

The Res Judicata Effects of Foreign Judgments in Post-Award Proceedings: To Bind or Not to Bind?

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This comparative analysis explores the question of preclusive effects arising from arbitration-related judgments, particularly when a foreign court has already ruled upon an issue relevant to the grounds for refusal under Article V of the 1958 New York Convention. It argues that arbitration-related judgments like exequatur or non-annulment decisions, along with the res judicata and estoppel effects arising from them, can be subject to recognition in other countries. The article thereby rejects some of the views contending that various legal obstacles stand in the way of such recognition, including its compatibility with the 1958 New York Convention. However, risks of forum shopping and undue imbalances in the parties' rights ultimately support restricting this recognition to judgments rendered at the arbitral seat only. Such judgments should be able to preclude the re-litigation of identical issues in non-seat countries as a matter of res judicata and estoppel.

1 INTRODUCTION

While the essence of arbitration consists in the settlement of disputes outside of a state's judicial system, courts are regularly called upon to decide on arbitration-related matters. Courts may rule on the validity of an arbitration agreement so as to decline jurisdiction and refer the parties to arbitration. In their supervisory capacity over the arbitration proceedings, courts may also annul or confirm an arbitral award rendered in their own jurisdiction. Courts may further examine a foreign award so as to determine whether it should be declared enforceable in their territory (exequatur), based on the limited grounds for refusal provided under Article V of the 1958 New York Convention.

In that context, some of the issues examined in post-award proceedings, such as the grounds for refusal of enforcement under Article V, may well overlap with an issue which a foreign court has previously decided. Since court judgments can

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be subject to recognition in other countries, the question arises: can and should a court, when ruling on e.g. the exequatur of an arbitral award, take into consideration a foreign judgment which has decided upon the same issue?

The recent English case of *Diag Human S.E. v. Czech Republic*¹ provides a helpful illustration. An award had been rendered in the Czech Republic and sought enforcement in Austria. The award-debtor had successfully argued before the Austrian courts that the award should be denied enforcement under Article V(1)(e) as it was still subject to an additional review process provided in the arbitration agreement, and thus had not yet become binding on the parties. The English High Court, subsequently prompted with an action to enforce the Czech award, refused enforcement after holding that the Austrian judgment precluded the award-creditor from disputing the findings made on Article V(1)(e).

The following analysis explores the legal mechanisms underlying such cases. Section 2 outlines the preclusive effects of res judicata and estoppel arising from court judgments in general. Section 3 examines how such effects can be exported to other countries through recognition. Section 4 then applies these principles to different types of arbitration-related judgments and inquires whether such judgments can and should create preclusive effects, in light of both national law requirements and the compatibility of these effects with the 1958 New York Convention. As will be shown below, there might be compelling arguments to limit the preclusive effects of foreign judgments in post-award proceedings, but not necessarily for the reasons often suggested in scholarly writing and court decisions.²

2 PRINCIPLES OF RES JUDICATA AND ESTOPPEL

2.1 RELEVANCE OF THE ‘POSITIVE’ RES JUDICATA EFFECT

Before addressing the principles of res judicata in different jurisdictions, one should determine *which* preclusive effect a party will seek for the purpose of post-award proceedings. The preclusive effects that may arise from a judgment generally depend on the overlap between the elements decided therein and the elements constituting the subsequent action.

¹ [2014] EWHC 1639 (Comm.), [2014] 1 C.L.C. 750, paras 51–63.

² Aside from passing comments, the question of preclusive effects arising from arbitration-related judgments and their recognition in post-award proceedings has attracted little attention in scholarly writing until recently. For relevant discussions on the topic, see, in particular, Jonathan Hill, *The Significance of Foreign Judgments Relating to an Arbitral Award in the Context of an Application to Enforce the Award in England*, 8 J. Priv. Int'l L. 159, 176–191 (2012); Maxi Scherer, *Effects of Foreign Judgments Relating to International Arbitral Awards: Is the 'Judgment Route' the Wrong Road?*, 4 J. Int'l Disp. Settlement 587, 617–624 (2013); Burton S. DeWitt, *A Judgment Without Merits: The Recognition and Enforcement of Foreign Judgments Confirming, Recognizing, or Enforcing Arbitral Awards*, 50 Texas Int'l L.J. 495, 508–517 (2015).

If the subsequent action entirely overlaps with the substance of the earlier judgment (typically in terms of identical parties, cause of action and subject matter), the preclusive effect bars the admissibility of the new action altogether. This preclusive effect, often referred to as ‘negative’ res judicata effect or *non bis in idem*,³ is of limited use in post-award proceedings. A refusal of exequatur in one country cannot make exequatur in another country inadmissible on the basis of negative res judicata: the actions are not truly identical in the above sense, if only because they pursue enforceability in two different territories and involve potentially different issues.⁴

On the other hand, preclusive effects may operate even when the subsequent action only partially overlaps with the elements decided in the judgment, in which case the overall action will be admissible but all such elements must be considered adjudicated and not open for re-litigation. This preclusion, which essentially expresses a negative res judicata effect confined to a specific issue rather than the entire action,⁵ results from the so-called ‘positive’ res judicata effect of the judgment,⁶ i.e. the notion that its findings are binding between the parties.⁷ This is the more relevant effect sought in post-award proceedings: a later exequatur action may not be entirely identical to an earlier one, but it may entail examining issues which have already been decided in the previous judgment, such as the validity of the arbitration agreement or whether the tribunal was properly constituted.

A relevant limitation in this context is the principle applied in some civil law countries, and discussed further below, prescribing that preclusive effects only arise with regard to the findings pronounced in the so-called *operative part* of a judgment, not the reasons motivating the decision (*ratio decidendi*). For the purpose of arbitration-related judgments, this limitation tends to prevent the relevant conclusions (e.g. on the validity of the agreement) from gaining preclusive effects, since such findings are often reviewed as a necessary but *incidental* question to the proceedings: when an exequatur court rejects the existence of grounds for refusal raised by the award-debtor, the operative part will usually declare the enforceability of the award in the country addressed, but not the explicit absence of such

³ Filip De Ly & Audley Sheppard, *ILA Interim Report on Res Judicata and Arbitration*, 25 Arb. Int’l 35, 36 (2009); see also the comparative analysis of Cécile Chainais, *L’autorité de la chose jugée en procédure civile: perspectives de droit comparé*, 1 Revue de l’Arbitrage 3, 12–34, paras 17–52 (2016).

⁴ A US district court however reached the unexpected conclusion that an exequatur judgment in Canada even barred an *annulment* action at the seat (*Belmont Partners LLC v. Mina Mar Group Inc.*, 741 F. Supp. 2d 743, 750–753 (W.D. Va. 2010)). The judgment has been rightly criticised for applying the negative res judicata effect in that context (DeWitt, *supra* n. 2, at 510).

⁵ See Cédric Bouty, *L’irrévocabilité de la chose jugée en droit privé* para. 21 (PUAM 2008); Jacques Héron & Thierry Le Bars, *Droit judiciaire privé* 297 para. 367 (6th ed., LGDJ 2015).

⁶ Chainais, *supra* n. 3, at 36, para. 55.

⁷ De Ly & Sheppard, *supra* n. 3, at 36.

grounds; when courts refer the parties to arbitration, the operative part will indicate that the court dismisses the action for want of jurisdiction, but will not necessarily declare the validity of the arbitration agreement; nor will such validity be expressly declared in the operative part of a judgment rejecting an annulment action, even if the issue was examined by the court.

2.2 POSITIVE RES JUDICATA EFFECTS IN CIVIL AND COMMON LAW SYSTEMS

Civil law countries generally recognize positive res judicata effects, either in statute⁸ or in case law.⁹ The common law principles of res judicata similarly prevent a party from contesting, in proceedings with a different cause of action, the findings of an earlier judgment,¹⁰ referred to as ‘issue estoppel’ in some common law jurisdictions and ‘issue preclusion’ or ‘collateral estoppel’ in others.

Some civil law countries view res judicata as arising only with regard to the operative part of a judgment and not its *ratio decidendi*,¹¹ with the exception of findings made on certain defences.¹² The strict limitation of res judicata to the operative part of judgments is unknown to other civil law countries, which extend res judicata to the reasons constituting the *necessary foundation* of the judgment.¹³

⁸ See, e.g. Spanish Law of Civil Procedure (Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil, LEC), Art. 222(4); Dutch Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering), Art. 236(1).

⁹ See, e.g. Swiss Federal Supreme Court, judgment of 15 Jan. 1997, 123 III 16, 19 para. 2(a); OGH [Austrian Supreme Court], Rechtssatz of 15 Feb. 1978, RIS-Justiz RS0041251; BGH [German Supreme Court], judgment of 26 June 2003, I ZR 269/00, para. II(1)(a); cf. however on the general reluctance towards positive res judicata in French case law and doctrine: Héron & Le Bars, *supra* n. 5, at 298–301, paras 368–369.

¹⁰ See, e.g. *Arnold v. National Westminster Bank plc* [1991] 2 A.C. 93 (HL) 104–105: ‘Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue.’

¹¹ Cour de cassation [French Supreme Court], ass. plén., judgment of 13 Mar. 2009, Bull. ass. plén. no. 3; BGH [German Supreme Court], judgment of 17 Feb. 1983, III ZR 184/81, para. III(3)(d); Swiss Federal Supreme Court, judgment of 13 Apr. 2010, 136 III 345, 348 para. 2.2; OGH [Austrian Supreme Court], Rechtssatz of 13 June 1979, RIS-Justiz RS0041357; Tribunal Supremo [Spanish Supreme Court], Sala de lo Civil, judgment of 10 Apr. 1984, Repertorio Aranzadi 1955.

¹² E.g. in Spain for defences of set off or absolute nullity of the underlying legal relationship (LEC, Art. 408(3)); the former is also subject to res judicata under German statute (Zivilprozessordnung (ZPO), s. 322(2)) and Swiss case law (Federal Supreme Court, judgment of 16 Apr. 2014, 4A_568/2013, para. 2.2).

¹³ E.g. *Eco Swiss China Time Ltd. v. Benetton Int'l N.V.*, Hoge Raad [Supreme Court of the Netherlands], judgment of 21 Mar. 1997, 23 Y.B. Comm. Arb. 180 para. 43 (1998); Cour de cassation [Belgian Supreme Court], judgment of 4 Dec. 2008, C.07.0412.F; cf. similarly the notion of res judicata under uniform European Union law, which extends to reasons providing the ‘necessary underpinning for the operative part’ (Case C-456/11 *Gothaer Allgemeine Versicherung A.G. v. Samskip GmbH*, CJEU, 15 Nov. 2012, para. 40); in Italy, res judicata can attach to the necessary but implicit assumptions underpinning the *ratio decidendi* itself: Corte di cassazione [Italian Supreme Court], sezioni unite, judgment of 12 Dec. 2014, 26242, para. 7.3(B) (res judicata effects on an implicit finding as to the validity of a contract).

This is also the approach in common law systems, where issue estoppel can attach to the reasons motivating the decision, though only if the point was *fundamental* to the decision and ‘not merely incidental or collateral’.¹⁴ Issue estoppel also requires that the judgment was rendered ‘on the merits’, usually satisfied when the resolution of the dispute hinges on findings of legal rights rather than procedure alone.¹⁵

Some civil law countries further bar claimants from raising a new action based on legal grounds which *could have been raised*, but were not raised, in earlier proceedings.¹⁶ In a 2006 decision,¹⁷ the French Cour de Cassation held that the claimant (and, in a later decision, the defendant¹⁸) was under the obligation to raise at first instance all of the legal grounds which could be relied upon (a so-called ‘concentration des moyens’) so that a subsequent claim based on an initially omitted ground was barred by the res judicata effect of the first judgment. Spanish law similarly provides that legal grounds that *could have been invoked* in the earlier proceedings will be considered identical to those raised in later proceedings for the purpose of res judicata.¹⁹ However, it is unclear whether these principles prevent the reliance on omitted legal grounds merely in a negative res judicata sense or also in its positive one, i.e. whether they merely bar a new action relying on the omitted legal grounds, or also preclude parties from subsequently raising omitted legal grounds whichever the cause of action, including e.g. by way of defence.²⁰

In common law systems, legal grounds that *could* have been raised in earlier proceedings are also subject to preclusion under a line of cases originating with *Henderson v. Henderson*.²¹ While *Henderson v. Henderson* was originally concerned with a case of cause of action estoppel (more closely related to the negative res judicata effect), the UK Supreme Court recently reiterated that the principle applied to issue estoppel, which accordingly ‘bars the raising in subsequent

¹⁴ *Hoystead v. Taxation Comr.* [1926] A.C. 155 (PC), 170–171; similarly *Angle v. M.N.R.* [1975] 2 S.C.R. 248, 254–255 (SCC); *Blair v. Curran* [1939] HCA 23, [1939] 62 C.L.R. 464, 531–532; *Thomas v. General Services Administration*, 794 F.2d 661, para. 10 (Fed. Cir. 1986).

¹⁵ *DSV Silo und Verwaltungsgesellschaft mbH v. Owners of the Sennar (The Sennar) (No. 2)* [1985] 1 W.L.R. 490, 499 (HL); *Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 657 F.2d 939, 943 (7th Cir. 1981).

¹⁶ See generally Romuald Di Noto, *La portée objective de l'autorité de la chose (qui n'a pas été) jugée: Un aperçu de droit comparé*, in *Die deutsch-französischen Rechtsbeziehungen, Europa und die Welt: liber amicorum Otmar Seul* 84–106 (Tilman Bezenberger et al. eds, Nomos 2014).

¹⁷ Cour de Cassation [French Supreme Court], ass. plén., judgment of 7 July 2006, Bull. ass. plén. no. 8.

¹⁸ Cour de Cassation [French Supreme Court], civ. 3e, judgment of 13 Feb. 2008, Bull. civ. III no. 28.

¹⁹ LEC, Art. 400(2).

²⁰ Cf. Johannes Landbrecht, *Teil-Sachentscheidungen und Ökonomie der Streitbeilegung: eine rechtsvergleichende Untersuchung zu Bindungswirkung und Statthafteigkeit gerichtlicher Teilentscheidungen* 233 (Mohr Siebeck 2012).

²¹ (1843) 3 Hare 100 (for a more recent authority: *Johnson v. Gore-Wood & Co.* [2002] 2 A.C. 1, 31 (HL)). Followed in: *Hoque v. Montreal Trust Co. of Canada* [1997] 162 N.S.R. (2d) 321, 338 (NSCA); *Port of Melbourne Authority v. Anshun Pty. Ltd.* [1981] HCA 45, [1981] 147 C.L.R. 589, 602–603; *Ngai New Fung v. Cheung Kwai Heung* [2008] 2 H.K.C. 111, 117–118 (CA).

proceedings of points which (i) were not raised in the earlier proceedings ... if [they] could with reasonable diligence and should in all the circumstances have been raised.’²²

3. RECOGNISING THE PRECLUSIVE EFFECTS OF FOREIGN JUDGMENTS

3.1 SOURCES OF LAW

The recognition of foreign judgments can result from international conventions or from national laws. Since court judgments on arbitral matters do not fall within the scope of either the 1958 New York Convention²³ or multilateral instruments such as the Brussels I regime,²⁴ these judgments and their preclusive effects will in most cases be subject to recognition under the conditions laid down in national law.

3.2 CONDITIONS FOR RECOGNITION

The national law requirements for recognizing a foreign judgment and its effects vary from jurisdiction to jurisdiction. For the purpose of this analysis, one should note the common requirement of *international jurisdiction* by the court of origin: some countries require that the foreign court based its competence on a jurisdictional provision equivalent to their own,²⁵ while broader rules sometimes require that the dispute merely had a sufficient link to the country of origin and that the courts in the country of recognition did not have exclusive jurisdiction under national law.²⁶ Another relevant requirement sometimes found in national law is that the foreign judgment was rendered on the merits,²⁷ not unlike the above-mentioned condition for creating estoppel under common law.

²² *Virgin Atlantic Airways Ltd. v. Zodiac Seats UK Ltd.* [2013] UKSC 46, [2014] A.C. 160, para. 22. Cf. however the approach of the US Supreme Court in *Cromwell v. County of Sac*, 94 US 351, 353 (1876).

²³ Confined to the recognition and enforcement of arbitral awards (and agreements).

²⁴ See Art. 1(2)(d) and recital 12 of Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] O.J. L351/1, explicitly excluding annulment decisions, exequatur judgments, and judgments confirming the validity of an arbitration agreement. On the latter two aspects under the previous Brussels I regime, see Case C-536/13 *Gazprom OAO*, CJEU, 13 May 2015, para. 41, and *Gothaer*, *supra* n. 13, para. 36 (*e contrario*).

²⁵ E.g. Swiss Private International Law Act 1987 (PILA), Art. 26(a); Spanish Law of International Judicial Cooperation in Civil Matters (Ley 29/2015, de 30 de julio, de cooperación jurídica internacional en materia civil, LCJI), Art. 46(1)(c); ZPO [Germany], s. 328(1)(1).

²⁶ LCJI, Art. 46(1)(c); Cour de Cassation [French Supreme Court], civ. 1re, judgment of 6 Feb. 1985, Bull. civ. I no. 55.

²⁷ E.g. BGH [German Supreme Court], judgment of 27 June 1984, IVb ZR 2/83, para. II(3)(a) (*‘eine Sachentscheidung’*).

3.3 EFFECTS OF RECOGNITION

When the country of origin and country of recognition differ in the extent of the preclusive effect attached to judgments under their respective laws, particularly with regard to the *ratio decidendi*, the result will depend on the approach followed in the country of recognition. Some countries simply assimilate the foreign judgment to a domestic one and apply the effect that would be produced under national law (equalization).²⁸ Other countries *extend* the effects granted under the laws of the issuing state into their territory (extension).²⁹ A third approach applies the common denominator of both laws and accordingly gives the foreign judgment no more effect than that granted in the state of origin *and* no more than that of an equivalent domestic judgment (combination).³⁰

In many cross-border cases, the limitation of res judicata effect to a judgment's operative part will prove an obstacle to the recognition of preclusive effects on issues only appearing in the *ratio decidendi*, though not without exceptions. If such limitation is applied under the laws of the country of origin, some courts may decline granting preclusive effect insofar as the issues remain open to re-litigation in the foreign country,³¹ while other courts may disregard this aspect of foreign law.³² If the limitation is known to a country of recognition practicing the equalization or combination approach, some countries will accordingly cap the preclusive effects to that of a domestic judgment,³³ while others nonetheless recognize foreign preclusive effects

²⁸ An approach followed by US federal courts: *Alfadda v. Fenn*, 966 F. Supp. 1317, 1327–1330 (S.D.N.Y. 1997), citing further decisions; similarly *Vas-Cath Inc. v. Mahurkar*, 745 F. Supp. 517, 526 (N.D. Ill. 1990); more reluctant: *United States v. Kashamu*, 656 F.3d 679, 683 (7th Cir. 2011).

²⁹ As applied in Spain (LCJI, Art. 44(3)).

³⁰ Practiced in e.g. Switzerland (Federal Supreme Court, judgment of 14 Feb. 2011, 4A_508/2010, para. 3.3) and supported by the German doctrine (Ivo Bach, in *Beck'scher Online-Kommentar ZPO* para. 54 ad s. 328 ZPO (Volkert Vorwerk & Christian Wolf eds, 2d ed., Beck 2011), with further references).

³¹ For instance, although estoppel is regarded as a matter for the *lex fori*, English courts require that the issues meant to create estoppel 'cannot be raised again in the foreign country', refusing to 'regard as conclusive something in a [foreign] judgment which the [foreign] courts themselves would not regard as conclusive' (*Carl Zeiss Stiftung v. Rayner & Keeler (No. 2)* [1967] 1 A.C. 853, 918–919 (HL)). Similarly, in cases of *Henderson v. Henderson* estoppel, English courts seem to give regard to the fact that the points which a party failed to raise in the foreign proceedings are now precluded under foreign law (*Femoscandia Ltd. v. Clarke* [1999] 1 All E.R. (Comm.) 365, 372–374 (CA)).

³² See, e.g. the approach of US federal courts in *Carl Zeiss Stiftung v. VEB Carl Zeiss, Jena*, 293 F. Supp. 892, 908 (S.D.N.Y. 1968) ('we would not be prevented from [according collateral estoppel as to these issues] merely because the West German courts would not give such effect to them'); *Alfadda v. Fenn*, *supra* n. 28, at n. 13 (no unfairness in 'according greater preclusive effect to a foreign country judgment than that accorded in the rendering country').

³³ The Swiss Federal Supreme Court, for instance, held that a res judicata effect covering the *ratio decidendi* under the laws of the state of origin will not be recognized in Switzerland, and the effect accordingly limited to the operative part (judgment of 27 May 2014, 140 III 278, 281 para. 3.2).

going beyond the operative part even if not applied to strictly equivalent domestic judgments.³⁴ In any case, the alternative or cumulative reliance on the laws of the country of origin and the laws of the country of recognition will require examining what *res judicata* effects arise from domestic judgments under these laws.

4 APPLYING THE FOREGOING PRINCIPLES TO ARBITRATION-RELATED JUDGMENTS

4.1 GENERAL CONSIDERATIONS

4.1[a] *Types of Overlapping Subject-Matter*

A judgment will only be able to preclude re-litigation when the disputed issues are identical. As discussed above, the identity does not refer to the proceedings as a whole but to the specific issues adjudicated therein. This prompts the question: which elements reviewed in post-award proceedings can constitute identical issues to that of earlier judgments? Each type of overlap will be examined in more details in their respective sections below (4.2–4.5).

First, one can conceive an overlap between the grounds for refusal of the New York Convention examined in two different exequatur proceedings. Under Article V(1)(a), provided that the second exequatur court concludes that the law determining the validity of the arbitration agreement is the same as the law applied by the first exequatur court,³⁵ the issue of the agreement's validity will be identical between the proceedings, and the findings thus potentially subject to *res judicata* and estoppel. The source of procedural fairness under Article V(1)(b), on the other

³⁴ See, e.g. the German doctrine supporting the recognition of foreign issue estoppel effects: Peter Gottwald, in *Münchener Kommentar zur Zivilprozessordnung* para. 168 ad s. 328 ZPO (Wolfgang Krüger & Thomas Rauscher eds, 4th ed., Beck 2013); Astrid Stadler, in *Zivilprozessordnung mit Gerichtsverfassungsgesetz* para. 35 ad s. 328 ZPO (Hans-Joachim Musielak & Wolfgang Voit eds, 12th ed., Vahlen 2015); Heinrich Dörner, in *Zivilprozessordnung* para. 7 ad s. 328 ZPO (Ingo Saenger ed., 6th ed., Nomos 2015); Bach, *supra* n. 30, para. 58 ad s. 328 ZPO; *contra* Herbert Roth, in *Kommentar zur Zivilprozessordnung* vol. 5, para. 9 ad s. 328 ZPO (Friedrich Stein & Martin Jonas eds, 22d ed., Mohr Siebeck 2006); Stefan M Kröll, in *Arbitration in Germany: The Model Law in Practice* para. 57 ad s. 1061 ZPO (Karl-Heinz Böckstiegel et al. eds, 2d ed., Kluwer 2015); similarly, many French scholars support applying foreign law to determine *which part* of the foreign judgment should be given preclusive effect: André Huet, *L'autorité (négative) de chose jugée des jugements étrangers*, in *De code en code: mélanges en l'honneur du doyen Georges Wiederkehr* 397, 407 para. 18 (Dalloz 2009); Marie-Laure Niboyet & Géraud de Geouffre de La Pradelle, *Droit international privé* 601–602 para. 685 (3rd ed., LGDJ 2011); Phocion Francescakis & Henri-Jacques Lucas, *Jugements étrangers*, in *Encyclopédie juridique Dalloz: Répertoire de droit international* vol. II, 226 para. 260 (Phocion Francescakis ed., Dalloz 1969).

³⁵ Which, despite the choice-of-law rule in Art. V(1)(a), is not guaranteed in the absence of an express choice of law governing the arbitration agreement itself: one court may refer back to the law of the underlying contract as an implied choice of law, while the other may consider the law of the seat as the implied choice of law – or simply apply the law of the seat as per the provision's second prong.

hand, is subject to divergent interpretations by national courts,³⁶ which militates against the notion of identical issues between the proceedings. While the scope of the arbitration agreement is normally interpreted under the law applicable to its validity,³⁷ Article V(1)(c) will often involve questions of facts rather than applicable law,³⁸ partly removing the potential for divergent standards and non-identical issues. Article V(1)(d) and Article V(1)(e) contain straightforward rules of applicable law and should not pose an obstacle as to the identity of issues between the proceedings.³⁹ The grounds for refusal in Article V(2)(a)–(b) refer to the arbitrability of the dispute and a violation of public policy, both under the law of the enforcing country. Exequatur judgments deciding upon a ground for refusal under Article V(2) are thus generally held to be intrinsically linked to the adjudicating country and unable to create preclusive effects in another.⁴⁰ However, this blanket exclusion seems to overlook that legal findings *preceding* the conclusion that the award violates public policy (or arbitrates non-arbitrable issues) are not necessarily territorial in nature and can very much be relevant to foreign proceedings⁴¹: if an exequatur court rejects a plea under Article V(2)(b) because it finds e.g. no illegality under specific national or international laws of mandatory application,⁴² there is no compelling reason why a subsequent exequatur court, addressed with a plea of illegality under the same mandatory laws, should not view the issues as identical.⁴³

The second and closely related category of overlapping matters consists of annulment judgments deciding on grounds which may also be raised as grounds for

³⁶ Albert Jan Van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 298 (Kluwer 1981); Gary Born, *International Commercial Arbitration* 3449–3450 (2d ed., Kluwer 2014).

³⁷ Christian Borris & Rudolf Hennecke, in *New York Convention* para. 206 ad Art. V (Reinmar Wolff ed., Beck 2012); thus potentially prompting the issue mentioned *supra* n. 35.

³⁸ Van den Berg, *supra* n. 36, at 312; Born, *supra* n. 36, at 3550–3551.

³⁹ Though here as well, the applicable standard may vary depending on whether the courts view ‘binding’ as defined by the Convention itself or by the law of the seat (Born, *supra* n. 36, at 3609).

⁴⁰ Catherine Kessedjian, *Court Decisions on Enforcement of Arbitration Agreements and Awards*, 18 J. Int’l Arb. 1, 11 (2001); Born, *supra* n. 36, at 3790–3791; Hans Smit, *Annulment and Enforcement of International Arbitral Awards: A Practical Perspective*, 18 Am. Rev. Int’l Arb. 297, 305 (2007); Scherer, *supra* n. 2, at 621; similarly *Yukos Capital Sarl v. OJSC Rosneft Oil Co.* [2012] EWCA Civ 855, [2014] QB 458, paras 150–157 (contemplating a Dutch exequatur of a Russian judgment); in that sense for annulment grounds of public policy and their overlap with exequatur proceedings: *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd.* [1999] 2 H.K.C. 205, 229–230 (CFA); *Haiyan v. Keeneye Holdings Ltd.* (No. 2) [2012] 1 H.K.C. 491, paras 92–96 (CFI) (cf. however the Court of Appeal ruling *infra* n. 102); *contra* to some extent *Gujarat NRE Coke Ltd. v. Coeclerici Asia (Pte.) Ltd.* [2013] FCAFC 109, paras 61–62, which held that the review by Australian exequatur courts of Art. V(2)(b) overlapped with the issue of ‘serious irregularity’ and ‘substantial injustice’ reviewed in an English annulment.

⁴¹ Cf. 4.2[a] *infra* on the territorial limits of exequatur decisions in general.

⁴² On such law, see, e.g. *Case C-126/97 Eco Swiss China Time Ltd. v. Benetton Int’l N.V.*, [1999] E.C.R. I-03055, paras 39, 41.

⁴³ In that sense see also Hill, *supra* n. 2, at 183–184; DeWitt, *supra* n. 2, at 514 (though rejecting a preclusive effect for other reasons).

refusal in exequatur proceedings (and potentially vice versa). Grounds for annulment are not prescribed in the New York Convention and are thus freely determined by each country, though some provide for annulment grounds which closely mirror the grounds for refusal of Article V.⁴⁴ However, even seemingly equivalent annulment grounds, such as the invalidity of the arbitration agreement, may not necessarily be viewed as identical to those of Article V, since the ground for annulment may rely on an entirely different choice of applicable law.⁴⁵ The annulment ground of procedural fairness may similarly rely on domestic standards of due process and thus not overlap with the issue of Article V(1)(b) examined in another jurisdiction.⁴⁶ In any event, this category is mainly relevant when an annulment was *rejected* at the seat.⁴⁷

The third category, also concerned with judgments from the seat jurisdiction, concerns decisions taken by the courts as so-called *juge d'appui* to support the arbitral proceedings. This includes e.g. judgments on the removal of an arbitrator due to non-compliance with the parties' agreement or the requirements of independence and impartiality⁴⁸: the findings of the *juge d'appui* may then overlap with the issue of improper constitution of the arbitral tribunal raised under Article V(1)(d) in exequatur proceedings.

The fourth category comprises decisions of courts (at the seat or elsewhere) which decline jurisdiction on the dispute and refer the parties to arbitration. The findings of the court on the validity of the arbitration agreement or the scope

⁴⁴ See, e.g. PILA, Art. 190.

⁴⁵ In Switzerland, for instance, an agreement found valid under Swiss law but not the law chosen by the parties is nonetheless considered valid (PILA, Art. 178(2)).

⁴⁶ This was no obstacle in *Gujarat*, *supra* n. 40, where the court held that the 'serious irregularity' and 'substantial injustice' reviewed in the English non-annulment decision was ultimately the same issue as that of Art. V(1)(b) (as well as Art. V(2)(b), *see supra* n. 40) in Australian exequatur proceedings. By contrast, a French court held it was not bound by a Swiss non-annulment decision since the French judge applied French or Convention standards for Art. V(1)(b), while the corresponding review in Switzerland was decided under Swiss arbitral law (*Société Unichips Finanziaria v. Gesnouin*, Cour d'Appel de Paris [Paris Court of Appeal], judgment of 12 Feb. 1993, 19 Y.B. Comm. Arb. 658, para. 5 (1994)). The non-annulment decision had indeed relied, at least in part, on the due process standard anchored in the Swiss Constitution (Federal Supreme Court, judgment of 1 July 1991, 117 II 346, 347–348, para. 1).

⁴⁷ A successful annulment, especially if decided on grounds identical to those of Art. V, will very likely bar recognition and enforcement under Art. V(1)(e) at the outset, though this is subject to much controversy. A preclusive effect in that case would thus only come into play in the somewhat improbable scenario that the exequatur court, having rejected the significance of an annulment decision under Art. V(1)(e), finds itself nonetheless bound by the individual findings of the seat court on the issue of e.g. invalidity of the arbitration agreement, and thereby forced to deny enforcement under Art. V(1)(a). This should be distinguished from preclusive effects recognized by enforcement courts when, while no annulment was sought, the seat courts have previously rejected the enforcement of the award (*Astro Nusantara v. PT Ayunda Prima Mitra* [2015] HKCFI 274, para. 96) or rendered a declaratory judgment finding the arbitration agreement invalid (Kammergericht Berlin [Berlin Court of Appeal], judgment of 18 May 2006, 20 Sch 13/04, para. II(2)(a)).

⁴⁸ E.g. under PILA, Art. 180(1)(a) and (c).

thereof will potentially overlap with issues raised in subsequent exequatur proceedings under Article V(1)(a) and (c).

4.1[b] *Consequence of the Operative-Part-Only Limitation*

As mentioned, most findings relevant to post-award proceedings tend not to appear in a judgment's operative part.⁴⁹ This can prove problematic when a limitation of res judicata effects to such part applies either under the law of the country of origin or the law of the country of recognition.⁵⁰ However, this aspect often seems neglected in post-award proceedings, as only few courts inquire as to the preclusive effect attached, under the laws of the rendering state, to the individual points decided in the foreign exequatur or annulment judgment subject to recognition: this is especially questionable in cases such as *Diag Human SE v. Czech Republic*⁵¹ or *Epis SA v. Roche Diagnostics GmbH*,⁵² where the potential for foreign re-litigation was not examined even though the laws of the respective countries of origin (Austria and Switzerland) do not normally grant res judicata beyond the operative part of the judgment.⁵³

An obvious remedy for the operative-part-only limitation would be to have all relevant points expressly declared in the operative part.⁵⁴ However, the requirements for declaratory actions are often restrictive, especially when the party can readily obtain an equivalent non-declaratory relief: some courts will be unwilling

⁴⁹ See s. 2.1 *supra*.

⁵⁰ See s. 3.3 *supra*.

⁵¹ *Supra* n. 1.

⁵² *Epis S.A. v. Roche Diagnostics GmbH*, Jerusalem District Court, judgment of 23 Nov. 2004, 31 Y.B. Comm. Arb. 786, para. 9 (2006).

⁵³ However, English courts did make such inquiry in other cases: in one instance, the High Court recognized the need for evidence on whether findings made in a French exequatur decision created issue estoppel under French law (*Chantiers De L'Atlantique S.A. v. Gaztransport & Technigaz S.A.S.* [2011] EWHC 3383 (Comm.), para. 315); in another, it noted that an established body of opinion under French law would potentially view (non-)annulment decisions as creating no issue estoppel on the question of fraud adjudicated therein (*ABCI v. Banque Franco-Tunisienne* [2002] I.L.Pr. 31 (QB), para. 217); and in a third, it did conduct a review of Dutch law to establish whether res judicata extended to 'findings that precede the decision' of exequatur, including findings of fact (*Yukos*, *supra* n. 40, [2011] EWHC 1461 (Comm.), [2011] 2 C.L.C. 129, paras 76–78).

⁵⁴ In a German exequatur case, the court considered a Turkish judgment at the seat which had declined jurisdiction and expressly declared that all disputes arising out of a partnership agreement were to be settled by arbitration; the German court found itself bound by the foreign judgment under s. 328 ZPO, precluding a defence under Art. V(1)(c) (Hanseatisches Oberlandesgericht Bremen [Bremen Court of Appeal], judgment of 30 Sept. 1999, 2 Sch 04/99, 31 Y.B. Comm. Arb. 640, paras 9–12 (2006)). The opposite situation was addressed by the Kammergericht Berlin, *supra* n. 47, which considered a declaratory judgment from the courts of the seat stating the *invalidity* of the arbitration agreement, yet despite the judgment being rendered post-award, no annulment was pronounced (nor apparently sought).

to declare e.g. the absence of grounds for refusal on the motion of an award-creditor when an ordinary exequatur action is readily available.⁵⁵

4.1[c] *Grounds Which Could Have Been Raised in the Earlier Proceedings*

One must finally consider the preclusion of grounds which could have been raised by a party in earlier proceedings, whether under common law, or, should they apply with regard to the positive effect of *res judicata*,⁵⁶ under the French *concentration des moyens* principles and other civil law equivalents. If, for instance, one but not all grounds for annulment are raised at the seat, these omitted grounds may be found precluded as grounds for refusal in subsequent exequatur proceedings by virtue of the *res judicata* effect (in the wider sense) arising from the first judgment.⁵⁷ This preclusive effect must be distinguished from the preclusion arising out of more general *waiver* rules (rather than *res judicata* principles), such as the failure to raise a point before the arbitral tribunal or the failure to bring an annulment action altogether, neither of which are within the scope of this analysis.

4.2 EXEQUATUR JUDGMENTS

This section is concerned with the recognition of exequatur judgments, along with their preclusive effects, in other exequatur proceedings. Few courts have had the opportunity to rule upon such cases.⁵⁸ Most of the considerations below also apply to the (controversial) situation where an exequatur judgment from a court outside the arbitral seat is sought recognition in annulment proceedings at the seat.⁵⁹

⁵⁵ In that sense under German law: Georg Borges, *Das Doppelresequatur von Schiedssprüchen: die Anerkennung ausländischer Schiedssprüche und Exequaturentscheidungen* 34 (Recht des internationalen Wirtschaftsverkehrs 1997), with further references.

⁵⁶ Which is not entirely clear (*supra* n. 20 and accompanying text).

⁵⁷ As noted in *Hebei v. Polytek*, *supra* n. 40, [1998] 1 H.K.C. 192, 202 (CA), affirmed on that point in [1999] 2 H.K.C. 205, 230 (CFA) (though the latter court was more reluctant to apply issue estoppel in general).

⁵⁸ Court decisions recognizing the preclusive effect of a foreign exequatur (or non-exequatur) judgment from courts outside the seat: *Diag Human S.E. v. Czech Republic*, *supra* n. 1; *Karaha Bodas Co. L.L.C. v. Perusahaan Pertambangan Minyak dan Gas Bumi Negara (Pertamina)* (No. 2) [2003] 4 H.K.C. 488 (CFI), para. 53 (*obiter*); similarly for a non-exequatur *at the seat*: *Astro Nusantara*, *supra* n. 47; rejecting a preclusive effect in general: *Pavan s.r.l. v. Leng d'Or S.A.*, Juzgado de Primera Instancia e Instrucción de Rubí [Court of First Instance of Rubí], judgment of 11 June 2007, 35 Y.B. Comm. Arb. 444, paras 8–9 (2010).

⁵⁹ Court decisions at the seat recognizing the preclusive effect of a foreign exequatur (or non-exequatur) judgment in annulment proceedings: *Belmont Partners*, *supra* n. 4; *Chantiers De L'Atlantique S.A.*, *supra* n. 53, paras 313–318 (*obiter*); similarly *Leibinger v. Stryker Trauma GmbH* [2006] EWHC 690 (Comm.), paras 15–23 (English seat court bound by German declaratory judgment confirming the validity of the arbitral agreement); *contra* Hanseatisches Oberlandesgericht Hamburg [Hamburg Court of Appeal], judgment of 24 Jan. 2003, 11 Sch 06/01, 30 Y.B. Comm. Arb. 509, para. 8 (2005). In two instances, English non-seat courts have postulated that the courts at the seat might take into account an

4.2[a] *Differentiating Between Exequatur Judgments as Such and the Legal Findings Therein*

Recognizing the preclusive effect of a foreign exequatur judgment is usually met with scepticism: exequatur judgments of arbitral awards are generally viewed as confined to a particular country and unable to produce any extraterritorial effect,⁶⁰ a notion often based on the maxim ‘*exequatur sur exequatur ne vaut*’ which seeks to prevent the enforcement of foreign exequatur rulings in lieu of the underlying award or judgment. However, indiscriminately applying this view to *any* extraterritorial effect needlessly blurs the line between recognition and enforcement: the *enforceable* content of an exequatur judgment is indeed confined to the territory where the foreign award or judgment is declared enforceable; the judgment may nonetheless contain judicial findings, e.g. as to the validity of the arbitration

exequatur decision for the purpose of issue estoppel: *Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, (2010) 3 W.L.R. 1472, para. 29 *in fine* (possible estoppel at the seat from an English non-exequatur decision); *Thai-Lao Lignite (Thailand) Co. Ltd. & Hongsa-Lignite (Lao PDR) Co. Ltd. v. Government of the Lao People's Democratic Republic* [2012] EWHC 3381 (Comm.), paras 20–21 (likely estoppel at the seat from a US exequatur decision). In both cases, however, the courts at the seat ended up merely noting the existence of the exequatur judgments, without giving their findings any regard whatsoever: *Government of Pakistan, Ministry of Religious Affairs v. Dallah Real Estate and Tourism Holding Co.*, Cour d'Appel de Paris [Paris Court of Appeal], judgment of 17 Feb. 2011, 36 Y.B. Comm. Arb. 590 para. 2 (2011); *Government of the Lao People's Democratic Republic v. Thai-Lao Lignite Co. Ltd. (TLL)* [2013] 3 M.L.J. 409 (HC), para. 52; in the latter case, following the Malaysian annulment, the US courts vacated their previous enforcement decision (the very judgment which the English High Court viewed as creating estoppel) and rightly noted that ‘the Malaysian High Court had no obligation to grant *res judicata* effect to the decisions enforcing the arbitral award by courts of secondary jurisdiction’ (*Thai-Lao Lignite (Thailand) Co. Ltd. & Hongsa Lignite (Lao Pdr) Co. Ltd. v. Government of the Lao People's Democratic Republic*, 2014 US Dist. LEXIS 15004 at **35–36 (S.D.N.Y. 6 Feb. 2014)).

⁶⁰ BGH [German Supreme Court], judgment of 2 July 2009, IX ZR 152/06, para. II(2)(c)(gg) *in fine*; Hanseatisches Oberlandesgericht Hamburg, *supra* n. 59, para. 8; *Pavan v. Leng d'Or*, *supra* n. 58, para. 8; *Direction générale de l'aviation civile de l'Emirat de Dubaï v. Société internationale Bechtel*, Cour d'Appel de Paris [Paris Court of Appeal], judgment of 29 Sept. 2005, 4 Revue de l'Arbitrage 1096, 1097–1098 (2005); Bernd Ehle, in *New York Convention*, *supra* n. 37, para. 49 ad Art. I; Patricia Nacimiento, in *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* 215–216 (Herbert Kronke et al. eds, Kluwer 2010); Alexis Mourre, *À propos des articles V et VII de la Convention de New York et de la reconnaissance des sentences annulées dans leurs pays d'origine: où va-t-on après les arrêts Termo Rio et Putrabali?* 2 Revue de l'Arbitrage 263, 287 para. 35 (2008); Michael McIlwrath & John Savage, *International Arbitration and Mediation: A Practical Guide* para. 6–093 (Kluwer 2010); W. Michael Reisman & Brian Richardson, *Tribunals and Courts: An Interpretation of the Architecture of International Commercial Arbitration*, in *Arbitration: The Next Fifty Years* 17, 26 (Albert Jan van den Berg ed., Kluwer 2012); Peter Schlosser, *Doppelexequatur zu Schiedssprüchen und ausländischen Gerichtsentscheidungen?* 1985 Praxis des Internationalen Privat- und Verfahrensrechts 141, 143; Pascal Rusch, *Zum Rechtsmittelverzicht in der internationalen Schiedsgerichtsbarkeit* 152 (Schulthess 2013); Georgios C Petrochilos, *Enforcing Awards Annulled in Their State of Origin Under the New York Convention*, 48 Int'l & Comp. L.Q. 856, 883 (1999); Haimo Schack, *Internationales Zivilverfahrensrecht* 1029 (6th ed., Beck 2014); Dominique T Hascher, *Recognition and Enforcement of Arbitration Awards and the Brussels Convention*, 12 Arb. Int'l 233, 240 (1996); Horatia Muir Watt, *Note – Cour d'appel de Paris (Ire Ch C), 29 septembre 2005*, 3 Revue de l'Arbitrage 700, 706 para. 10 *in fine* (2006). See also Scherer, *supra* n. 2, at 608–609. Cf. Opinion of AG Wathelet in *Gazprom*, *supra* n. 24, at n. 86 *in fine*.

agreement, which remain very much subject to *recognition* in another country. As noted in scholarly writing, there is nothing necessarily preventing such determinations from producing preclusive effects abroad just as any other judgment would.⁶¹ In other words, the extraterritorial effect sought is not the foreign *enforceability* of the award created in the state of origin, but the foreign *res judicata* effect precluding re-litigation of the adjudicated issue, such as the validity of the arbitration agreement or the arbitrator's observance of the chosen arbitral procedure.

4.2[b] *Preclusive Effect of an Exequatur Judgment Under National Law*

As outlined in section 3.3, the country of recognition will determine the preclusive effects of the foreign judgment based either on its own laws or those of the issuing country – or the common denominator of both. One must thus examine whether the applicable national law(s) permit an exequatur judgment to preclude the re-litigation of any ground for refusal addressed therein. As mentioned above, this is not necessarily the case when national laws restrict all *res judicata* effects to the judgment's operative part, which will typically address the award's enforceability but will not explicitly pronounce the existence or absence of specific grounds for refusal.

The emergence of such preclusive effects are all the less likely in enforcement systems like Switzerland, where the very enforceability of an award can be reviewed as an *incidental* question in a summary enforcement action⁶² rather than in a standalone exequatur procedure (which remains available but entirely optional): in the case of such summary action, no *res judicata* effect arises in other proceedings as to the question of the foreign award's enforceability,⁶³ and

⁶¹ Hill, *supra* n. 2, at 179; Scherer, *supra* n. 2, at 610 (though ultimately rejecting a binding effect for other reasons); Borges, *supra* n. 55, at 261–262; Dennis Solomon, *Die Verbindlichkeit von Schiedssprüchen in der internationalen privaten Schiedsgerichtsbarkeit: zur Bedeutung nationaler Rechtsordnungen und der Entscheidungen nationaler Gerichte für die Wirksamkeit internationaler Schiedssprüche* 589 and 604 (Sellier 2007), rejecting the notion that such decisions are territorially limited by mere virtue of their object or content; similarly supporting preclusive effects arising from for *non-annulment* judgments (while pointing out that the French notion of *res judicata* is likely too narrow to permit it): Basil Zajdela, *L'approche Française in Table Ronde: l'autorité de chose jugée des décisions relatives au contrôle des sentences*, 1 *Revue de l'Arbitrage* 183, 187, 189, n. 19 and accompanying text (2016). Generally supportive: Kessedjian, *supra* n. 40, at 11; Smit, *supra* n. 40, at 305–306; Talia Einhorn, *The Recognition and Enforcement of Foreign Judgments on International Commercial Arbitral Awards*, 12 *Y.B. Priv. Int'l L.* 43, 64–65 (2010). Cf. similarly in the context of the Brussels I regime: Pietro Franzina, in *The Brussels I Regulation Recast* para. 13.75 n. 95 ad Arts 36–38 (Andrew Dickinson & Eva Lein eds, OUP 2015) (findings made on certain grounds for refusal under the Brussels I Regulation may be 'relevant to the assessment' of the judgment's recognition in other EU Member States).

⁶² Swiss Debt Enforcement and Bankruptcy Act 1889, Art. 81(3).

⁶³ See Swiss Federal Supreme Court, judgment of 7 Aug. 1974, 100 III 48, 50–51, para. 3; cf. Paolo Michele Patocchi & Cesare Jermini, in *Internationales Privatrecht* para. 135 ad Art. 194 PILA (Heinrich Honsell et al. eds, 3rd ed., Helbing Lichtenhahn 2013).

a fortiori as to the existence of grounds for refusal, which thus remains open for subsequent re-litigation. Such decisions will in most cases fail to create res judicata effect abroad.⁶⁴

More generally, one should distinguish between the preclusive effects attached to a specific finding within the exequatur decision and the preclusive effects attached to the resulting (non-)recognition of the award in that particular country, since only the former can overlap with the issues examined in the other countries of recognition. To that end, the extent of res judicata effects arising from exequatur judgments under national laws should be determined by reference to the findings *separately* from the question of the award's fate under that law. For instance, if the court of a country practicing the extension or combination approach considers the recognition of a German judgment having refused exequatur due to the invalidity of the arbitration agreement, and must accordingly determine whether the issue is open for re-litigation under German law, said court should not merely examine whether the validity of the arbitration agreement can be re-litigated *as a ground for refusal of enforcement* in Germany. Rather, the question should be whether the agreement's validity itself is now generally precluded from re-litigation in Germany, e.g. if an action is brought before the German courts regarding a *different* dispute arising out of the very same contract: if the earlier non-exequatur judgment prevents the German court from referring the new dispute to arbitration, then the preclusive effect did attach to the specific finding of the agreement's invalidity, and should accordingly be given effect in the country of recognition. If, on the other hand, the German court may freely refer the parties to arbitration after examining the validity of the agreement anew,⁶⁵ then the preclusive effect was merely attached to the non-recognition of the award in that particular country, which does not overlap with the issue of validity reviewed in the other country of recognition and thus should not be given effect therein.

⁶⁴ Barring exceptions like the US approach mentioned *supra* n. 32.

⁶⁵ Which will likely be the case whenever said country limits res judicata effects to the judgment's operative part: *see* the expert report of Prof. Pierre Mayer cited in *ABCI*, *supra* n. 53, para. 238, on whether a French decision refusing annulment creates estoppel on the issue of the award being obtained by fraud: 'The Court of Appeal did not determine the existence or otherwise of the grounds of annulment ... It considered that ... the application was inadmissible ... This and only this constitutes the operative part of the decision ... A judgment rendered in the context of different proceedings, whereby the award would be considered to have been obtained by fraud, would not contravene the operative part of the decision ... It would admittedly contradict some of the Court of Appeal's reasons: in particular, those whereby the Court of Appeal declared that it did not find the existence of fraud ... However, such contradiction would not affect any kind of authority.'

4.2[c] *Requirement of a Judgment ‘On the Merits’*

As mentioned, the foreign judgment is often required to have been rendered ‘on the merits’, either to create estoppel⁶⁶ or in the context of recognition.⁶⁷ Some scholars consider the procedural nature of exequatur judgments to pose no obstacle for the cross-border recognition of its findings.⁶⁸ Some court decisions suggest otherwise,⁶⁹ but only seem to consider the judgment as a whole. The better view must again differentiate, as with issues of extraterritoriality, between the potentially procedural *outcome* of the judgment (e.g. that an award is declared enforceable) and the legal, fact-based findings underpinning its conclusion (e.g. that an arbitration agreement is invalid), the latter of which are no more procedural in nature than any finding made in judgments deemed properly ‘on the merits’.⁷⁰ If the judgment ultimately prevents the re-litigation of such findings in that country, there seems to be no compelling reason to restrict their preclusive effect abroad merely because of the procedural outcome of the dispute.

4.2[d] *Requirement of International Jurisdiction*

As mentioned, another widespread requirement for recognition is that the foreign court had *international jurisdiction* to decide the matter.⁷¹ Most countries hold themselves intrinsically competent to recognize or enforce awards in their territory (though not without exceptions⁷²) so that countries requiring that the jurisdiction

⁶⁶ *Supra* n. 15 and accompanying text.

⁶⁷ *Supra* n. 27 and accompanying text.

⁶⁸ Hill, *supra* n. 2, at 179, for the English requirement; Borges, *supra* n. 55, at 35–36, for the German requirement.

⁶⁹ Hanseatisches Oberlandesgericht Hamburg, *supra* n. 59, para. 8: ‘An enforcement decision does not concern the merits; rather, it concerns procedural enforceability’; *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 372 (5th Cir. 2003): ‘the district court’s “final judgment” is not truly a decision on the merits; rather, it is an order to enforce an award resulting from litigation elsewhere’; similarly for *annulment* judgments: *E.T. Sp. z o.o. v. T.M.D. GmbH*, Sąd Najwyższy [Polish Supreme Court], judgment of 6 Nov. 2009, 36 Y.B. Comm. Arb. 310, para. 29 (2011) (while ‘a ruling denying a petition to set aside an arbitral award, formally speaking, is a decision on the merits, not merely a procedural one’, the merits of the dispute are actually adjudicated by the arbitral tribunal alone, and the annulment is ‘only a resolution with respect to the state’s exercise of control over arbitration rulings’); *contra* to some extent the (otherwise questionable) analysis in *Belmont Partner*, *supra* n. 4, which did recognize that the foreign exequatur proceedings were ‘on the merits’.

⁷⁰ See in that sense the dissenting opinion in *Vinod Kumar Dahiya v. Talmidge Int’l Ltd.*, 371 F.3d 207, paras 31–32 (5th Cir. 2004): ‘Usually, a determination that a court lacks jurisdiction is not considered a judgment on the merits for collateral estoppel to apply ... But legal findings that serve as prerequisites to and are thus necessary to make a lack of jurisdiction decision can have a collateral estoppel effect in state court ... Here, a finding that no valid arbitration agreement existed equated precisely to a “judgment on the merits” of the efficacy of such arbitration clause.’

⁷¹ *Supra* ns 25–26 and accompanying text.

⁷² See the few examples of (mainly US) court decisions cited in Born, *supra* n. 36, at 2981–2987.

of the foreign court be founded on provisions similar to their own will readily acknowledge the jurisdiction of a foreign exequatur court. Nonetheless, exequatur courts may be seen as lacking international jurisdiction to render binding decisions on the *validity* of an award, a determination reserved to the courts of the arbitral seat.⁷³ However, while considerations of seat and non-seat jurisdictions under the New York Convention are highly relevant (and examined in section 4.2[h]), it is submitted that this obstacle to recognition does not pertain to an actual lack of jurisdiction regarding the exequatur decision itself⁷⁴ but is rather concerned with the binding effect *resulting* from the cross-border recognition of said decision. The problem, if any, does not relate to a prerequisite for recognizing judgments (international jurisdiction) but rather to the compatibility of such recognition with the New York Convention.⁷⁵

4.2[e] Requirement of a Finding ‘Necessary’ to the Conclusion

Another potential issue with regard to recognition relates to the requirement that the finding was *necessary* for the conclusion reached by the court⁷⁶: it has been argued that, since a grant or refusal of exequatur is not always predicated on the absence or existence of grounds for refusal, any finding on such grounds cannot be considered *necessary* for the court’s decision, thereby failing a requirement for preclusive effect.⁷⁷ This view, however, overlooks that a finding need merely be necessary to the conclusion reached in a particular case, not *necessary in abstract terms* for all cases reaching such a conclusion⁷⁸: if a particular judgment refuses exequatur based on the invalidity of the arbitration agreement, or a particular judgment grants exequatur after rejecting such objection raised by the award-debtor, then in both cases the grant or refusal of exequatur could not have been decided on these facts

⁷³ Solomon, *supra* n. 61, at 658–659.

⁷⁴ Since exequatur courts are obviously free to make legal findings on the validity of an award under Art. V.

⁷⁵ An arguably more accurate example for lack of international jurisdiction would be a court rendering a judgment on the substance of the dispute in breach of Art. II(3), i.e. without referring the parties to arbitration despite finding the agreement valid (*see* Swiss Federal Supreme Court, judgment of 19 Dec. 1997, 124 III 83, 86–88 para. 5(b)); the judgment in such case fails the requirement of international jurisdiction because the *finding itself*, not merely its cross-border recognition, conflicts with the allocation of jurisdiction under the Convention.

⁷⁶ As required in civil law countries granting preclusive effects beyond the operative part of judgments (*supra* n. 13 and accompanying text) and in common law countries (*supra* n. 14 and accompanying text).

⁷⁷ DeWitt, *supra* n. 2, at 515, adding: ‘That each ground for non-recognition is not mandatory operates to prevent foreign judgments recognizing foreign arbitral awards from having any preclusive effect whatsoever.’

⁷⁸ *See Yukos*, *supra* n. 53, para. 52: ‘The issues which are necessary to a decision in a particular case will depend on the matters in issue in that case. It cannot be answered in general or abstract terms.’

without ruling on the validity of the agreement – a finding thus necessary to the conclusion reached.

4.2[f] *Requirement of Foreseeable Re-litigation*

Another issue to examine is the potential for unjust results when a party raised an issue in the earlier proceedings but could not have been expected to present a full defence on that point, as noted in *Carl Zeiss Stiftung*.⁷⁹ Enforcement is often sought simultaneously in multiple jurisdictions, and the award-debtor's resources may become accordingly limited: in such circumstances, courts should exercise caution before granting preclusive effect to a foreign exequatur judgment.⁸⁰ However, the problem is somewhat different when the award-debtor neglected a full defence not because of overwhelming exequatur actions on all fronts, but only because e.g. the exequatur proceedings brought in the first country concerned trivial assets. The caution advocated in *Carl Zeiss Stiftung* was partly based on the fact that the issue might have been trivial and a second case 'may never be brought'⁸¹: this rationale is arguably less persuasive in the context of post-award proceedings, where the potential for multiple enforcement actions (with overlapping issues between one another) is readily foreseeable.

4.2[g] *Requirement of Contradictory Proceedings*

Granting preclusive effects to exequatur judgments may be viewed as incompatible with the way exequatur proceedings are conducted: as exequatur judgments are sometimes rendered *ex parte*, with the award-debtor only able to raise grounds for refusal in a subsequent application, it has been suggested that the lack of opportunity for award-debtors to argue their case should bar any preclusive effects arising from such judgments.⁸² However, it is submitted that the problem does not arise in the first place, since any preclusive effect is conditioned upon an identical issue which was raised (or, at the very least, could have been raised) in earlier proceedings. When grounds for refusal could not (yet) be raised, the resulting judgment will simply fail the requirement of an identical issue, not to mention that of *finality*, insofar as the grounds for refusal are still open to litigation.

⁷⁹ *Carl Zeiss Stiftung*, *supra* n. 31, at 918.

⁸⁰ DeWitt, *supra* n. 2, at 514.

⁸¹ *Carl Zeiss Stiftung*, *supra* n. 31, at 917; similarly *Hyman v. Regenstien*, 258 F.2d 502, 510–511 (5th Cir. 1958) ('collateral estoppel by judgment is applicable only when ... it was foreseeable that the fact would be of importance in possible future litigation').

⁸² Scherer, *supra* n. 2, at 620, referring to exequatur proceedings conducted *ex parte* under French and English law.

4.2[h] *Compatibility with the New York Convention and Other Policy Concerns*

The last question to examine is whether the system of the New York Convention allows for the recognition of preclusive effects on legal findings made in exequatur judgments.

One court has held that contracting states should reject such preclusive effects given that contradictory decisions are conceivable under Article V and may especially result from the territorially bound grounds for refusal under Article V(2).⁸³ The latter point, however, overlooks the potential for legal findings having extraterritorial relevance even under Article V(2),⁸⁴ and the former point seems to give prescriptive value to the mere potential for contradictory decisions.

A more justifiable concern relates to the award-debtor's ability to bind other exequatur courts with a single refusal of enforcement: should the court's finding of e.g. invalidity of the arbitration agreement be recognized in all other non-seat jurisdictions, the refused exequatur would be tantamount to an annulment, which arguably contradicts the structure of the Convention⁸⁵ and the general obligation of contracting states to recognize arbitral awards and agreements.⁸⁶ This applies *a fortiori* to exequatur judgments meant to bind courts at the seat in annulment proceedings,⁸⁷ which would compel an actual annulment by the court. It must therefore be acknowledged that a preclusive effect attached to rejected exequatur judgments – or more accurately, to legal findings establishing the existence of grounds for refusal – is simply incompatible with the New York Convention.

The question is whether this rationale equally applies to judgments *granting* exequatur, which the award-creditor could use to compel enforcement in other countries. Precluding grounds for refusal may undermine the rights of defence owed to the award-debtor by the Contracting States under Article V,⁸⁸ and creates an obvious imbalance as only the award-creditor and not the award-debtor can benefit from the outcome of the judgment. Such asymmetry could be explained by the court's discretion in disregarding grounds for refusal under the wording of

⁸³ *Pavan v. Leng d'Or*, *supra* n. 58, para. 9.

⁸⁴ *Supra* ns 40–43 and accompanying text.

⁸⁵ Hill, *supra* n. 2, at 187; Matthew Barry, *The Role of the Seat in International Arbitration: Theory, Practice, and Implications for Australian Courts* 32 J. Int'l Arb. 289, 319 (2015); similarly Dirk Otto, in *Recognition and Enforcement of Foreign Arbitral Awards*, *supra* n. 60, at 170, regarding declaratory judgments from non-seat courts.

⁸⁶ Scherer, *supra* n. 2, at 622; Born, *supra* n. 36, at 3791 ('If the courts of one Contracting State refuse to recognize an award, based upon an incorrect application of the Convention, that does not justify or excuse another Contracting State's wrongful non-recognition of the same award').

⁸⁷ Hill, *supra* n. 2, at 188; Linda J Silberman & Maxi Scherer, *Forum Shopping and Post-Award Judgments*, in *Forum Shopping in the International Commercial Arbitration Context* 313, 343 (Franco Ferrari ed., Sellier 2013).

⁸⁸ See George A Bermann, 'Domesticating' the New York Convention: the Impact of the Federal Arbitration Act, 2 J. Int'l Disp. Settlement 317, 324 (2011).

Article V ('may be refused'),⁸⁹ or by the general pro-enforcement aim of the Convention.⁹⁰ Some have countered that making the preclusive effect of a foreign judgment depend on its content (i.e. establishing or rejecting the existence of grounds for refusal) is ultimately unsatisfactory, so that no preclusive effect should be granted either way.⁹¹ However, one should keep in mind that this kind of asymmetry is already foreseen under Article VII(1), which allows the award-creditor to rely on more favourable provisions of national law or other Conventions in order to facilitate enforcement, thus equally making the 'effects' of such instruments contingent on whether they benefit the award-creditor or not.

The recognition of preclusive effects arising from foreign judgments could even fall within the actual operation of Article VII(1): provided that principles of *res judicata* and recognition of foreign judgments apply under a more favourable law governing the recognition and enforcement of international awards,⁹² i.e. the award-creditor could in principle invoke the *res judicata* effects of foreign judgments to deny the existence of grounds for refusal under that law, there seems to be nothing preventing their application under Article VII(1).⁹³

It seems therefore that preclusive effects arising from a judgment *granting* the enforcement of an award are compatible with both the pro-enforcement policy of the Convention and a possible recourse to national law under Article VII(1).

Nonetheless, the grant of preclusive effects to *exequatur* judgments in general has also prompted broader policy concerns. It has been suggested that, while efficiency and fairness dictate that judgments should normally be recognized whenever a court has considered evidence and come to a conclusion, this cannot apply to ancillary judgments like *exequatur* decisions since such court 'does not look at the evidence and come to a decision on the merits' since it is often 'prohibited from reviewing the merits of the case (*révision au fond*)'.⁹⁴ This view

⁸⁹ The UK Supreme Court in *Dallah*, *supra* n. 59, para. 68, suggested that judicial discretion under the word 'may' could operate in case of 'fresh circumstance such as ... an estoppel'.

⁹⁰ Hill, *supra* n. 2, at 188.

⁹¹ Silberman & Scherer, *supra* n. 87, at 344.

⁹² If no such law exists, it may be more delicate to import general, non-arbitration-specific principles of preclusion, since some consider that Art. VII(1) does not allow courts to combine the Convention with isolated provisions of the more favourable law (David Quinke, in *New York Convention*, *supra* n. 37, para. 60 ad Art. VII; Otto, *supra* n. 85, at 449; *contra* Philippe Fouchard et al., in *Fouchard Gaillard Goldman on International Commercial Arbitration* para. 271 (Emmanuel Gaillard & John Savage eds, Kluwer 1999); Born, *supra* n. 36, at 3433), and, more generally, such general principles may fail to qualify as 'right ... to avail [oneself] of an arbitral award' in the first place. This, however, does not exclude their application under the potential discretion of Art. V (*supra* n. 89).

⁹³ Similarly, it is often held that the award-creditor is allowed to invoke the preclusive effects, under national law, arising not from *res judicata* as such but from a *waiver of rights* (e.g. after failing to raise an objection before the arbitral tribunal): *see*, e.g. Borris & Hennecke, *supra* n. 37, para. 49 ad Art. V; BGH [German Supreme Court], judgment of 16 Dec. 2010, III ZB 100/09, para. II(3) (preclusion rules of national law applicable in principle under Art. VII(1)).

⁹⁴ Scherer, *supra* n. 2, at 611.

is difficult to reconcile with the fact that exequatur courts do make evidence-based legal findings,⁹⁵ the re-litigation of which seems just as likely to create inefficiency or unfairness as the re-litigation of any other legal findings.

A more compelling policy objection relates to the potential for *forum shopping*: if preclusive effects can arise from exequatur judgments, the award-creditor could seek enforcement in a forum with the most arbitration-friendly approach and use the resulting exequatur to bind all other courts.⁹⁶ The potential for forum shopping in that sense is unlike any other, since virtually all contracting states of the Convention will view themselves as competent to deliver such judgment.⁹⁷ This is admittedly one of the more persuasive concerns expressed against the grant of preclusive effects to exequatur judgments, and one which the High Court in *Diag* may not have considered.

One should nevertheless keep in mind that even though an award may potentially be enforced anywhere, the grounds for refusal themselves are not raised on the motion of the award-creditor: should the award-creditor attempt shopping for an exequatur judgment in a country where the award-debtor has no assets, the award-debtor can simply decline to raise grounds for refusal, making the resulting judgment useless to the award-creditor in terms of preclusive effects, thus partly alleviating the concern of worldwide forum shopping.⁹⁸ On the other hand, when substantial assets are at risk in multiple countries, the potential for forum shopping combined with the asymmetrical binding effect discussed above would enable award-creditors to try their luck in each forum, with nothing to lose in terms of preclusion (no effect in case of refused exequatur) and everything to gain (preclusive effect in case of granted exequatur). While forum shopping may not be intrinsically reprehensible,⁹⁹ the resulting imbalance in this situation seems ultimately incompatible with the obligations of the contracting states under the Convention, in that it restricts the rights of defence owed to the award-debtor under Article V in a way that may well exceed the limits of even the most adamantly pro-enforcement interpretation of the Convention.

⁹⁵ *Supra* n. 70 and accompanying text.

⁹⁶ Scherer, *supra* n. 2, at 622–623; DeWitt, *supra* n. 2, at 514.

⁹⁷ *Supra* n. 72 and accompanying text.

⁹⁸ This is notwithstanding the ability of the award-creditor to prompt a review by seeking a *declaratory judgment* that there are no grounds for refusal. However, as mentioned above, such declaration may not be open to the award-creditor insofar as an ordinary exequatur action is readily available (*supra* n. 55 and accompanying text). See also Einhorn, *supra* n. 61, at 64–65.

⁹⁹ See the dictum of Lord Simon in *The Atlantic Star v. Bona Spes* [1974] A.C. 436, 471 (HL): “‘Forum-shopping’ is a dirty word; but it is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can be most favourably presented: this should be a matter neither for surprise nor for indignation.”

4.2[i] *Conclusion on Exequatur Judgments*

The foregoing analysis has shown that legal findings made on grounds for refusal in exequatur judgments are in principle able to create preclusive effects in other exequatur proceedings. The New York Convention would seem to allow such effects insofar as the judgment benefits the award-creditor. However, this necessarily results in one-sided preclusive effects which, combined with a significant potential for forum shopping, ultimately prove incompatible with the award-debtor's rights of defence under Article V and thus militate against granting such effects to exequatur judgments either way.

4.3 (NON-)ANNULMENT DECISIONS

This section is concerned with judgments of seat courts declining annulment actions or confirming the award, and the resulting preclusive effects for subsequent exequatur proceedings dealing with identical issues raised as grounds for refusal. Court decisions in that context are more abundant than in the previous section: many recognize the preclusive effect of individual findings made in a foreign non-annulment judgment¹⁰⁰; some reject such preclusive effects¹⁰¹; less relevant to the present analysis but still noteworthy are court decisions which base a form of preclusion not on *res judicata* as such (sometimes rejecting it on the facts) but on a more general *deference* owed to the findings made by seat courts,¹⁰² or by holding

¹⁰⁰ *Epis v. Roche*, *supra* n. 52, para. 9; *Gujarat*, *supra* n. 40, [2013] FCA 882, para. 102; *International Investor KCSC v. Sanghi Polyesters Ltd.*, High Court of Andhra Pradesh, judgment of 9 Sept. 2002, 30 Y.B. Comm. Arb. 577, para. 19 (2005); *ABCI*, *supra* n. 53, para. 217 (estoppel considered in principle, rejected for apparent lack of finality under French law); *Dallah*, *supra* n. 59, [2009] EWCA Civ 755, [2010] 2 W.L.R. 805, para. 90 ('As for an unsuccessful challenge, that may also set up an issue estoppel'); Oberlandesgericht München [Munich Court of Appeal], judgment of 22 June 2009, 34 Sch 26/08, 35 Y.B. Comm. Arb. 371, para. 15 (2010); cf. also the recognition of a foreign judgment *refusing enforcement at the seat* (without annulment) in *Astro Nusantara*, *supra* n. 47; see also *House of Spring Gardens Ltd. v. Waite* [1991] 1 QB 241, 252–254 (CA), in the context of foreign judgments refusing to set aside a *judgment*, and the resulting issue estoppel on grounds for refusal subsequently raised in England.

¹⁰¹ *E.T. v. T.M.D.*, *supra* n. 69, para. 35 (no interference with the discretion of the exequatur court allowed); *Unichips*, *supra* n. 46, paras 2 and 5 (partly due to non-identical issues); to some extent *Hebei v. Polytek*, *supra* n. 40, at 228–230 (reluctant in general and rejecting estoppel regarding public-policy-related findings in particular).

¹⁰² *Minmetals Germany GmbH v. Ferco Steel Ltd.* [1999] C.L.C. 647, 661 (QB); *Epis v. Roche*, *supra* n. 52, para. 8 (in addition to estoppel); *IPOC International Growth Fund Ltd. v. LV Finance Group Ltd.*, Eastern Caribbean Court of Appeal, judgment of 18 June 2008, 33 Y.B. Comm. Arb. 408, para. 29 (2008); *Gujarat*, *supra* n. 40, [2013] FCA 882, para. 10 (in addition to estoppel), [2013] FCAFC 109, paras 64–65 (estoppel left open); *Haiyan v. Keeneye*, *supra* n. 60, [2012] 1 H.K.C. 335 (CA), paras 66–68 (estoppel denied); similarly under the 1927 Geneva Convention: Swiss Federal Supreme Court, judgment of 25 Jan. 1967, 93 I 49, 55 para. 3(b), holding that the judgments of the Belgian seat courts on the agreement's validity were binding, as the question of validity before the Swiss courts was to be decided under Belgian law.

seat annulment and exequatur challenges as alternative and *mutually exclusive* remedies.¹⁰³

4.3[a] *Preclusive Effect under National Law and Other Issues of Recognition*

Many of the considerations above with regard to exequatur judgments can apply to annulment judgments: just as with exequatur decisions, this analysis is concerned with the recognition of the preclusive effect attached to individual legal findings, not the enforcement of the foreign seat judgment *in lieu* of the award.¹⁰⁴ To determine the extent of the preclusive effect under the applicable national law(s), one should, as with exequatur judgments, inquire whether the findings are generally precluded from re-litigation under that law, e.g. whether an annulment based on the invalidity of the arbitration agreement also precludes a party from ever relying on said agreement in an entirely different dispute brought under the same contract before the state courts of the seat.¹⁰⁵ As to the requirements of a judgment ‘on the merits’, it seems no more of an obstacle for annulment judgments than it is for exequatur judgments.¹⁰⁶

Some of the potential issues discussed above are less problematic in the context of annulment judgments by virtue of being rendered at the seat. For instance, the requirement of international jurisdiction by the foreign court for the purpose of recognition is unproblematic for seat judgments.¹⁰⁷ As to the need for caution advocated in *Carl Zeiss Stiftung* due to trivial stakes and unforeseeable re-litigation,¹⁰⁸ this notion has limited applicability here: in annulment proceedings, award-debtors can legitimately be expected to argue their case in full given the significant consequences of a successful annulment,¹⁰⁹ *a fortiori* when such review is initiated on the motion of the award-debtor alone.

4.3[b] *Compatibility with the New York Convention and Other Policy Concerns*

The potential issues mentioned in the context of exequatur judgments do not seem to apply to the preclusive effects of findings made in (non-)annulment

¹⁰³ *Newspeed Int'l Ltd. v. Citus Trading Pte. Ltd.*, High Court of Singapore, judgment of 4 June 2001, 28 Y.B. Comm. Arb. 829, para. 6 (2003).

¹⁰⁴ See s. 4.2[a] *supra*.

¹⁰⁵ See *supra* n. 65 and accompanying text, in particular the expert report cited.

¹⁰⁶ Cf. nonetheless the contrary view held by the Polish Supreme Court in *E.T. v. T.M.D.*, *supra* n. 69.

¹⁰⁷ Solomon, *supra* n. 61, at 658–659; cf. *supra* n. 73 and accompanying text for exequatur judgments.

¹⁰⁸ *Supra* n. 79 and accompanying text.

¹⁰⁹ DeWitt, *supra* n. 2, at 516.

judgments. No risk of forum shopping arises in this case as only one forum can render such judgments.¹¹⁰ There is no intrinsic imbalance in allowing a refused annulment to bind exequatur courts, since the award-debtor equally benefits from the (usually) binding effect of a *granted* annulment. If anything, recognizing the preclusive effect of refused annulments is very much in line with the deference given to seat judgments under Article V(1)(e).¹¹¹ The fact that the Convention is silent on the consequences of a refused annulment may well entail that there is no *obligation* to grant enforcement whenever an annulment is rejected,¹¹² but it arguably does not *prohibit* the recognition of individual findings made in such judgments, provided they can be subject to recognition under national law.¹¹³ These considerations, of course, rely to some extent on the supervisory role of the arbitral seat, and may prove less persuasive to supporters of transnational or delocalized arbitration models.¹¹⁴

It has been suggested that allowing the preclusive effects of refused annulments would incentivize award-creditors to seek confirmation at the seat, and thus unduly reinstate a form of double exequatur (i.e. the former requirement of award confirmation at the seat, as was provided in the 1927 Geneva Convention and abolished in the 1958 New York Convention), even if not strictly mandatory.¹¹⁵ However, this concern may well be overstating the similarities between double exequatur and granting preclusive effects to non-annulment decisions: in the former case, the seat courts are required to confirm the award even though the grounds for refusal remain open for review in all subsequent exequatur proceedings; in the latter case, all the objections against the award (insofar as they overlap with grounds for refusal under Article V) are concentrated in one set of proceedings, arguably the very opposite of the redundant double exequatur. The only accurate similarity is that such preclusive effect gives some significance to confirmation judgments at the seat, a confirmation which the award-creditor is nonetheless free to skip, unlike under the 1927 Geneva Convention.

¹¹⁰ *Ibid.*; Scherer, *supra* n. 2, at 625.

¹¹¹ Smit, *supra* n. 40, at 303; Hill, *supra* n. 2, at 176; DeWitt, *supra* n. 2, at 515–516.

¹¹² In that sense *Hebei v. Polytek*, *supra* n. 40, at 229; *Unichips*, *supra* n. 46, para. 2.

¹¹³ Thus the ruling of the Polish Supreme Court in *E.T. v. T.M.D.*, *supra* n. 69, seems too restrictive in holding that the ‘precise, closed system’ of the Convention prevents even an indirect interference with the court’s discretion insofar as ‘[t]here are no legal grounds in the provisions governing the procedure for recognition of foreign arbitral awards for the court to be bound in this manner’ (para. 37).

¹¹⁴ On these theories generally, see, e.g. Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* paras 3.73–3.83 (6th ed., OUP 2015), with further references.

¹¹⁵ Scherer, *supra* n. 2, at 624; similarly Rusch, *supra* n. 60, at 153.

4.3[c] Conclusion on (Non-)Annulment Judgments

Given that most of the considerations on exequatur judgments apply to this section, yet without the concerns of forum shopping combined with one-sided binding effects, there seems to be no compelling reason against granting res judicata effect to legal findings made in annulment decisions when such findings overlap with issues reviewed in subsequent exequatur proceedings.¹¹⁶ This should also provide a more legitimate basis for preclusion than mere deference to the courts of the seat.

4.4 DECISIONS OF SEAT COURTS IN SUPPORT OF THE ARBITRATION PROCEEDINGS

This section briefly addresses the preclusive effect of a seat decision as so-called *juge d'appui* on e.g. the removal of an arbitrator and its relevance in later exequatur proceedings. The considerations above concerning seat judgments apply *mutatis mutandis* to the judgments examined here.

Under national law, a decision by the *juge d'appui* on the composition of the tribunal is usually final, so that the question of e.g. impartiality or irregularity cannot be subsequently reviewed in annulment proceedings.¹¹⁷ Insofar as the resulting res judicata effect covers an issue relevant to Article V(1)(d) (e.g. that the appointment procedure complied with the applicable institutional rules or the *lex arbitri*), there seems to be nothing preventing the recognition of such preclusive

¹¹⁶ As far as EU Member States are concerned, it is not entirely clear to which extent recognizing the preclusive effects arising from seat judgments (be it annulment decisions or, as discussed further below, judgments declining jurisdiction in favour of arbitration) may contravene the Brussels I regime by interfering with the rights of Member State courts to decide freely on their own jurisdiction, namely if a party brings the entire dispute before Member State courts while the other invokes e.g. a seat judgment confirming the validity of the arbitral agreement. Although the CJEU deemed that an anti-suit injunction aiming to protect arbitration proceedings created an interference in the above sense (Case C-185/07 *Allianz S.p.A. and Generali Assicurazioni Generali SpA v. West Tankers Inc.*, [2009] E.C.R. I-00663, para. 28), it also held that the recognition of an arbitral award, even if it expressly seeks to limit the power of state courts to consider a claim, did not contravene the Brussels I Regulation (*Gazprom*, *supra* n. 24, para. 39). By facilitating the recognition and enforcement of an arbitral award, the recognition of preclusive effects arising from arbitration-related judgments is arguably more closely related to the latter situation. However, the CJEU in *Gazprom*, *supra* n. 24, did point out that said compatibility with the Brussels I Regulation hinged at least in part on the availability of grounds for refusal against the recognition of the award (para. 38), i.e. the very safeguard removed through the mechanisms discussed in this article.

¹¹⁷ *PT Central Investindo v. Franciscus Wongso* [2014] SGHC 190, para. 53 ('In the event that the challenge is dismissed, a setting aside application that is based on the same grounds raised in the Art. 13 challenge will, at the very least, give rise to objections like issue estoppel and abuse of process'); Swiss Federal Supreme Court, judgment of 3 July 2002, 128 III 330, 332–333 para. 2; Cour de Cassation [French Supreme Court], civ. 1re, judgment of 13 Mar. 2013, Bull. civ. I no. 40; ZPO [Germany], s. 1065(1) *in fine*. On whether res judicata effects should also attach to similar decisions rendered by the *arbitral institution*, see Charles Jarrosson, *L'autorité de chose jugée des décisions relatives à l'indépendance des arbitres*, 1 Revue de l'Arbitrage 165, 178–182 paras 26–38 (2016).

effect in subsequent exequatur proceedings. As far as can be ascertained, national courts have yet to be confronted with this situation.

4.5 JUDGMENTS DECLINING JURISDICTION

At the seat or elsewhere, local courts may decline jurisdiction on a dispute after deciding on the validity or scope of the arbitration agreement, a finding which may become relevant under Article V(1)(a) or (c) of the New York Convention. Few exequatur courts have so far dealt with the cross-border recognition of judgments declining jurisdiction based on an arbitration clause.¹¹⁸

As above, the first inquiry must examine the domestic preclusive effect granted to such decisions under the national laws applicable to the effects of recognition. In that context, one must differentiate between judgments declining jurisdiction based on the *prima facie* validity of the agreement, and those rendered after a full review¹¹⁹: the latter are often viewed as producing *res judicata* effect on the validity of the agreement, thereby precluding re-litigation of the issue in the same country during subsequent annulment¹²⁰ or enforcement¹²¹ proceedings (or even proceedings before a *juge d'appui*¹²²). The applicability of this principle is not undisputed in the few civil law countries where *res judicata* is limited to the operative part,¹²³ as that part might only state that the court dismisses the action for want of jurisdiction, not *why* the court lacks jurisdiction.

¹¹⁸ The Hanseatisches Oberlandesgericht Bremen, *supra* n. 54, recognized a (declaratory) judgment of this kind rendered by the Turkish courts of the seat. See also the issue estoppel found by the English High Court in *Leibinger*, *supra* n. 59, as a result of a (non-seat) German declaratory judgment confirming the validity of the arbitral agreement.

¹¹⁹ See Kessedjian, *supra* n. 40, at 3; Otto, *supra* n. 85, at 170; Claire Debourg, *L'autorité de chose jugée des décisions relatives à la compétence arbitrale*, 1 *Revue de l'Arbitrage* 127, 142–144 paras 25–29 (2016).

¹²⁰ Audiencia Provincial de Madrid [Madrid Court of Appeal], judgment of 20 Apr. 2005, 234946, sixth consideration.

¹²¹ Oberlandesgericht Celle [Celle Court of Appeal], judgment of 31 May 2007, 8 Sch 06/06, 33 Y.B. Comm. Arb. 524, para. 8 (2008); *Italo Meneghetti v. August Töpfer & Co. GmbH*, Corte de Cassazione [Italian Supreme Court], judgment of 13 July 1988, 15 Y.B. Comm. Arb. 493, para. 5 (1990). Similarly, in *Al Haddad Bros. Enterprises, Inc. v. M/S AGAPI*, 635 F. Supp. 205, 209–210 (D. Del. 1986), it was held that a previous judgment referring the parties to arbitration exempted the award-creditor from having to produce a certified copy of the arbitration agreement under Art. IV(1)(b) during subsequent enforcement proceedings before the very same court.

¹²² Cour de Cassation [French Supreme Court], civ. 2e, judgment of 24 June 2004, Bull. civ. II no. 311.

¹²³ Accepting that a judgment declining jurisdiction creates *res judicata* under Swiss law as to the validity of the arbitration agreement: Markus Schott & Maurice Courvoisier, in *Internationales Privatrecht*, *supra* n. 63, para. 39 ad Art. 186 PILA; Bernhard Berger & Franz Kellerhals, *International and Domestic Arbitration in Switzerland* para. 728 (3rd ed., Stämpfli 2015); *contra* Obergericht Luzern [Lucerne Court of Appeal], judgment of 23 Apr. 2008, LGVE 2008 I no. 31 72, 75 para. 4.4.4. (the validity of the agreement determined by the court is merely the *ratio* of its decision to decline jurisdiction and as such fails to produce *res judicata* effects). For the equally unsettled German position, see Peter Huber & Ivo Bach, in *Arbitration in Germany*, *supra* n. 34, para. 27 ad s. 1032 ZPO.

As with exequatur judgments, a potential obstacle to the cross-border recognition of judgments declining jurisdiction is that they are deemed purely procedural and not ‘on the merits’.¹²⁴ It is nonetheless submitted, as above, that a distinction should be drawn between the procedural outcome of a decision and its underpinning, fact-based legal findings on the validity of the agreement.¹²⁵

Finally, the above-mentioned policy concerns and issues of compatibility with the New York Convention merit consideration. The situation is of course different insofar as the winning and losing parties of the arbitration are not yet determined at the time of the judgment declining jurisdiction, in which case any forum shopping undertaken to bind future exequatur courts would be somewhat speculative.

If a court outside the seat renders a judgment declining jurisdiction due to an arbitration clause, the (future) award-creditor could potentially bind all subsequent exequatur courts on the question of the agreement’s validity. Insofar as the Convention prevents an award-debtor from doing the same with the opposite judgment,¹²⁶ the problem of forum shopping and one-sided binding effects applies here as well.¹²⁷ On the other hand, when the *seat* courts have declined jurisdiction on the dispute, the same policy considerations¹²⁸ allowing a (non-)annulment to bind exequatur courts apply: an exequatur court should view seat judgments declining jurisdiction the same way it would view a potential seat decision rejecting a plea of invalidity of the agreement in annulment proceedings – not least because, as outlined above,¹²⁹ the seat judgment declining jurisdiction is usually binding on the validity of the agreement for any *actual* annulment proceedings that would follow. Court judgments declining jurisdiction should therefore be disregarded in exequatur proceedings when rendered outside the seat, and able to create preclusive effects when rendered at the seat.¹³⁰

¹²⁴ The objection of such judgments not being ‘on the merits’ has been occasionally rejected by national courts, notably by the House of Lords in *The Sennar*, *supra* n. 15, at 499; see similarly the position of the CJEU under the Brussels I Regulation (*Gothaer*, *supra* n. 13, para. 32).

¹²⁵ See 4.2[c] *supra*, especially the dissenting opinion in *Dahiya v. Talmidge*, *supra* n. 70.

¹²⁶ Since such a binding effect would make the non-seat court judgment tantamount to an annulment (see *supra* n. 85 and accompanying text).

¹²⁷ Although, as with exequatur proceedings (*supra* n. 98 and accompanying text), the validity of the agreement will usually be reviewed on the motion of the award-debtor only (here as defendant to the action before the state court), alleviating the problem of the award-creditor shopping worldwide for a pre-emptive state court judgment referring the parties to arbitration, notwithstanding the possibility to obtain a declaratory judgment pronouncing the agreement’s validity.

¹²⁸ See 4.3[b] *supra*.

¹²⁹ *Supra* n. 120 and accompanying text.

¹³⁰ See *supra* n. 116 on the potential interference with the EU’s Brussels I regime.

5 CONCLUSION

This analysis has shown that none of the legal requirements for the cross-border recognition of foreign judgments truly stand in the way of recognizing an arbitration-related judgment in post-award proceedings, provided that the issues under review are identical. Preclusive effects can therefore arise in principle from foreign judgments granting the *exequatur* of an award, rejecting an annulment, supporting the arbitral proceedings, or declining jurisdiction in favour of arbitration.

In order not to subvert the structure of the New York Convention, only judgments benefitting the award-creditor should be taken into account in that context. When it comes to judgments from non-seat jurisdictions, however, this necessarily results in one-sided preclusive effects which, combined with a significant potential for forum shopping, create an untenable scenario where award-creditors can try their luck in multiple jurisdictions with nothing to lose and everything to gain in terms of preclusion.

Accordingly, one must ultimately subscribe to the view that *exequatur* judgments, along with other non-seat decisions, cannot create preclusive effects in other proceedings, albeit based on policy considerations rather than the legal obstacles often argued by scholars and courts.

Said considerations do not apply to the recognition of seat judgments, which should therefore enable the award-creditor to bind other courts under applicable rules of *res judicata* and *estoppel*, also providing a more justifiable basis for preclusion than mere deference to seat courts.