Res judicata in international arbitration

Vaughan Lowe

Chichele Professor of Public International Law.
All Souls College, Oxford
& Essex Court Chambers
Introduction

- An overview of some of the difficulties arising from determinations in multiple fora
BITs

- Protect direct and indirect investments
- Wide concept of investment
- ICSID cases:--
  - CMS v Argentina (Jurisdiction)
- Possibility of multiple actions
  - Lauder v Czech Republic
  - CME v Czech Republic
Res judicata

“... a right, question or fact distinctly put in issue and distinctly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed.”

(Amco v Indonesia [Resubmission: Jurisdiction] )
Res judicata

- Triple identity:
  - Identity of object
  - Identity of cause
  - Identity of parties

(Anzilotti in Chorzów Factory)
Issue estoppel

- A wider doctrine?
  - same question decided
  - final decision
  - same parties

- but not identity of cause.
The aims

- To ensure
  - finality in litigation
  - no harassment of respondents
  - *ne bis in idem*
  - good order among tribunals
The problems

- Points distinctly argued and distinctly decided
- Identity of parties
Points distinctly argued and distinctly decided

- Confidentiality in arbitration
  - ...of the award
  - ...of the pleadings

- No right of intervention in arbitration

- Few provisions for ordering joining of cases
Identity of parties

- Corporate affiliates
- Shareholders and companies
Different contexts

- Parallel arbitrations
- Incidental questions
- Different phases in different tribunals
Parallel proceedings

- The Czech arbitrations:
  - Lauder (US) v Czech Republic (London, 2001)
  - CME (Netherlands) v Czech Republic (Stockholm, 2001, 2003)

- also other proceedings
Incidental questions

- Standing to sue: the arbitral tribunal in *Mox* and the ECJ
- ‘Loss’ in national courts
Different phases in different tribunals

- Provisional measures in municipal courts

- ITLOS provisional measures: Mox and Land Reclamation cases
Approaches to solutions

- Cannot simply transplant private international law doctrines
- Necessary to preserve judicial good order
- Consider available forums as a system, not as isolated transactions
- Inherent powers of tribunals to preserve good order