

COLLATERAL ESTOPPEL OF AN
INTERNATIONAL ARBITRAL AWARD IN THE
CIVIL LAW TRADITION OF THE COLOMBIAN
LEGAL SYSTEM

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INTRODUCTION

The world nowadays is more connected than it was in the past. People every day get into several relationships from different places in the world. People more often than before create obligation and rights for the law to protect. Meaning that the legal barriers and limits need to be softened to protect the people, who are the last and most important interest of the governments and States.

This phenomenon is causing legal problems for the countries to protect those relationships, to enforce those obligations, and to protect those rights. Each country has its own legal order, recognizes its own legal tradition, and it has its own institution regarding rights, obligations and relationships of the people. The problem arises, sometimes, when the parties in an international context seek the protection of the law of a specific State of those rights, obligations, and relationships derived from the international relationship at which they are involved. It also arises because those rights, obligations and relationships have origin and meaning in the law of another country, no in the country the protection is pretended.

The purpose of this analysis is to present that international commercial arbitration is one of those situations that creates relationships, obligations and

rights in one country, under one sovereign legal system, that the parties seek to protect and enforce in another country with another sovereign legal order.

Another purpose is to present that even though the common law tradition recognizes different doctrines regarding the conclusive and preclusive effect of adjudicative decisions in comparison with the civil law tradition due to international commercial arbitration and the international public and private law, it is possible in certain situations that a Country of the civil law system has to apply doctrines non recognized by it but that has been recognized in a Country of the common law system, where the adjudicative decision has been relied upon.

Also, it is the purpose of this analysis to present that the legal traditions, the legal orders can be different in certain aspects but that the principles that are the basis of any legal tradition can be similar and can pursue the same goals, causing the differences to disappear.

In order to comply with the objectives of the present analysis, first, there is going to be explained the differences between the common law and the civil traditions regarding the binding, conclusive and preclusive effect of adjudicative decisions. Second, there is going to be explained the similarities of regarding res judicata. Third, there is going to be analyzed the doctrine of issue preclusion or collateral estoppel, that has been recognized by the common law system, but that has not been recognized, neither denied, by the civil law tradition. Fourth,

there is going to be explained res judicata from the Colombian legal system, and international arbitration as part of the judicial system and as exercise of the right to access the judiciary. Finally, it is going to be analyzed an inquiry regarding the possibility under Colombian law to recognize collateral estoppel to an international award, even though it has not been recognized domestically.

BACKGROUND

1. Common Law tradition v. Civil Law tradition.

The common law tradition and the civil law tradition have great differences due to the origin and principles ruling each legal system. The origin of the common law is cases, “the common law is to be found primarily in precedents and that the law can be inferred just from the cases”¹. On the other hand, the origin of the civil law is the code. This origin creates a substantial difference regarding the starting point of where to look for the legal source to solve a controversy. In the common law system, the solution for a controversy is researched in the precedent; case analysis is the first and primarily source of law. While, in the civil law system, the solution for a controversy is researched in the codification, positive law, which is the first source of law. Thus, the origin can be understood as the source of law, which provides the structure for thinking about a problem.

However, this understanding of the origin of these legal traditions is not absolute because in countries of the common law, there is also positive law, statutes, legislation and principles as sources of law, “ the common law consists not only of cases and precedents but also of legislative interventions by

¹ Fletcher George & Sheppard Steve, American Law in a Global Context, 15 (Oxford University press) (2005).

Parliament”². Also, the civil law system involves scholarly commentaries, judicial interpretation and principles of law as sources of law. Nevertheless, the existence of diverse sources of law in each tradition does not cause to disappear the differences regarding the origin and the importance of it to search for the law applicable to a particular problem.

The principles of law ruling each legal system determine the big difference between the two traditions. The principles of law sometimes have different context and meaning, and the principles of law play a different role within each system. For example, the principle derived from the right to access the court in the common law system and the principle derived from the right to access to the judiciary in the civil law system. Both principles are derived from the same purpose but both have different understanding from the perspective of arbitration. In the common law system agreeing to arbitrate means a waiver to the right to access the court, while in the civil law system agreeing to arbitrate does not mean a waiver to access the judiciary, because arbitration is understood as a part of the judicial system. Thus, the principles of law cause a substantial difference between the two legal traditions even though sometimes, those principles derived from the same idea and pursued the same goal.

For centuries those differences, the origin and the principles of law, have determined a central point regarding the way legal institutions are designed and

² Fletcher George & Sheppard Steve, American Law in a Global Context, 18 (Oxford University press) (2005).

performed at each tradition. Some institutions that exist in the two legal traditions have been developed from the same starting point, from the same need and even from the same concept. However, the origin and principles founded in each legal tradition have made those institutions to be applied or practiced in different ways.

2. Former Adjudication.

Former adjudication is one of those institutions that co-exist in the common and the civil law system. However, the common law recognizes within this institution two doctrines, claim preclusion and issue preclusion, while the civil law just recognizes the doctrine of claim preclusion within the institution. Nevertheless, former adjudication is based on the concern regarding the effect of judgments on subsequent litigation and it serves to bring lawsuits to end³ in both systems.

A. *Res Judicata*.

The common law system uses claim preclusion and *res judicata* interchangeable, while the civil law system uses *res judicata* and *cosa juzgada* interchangeable. Even though the terminology is different, the context and meaning, the principles, and the requirements are almost the same.

³ Yeazell, Stephen C., Civil Procedure, 657 (Aspen Publishers, Sixth Edition) (2004)

Res judicata is an effect recognized to a decision taken by a judicial tribunal. In the common law under claim preclusion, a final judgment on the merits in a prior suit bars a second on the same claim involving the same parties or persons in privity with these parties⁴. A person is precluded from relitigating any claim or cause of action that was or could have been litigated in a prior proceeding⁵. In the civil law:

“El presupuesto de cosa juzgada impide la modificación de una norma jurisdiccional ya emitida en proceso anterior y evita la generación de decisiones contradictorias, al rechazar la posibilidad de discusión de una cuestión ya tratada y decidida. No solo es necesario que una decisión jurisdiccional se plasme a través de un contenido vinculante entre las partes, sino que también se requiere proteger el contenido interno, evitándose que posteriormente se genere una nueva decisión contradictoria. La cosa juzgada solo cubre a los sujetos que se involucraron en el proceso jurisdiccional a título de parte (es decir, como sujeto activo o pasivo de la pretensión o de las pretensiones procesales que se cumularon en el mismo)”⁶.

Both systems have developed the context and meaning of res judicata in similar ways. Res judicata is an effect that is assigned to a judicial decision, which is final. Res judicata is an effect that is assigned to a judicial decision on the merits of a specific controversy. Res judicata is an effect that is assigned to a

⁴ Restatement (Second) of Judgments Section 18 (1982)

⁵ *Rush v. City of Maple Heights*, 147 N.E.2d 599 (1958)

⁶ Martín Agudelo Ramírez, Los límites subjetivos de la cosa juzgada desde el horizonte de la bilateralidad de la audiencia, 1 (unpublished comment, Universidad de Medellín) (2001)

judicial decision of a controversy among the parties at court. *Res judicata* is an effect of a judicial decision that bars a second lawsuit between the same parties over the same subject matter of controversy.

The principles that are the basis of *res judicata* are conclusiveness or finality, efficiency, preclusiveness, and the avoidance of inconsistency, which are concurrent in the institution in the two legal systems. In the common law system, *claim preclusion* “encapsulates the principle inherent in all judicial systems which provides that an earlier adjudication is conclusive in a second suit involving the same subject matter and same legal bases.”⁷ In the civil law system, *cosa juzgada* “es la norma concreta de la solución del conflicto que fue objeto de la decisión que en su obligatoriedad se ve además reforzada por la característica de la inmodificabilidad”.⁸

Both traditions recognize the principle of conclusiveness of the judicial decision, which can be understood via “adjudication is conclusive” and “norma concreta de la solución del conflicto”. Conclusiveness means that the decision taken in a first proceeding is the final one over the controversy, and in a second forum that decision must be taken as logical and legal to reach a second decision in line with the determination of the first one. This conclusiveness or finality principle helps for the materialization of the other principles such as efficiency and avoidance of contradictory decisions because barring a second lawsuit on the

⁷ Barnett, Peter, *Res Judicata, Estoppel, and Foreign Judgments*, 8 (Oxford University Press) (2001)

⁸ Quintero, Beatriz, *Teoría General del Proceso Tomo II*. 208 (Editorial Temis) (1998)

merits over a controversy already adjudicated in a first forum, the judiciary branch is more efficient and contradictory decisions are avoided.

The doctrine of *res judicata* demands a number of requirements in order to have effect. Those requirements in the two legal traditions are similar, which are:

(1) Tribunal of competent jurisdiction.

The tribunal issuing a decision must be competent, which means that the tribunal has subject matter jurisdiction and personal jurisdiction under the common law; and that the tribunal “goza de la aptitud legal de ejercer funcion jurisdiccional con un asunto determinado”⁹ under the civil law. This requirement in pure reading is just related to courts but it has been expanded to arbitral tribunal according to the law and principles of the two traditions. Moreover, this requirement has been understood for international courts and international arbitral tribunals, according to international public and private law.

(2) Judicial decision.

The decision with *res judicata* effect must be a decision or adjudication, which determines a question of law, facts or both fact and law¹⁰. A judgment, sentence, judicial declaration and arbitral award (*laudo arbitral*) for purposes of *res judicata* are considered adjudication.

⁹ Quintero, Beatriz, Teoria General del Proceso Tomo II 203 (Editorial Temis) (1998).

¹⁰ Barnett, Peter, Res Judicata, Estoppel, and Foreign Judgments 13 (Oxford University Press) (2001)

(3) Final and conclusive.

A judicial decision and an arbitral award is final and conclusive under the common law “when the matter should have been raised and contradicted before the earlier tribunal and shall have been clearly, and finally, decided by it”¹¹. Also, a judicial decision is final and conclusive under the civil law “cuando la pretension ha sido alegada, sustentada, controvertida y decidida, la resolucion sobre dicha pretension es final, y constituye “caso juzgado”¹² This character of final is also required to an arbitral award, either domestic or international, for purposes of res judicata in both systems.

(4) A decision on the merits.

A judicial decision and an arbitral award must be on the merits in order to have res judicata effect. On the merits under the common law tradition is a decision that involves the determination of substantive questions¹³, rights, and facts in issue. On the merits under the civil law is “sentencia de fondo sobre las cuestiones de merito del proceso, which means the adjudication is over the claims (pretensions) and is final over those claims. Therefore, a decision with res judicata effect both under the common law and under the civil law has to be decisive about the issues and questions of the controversy.

(5) Same parties.

¹¹ Barnett, Peter, Res Judicata, Estoppel, and Foreign Judgments 17 (Oxford University Press) (2001)

¹² Allorio, Enrico, Problemas del derecho procesal, II 105 (Trad. De Santiago Sentis Melendo, EJE) (1963).

¹³ *Gargallo v. Merrill Lynch*, 918 F.2d 658 (1990)

A judicial decision and an arbitral award have res judicata effect just between the parties involved in the first litigation or arbitration proceeding. The common law rules “claim preclusion will operate only between those who were the parties different claims for preclusions purposes, even when those claims arises out of the same transaction”¹⁴. The civil law rules “la cosa juzgada solo cobija a los sujetos que se involucraron en el proceso jurisdiccional a titulo de parte”¹⁵. Both legal traditions limit the res judicata effect recognized to a judicial decision and to an arbitral award, either domestic or international or foreign, between the parties that were part of the litigation or the arbitral proceeding, and the parties whose controversy was adjudicated on the merits.

(6) Same legal and factual issues.

Both legal traditions require that the controversy adjudicated in the first proceeding is the same as the controversy that is pretending to be adjudicated in the second forum. The res judicata effect comes to life when one party attempts to get adjudication from another forum, court or arbitral tribunal, regarding a specific controversy that has been adjudicated in the past for another court or arbitral tribunal. This requirement is based on the idea that a plaintiff who brings a case, or a defendant who defends one, should not be able to try again if he is not satisfied with the result¹⁶.

¹⁴ Yeazell, Sthepen C., Civil Procedure 673 (Aspen Publishers Sixth Edition) (2004)

¹⁵ Martin Agudelo Ramirez, Los límites subjetivos de la cosa juzgada desde el horizonte de la bilateralidad de la audiencia 2 (unpublished comment, Universidad de Medellin) (2001)

¹⁶ 18 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure Section 4416 (2008)

Therefore, the institution of res judicata, either as claim preclusion or as cosa juzgada, coexists in the two legal traditions and works in the same way. The meaning and context, the principles and the requirements confirm that res judicata is an effect of judicial decisions or arbitral awards, domestic or international, that a final judgment of a competent court is conclusive upon the parties in any subsequent litigation involving the same cause of action.

B. Issue preclusion.

Issue preclusion is a doctrine part of the institution of former adjudication, which actually co-exists in the common law and the civil law and it is based on the same principles. However, the civil law system does not recognize the doctrine of issue preclusion within the institution of former adjudication. This is one of the substantial differences regarding the conclusive and preclusive effect of a judicial decision and an arbitral award, domestic or international.

Issue preclusion in the common law system is based on the same principles of law that rule claim preclusion but it is narrower. Issue preclusion, also known as collateral estoppel, “prevents parties from relitigating specific factual and legal issues that have been adjudicated in a prior proceeding and that arise in subsequent litigation involving a different claim than was contested in the first case”¹⁷. Thus, issue preclusion bars any of the parties that had already been

¹⁷ Restatement (second) of judgments Section 27 (1982)

part of a prior litigation or arbitral proceeding for alleging different legal and factual theories regarding a particular issue of facts or a particular issue of law.

Moreover, issue preclusion has been extended or expanded to third parties that were not part of the first litigation or arbitral proceeding at which the parties obtain the judicial decision or the arbitral award that has the effect of collateral estoppel. This means that a third party, stranger, at the initial proceeding could invoke conclusive and preclusive effect in front of any of the parties when one of them attempts to relitigate any factual or legal issue that was already adjudicated. Then, a party and/or third party can use issue preclusion as defensive method to put end and bar somebody from contradicting an issue that has already been distinctly raised and decided.

The concept of third party in issue preclusion has developed the doctrine of non-mutuality. This doctrine derived from the concept of third parties in issue preclusion has reference to the relationship they have with the parties of the first proceeding. The third parties do not have to be in privity with the parties, neither they have to be in a mutual relationship. The non-mutuality doctrine means that the third parties can take advantage of the issue preclusion effect of a judicial decision and/or an arbitral award in front of a real party, who lost a claim or issue, and who had full and fair opportunity to litigate the claim or issue. The non-mutuality is based on the argument that there is no reason for barring a party from

asserting new theories regarding a factual and legal issue that has been decided on the merits. In the words of Jeremy Bentham:

“There is reason for saying that a man shall not lose his cause in consequence of the verdict given in a former proceeding to which he was not a party; but there is no reason whatever for saying that he shall not lose his cause in consequence of the verdict in a proceeding to which he was a party, merely because his adversary was not. It is right enough that a verdict obtained by A against B should not bar the claim of a third party C; but that it should not be evidence in favor of C against B, seems the very height of absurdity”¹⁸.

Collateral estoppel is then a defensive method that can be alleged in two ways, as offensive collateral estoppel and as a defensive collateral estoppel. “Offensive use of collateral estoppel refers to a situation in which plaintiff seeks to foreclose a defendant from relitigating an issue the defendant has previously litigated unsuccessfully in another action against the same, or a different party”¹⁹. “Defensive use of collateral estoppel refers to a situation in which defendant seeks to prevent plaintiff from relitigating an issue plaintiff has previously litigated unsuccessfully in another action against the same or a different party”²⁰. Thus, a third party could allege preclusion with respect to a factual and/or legal issue that has been decided in a prior judicial decision or arbitral award in front of a party under the common law tradition.

¹⁸ Barnett, Peter, Res Judicata, Estoppel, and Foreign Judgments 64 (Oxford University Press) (2001).

¹⁹ *U.S. v. Mendoza*, 464 U.S. 154, 156 (1984)

²⁰ *U.S. v. Mendoza*, 464 U.S. 154, 157 (1984)

Both offensive and defensive collateral estoppel have been recognized for judicial decision but in reference to arbitral awards, it has been argued because of the contractual character of the arbitral proceeding. However, the parties freely choose adjudication via arbitration, the parties intent is to get a final and conclusive decision over the controversy, factual and legal, and the parties opportunity to defend their theories and present evidence to support those in an arbitral proceeding, justify that the context and result of the arbitral proceeding is binding against them, even when the individual using the award was not a party during the arbitral proceeding. Nevertheless, collateral estoppel is a matter of discretion of the “judge” assigning the effect and in front of whom the third party alleges preclusive award. In words of Richard Shell:

“With respect to collateral estoppel, courts should impose preclusion when relitigation of particular issues threatens the finality of an award that the parties intended to be binding. When finality is not threatened, courts should examine whether the formality of the factfinding process engaged in by the arbitros supports an inference that the parties expected issue preclusive effects upon later litigation.”²¹

Collateral estoppel or issue preclusion is recognized as effect for judicial decisions and arbitral awards, domestic and international, under the common law. It is recognized with the two methods of defense, offensive and defensive, against the parties, by not only those parties, in privity and mutual relationship, but also by third parties with non-mutuality. It is recognized in case by case basis

²¹ Shell, Richard. Res Judicata and Collateral Estoppel effects of commercial arbitration, 35 UCLA Law Review 623, 674. (1988)

and it is recognized for the judge or arbitrator to apply according to its discretion and according to the principles of fairness, conclusiveness and efficiency.

However, the civil law tradition has not recognized and has not developed collateral estoppel or issue preclusion. Some scholars argue that “the codified res judicata is normally confined to the claims rather than the issues determined in a judgment”²² even though it is true, the concept of res judicata as it is understood today, does not deny the existence of issue preclusion or collateral estoppel, it just has not been developed yet because if a claim is decided on the merits and it is relevant for the final decision that recognizes specific right to one of the parties, that specific claim with all its issues enjoy of the preclusive and conclusive effect. Nevertheless, this understanding of the possibility of collateral estoppel or issue preclusion in the civil law system is not the purpose of this analysis and it is not going to be developed.

Therefore, judicial decisions and arbitral awards, domestic and international, enjoy of another effect different than res judicata, called collateral estoppel, which has been recognized and developed under the common law tradition, and has not been recognized and developed under the civil law tradition.

²² Brekoulis, Stavros, The effect of an arbitral award and third parties in international arbitration: res judicata revised, 16 Am. Rev. Int'l Arb. 177, 183 (2005)

This conclusion creates an inquiry regarding international judicial decisions and international arbitral awards. Those adjudications enjoy the effect of res judicata and issue preclusion when are issued in a country of the common law tradition, but when are issued in a country of the civil law tradition those adjudications do not enjoy of issue preclusion effect. How the conclusive and preclusive effect works, when an international judicial decision and international arbitral award issued in a common law country is intended to be recognized and enforced in a civil law country, like Colombia? Is it possible to execute a foreign adjudication with collateral estoppel in a country of civil law tradition, like Colombia? How is it possible?

THE COLOMBIAN LEGAL SYSTEM.

The legal system of Colombia follows the civil law tradition, therefore Colombia does not recognize issue preclusion but it does recognize and rules *res judicata* in great extent. The Colombian legal system also recognizes arbitration as an adjudicating proceeding that promotes the right of access to the judiciary; therefore the award issue as a consequence of an arbitral proceeding has been understood to enjoy the same nature and characteristics of judicial decision. This homologation of the award to a *sentencia* means that an arbitral award, called *laudo arbitral*, has recognized the conclusive and preclusive effect of *res judicata*. In the words of Hernan Fabio Lopez Blanco:

“Todo lo que se predica acerca de la ejecucion de una sentencia lo es de identica manera respecto de los laudos arbitrales que, al fin y al cabo, no son nada diversos de aquellas: los laudos son las sentencias de los arbitros.”²³

Colombia has recognized international arbitration as an alternative to exercise the right to access to the jurisdiction. International arbitration is part of the Colombian legal order after the government signed the Convention for recognition and enforcement of foreign arbitral awards and ratified it by the Statute 39 of 1990, after the government signed the Panama Convention and other treaties with several countries.

²³ Lopez Blanco, Hernan Fabio, Instituciones de Derecho procesal civil Colombiano. Tomo II 872 (Dupre Editores, Septima Edicion) (1999).

1. Cosa Juzgada or Resjudicata.

In Colombia, when an adjudicative decision is final and binding, it has effect of res judicata. A decision is final and binding after it is notified to the parties and the parties do not appeal within the period authorized by the law, or competent superior decides the appeal and the other procedural resources available to the parties. Once the judicial decision and/or the arbitral award is final and binding, the adjudication has conclusive and preclusive effect. In the words of the legislator:

“La sentencia ejecutoriada proferida en proceso contencioso tiene fuerza de cosa juzgada,(...)”. Código de Procedimiento Civil [CPC] art 332, 1st paragraph. (Colom.)

Colombian law rules that an adjudicative decision has the effect of res judicata as long as the new litigation is related to the object and subject matter, is regarding the same claim, and involves the same parties. It is ruled:

“(...) siempre que el Nuevo proceso verse sobre el mismo objeto, y se funde en la misma causa que el anterior, y que entreambos procesos haya identidad jurídica de partes”. Código de Procedimiento Civil [CPC] art 332, 1st paragraph. (Colom.)

In plain view, Colombian res judicata can only be alleged by the parties against the same parties. However, it has been interpreted that res judicata has a direct and indirect effect because the party's relationship that is adjudicated can affect strangers or third parties. Therefore, when a third party has an interest on the party's relationship or right recognized in the decision, and/or when a third

party has a relationship or right dependable from the relationship of the parties in the litigation or arbitral proceeding. In words of Martin Agudelo:

“(…) se comprende como los terceros pueden ser titulares de relaciones dependientes con las procesadas. Es posible encontrar una serie de relaciones que se cruzan o que son interdependientes o interferidas entre si, lo que puede implicar la afectacion directa e indirecta de terceros. Se extiende de esta forma la cosa juzgada como consecuencia logica de las relaciones sustanciales procesadas que se conectan a otras, siendo inevitable la afectacion de terceros.”²⁴

This acknowledgment that third parties are affected by adjudication to other parties supposes that third parties, strangers, can allege *res judicata* or *cosa juzgada* in order to avoid inconsistent decisions regarding the same object. In order to avoid relitigation of claims already decided, in order to avoid expenditure of the resources by the parties and the judiciary, and in order to avoid the parties to pretend another decision due to the in-satisfaction for the context of the prior one.

This possibility for third parties to take advantage of the conclusive and preclusive effect of a judicial decision and/or arbitral award is always against the party that had the opportunity to defend and support its case during the proceeding. The Colombian legal system through its principles of law and especially the principle of contradiction supposes than a party that has not had

²⁴ Martin Agudelo Ramirez, Los límites subjetivos de la cosa juzgada desde el horizonte de la bilateralidad de la audiencia 2 (unpublished comment, Universidad de Medellin) (2001)

the opportunity to defend and support its theory cannot have its rights adjudicated in a judicial decision and/or arbitral and cannot be submitted to the effect of res judicata. In words of Martin Agudelo:

“La seguridad que propicie la cosa juzgada solamente se debe pregonar de una relacion procesal en la que se surtieron mecanismos de publicidad suficientes para que la justicia no sea vulnerada a nivel estimativo en cada caso concreto; es asi como resulta compatible conciliar ambas realidades de justicia y seguridad juridica. Solo podra afectarse con la sentencia aquel sujeto al que se le ofrecio de forma clara la oportunidad de llegar al proceso, por los medios claros de publicidad con los que contaba este instrumento, haya o no estado presente en el mismo desplegando actos concretos, siempre y cuando haya tenido interes en perseguir la sentencia. (...) Una extension de la cosa juzgada sobre terceros ha de estar condicionada por la existencia de unos mecanismos suficientes de publicidad en el proceso, para que se les permita hacer valer sus derechos e intereses en el proceso, sosteniendo una posicion juridica concreta; (...)”²⁵

Therefore, if the only limit to extend res judicata is the principle of contradiction and the right of defense, when a party has the opportunity to defend and support its case, claims and rights, the party is subject to the effect of res judicata, and then a third party can use the adjudicative decision against that party.

²⁵ Martin Agudelo Ramirez, Los límites subjetivos de la cosa juzgada desde el horizonte de la bilateralidad de la audiencia 3 (unpublished comment, Universidad de Medellin) (2001)

2. Issue Preclusion or Collateral Estoppel.

Colombia does not recognize issue preclusion and it is not part of the law, as a consequence, any form of adjudication proceeding authorized does not create this effect. Nevertheless, the law of arbitration, either international or domestic, creates a gap and the possibility that an arbitral award gets this effect in Colombia, and mostly in any country following the civil law tradition.

One of those scenes, and the most likely to happen, is in international arbitration because it can take place in common law country and it can be subjected to the law of a common law country, because the parties agree to it or because the arbitrators chose that procedural law. It means that the award would have conclusive and preclusive effect in terms not only of claim preclusion but also in terms of collateral estoppel. When the international arbitral award is brought to Colombia, it enjoys the all the effects, and a third party could pretend to use this award to preclude any of the parties to re-litigate any issue and/or claim in a subsequent proceeding that takes place in Colombia.

Therefore, even though Colombia does not recognize collateral estoppel, situations involving the application of collateral estoppel can exist in Colombian courts due to international arbitration.

3. International Arbitration.

Colombian system recognizes international arbitration as an alternative method of adjudication and assigns the arbitral award the nature and effects of a judicial decision. Colombia signed the Convention for recognition and enforcement of foreign award, also known as the New York Convention, and Colombia ratified this convention by enacting the statute 39 de 1990. The country after signing and ratifying the Convention made it binding in the domestic order, which means that Colombian judges are obligated to recognize and to enforce international arbitral awards.

Also, Colombia enacted the statute 315 of 1996, which rules international arbitration, defines the conditions for an arbitration proceeding to be qualified as international, defines when an award is international, defines that the arbitral agreement or clause can be used as a defense for jurisdiction issues; and establishes Supremacy of the treaties ratified for Colombia of arbitration in relation with the domestic law²⁶.

The Constitution in the article 116 recognizes the possibility of adjudication via arbitration and conciliation, which means that people can agree to arbitrate its controversies either in the territory or in a foreign jurisdiction.

²⁶ (...) a través de la Ley 39 de 1990 el Estado Colombiano aceptó el acatamiento a decisiones proferidas por tribunales arbitrales extranjeros; sometimiento que hoy se mantiene constante en la legislación nacional, conforme a lo establecido en la Ley 315 de 1996, que se encargó de reglamentar algunos aspectos del arbitraje internacional. See. Sala de lo Contencioso Administrativo, Consejo de Estado, 2004, 11001-03-26-000-2003-00034-01(25261) (Colom.).

Besides, the freedom of contract and principle of contractual autonomy allow people in Colombia to agree to arbitrate its controversies, either in Colombia or in another country.

As a consequence, the Colombian legal system authorizes the parties something more than to arbitrate, it authorizes the parties to define the substantive law applicable to the controversy they agree to arbitrate, and it also authorizes the parties to choose and design the procedure or procedural law to follow by the arbitral tribunal. These authorizations are established in the statute 315 of 1996, the words of the second rule:

“En todo caso, las partes son libres de determinar la norma sustancial aplicable conforme a la cual los árbitros habrán de resolver el litigio. También podrán directamente o mediante referencia a un reglamento de arbitraje, determinar todo lo concerniente al procedimiento arbitral incluyendo la convocatoria, la constitución, la tramitación, el idioma, la designación y nacionalidad de los árbitros, así como la sede del Tribunal, la cual podrá estar en Colombia o en un país extranjero.” Ley 315, 1996, 42.878 (Sept. 1996) (Colom.)

A. Definition of international arbitration.

Colombian law defines very specifically when arbitration is international. The statute 315 of 1996 establishes five scenes for arbitration to be international, scenes that do not have to be concurrent. It is necessary that just one of those scenarios be realized in order for arbitration to be international. Those scenarios have in common a foreign element because it should involve parties from

different countries, it should take place in a foreign country, it should involve international commercial relations, it should involve partial foreign execution of the agreement from which the arbitration arises, etc. In the words of the first rule:

“1. Que las partes, al momento de la celebración del pacto arbitral, tengan su domicilio en Estados diferentes.

2. Que el lugar de cumplimiento de aquella parte sustancial de las obligaciones directamente vinculada con el objeto del litigio se encuentre situado fuera del Estado en el cual las partes tienen su domicilio principal.

3. Cuando el lugar del arbitraje se encuentra fuera del Estado en que las partes tienen sus domicilios, siempre que se hubiere pactado tal eventualidad en el pacto arbitral.

4. Cuando el asunto objeto del pacto arbitral vincule claramente los intereses de más de un Estado y las partes así lo hayan convenido expresamente.

5. Cuando la controversia sometida a decisión arbitral afecte directa e inequívocamente los intereses del comercio internacional.” Ley 315 art. 1 (1996) (Colom.)

Therefore, when parties agree to arbitrate and that arbitration meets any of the five scenarios, the arbitration is international, the award is international, and Colombia is obligated to recognize and enforce that foreign award when is brought to the country due to the ratification of the New York Convention.

4. Exequatur

Colombian law establishes that an international decision and/or foreign award can have binding effect domestically, it establishes the type of effect the foreign adjudication might have internally, it also establishes the requirements for the foreign decision to meet to be binding in the country, and it rules the procedure to follow in order to have an international adjudication enforced by a Colombian judge, which is called exequatur.

A. Effect of international adjudicative decision internally.

Colombian law establishes that foreign judicial decisions and foreign arbitral awards can be enforced in the country with the effect that has been assigned in the treaty, or the effect recognized by Colombian procedural law. This means that an arbitral award issued in a tribunal located in the United States and submitted to the United States procedural law, and that is brought to Colombia for recognition and enforceability according to the New York Convention, can be enforced or executed in a Colombian court with the binding effect that has been assigned by the Convention. In the words of the rule 693 of the Código Procedimiento Civil Colombiano:

“Las sentencias y otras providencias que revistan tal caracter, pronunciadas en un pais extranjero en procesos contenciosos o de jurisdiccion voluntaria, tendran en Colombia la fuerza que les concendan los tratados existentes con ese pais, y en su defecto la que alli se reconozca a las proferidas en Colombia. Lo dispuesto en el inciso anterior se aplicara a los laudos arbitrales proferidos en el exterior.” Código de Procedimiento Civil [CPC] art. 693 (Colom.)

The New York Convention does not rule specifically the binding effect that an international arbitral award might have, then it cannot be said that the United States binding effect is applicable in Colombia due to the Convention. Nevertheless, the will of the parties is that the award has the effect of the place where it was issued, because the parties expressly agree to specific procedural law or because the parties did not agree to specific procedural law, and it was defined by the arbitrators that it was the applicable law, or it was applied as custom that the tribunal is required to act following the laws of the country where it takes place²⁷. As a result, a foreign award issued by a tribunal in the United States might have claim preclusion and collateral estoppel effect in Colombia due to the express authorization of the law.

However, it can be argued that due to the fact that the will of the parties was not a factor defined in the rule, this cannot be used to justify and expand the effect of a foreign award in Colombian jurisdiction. It also can be sustained that the legislator only defined the treaty exception in order to respect the will of the executive branch when entering in a treaty with another country.

Thus, a foreign award issued in the United States under the procedural rules of this country enjoys the effect of claim preclusion and collateral estoppel, and Colombian law might apply these effects of the final award due to the

²⁷ Each contracting State shall recognize arbitral awards as binding and enforce them in accordance with the *rules of procedure of the territory where the award is relied upon*, under the conditions laid down in the following articles. See Convention on the recognition and enforcement of foreign arbitral awards art. 3, June 10, 1958, U.N.

language of rule 693, even though issue preclusion effect is not recognized in the legal order of the country.

B. The requirements.

Colombian law establishes that a foreign judicial decision and/or arbitral in order to have effect in Colombia has to meet several requirements. Those requirements seek to guarantee that the litigation or arbitral proceeding had met the minimum standard of due process, the right of contradiction had been respected, and the decision on the merits does not violate Colombian law. In the words of the H.J. Jaime Arrubla Paucar:

“(…) que se reúnan ciertas exigencias mínimas señaladas por la legislación con el fin de precaverse de las 'irregularidades internacionales' de que las ameritadas sentencias puedan adolecer”.²⁸ (Sent. de 16 de enero de 1995).

Rule 694, Código Procedimiento Civil Colombiano, defines seven requirements that have to concur for an arbitral award to be enforced in Colombia. For the purpose of the present analysis the second and third requirement are the only relevant for the specific inquiry of this paper. The second requirement is relevant because the interpretation of its language together with article V(2)(b) of the New York Convention leads to the conclusion when an international award cannot be recognized nor enforced in Colombia. In the words of rule 694 #2:

²⁸ Sala de Casación Civil, Corte Suprema de Justicia, 2005, 11001-02-03-000-2003-00140-01 (Colom.)

“Para que la sentencia o el laudo arbitral surta efectos en el país, deberá reunir los siguientes requisitos:

2. Que no se oponga a leyes u otras disposiciones colombianas de orden público, exceptuadas las de procedimiento.” Código de Procedimiento Civil [CPC] art. 694 Nro. 2 (Colom.)

This ruling means that when the international arbitral and/or the international judicial decision violates “las normas orden público”, it cannot be enforced. The concept of orden público is related to substantive law, which is clearly understood from the language of the rule that expressly excludes the procedural law. Moreover, The Supreme Court has reinforced this concept in different decisions holding that the context of the adjudicative decision has to be identical and cannot contradict Colombian law. In the words of the H.J. Jaime Arrubla Paucar:

“El pronunciamiento extranjero, por otro lado, no se opone a los principios y leyes de orden público del Estado Colombiano, pues en la legislación patria se prevé la disolución del matrimonio civil "por divorcio judicialmente decretado" -artículo 152 del Código Civil- a más que el mutuo acuerdo de los cónyuges, que justificó el decreto de divorcio del acto matrimonial de que aquí se trata, es causal que también en Colombia autoriza decretarlo -artículo 154 ibidem-.”²⁹

The importance of the exclusion done by the rule is derived of Rule 6 from the Código de Procedimiento Civil (CPC), which establishes that procedural law

²⁹ Sala de Casación Civil, Corte Suprema de Justicia, 2005, 11001-02-03-000-2003-00140-01 (Colom.)

are “normas de orden publico”, and therefore are rules of obligatory performance, unless the law authorizes the opposite. In the words of rule 6 CPC: “ las normas procesales son de orden publico y por consiguiente, de obligatorio cumplimiento, salvo autorizacion expresa” Codigo de Procedimiento Civil [CPC] art. 6 (Colom.). This means that if the second requirement does not make the exception, a foreign award or international judicial decision which effect violates the procedural law of Colombia cannot be recognize nor enforce internally.

Moreover, this exclusion of the procedural law is important because the New York Convention in its article V(2)(b) establishes that a country where an arbitral award is sought to be recognized and enforced can refuse to do it evoking public policy reasons³⁰. This authorized exception by the Convention to refuse recognition and enforcement can be invoked by a Colombian judge, even though “orden publico” is not the same than public policy, it can be applied for the purposes to protect the internal legal system.

It was said before that the third requirement is also relevant for the analysis pertinent to the inquiry of this paper. The third requirement of Rule 694 from Codigo de Procedimiento Civil (CPC) establishes “Que la sentencia se encuentre ejecutoriada de acuerdo con las normas del pais de origen y se presente copia debidamente legalizada de ella.” This rule establishes that an international adjudicative decision can only be enforced in Colombia, when it

³⁰ Convention on the recognition and enforcement of foreign arbitral awards, Article V(2)(b), June 10, 1958, U.N.

already has binding effect in the country where it was issued. Meaning that when an arbitral tribunal located in the United States issues an award according to the rules of this country, it becomes binding with claim preclusion and collateral effect. Thus, the arbitral award when brought to Colombia for enforceability already enjoys of the effect that is not recognized by the legal system, and it can be executed with that effect.

Therefore, a foreign award can be enforced in Colombia with the binding effect of the country where it was issued, even though the effect is not recognized in the legal system, because a different procedural law in the country of origin cannot constitute a bar for the award to be recognized and enforced according to the express exception of rule 694, because the award to be enforceable has to be binding in the country of the origin, and because public policy cannot be used as a reason to refuse the enforcement due to the second requirement of the rule 694 .

C. The procedure.

Colombian law establishes a specific procedure for recognition, called Exequatur, which has to be followed before the award is actually enforceable for a Colombian judge. Exequatur is a "latin word that means a permission and

authority to the officer to execute it within the jurisdiction of the judge who put it below the judgment.”³¹

This procedure starts with the filing of a complaint in front of the Supreme Court who has to evaluate that the award or judicial decision meets the requirements of the rules 693 and 694 from *Código de Procedimiento Civil* (CPC). The importance of the *exequatur* is that in this phase the court must exercise the discretion to apply the collateral estoppel effect of the award as it has been defined by the common law system. In the words of Stavros Brekoulakis:

“The decision on the (...) effect rest in the discretion of the second tribunal or court, which should exercise discretion taking into account all the relevant factors and the competing interests.”³²

The Supreme Court of Colombia has the power to recognize a foreign award via *exequatur* and to authorize the enforceability of this award in the country. This power to recognize not only supposes to check that the requirements of the law are met but also it supposes the appreciation of the principles of law ruling arbitration, the principles of law of former adjudication and the principles of public international law. The Supreme Court must consider the principles of conclusiveness and finality, efficiency, avoidance of inconsistency,

³¹ Dictionary of Legal Terms, definitions and explanations for non-lawyers. 169 (3d. ed. 1998).

³² Brekoulis, Stavros. The effect of an arbitral award and third parties in international arbitration: *res judicata* revised. 16 Am. Rev. Int'l Arb. 177, 201 (2005)

contractual autonomy, fairness and reciprocity, when the court decides the exequatur of a foreign adjudicative decision.

In a case that the Colombian Supreme Court has to decide if a foreign award can be enforced with collateral effect that is recognized in the country of origin, it is because the individual seeking the recognition and enforceability has pleaded its application. The Supreme Court has to ask and evaluate the pleading according to the requirements that have been developed in the common law because collateral estoppel has not been recognized in the civil law system, thus the court does not have its own guidelines to take a decision. Also, the Supreme Court is bound by rule 693 to follow the guidelines of the common law due the obligation to recognize the foreign adjudicative decision with the effect assigned in the treaty.

However, the last interpretation that the Supreme Court has to follow and demand the guidelines of the burden of pleading developed in the country of the common law tradition has not been developed. The Colombian Supreme Court has interpreted that if there is not treaty, the effect to be assigned must be Colombian final effect. In the words of H.J. Carlos Iganacio Jaramillo Jaramillo:

“En otras palabras, para que los fallos foráneos produzcan efectos en el territorio colombiano, necesariamente deberá acreditarse la existencia de un tratado suscrito entre Colombia y el país que dictó la sentencia, lo que es conocido como reciprocidad diplomática. Si falla esta primera hipótesis, es posible acudir a las previsiones de la ley extranjera, que tengan como cometido reconocerle efectividad

a las sentencias dictadas en Colombia, fenómeno denominado reciprocidad legislativa; valor “que primeramente ha de verificarse en el marco de los tratados internacionales que hayan suscrito al efecto Colombia y las otras naciones, o sea siguiendo los dictados de la denominada reciprocidad diplomática; o, a falta de tratado, según lo que a ese respecto disponga la ley foránea en orden a reconocerle también efectividad a las sentencias dictadas aquí, es decir atendiendo al instrumento de la reciprocidad legislativa”³³

Nevertheless, the Colombian Supreme Court in certain occasion has also recognized that when a treaty does not exist, there is possible to apply the foreign adjudicative decision with the effect of the country of origin due to the principle of reciprocity, fairness and efficiency. Therefore, It is a matter of discretion of the Colombian Supreme Court during the exequatur to recognize the arbitral award with the effect of collateral estoppel, the pleading requirements and the guideline of the country of origin.

The third party attempting to preclude a party of the foreign arbitration proceeding by using the award has to fulfill the requirements of the issue preclusion in order to be applicable to the specific case, requirements that have been defined in the common law. The third party demanding collateral estoppel over an arbitral award has the burden of pleading and proving the requirements of the common law. The third party has to prove:

“(1) that the issue contested in the second proceeding is identical to one involved in

³³ Sala de Casacion Civil, Corte Supreme de Justicia, 0142, 2001 (Colom.)

the prior litigation; [FN126] (2) that the issue was both actually litigated in the earlier *648 case and necessary to a final judgment; [FN127] (3) that the party against whom preclusion is asserted was a party to or in privity with a party to the prior adjudication; [FN128] and (4) that the party to be precluded had a full and fair opportunity to air the relevant evidence. [FN129]" .³⁴

The third party has the burden of pleading and proving that the award is final and on the merits according to the law of the country where it was issued. It also has to plead and prove that the party in front of whom the award is used against was actually in the arbitral proceeding or was properly notified of the tribunal. The third party seeking the exequatur has to plead and prove that the party had the opportunity to allege and support its case and theories. Moreover, the third party has to plead and prove that the arbitral award has decided on the merits an issue and/or a claim; the third party might plead and prove that it has an interest on and/or has a right dependable of that issue and/or claim, and the third party might plead and prove that is the same claim and issue relevant to its own case. Additionally, the third party has the burden of plead, prove and persuade The Colombian Supreme Court that it is fair and equitable recognize to him or her the effect of collateral estoppel. It is inefficient, unfair and absurd to allow the party to relitigate an issue or claim that has been already decided on the merits for another competent forum. Thus, the third party had a higher burden than the required in the common law country when it asks for issue preclusion

³⁴ Shell, Richard. Res Judicata and Collateral Estoppel effects of commercial arbitration, 35 UCLA Law Review 623, 648. (1988) (Citation omitted)

effect of the international award because it has to plead, prove and persuade the reasons to have recognize the effect that does not exist in The Colombian System.

In conclusion, the Supreme Court has to place itself as a common law tribunal to recognize the effect of issue preclusion and it has to demand from the third party the elements of the doctrine in the country of origin. Additionally, the third party has to place itself as a third party in the common law tradition and as a third party of the civil law tradition to persuade about the need and its right to have the foreign adjudicative decision recognize and enforce in Colombia.

HYPO.

The present analysis has found an inquiry and has developed a reasonable explanation for the problem but it does not pretend to be the absolute and correct answer. It is just an attempt to analyze a possible situation where the two legal traditions can overlap.

In order to clarify what has been explained in the past pages, a hypo has been imagined to illustrate how the inquiry can become real:

Arcor Inc. agreed with developer "X" to design and build a candy plant in Entre Rios, Argentina. The developer had to design the plant and build the plant according to the specification of Arcor Inc. in a certain period of time. Three years after the plant was built, Arcor Inc. had a problem at the candy plant, which started to fall. Arcor Inc. decided to take the developer to litigation but they agreed to arbitrate any dispute or conflict derived from the contract of design and construction of the plant. The arbitration took place in Miami and it followed the federal rules of civil procedure of the United States. Arcor Inc. got an award in its favor and against the developer, the arbitrators found the developer liable due to a problem in the design of the plant and a problem in the construction of the structure of the plant.

La Nacional de Chocolates de Colombia S.A. also agreed with developer "X" to design and build a candy plant in Rionegro, Antioquia. The developer had

to design and build the plant according to the proposal presented based on the Arcor Inc.'s plant. Five years later, the candy plant in Rionegro started falling, La Nacional de Chocolate filed a lawsuit in Colombia against developer "X", in the course of discovery, La Nacional de Chocolate learned that developer "X" lost an arbitration in Miami against Arcor Inc. for the same problems in the design of the candy plant, and how the developer's proposal was based on Arcor's plant, the Colombian company decided to use the award against the developer. However, Developer "X" in the Colombian Court pleaded that there was not a problem in the design, that there was a problem of maintenance of the candy plant by the Colombian Company.

La Nacional de Chocolates gets an authenticated copy from Arcor Inc. of the award issued in Miami, which found developer "X" liable for negligence in the design of the candy plant in Entre Rios, Argentina. Subsequently, the Colombian Company files an exequatur complaint in front of the Supreme Court to get recognition of the international award and recognition of the collateral estoppel, preclusive, effect of the award against developer "X".

La Nacional de Chocolates seeks recognition of the collateral estoppel effect as a third party of the issues and claims regarding the problem on the design. It also seeks enforceability of the award against one of the parties in privity of the arbitral tribunal, developer "X", as a third party, a stranger of the proceeding. La Nacional de chocolates attempts to get reorganization of the

Miami award based on the New York Convention signed by the Colombian government and based on the Statute 39 of 1990 that ratifies the treaty and places in Colombia a duty to recognize and enforce a foreign award.

In order to get the recognition and enforceability as a third party, la Nacional de chocolates has to plead and prove that the issue and claim of the design is the same that the one pleaded in the Colombian domestic court, la Nacional has to plead and prove that developer “X” had a fair and full opportunity to defend its case regarding the design issue and claim in front of Arcor Inc; and la Nacional has to plead, prove and persuade the Colombian Supreme Court that it is absurd to allow developer to relitigate a claim and issue that had been already decided, that it is fair to avoid the relitigation and the possible contradictory decision, that it is efficient to avoid the relitigation in order to save resources, that it is not against the public policy of Colombia to recognize the issue preclusion effect, and that it does not violate the “normas de orden publico” according to Rule 694 requirement two.

The Colombian Supreme Court has the discretion to evaluate the pleadings, to recall the guidelines of the United States regarding issue preclusion, and to balance the principles of law in order to decide to recognize the final and preclusive effect of the Miami award in Colombia, where the law does not recognize.

CONCLUSION

The institution of former adjudication is concurrent in the different legal traditions called common law and civil law. The principles that found former adjudication at both systems are the same, which are finality of adjudicative decisions, congruency of the judiciary, efficiency of the judicial system and fairness.

The interpretation of those principles has lead to the creation of different doctrines regarding the effect of an adjudicative decision. In the common law, the principles of law has lead to the development and recognition of claim preclusion and issue preclusion, while in the civil law, the principles of law has lead to the development and recognition of cosa juzgada. The doctrines in each system pursue the same goals, protect people's rights and guarantee government's performance.

International commercial arbitration, specially the final foreign award, represents a challenge to the national governments regarding the conclusive and preclusive effect. The award can assign a right to one individual that has not been recognized in the country where the award is sought for enforceability, like in the case of a third party to preclude one of the parties in privity to relitigate against him the same issue and/or claim, at which the third party has an interest

on. This challenge can be solved if presented in a Colombian Court just interpreting the domestic law. The Colombian law authorizes international arbitration, the Colombian law standardizes arbitral award to a judicial decision extending the binding effect to the award. Also, the Colombian procedural law authorizes to apply a foreign effect of international awards for its recognition in the country, and the Colombian procedural law establishes only as a limit the violation of “normas de orden publico” of substantive character. Thus, there is not a prohibition in the domestic law of Colombia to recognize collateral estoppel to a third party when seeking protection and preclusion against one party in privity during a domestic litigation.

The Colombian Supreme Court is the organ with the power to recognize and allow issue preclusion, and it has the discretion to do it has any other court has it in a common law country. However, the Supreme Court needs to rely on the common law guidelines because there is nothing like issue preclusion in Colombia, and the Colombian Supreme court has to balance the principles involve in former adjudication, in arbitration and international public and private law in order to recognize and enforce the foreign award with colleteral estoppel effect.

The same reasoning is to apply to the third party seeking the effect. The third party has to meet the burdens of pleading and proof define in the country under which the award was issued. In addition, the third party has to meet the

burden of pleading, the burden of proof and the burden of persuasion regarding to the balancing of the principles in order to gain the effect Colombian law does not have in its domestic legal order. Thus, the third party in Colombia has higher burden than the third party in the common law country in order to obtain the desire preclusive effect.

Therefore, the principles and the domestic law leave a gap in the legal order to create the possible scenario where a common law doctrine has to be applied in a civil law system. Even though, the role of the Supreme Court and the third party is more demanding than the role played in a common law country, there is nothing that limits this possibility to have issue preclusion of an international award in a domestic litigation in Colombia.

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