exhaustive manner.

First, an arbitral award is meant to provide judicial certainty to the parties. This means that an arbitral award that interprets a long-term contract provides a degree of clarity for the contracting parties. The parties will rely on the manner in which the clauses contained within their long-term contract have been interpreted and will adjust their behaviour accordingly.

Second, an arbitral award is also meant to provide economic certainty. This is potentially more important than judicial certainty. From the perspective of managing the relationship between the parties of a long-term contract, it seems that reopening issues would cause confusion and a waste of resources. An arbitral award allows a party to economically plan its relationship with its

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10 Translation provided by the authors.

11 For e.g., and without being exhaustive, similar provisions are found in Egyptian law [Civil Code, art. 147(2)], the laws of Bahrain [Article 130 of Legislative Decree 19/2001 promulgating the Civil Code], Iraqi law [Civil Procedures Law, art. 146], Libyan law [Article 147(2) of the Civil Code], the laws of Qatar [Article 171 of the Civil Code] and the laws of the UAE [Article 249 of the Civil Code].

12 *See, e.g.,* CODICE CIVILE [C.c.] [It.], art. 1467 (Braz.) and CODIGO CIVIL [C.C.] [CIVIL CODE] art. 478 (Braz.).

counterpart. An arbitral award that provides clarity on the governing provisions of a long-term contract could mean that the interpretive issue in question is settled. A party therefore can plan to properly use its resources throughout the lifetime of the contract, without the risk of having to litigate the same issue twice.

As is clear, an arbitral award would settle key questions of interpretation with significant practical implications for the lifetime of the contract. What remains to be seen, however, is how such an award would be regarded in the future by the parties and future tribunals should such issues arise again. The second part of this article attempts to address this in particular, suggesting potential solutions to recurring issues of interpretation that have already been settled by a prior arbitral decision.

## III. Possible Solutions for Subsequent Awards

There are at least three potential solutions to help parties and arbitral tribunals deal with recurring questions regarding the interpretation of clauses found in long-term contracts. The first is issue estoppel, or *venire contra factum proprium*, i.e. that a party cannot set himself in contradiction to his own previous conduct (A). The second solution is the principle of *res judicata*, i.e. when there has been a final judgment for a claim, the claim cannot be brought forward again (B). The third is a play on the credibility of the parties' positions (C). Each of these options will be addressed before making a qualitative assessment of the benefits of the three tools (D).

### A. Estoppel

Estoppel is recognised as a general principle of international commercial arbitration, and precludes a party from adopting inconsistent positions to the detriment of the other party. In essence, it means that a party is prevented from acting towards the other party in a manner that would be contrary to its previous behaviour because, in doing so, the other party's understanding of the relationship on which it relied, would be modified.[13] It is also referred to in certain legal systems as *venire contra factum proprium*.

Estoppel takes many shapes and forms and the way it operates can vary considerably from one legal system to another. Nonetheless, estoppel, as a general principle untied to a specific legal system, can be used as an argument within the context of a dispute between the parties. More importantly for our purposes, estoppel can also be used by an arbitral tribunal as a tool to exclude those arguments from the second arbitration that were previously settled by the first award.

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13 ICC Case No. 14108, XXXVI Y.B. Comm. Arb. 135-201 (2011) ("[…] It is a modern formulation of the principle 'non concedit venire contra factum proprium', a principle applied in many international arbitration awards."); *see also* Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 1962 I.C.J. 6 (June 15, 1962); Occidental Petroleum Corporation, Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award (Oct. 5, 2012); E. Gaillard, *L'interdiction de se contredire au détrimentd'autruicommeprincipegénéral du droit du commerce international*, Rev. Arb. 241 (1985); P. Pinsolle, *Les applications du principed'interdiction de se contredire au détrimentd'autruicommeprincipegénéral du droit du commerce international*, *in* L'INTERDICTION DE SE CONTREDIRE AU DÉTRIMENTD'AUTRUI 37-52 (M. Béhar-Touchais, ed., 2001); *see also* UNIDROIT Principles 2010, art. 1.8 ("A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment").

For example, in a gas price review, one party may put forward its definition of "economically market the gas" in the first arbitration to mean that the buyer must be able to make a given level of profit which represents the profit initially granted to the buyer when the contract was entered into. That party may not then change its position in a future arbitration to claim that the buyer must not receive the same level of profit as that which was determined when the contract was entered into but rather a hypothetical profit that a hypothetical average buyer could achieve in the marketplace.

### B. Res Judicata

*Res judicata* is a tool available to courts and tribunals in order to ensure, among other things, that there is no abuse of process. The doctrine of *res judicata* ensures that subsequent proceedings should be precluded if a tribunal views that it is necessary to prevent any kind of abuse of procedure to the unfair detriment of the other party. The theory of *res judicata* is that a claim may not be re-litigated once it has been judged on the merits.[14] Doctrines having similar effect are the doctrines of claim preclusion or issue preclusion (depending of the scope of the effects of the doctrine). A matter cannot be raised again once it has been settled by an authority possessed with jurisdiction to decide the claim. Therefore, an earlier and final adjudication by a court or arbitration tribunal is conclusive in any following proceedings involving the same parties and the same subject matter or relief.

*Res judicata* gives both a positive and a negative effect to the prior decision. The previous award is binding on both the parties and the tribunal for any future decision-making. This is the positive effect of the previous award. The other side of the coin is that a party is precluded from bringing forward a claim that has already been litigated and decided upon. Equally, a tribunal is precluded from deciding a claim that has already been brought forward to an arbitral tribunal and has been duly decided. This is the negative effect of the prior decision under the doctrine of *res judicata.*

A key issue that arises with respect to the determination of the applicable principles of *res judicata* in an international context is the determination of the law applicable to it. There are serious differences of approach in this respect, as will be briefly recalled below.

The process of determining the applicable law can raise issues of conflicts of law if one decides to pursue that route.[15] This article will not address this. Arbitral tribunals also have leeway to avoid such discussions and undertake an approach linked to the substantive rules. The modern view is that this direct method is the preferable approach of tribunals and doctrine alike.[16] The determination of a given applicable law is likely to have a profound impact on the scope of *res judicata.*

There is however a long standing debate relating to the scope of *res judicata* with respect to international arbitral awards. Each jurisdiction has its own view on this issue.[17] The scope of *res judicata* will differ depending on the law that is applied. For example, under French law,

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14 For a recent and exhaustive study on these issue, *see* Felix J. Montero & Laura Ruiz, *Res judicata and issue preclusion in international arbitration: ICC Case study*, 1 The Paris J. Int'l. Arb. 19 (2016).

15 Christophe Seraglini, *Le droit applicable à l'autorité de la chose jugée dans l'arbitrage*, 1 Rev. Arb. 59 (2016).

16 *Id.*

17 On this specific issue *see*, International Law Association [ILA], *Report on Res judicata and arbitration* (2004).

according to Article 1484 of the French Code of Civil Procedure, an award is vested with *res judicata* effect: "*as soon as it is made, an arbitral award shall be res judicata with regard to the claims adjudicated in that award*".[18] The position of French law is the following: any final decision made by an arbitral award on a disputed issue of a legal nature between the same parties is *res judicata*.

By contrast, in Switzerland, the Federal Supreme Court has held that: "*Res judicata only relates to the dispositif of the decision or the award. It does not cover the reasoning. However, one sometimes needs to look at the reasoning of the decision to know the exact meaning and extent of the dispositif.*"[19]

Looking briefly at English law as a yardstick for the common law approach, the issues that are settled by an arbitral tribunal are considered *res judicata*.[20] Therefore in the context of long-term contracts, especially with respect to disputes that relate to the interpretation of the provisions of the contract, an arbitral award would have *res judicata* effects for both the operative part and the reasoning.

Although the *res judicata* approach can seem appealing, tribunals are often loathe to pursue it. This is primarily because *res judicata* is not flexible at all. It binds both parties and the tribunal, and arbitral tribunals do not like to have their hands tied up. More importantly, however, the scope of *res judicata* can vary tremendously depending on the applicable law, and there is some degree of uncertainty in the determination of the applicable law. As a result, the effects of *res judicata* can be tailored to some degree. It follows that although *res judicata* can be a very powerful tool in a domestic context, it is less so in an international context.

A related question is whether there is any sanction for an arbitral tribunal that would disregard the *res judicata* effects of a prior decision. It is doubtful that, in France, this would lead to the annulment of the award as it would entail a review of the merits of the award and French Courts consistently affirm that a review of the merits of the award is prohibited.[21] There is however no case law on this issue and one cannot exclude the possibility that a French Court might take the view that respecting the *res judicata* effect of a prior binding decision is part of international public policy.

The Swiss Federal Tribunal has taken this view. First, it decided that an arbitral award that disregarded the *res judicata* effect of a prior Swiss court decision would be quashed for breach of international public policy.[22] In more recent decisions, the Federal Tribunal decided that the same solution would apply if an arbitral tribunal were to disregard the *res judicata* effect of a foreign decision.[23] The Federal Tribunal added however that the *res judicata* effect of the foreign decision could not exceed the *res judicata* effect that this foreign decision would have in

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18 CODE CIVIL [C. CIV.] [CIVIL CODE] art.1484 (Fr.), ¶ 1. (This article is applicable to international arbitrations by virtue of the cross reference found at Article 1506 of the same Code).

19 Bundesgericht [BGer] [Federal Supreme Court] Apr. 3, 2002, 128 ARRÊTS DU TRIBUNAL FEDERAL SUISSE (RECUIL OFFICIEL) [ATF] III 191 (Switz.); and *see* Bernard Corboz, *Le recours au Tribunal fédéral en matière d'arbitrage international*, *in* SEMAINE JUDICIAIRE 97 (Part II, Vol. 1, 2002).

20 GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3732-3827 (2d ed., 2014); *see also* Fidelitas Shipping Co Ltd v. V/O Exportchleb [1966] 1 QB 630, CA (Diplock LJ) (Eng.).

21 *See generally* Cour de cassation [Cass.] [Supreme Court for Judicial Matters], 1e civ., Nov. 14, 2006, 05-12395; Cour de cassation [Cass.] [Supreme Court for Judicial Matters], 1e civ., June 30, 2015, 14-19119.

22 Bundesgericht [BGer], Apr. 13, 2010, 4A_490/2009, 136 ARRÊTS DU TRIBUNAL FEDERAL SUISSE [ATF] III 345.

23 BGer, May 27, 2014, 4A_508/2013, 140 ATF III 278; BGer, May 29, 2014, 4A_633/2014.

Switzerland if that decision was recognized in Switzerland.[24] That is to say that the *res judicata* effect would be limited to the operative part of the decision, regardless of the rules of *res judicata* of the law of the relevant foreign state.

The authors are not aware of any other court having sanctioned an arbitral tribunal for having disregarded the *res judicata* effect of a prior decision. As a result, other than in Switzerland (but only for the operative part of the decision), an arbitral tribunal may be tempted to ignore such effects if only to avoid being bound by it. As a result, it is unlikely that an arbitral tribunal would be willing to be tied down by the *res judicata* doctrine if it can avoid it.

### C. Considering a Party's Credibility

Perhaps the most flexible tool available to an arbitral tribunal is simply to consider the credibility of the parties' arguments. This does not require that any particular condition be satisfied. It requires both that the full record of the previous arbitration is available to the new tribunal and that the new tribunal is very familiar with the previous submissions. It is also for the parties to draw the second tribunal's attention to the inconsistencies between the arguments raised in the first case and the position in the second case.

Under this approach, a party is not legally prevented from changing its position from one arbitration to the next. It must however provide a convincing justification for this change in position.

There is no distinction between legal and factual arguments in this respect. It only affects one party at a given point in time. For instance, with respect to the "economically market the gas" example, if a party in the first arbitration had stated that this means that they must make a 10% profit margin on reselling the gas (this figure is, of course, hypothetical), the issue of credibility will arise if that party claims, without explanation, in the next arbitration that a 2% profit margin is sufficient.

Confronted with such a claim, the arbitral tribunal can perfectly decide to retain the 10% figure if it is convinced that there is no justification for changing it. This will not require the arbitral tribunal to rely on any legal doctrine. It will rather be a direct decision of the tribunal based on the positions taken in the previous case, and the lack of justification for the newly adopted position. Conversely, the arbitral tribunal can choose to ignore the position taken in the previous case if there is a strong justification to depart from the previously held positions.

This approach enables the second arbitral tribunal to look at the totality of the evidence, both in the previous case and in the new case, and assess both legal and factual arguments to arrive at its own decision.

### D. Qualitative analysis of the tools available to tribunals

The three principal tools at the disposal of tribunals to deal with a first award, namely, *res judicata*, estoppel and the credibility of the parties have been considered. Each of these approaches has its

[24] However, the Federal Tribunal also held that the res judicata effect of a foreign decision is based on that legal system and will therefore not exceed the limits of the scope of the res judicata principle in that legal system.

own specific characteristics as described above. In this section, the pros and cons of each approach will be discussed and weighed against one another.

An approach based on estoppel or like mechanisms is simpler and more flexible for a tribunal than the approach based on *res judicata,* which is the most rigid of the three tools. The key distinction relates to who is bound by this approach and to what extent. *Res judicata* binds every actor involved in the second tribunal – the parties and the tribunal, and they are bound to the extent dictated by the applicable law. By contrast, estoppel binds the parties only, and generally only one of them at a time.

In addition, the arbitral tribunal does not have to concern itself with questions of the applicable law, and the scope and enforcement of *res judicata*. The applicability of estoppel or *venire contra factum proprium* is more straightforward, especially as we have shown above that it is a general principle of international arbitration. This is the main disadvantage of a *res judicata* approach. The questions surrounding the applicable law and the specific scope of *res judicata* are often complicated and cumbersome to deal with for a tribunal.

The difficulty with estoppel, even stripped from its technicalities, is that it requires reliance by one party on the statements made by the other. Estoppel protects this reliance. It will not always be possible to establish reliance with enough precision to trigger an estoppel-type mechanism. For an estoppel argument to succeed, inconsistent statements must be accompanied by a demonstration that the other party has relied on this particular statement. This explains why, in practice, arbitral tribunals often resort to more flexible mechanisms.

On the other hand, the approach of considering a party's credibility is particularly appealing for an arbitral tribunal as the tribunal itself is not bound by anything. It amounts to saying to a party that it is held to what it said previously, unless it has a very good reason for changing its position. It is a practical solution because the arbitral tribunal can consider the totality of a party's arguments in the broader context of the particular arbitration. The arbitral tribunal can also consider the party's arguments against the backdrop of the previous dispute.

This approach is also most likely lead to the just result, while ensuring full respect of due process. If the parties are allowed to reopen previously settled arguments, and the tribunal may consider their new arguments while also considering their credibility, this would also ensure that the party has its due process rights respected. The tribunal will therefore have all the arguments at its disposal when making its decision.

The principal drawback with this approach is, of course, that it takes away from the policy considerations that gave rise to the principle of *res judicata.* As stated above, the underlying concern was the expediency of proceedings. If an arbitral tribunal will regard the credibility of the parties when deciding the second dispute, then it must, necessarily, consider the arguments of the parties anew. It must also not only consider the decision of the previous tribunal but also the arguments of the parties during the course of the previous dispute. Therefore, despite the added flexibility and practicality, it slows down the adjudication process. It adds significantly to the work-load of the second tribunal, and could give rise to the potential for an abuse of process. That said, in practice, this approach is often applied cumulatively with *res judicata* and estoppel.

It is the opinion of the authors however that the drawback of the potential abuse of process does not outweigh the benefit of the flexibility that this approach affords. The pursuit of the just result and ensuring beyond any doubt the full respect of due process is not only a far more important consideration for an arbitral tribunal, in the long run, it is also the most efficient for the decision making process.